IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 10/2002

In the matter between

COUNCILLOR MANDLA DLAMINI	1st Appellant
MANZINI CITY COUNCIL	2nd Appellant

And

MUSA NXUMALO	Respondent

Coram	LEON, JP; STEYN, JA; TEBBUTT, JA
For Appellants	P. Flynn
For Respondent	C. Ntiwane

JUDGMENT

LEON, JP

The appellants were the unsuccessful respondents in the court *a quo.* The present respondent, under Notice of Motion, sought the following order:

(a) That the decision and proceedings of the 2nd Respondent terminating applicants' employment services with the former sent under cover of a

letter dated 26th January 2000 be reviewed and/or corrected and/or set aside.

(b) Costs

(c) Further and/or alternative relief.

The matter came before **MATSEBULA J** in the High Court who granted the following order:

> *"I hereby set aside the decision by second respondent terminating applicants' employment and I order that the matter be heard de novo by respondent and that applicant be afforded an opportunity to engage services of counsel. I also grant costs incurred during the hearing of the matter before this Court."*

It is against that order that the appellants have appealed.

It will be convenient to refer to the parties, as they were in the Court *a quo*, as the applicant and the 1st and 2nd respondents respectively.

It is common cause that on 26 January 2000 the 2nd respondent dismissed the applicant from its employment following a disciplinary hearing on 21 and 22 December 1999. It is also common cause that the 1st respondent was the Chairperson of the duly appointed sub-committee of the 2nd respondent to hear and determine disciplinary proceedings brought against the applicant. The disciplinary proceedings followed upon the following charges levelled against the applicant:

1. On Saturday 9 October 1999 and at approximately 6.45 a.m. he wrongfully, unlawfully and maliciously and in contravention of section 111 3(1)(I) and section 111 3(1)(O) read with section 36 of the Employment Act of 1986 and the Staff Standing Orders for Officers, caused damage to residential property occupied by the Town Clerk by striking the door and the windows with an axe causing them to break.

An alternative charge followed.

2. On the same day it was alleged that the applicant had wrongfully, unlawfully and intentionally threatened the Town Clerk with bodily injury and death and attempted to run him over with a motor vehicle.
3. At about the same time, on the same date and place, the applicant wrongfully, unlawfully and intentionally and falsely accused the Town Clerk, Mr. Terry Parker, of:

    (i) owing him the sum of E10 000; and
    (ii) being corrupt and guilty of committing irregularities at his place of work

    contrary to the provisions of section 111 3(1)(e) of the Staff Standing Orders.

There followed an alternative charge.

In his application the applicant launched a number of attacks upon the conduct of the proceedings. He complains that they were conducted unfairly and irregularly and that such irregularities are fatal. He also objected to the fact that the Minister for Housing and Urban Development never called upon him for an

explanation before approving the decision of the City Council which the Minister did in terms of Urban Government Act No.8 of 1969. However, the Minister is not a party to these proceedings.

The applicant's main complaint is that he was unfairly refused a postponement after his attorney had withdrawn and given too little time (three working days) to engage another legal representative particularly in the middle of December when many legal firms were closing down for the Christmas holidays.

The learned judge *a quo* based his decision solely and exclusively on the fact that the 2nd respondent had erred in not affording the applicant a postponement in order that he could be legally represented. I shall later deal with the chronology on this topic. Before dealing with the facts MATSEBULA J referred to section 18 of Part IV relating to Disciplinary Powers of Council. The section reads:

> *"Any person aggrieved by the decision of Council under this part may apply to the High Court for relief in accordance with the High Court Rule of 1954."*

The High Court Rule of 1954, dealing with reviews, states:

> *"Provided that the High Court shall not set aside the proceedings of the Council by reason only of an irregularity which did not embarrass or prejudice the applicant in answering the charge or the conduct of his defence."*

In holding that a postponement should have been granted the learned judge relied on cases such as ***Madnitsky v Rosenberg*** 1949(2) SA 392(A) where it

was held that a postponement should generally be granted where an applicant's unpreparedness has been fully explained, that there is no question of the application being based upon delaying tactics and that justice required that the applicant should be afforded further time to prepare his case.

MATSEBULA J stated that he was unable to make any findings on the merits of the matter precisely because the applicant was entitled to a postponement. He held further that the failure of the tribunal to grant the applicant a postponement was unreasonable, unfair, and based on unsustainable grounds to which I will later refer.

It now becomes convenient to refer to the relevant chronology.

The disciplinary proceedings began on 8 December 1999. At that time Mr. Samuel Earnshaw appeared for the 2nd respondent while Mr. Ntiwane appeared for the applicant. It was pointed out that Mr. Earnshaw's partner was the Mayor of Manzini and that if Mr. Earnshaw continued to act, that would be contrary to section 24(3) of the Urban Government Act. Mr. Earnshaw then withdrew. The date of 8 December 1999 had been agreed to due to the availability of Mr. Ntiwane who was unavailable on certain earlier dates which had been suggested. No new date was arranged on that date.

On 10 December the Human Resources Manager of the 2nd respondent wrote to Mr. Ntiwane's firm advising him of the new date of hearing being 14 December 1999 at 10.00 a.m., the letter stating that it was in the best interests of all parties that the matter be heard that day. The letter ends:

> *"Please confirm in writing your availability and fax to us today as you said after the 17th December, 1999 you will be not available."*

Mr. Ntiwane that afternoon faxed a reply confirming his availability.

Unfortunately Mr. Ntiwane was not able to get in touch with the applicant, as, unknown to Mr. Ntiwane, he had gone to a wedding at Mahlanya for the weekend returning to his home on the afternoon of 14 December 1999 and only became aware of the fact that the disciplinary proceedings were due to commence at 10.00 a.m. that day when his attorney apprised him of that fact on the afternoon of 14 December. These facts are not disputed in the opposing affidavit by the 1st respondent; he merely states that the facts are unknown to him.

On 14 December 1999 Mr. Ntiwane, having at that stage been unable to contact the applicant, applied for a postponement until January 2000. He indicated that his office was closing down for the Christmas holidays on 17 December. It was suggested to Mr. Ntiwane that the matter proceed on 15 and 16 December but Mr. Ntiwane stated that he had a large practice to run and was not available on those dates. If the Council insisted that the matter proceed on those dates he would be forced to withdraw as the applicant's attorney.

Nevertheless the Council determined that the matter had to proceed..

On 14 December 1999 the 2nd respondent wrote to the applicant advising him that the disciplinary hearing would proceed on 21 December 1999 with or without his representative and whether the applicant was present or not. The applicant received the letter on the afternoon of Wednesday 15 December 1999, which gave him three working days in which to engage the services of another attorney.

A copy of the letter was sent to Mr. Ntiwane who faxed a reply to the 2nd Respondent on 16 December 1999. In the letter Mr. Ntiwane reiterated that he would not be available on 21 December 1999 as his offices closed on 17 December 1999. He went on to write that it was unfortunate that the 2nd respondent was proceeding with the hearing in the absence of legal representation. He also placed on record that it was unreasonable in the circumstances to expect the applicant to engage the services of another attorney at such short notice particularly as the attorneys were closing their offices for the festive season.

The result of all this was that when the applicant appeared on 21 December 1999 he had no attorney. It appears from page 22 of the record that the applicant then applied for a postponement saying that he had briefed a particular attorney and that it was unreasonable to expect him to engage the services of another attorney at such short notice particularly during the festive season when the attorneys' offices were closed. He only sought an adjournment for two weeks.

Much of the record of the disciplinary proceedings is described as "incomprehensible" and sometimes "inaudible" but it is common cause that the applicant's application for a postponement was refused.

One of the reasons given for refusing a postponement was that the Council was still paying the applicant a salary. However, according to Annexure "CCN4" it had been resolved on 16 December 1999 that the applicant's salary be withheld during the period of his suspension as from 1 January 2000.

The facts which I have outlined above are substantially common cause although each side has given a different emphasis to them. The 1st respondent swore an

affidavit on behalf of the 2nd respondent and he was also the Chairman of the sub-committee investigating the charges against the applicant. In justification of the decision not to grant the applicant a postponement he stated in paragraph 18 of his affidavit:

> ***"Ad paragraph 6.9***
>
> *I admit the contents hereof and add that Council has to conclude the hearing before the end of that year. It was important for the situation at Council to be normalised as there is a whole department that did not have a head. Moreso the department in question was a crucial one which always required consent (sic) availability of incumbent as it concerned advising (sic) the City Council on an almost daily basis."*

In reply to that paragraph the applicant in paragraph 27 of his answering affidavit stated:

> *"I submit that a two (2) week postponement would not have been prejudicial to the interests of the Respondents. It is submitted that by that time I had been on suspension for a period of three (3) months. Surely a further two (2) weeks would not have been prejudicial (sic) the interest of the Respondents."*

The "unsustainable grounds" by the sub-committee for refusing a postponement upon which the Court *a quo* relied were:

(a) that the applicant himself was a lawyer;

(b) that his erstwhile attorney should have handed the file to another lawyer so that the sub-committee would not have had to entertain the

application for a postponement at that moment. A member of the committee even asked what the applicant would have done if his attorney had died.

(c) Counsel for the Council advanced as one of the grounds for refusing a postponement that the respondents were still paying the applicant a salary (I have already dealt with this point).

(d) The applicant was refused copies of certain documents in his file. (This is disputed by the sub-committee).

The court *a quo* was of the view that the respondents had been influenced by wrong principles and had misdirected themselves on the facts. If the discretion had been properly exercised a postponement would have been granted.

Mr. Flynn, who appeared for the Chairman of the subcommittee and the Council, submitted that the City Council as the employer has a number of options as to who is to enquire into misconduct on the part of employees. He contended that the hearing granted to the employee is not conducted by a statutory body, tribunal or officer and is therefore not subject to review by a court. In this regard he relied upon *Davies v Chairman, Committee of the JSE 1991(4) SA 43(W) at 46G-H and Johannesburg Consolidated Investment Company v Johannesburg City Council 1903 TS 111 at 115.*

It was further contended by Mr. Flynn that the Court a quo's reference to Part IV Disciplinary Powers of Council, Section 18, was misplaced because the Council there referred to was not a City Council but one elected by the Institute of Accountants under Act No. 5 of 1985.

The next point argued by Mr. Flynn was that in granting an order setting aside the applicant's dismissal and ordering that the matter proceed *de novo* the Court *a quo* had usurped the function of the Industrial Court which had sole and exclusive jurisdiction in respect of employment matters. He contended that Section 8(1) of the Industrial Relations Amendment Act No 8 of 2000 ousted the review powers of the High Court.

In the alternative it was submitted that if it were held that the High Court did have jurisdiction to review the decision of the City Council's subcommittee, it would be necessary to show that the decision of the tribunal was so grossly unreasonable as to warrant the inference that it had failed to apply its mind to the matter.

In this regard reliance was placed on *Davies'* case (supra) at page 47D and *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972(3) SA 726 at 735E-G. This was a formidable *onus.* Reliance was also placed on *Takhona Dlamini v President of the Industrial Court and Another,* Swaziland Court of Appeal Case No. 23/1997. In elaboration of this argument it was contended that it was necessary to show that there had been a failure of justice. (Davies' case (*supra); Jockey Club of South Africa & Others v Feldman* 1942 AD 340 at 359.)

It was further submitted by Mr. Flynn that the court *a quo* itself considered the merits of the application and substituted its own decision for that of the committee. He argued that the court *a quo* interfered on the basis that the decision was one which it would not have arrived at. In so doing it erred by considering the merits of the decision and pronouncing on its correctness.

Mr. Flynn also relied upon the fact that there was no obligation upon the Council or its subcommittee to allow the applicant legal representation. However, it did so. It is true that at common law there is no general right to legal representation and that, unless required by statute, it is generally a matter in the discretion of the tribunal. However, in a disciplinary case where the charges are serious and the consequences of conviction are harsh, the court is likely to require a higher standard of fairness from the decision-maker. Each case has to be dealt with on its merits. In *Dladla v Administrator, Natal* 1995(3) SA 769 (N) Didcott J found that the applicants' need for a lawyer to defend them in disciplinary proceedings was strong in the circumstances. Their jobs and livelihood were at stake, their disadvantage was aggravated by differences of race, culture, language and background and the tribunal itself lacked independence.

I find it unnecessary to decide, in the present case, whether the Council or the sub-committee was obliged in law to allow the applicant legal representation. What is important is that the applicant was allowed legal representation and, at material times, was represented by Mr. Ntiwane who was steeped in the case and had been acting for the applicant for some weeks. It may safely be inferred that all the necessary consultations would have been held by him.

The first question is whether the decision in *Johannesburg Consolidated Investment Co v Johannesburg City Council (supra)* affects the position. In that case *INNES CJ* (who delivered one of the majority judgments) said this at page 115:

> *"Whenever a public body has a duty imposed upon it by statute and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court*

> *may be asked to review the proceedings complained of or comment thereon. This is no special machinery created by the legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil proceedings arising within the Transvaal."*

That passage was reproduced by *ZULMAN J* in *Davies'* case (*supra)* at page 47B. In that case the learned Judge also referred to the limited jurisdiction which a Court had in review proceedings and supervises administrative action in appropriate cases on the basis of "gross irregularity" i.e. an irregularity so grossly unreasonable as to justify the inference that the body concerned failed to apply its mind. (*National Transport Commission & Others v Chetty's Motor Transport (Pty) Ltd* 1972(3) 726(A) at 735E-G.) In the absence of unlawfulness or gross irregularity, considerations of equity do not provide a ground for review. (*Davies'* case at page 47G.) It is necessary for an applicant to show that there has been a failure of justice. (*Davies'* case at page 48 and the cases there cited).

I shall later consider whether the test is one of gross unreasonableness or some lesser test.

Mr. *Flynn's* first submission was that the decision of the sub-committee was not that of a statutory body and that therefore, in the light of *the Johannesburg Consolidated Investment Co* case and *Davies* case (*supra),* the High Court had no power to review the matter.

I am quite unable to accede to this submission.

Section 19(1) of the Urban Government Act No. 8/1969 provides:-

"19 (1) A council may from time to time appoint from amongst its members committees for any general or special purposes which in the opinion of the council would be better regulated and managed by a committee, and may delegate to a committee so appointed, with or without restrictions or conditions as it may think fit, any of the powers or duties conferred upon the council under this or any other law other than

(a) the power to levy rates; or
(b) the power to borrow money; or
(c) the power to make bye-laws; or
(d) any other power which by this or any other law is expressly required to be exercised by the council."

Section 19(2) provides:-

"Each committee shall report its proceedings to the council, and in no case shall any act of any committee of a council be binding upon the council until submitted to and approved by the council except in any case where the council has, by resolution, delegated absolutely to that committee the power to do the act."

It appears from the letter of the Town Clerk to the applicant on the 26th January 2000 that the inquiry by the sub-committee was held in terms of Section 111(6) (b) of the Council's Standing Orders for Officers and that, at a special meeting of the Council, it held that the case of misconduct by the applicant had been proved.

Section 6 111(6) of the Council's Standing Orders provides:-

"(a) Where at the conclusion of an inquiry held in accordance with 3(a)

…….

the council is of the opinion that the offence alleged to have been committed by the employee has been proved it shall impose a penalty.……."

Standing Order 3(a) provides:

"(3) On receipt of the report and request the Town Clerk shall refer the matter to the Council which shall either

(a) itself enquire into the matter, or

(b) instruct the Town Clerk or other competent employee or employees to enquire and report to the council."

The Council did not instruct the Town Clerk or other competent employee to enquire and report to the Council. What it did was to appoint a sub-committee of the Council comprising four Councillors to enquire into the applicants' alleged acts of misconduct.

This is not a case where the statutory body delegated its powers to some other person or body. On the contrary the subcommittee comprised only four members of the statutory body. It was thus a part of the statutory body itself. Moreover it is clear from the provisions of Standing Order (111) 6 that upon receipt of the report from the sub-committee it would be the council (the statutory body) which would decide whether or not the alleged offence had been proved.

In all these circumstances I am of the opinion that the power of the statutory body was not delegated; it remained with the Council and when the sub-committee acted it was part of the statutory body.

When these difficulties in the way of *Mr. Flynn* were put to him he fairly conceded that his argument on this part of the case was "weak". In my opinion it has no merit.

The next question which falls to be considered is whether the provisions of Section 8(1) of the Industrial Relations (Amendment) Act No. 8 of 2000 has the effect of ousting the review powers of the High Court.

Section 8(1) of the Industrial Relations (Amendment) Act No. 8 of 2000 provides, under the heading "JURISDICTION":-

> *"The court shall, subject to Sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and an employee in the course of employment……."*

Emphasising the words which I have underlined, Mr. *Flynn* submitted that it was clear that, this being a matter which arose at common law between an employer and an employee in the course of employment, the jurisdiction of the High Court's powers of review had been excluded.

Mr. Flynn may be correct in his general interpretation of Section 8(1) but the question which arises is whether it applies to the applicant's cause of action in this case.

The 2000 Act came into operation on 6th June 2000 but the applicant's cause of action arose on the 22nd December 1999. When this difficulty was pointed out to Mr. *Flynn* he was unable to point to anything in the Act of 2000 which would make it retrospective so as to embrace the applicant's cause of action.

That cause of action accordingly falls to be dealt with under the previous Industrial Relations Act, i.e. No. 1 of 1996.

In ***TAKHONA DLAMINI V PRESIDENT OF THE INDUSTRIAL COURT*** case No. 23/1997 this Court had occasion to consider whether a decision of the Industrial Court that it would not hear an application which an employee sought to bring before it because the matter was "not properly before it" should be taken on appeal to the Industrial Appeal Court by the aggrieved employee or brought by the latter on review to the Swaziland High Court.

Under the 1996 Act the Swaziland Industrial Court derives its jurisdiction from Section 5(1) of the Act. In the abovementioned case this Court considered the provisions of Section 5(1) of the 1996 Act which do not contain the words which I have underlined in Section 8(1) of the 2000 Act. On the contrary Section 11(5) of the 1996 Act provides:

> *"11(5) A decision or order of the court shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."*

The judgment of this court in the *TAKHONA DLAMINI* case was given by Tebbutt, JA, (with whom Kotze, P and Browde, JA concurred).

In the course of his most comprehensive judgment, Tebbutt, JA, in dealing with Section 11(5) said this:-

> *"It is quite clear from the aforegoing that the legislature was conscious of the difference between an appeal and a review and it confined its jurisdiction to hear appeals from the Industrial Court to questions of law only and specifically retained by Section 11(5) the jurisdiction of the High Court to review decisions of the Industrial Court on common law grounds."*

That decision may well have caused the legislature to introduce the underlined words into Section 8(1) of the 2000 Act.

The present case is a review based on common law grounds. It follows that the 1996 Act does not exclude the jurisdiction of the High Court and Mr. *Flynn*'s point must fail.

The next matter which falls to be considered is whether, in order to succeed, it is necessary for the applicant to prove that the sub-committee acted grossly unreasonably as was held to be the position in *Chetty*'s case (*supra)* and the other cases on this topic referred to above. I should add that that test was also accepted by this court in ***STANDARD CHARTERED BANK SWAZILAND LIMITED vs ISRAEL MAHLALELA*** IN 1994 (see pages 11 and 12 of the judgment) and also in the ***TAKHONA DLAMINI*** case (*supra)* (see page 11 of the judgment). In that case TEBBUTT, JA said this at page 11 of the judgment:-

> *"Those grounds (to review) embrace inter alia the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the court misconceived its function or took into account irrelevant considerations or ignored relevant ones; or that the decision was so grossly unreasonable as to warrant the inference that the court failed to apply its mind to the matter."*

With regard to the question of the test of gross unreasonableness in reviewing the decisions of statutory bodies, I am fully conscious of the weight of the aforesaid decisions as well as the eminence of the learned judges who gave them. However it is necessary to decide whether, in this day and age, that narrow approach should be maintained.

After anxious consideration I am driven to the conclusion that it should not. What has led me to this conclusion is the modern approach to judicial review.

IN ADMINISTRATOR TRANSVAAL AND OTHERS V TRAUB AND OTHERS 1989(4) SA 731 (A), Corbett CJ dealt exhaustively with the change in the scope of judicial review. In the course of his judgment the learned Chief Justice referred at length to a large number of cases in England as well as cases in Australia and New Zealand. He said this at page 761 A – D:-

> *"In the Council of Civil Service Unions case supra at 953 Lord Roskill observed that since about 1950 as a result of a series of judicial decisions in the House of Lords and in the Court of Appeal there had been a dramatic and, indeed, radical change in the scope of judicial review; and that this change had been described 'by no means critically as an upsurge of judicial activism'. One aspect of the change in the scope of*

> *judicial review was, of course the evolution of the legitimate expectation principle. And it was evolved, as I read the cases in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case.* (my emphasis)"

The legitimate expectation principle was first expounded by Lord Denning M.R. in *SCHMIDT & ANOTHER V SECRETARY OF STATE FOR HOME AFFAIRS* [1969] 1 ALL ER 904 CA where the following was stated at page 909 C:-

> *"An administrative body may in a proper case, be bound to give a person who is affected by their decisions an opportunity of making representations. It all depends upon whether he has some right or interest, or I would add some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."*

That case followed the landmark decision of the House of Lords in *RIDGE V BALDWIN and OTHERS* [1963] 2 ALL ER 66(HL).

Although the present case does not involve the question of a legitimate expectation of being heard, in view of the fact that the applicant was indeed heard, it is clear to me that the legitimate expectation of being heard is part of the notion of what is fair. This appears from the passage in the *Traub* case which I have cited and underlined. It also appears from an article cited by ***Corbett,*** CJ with approval in the *Traub* case at page 755 C – E. That article is by Professor Robert E. Riggs published in (1988) 36 American Journal of Comparative Law at 395 ff. The first paragraph of the article, as cited by Corbett, CJ reads:

> *"Since the landmark decision of Ridge v Baldwin, handed down from the House of Lords in 1963 English courts have been in the process of imposing upon administrative decision-makers a general duty to act fairly. One result of this process is a body of case law holding that private interests of a status less than legal rights may be accorded procedural protections against administrative abuse and unfairness. As these cases teach a person whose claim falls short of legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a "legitimate expectation." The emerging doctrine of legitimate expectation is but one aspect of the duty to act fairly……."*

I am satisfied, upon a consideration of the cases, including that to which I shall immediately refer, that the principle of *audi alteram partem* is a part of the general duty to act fairly.

In *DU PREEZ AND ANOTHER v TRUTH AND RECONCILIATION COMMISSION* 1997 (3) SA 204(A) it was accepted by the Court at page 232 E – F that, in carrying out their statutory functions, the Truth and Reconciliation Commission and its Committee in question in that case "*were under a duty to observe the principles of natural justice and, therefore, to act fairly (see also re Pergamon Press [1970] 3 ALL ER 535(CA) at page 539 a – f).*

In the Du Preez case Corbett CJ, having referred to the Pergamon case, went on to say this at page 233 B – E:-

> *"I am of the view likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the committee*

in the course of its investigations and/or hearings. As I have indicated, the subject matter of inquiries conducted by the committee is "gross violations of human rights". Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct.

The committee's findings in this regard and its report to the commission may accuse or condemn persons in the position of appellants……Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly."

Fairness in that case included an obligation on the committee to give the appellants reasonable and timeous notice of the time and place when evidence affecting the appellants detrimentally or prejudicially would be presented to the committee.

In that case it was held (at page 231 G) that the principle of *audi alteram partem* is but one facet, albeit an important one, of the general requirement of natural justice that a public body will act fairly unless the empowering statute either expressly or by necessary implication indicates the contrary. (see also *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at page 10 G – I)

In the present case the deliberations of the sub-committee and its findings could have gravely serious consequences to the applicant. If the findings were adverse (which they were) and, if approved by the council, this could cause the applicant not only to be dismissed from his employment but also to be exposed to the danger of criminal prosecution.

In all these circumstances I am of the opinion that there was a duty upon the sub-committee to act fairly. Furthermore I am of the view, that in the light of the modern approach to judicial review, the time has arrived in Swaziland, to jettison the narrow approach of gross unreasonableness.

It follows that if the sub-committee acted procedurally unfairly the High Court had the power to review and set aside its decision.

Before I consider the question as to whether the sub-committee acted unfairly, it is necessary to refer to Mr. ***Flynn***'s argument that the court should not approach the matter as if the sub-committee were a court of law, which it was not. I quite agree. I agree, too, that it follows that the court ***a quo*** was wrong in applying the test adopted by courts in deciding whether or not a postponement should be granted. As I have said, the sub-committee was not a court of law but comprised four councillors who were all lay people.

It is not the function of this court to substitute its own judgment for that of the sub-committee.

Not only is Mr. Flynn's argument correct in principle, but it is supported by what was said by Schreiner, JA in ***The Standard Chartered Bank Swaziland*** case. The learned Judge of Appeal said the following at pages 11 and 12 of the judgment:

> *"There was in my view a basis for the Industrial Court, as the arbiter of fact, to have decided as it did that the second respondent's action was not so serious as to justify dismissal. It is not, as my predecessor Hannah CJ said in* ***Dlamini*** *, the function of this court simply to substitute its own judgment for that of the Industrial Court."*

It accordingly becomes necessary, for this court, to endeavour, to the best of its ability, to place itself in the position of the sub-committee conducting the inquiry into the allegations against the applicant.

The minutes of the sub-committee are before the court. Those minutes deal at length with the reasons for the sub-committee's conclusion on the merits of the case.

However those minutes also deal with the history of the matter and the sub-committee's reasons for not granting a postponement.

In dealing with the history of the matter the report reads:-

> *"The enquiry took place on the 21st December 1999 after four previous postponements, two of which came about as a result of the hearing dates not being suitable to Mr. Nxumalo's Attorney Mr. Ntiwane. The third such postponement came about because of technicality, which disqualified City Council's Attorney Mr. Earnshaw from going ahead representing the City Council.*
>
> *It must be pointed out that on the said date the matter was postponed indefinitely. However, on Friday the 10th December 1999, the Human Resources Manager wrote a letter to the respondent's attorney, Mr. Ntiwane. The said letter sought to advise Mr. Ntiwane that the matter was to take place on the 14th December, 1999, and asked Mr. Ntiwane to confirm his availability on the said date. Though not expressly stated in the letter, it had been the understanding that Mr. Ntiwane would be the one to notify his client about the enquiry date because then all*

communication were being done through him. Attorney Mr. Ntiwane communicated his availability on the same date by way of fax. However, Council itself also took steps of informing Mr. Nxumalo with a letter, he however could not be found at his place.

The 14th of December 1999, was the date at which the matter was supposed to take place. By this time the City Council had acquired the services of another attorney, namely, Mr. N. Hlophe from Millin and Currie. The matter was supposed to take off at 10.00 o'clock in the morning but Mr. Ntiwane and his client were not available until about after thirty five minutes later, when Mr. Ntiwane tendered his apologies and stated that he had not been able to see his client who was no where to be found.

The matter was postponed and Mr. Ntiwane was asked when he could be available. He stated that he could only be available for the said matter from the 10th January 2000, and not any earlier. Mr. Ntiwane's attention was drawn to the fact that Council was desirous to have the matter dealt with and finalized; and that it may be in the interest of his client to find another attorney to represent him. It was fronted out (sic) that Council's operations were being adversely affected by the absence from duty of the respondent whose matter had to be finalised soonest. As well as the fact that Council is still paying Mr. Nxumalo's salary which Council cannot afford if the matter was unduly delaying. Furthermore, his post is that of special duties, he is the City Council's legal adviser.

On the 14th day of December 1999, the Human Resources Manager wrote another letter to Mr. Nxumalo, in which it advised him that the matter was to go on, on the 21st December 1999, and that on the said date he

had to come with his representative as the matter would have to take off with or without his attorney. It further advised him that his attorney, Mr. Ntiwane had stated his unavailability and that Nxumalo therefore had to find another attorney or representative.

On the 21st December 1999, the date the matter was to take off. Mr. Nxumalo arrived but was not accompanied by his attorney, notwithstanding the clear advice contained in the letter of the 14th of December, 1999, which was served personally upon him on the 15th of December, 1999."

With regard to the issue of representation by an attorney the minutes read:-

"As concerns the issue of his representation by an attorney, it was found that the application for a postponement had not been well motivated in as much as no sound and acceptable reason was given on why Mr. Nxumalo did not have a representative then. Mr. Nxumalo had stated that he wanted to be represented by his specific attorney and not any other person. He further stated that in any event attorneys are closed at that time of the year. This was found to be unacceptable because Mr. Nxumalo had not specified the attorneys he had approached and would not find, but was only making a general statement, which was inaccurate.

The arguments of Mr. Nxumalo could not stand when viewed against the prejudice that Council was suffering as stated above, as well as the letter of the 24th December 1999 which advised him clearly of what was to happen on the day in question. The matter then went ahead." (The reference to the 24th December should have been to the 14th December).

I can well understand the sub-committee's irritation on being informed on the 14th December that the applicant himself was not available and that the matter could not proceed despite that date having been agreed by the applicant's attorney.

However, this was not the fault of the applicant himself but an oversight on the part of his attorney in having assumed that the applicant would be available and therefore not communicating with him.

The sub-committee was under the misapprehension that the Council would be prejudiced because the applicant's salary would continue to be paid. This, despite the fact that it had earlier been agreed that his salary would cease at the end of December. The sub-committee, having expressly agreed that the applicant should be represented by an attorney was, in my view, wrong in insisting that the matter should proceed because the applicant himself was an attorney.

I also regard it as highly probable that attorneys were closing their offices at the time of the year in question. That was stated in Mr. Ntiwane's letter of the 16th December to which there was no reply. In his judgment the learned judge *a quo* states that……."Mr. Ntiwane was indicating that further dates with the remainder of December 1999 would not be suitable. It is common cause that these are dates when most of the legal firms close for the festive season." The judge himself, as a former legal practitioner, would certainly be aware of that. It is true that the applicant himself took the view that he wanted Mr. Ntiwane, who was steeped in the case, to handle it, and that it was not reasonably practicable in any event to find another attorney at that time of the year within three working days. But the sub-committee may have been influenced by the fact that the applicant took the view that he wanted his own attorney.

It is clear from what I have set out above that the sub-committee was clearly wrong in thinking that the Council would be financially prejudiced if the hearing did not take place on the 21st December. The members were plainly wrong in this regard in view of the fact that the Council had resolved not to pay the applicant a salary beyond the end of December. It is important to bear in mind that all that the applicant sought was a postponement for two weeks. The applicant was hardly asking for the moon. Also, given that the applicant had been on suspension for three months during which time nobody had been appointed into his position, the elapsing of a further two weeks would hardly have been prejudicial to the operations of the Council, more particularly during this period.

The fact that what was sought was only a postponement for two weeks is what has weighed most heavily with me. The application was made on the 21st December 1999 which means that the two weeks would end on the 4th January 2000. The application was thus made four days before Christmas and the 4th January 2000 was three days after New Year. The two-week period would include both the Christmas and New Year Holidays leaving only a few working days. It is a matter of common experience that during that period for which the postponement was sought very little work is done.

I have done my best to put myself in the position of the sub-committee. It may be correct to say that there was a basis for their decision which was not in the circumstances grossly unreasonable, but, having regard particularly to the last mentioned point as well as all the other relevant facts and circumstances, I have come to the conclusion that it was unfair of the sub-committee to refuse the applicant's application for a postponement.

In my view the decision of the High Court was correct and the appeal must be dismissed, with costs.

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LEON, JP

I agree _____

STEYN, JA

I agree _____

TEBBUTT, JA

GIVEN AT MBABANE this……day of November, 2002

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