

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: J173/08

In the matter between:

SPIES, JOHANNES MARTHINUS

APPLICANT

AND

**NATIONAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICE**

FIRST RESPONDENT

THE MINISTER OF SAFETY

AND SECURITY

SECOND RESPONDENT

**THE PROVINCIAL COMMISSIONER:
GAUTENG SOUTH AFRICAN
POLICE SERVICE**

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI J

- [1] This is an application in terms of which the applicant seeks an urgent mandatory order compelling and directing the respondents to immediately reinstate his salary and benefits.

- [2] It is common cause that the applicant has been absent from work since October 2006. According to the applicant, he was unable to tender his services because of ill-health. He states in his founding affidavit that he has been diagnosed by Dr Verster as suffering Post Traumatic Stress Disorder (PTSD) which was caused by a number of traumatic incidents which occurred during the course of his employment by the South African Police Services (SAPS).
- [3] It is also common cause that the SAPS addressed a letter to the applicant dated 28 August 2008, requiring him to report for duty failing which payment of his salary would be suspended. The applicant was further in the same letter offered an opportunity to make representation about why his salary should not be suspended.
- [4] The applicant responded to the above letter on the 12th September 2007, by stating that he had been booked off due to ill-health and that he was awaiting the outcome of his application for ill health retirement.

[5] He also indicated that his health condition emanated from conditions and circumstances that existed at the workplace and was regarded as injury at the workplace. The same letter went further to state that:

“I hope the above meet your approval and it will be appreciated if you can inform me as soon as possible of the outcome and before any suspension of salary might take place.”

[6] The SAPS responded to the applicant’s letter dated 20 September 2007, wherein it is stated:

“1. We acknowledge receipt of your representation letter dated 1 September 2007 and have noted the contents thereof.

2. The decision of this office is that you must report for duty within [7] working days of receipt of this letter.

3. Your failure to comply with this instruction will result in the immediate termination of your salary benefits.”

[7] On 16 October 2007, the applicant was invited to attend a meeting with the SAPS, the purpose of which was to discuss alternative placement for him.

- [8] The meeting to discuss the alternative position was convened on the 6th November 2006. The applicant indicated at this meeting, according to the SAPS, that he was not prepared to return to work under any circumstances.
- [9] Subsequent to the above meeting the SAPS took a decision to suspend the salary of the applicant. The decision to suspend the salary was implemented in November 2007.
- [10] In their answering affidavit, the respondents raised two **points in limine**. The two points concerned lack of urgency and jurisdiction of the Court to entertain the application.
- [11] During his argument counsel for the respondent indicated that respondents did not wish to pursue the urgency point because even if they were to be successful, such result would not dispose off the matter.
- [12] As concerning the issue of jurisdiction, counsel for the respondent argued that the applicant was not entitled to sick leave as he had exhausted his sick leave days in terms of resolution 7 of 2000 as amended by resolution 5 of 2001 of the

Public Service Coordinating Bargaining Council (the PSCBC).

Thus the applicant was on unauthorised leave since October 2006.

[13] Counsel for the applicant based his argument in support of the case of the applicant on the National Instruction 2/ 2004 (the National Instruction) issued by the National Commissioner of Police in terms of section 25 of the Police Act 86 of 1995. He further argued that the National Instruction formed part of the terms and conditions of employment.

[14] However, when invited by the Court to indicate whether, the National Instruction overrides resolution 5 of the PSCBC as amended, counsel for the applicant indicated that the resolution provides for a broad framework in as far as sick leave was concerned.

[15] Clause 7.5 of resolution 5 of the PSCBC deals with disability management and incorporates both temporary and permanent disability. In terms of temporary disability clause 7.5.1 provides for the extension of sick leave in the situation where the normal sick leave credit in a cycle has been exhausted.

[16] An employee whose disability has been certified as permanent is entitled to be granted a maximum of 30 working days period leave while the employer is ascertaining the feasibility of either alternative employment or adapting the duties to accommodate the circumstances of the employee. The employee who is incapacitated to the extent that he or she will never be able to perform any type of duties of his/her level or rank would (if the employer also is so convinced about this) be entitled to apply for ill health benefits in terms of the Government Service Pension Act 57 of 1973.

[17] Occupational injury and diseases leave may be granted in terms of clause 7.6 where employees, as a result of their work, suffer from occupational injuries or contract occupational diseases.

[18] Contrary to the argument presented by counsel for the applicant the purpose of the National Instruction is to regulate the management and administration of sick leave within the SAPS. Even though, the National Instruction is silent about resolutions 7 or 5, it would seem its real purpose was that of

providing mechanism for the implementation of the resolution.

In all respects the wording of the National Instruction, in as far as leave is concerned is identical to that of resolution 5 of 2001.

[19] Counsel for the applicant sought to persuade the Court that the right to full pay of the applicant arises from the provisions of clause 6 of the National Instruction. The relevant provisions of clause 6 reads as follows:

“(a) An employee who sustain an occupational injury, or who contracts an occupational disease, is entitled to occupational injury and disease leave with full pay, from the time that he or she becomes unable to work-

(i) until he or she can resume his or her work; or

(ii) until he or she is discharged from Service after an inquiry as contemplated in section 34 of the Act.”

[20] The right to full pay envisaged in clause 6(a) above is subject to the conditions set out in clause 6(b) which reads as follows:

“(b) An employee who is absent from work due to an alleged occupational injury, or an occupational disease, must complete and submit the documents

required for temporary incapacity leave and documents must be referred to the health risk manager for verification and validation of the period of absence.”

The applicant in his papers applied for permanent disability and not temporary incapacity.

[21] In my view the applicant has failed to make out a case for urgency in that he became aware on the 12th September 2002, that the respondent intended not to pay his salary if he did not report for duty. This decision was implemented in November 2007, but the applicant brought this application on the 29th January 2008.

[22] The question of whether the applicant was entitled to be paid for unauthorised sick leave is an issue that arises within the interpretation and application of resolution 7 of 2000 as amended by resolution 5 of 2001. It is therefore an issue which would appropriately be dealt with in terms of section 24 of the Labour Relations Act 66 of 1995, and be processed through the procedures of the Safety and Security Sector Bargaining Council (SSBC). The applicant has in my view failed in his

founding papers to show that he has a *prima facie* right to be paid his salary while on an unauthorised leave. I do not agree with the applicant's counsel that such right is found in the provisions of the National Instruction issued by the National Commissioner.

[23] The applicant has also failed to show in his papers that he had no alternative remedy. The alternative remedy lies in the referral of the dispute to the SSSBC for determination of interpretation and application of resolution 7 as amended.

[24] As concerning the issue of costs I am of the view that it would not be fair and proper to make an order as to costs.

[25] Therefore the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING : 29 January 2008

DATE OF JUDGMENT : 06 February 2008

APPEARANCES

For the Applicant : Adv. E. Raubenheimer

Instructed by : Johan Grows Prokureurs

For the respondent : Adv. T.J. Bruinders SC

Instructed by : Bowman Gilfillan Attorneys