THE RIGHT TO LEGAL REPRESENTATION WHEN APPEARING BEFORE A DISCIPLINARY ENQUIRY

Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 7 BCLR 756 (SCA)

1 Introduction

Given the present work climate in South Africa, it can no longer be assumed that after completing tertiary education, a graduate is automatically assured of employment in his or her field of study. Opportunities are scarce and the supply generally outweighs the demand. It is therefore no surprise that any future candidate for the job market would prefer to keep his or her education record clean.

The possible consequences of a disciplinary enquiry have the potential to impact on the record of the student concerned. Such a student will put up the strongest possible defence at such an enquiry, and the question arises as to whether or not the student should be entitled to acquire the services of a legal representative to serve his or her best interests.

At the same time, seen from the viewpoint of a tertiary institution, the preference may well be to keep the enquiry a domestic affair and not allow the intervention of an outsider who may cause the enquiry to be prolonged, or show the chairperson or initiator of the enquiry, often a layperson, to be inadequately skilled when compared with a legal practitioner.

The question of the right to representation at a disciplinary enquiry of an employee arises for similar reasons, and it happens more often (see *eg*, *Davids v ISU C (Pty) Ltd* (1998) 5 BALR 534 (CCMA) and *Lamprecht and Nissan SA (Pty) Ltd v McNeillie* (1994) 11 BLLR 1 (A)).

In the present constitutional dispensation it cannot be assumed that the right to legal representation at disciplinary enquiries is only established by contractual agreement (individual or collective), or by an express provision in some legislative enactment, or even that such agreement or enactment may lawfully prohibit legal representation at enquiries.

In the recent judgment in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (*supra;* hereinafter "*Hamata"*) handed down by the Supreme Court of Appeal this issue of legal representation at disciplinary enquiries was considered and addressed.

2 Facts

The first appellant in the present case was a journalism student at the Peninsula Technikon (hereinafter "the Technikon"). During this time he co-authored an article which was published in a national newspaper, the *Mail and Guardian*, concerning the fact that prostitution was prevalent at the Technikon and that the institution had failed to take any action against it. The Technikon took exception to the content of the article, and regarded it as defamatory and an abuse of the right to freedom of expression of the student concerned. Whether he was the source or originator of the content of the article or not, he had knowingly reported false and damning statements about the institution without taking any reasonable steps to verify the truth thereof. The student was subsequently brought before an internal disciplinary committee on a the charge of conduct calculated to bring the Technikon into discredit.

Realizing the potential seriousness of a decision of the Internal Disciplinary Committee, the student requested the right to be represented at the enquiry by an attorney. The request was refused on the basis of "the representation rule" of the Technikon. This rule reads:

> "The student may conduct his/her defence or may be assisted by any student or a member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present, the Committee may nonetheless hear the case, make a finding and impose punishment."

In considering the above rule, the Committee came to the conclusion that it had no discretionary right to consider representation of the student by an attorney who was not a member of staff, and refused the application.

The student objected to being deprived of such legal representation and consequently did not present himself at the enquiry. It was held *in absentia* and the Committee found the student guilty of the charge and he was expelled from the Technikon. This finding was then reconsidered by internal appeal bodies at the institution, who in turn confirmed the sanction of expulsion.

The student, first appellant in the present case, took the matter to the High Court on review, where the application was dismissed. With leave to appeal such dismissal, the first and second appellants (the latter the publisher of the *Mail and Guardian* newspaper) approached the Supreme Court of Appeal to set aside the findings of both the Internal Disciplinary Committee and the High Court.

3 Legal question and decision of the court

The court restricted its consideration to the question of the right of the student to have legal representation before the domestic tribunal, namely the Internal Disciplinary Committee hearing.

With reference to *inter alia* the Constitution (Act 108 of 1996, hereinafter "the Constitution"), the court concluded that, as far as administrative and quasi-judicial tribunals were concerned, the right to legal representation is not in itself an absolute right. Other than in a court of law where the matter to be decided concerns an alleged offence, and where it is accepted that the accused is entitled to legal representation in order to ensure a fair trial, proceedings before other forums as referred to above, and applicable in this instance, do not give rise to the entitlement to legal representation purely on the basis that such representation is sought. Before such tribunals, legal representation is not in all instances a *sine qua non* for a procedurally fair hearing.

The court considered the question as to whether the Disciplinary Committee had a residual right of discretion to consider allowing legal representation in certain instances, having regard to the facts of each individual case. The conclusion reached was that the facts of each case had to be considered on an *ad hoc* basis and in instances where procedural fairness is dependent upon legal representation, it is an enforceable right.

The court concluded that the Internal Disciplinary Committee had erred in refusing to even entertain the right to legal representation based on its interpretation of the applicable rule of representation. Failure to exercise this discretion resulted in the vitiation of the proceedings at the hearing, and all subsequent proceedings. The decision of the Internal Disciplinary Committee and other forums of appeal was accordingly set aside.

4 Reasoning of the court

Considering the rule of representation that was relied upon in the disciplinary enquiry, the court pointed out that there were three possible objects which this rule could achieve, namely:

(a) to prohibit absolutely, any form of representation other than that for which provision is made in the rule; or

(b) to grant tacitly, an absolute right to be represented by a lawyer of one's choice and to extend expressly the right to representation to encompass representation even by a non-lawyer, provided only that such non-lawyer is a student or member of staff of Technikon: or

(c) to grant an absolute right to be represented by a student or member of staff of the Technikon irrespective of whether such a person is a lawyer; to deny an absolute right of representation by a lawyer of one's choice if the latter is neither a student nor a member of the staff of the Technikon; but to allow the Disciplinary Committee, in the exercise of its discretion, to permit representation by such a lawyer.

The court referred to the common law rules of presumption which have to be followed when interpreting a written document. Included in these was the presumption that fair administrative procedure depended upon the facts of each individual case.

The court highlighted the fact that under any circumstances the law of South Africa was subordinate to and bound by the principles of the Constitution of the country. Special reference was made to section 35 of the Constitution – but the court came to the conclusion that the right to a fair trial which every accused person has is restricted to the right of an alleged offender in a criminal case. The court saw no reason to presume that the same principle extended to the right of representation in a disciplinary hearing. If the legislature had intended to extend this right to administrative action or a quasi-judicial administrative action, this would have been done expressly. Neither the Schedule nor the Bill of Rights recognized an absolute enforceable right to legal representation outside the criminal law sphere.

With reference to the Promotion of Administrative Justice Act (3 of 2000), the right to a lawful, reasonable and procedurally fair administrative action is recognized and accepted. However, it is not imperative that the request for outside legal representation be allowed in all cases. The right to such representation is to be applied with flexibility on an *ad hoc* basis, namely with reference to the circumstances of each case and where procedural fairness will only be attained where such representation is permitted. In such a case the right to legal representation is imperative.

Although it is understandable that the Technikon preferred to keep disciplinary hearings of its students within its own domain and thus a "closed" affair as far as outside third parties were concerned, it was clear that the facts of a particular case might demand the intervention and services of an attorney in order to ensure the attainment of procedural fairness. In such an instance the option of outside legal representation for the student could be the only acceptable interpretation of the rules of the institution itself, and the Committee would have to exercise its residual discretion in determining whether the case before it fell into this category.

In the present case the Committee had felt itself bound by the obligation supposedly imposed on it to keep the enquiry within "the family" of the Technikon and as such felt that it was not within its power to exercise any

discretion to determine otherwise. The court held that this was a fatal error of interpretation of the rule and as such the proceedings that followed and the decisions reached were of no force or effect.

Legal representation may be granted at the discretion of the chairperson of a disciplinary enquiry. The court observed that the parties had argued the matter on the premise that the disciplinary bodies at the Technikon had been engaging in administrative action as contemplated by the Constitution (765D-E).

Considering the provisions of the Constitution as well as section 3 of the Promotion of Administrative Justice Act it is abundantly apparent that a discretion to allow legal representation exists and that disciplinary enquiries are regarded as administrative action as contemplated.

5 Discussion

5 1 No absolute right to legal presentation

It is important to establish clearly at the outset that the Supreme Court of Appeal (760E-761A) stated in no uncertain terms that while the Bill of Rights expressly spells out "the right to choose, and to consult with a legal practitioner" (s 35(2)(b) of the Constitution) it does so only in the context of an arrest for allegedly committing an offence (s 35(1) of the Constitution) and the right to a fair trial that every accused person has (s 35(3) of the Constitution).

Moreover, in the national legislation enacted (the Promotion of Administrative Justice Act) as required in section 33 of the Constitution to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons where rights have been adversely affected by an administrative act, there is no reference to an absolute right to legal representation. This "can only be construed as a deliberate omission to account or recognize such a right" (761B-C).

Instead, section 3(2)(a) of the Promotion of Administrative Justice Act recognizes that a fair administrative procedure depends on the circumstances of each case. Section 3 makes provision for legal representation only in a serious and complex case in which, in order to give effect to procedurally fair administrative action, an administrator exercises discretion and decides to grant an opportunity to obtain legal representation. There is also a definite contrast between certain rights spelt out in section 3(2)(b) which *may* be given and the opportunities provided by the Constitution and the Promotion of Administrative Justice Act.

But, does the discretion exist in disciplinary enquiries that fall outside the ambit of the Constitution and the abovementioned Act? This question is important because it is likely that disciplinary enquiries in the private sector fall outside the ambit of such administrative action. Marais JA (who delivered the unanimous judgment in *Hamata*) answered this question in the affirmative. He was satisfied that an application of the principles of the common law in existence in the pre-constitutional era also led to the same conclusion. He held as follows:

> "They too, require proceedings of a disciplinary nature to be procedurally fair whether or not they can be characterized as administrative and whether or not an organ of State is involved" (765 F-G).

From this conclusion it follows that this discretion applies to disciplinary enquiries of any sort, including those involving employees and students, and including the public as well as the private sector.

5 2 Exercising the discretion

It was the court's view that in order to achieve procedural fairness in a particular case, legal representation might be necessary and a disciplinary body should exercise its discretion accordingly.

Factors that will influence the discretion include the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student-staff body, and the fact that the initiator might be legally trained. Where an employer retains a legal practitioner to prosecute a disciplinary hearing, the same right should be accorded to the employee: see for example *Blaauw v Oranje Soutwerke* [1998] BALR 254 (CCMA) 267A-E). In addition, any other factor relevant to the fairness or otherwise of confining the accused to the kind of representation provided for by the applicable representation provisions will be relevant in exercising this discretion (764I-765B).

In *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho intervening)* (2001 3 SA 1151 CC 1184E) Chaskalson CJ summarized the position as follows:

> "Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made and the consequences resulting from it."

Regard may also be had to the rules of the Commission for Conciliation, Mediation and Arbitration where a similar discretion to allow legal representation in arbitration proceedings involving the dismissal for misconduct or incapacity is exercised. Factors to consider in the exercising of this discretion are the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability

of opposing parties or their representatives to deal with the dispute (Rule 25 of the Rules for the Conduct of Proceedings before the CCMA).

5 3 Can the discretion to allow legal presentation be excluded?

Marais JA stated that "a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of such discretion. If it has, the validity in law of the deprivation may arise …" (765G-H).

Since it was held that the disciplinary body in *Hamata* had not been so deprived, the issue was not taken much further in the judgment. This is of course of great importance and needs to be investigated and considered carefully. A few provisional remarks follow.

It is submitted that the provisions of the Constitution and the Promotion of Administrative Justice Act which give effect to the constitutional imperatives regarding fair administrative action are clear in regard to the retention of a discretion to allow legal representation. An agreement, conditions of service, policy or even a subordinate legislative enactment suggesting that the discretion is removed, cannot be enforced in the face of this Act and the Constitution.

Any other Act of Parliament that seeks to do so can only be enforced if it is found to be in compliance with section 36 of the Constitution (the "limitations clause").

In regard to disciplinary enquiries of *employees* in the private sector who may be regarded as being excluded from the operation of administrative action as understood in terms of the Constitution and the Promotion of Administrative Justice Act, it is submitted that the constitutional right to fair labour practices (in s 23 of the Constitution) demands equally that any agreement, conditions of employment and policy that purport to exclude the discretion to allow legal representation be regarded as unconstitutional and therefore unfair.

It is accordingly submitted that the discretion to allow legal representatives in a particular disciplinary enquiry cannot be excluded – both in instances where administrative law applies as well as disciplinary enquiries in the private sector.

6 Conclusion

In *Hamata* the Supreme Court of Appeal established clearly that, although the right to legal representation is not absolute in disciplinary enquires, a discretion to allow legal representation where procedural fairness demands it exists both in enquiries covered by the Promotion of Administrative Justice Act, as well as those that fall outside the scope of that Act. It is submitted, in conclusion, that the discretion cannot be excluded by an internal rule, policy or agreement, and a legislative attempt to enforce the exclusion will be subject to the limitations clause contained in section 36 of the Constitution.

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