Case No 628/92 IN THE
SUPREME COURT
OF SOUTH
AFRICA

(APPELLATE DIVISION)

In the matter between:

THEMBA MASINGA

APPELLANT

and

THE MINISTER OF JUSTICE
KWAZULU GOVERNMENT

RESPONDENT

CORAM: E M GROSSKOPF, VIVIER, NIENABER JJA,

NICHOLAS et OLIVIER AJJA

HEARD: 3 MARCH 1995

DELIVERED: 27 MARCH 1995

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant was a public prosecutor in the employ of the KwaZulu Department of Justice ("the department"). The issue is whether he still is. His employment was - or is - governed by the provisions of the KwaZulu Public Service Act 18 of 1985 (KwaZulu) ("the Act"), which came into operation on 1 April 1985. On 5 June 1989 the appellant was charged in terms of s 18 of the Act with misconduct and suspended without pay with effect from 1 July 1989, pending an enquiry in terms of s 19 thereof. But the enquiry dragged on and the appellant sought and obtained employment with the Community Law Centre of the University of Natal as a "rural paralegal co-ordinator" in its community law project. Such employment commenced on 19 October 1989. On 2 May 1990 he was suspended from this latter employment, this time on full pay, pending a disciplinary board hearing by the university. The department only became aware of the appellant's current employment when the legal representative of the director of the Centre's community law project ("CLP"), in a letter dated 7 June 1990,

addressed certain queries to the department about the circumstances of the appellant's employment with the department and his suspension from it. The department reacted to this information by promptly discharging the appellant from its service on 11 June 1990 with immediate effect. It purported to do so in terms of s 19(29) of the Act which reads as follows:

> "An officer who has been suspended from duty in terms of sub-section (4) or against whom a charge has been preferred under this section and who resigns from the Public Service or assumes other employment before such charge has been dealt with to finality in accordance with the provisions of this section, shall be deemed to have been discharged on account of misconduct with effect from a date to be specified by the Minister unless, prior to the receipt of his notification of resignation or the date of his assumption of other employment he had been notified that no charge would be preferred against him or that the charge preferred against him had been withdrawn." (My emphasis.)

It was common cause on the papers that the appellant was (i) "an officer" for purposes of the section who had (ii) been suspended from duty in terms of section 19(4), (iii) against whom a charge had been preferred which, at the time, had (iv) not yet been dealt with to finality and (v) that

the appellant had not resigned from the Public Service. The crisp question is whether the appellant had "assumed other employment" within the meaning of the section. If yes, he would be deemed to have been discharged on account of misconduct, with all the detrimental consequences of such a finding, and the department's notification to the applicant to that effect would have been in order. If no, the appellant was at the very least entitled to a declarator that his dismissal was not in order.

The appellant, as applicant, instituted motion proceedings in the Durban and Coast Local Division for an order:

> "1. That the decision of the Respondent discharging the Applicant from the Public Service of KwaZulu (Department of Justice) in terms of section 19(29) of the Public Service Act, 1985 (KwaZulu) be and it is hereby declared to be invalid and is reviewed and set aside."

The matter came before Didcott J. He decided it in favour of the appellant. At the same time he granted leave to the respondent to appeal to

the Natal Provincial Division. The Full Bench of the Natal Provincial Division (Galgut J, Hugo and Combrink JJ concurring) came to the opposite conclusion, mainly on the ground that the present appellant failed to adduce sufficient evidence to justify the order sought. This is a further appeal against the latter decision, special leave having been granted by this Court.

Before dealing with the evidence, such as it was, it is helpful to consider the purpose of s 19(29). According to Didcott J:

> "It is to prevent someone who is facing charges of misconduct from ducking these charges by resigning and attracting the advantages of a resignation in good standing. It is to ensure that, if anybody resigns while he is facing charges, he will be in as bad a position as he would have been if the charges had been found proved and he had been dismissed on account of them. So what is prevented is, as I say, a resignation in an attempt to avoid the charges and to prevent the misconduct from being investigated and its presence or otherwise determined."

The court a quo agreed with this analysis and so do I.

An officer who resigns while under suspension shall be deemed to be

discharged on account of misconduct. In effect it means that his resignation is deemed to be an admission of misconduct justifying a discharge from a date specified by the minister. So too, if the officer, without formally resigning, assumes other employment. The phrase "assumes other employment" is thus used as an elaboration or extension of the concept of "resignation". "Assuming other employment" must therefore be comparable in effect to a resignation; the "other employment", in a word, must be incompatible with continued employment with the department. It would be incompatible, on a par with resignation, if his new conditions of service should prevent him from resuming employment with the department at will if his suspension is lifted e.g. if he is obliged to give notice to his new employer to do so. It would likewise be incompatible with his occupation as a prosecutor if the nature of his new employment would tend to create a conflict of interests, e.g. if his new employer had an interest in exploiting

confidential information at his disposal or is engaged in criminal pursuits.

These are mere examples. They are not applicable in this case. Here the only real issue is whether his work in the CLP could prevent him from resuming employment with the department forthwith if his suspension were lifted.

That brings me to the evidence. According to the court a quo the appellant, once the issue of his employment with the university was raised, failed to make out even a prima facie case that such employment was not incompatible with his service with the department. Thus it was stated:

> "In my view the evidence, such as it was, did not show, not even prima facie, that the employment the Respondent had undertaken with the CLP did not fall foul of section 19(29). The Respondent repeatedly averred that his employment with the CLP was "temporary", that he could leave such employment "as soon as" he liked, and that such employment did not constitute a repudiation by him of his contract of employment with the Department. He insisted that he had at all stages intended to return to his employment with the Department as soon as the Department's disciplinary enquiry was completed and

findings were made in his favour, and that he had at all times kept the Department well aware of his intention in this regard.

What the Respondent failed to do in his application, however, was to disclose the terms of his employment. He in fact disclosed not a single such term. In the result it was not possible for a court to establish whether his averment that his employment with the CLP was temporary was factually correct, or what exactly was meant by his averment that it was "at any time" that he could return to his employment with the department."

With respect I cannot agree. Neither in his founding nor in his replying affidavit, it is true, did the appellant adduce any evidence in support of his assertion that his work with the CLP was merely "temporary", but the court of first instance did have before it a further supplementary affidavit, incorporating an affidavit from the Deputy Registrar (Personnel) of the university, Colin Noel Chaplin, in which it is stated:

"According to the records of the University of Natal, the Applicant was employed by the Community Law Centre on a casual basis and was paid by the hour. He was not appointed on University conditions of service and there was no contract between him and the University."

Paragraph 4 of the affidavit reads:

> "The decision that the Applicant be not re-employed by the Community Law Centre was made on the basis of a personality conflict between him and the Centre's Director, Ms. C.A. BAEKEY, and was not related to the findings of the Committee of Enquiry which had cleared the Applicant of any charges against him."

Ms Baekey also made an affidavit. What its exact status was and when and by whom it was produced is not altogether clear. According to statements from the bar it was handed up by counsel who then appeared for the present respondent. It formed part of the record before this Court and neither counsel objected to its admissibility - indeed both counsel referred to it in argument. I shall accordingly accept that it was duly placed before the court of first instance. Paragraph 2 of Ms Baekey's affidavit reads:

> "Annexed hereto marked "A" is an Application for Authority for the temporary appointment of the Applicant as a part-time paralegal for the period 19 October 1989 to 15 January 1990."

The form is annexed. Its heading is: "Application for Authority for

Temporary Appointment". The designation of the appointee is: "Temporary Paralegal - Part-time". The period of appointment is stated as 16/01/90 to 15/4/90 (and not 19/10/89 to 15/1/90). Presumably there was a similar authority which related to the earlier period. At the bottom of the form there is a note "Period of notice required on either side is normally two weeks (unless otherwise stated)". The form was completed by the appellant.

Against the topic "Experience (including present employment)" the appellant stated that he was employed by the KwaZulu government as a public prosecutor from 1977 to 1989 and that "the reason for leaving" was "unfavourable working conditions". Against the heading "salary" appears the following in block form:

	H = Hour	Hours
R12.50 per H	D = Day	Fixed for OS Days at a total cost of R6000"
	M = Month	Months

(With the help of some assumptions the R6000 is capable of conversion to

a period of employment of 3 months: R12.50 per hour, for 8 hours per day, for 5 days per week, for 4 weeks = R2000 per month, which equals R6000 for 3 months.)

What is one to make of this material? To begin with there is the direct evidence of Chaplin, supported by all the documents, that the appellant's employment was casual, temporary and part-time at a salary of R12.50 per hour. The form covers a period of three months from 16 January 1990 to 15 April 1990. When a letter was sent to him on 2 May 1990 (informing him that serious allegations had been made, that a disciplinary hearing had been arranged and that, pending such a hearing, he had been suspended on full pay), that period had already expired. His exact status vis-à-vis the university at that stage, is left in the air. So too, one does not know whether a period of notice was in fact required in terms of the form and if it was, whether it was applicable to the period after 15 April

1990.

It is all most unsatisfactory. In these circumstances it is hardly surprising that there was some debate about the incidence of the onus.

The court a quo held that the appellant, even on the assumption that the onus was on the present respondent, failed to produce the minimum quantum of evidence calling for a response.

With respect I would invert both propositions. In my opinion, even if the onus was on the appellant, he did adduce sufficient evidence to call for a response which, in the event, was inadequate.

There is authority that in a case of wrongful dismissal the onus is on the employee to prove the agreement and his subsequent dismissal; and that the onus thereafter is on the employer to justify it (Federal Cold Storage Co Ltd v Angehrn and Piel 1910 TS 1347, 1349, 1352; Mine Workers' Union v Brodrick 1948 (4) SA 959 (A) 974-977; De Villiers v

Administrator OFS 1954 (3) SA 395 (O)402F-403D;Cotlerv Variety Travel Goods (Pty) Ltd and Others 1974 (3) SA 621 (A) 628B. See, too, Brassey et al, The New Labour Law, 373; Le Roux, 1990 Acta Juridica

100). Reservations have been expressed about the soundness of some of the reasoning in the first two cases cited (cf Hoffmann and Zeffertt The South African Law of Evidence, 4th edition, 521-522; Schmidt, 1963 THR-HR 165, 169). But it is not necessary for present purposes to revisit these cases for I am prepared to assume, in favour of the respondent, that the onus was on the appellant who moved for the order to prove the conditions entitling him to it (cf Kwete v Lion Stores (Pvt) Ltd 1974 (3) SA 477 (SR) 482B-D). Those conditions were that he was employed by the department and that the department wrongly discharged him. The agreement as such is common cause and so is the purported discharge. What is in issue is the wrongfulness thereof. And that depends, in the first instance, on whether his engagement

with the university was irreconcilable with his employment with the department while under suspension and, in the final instance, on whether he was able to resume his duties with the department forthwith if his suspension were to be uplifted.

The evidence of Chaplin was that the appellant was initially employed on a casual basis for which he was paid by the hour. There is nothing to suggest that the basis of his employment changed thereafter. On the face of it Chaplin's further statement

> "He was not appointed on University conditions of service and there was no contract between him and the University."

can only mean, judged on the probabilities, that his employment was an ad hoc one, a loose arrangement, which the appellant could terminate at will. And if that is so the appellant's employment with the university was not incompatible with his employment with the department while he remained

under suspension, no more so than if he hawked fruit or sold insurance on commission or did casual paint work for a building contractor.

There is nothing in the correspondence or in the affidavit of Ms Baekey to contradict that view. The form annexed to her affidavit, for what it is worth, confirms the part-time, temporary nature of both the work and the salary. The statement at the bottom of the form "Period of notice required on either side is normally two weeks (unless otherwise stated)" takes the matter no further, firstly, because one does not know whether casual work at a salary per hour means that it was "otherwise stated" and secondly, because one does not know whether the same position applied for the period after April 1990. Apart from this casual reference there is nothing in the papers to indicate whether or not notice was required if he wanted to leave the service of the university.

It is recorded in the form that the appellant gave as his "reason for

leaving": "unfavourable working conditions". It was argued that this reply shows that he had no intention of returning to the department. But this submission is gainsaid by the appellant's evidence, supported by the letter of 7 June 1990 referred to earlier, that he had informed the university when he applied for the post, that he had been merely suspended by the department and proposed to return to the department if this suspension was lifted. So too, it is not conclusive that the university resolved to place him on suspension pending the outcome of its own enquiry into his conduct. In the absence of evidence as to whether the university convenes an enquiry as a matter of course whenever misconduct is alleged, no inference can be drawn from that fact alone that the appellant enjoyed some or other form of security of tenure which required prior notice of termination.

Chaplin's evidence supports the inference that no period of notice had been agreed upon. That means that he could leave the service of the

university and rejoin the department at a moment's notice. And that in turn means that his temporary employment with the university was not incompatible with his employment by the department while under suspension, and hence did not justify a discharge under s 19(29) of the Act. Chaplin's evidence was sufficient to shift the evidentiary burden to the respondent. But the respondent adduced no evidence to contradict or amplify Chaplin's evidence or to explain or qualify its significance. On a consideration of the totality of the evidence the appellant had accordingly done enough, even if encumbered with the onus, to prove that his purported discharge fell outside the terms of s 19(29) of the Act. The appeal must accordingly succeed.

That leaves the question of the form of relief to which the appellant is entitled. The main thrust of the case he sought to make out in his founding affidavit was that he was entitled to be heard before a decision was taken that he be deemed to have been discharged, and since he was not

accorded a hearing (which was common cause) that the decision of the Minister be "declared to be invalid and is reviewed and set aside". But as was pointed out by both courts below this was not a matter for the operation of the audi alteram partem rule. His discharge depended on the terms of his contract with the department and not on the exercise of a discretion by its officials. If his conduct fell foul of s 19(29) of the Act his discharge would have been automatic, not bureaucratic (cf Minister van Onderwys en Kultuur en n Ander v J P Smith NO en 'n Ander; an unreported judgment of this Court, delivered on 18 November 1994, case no 241/93, at 9-11). At best for him he is entitled to a declarator to the effect that s 19(29) was not applicable to the circumstances of his case. The order issued by the court of first instance, reviewing and setting aside the respondent's decision, must be varied accordingly. The following order is made:

1. The appeal succeeds with costs.

2. The order of the court a quo is set aside and the following order is substituted therefor:

"1. The order of the court a quo is set aside and the following order is substituted therefor: It is declared that the applicant's assumption of employment with the University of Natal on 19 October 1989 did not result in his discharge, in terms of s 19(29) of the Public Service Act, 1985 (KwaZulu), from the Public Service of KwaZulu (Department of Justice).

2. Save for the aforegoing the appeal is dismissed with costs."

P M Nienaber Judge of Appeal

E M Grosskopf JA) Vivier JA) Concur
Nicholas AJA) Olivier AJA)