

SOUTH AFRICA / JUDGMENT

Dumani v Nair and Another (2458/2010)

[2011] ZAECHGC 36 (12 August 2011)

[2011] ZAECHGC 36**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

D Chetty, J D Pickering

CASE / FILE NUMBER

2458/2010

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**IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

In the matter between:

Case No: 2458/2010

COLLEN MZINGISI DUMANI

.....Applicant

And

DESMON NAIR

.....First

Respondent

THE

MAGISTRATES' COMMISSION

.....Second

Respondent

Coram: Pickering and Chetty JJ

Heard:

29 July 2011

Delivered:

12 August 2011

Summary The

applicant, the acting chief magistrate of Graaff-Reinet was charged on four counts of misconduct in contravention of the magistrates' code of conduct. Four female members of the magistrate's court staff had levelled allegations of sexual impropriety against him. A

commission of enquiry conducted by the Chief Magistrate of Pretoria found that the allegations by three of the complainants to have been

proved and recommended the applicant's dismissal. On review to the High Court the applicant contended that the decision reached was

so unreasonable to warrant a finding that the presiding officer failed to properly apply his mind to the matter.

The application to

review such decision dismissed, in as much as it could not be found that the decision reached was unreasonable given the evidential

material before the first respondent or that he failed to take into account relevant considerations.

JUDGMENT

Chetty, J

[1] The applicant, an acting magistrate, was appointed as the acting head of the magistrate's court at Graaff-Reinet on 1 December 2008. On his arrival, he was introduced to the members of staff and by his own admission was warmly welcomed by all without exception. During the first week of February 2009, and whilst attending a magistrate's training course in Pretoria, the applicant was informed that complaints of sexual impropriety by several female members of staff at the Graaff-Reinet magistrates court had been levelled against him and his response thereto was elicited. On 2 March 2009, the applicant's attorney in a letter addressed to the Magistrates Commission (the Commission)¹ refuted the allegations against him and reserved the right to answer the allegations at a contemplated hearing in due course.

[2] Shortly thereafter the applicant was formally charged on four counts of misconduct, the gravamen of each charge framed as:

"CHARGE 1

That you are guilty of misconduct in terms of paragraphs 3 and/or 4 and/or 16 of the Code of Conduct for Magistrates as published in Schedule E to the Regulations for Judicial Officers in Lower Courts, 1994 in that during December 2008 in your office at the Graaff-Reinet Court House you conducted yourself in an unbecoming and embarrassing manner by stroking the check of Ms

Salomie Hartney, a clerk , employed at the said Court House, with the back of your hand whilst she was seated in front of the personal computer in your office. That when she told you “Sir please don’t do it” you told her that you were sorry but when she stood up, you against stroke her check with the back of your hand

CHARGE 2

That you are guilty of misconduct in terms of paragraphs 3 and/or 4 and/or 16 of the Code of Conduct for Magistrates as published in Schedule E to the Regulations for Judicial Officers in Lower Courts, 1994 in that on or about 6 January 2009 at about 14:00 at or near he Graaff-Reinet Court House you stroke the check of Ms Marilyn Slawers, a security officer employed at the said Court House, with the back of your hand and said “Marilyn”. She reacted by saying “Nee man meneer” and hit your hand downwards.

CHARGE 3

That you are guilty of misconduct in terms of paragraphs 3 and/or 4 and/or 16 of the Code of Conduct for Magistrates as published in Schedule E to the Regulations for Judicial Officers in Lower Courts, 1994 in that on or about 29 January 2009 at about 09:30 in your office at the Graaff-Reinet Court House you tickled the back of the neck of Ms Regina Carolus, a cleaner employed at the said Court House, whilst she was cleaning your office.

CHARGE 4

That you are guilty of misconduct in terms of paragraphs 3 and/or 4 and/or 16 of the Code of Conduct for Magistrates as published in Schedule E to the Regulations for Judicial Officers in Lower Courts, 1994 in that on or about 30 January 2009 between approximately 13:00 and 14:00 at or near the cash-hall of the Graaff-Reinet Court House, you stuck you hand between Ms Edwina Ellie’s breasts.”

and concluding, in each case with the allegation that:

“In so doing you wrongfully and intentionally impaired the dignity and/or privacy of the said Salomie Hartney, Marilyn Slawers, Regina Carolus and Edwina Ellie and you therefore –

failed to execute your official duties with dignity , courtesy and self-control and/or

failed to act in a manner which upholds and promotes the good name, dignity and esteem of the Office of Magistrate and the administration of justice and/or

acted to the detriment of the discipline or the efficiency of the administration of justice or allied activities.”

[3] The first respondent, the Chief Magistrate of Pretoria, was duly appointed to preside over the misconduct hearing. After the adduction of evidence by the four complainants, the applicant and several other witnesses, the first respondent found the applicant guilty of misconduct as envisaged in paragraphs 3, 4 and 162 of the Code of conduct on counts one, three and four and not guilty on the second count. Acting pursuant to the provisions of

Regulation 26 (17) (b) the first respondent, on 24 May 2010, made the recommendation that the applicant be removed from office as provided for in s 13 of the Act³.

- [4] Aggrieved thereby the applicant sought recourse to the Commission to have the first respondent's findings apropos counts one, three and four set aside. In his written representations, the applicant annexed a précis of the evidence adduced and with reference thereto contended that the evidence was so contradictory and unreliable that its rejection was warranted. Unpersuaded by the tenor of the submissions advanced, the Commission supported the first respondent's findings and advised the applicant that it intended recommending the applicant's removal from office in terms of s 13 (4) (a) (i) of the Act⁴. It is common cause that the commission informed the applicant that its recommendation had been forwarded to the Minister of Justice and Constitutional Development.
- [5] Cognisant of the fact that he was precluded from noting an appeal against the first respondent's findings and that his domestic remedies had been exhausted the applicant now seeks to review the first respondent's findings on various grounds which I shall in due course elucidate. In his founding affidavit, he referred to and incorporated the contents of his written representations to the Commission as the basis for contending that the first respondent's findings were so unreasonable as to warrant it being reviewed and set aside.
- [6] In a supplementary affidavit filed in terms of Rule 53 (4), the applicant broadened the scope of his attack on the first respondent's

findings and contended:

"4. that in convicting me, on 19 March 2010, on three counts of misconduct, the First Respondent took into account irrelevant considerations and failed to take into account relevant considerations;

that on convicting me as aforesaid, the First Respondent acted arbitrarily, capriciously and without proper regard to the evidence before him;

that the First Respondent's aforesaid decision to convict me is so unreasonable that no reasonable person could have reached such a decision, and

that my aforesaid conviction by the First Respondent was grossly unreasonable and unjust."

- [7] It will be gleaned from the foregoing that the first respondent's findings are assailed on two distinct bases, firstly,

unreasonableness, on the ground that he failed to properly apply his mind to the evidence before him and secondly, that he took into account irrelevant considerations and failed to consider relevant ones. The latter complaint is derived entirely from s 6

- (2) (e) (iii) of Paja⁵. I have earlier in this judgment commented upon the fact that the applicant recognized that the first respondent's findings are not appealable, hence the review application. In our jurisprudence there is a clear distinction between appeals and review. O'Regan J, emphasised the point in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*⁶ where the learned judge stated:

"Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

- [8] The requirement of reasonable administrative action was trenchantly articulated by Howie P, in review proceedings in *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa*⁷ as follows:

*"[20] In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*. As made clear in *Bel Porto*, the review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h))."*

- [21] We were invited by the respondent's counsel to adopt, instead of rationality, the test of perversity, in the sense, so suggested

counsel, of utter irrationality. In this regard, reliance was placed on the respective passages in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*

[1973] 1 All ER 689 (CA) at 706e and *R v Radio Authority, Ex parte Bull and Another*

[1997] 2 All ER 561 (CA) at 578a

- b.

The first formulates the following test:

'Was [the authority's] decision . . . one which no reasonable authority could have made? In simpler terms, did they make a perverse decision?'

The second reads:

'The task of a supervisory court in a case of this kind is not to concern itself with the merits of the decision . . . unless that decision can be properly stigmatised as perverse or utterly irrational.'

A reading of those cases reveals that the review ground involved was that of unreasonableness, as developed and expounded in the leading English case of *Wednesbury Corporation*. The passage quoted from the second of the two cases cited by counsel is contained in the judgment of Brooke LJ. In the judgment of Aldous LJ at 577h, the test is put as follows:

'Is the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it?'

It is clear that the standard expressed in those cases approximates, to all intents and purposes, to the one constituted by s 6(2)(h) of the Promotion of Administrative Justice Act. The word 'perversity' may be appropriate (I need express no opinion on the subject) to the standard set by s 6(2)(h) and *Wednesbury Corporation* but it has no bearing on the rationality test set by s 6(2)(f)(ii) and explained in *Pharmaceutical Manufacturers, Bel Porto and Carephone*. It is the latter test with which we are concerned in the present case. In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"

[9] It is furthermore not in dispute that the applicant bears the onus, described by Holmes JA, in *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd*⁸ as a "formidable" one. The learned judge stated as follows: -

"There is no appeal against the decision of the Commission. The Legislature has appointed it as the final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands - unless it is vitiated by proof on review in the Supreme Court that -

- (a) the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that, *de jure*, it failed to decide the matter at all. Such failure could be established by reference to *mala fides*, improper motive, arbitrariness or caprice. The list is not exhaustive; or
- (b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid - a formidable onus."

[10] With this prelude, therefore, I turn to consider whether the applicant has succeeded in discharging the onus resting upon him.

[11] The four complainants' accounts of what transpired are succinctly set out in paragraph 2 and bear no repetition. Each of them was subjected to prolix cross-examination during which their honesty and integrity was sought to be impugned. Before us, counsel for the applicant pointed to what he submitted were material deficiencies in their evidence. He adverted to discrepancies between their *viva voce* evidence and statements they made to the police during the investigation. These alleged discrepancies we were told are material to such a

degree that they compel the conclusion that the one or the other version must be false. There are many judicial pronouncements dealing with the issue of the weight to be accorded to an apparent conflict between a witness' police statement and his or her viva voce evidence. Cross-examiners are wont to impeach a witness' credit by pointing to conflicts between the police statement and evidence tendered in court. The mere existence of such a conflict is insufficient to warrant a finding that the witness is untruthful. The case law recognises that the written statement often does not represent a true account of the verbal account and that care must be taken, in analysing the evidence, not to accord such discrepancies undue weight. The examples of such alleged discrepancies referred to by the applicant's counsel are, upon proper analysis, so trifling that it can hardly be contended that they show that the witnesses are untruthful and that their evidence should on that account alone be rejected.

[12] Notwithstanding the long and arduous cross-examination the complainants were subjected to, their evidence remained unshaken,

even in the case of Ms Slawers, despite the apparent concession which she made at the end of her cross-examination. Such concession does not however, notwithstanding the first respondent's finding, deleteriously impact upon the reliability of her evidence. Her evidence too remained consistent throughout. A proper reading of her evidence shows that the concession which she made to be, in effect, no concession that the applicant had not stroked her cheek with his hand. The transcript reads as follows: -

"MS SLAVERS On that Tuesday Mr Dumani when he was passing me, passing the scanner, he did touch my cheek with the back of his hand.

MNR DAUBERMANN Ek wil dit aan jou stel dat of jy maak 'n fout met wat aan jou geraak het of jy praat 'n leuen as jy sê hy het met sy hand aan jou gesig gevat. Een van die twee.

MS SLAVERS Defintely I am not lying. Mr Dumani came and said "Marilyn" and he went through.

VOORSITTER Nee, maar die vraag is 'm dubbel tipe vraag. Hy sê sy instruksies is of u lieg of u het 'n fout began. Dan antwoord

jy ek lieg nie. Sluit dit ook dan u het geen fout gemaak nie. As u nie 'n leuen praat nie dan maak u 'n fout maak. As u nie 'n fout gemaak het nie dan praat jy 'n leuen.

MS SLAVERS I am not lying about it.

MNR DAUBERMANN Kon u miskien 'n fout gemaak het? Dink baie mooi. Mnr Dumani se loopbaan is op die spel hierso. Dit is mos moontlik né?

MS SLAVERS It can be possible that it can be a fault, but the touch of Mr Dumani's hand I did feel on my cheek.

MNR DAUBERMANN Dit het so vir jou gevoel, maar miskien maak jy 'n fout dat dit sy hand was né?

MS SLAVERS The fact that I did not hit his hand when he was passing.

VOORSITTER Beteken wat?

MS SLAVERS It could be that he touched my cheek but I could not hit his hand.

MR LOUW It has not been clarified Mister Chair (Indistinct)

VOORSITTER Kom ons gaan net 'n entjie terug. Sê Mnr Daubermann, sê hy vir u, dit is die stelling aan u, dame ja u kon 'n fout began het, dit is moontlik, dan sê u ja dit kon 'n fout gewees het, maar Mnr Dumanii, wat het u gesê?

ME SLAVERS Dat Mnr Dumani deurgeloop het en gesê het, aan my wang "ge-touch" het en deurgeloop het.

VOORSITTER Wat sal die fout dan wees?

MS SLAVERS (no reply)

VOORSITTER Dit is die tweede keer nou waar ek 'n lang stilte kry. Is u op u gemak dame?

MS SLAVERS That is correct

VOORSITTER Verstaan u die vraag?

MS SLAVERS I understand it that whether he touched me or not, and my answer is that yes he did touch me on my cheek.

VOORSITTER Toe u verwys het na fout na wat het u verwys, wat sou 'n fout wees? U het gesê dit kon 'n fout wees.

ME SLAVERS Ja, ek het dit gesê meneer.

VOORSITTER Wat sal 'n fout wees?

MS SLAVERS It could have been that Mr Dumani, if it was not his finger it could have been that his jacket could have touched me."

Immediately thereafter, in response to the first respondent's question she related that "she felt the outside of Mr Dumani's hand on my cheek". The weight to be accorded concessions of this nature was pertinently adverted to by Kroon J, in *Harlech-Jones Treasure Architects CC and Others v University of Fort Hare*⁹ where the learned judge at paragraph [29] referred with approval to the judgment of Jones J, in the court below where the latter considered the nature of a concession and its impact in the overall assessment of a witness' testimony thus: -

"The defendants' arguments also place emphasis on concessions made by Christopher during the course of cross-examination. In evaluating these concessions I must remember that parties are not bound by concessions made by a witness in the course of evidence. A concession is not necessarily decisive of the outcome of an action. My impression of these concessions is that, whatever their

appearance, they [are] not and were not intended by Christopher to be a departure from his fundamental standpoint that the University and not the Foundation contracted with Heaton. Answers to individual questions which indicate the contrary should be viewed in the context of his evidence as a whole. I think that there is merit in Mr Van Rooyen's submission for the plaintiff that the concessions were qualified concessions intended to apply within the particular framework of a particular line of questioning, mainly in relation to the second issue, the question of the loan. They are not concessions in which the witness retracts his entire case. In many instances the concession is not really a concession of a fact or facts, but rather a concession of what to make of the facts, which is not the witness's function. I must also bear in mind that the evidential value of concessions depends upon a variety of considerations. In this case they are made by an 81-year-old witness who was called upon to give extensive in-depth evidence about complicated factual issues over a period of days. He was subjected to an exhaustive and pressing cross-examination by three senior counsel. He was required to cast his mind and memory back to details of events which occurred as many as five years ago. He has a feeling of personal responsibility for the predicament in which the University finds itself. His lengthy spell in the witness box was nothing less than an ordeal. He came through it well, though not unscarred. In passing, I should mention that in the course of argument it was suggested that his evidence contained "patent falsehoods". That is not so. He was an honest witness. His evidence may contain mistakes and contradictions, but it contains no falsehoods. However

one views his evidence, I think that concessions made by him in these circumstances carry less weight than they otherwise might.

This is not to say that the concessions carry no weight at all and can be ignored. They are on record. They are part of the total picture. They have a role to play in an assessment of where the balance of probability lies. The plaintiff's case is weaker than it would have been if Christopher had not made them. When I consider these concessions - the important ones are set out in counsel's heads of argument - in the light of Christopher's evidence in its entirety, in the light of Tilney's evidence and that of the other witnesses, in the light of the background and the inherent probabilities to which I have referred, and in the light of the wealth of documentary

material, I am of the view that they are not of sufficient weight to cast doubt on the conclusion that the University and not the

Foundation entered into the building contract with Heaton."

[13] The general tenor of the judgment unequivocally shows that the first respondent was fully aware, in considering the evidence of the complainants, that there were, in effect, single witnesses. He was conscious of the dangers inherent in such evidence and the need to evaluate the evidence cautiously. This is amply demonstrated in the applicant's acquittal on the second charge. There is nothing in the record to suggest that the first respondent in any way erred in accepting the evidence of the complainants and rejecting that of the applicant. The first respondent moreover had the distinct advantage of seeing, hearing and appraising the complainants and upon a conspectus of the evidence tendered there is no room

warranting interference with the first respondent's evaluation of the evidence.

- [14] It was furthermore suggested to each of the complainants that they had fabricated their evidence and the reason advanced was their alleged hostility towards the applicant for his lack of proficiency in Afrikaans. Each of them decried any notion of bias against the applicant and any suggestion of bias is far-fetched and untenable. The further imputation of a lack of respect towards the applicant allegedly displayed by the complainants was vehemently denied by each of them and, objectively construed, fanciful in the extreme. It is highly improbable that the complainants, given their station in life, would have the temerity to have treated the applicant, the acting chief magistrate, in the contemptuous manner suggested by him.
- [15] Mr Daubermann laid great emphasis on the first respondent's treatment of the evidence of Claasen. Seizing upon the use of the word "potent" in the judgment, counsel sought to persuade us that the applicant's version was rejected on that score alone. There is no merit in this submission. The first respondent's use of the word was imprecise and unfortunate but it is obvious from the judgment that upon an appraisal of the totality of the evidence, whatever conflict existed between the applicant's evidence and that of Claasen, played no meaningful role in the decision arrived at by him. The conclusion reached by the first respondent cannot be construed as being unreasonable. It was a conclusion based on credible evidence, with regard to the probabilities and clearly not one that a reasonable decision maker, in casu, the first respondent, could not reach. There is furthermore no warrant for contending that irrelevant considerations were taken into account or relevant ones not considered.

[16] In the result the following order will issue:-

The application is dismissed with costs.

D. CHETTY

JUDGE OF THE HIGH COURT

Pickering, J

I agree.

J.D PICKERING

JUDGE OF THE HIGH COURT

For the Applicant: Mr. Pieter Daubermann

Instructed by: Whelldon, Rushmere & Cole, 119 High Street, Grahamstown, Tel: (046) 622 7005,
(Ref: O Huxtable)

For the 2nd Respondent: Adv N. Gaisa

Instructed by: The State Attorneys c/o Nettleton Attorneys, 118A High Street, Grahamstown, Tel: (046) 622 7149, (ref: Mr Mvulana)

1The magistrates Commission was established by the Magistrates Act 90 of 1993 (the Act). A code of conduct for magistrates envisaged in terms of s 4 (d) of the Act was duly promulgated in the Regulations for Judicial Officers in Lower Courts, 1994 as Schedule E thereto.

2Paragraphs 3, 4 and 16 provide as follows: “3. A magistrate executes his/her official duties objectively, competently and with dignity, courtesy and self-control. 4. A magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice. 16. A magistrate shall not act to the detriment of the discipline or the efficiency of the administration of justice or allied activities.”

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4. A magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice.
16. A magistrate shall not act to the detriment of the discipline or the efficiency of the administration of justice or allied activities.”

3It is common cause that the applicant was provisionally suspended on 18 September 2009.

4Section

- (4) (a) provides as follows: “(4) (a) If the Commission recommends that a magistrate be removed from office-
 - (i) on the ground of misconduct; (ii) on account of continued ill-health; or (iii) on account of incapacity to carry out the duties of his or her office efficiently, the Minister must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1) (a), confirm the suspension.

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6[2004] ZACC 15; 2004

(4) SA 490 (CC) at para 45

7 2004

(3) SA 346 (SCA) paras [20] and [21]

8 1972

(3) SA 726 (A) at 735 E-H

9 2002

(5) SA 32 (E)

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