

## LEGAL REPRESENTATION AT A DISCIPLINARY HEARING

As the point of departure, disciplinary hearings are regarded as internal processes used by the employer in order to progressively discipline an employee who might have contravened any valid and reasonable rule, which the employee was aware of and/or was reasonably expected to be aware of.

A right to legal representation is not an absolute right to the employee, but a right which can be requested from the employer. The employer must make a decision based on the considerations (but not limited to) formulated in **Department of Finance, Economic Affairs & Tourism: Northern Province v Godwilly Mahumani**

In terms of the above case, the court held that a chairperson must consider the following when deciding to allow or refuse legal representation:

- a) The Nature of the charges brought
- b) Degree of factual and legal complexity involved in the hearing (where the respondent may require legal assistance to argue for him)
- c) Potential seriousness of the consequences of an adverse finding for the employee; and
- d) The nature of the prejudice to any employer in permitting legal representation, or

- e) The nature of the prejudice to the employee in refusing legal representation.

It is also important for the employer to have a disciplinary code that explicitly states that **“representation from outside and/or by Legal representative is not permitted”** if the Employer wants to oppose any application for the use of legal representation. However, the existence of the clause prohibiting the use of legal representation does not necessarily give the employer a right to outrightly and/or blatantly refuse the employee an opportunity to make use of legal representation.

If the employee indicates to the employer that he wishes to make use of legal representation, the employer must approach the matter with the above guidelines in mind and make a decision which will be appropriate in the circumstances.