CASE NO.: LC 06/2006

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

RONALD PATRICK KURTZ Applicant

and

NAMPOST NAMIBIA LIMITED First Respondent

SAKARIA NGHIKEMBWA Second Respondent

CORAM: **PARKER, A P**

Heard on**:** 13 April 2006

Delivered on: 08 May 2006

JUDGMENT

PARKER, A P

[1] This matter started its life in this Court as an urgent application by the applicant who is employed by the first respondent as Manager: IT. He was advised by a letter dated 1 March 2005, under the hand of Mr. Johan L. Claassen, acting Chief Executive Officer (CEO) of the first respondent, that the first respondent had decided to suspend the applicant's services with full remuneration with effect from the said date (1 March 2005).

[2] On 10 November 2005 the first respondent gave to the applicant a letter dated 10 November 2005 entitled "Notification of Disciplinary Enquiry", signed *per pro*. a person who described himself or herself as the "Initiator", setting out eight charges of misconduct, namely, gross negligence (Charge 1); gross negligence (Charge 2); making threats to cause financial harm to AST Namibia and/or causing the name of the company to be brought into disrepute (Charge 3); refusal to obey instructions given, alternatively gross negligence (Charge 4); conflict of interest (Charge 5); unauthorized use and/or misuse of company property (Charge 6); illegal diamond dealing (Charge 7); using company equipment for illegal purposes (Charge 8). I must add that each charge is accompanied by particulars, forming the basis of the charge. The applicant was informed in the said letter ("Notification of Disciplinary Enquiry") that a disciplinary enquiry into the alleged charges would take place on 30 November and 1 and 2 December 2005 at 14h00 at the NamPost Boardroom, 2nd Floor, Nampost Head Office.

[3] In an adjunct to the charges, the applicant was advised that he could exercise the following rights during the hearing:

(a) The right to representation in accordance with the Company's existing policy.

(b) The right to defend yourself against the afore-mentioned allegations through the submission of your evidence and, through cross and re-examination of evidence.

(c) The right to nominate and call witnesses of your choice in your defence.

(d) The right to the services of an interpreter.

[4] The first "right" is substantially the subject matter of the first issue in this matter. On the first appointed day, i.e. 30 November 2005, the applicant arrived at the enquiry accompanied by his legal representative from a firm of legal practitioners. He was informed that an external representative could not represent him and that if he wished to be so represented he must make a written application. He made an application in that regard to the second respondent who is the CEO of the first respondent and who is also the "chairperson" of the disciplinary enquiry.

[5] I pause here to make what in my view is a significant observation, namely, that although the term "chairperson" is used, in reality, the disciplinary enquiry under the auspices of the first respondent is a one-person enquiry. The second respondent *qua* CEO of the first respondent is the "chairperson" of the disciplinary enquiry, as I have mentioned above: the second respondent alone will take the final decision at the applicant's disciplinary hearing, though his decision is appealable; the second respondent alone decided to deny the applicant the use of an external representative: the applicant can appeal against his decision only after the hearing. (See Annexure "RPK 22" to the applicant's founding affidavit.)

[6] Be that as it may, the second respondent's refusal to allow the first applicant to have external legal representation at his disciplinary hearing is premised on clause 20.4.2 - Part B (ii) (e) (clause B (ii) (e)) of the first respondent's Human Resources

Policy and Procedures Manual (the Manual). The said clause B (ii) (e) reads:

> Except in the case of a verbal warning, an employee may be represented by a fellow employee or his recognized representative in the company to assist him toward any steps taken in terms of this procedure. Representatives from outside the Company will be allowed in exceptional circumstances only.

[7] As I mentioned previously, this matter began in this Court as an urgent application. However, by an agreement between the parties, the Court, after hearing both counsel, i.e. Mr. Hinda for the applicant and Mr. Obbes for the first and second respondents, made an Order on 27 March 2006 in the following terms:

> (1) That the matter is hereby postponed until Thursday 13 April 2006 at 10h00.
>
> (2) That the Applicant files his answering affidavits on or before 30 March 2006.
>
> (3) That the Respondents file their replying papers on or before 07 April 2006.
>
> (4) That the Applicant files his Heads of Argument on or before 12 April 2006.
>
> (5) That the Respondents file their Heads of Argument on or before 11 April 2006.
>
> (6) That the Respondents undertake to suspend the disciplinary hearing pending determination of the application by the Court.

[8] When the case resumed on 13 April 2006, Mr. Hinda, counsel for the applicant, informed the Court that the applicant would not persist in his contention that Mr. Ikanga who deposed to the answering affidavit on behalf of the first respondent did not have the necessary authority to do so. Mr. Obbes, on his part, informed the Court

that the first and second respondents would not oppose the applicant's application for condonation of the applicant's failure to comply with the Order of the Court respecting the time limits for the filing of the applicant's replying affidavit and the heads of argument of the applicant's counsel.

[9] That being the case, only two issues remain to be determined by this Court. They are: (a) the applicant's prayers contained in paragraphs (1) and (2) of the notice of motion, which in effect are really one issue, to wit, a declaration in terms of s. 18 (1) (e) of the Labour Act 1992[1] that exceptional circumstances exist entitling the applicant to be represented by a person from outside the first respondent, including a legal practitioner; and (b) the first and second respondents' application to strike out subparagraph 4.2.9 of the applicant's founding affidavit on the basis that the content thereof "constitutes inadmissible hearsay evidence."

[10] I will dispose of the second issue first. Mr. Obbes's argument, put simply, is this: it is not possible that Mr. Karamata's affidavit deposed to on 21 December 2005 could confirm the contents of subparagraph 4.2.9 of the applicant's founding affidavit that was deposed to on 9 March 2006. Consequently, the contents of the offending subparagraph 4.2.9 are inadmissible hearsay evidence, and must, therefore, be struck out. Mr. Obbes argued further that it does not matter whether the hearsay evidence will prejudice the first and second respondents. The reason is that the respondents' application has not been made in terms of Rule 6 (15) of the Rules of the Court,

[1] Act No. 6 of 1992.

contrary to Mr. Hinda's submission. I had the feeling that Mr. Hinda's challenge was put up rather faintly: he did not really wish to pursue his opposition to the application, so long as there was no order as to costs as prayed for by the respondents.

[11] Mr. Obbes's argument is well founded. In the circumstances, I have no difficulty in holding that the content of subparagraph 4.2.9 of the applicant's founding affidavit is inadmissible hearsay evidence. In the result, the respondents' application to strike out the offending subparagraph 4.2.9 succeeds: I will, therefore, not take cognizance of the said subparagraph 4.2.9 of the applicant's founding affidavit. I shall deal with the matter of costs of the strikeout application *infra*. I will now turn to the first issue, which is, indeed, the main issue.

[12] The crucial question that falls to be determined by me under the first issue turns primarily on the interpretation and application of the provisions of the said clause B (ii) (e), particularly the words "in exceptional circumstances only".

[13] It is quite clear from the affidavits filed of record by the parties and the submissions by the parties' counsel that it is common cause between the parties that the applicant is not entitled as of right to external legal representation. In this connection, the following authoritative statement by Innes, CJ, which has been followed in a number of cases,[2] is instructive and apposite: "No Roman-Dutch

[2] E.g. *Ibhayi City Council v Yantolo* (1991) 12 *ILJ* 1005; *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2004) 25 *ILJ* 2311 (SCA).

authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none."[3]

[14] Both counsel agreed also that the common law, however, requires disciplinary hearings to be fair. According to Mr. Hinda, it follows that the employer has discretion to allow external legal representation in circumstances in which it would be fair to do so, and in support of his contention, Mr. Hinda referred me to a number of cases. I do not think anybody can reasonably dispute the soundness and correctness of these general principles. Indeed, Mr. Obbes made a similar point in his submission. According to him, the common law requirement that disciplinary proceedings be fair "may require, in a particular case, that legal representation may be necessary." He also referred me to a number of cases in this regard. Indeed, *Mahumani*[4] and *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* appear in both lists of authorities. But, as Mr. Obbes submitted, "the fairness of the procedure will obviously differ depending on diverse circumstances."[5] That is correct. Indeed, concerning this aspect of procedural requirement, Chaskalson, CJ put it even more succinctly thus: "What procedural fairness requires depends on the particular circumstances of each case."[6]

[15] If one extrapolates the principles in *Dabner, Kamanya* and *Bel Porto School Governing Body* to the interpretation and application of clause B (ii) (e) of the first

[3] *Dabner v South African Railways and Harbours* 1920 AD 583 at 598.
[4] *Supra*.
[5] *Kamanya & Others v Kuiseb Fish Products Ltd* NLLP 1998 (1) 125 NLC at 130, *per* O'Linn, J.
[6] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at 291 H.

respondent's Manual in relation to the facts *in casu* and to the applicant's application, the following short and narrow question is all that remains to be answered: are there exceptional circumstances entitling the applicant to external legal representation during his disciplinary hearing? In this connection, if there are, then the hearing will not pass the test of fairness if the applicant is denied external legal representation.[7]

[16] The applicant contends that exceptional circumstances exist. Counsel for the applicant submitted that the presence of "intricacy and complication" in the nature of the charges preferred against the applicant are the hallmarks of exceptional circumstances. In this connection, he argued that if the applicant was found guilty of any of the charges he could be dismissed. He submitted further that the charges were so intricate and complicated that when the applicant approached some of his colleagues to represent him at the hearing, they declined or ultimately declined the assignment (some changed their minds later) because the charges were complex and outside their areas of expertise.

[17] One such employee who declined to represent the applicant was Mr. Lucky Mungunda. The second was Benjamin Nghalukamo Jacobs, who declined because, among other things, "I am not an Information Technology expert;" but he later agreed to represent the applicant "after having canvassed the matter with the second respondent." Mr. Jacobs does not say what was the nature of the matter that was canvassed and what was the purpose of speaking to the second respondent before

[7] See *Mahumani, supra*; *Hamata, supra*; *Yantolo, supra*.

changing his mind. In my view, the applicant's uneasiness at Mr. Jacobs representing him at the hearing is not baseless. The third was Mr. Heronimus Witbooi. According to Mr. Witbooi, he is "experienced in representing employees of first respondent at disciplinary hearings at all levels;" therefore, he is ready to represent the applicant. Mr. Witbooi does not give samples of the type and nature of offences that were levelled against the employees he had represented. Consequently, in my opinion, Mr. Witbooi does not assist this Court in determining whether the applicant's disquiet to have Mr. Witbooi represent him at the disciplinary hearing is justified or unjustified: he leaves the Court in doubt. In the result, I will resolve the doubt in the applicant's favour[8] and hold that the applicant's fears about having Mr. Witbooi represent him are justified.

[18] At any rate, according to the first and second respondents, there are other employees who have received some training in matters concerning disciplinary hearing and that they are capable of representing the applicant, and they are willing to do so. There is no evidence about the willingness of such employees. Keeping in mind the fact that some employees had declined the applicant's invitation to represent him, such evidence is important. And for the training programmes, I doubt their adequacy and usefulness in the present case. The first respondent filed of record a list of names of these capable employees, the courses they undertook, and the duration of the courses. The following courses are mentioned: IR (I take that to mean industrial relations.): one or two days; IR for chairpersons: one or two days; trade unionism: two

[8] See Schwikkard, *Principles of Evidence*, 1997: p401.

days; labour law: two days; labour relations: two days; and labour, policy and procedure: two days. I also note that the greater majority of those who attended the courses are postal clerks, mailing clerks and clerks. With the greatest respect, I cannot see how these so-called capable co-employees can fathom the nature and content of most of the charges that are preferred against the applicant, let alone lead evidence and cross-examine witnesses, some of whom may be IT expert witnesses.

[19] Apart from having some reservations about these three and other co-employees representing him, which I have already dealt with above, the applicant put forward the following key arguments in support of his application. According to the applicant, the charges against him constitute a witch-hunt and that the second respondent is hell-bent to victimize him. Besides, according to the applicant, because he has been suspended for such a long period, i.e. “more than 365 days,” he has lost contact with co-employees. I agree with counsel for the respondents that the applicant’s counsel cannot raise these points in his heads of argument when they have not been the applicant’s case in terms of his notice of motion.

[20] I will now turn to the other key arguments. A major one is that the charges are varied and complex and if the applicant is found guilty of any one of them, he stands not only to lose his job, but he may also be liable for civil claims and criminal charges; therefore, he has no confidence in the skills and competencies or abilities of any internal representative. In addition, he agued, the investigation involved experts in Information Technology and other disciplines. The respondents have argued in the

opposite way. In his submission, counsel for the respondents took the point that the applicant does not say why he avers that the charges are varied and complex. In my opinion, the applicant does not need to show that the charges are varied. That the charges are varied is there for all to see. There are two gross negligent charges (i.e. Charge 1 and Charge 2) apart from another gross negligent charge, which is an alternative charge to the charge of refusal to obey instructions (Charge 4). And the particulars in each of the three charges are different. In that sense, even the gross negligent charges are varied. On top of these, there is the charge of making threats to cause financial harm to AST Namibia and/or causing the name of the company (i.e. first respondent) to be brought into disrepute (Charge 3). Charge 3 on its own contains two different charges. Then, there is also Charge 6, which in reality contains two different charges, namely, unauthorized use of company property and misuse of company property. In addition, although the last two charges concern diamond dealings, they are two different charges: illegal diamond dealings (Charge 7) and using company equipment for illegal purposes (Charge 8). In the circumstances, I find that the charges are unquestionably varied.

[21] I will now determine whether the charges are complex. The word “complex” in its ordinary adjectival form means complicated; and “complicated” means intricate; and “intricate” means “very complicated”.[9] From the ordinary grammatical meaning of “complex”, I conclude that a “complex” issue or problem or matter means the issue, problem or matter is not easy to comprehend or deal with because it contains many-

[9] *The Oxford Concise English Dictionary*, 10th Ed.

sided and difficult aspects. And whether an issue, problem or matter is intricate cannot be determined in a vacuum: it depends largely upon the subject matter involved and the level of understanding of the individual faced with the issue, problem or matter, such understanding having been gained through formal or informal education and developed through experience. Bearing in mind the above examination and conclusions, I now turn to answering the following central question: are the charges that have been preferred against the applicant "very complicated" as the applicant says? In other words, given the applicant's level of education and experience, can it be reasonably expected of him to be able not only to understand the charges but also to deal with them at the hearing? By "deal with them", I mean lead evidence that is capable of countering each and every element of each charge; lead evidence of witnesses that are called to support the applicant's case; and cross-examine witnesses that are called to give evidence against him.

[22] The only basis of the respondent's opposition to the respondent's contention that the charges are complex appears in the respondents' answering affidavit: "It is denied that the charges levelled against applicant are as varied and complex as applicant suggests. None of the charges amount to criminal charges. … All the charges pertain to matters internal to the first respondent." And in his submission, counsel for the respondents argued that some of the charges relate to IT, and the applicant is the IT Manager. For example, with regard to Charge 1 (gross negligence), counsel submitted that the charge is clear, specific and clearly delineated, and with regard to Charge 2, (gross negligence), he argued simply that the issues are not complex. Of course, as the

respondent's counsel submitted, it is the burden of the applicant to persuade the Court that the charges are complex; the respondents need not prove anything. And according to him, the applicant has not made out a case. I do not agree that the applicant has not made out a case.

[23] I have already found above that the charges are varied. What about the charges being complex? In their challenge to the applicant's contention that the charges are complex, the respondents are labouring under a very serious misapprehension of the real issue at hand. A complex charge does not become otherwise just because the information accompanying the charge can be 'understood' by any person having a sufficient knowledge of the English language. In my view, many of the charges the applicant is facing are replete with legal concepts, which can be really understood by lawyers or persons with sufficient legal training, e.g. "gross negligence", "due care" (Charges 1, 2 and 3), "ostensibly in your capacity as employee", "serious prejudice" (Charges 3 and 4), "conflict of interest" in respect of the named businesses (Charge 5), "illegal diamond dealings", and "criminal offence" (Charges 7 and 8).

[24] It must be remembered that it took the first respondent eight months to bring the charges of misconduct against the applicant; and it took the National Forensic Science Institute close to two months to complete its investigation and the Business Connection (Pty) Ltd about six months to complete its IT network investigation on behalf of the first respondent.

[25] From the forgoing analyses and conclusions, and taking into account a combination of the surrounding circumstances, I come to the inescapable conclusion that the charges are also complex.

[26] As I stated above, it is not simply a matter of the applicant and any co-employee, who agrees to represent him, being able to understand the information accompanying the charges. The said information merely describes the alleged acts of misconduct of the applicant and the periods during which such actions were carried out. What is important and crucial is the applicant and any such co-employee being able to lead credible evidence in the applicant's favour and being able to cross-examine witnesses who give evidence against him. It cannot reasonably be controverted that almost all the charges are serious, and that if found guilty on any one of them, the applicant will, not may, be dismissed (see Annexure "RPK 7" to the applicant's founding affidavit, which is discussed above).

[27] The English case of *Pett v Greyhound Racing Association Ltd*[10] is apposite. In that case, the rules applicable to the domestic enquiry to be held did not specifically exclude legal representation, just as the first respondent's rule under clause B (ii) (e) of the Manual does not. Lord Denning MR at 549 B-G states the following:

[10] [1968] 2 All ER 545.

> Counsel for the defendants says that the procedure is in the hands of the stewards. If they choose to say: "We will not hear lawyers", that is for them, he says, and it is not for the courts to interfere.
>
> I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. …
>
> Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. … If justice is to be done he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?[11]

[28] As mentioned previously, one must not lose sight of the fact that clause B (ii) (e) of the first respondent's Manual does not specifically exclude legal representation. What it seeks to exclude is "representatives from outside the Company". That was also the applicable rule in *Hamata*, which provided: "The student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon."[12] And the Supreme Court of Appeal in that case held that the rule was not intended to prohibit altogether representation by lawyers in disciplinary enquiries, so long as the lawyer involved is a student or staff of the Technikon.[13] Thus, the total exclusion of

[11] At 549 B-G.
[12] *Supra* at 455B.
[13] *Ibid*. at 458H-459A; 460D-E.

lawyers as such could not have been the object of clause B (ii) (e). For this reason, the argument by counsel for the respondents premised on a passage from a book by Le Roux and Van Niekerk to the effect that "[T]o permit this (i.e. legal representation) would open the way for time consuming delays, disciplinary proceedings even (becoming) longer than they are at present, and inordinate expense"[14] is, with respect, very weak; the proposition cannot apply in this case.

[29] Besides, the decision in *Namibia Post Limited v Hans Eiman*[15] cannot assist me in my present enterprise for three reasons. The first reason is that, as Mr. Obbes who referred me to the case conceded, the nature of the charge in *Eiman* is totally different from the nature and content of the charges in the present matter. According to the judgment of this Court in *Eiman*, "[T]he respondent (Eiman) was charged (by the appellant) with unlawfully and intentionally making a false statement when applying for a job with the appellant."[16] Significantly, it is noted that the respondent was charged with one charge of misconduct. The respondent applied for a managerial post with the appellant. For that purpose he completed an application form requiring the applicant to disclose his personal particulars by answering a questionnaire. Among the questions posed was the question: "Have you ever been convicted of a criminal offence or been dismissed from employment? If so, furnish particulars on a separate sheet". The respondent did not provide an answer to the question. Further on and at the very end of the application form, the respondent was asked to make the following declaration: "I declare that the above particulars are complete and correct and I have

[14] *The South African Law of Unfair Dismissal*, 1994: p 162, fn 46.
[15] Case No.: (P) LCA 13/2005. (Unreported)
[16] At p 8.

not withheld any required information". The nature and content of the charge in *Eiman* will be very clear *ex facie* the 'charge sheet', considering the application form that the appellant had completed. This charge is not comparable on any pan of scale to the varied and complex charges (eight in all) that are preferred against the applicant in the present case. The second reason is that a "Mr. Ikanga told the Court, the appellant regarded the exceptional circumstances as being present only where the case was complex and needed legal expertise." Mr. Ikanga's argument is *petitio principii*; such a circular argument does not, with respect, appeal to me in the least. The third reason is that even in begging the question, Mr. Ikanga's statement might apply to cases where the applicable rule precludes totally legal representation – whether internal or external. As I have shown above, the rule under clause B (ii) (e) of the first respondent's Manual does not prescribe the total exclusion of lawyers.

[30] From the foregoing, the only conclusion that is reasonable and fair to make is that the charges preferred against the applicant are varied and complex.

[31] That is not the end of the matter. In my view, in determining the first issue, it is also apt and crucial to examine certain aspects of the employment history of the applicant, i.e. the relationship between the applicant as the employee and the first respondent as the employer, that are relevant to the issue at hand, as well as any related matters. Besides, I am examining them because they have been raised both on the papers filed of record and in submissions by both counsel.

[32] The applicant was appointed to the position of Manager: Courier Services by the first respondent in February 2001. Around that time, the position of CEO of the first respondent became vacant and so an acting CEO was appointed. Mr. Claasen was appointed corporate advisor to the first respondent's board of directors; he ceased to occupy that position in October 2002: this event coincided roughly with the appointment of a Mr. Hermanus Kasper as the first respondent's new CEO. Mr. Hermanus Kasper resigned on or about 1 April 2004, and Mr. Claasen was re-appointed to the position of corporate advisor to the board of directors and acting CEO from 1 April 2004 to April 2005. Mr. Claasen had been re-appointed corporate advisor and acting CEO in order to turn around the fortunes of the first respondent. One of the things that Mr. Claasen did in this connection was to restructure the organization of first respondent.

[33] In a letter dated September 2002 (no particular day was indicated on the letter), the applicant was informed that his "current position and job content" were removed from the new structure. The applicant was told that he would "not be transferred automatically." He was also informed that "[I]f all efforts fail to accommodate you, you will be declared redundant." Thereafter, a letter dated 24 September 2002 offered the applicant the post of Head: Quality Control in the Operations Division. As I have mentioned above, the September 2002 letter did not bear any date of a particular day, but all of sudden the 23rd day is supplied in the 24 September 2002 letter as the date of the day of the said September 2002 letter. One Geoffrey Bailey signed the 24 September 2002 letter; he does not supply his designation. I am not sure what

Geoffrey Bailey hoped to achieve by supplying a particular day in his 24 September 2002 letter. Be that as it may, the applicant did challenge the contents and effect of the September 2002 and the 24 September 2002 letters.

[34] When Mr. Hermanus Kasper was appointed to the post of CEO of the first respondent, as mentioned above, he made changes to the establishment of the first respondent. It is reasonable to assume that the changes made by Mr. Hermanus Kasper resulted, among other things, in the appointment of the applicant to the position of Manager: Projects, Contract Management & Strategy in the CEO's department with effect from 1 August 2003. I have mentioned previously that Mr. Hermanus Kasper resigned on or about 1 April 2004, which led to the re-appointment of Mr. Claasen as corporate advisor to the board of directors and the management of the first respondent and the fist respondent's acting CEO; a post he held until April 2005.

[35] In its answering affidavit, the first respondent avers that the "Information and Technology ('IT') Department also then fell under applicant's ambit." This is not correct as evidenced by the letter of appointment, dated 29 July 2003 (Annexure "RPK 4" to the applicant's founding affidavit). This is significant because the first respondent relies on this wrong assertion to contend that the applicant's experience with IT should date back from 1 August 2003 when he was appointed to the post of Manager: Projects, Contract Management & Strategy, and not 3 June 2004 when he was appointed Head: IT Applications within the Department of IT Applications (Annexure "RPK 5" to the applicant's founding affidavit).

[36] As indicated in “RPK 5”, entitled “TRANSFER/REDEPLOYMENT”, for the first time, the applicant’s appointment letter provides that he must serve probation for six months. In its answering affidavit, the first respondent contends that Annexure “RPK 4” (to the applicant’s founding affidavit, dealing with the applicant’s appointment to the position of Manager: Projects, Contract Management & Strategy) and Annexure “RPK 5” (to the applicant’s founding affidavit, dealing with the applicant’s appointment to the position of Head: IT Applications) are substantially similar in format. That is also not correct: “RPK 4” is entitled “RE-DEPLOYMENT”, while “RPK 5” is entitled “TRANSFER/REDEPLOYMENT”. More important, the applicant was not asked to serve probation in “RPK 4”, but he was required to serve a six-month probation in “RPK 5”.

[37] It is not clear whether the system of probation is a management practice in the first respondent, or the system was tailor-made specifically for the applicant alone. The latter appears to be the case; for, in paragraph 28 of the first respondent’s answering affidavit, the deponent states as follows:

> The reason for this long probation is the strategic and operational importance of the Information System function for NamPost. Six months would have given you (i.e. the applicant) as the existing Manager for the post for the past 18 months in this position, enough time to develop and comply with the position’s requirements and will also provide the time

> for NamPost to evaluate your capabilities and to identify shortcomings or limitations that may make you unsuitable for this position. (My emphasis)

That being the case, in my opinion the applicant's complaint against the selective treatment meted out to him by the acting CEO, Mr Claasen, is not baseless. In my view, the first respondent was not interested in assisting the applicant to become suitable for the position: it was apparently rather interested in the applicant becoming "unsuitable for this position," i.e. in the applicant failing to make the mark in that position.

[38] As it will become apparent shortly, in my view, the most important aspect of the applicant's employment with the first respondent that is most pivotal to the issue at hand is Mr. Claasen's letter of 15 December 2004, written in his capacity as acting CEO of the first respondent and addressed to the applicant (Annexure "RPK 7" to the applicants founding affidavit). I will only examine some salient parts that I consider relevant for my present purposes. In the said letter, Mr. Claasen prescribes to the applicant three predestined routes for the applicant to take, and each one of them leads eventually to the applicant's destruction, so to speak. I do not believe that Mr. Claasen and the applicant agreed the routes through genuine and bona fide negotiations, as is reasonably expected in employment relations;[17] otherwise, why should the applicant instruct his legal practitioners to lodge a protest to the said letter with the first

[17] See *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia* Case No.: LC 13/99 at p 12. (Unreported); *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 12221 at 1237.

respondent's acting CEO, Mr. Claasen, the author of the said letter, on 21 December 2004, barely six days after receiving the letter?

[39] The first route or the first of the three "options" is this: the applicant remains in his current position for one month, but he does so at his peril because within the one-month period, he is expected to improve his IT skills and perform satisfactorily, otherwise he will automatically be dismissed "after the conclusion of a fair procedure." In addition, the first respondent will bring charges against the applicant "for gross negligence and/or insubordination and/or refusal to perform lawfully assigned work." Here, too, the only punitive measure is an automatic dismissal, "if found guilty at a disciplinary hearing." In my considered opinion, any employer who has only the 'capital' punishment in the employment situation in store for an employee who is facing a disciplinary hearing – as it is the case in this matter – can never be found to be fair or unbiased. The employer has already prejudged the issue, namely that there is only one suitable punishment to mete out: nothing less than dismissal, so long as the employee is found guilty.

[40] The second route is this: Facilities will be put at the disposal of the applicant to enable him to acquire the requisite skills that would, hopefully, enable the applicant to perform satisfactorily. But this "option" entails demotion of the applicant, with resultant reduction in applicant's "remuneration package". Behind this "option", too, lurks an ominous consequence, namely, "termination of your (i.e. the applicant's) services", should the applicant be found to have not improved his "standard of

performance." It cannot be gainsaid that an employee can only be legally demoted, since it is a punitive measure, after he or she has been found guilty of an offence following a fair disciplinary hearing.[18] Indeed, this is what the first respondent's own "Disciplinary Procedure" in the Manual provides. Clause B (v) (d) of the said Procedure reads: "Demotion may only be recommended following a formal Disciplinary Enquiry." But, Mr. Claasen, the acting CEO of the first respondent, is prepared to violate the first respondent's own disciplinary procedure. And as if that were not enough, the demotion is only a prelude to dismissal, which under this second "option" is automatic: it will follow without any disciplinary hearing.

[41] The third "option" is that the applicant is called upon to agree termination of his contract of employment.

[42] In my respectful view, the acting CEO's letter of 15 December 2004 ("RPK 7") is not only ominous but it is also pregnant with all that is bad and unacceptable in labour or industrial relations, to wit, unfairness, bias, disrespect for the employer's own disciplinary code and bad faith on the part of the employer in the employer-employee dealings.

[43] Through his legal practitioners, the applicant took issue with Annexure "RPK 7". Thereafter, in a letter dated 17 January 2005, Mr. Claasen extended the applicant's period of probation for three months. But, there is more: the extension was granted

[18] See, e.g. s. 26 (12) (a) (iv) of the Public Service Act 1995 (Act No. 13 of 1995).

"pending the outcome of disciplinary procedures that will be instituted against you." Without delay, the applicant's legal practitioners sent a letter dated 18 January 2005 to Mr. Claasen, challenging Mr. Claasen's letter of 17 January 2005.

[44] Thereafter, by a letter dated 1 March 2005, Mr. Claasen, *qua* acting CEO of the first respondent, put the applicant on suspension on full pay, and barred the applicant from entering the premises of the first respondent without "the express permission of the writer thereof."

[45] I have already commented above on the fact that it took the first respondent eight months to bring disciplinary charges against the applicant. The first respondent's explanation is contained in paragraphs 41 to 49 (inclusive) of the first respondent's answering affidavit. The gravamen of the response is the following. The first respondent engaged National Forensic Science Institute (NFSI) to assist in extracting electronic information from the applicant's laptop. According to the first respondent, it took the NFSI about two months to complete the assignment. Business Connection (Pty) Ltd (BCL) "was contracted to conduct another IT network investigation." BCL's report was provided to the first respondent in October 2005. It took the BCL about six months to complete the assignment. Thereafter, according to the first respondent, time was needed because "charges against the applicant had to be properly considered and formulated, resulting in him being finally charged on 10 November 2005."

[46] The first respondent's view is that "[W]hy applicant places so much emphasis on this aspect is unclear." For, according to the first respondent, "The delay in charging applicant is not significant." With respect, the first respondent misses the point. The applicant was suspended on 1 March 2005, but was charged on 10 November 2005. The crucial questions that arise are these: upon what legal and legitimate basis did the first respondent suspend the applicant in the first place, and what was the purpose of suspending the applicant? The significance of the long delay is that, in my opinion, on 1 March 2005 the first respondent did not have any good and sufficient reason to suspend the applicant. The upshot of this is that the first respondent was on a long fishing expedition – for fishing expedition it was – looking for acts of misconduct with which to charge the applicant. Besides, one must remember that in December 2004 Mr Claasen, the acting CEO of the first respondent, had already threatened the applicant with dismissal, after a disciplinary hearing (see Annexure "RPK 7" to the applicant's founding affidavit). All these go to show the attitude of the first respondent's acting CEO towards the applicant.

[47] I find that the foregoing concerning aspects of the applicant's employment history and connected matters cumulatively go to show unmistakeably the *mala fides* and bias on the part of the first respondent in its dealings with the applicant. Any reasonable employee in the position and situation of the applicant would form the view that the first respondent was out to get him or her by hook or crook. Consequently, I do not accept the first respondent's contention in its answering affidavit that the applicant was without good reason "consistently trying to create the

impression that Mr Claasen's conduct towards him was arbitrary and dictatorial." In my opinion, the applicant's fears were not unfounded or groundless.

[48] The conclusions I have reached above concerning the aspects of the applicant's employment history and the attitude of the first respondent towards the applicant, coupled with my finding that the charges against the applicant are varied and complex cumulatively constitute sufficient proof that exceptional circumstances exist in relation to the applicant's disciplinary hearing.

[49] As I mentioned previously, both Mr Hinda and Mr Obbes referred me to *Hamata*.[19] In that case, the South African Supreme Court of Appeal proposed a list of factors – and the list is not exhaustive – that ought to be taken into account when considering any request for external legal representation in disciplinary hearings. I find the factors appropriate and very useful, and so I have decided to adopt them *in casu*. Marais, JA, writing a unanimous judgment of the Court, stated: "Such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, (and) the potential seriousness of the consequences of an adverse finding … will have to be considered."[20] Applying these factors to the facts of this case and taking into account a *conspectus* of all the relevant circumstances, I come to the only reasonable and just conclusion that the applicant's disciplinary hearing will not be fair if the applicant is denied external legal representation. The adjunct to the "Notice of Disciplinary Enquiry" set out previously provides that during the hearing,

[19] *Supra*.
[20] At 461.

the applicant shall have the right, *inter alia*, to give evidence himself, to call any witness to give evidence in support of his case, and to cross-examine any witness called to give evidence against him. Doubtless, this is the type of work a legal practitioner is trained to do. And in the words of Lord Denning in *Pitt v Greyhound Racing Association Ltd*: "If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"[21] And since, as I have found, exceptional circumstances exist, I do not see any good reason why the applicant should not be allowed to be represented at his disciplinary hearing by someone from outside the first respondent, including a legal practitioner of his choice.

[50] In terms of s. 18 (1) (e) of the Labour Act 1992,[22] this Court has jurisdiction to issue a declaratory order in relation to the application and interpretation of, *inter alia*, any term or condition of any collective agreement, any wage order or any contract of employment. It is not disputed that the applicant's application concerns the application and interpretation of a term of his contract of employment with the first respondent. And the fact that another remedy exists, namely, an appeal against the decision of the disciplinary inquiry to an appellant body in terms of the first respondent's Manual, cannot take away the applicant's right to approach this Court in terms of the said s. 18 (1) (e) of the Labour Act 1992.[23]

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[21] *Supra*, *loc. cit*. See also *Yantolo*, *supra*, at 1010-1.
[22] Act No. 6 of 1992.
[23] See *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 where Gubbay, CJ stated at 680 the common law rule that "the availability of another remedy does not render the grant of a declaratory order incompetent."

[51] That being the case, I declare that exceptional circumstances exist within the meaning of clause B (ii) (e) of the first respondent's Manual, entitling the applicant to be represented by a person from outside the first respondent, including a legal practitioner of his choice.

[52] The applicant has prayed for costs in his application for a declaratory order. The respondents, too, have prayed for costs in their application to strike out subparagraph 4.2.9 of the applicant's founding affidavit. In terms of s. 20 of the Labour Act 1992, the Labour Court (like the district labour courts) must not make any order as to costs unless a party acted frivolously or vexatiously in either instituting or opposing proceedings. This is a departure from the usual practice in litigation, where the general rule is that in the absence of special circumstances, costs are awarded to the successful litigant.[24] A party acts frivolously if he or she is "lacking seriousness" in instituting or opposing proceedings, and acts vexatiously if he or she did not have sufficient grounds and sought only to annoy the other party.[25] I do not find that the applicant or the respondents acted frivolously or vexatiously in these proceedings.

[53] In the result, the applicant's application for a declaratory order succeeds in terms contained in paragraph 51 above. The respondent's application to strike out subparagraph 4.2.9 of the applicant's founding affidavit succeeds. There will be no order as to costs.

[24] *Fleming v Johnson and Richardson* 1903 TS 318 at 325; *Kathrada v Arbitration Tribunal* 1975 (2) SA 673 at 676.
[25] *The Concise Oxford English Dictionary*, 10th Ed.

Parker, A P

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