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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 17951/16

DATE: 16/3/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....

DATE

SIGNATURE

In the matter between:

**J S
and**

APPLICANT

**THE MINISTER OF THE SOUTH AFRICAN POLICE SERVICES
RESPONDENT**

JUDGMENT

RANCHOD J:

[1] In his founding affidavit the applicant says the purpose of this application is to apply for an order:

‘ . . . directing the respondent to proceed with the Medical Board of Inquiry (the Board) relating to my application for ill health retirement, in

terms of Regulation 64 of the Police Services Act, Act no 68 of 1995. As the Honourable Court will take note from what is contained herein later, the Respondent commenced with an Inquiry in terms of Regulation 64 of the Police Services Act, following my application for ill health retirement. This Inquiry is still pending, but is not brought to finality by the Respondent. Instead of proceeding with the Inquiry, the Respondent made a unilateral decision, disregarding the pending Inquiry, that I am not medically incapacitated. As will appear from the prayers as contained in the notice of motion, I seek a mandamus against the Respondent to proceed with the Inquiry in terms of Regulation 64, alternatively and if this Honourable Court is of the view that the unilateral decision taken by the Respondent, is valid, I seek, as an alternative, an order that such decision be restricted and referred to the Board which is pending in terms of Regulation 64, in order to determine my capacity.'

[2] The respondent opposes the application for reasons that will become apparent below.

Background

[3] The applicant says he was diagnosed by his treating psychiatrist as suffering from post-traumatic stress disorder ('PTSD') as a result of which he was not fit to render any further services as a police officer to the respondent. He thus applied to be medically boarded.

[4] A Board was established by the respondent in terms of Regulation 64 of the South African Police Services Act No 68 of 1995 ('the Act'). Regulation 64 regulates the procedure to be followed when any member applies for medical boarding.

[5] The Board first convened on 3 October 2013 but was postponed to 31 October 2013 at the request of the respondent's representatives as the respondent wanted to appoint his own psychiatrist to investigate the

applicant's employability as well as for a decision to be taken about legal representation for the respondent.

[6] Instead of appointing a psychiatrist of his choice the respondent instead, almost a year later, summoned the applicant in terms of a Notice dated 4 September 2014 to appear before a 'Board of Inquiry' in terms of section 34 of the Act. The stated purpose for which the applicant was to appear before the board of inquiry was to '[inquire] into and make a finding and recommendation in order to determine whether you ... is (*sic*) fit to remain in the Service as a result/on account of indisposition, ill-health, disease or injury and or the fitness or ability of a member to perform his duties or to carry them out efficiently.' The applicant was asked to produce any relevant documents or objects at the hearing regarding proof of his illness in order to prove his case.

[7] The applicant and his attorney duly attended at the inquiry. It was again postponed at the request of the respondent on the basis that the respondent wished to have the applicant evaluated by a psychiatrist of his choice. The inquiry was accordingly postponed to 18 November 2014. It was also recommended that the applicant submit a new application on the basis of new evidence from his own psychiatrist.

[8] Further interactions took place between the applicant's attorneys and the respondent's representatives regarding some further requirements of the respondent including the completion of a 'Functional Medical Assessment Form'

[9] The inquiry that was scheduled to re-convene on 18 November 2014 was once again postponed – this time *sine die* due to the temporary incapacity of Lt. Col. D F Ledwaba of the respondent.

[10] The applicant's attorney wrote to the chairperson of the Board a letter dated 25 November 2014 expressing his concern at the delay in a final decision being taken pertaining to the applicant's medical condition. The

attorney also said that if there was any further information required the applicant was prepared to furnish it as far as he was able to. Importantly, he then says:

‘We are of the view that a *prima facie* case has been made out by our client and that a decision can in fact be made without further evidence.’

[11] It is evident that the applicant was of the view that the respondent could take a decision on the evidence already before the Board and that no further input was required – at least from the applicant himself.

[12] The chairperson of the Board, Lt. Col. M.L Bezuidenhout, however, replied that an objective decision could not be made without a medical assessment by the respondent’s Health Risk Manager (Alexander Forbes) and that before the applicant’s case could be referred for assessment he had to provide certain medical certificates as well as a copy of his identity document which were still outstanding. The documents were duly provided by the applicant.

[13] It is to be noted that the applicant did submit himself for examination to a psychiatrist and occupational therapist of the respondent’s choice on 26 February 2015 and 4 March 2015.

[14] Applicant’s attorney addressed several letters to Bezuidenhout and Ledwaba requesting urgent finalisation of the matter by convening the previously postponed inquiry. He was informed that Bezuidenhout had in the interim passed away.

[15] In a notice dated 24 June 2015 the applicant was informed by a Col. P.H Dlamini that the medical administration section of the respondent had considered the findings and recommendations of the Health Risk Manager and that it was decided by the respondent that the applicant must resume duties in an administrative post by 1 July 2015.

[16] The applicant, through his attorney objected to the notice to return to work albeit in an administrative post and demanded that the notice be withdrawn and that the inquiry which was postponed indefinitely be convened to proceed further failing which he would seek an urgent interdict against the respondent. The respondent did not reply to the letter.

[17] Further inquiries were addressed by the applicant's attorney to the respondent and eventually Lt. Col. Ledwaba replied. He merely regurgitated the events leading up to the applicant being called to resume duty but in an administrative post.

[18] The applicant disputes the view of the respondent's Health Risk Manager that he is able to return to work in an administrative capacity. (The applicant was previously in the respondent's Anti-Hijack Unit). The Health Risk Manager's conclusion seems to be primarily based on the report of the respondent's Occupational Therapist. However, I am not called upon to determine this dispute.

[19] The essence of the applicant's contentions is that he should have been allowed to make further representations at a reconvened Board of Inquiry.

[20] The respondent has raised a point *in limine* that this court lacks jurisdiction to hear this matter and disputes that it was necessary to reconvene the Board of inquiry as the Board had completed its deliberations after the last postponement even though it did not formally reconvene.

[21] During oral argument applicant's counsel said he was deviating to some extent from the written heads of arguments which were prepared by a colleague of his who had in the interim passed away. Counsel submitted, as I understood the argument, that the failure by the respondent to invite the applicant to a reconvened Board constituted an illegality as it violated his right to a fair administrative process. And once illegality is alleged a High Court has jurisdiction to hear the matter. For the reasons that follow that submission cannot be sustained.

[22] It is indeed correct, as the applicant contends, that he is entitled to a fair administrative process in his application for ill-health retirement. However, the Labour Relations Act 66 of 1995 (the LRA) and the collective agreements concluded in the Public Service Co-ordinating Bargaining Council ('the PSCBC') are relevant in this regard in that provision is made therein for dispute resolution of the kind in issue here.

[23] The applicant's complaint that the board of inquiry was not finalised and that the decision taken by the Section Head: Medical Administration that the applicant is not a candidate for medical boarding and should thus report for duty should be determined within the confines of the LRA and the PSCBC.

[24] Regulation 7.5.2 of Resolution 5 of the PSCBC deals with permanent disability leave and applications for ill-health benefits. It provides:

"7.5.2 Permanent disability leave:

- a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalise the process set out in (b) and (c) below.
- b) The employer shall, within 30 working days, ascertain the feasibility of:
 - i) alternative employment; or
 - ii) adapting duties or work circumstances to accommodate the disability.
- c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996."

[25] Section 24 of the LRA regulates disputes about collective agreements. It provides in relevant part that:

‘(1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.’

[26] Accordingly, if there is a dispute about ill-health retirement then it must be referred to statutory arbitration at the PSCBC. Section 24 of the LRA ousts the jurisdiction of this court to interrupt, apply and enforce collective agreements. A dispute has arisen between the applicant and respondent on the question whether the applicant is able to perform any type of duty in the police service as contemplated in clause 7.5.2(c) of Resolution 5.

[27] This adjudicatory route differs materially from a review application as the LRA provides that an arbitrator would be required to interpret and apply Resolution 5 and to make a determination whether in his or her review ‘an employee will never be able to perform any type of duties at her or his level or rank.’

[28] If, after referring the matter to the PSCBC in terms of Resolution 5, the applicant does not agree with its finding, his further remedy would be to have it reviewed in terms of the statutory arbitration review proceedings provided for in the LRA.

[29] The applicant can therefore, in my view, not take the dispute out of the confines of the LRA and the relevant collective agreements and bring it before this court for adjudication.

[30] Furthermore, the factual disputes about whether the Board completed its inquiry and whether it must be reconvened as well as whether the applicant

is too ill to report for duty are matters to be properly adjudicated in terms of the process provided for in Resolution 5 and the LRA. In terms of these processes oral evidence by various experts may be presented by the parties in order to reconsider the applicant's medical condition and its impact on his future employment.

[31] It is there that oral evidence may also be led on the question whether the Board had completed its inquiry and whether it was done in the correct manner.

[32] The applicant's cause of action, in my view, does not fall within the list of impugned conduct under the Promotion of Administrative Justice Act 3 of 2000. As I said, his remedy lies in the dispute resolution process provided for in the LRA, the PSCBC agreements and the Policy and Procedure on Incapacity Leave and Ill-Health Retirement ('PILIR'). (The PILIR is a policy document which regulates incapacity leave and ill-health retirement in the public service. It applies to employees of the SAPS only insofar as its provisions are not contrary to the SAPS Act. Clause 3.2.2 of the PILIR vests in an employer the right to 'consider on the basis of medical evidence the discharge of an employee on account of ill-health').

[33] In *Kotze v National Commissioner, SA Police Service and Another* (2008) 29 ILJ 1869 (T) this court was seized with a review application in terms of which the applicant sought to set aside the decision of the SAPS refusing his application for ill health retirement. The review was premised on the allegation that the relevant director in making the decision had failed to comply with Regulation 28(4)(a) by not informing him when the medical board would convene to consider his fitness to remain in the service. He charged that he was denied the right to be represented when the Board evaluated him. This court per Fabricius AJ (as he then was) held:

“[12] Having regard to applicant's argument that he was entitled to a fair administrative process (which I accept for present purposes), I am of the view that that particular classification of the dispute does not take it out of the confines of the Labour

Relations Act and the relevant collective agreements and places it within the ambit of the Administrative Justice Act. If that were otherwise, one could realistically imagine by the exercise of skilful legal drafting, an aggrieved person could merely as a result choose a forum allegedly best suited to him/her, either within the confines of the Labour Relations Act or the Administrative Justice Act. This could never have been the intention of the legislature nor, upon a proper reading of the judgment of the Constitutional Court, is a litigant entitled to do that. In any event, I am of the view that the relevant decision taken herein is not “administrative action” as defined in the Administrative Justice Act. I say that having regard to the nature of the power that was exercised by way of the mentioned letter of 19 December 2005.”

[34] *Kotze* was later endorsed by the Constitutional Court in *Gcaba v Minister of Safety and Security and Others (2010) 31 ILJ 296 (CC)* where Van Der Westhuizen J, writing for the majority, held:

‘[64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.’

[35] The respondent submits that the National Commissioner (‘the Commissioner’) of Police and the Section Head: Medical Administration were

not cited as respondents and this constitutes a material non-joinder. Whilst s206(1) of the Constitution vests political responsibility for policing in the Minister of Police, it is ultimately the National Commissioner who is charged with the control of the police service in terms of section 207(2) of the Constitution which provides that “[t]he National Commissioner must exercise control over and manage the police service in accordance with the national policy and directions of the Cabinet member responsible for policing. This power is given effect to by section 11(1) of the South African Police Services Act, 68 of 1995 (the SAPSA) which provides that “[t]he National Commissioner shall exercise control over and manage the police service in accordance with section 207(2) of the Constitution of the Republic of South Africa, 1996.’

[36] The respondent says it was the Commissioner, acting through the Medical Administration Department of the SAPS, who exercised the discretion to direct the applicant to resume his duties, hence the failure to join the National Commissioner as an interested party to the application constitutes a material non-joinder and a violation of Rule 53. Further, the applicant’s failure to join the Section Head: Medical Administration is also a material non-joinder and a violation of Rule 53. This is so because it is this official who declined his application for ill-health retirement acting in terms of the powers conferred on him by the National Commissioner under section 11, particularly section 11(2).

[37] In these circumstances, the point *in limine* as to jurisdiction must be upheld and I also find that there has been a material non-joinder of the Commissioner and the Section Head: Medical Administration. Accordingly I do not deem it necessary to deal with the rest of the issues raised relating to the validity or otherwise of the decision to order the applicant to resume his duties albeit in a different capacity.

[38] The application is dismissed with costs.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv. Welgemoed
Instructed by	: Schoeman & Associates
Counsel on behalf of Respondent	: Adv. R. Tulk
Instructed by	: The State Attorney
Date heard	: 6 March 2017
Date delivered	: 16 March 2017