RAPPORTEERBAAR
CASE NO. 492/92
EB

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THOMAS ALBERT LAMPRECHT 1st APPELLANT

NISSAN S A (PTY) LIMITED 2nd APPELLANT

and

ROBERT CHARLES McNEILLIE

RESPONDENT

CORAM: CORBETT CJ, BOTHA, KUMLEBEN, HOWIE et HARMS, JJA

HEARD: 18 MARCH 1994

DELIVERED: 29 MARCH 1994

JUDGMENT

HARMS JA:

The respondent in this appeal, Mr R C McNeillie ("McNeillie") entered the employ of the second appellant ("Nissan") on 1 June 1990. During July 1991 Nissan initiated a disciplinary inquiry against McNeillie under

the chairmanship of the first appellant ("Lamprecht"), who was a manager of Nissan's supply department. McNeillie was "found guilty of the transgressions as stipulated" and his services were terminated with immediate effect. Not satisfied with this result, he applied to the Transvaal Provincial Division by way of notice of motion for a review of the decision to "convict" and dismiss him. The ground for the review was that the principles of fundamental or natural justice had not been complied with in especially two respects: Lamprecht had refused to comply with a request for further and better particulars to the charges of misconduct and had also denied him legal representation at the hearing. Preiss J granted the relief sought by setting aside the proceedings before Lamprecht and also McNeillie's dismissal. He subsequently granted the appellants leave to appeal to this Court.

Before instituting the review proceedings, McNeillie launched an application in terms of s 43 of the Labour Relations Act 28 of 1956 in which he alleged that his

dismissal had amounted to an unfair labour practice. It seems that he has abandoned (at least for the time being) that avenue but, in any event, as far as the present litigation is concerned the question of an unfair labour practice does not arise. Also it will already be obvious that this employment relationship had no public law element to it and that administrative law does not govern the case (cf Malloch v Aberdeen Corporation [1971] 2 All ER 1278 (KL) at 1294d - 1295f). McNeillie's alleged right also did not flow from a voluntary association's constitution (see Grundlina v Beyers and Others 1967 (2) SA 131 (W) at 139D - G). It was accepted on his behalf that he had to prove a contract (express or tacit) containing a provision (also either express or tacit) incorporating the rules of natural justice (cf Theron en Andere v Ring van Wellington van die NG Sendinokerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 21D - G, 31E - F). The following dictum of Trollip J in Grundling's case supra at 141D - E is in this context apposite:

> "In a statute empowering an official or body to give a decision adversely affecting the rights of liberty or property of an individual, a legal presumption usually operates that the audi alteram partem rule has to be observed. There is no such presumption in a contract. The obligation to afford a hearing according to natural justice must there be either an expressed or necessarily implied term of the contract (Russell v Duke of Norfolk, [1948] 1 All E R 488, [1949] 1 All E R 109; Lawlor v Union of Post Office Workers. [1965] 2 W L R 579 at pp 591/2; cf Marlin v Durban Turf Club and Others, 1942 A D 112 at pp 122, 127/128)."

So, too, that of Botha JA in Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 645H - 646B:

> "In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal

created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. (Maclean v Workers' Union, (1929) 1 Ch D 602 at p 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in Mullin (Ptv) Ltd v Benade Ltd, 1952 (1) S A 211 (A D) at pp 214-5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. (Marlin's case, supra at pp 125-130)."

(See also, latterly, Seloadi and Others v Sun International (Bonhuthatswana) Ltd 1993 (2) SA 174 (BCD) at 179I - J.)

But McNeillie had to go further: he had to establish that the contract conferred a right to legal representation and to further and better particulars as part of the rules

regulating the hearing (cf Balomenos v Jockey Club of South Africa 1959 (4) SA 381 (W) at 388A - 390C; Pett v Greyhound Racing Association Ltd (No 2) [1969] 2 All ER 221 (QBD) at 228G - H, quoted with approval in Hone v Maze Prison Board of Visitors, McCartan v Maze Prison Board of Visitors [1988] 1 All ER 321 (HL) at 325f - g).

The first factual inquiry is thus to establish the terms of the employment contract between Nissan and McNeillie. It is common cause that the parties had this agreement reduced to writing in a letter of appointment of 14 June 1990. It dealt with the following matters: remuneration, the commencement date, job grading, membership of a pension fund and a medical aid scheme, a housing subsidy, a vehicle scheme, an annual bonus, leave, medical examination and confidentiality. It also provided that it was a monthly contract allowing for one calendar month's notice by either side. It had no terms relating to breach and cancellation as a result of it. On the face of it such matters were left to be dealt with in terms of

the common law. It was also not part of McNeillie's case that this letter tacitly gave any rights to a hearing prior to a dismissal on the ground of a fundamental breach of the contract. His case was that Nissan's guidelines for "Grievance and Discipline Handling" conferred the rights to a fair hearing (including those contended for). He alleged that the guidelines formed part of the terms and conditions of his employment. This the appellants denied.

The guidelines were introduced by Nissan in reaction to the 1988 amendments to the Labour Relations Act. They fall into two parts: grievance guidelines and disciplinary guidelines. The foreword indicates that the document was addressed to the management of the company and that the guidelines were designed with the idea of enhancing good industrial relations. The section dealing with grievances gives an aggrieved employee the "choice of using a representative". (I may add that McNeillie's counsel, in my view correctly, conceded that the representative here referred to, cannot, in the context of the document, refer

to a legal representative.) The part dealing with discipline provides inter alia for the following matters:

1. The disciplinary framework is based on the concept of behaviour correction.

2. The guidelines "shall apply to all employees".

3. The employee concerned "shall have the right to state his case and shall have the right to representation."

4. It lists a number of transgressions ranging from "poor housekeeping" to assault and intimidation. In some instances a full disciplinary inquiry is mandatory and in others discretionary.

5. If it is decided to give an employee a written warning, the warning must be signed by the person issuing it, the employee and "his representative".

6. In the case of a full disciplinary inquiry, these are some of the rules:

(a) The complainant must usually be the foreman of the defendant but it may also be another person, for instance, one who made the allegation of misconduct.

(b) His function is to lead evidence and present the case against the employee.

(c) He is responsible for cross-questioning not only the accused and his witnesses but also "his representative".

(d) The charges must be formulated with exactitude.

(e) The duty of the representative is to "represent the defendant and make sure that his rights are honoured."

(f) The defendant has the "right to choose his own representative".

(g) A "representative" from the Industrial Relations Department (of, presumably, Nissan) is to attend and has to advise the parties on company policy and industrial relations related isssues.

(h) The chairman is enjoined to see to it that at the hearing the procedural rights of the employee are respected.

10 (i) If found guilty, the employee may, depending inter alia on the seriousness of the offence, be dismissed.

Although the guidelines purport to bestow upon an employee certain procedural rights, the question is whether those rights were granted animo contrahendi (cf Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (W) at 506 C - F). In this regard Nissan, in support of its denial that the guidelines had any contractual force, stated that they were drafted in an attempt to satisfy the "fair procedure" provisions contemplated in the definition of an unfair labour practice as contained in the Labour Relations Act before its amendment during 1991. It was also said that neither party had the intention that the code would create contractual rights. It was pointed out that in the industrial court proceedings McNeillie did not allege that the guidelines had formed part of his contract of employment. They were, Nissan's deponent stated, as their name indicates, merely guidelines introduced to assist management in the handling of discipline.

McNeillie's "evidence" that the guidelines had formed part of his contract, consisted of a bare allegation in the founding affidavit to that effect, without any factual substratum. In reply, he was content to rely on a bare denial of Nissan's allegations. He did not even take the court into his confidence by disclosing how and when he had become aware of the existence or contents of the guidelines. If regard is had to his correspondence with Nissan at the time, one is left with a strong impression that his knowledge of or about them arose ex post facto. On the face of it the guidelines also do not evince any contractual intent in spite of the use of the word "right". Its use in its setting refers to the rights created by the Labour Relations Act and not to contractual rights. To conclude on this aspect of the case: McNeillie failed to prove, even prima facie, that the guidelines had formed part of his employment contract.

Preiss J held, however, that by instituting the proceedings in terms of the guidelines, Nissan conferred

a right to representation by a person of his choice on McNeillie and that he, by arriving at the proceedings with a representative, had by conduct accepted the benefit of this portion of the guidelines. The learned judge, with respect, misdirected himself as to what the evidence was. The letter which initiated the proceedings was explicit. It informed McNeillie that he had "the right to be represented by any person of your choice from your working area" (my underlining). McNeillie did arrive at the proceedings accompanied by one Palmer, someone from his working area, but according to McNeillie, Palmer was an intended witness and not his representative. This means that there never was an offer by Nissan in the terms nor an acceptance in the manner found by the court a quo. The consequence of this is that McNeillle's claim, insofar as it is contractual, had to fail.

In her written argument, McNeillle's counsel submitted that Nissan by publication and implementation of the guidelines had created a legitimate expectation on the part

of McNeillie that he would be entitled to a hearing in terms of them. This argument (which was not pressed during the hearing, but also was not abandoned) poses two questions, namely (a) whether the so-called doctrine of legitimate expectation can operate in the field of contract and (b) whether on the facts of the case the guidelines had created a legitimate expectation as to legal representation. (It was not contended that, save for refusing legal representation, the provisions of the guidelines had not been followed during the disciplinary hearing.)

As to (a), the question is moot. In Lunt v University of Cape Town and Another 1989 (2) SA 438 (C) at 449F - H it was held that the legitimate expectation approach can be applied in a contractual context. The opposite view was expressed in Embling v Headmaster. St Andrew's College (Grahamstown) and Another 1991 (4) SA 458 (E) at 469J - 470E. And in Administrator Transvaal and Others v Traub and Others 1989 (4) SA 731 (A) at 761G there is an

indication that the doctrine, as it applies to the relationship between a public authority and an individual, applies to that between "certain domestic tribunals" and the individual. Since the question was not debated before us and because the answer to question (b) disposes of the argument, I proceed to consider the latter.

In the first instance, McNeillie never stated that he knew of the guidelines before receipt of the letter referred to earlier in which he was informed of his right to be represented by someone from his "working area". Secondly, the undisputed evidence was that Nissan had never before permitted legal representation in disciplinary inquiries. In any event, I do not accept that the word "representative" in the guidelines included a legal representative. My reasons are these: As noted, the representative in the context of the grievance procedure could hardly be a legal one. The same applies to the representative who may be employed if the inquiry does not amount to a full disciplinary inquiry. The right to a

representative applies irrespective of whether the

transgression is for arriving late at work or for theft or

any other serious offence. The representative may be

cross-questioned. Finally, the chairman, the complainant

(prosecutor) and the Industrial Relations Department are all lay persons - a strong indication that the overall intention was that the inquiry had to be a domestic matter. I would like to add some remarks about Ibhayi City Council v Yantolo 1991 (3) SA 665 (E) (per Zietsman AJP, Jones J and Ludorf J concurring), since Preiss J relied heavily on it to justify his finding that the "representative" of the guidelines included a legal representative. First, the court was there dealing with the interpretation of a regulation and the meaning of the word in its context and matrix. An extrapolation to the present context, is inherently dangerous and ignores the internal pointers to the contrary. Further, Zietsman AJP

(at p 670 D - G and p 674 A - B) was influenced by certain views expressed by Lord

Denning MR in the interlocutory

appeal in Pett v Greyhound Racing Association Ltd [1968] 2 All ER 545 (CA) at 549 B - G to the effect that once a person has a right to appear by an agent, there is no reason why the agent should not be a lawyer. It seems that it was not brought to that court's attention that Lord Denning's views do not reflect English law. See in this regard Pett v Greyhound Racing Association Ltd (No 2) supra at 231 E - G (discussed in Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die SA Weermag 1980 (3) SA 519 (T) at 522 H - 523 A) and the Hone case supra at 325 e - h. Also it may be noted that the House of Lords in the last-mentioned case (at 327 b - c) held that it did not follow, simply because a charge before a disciplinary tribunal related to facts which in law constituted a crime, the rules of natural justice required it to grant legal representation. But whether or not Zietsman AJP was in any event correct in his ultimate decision does not require consideration in this instance and does not affect my interpretation of the guidelines. It follows that there

was no factual basis for the alleged expectation.

It was submitted on McNeillie's behalf, seemingly in the alternative, that Lamprecht had at least a discretion to allow him legal representation. This discretion, it was said, was not properly exercised and was consequently subject to review. The argument was not clear as to whether the discretion existed as a matter of law or of contract. As far as the latter is concerned, my earlier findings relating to the status of the guidelines are fatal to the argument. As to the former, there appears to be some basis for the argument in dicta (all obiter) of Lord Denning MR in <u>Enderby Town Football Club Ltd v The Football Association Ltd and Another</u> [1971] 1 All ER 215 (CA) at 218 b - 219 h. They amount to this:

7. Although the rules of a voluntary association are in legal theory a contract, the theory is based upon a legal fiction. In truth they form a legistative code.

8. If such a rule is contrary to natural justice, it

is invalid.

3. Although the rules may disallow legal representation during a hearing before a domestic tribunal, they may not do so in absolute terms.

9. The tribunal must retain a discretion to allow, in a suitable case, legal representation.

10. The discretion must be exercised judicially.

At least some of what has been said in this judgment does not reflect our law. I do not believe that it is a mere fiction that the rules of a voluntary association amount to a contract. And although it is trite that a term of a contract that is contra bonos mores is void, the mere fact that a rule is contrary to natural justice does not mean it is also contrary to good morals and thus void (Marlin v Durban Turf Club and Others 1942 AD 112 at 125 -129). As far as the question of discretion is concerned, even if I were to assume that Lamprecht had a discretion to allow legal representation, McNeillie never raised the question of discretion or a failure to exercise it properly

in his founding affidavit. Lamprecht was thus not called upon to deal with the matter and it was consequently not an issue between the parties. In any event, Lamprecht was never requested by McNeillie, either prior to or during the proceedings, to exercise a discretion in this regard. There was, once again no factual basis for the argument and it has to be rejected.

In the result the appeal is upheld with costs and the order of the court a quo is set aside, and substituted with an order: "Application dismissed with costs".

L T C HARMS
JUDGE OF APPEAL

CORBETT, CJ)
BOTHA, JA) AGREE
KUMLEBEN, JA)
HOWIE, JA)