30:11:77 272/77

G.P.-S.59968—1970-71—2 500 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

272/77

Appeal in Civil Case
Appèl in Siviele Saak

DIRECTOR OF HOSPITAL SERVICES *Appellant,*

versus

N. V. MISTRY *Respondent*

Appellant's Attorney DEP. STATE ATT *Respondent's Attorney* ROSENDORFF, V. B
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate L. T. C. Harms *Respondent's Advocate* M. D. Kuper
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op

(TPD) 2

Coram: Rumpff CJ, Rabie, Diemont JJA
Viljoen et Howie AJJA.

9.45 am ——— 11.50 am
11.15 am ——— 11.35 am

C. A. V.

The Court allows the appeal with costs and alters the order of the Court a quo to read:

"Application dismissed with costs."

Judgment

Per Diemont JA

78.11.09

Bills taxed—Kosterekenings getakseer

Writ issued Lasbrief uitgereik	Date Datum	Amount Bedrag	Initials Paraaf
			Registrar

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

THE DIRECTOR OF HOSPITAL SERVICES ..... appellant

versus

NAVIN VITHAL MISTRY ..... respondent.

CORAM: Rumpff, CJ, Rabie et Diemont, JJA, Viljoen et Hoexter, AJJA.

DATE HEARD: 7 September 1978.

JUDGMENT DELIVERED: 9 Nov 1978.

J U D G M E N T

DIEMONT, JA:

The appellant is the Director of Hospital Services in the Transvaal. The respondent, Navin Vithal Mistry, is a medical doctor who, at the time of his suspension from office, was serving on the staff of the Baragwanath Hospital in Johannesburg. The appellant was the respondent

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in the lower court and I shall, in order to avoid confusion, refer to him as the respondent, and to respondent in this court as the applicant.

It appears from the papers that the applicant graduated with the degrees of bachelor of medicine and bachelor of surgery at the University of Poona in India in 1968, that he took up residence on the Witwatersrand in the following year and that in December 1971 he accepted an appointment on the staff of the Baragwanath Hospital. At the time of his suspension in August 1976 he was the acting head of the casualty section of that hospital.

Six months after his suspension he instituted proceedings on notice of motion in the Transvaal Provincial Division for his reinstatement on the hospital staff and for certain ancillary relief. In his founding affidavit Mistry stated that he was arrested by the South African Police and ~~asked~~ told to appear in the Kliptown Magistrate's Court on 3 August 1976 on criminal charges arising out of his employment. He was not asked to plead to any charge

/ nor.....

nor was he informed of the precise nature of the charges but he was advised by the investigating officer that the charges concerned fraud and forgery. The case was remanded until 30 August 1976 in the Orlando Magistrate's Court. On 12 August 1976 he received a notice signed by the Director of Hospital Services in the following terms:

> "Dr. N.V. Mistry,
> C/o BARAGWANATH HOSPITAL
> You, NAVIN VITHAL MISTRY, a Medical Officer on the staff of the Baragwanath Hospital, and as such an officer as contemplated in Section 41 of the Hospital's Ordinance, 15 of 1958, in the service of the Transvaal Provincial Administration are hereby suspended from duty in terms of Section 53(4) of the said Ordinance with effect from 1 August 1976 until further notice.
>
> In terms of Section 53(5) of the said Ordinance you will not be entitled to any emoluments for the period of suspension."

Applicant stated that he was told by the person who served the notice on him that his suspension arose from the matters which had given rise to the criminal charges against him. He stated further that having been only suspended,

/ and .....

and not discharged, he was precluded from taking any other employment as a medical doctor.

On 30 August 1976 the case against applicant was postponed to 8 September 1976 on which day he was ordered to appear in the Magistrate's Court in Johannesburg on 22 September 1976. A further postponement followed and on 30 September 1976 the matter was once more postponed for the fixing of a trial date in the Johannesburg regional court. Finally applicant's attorney and the regional court prosecutor arranged that the trial would take place some three months later on 19 and 20 January 1977 in the Johannesburg regional court. There were several reasons for this lengthy postponement: the police officer who was investigating the case was going on leave in October, the applicant himself had planned a visit to India for religious purposes and did not intend returning to South Africa until late in December and finally the regional court prosecutor wanted sufficient time to enable him to frame a charge and furnish particulars after the police had completed their investigations.

/ Several.....

Several written requests were made by applicant's attorney to the regional court prosecutor for a copy of the charge sheet and when these requests met with no success a final letter was written on 6 January 1977 advising the prosecutor that as no charge sheet had been furnished, there was was insufficient time to prepare for trial and accordingly application would be made on 19 January 1977 for the matter to be quashed. The reply to this letter was a telephone call from a member of the prosecutor's staff informing Mistry's attorney that the trial would not take place on 19 January 1977 and would have to be postponed once more. Applicant attended court with his attorney and was told that the investigations into the charges against him had not been completed, that no charge had been framed and that it would not be possible for the case to be heard for at least two or three months.

Applicant submitted that he was being harshly penalised for his alleged criminal conduct in that he had not only received no emoluments during the period of his sus-

pension and no annual bonus, but he was also precluded from taking other employment while he was under suspension. He denied his guilt and said that, regard being had to the consequences of his suspension, he was entitled to have the matter determined as expeditiously as possible. He declared that the respondent was fully aware of the terms of his suspension and was obliged to act in such manner as to ensure that any charges against him were determined with a minimum of delay. When he learned on 19 January 1977 that the trial could not proceed on that day and would probably not be heard for at least another two or three months and he realised that he faced the prospect of another lengthy period without pay or employment, he formed the view:

> " that the respondent had not acted promptly or expeditiously in this matter (and) was not concerned to ensure that my guilt or innocence was determined with a minimum of delay".

He cited as his reasons for coming to this conclusion the following:

/ " 1. Numerous....

"1. Numerous postponements of my trial had taken place due to the fact that investigations were not complete. Those members of the South African Police who were investigating this matter appeared to have acted promptly and it would therefore seem that the failure to complete investigation is due to the Respondent.

2. No formal charge sheet has been furnished to my attorney which again is the result of incomplete investigations and which I again attribute to the Respondent.

3. Shortly after my suspension, I addressed a lengthy letter to the Superintendent of Baragwanath to which I received neither an acknowledgment nor a reply.

4. My attorney was desirous of interviewing a member of the staff of Baragwanath or some other official who could provide some information as to the offences which I am alleged to have committed. My attorney was given the necessary permission by the police to have this interview. Pursuant thereto, my attorney telephoned the Superintendent of Baragwanath and was referred to an employee of the Respondent in Pretoria. When asked whether an interview could be arranged, my attorney was referred by this employee to another employee of the Respondent who in turn informed my attorney that the information which was being sought could not be discussed nor given without the permission of yet another employee of

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the Respondent. I submit that this indicates an unwillingness to co-operate on the part of those officials and employees of the Respondent who are responsible for having the investigations against me completed timeously.

5. In terms of Section 53 of the Hospitals Ordinance of the Transvaal, the Respondent has the right to have my alleged misconduct determined in the manner contemplated in that Section. The Respondent has not availed himself of his right in terms of that Section."

The deponent stated further in his affidavit that although he was unaware of the specific nature of the charges against him, sufficient time had elapsed for all such charges to be fully investigated and for his trial to have been concluded or for an administrative enquiry into his alleged misconduct to have been held. In the circumstances he prayed for relief in the form of an order:

1. Directing his reinstatement as a medical officer at the Baragwanath Hospital with effect from 1 August 1976 on full pay.

2. Ordering payment of all salary and other emoluments for the period 1 August 1976 until date of reinstatement.

/ 3. .....

3. Alternatively to paragraphs 1 and 2, ordering that his suspension in terms of section 53(4) of the Hospitals Ordinance of the Transvaal be on full pay.

4. Costs of suit.

The affidavit was dated 24 February 1977 and the Director of Hospital Services was given notice to intimate on or before 23 March 1977 whether he intended to oppose the application.

The respondent filed an opposing affidavit dated 13 April 1977 in which he set out the circumstances leading up to applicant's arrest by the police. In brief he alleged that medical officers in the service of the hospital were allowed to do overtime work in the casualty section for which they were paid an additional emolument; but such overtime work was limited to 80 hours per week per medical officer. In July 1976 a certain Dr Alexander had complained that she had received a statement for income-tax purposes showing that for the tax year 1975/1976 she had received an amount

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in excess of what she had in fact earned or been paid. Investigation established that claim forms which related to the overpayment had been submitted for the months of June, July and August 1975. These claim forms had been certified as correct by applicant as head of the department and the cheques which had been issued in payment of the claims were endorsed in the name of Dr Alexander. The official who investigated the matter, one Van Dyk, established that Dr Alexander was overseas during the three months in question, that she could not have done the overtime work to which the claim forms related and that the endorsements on the cheques were forgeries. Van Dyk suspected that the applicant had com= pleted the false forms, certified them as correct and payable, forged Dr Alexander's endorsement on the cheques and then wrongfully cashed the cheques and appropriated the monies.

Respondent alleged further in his affidavit that as a result of this investigation a charge of fraud and forgery against the applicant was laid with the South

/ African .....

African Police. This was followed by a thorough departmental investigation which indicated that applicant might be involved in a number of other similar contraventions which might well culminate in further charges of fraud and forgery. When the enquiry was completed a detailed report was given to the South African Police at Kliptown during the month of November 1976. So far as could be established the amount involved was R9 274,71. The respondent stated that after the criminal trial he would take action in terms of the Hospitals Ordinance of 1958 and charge applicant under section 52(ñ) with having committed a criminal offence, but that such action must needs await the outcome of the criminal prosecution. He admitted that the case had been struck off the roll in the regional court on 19 January 1977, the reason for this being that two key State witnesses, Drs Alexander and Chiba, were overseas on that date and police investigations could not be completed nor the trial held in their absence. Dr Alexander had now returned and Dr

/Chiba.....

Chiba was expected to return on or about 15 April 1977. He reiterated that all available information had been given to the police and said that he had no control over, nor could he intervene in, the prosecution. He admitted that no formal charge had been furnished to the applicant's attorney but denied that he could be held to blame for any delay there may have been since all known information had been given to the police. An offer to re-employ applicant subject to certain conditions relating to salary had been made to applicant but that offer had been rejected.

Supporting affidavits were filed by Van Dyk, the administrative officer who had conducted the initial departmental enquiry, and Harmsen, a senior inspector on the staff of the Director of Hospital Services, who completed the investigation. Further affidavits were filed by Jonck, an assistant senior prosecutor in charge of the regional courts in Johannesburg, and two detective officers who

/ conducted.....

conducted the police investigations.

Jonck corroborated the fact that two important State witnesses were not available in January 1977 and stated:

> "Dit moet beklemtoon word dat die beamptes by Baragwanath-hospitaal en ander onder beheer van die Direkteur van Hospitaaldienste op geen stadium versuim het om inligting ten opsigte van die saak te verstrek nie. Die Staat en die Suid-Afrikaanse Polisie het te alle tye hulle volle samewerking geniet en hulle was net so gretig om die saak te finaliseer. Die beamptes by Baragwanath-hospitaal en ander onder beheer van die Direkteur van Hospitaaldienste was egter nie by magte om inligting te verstrek wat slegs binne die betrokke twee dokters se persoonlike kennis val nie."

He said further:

> "Die saak sal sonder versuim aangebring word sodra genoemde twee dokters beskikbaar is en die ondersoek voltooi is. Die beskuldigde sal tereg staan op ongeveer 30 - 40 aanklagte van bedrog. Hierdie aanduiding is natuurlik onderhewig aan verdere aanklagtes wat aan die lig mag kom na verdere ondersoek."

/ The.....

The police officers explained that the delay was in no way attributable to the conduct of the hospital authorities and said that when the witness, Dr Chiba, returned to South Africa the investigation would be completed and the case set down on the roll for hearing.

No replying affidavit was filed by the applicant until two months later on 8 June 1977. In this affidavit Mistry denied that he was guilty of any criminal misconduct; it was his duty as acting head of the casualty section to ensure that the section was fully staffed and functioning properly and to ensure this he had followed procedures that had been instituted by his predecessors. In any event the merits of such procedures were irrelevant to this application; what was relevant was that the question of his alleged criminal misconduct should be determined as speedily as possible, regard being had to the terms of his suspension. He averred that the question of his misconduct should have been thoroughly investigated before his suspension on

12 August 1976. Had the police been given full information the trial could have taken place during the months of August, September or October before Dr Alexander left for overseas. He then referred to the terms of the Ordinance and conceded that if the respondent intended basing his charge on section 52(n) he must of necessity await the outcome of the criminal trial, but there were, he pointed out, various other grounds of misconduct on which the respondent could initiate proceedings. It was significant, he said, that to date no formal charge had been brought against him and this might well mean that by the time the trial had been concluded and charges instituted in terms of the Hospitals Ordinance, he would have been under suspension without any pay for more than a year.

This affidavit, as I have said, was not signed until 8 June and then despite applicant's apparent anxiety to bring matters to a head, the proceedings continued to move at a leisurely pace. Applicant did not set the case down until three weeks later and then for hearing

only on 30 August 1977 despite the fact that earlier dates were available.

The matter came before LE ROUX J who commented on the tardiness of the parties in critical terms; this is an issue to which I shall again refer.

Addressing himself to the merits of the application the Judge a quo referred first to the relevant provisions of the Transvaal Hospitals Ordinance, No. 14 of 1958. Section 52 of that Ordinance provides that:

> "An officer shall be guilty of misconduct and may be dealt with in accordance with the provisions of section fifty-three if he — "

and then follow 16 paragraphs setting out various grounds of misconduct including paragraph (n) which reads:

> "commits a criminal offence or an act in respect of which he is found guilty of improper or disgraceful conduct by the South African Medical and Dental Council, the South African Pharmacy Board or the South African Nursing Council;"

The procedure to be followed in case of misconduct is set out in the following section in the Ordinance which provides, inter alia, as follows:

"(1) When an officer is accused of misconduct, the Director may charge him in writing under his hand with that misconduct and may at any time withdraw such charge.

(2) The Director shall cause the charge to be served upon the officer concerned.

(3) The charge shall contain or shall be accompanied by a direction calling upon the officer charged to transmit or deliver, within a reasonable period specified in the direction, to a person likewise specified, a written admission or denial of the charge and, if he so desires, a written explanation of the misconduct with which he is charged.

(4) The Director may at any time before or after the officer has been charged under subsection (1), suspend him from duty.

(5) An officer who has been suspended from duty in terms of sub-section (4) shall not be entitled to any emoluments for the period of his suspension: Provided that the Administrator may, in his discretion, order payment to such officer of the whole or portion of his emoluments.

(6) If no charge under this section is preferred against an officer who has been suspended from duty or if a charge against such officer is withdrawn, he shall be allowed to resume duty and be paid his full emoluments for the period of his suspension."

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The Judge a quo drew attention in his judgment to the fact that the wording of subsection (6) of section 53 of the Hospitals Ordinance, save for a minor addition which is of no consequence, is similar to the wording of subsection (6) of section 18 of the Civil Service Act, 54 of 1951. In construing the later enactment it was held by this Court in Minister van Landbou en n Ander v Venter, 1973 (3) SA 59 (A) that the words "within a reasonable time" must be read into the subsection. JANSEN JA said at page 66 of the report —

> "Myns insiens is dit sonder twyfel duidelik dat aan die ware bedoeling van die Wetgewer gevolg gegee sal word as in sub-artikel (6) die woorde ‚binne redelike tyd' ingelees word".

The Judge a quo referred also to Gouws v Secretary for Transport and Another, 1973 (4) SA 323 (T) in which the same problem was discussed and the decision confirmed on appeal (1974 (3) SA 124). Regard being had to the similarity of the two subsections, that is 18 (6) of the

Civil Service Act and 53 (6) of the Hospitals Ordinance, it followed that where an officer in the Hospital Service was suspended on grounds of misconduct he was entitled to reinstatement on full salary if no charge was preferred against him within a reasonable time. The problem which arose in this case, however, was that the Director of Hospital Services elected to charge the applicant under subsection (n) with having committed a criminal offence, and that being so, it was both proper and in the public interest to await the outcome of the criminal prosecution. As was pointed out by RUMPFF CJ in Gouws's case (supra) at p 130 —

> "Seer seker het die appellant die reg gehad om binne redelike tyd na sy skorsing aangekla te word, maar in n geval soos die onderhawige sou dit m.i. voorbarig van die respondente gewees het om appellant op voorlopige gegewens departementeel aan te kla terwyl nie net die departementele belang nie maar ook die openbare belang vereis het dat die saak tot op sy been oopgevlek word".

/ After.....

After referring shortly to the facts, LE ROUX J came to the conclusion that applicant had not proved that respondent had delayed unreasonably or that his officials had not been sufficiently diligent or had in any way failed to expedite the matter. This finding was of cardinal importance to the decision of the issue between the parties and I accordingly quote it in extenso:

> "Die feit dat die wetgewer n werkgewer in die posisie van die respondent toelaat om te wag op die uitslag van n strafsaak, dui myns insiens daarop dat dit duidelik moet blyk uit die applikant se aansoek dat die onredelike optrede bestaan het aan die kant van die persoon by wie hy dit wil tuisbring, dit wil sê, die respondent, en die bewyslas daarvoor sou op hom rus om my op n oorwig van waarskynlikhede te oortuig dat dit die posisie is. Alle omstandighede in die stukke voor my dui daarop dat die respondent self, en sy amptenare nie nalatig was in hulle optrede nie; dat hulle alles gedoen het wat moontlik was om die polisie behulpsaam te wees en die saak te bespoedig. Dit word bevestig deur die ondersoekbeampte, tans adjudant-offisier Trollip wat met die saak gehandel het, in soveel woorde. Hy beweer dat daar allerhande probleme was met sy eie posisie deurdat hy onttrek was aan die saak op n kritieke stadium, en dat hy by die Soweto

/ onluste....

> onluste verlede jaar betrokke was. Die hoofrede wat egter aangevoer word vir die vertraging, en veral vir die feit dat die saak nie op die 19de en 20ste Januarie kon voortgaan nie, was die afwesigheid van die twee sleutelgetuies waarna ek reeds verwys het. Ek is derhalwe nie geneë om te bevind dat daar 'n onredelike optrede was by die respondent tot 15 April vanjaar nie".

This finding was not challenged on appeal but what was challenged was the somewhat surprising statement which followed, to wit that this was not the end of the case:

> "Dit is egter nie die einde van die saak nie. Die feite van hierdie geval gaan na my mening verder as dié wat in Gouws se saak voor die hof gedien het. Wat ek nie kan begryp nie, en wat geheel en al onverklaarbaar is, is wat gebeur het na die 15de April."

I have referred to the fact that at an early stage in the proceedings the Judge a quo taxed counsel with the delay in bringing the application before the court and called for an explanation from the bar. Counsel for the applicant made some cautious reference to negotiations between the parties, while counsel for the respondent indicated that he had certain information and might reserve his right to file further affidavits. He was told by the court that he must make his election - either he must file the addi-

tional affidavits in which case there would be a postponement, or he must proceed forthwith. After a short adjournment counsel decided not to adopt the former course but to argue the matter on the papers before the court. The court was not satisfied with the explanation and complained that it had been left in the dark —

> "Ek is dus volkome in die duister oor wat die posisie is ten aansien van die strafsaak, en die opstel van n klagstaat ná die operatiewe datum van 15 April 1977, toe die getuie Dr. Chiba in die land terug sou wees".

The Judge a quo then proceeded to make certain findings and draw certain conclusions.

He said that although more than a year had gone by, no charge had been brought against the applicant, no charge had been framed nor did there appear to be any intention of charging him. He said further that he could not understand why no attempt had been made to prosecute the case nor could he understand why no attempt was made to alleviate the applicant's financial position. He pointed out that the respondent could not hide behind the police indefinitely; he must at least show what steps had been taken to exert pressure on the police to bring the case to

finality. In conclusion he stated:

> ".... na my mening kom die gebrek aan optrede van die respondent ná 15 April so vreemd voor dat ek slegs een afleiding daaruit kan maak, en dit is dat hy nie langer daarin belangstel om die applikant te vervolg nie. 'n Ander verklaring, wat blote spekulasie is, kan moontlik aangebied word, en dit is dat die polisie tevrede is met die verduideliking wat deur die applikant verstrek is, aangesien dit nie 'n bedoeling om te bedrieg daarstel nie".

He added:

> "Ek het gevolglik tot die gevolgtrekking gekom dat ek verplig is om die applikant gelyk te gee slegs op die basis van die gebrek aan 'n verduideliking wat gebeur het met hierdie saak ná 15 April 1977".

The court accordingly ordered the respondent to reinstate the applicant in his post in terms of prayers 1 and 2 of the application. The judgment concluded with an order as to costs in the following terms.

> "In die lig egter van my benadering ten aansien van waar die onredelikheid van die respondent lê, en die feit dat dit nie op die stukke 'n geskilpunt gevorm het nie, is ek nie bereid om te gelas dat die respondent die applikant se koste betaal nie en ek maak gevolglik geen bevel ten aansien van koste nie".

/ Mr Harmse.....

Mr Harms, who appeared for the respondent on appeal, argued that the Judge a quo had erred in holding both parties to blame for procrastination. The applicant was dominus litis and had given no reason why he had allowed four months to go by after 13 April 1977 when the opposing affidavits were filed. The court had also misdirected itself in stating that no charge had been framed, that there was no intention of prosecuting the applicant and that no attempt had been made to ease his financial position. It was argued that there were either no facts on record to support these findings, or the facts indicated the contrary. Thus the correspondence before the court showed that the respondent had indeed offered applicant employment but at a reduced salary (see annexure E to the opposing affidavit).

There is substance in Mr Harms's contentions but I propose considering the gravamen of his complaint. His main argument was that the Judge a quo had decided the

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dispute on an issue which was not raised on the papers before the court. He said that the crisp point for decision was whether at the date when the action was launched, that is on 24 February 1977, the respondent had delayed unreasonably in charging the applicant with misconduct. What may or may not have happened after that date, or at latest after the date when the opposing affidavit was filed, 13 April 1977, was not relevant. Opposing counsel, Mr Kuper, disputed that contention. He said in answer to a question put to him that the issue which the Judge a quo had to resolve was whether the respondent was guilty of undue delay at the time of the hearing of the application on 30 August 1977. He argued that there had been an extension of the issue in dispute and that the judgment showed that that extension was agreed to by both parties. No explanation had been given for the delay in prosecuting the applicant after the opposing affidavits were filed and the court was accordingly justified in drawing inferences adverse to the respondent. Mr Harms did not

concede that there had been any agreement between the parties to extend the issue in order to cover the period from the date of suspension to the date of the hearing of the application. I can find nothing in the judgment which reflects any such agreement; on the contrary, it is clear that when applicant's counsel was put to his election to ask for a postponement or argue the issue on the papers, he chose the latter course.

Counsel cited authority, ancient and modern, for the principle that a judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before the court; he must not have regard to extraneous issues and unproved facts. Thus Voet says in discussing the duties of a judge:

> "But things can nohow be done by him without being called upon which spring in their own origin from the litigants. Thus account should not be taken in giving judgments of exceptions not raised, nor of witnesses not produced. .....
>
> It follows from this that a judge cannot make good matters of fact if they are not

/ stated .....

> stated by the parties, unless they are quite notorious from the documents which have been put in by way of proof in the proceeding. That is to prevent his appearing by making good doubtful matters of fact to fill the role not so much of judge as of advocate, and to defend as counsel rather than to judge." (Voet 5.1.49 Gane's Translation, Volume 2, p 60.)

When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountas' Trustee v Lahanas, 1924 WLD 67 at 68, and as has been said in many other cases:

> "..... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it

/ is .....

is not permissible to make out new grounds for the application in the replying affidavit" (per VAN WINSEN J in S.A. Railways Club v Gordonia Liquor Licensing Board, 1953 (3) SA 256 at 260). It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the bar. I am not losing sight of the fact that in the absence of ~~a~~ an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the court is expected to pronounce upon it as an issue. (See the recent judgment of HOLMES JA in South British Insurance Co. Ltd. v Unicorn Shipping Lines (Pty.) Ltd., 1976 (1) SA 708, at 714.) But that situation did not arise in this case; respondent's counsel expressly confined his argument to the issue on the papers before the court, that is, to the

/ issue.....

issue as to whether the respondent had delayed unreasonably in taking action during the initial period of applicant's suspension. The question as to what happened after 13 April 1977 was not canvassed by the parties and the Judge was, as he conceded in his judgment, left in the dark. Nevertheless, no doubt because he feared that the applicant was being penalised and had suffered an injustice, he made an order granting him the relief for which he had asked and then, to balance the scales of justice, ruled that there should be no order as to costs as the case had been decided on an issue not raised by the parties. Those orders cannot stand.

The appeal is allowed with costs and the order of the lower court altered to read:

"Application dismissed with costs".

M.A. DIEMONT.

RUMPFF, CJ)
RABIE, JA)
VILJOEN, AJA)
HOEXTER, AJA)