LL

Case No 246/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE MINISTER OF HEALTH, KWAZULU GOVERNMENT	First Appellant
SECRETARY FOR HEALTH, KWAZULU GOVERNMENT	Second Appellant

and

RICHARD NTOZAKHE	First Respondent
VELA GILBERT NDLOVU	Second Respondent
BHEKI WILLIAM MKHIZE	Third Respondent
CHRISTIAN SHANDU	Fourth Respondent
THAMSANQA NQAMBI	Fifth Respondent
ELLECK NYAWOSE	Sixth Respondent
B R MKHABA	Seventh Respondent
M M MAHLANGU	Eighth Respondent

CORAM: BOTHA, E M GROSSKOPF, GOLDSTONE JJA

HEARD: 9 NOVEMBER 1992

DELIVERED: 26 NOVEMBER 1992

JUDGMENT

BOTHA JA:-

The eight respondents were formerly employed by the KwaZulu Government in its Department of Health. On 4 June 1990 they were notified by the second appellant (the Secretary for Health) that the first appellant ("the Minister") had, with the prior approval of the Cabinet, summarily discharged them from the public service in terms of section 15A(1) of the KwaZulu Public Service Act 18 of 1985 ("the Public Service Act").

The respondents thereupon brought an application against the appellants in the Durban and Coast Local Division for an order reviewing and setting aside the decision to terminate their employment and for certain ancillary relief. The application was heard by MAGID J. He granted the relief sought by the respondents, with costs. Subsequently leave was given to the appellants to appeal to this Court. The costs of the application for leave to appeal were

ordered to be costs in the appeal.

Section 15A(1) of the Public Service Act was introduced by section 3 of Act 14 of 1989. It reads as follows:

> "Notwithstanding the provisions of this Act or any other law, the Minister may with the prior approval of the Cabinet summarily discharge an officer or an employee from the public service without the Commission having made a recommendation for his discharge if -
>
> (a) in the opinion of the Cabinet such officer or employee has taken part in a strike or has conspired with another to strike or takes part in subversive activities; and
>
> (b) in the opinion of the Cabinet the continued employment of such an officer or employee is not in the interest of the Government."

The sole issue for decision is whether these provisions impliedly exclude the operation of the audi alteram partem principle. The Court a quo held that they did not. Other issues which had been raised in the papers and in argument before the Court

a quo, and which were discussed in the judgment a quo, were not pursued on appeal, and nothing further need be said about them.

In view of the narrow issue now before us, no more than brief mention is required of the undisputed facts giving rise to it. Prior to their dismissal the respondents were employed as drivers at the Prince Mshiyeni Memorial Hospital. Their terms of employment were governed by the Public Service Act. During May 1990 dissatisfaction arose amongst the drivers at the Hospital about their rates of pay. This led to a work stoppage on 17 and 18 May 1990, in which the respondents took part. As a result, they were suspended from duty. The events were reported to the second appellant, who in turn reported to the Minister. The Minister submitted a memorandum to the Cabinet, setting out the facts and motivating a recommendation that the respondents be summarily

dismissed. The matter was considered by the Cabinet at a meeting on 29 May 1990. The Cabinet was of the opinion that the respondents had participated in a strike as defined in the Act and that the continued employment of the respondents was not in the interests of the Government, and accordingly it approved the summary discharge of the respondents in terms of section 15A(1) of the Public Service Act. The Minister thereupon summarily discharged the respondents with effect from 18 May 1990, and they were notified accordingly. The respondents were at no time afforded an opportunity of making representations concerning their dismissal.

It is not in question that the respondents had a right to be heard

> "unless the statute shows, either expressly or by implication, a clear intention on the part of the Legislature to exclude such a right."

(Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 662H.) The case for the appellants is that section 15A(1) by implication evinces a clear intention on the part of the KwaZulu Legislature to exclude the right to be heard. In argument their counsel advanced a number of considerations which, it was contended, justified the implication. First, he pointed to the provisions of sections 18 and 19 of the Act. Section 18 details the forms of misconduct of which an officer in the public service may be guilty; these include participation in a strike (para (u)). Section 19 prescribes an elaborate procedure which is to be followed when an officer is charged with misconduct, including detailed provisions relating to a hearing, the making of representations, and so forth. The presence of these provisions in the Act indicates, so it was contended, that section 15A(1) was intended to

provide an alternative procedure for dealing with public servants who go on strike, in which the right to a hearing was necessarily excluded. Secondly it was argued that this view of the Legislature's intention was fortified by the fact that section 15A(1) was introduced into the Act by way of subsequent amendment, giving rise to the inference that its purpose was to exclude any enquiry so as to enable the Cabinet to deal with a strike quickly and expeditiously.

In support of the arguments mentioned above counsel sought to rely on an unreported judgment delivered by SHEARER J in the Durban and Coast Local Division on 27 October 1988, in the case of Malimba v Minister of Education and Culture, KwaZulu Government. At the same time counsel duly drew attention to a later case decided in the same Division, Zindela v Chief Minister of KwaZulu NO and Another

1992 (2) SA 333, in which McLAREN J dissented from the earlier judgment. In both cases the Court was concerned with section 21A of the KwaZulu Education Act 7 of 1978 ("the Education Act"), which provides that

> "..... the Minister may, with the prior approval of the Cabinet, discharge a teacher from the service of the department with short notice and without advancement of reasons if in the opinion of the Cabinet the continued employment of the teacher is not in the interest of KwaZulu ....."

The Education Act contains detailed provisions relating to the procedure to be followed in cases of misconduct (corresponding broadly to sections 18 and 19 of the Public Service Act) and section 21A of the former (like section 15A(1) of the latter) was inserted by subsequent amendment. By reason of those circumstances SHEARER J in Malimba's case supra found that section 21A impliedly excluded the right of a teacher to be heard if the section is invoked. In

of the Education Act and section 15A(1) of the Public Service Act, but in my view there is no reason to differentiate between the two sections as far as the applicability of the audi alteram partem principle is concerned. Counsel for the appellants pointed to the fact that section 15A(1) (unlike section 21A) is confined to conduct relating to strikes and subversive activities, and argued that this showed an intention to provide for a speedy procedure in which there would be no room for applying the audi rule. It may be accepted that a more expeditious procedure was envisaged than that laid down in section 19, but it simply does not follow that it was intended thereby to nullify entirely the right to be heard. The reasoning in Zindela's case supra at 337E-H is as apposite to section 15A(1) as it is to section 21A. Counsel also relied on the fact that section 15A(1) refers not only to officers (to whom section 19 applies) but also to employees (to whom it does not

apply), contending that this justified the inference that it was intended not only to curtail the right to be heard, but indeed to exclude it altogether. I do not agree. Again, the reasoning in Zindela's case supra (at 337C-E) is applicable; in the present context it can make no difference that section 21A has the words "without advancement of reasons", whereas section 15A(1) uses the words "without the Commission having made a recommendation for his discharge". The point remains that it cannot be imagined that the Legislature, if it had intended by the amendment to oust the operation of the audi principle, would not have said so. A clear intention to do so cannot be extracted from the subtle and oblique indications put forward by counsel for the appellants.

It follows, therefore, that the arguments for the appellants which are based on Malimba's case

supra must be rejected.

A further argument advanced by counsel for the appellants was that, since section 15A(1) provided only for the discharge of an employee or officer, and not for any lesser form of discipline, the recognition of a right to be heard would serve no useful purpose. It need hardly be said that the argument is without substance. Representations by an affected employee or officer can obviously have a vital bearing on the opinion to be formed by the Cabinet in terms of paragraphs (a) and (b) of the section, and on the decision whether or not to exercise the power conferred by the section at all. In the present case, indeed, the respondents' founding and replying affidavits contain a number of allegations and contentions that are germane to the question whether the section could and should have been applied.

Zindela's case supra McLAREN J held that SHEARER J's finding was wrong and that the audi alteram partem principle was not excluded.

In my judgment the decision in Zindela's case supra is clearly correct. I also agree, in general, with the reasons given by McLAREN J for declining to follow Malimba's case supra. There is no need to go into details. I would merely observe that the judgment of this Court in Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A), on which McLAREN J rightly relied for rejecting the earlier approach of SHEARER J, has since been applied and expanded upon in recent decisions of this Court: see South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) and Administrator, Natal, and Another v Sibiya and Another 1992 (4) SA 532 (A).

There are differences between section 21A

Finally, counsel for the appellants argued that an intention to exclude the right to be heard was to be inferred from the fact that it is the KwaZulu Cabinet which has to form the requisite opinion in terms of section 15A(1); counsel said that the Cabinet exercises the prerogative powers of the executive government, that the Minister was bound to give effect to its decisions, that its meetings were secret, and that in constitutional history it was unheard of for anyone to have a right to make representations to it. I cannot accept this argument. The considerations advanced in support of it do not justify the conclusion contended for. If the Legislature sees fit to involve the Cabinet in the process of the dismissal of a public servant, I can perceive no reason why, in relation to the duty to observe the audi alteram partem principle, the Cabinet is in a position any different from that of

the Minister or a lesser functionary of the executive government; the considerations attracting the duty (as formulated, for instance, in the South African Roads Board case supra at 13B-C) apply with equal force - cf Strydom v Staatspresident, Republiek van Suid-Afrika, en 'n Ander 1987 (3) SA 74 (A) at 96J-97C. It is possible, as was stated in the last-cited passage, that the manner of applying the principle may be influenced by the constitutional position, but that is a question which need not be pursued, since it does not arise in the present case. It is the exclusion of the principle itself which is in issue. On that issue the arguments on behalf of the appellants are rejected.

The appeal is dismissed with costs.

A S BOTHA JA

E M GROSSKOPF JA
CONCUR
GOLDSTONE JA