



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case No: CA 5/2011

In the matter between:

DIRECTOR – GENERAL: OFFICE OF THE

PREMIER OF THE WESTERN CAPE

First Appellant

THE HEAD: HEALTH

DEPARTMENT OF HEALTH WESTERN CAPE

Second Appellant

and

SOUTH AFRICAN MEDICAL ASSOCIATION

Obo BERNADES HERMANUS BROENS

First Respondent

THE PUBLIC HEALTH AND WELFARE

SPECTORAL BARGAINING COUNCIL

Second Respondent

LAWRENCE RAMABULANA N.O.

Third Respondent

Heard: 01 March 2012

Delivered: 26 April 2012

Coram: DAVIS JA, MOLEMELA AJA and MURPHY AJA

JUDGMENT:

DAVIS JA

Introduction

- [1] This is an appeal against the judgment of Steenkamp J in which he found that the decision reached by third respondent was not so unreasonable that a reasonable arbitrator could not have arrived at the same decision; that is the dismissal of Dr Hermanus Broens, who was employed as a principal medical officer at the Bellville Community Health Centre, was unfair on both procedural and substantive grounds and that Dr Broens be reinstated retrospectively, although be appointed into a non-clinical equivalent position. With leave of the court *a quo*, the appellants approached this court on appeal.

Factual background

- [2] Dr Broens was diagnosed in June 2002 with a condition of anxiety and depression with a social phobia. He consulted a psychiatrist who recommended that he be redeployed in a non-clinical capacity. On 13 January 2003, he was advised that he would be redeployed and would now be required to perform vetting functions. This decision was later reversed by the appellants. In April 2003, he attended a further meeting with Dr Perez, the Chief Medical Officer, who informed him that a placement could not be found. Accordingly, Dr Perez advised that he would initiate proceedings to board Dr Broens as medically unfit.
- [3] On 12 November 2003, Dr Broens objected to being so boarded. He was referred to a state's psychiatrist for an assessment who recommended that

Dr Broens be placed in a non-clinical position. After 12 November 2003, it is common cause that Dr Broens did not return to work. He described his position as being in 'a state of bureaucratic limbo', in that no further communications were generated by the Department until 14 June 2004 when a letter headed 'termination of contract of employment' was sent to him stating:

'You are hereby notified that your contract of employment with the Department of Health, Provincial Government of the Western Cape is terminated with immediate effect.'

On 7 July 2004 a further letter was received by Dr Broens from the Department. In this letter he was informed:

'Due to the fact that you have been absent from official duty without prior permission for more than one calendar month since 13 October 2003 your services are deemed to be terminated due to misconduct in terms of s 17 (5) (a) (i) of the Public Services Act 1994 with effect from 13 October 2003.'

- [4] Dr Broens referred this decision to dismiss him to second respondent which appointed third respondent to conduct the arbitration. Third respondent found that [t]hough the employer called a witness, it failed to provide evidence of any wrongdoing on the part of the employee that would have necessitated the institution of disciplinary or dismissal procedures. The witness Dr Martell has no knowledge of applicant's absence and why and how it would have been necessary to dismiss the applicant. According to him he acted on instructions.'
- [5] On this evidence, third respondent found that there had been no case brought against Dr Broens which could have justified his dismissal.
- [6] Steenkamp J arrived at a similar conclusion. He found that no evidence had been produced to show that Dr Broens had been absent without permission. The evidence suggested a contrary conclusion. After 13 October 2003, the

appellants had not yet decided upon the position of Dr Broens and the latter was clearly under the impression that a suitable position was still being sought for him. Alternatively, it could have but did not proceed to implement medical boarding procedures.

Evaluation

- [7] The sole witness for the employer, Dr Martell, the chief medical officer testified that he received an instruction in June 2004 to draft a letter to Dr Broens which was then signed by the senior medical superintendent Dr Frantz. Under cross-examination, Dr Martell was unable to explain the basis upon which the dismissal letter had been written. The only relevant testimony was when he told the court:

'So my understating was that we'd looked to see if we could accommodate Dr Broens and that the discussions were then at that point when I first met him was around the fact that we're not able to accommodate that, and that if he was to continue to work for Metro District Health Services it would have to be in a clinical capacity.'

- [8] By contrast, Dr Broens insisted, when he testified, that his employment had not been terminated and that second appellant had continued to pay his salary so that he was under the clear impression that he remained employed. In his view, the hospital administration seemed unwilling or unable to deal with his problem and to address the question as to whether he could continue to be employed, even though he could no longer perform clinical work.
- [9] Dr Broens' impression, as he set it out in his testimony, was confirmed by the psychiatrist who examined him and prepared a report on 12 November 2003, which report contained the following:

'Worsened since July 2007 when saw psychiatrist (unspecified) in the context of finding clinical work the demanding and dissatisfaction at cause of being unfairly passed over for promotion and having his psychiatric history known

in his work context (sic). Has been off work since October 2002 with stalemate over how and in what capacity and where to return.'

In his report, the psychiatrist found that Dr Broens was able to function adequately and in a non-clinical capacity and made a recommendation to that effect.

[10] When the evidence is viewed accordingly, there is no basis to conclude that the decision arrived at by the arbitrator was not reasonable in the circumstances of this case. There is no clear evidence that he had been dismissed prior to the two dismissal letters of 14 June 2004 and 27 July 2004, or had willfully absented himself from his employment. To the contrary, second appellant's conduct provided Dr Broens with sufficient indication that he remained employed and that a decision had not been taken with regard to boarding or Dr Broens offering him an alternative position.

[11] In the second letter of 7 July 2004, appellants sought to rely upon s 17 (5) (a) of the Public Service Act (PROC 103 of 1994). It provides:

'An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place or duty.'

Appellant's sought to alter the reason for terminating Dr Broens' employment for the reasons given in the dismissal letter of 14 June 2004 by contending that he had absented himself for more than one calendar month and thus, in terms of s 17(5)(a) of the Public Service Act, his services were deemed to have been terminated.

- [12] Appellant was confronted with a number of difficulties, with regard to the application of this deeming provision, including the ruling of third respondent that both parties had recorded their consent to have the matter arbitrated by the second respondent. For this reason, the entire arbitration process was based on an agreement that the determination which was required was whether Dr Broens had been dismissed in terms of s 186 of the Labour Relations Act 68 of 1995 ("the Act"). Further, when the appellants terminated Dr Broens' contract of employment on 14 June 2004, no invocation of the provisions of the Public Service Act were raised. When the evidence is read as a whole, it is clear that appellants had not regarded Dr Broens as being absent from official duty without prior permission for more than one calendar month, given its conduct towards him, including the payment of salary. In addition, the second letter of 7 July 2004, in which s 17 (5)(a)(i) of the Public Service Act (PROC 103 of 1994) was invoked, runs counter to the first letter of the 14 June 2004. In summary, the evidence which was presented to third respondent without more cannot suffice to make appellants' case; hence it is unnecessary, on these facts, to deal further with arguments relating to s 17(5)(a)(i) of the Public Service Act.

The appropriate order

- [13] In dealing with third respondent's finding that Dr Broens be reemployed with immediate effect into a non-clinical equivalent position, Steenkamp J found that it was not reasonably practicable for the Department to reinstate Dr Broens in the same position, particularly in the light of the available psychiatric evidence. However the learned judge found that the award by the third respondent had sought reasonably to resolve the underlying dispute and accordingly stood to be confirmed.
- [14] The difficulty with the award is that there was no evidence that there was a designated post into which Dr Broens could be placed, no such evidence had been placed before the third respondent. Had third respondent called for such

evidence, he could then have determined whether it was possible, under the circumstances of this case and the organisation of second appellant, to appoint Dr Broens into a non-clinical position. In short, in the circumstances of this case, where third respondent finds that reinstatement is itself not a practical alternative, absent evidence, it does not appear to be appropriate for an order to be made which would place an employee into a different post which may not exist and which cannot be created.

- [15] In my view, given that it was clear that Dr Broens could no longer function in a clinical environment and that there was no evidence to the effect that he could be employed in a clearly designated non-clinical position, the only alternative remedy, which was reasonably available to third respondent, was to award compensation for the unfair dismissal. Hence, this dispute falls within the framework of s 193 (2)(c) of the Act, namely it is a case where reinstatement or reemployment cannot be required because it is not reasonably practicable for the employer to reinstate or reemploy the employee. Accordingly, the appropriate award in this case would have been to grant the maximum compensation, pursuant to s 194 (1) of the Act, that is 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal.

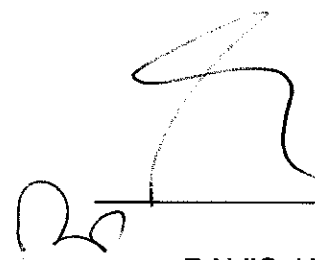
Order

- [16] For these reasons, therefore the appeal is upheld in part. While first respondent was substantially successful in the proceedings before the court *a quo*, the appellant has enjoyed some success on appeal; hence it would not be appropriate to make an adverse court order on appeal.

The order of the court *a quo* is set aside and replaced with the following:

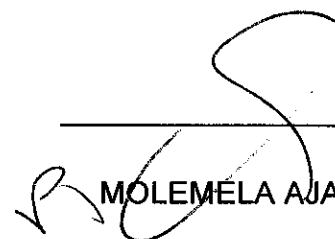
1. (a) The decision of the third respondent that the dismissal of Dr Broens was both procedurally and substantively unfair is confirmed.

- (b) The applicants are ordered to pay compensation to Dr Broens in the amount of 12 months of remuneration that calculated at Dr Broens' rate of remuneration on the date of dismissal.
 - (c) The applicants are ordered to pay first respondents' costs.
2. There is no award as to costs in respect of this appeal.



DAVIS JA

I agree,



MOLEMELA AJA

I agree.



Murphy AJA


Appearances:

For the Appellants: Mr Ewald DeVilliers-Jansen

Instructed by: State Attorney, Cape Town

For the Respondents: Mr Collin Kahanovitz

Instructed by: Bagraims Attorneys