

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN PORT ELIZABETH**

Case No: P36/2010

In the matter between:

BONISILE MAKADE

Applicant

AND

**PUBLIC HEALTH & SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL
JOHN CHEERE ROBERTSON
DEPARTMENT OF HEALTH,
EASTERN CAPE**

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

CAWE AJ

Introduction

- 1] The instant application is to review and set aside the Ruling by the Second Respondent, (the Commissioner) under case Number PHSHS 489-07/08 dated 16TH November 2009.

Background Facts

- 2] The Applicant was previously a nurse. With effect from June 2000 he was seconded to the office of the Member of the Executive Council for Health, (MEC) Eastern Cape Province. From 1 June 2001 he was appointed and translated to the position of Deputy Director which is a post level 12 post. At the time of his secondment to the MEC in 2001 the Applicant had qualified and practised as an attorney in Umtata, Eastern Cape.
- 3] On the 14 April 2003 the MEC suspended the Applicant by letter. The said letter was not

specific as to why the Applicant was being suspended. It merely stated:

“You are hereby advised that with effect from 14th April 2003, you should take a leave of absence pending the discussion on your future deployment in the office of the MEC. You are to report to this office on 22nd of April 2003 at 8h30.

- 4] According to the Applicant's Heads of Argument (paragraph 4) he was required to return his office keys and the Department's cellular phone.
- 5] The leave of absence was extended by the then Acting Superintendent General until the matter was finalised or until further notice. This was done per letter dated 30 April 2003.
- 6] On the 21 August 2003 the Applicant received a charge sheet, setting out that he was being charged with insubordination relating to the alleged incident of the 14 April 2003. The hearing was scheduled to sit on the 28 August 2003.
- 7] On the 24th March 2004 the applicant received a letter to the effect that the applicant's suspension was uplifted and the applicant was deployed in a post of Middle Manager (Deputy Director: Hospital Administration Victoria Hospital in Victoria East. He did not take up the offer at Victoria Hospital. The Department seems to have relented on its offer to deploy the Applicant to Victoria East and offered him a post at SS Gida Hospital as Middle Manager: Health.
- 8] In a letter dated 5th November 2004 the Applicant challenged the Third Respondent's offer of employment as an attempt to impose on him what he called:

“unilaterally varied terms of employment without even clearly defining my exact duties in the offered post.” He went on (in the same letter) to state that *“ I therefore hereby write to register my contemptuous rejection of your “final offer” and write to you to further unilaterally take a decision you deem appropriate in furtherance of your noble mission.”*
- 9] On 6 December 2004 the Applicant wrote a letter to the Superintendent General, requesting to be placed in the post that he occupied before his suspension. On that same day he reported for duty.
- 10] The department refused to let the Applicant tender his services at Bisho and instructed him to report to SS Gida Hospital Failing which he would be deemed to have absconded from work with effect from 8 December 2004.
- 11] The Applicant referred the matter to the First Respondent (PHWSBC), as an Unfair

Labour Practice dispute, in 2005.

12]The matter was duly arbitrated and an award was issued by Commissioner Pierre Naude. He recommended that the Applicant should exhaust all the Department's internal remedies before re-referring the matter to the PHWSBC. He also stated that until all the internal avenues had been exhausted by the Applicant the PHWSBC had no jurisdiction to hear the matter.

13]The Applicant decided to refer the dispute to the PWSBC again in 2007. This was after he had lodged a grievance internally. The matter was scheduled to be heard on the 7 June 2007 but the employer's representative did not attend and the Applicant's evidence was heard in default. The Applicant did not get a Ruling from the Chairperson until he decided to refer the dispute that culminated in the Ruling presently under review.

14]After hearing evidence from both parties the Commissioner requested that they address him on the effect of Section 17 (5) (a) (i) of the Public Service Act (PSA) of 1994 (Proclamation 103) (PSA), alternatively Section 17(3) (A) (I) of the PSA as amended. He then made a Ruling that:

- "1. The employee (Mr Makade) was dismissed from the Public Service by operation of law.*
- 2. The PHSDSBC does not have jurisdiction to hear the employee's dispute as referred.*
- 3. The employee's dispute referred under case reference PSHS 489-07/08 is dismissed.*
- 4. There is no order as to costs.*
- 5. Note: The parties agree that the period within which to bring review proceedings will only run from the date of receipt of this written Ruling.*

15]His reasons for finding as he did were that by not reporting for duty the Applicant had absconded. He then found the requirements of Section 17(5) (a) (i) are applicable. In paragraph 1-5 (pages 5) of his award the Commissioner states the following:

"I find the employee fell foul of S17 (5) (a) (i) in this regard and notwithstanding:

- His written challenges*

- *Whether or not the employer acted correctly*
- *The employer's subsequent "final offer" to the employee contained in a letter of 28 October 2004 and requiring the employee to report to SS Gida with effect from 8 November 2004 (this by way of a letter handed to the employee when he attended on the Director of Human Resource Management, Bhisho on 1 November 2004)*

His employment with the Department of Health terminated by operation of law.

The employee has argued with regard to the second incident that by referring the matter to the Bargaining Council and in the light of the tender of his services in his prior post, the deeming provisions did not come into effect.

This would be so but the employee would be required to report for duty as instructed (wrongly or rightly by the employer) and then to pursue the matter either through the Bargaining Council or Labour Court. The fact that the employee remained at his home and wrote the letter dated 6 November 2004 cannot amount to a proper tender of services in that:

- *The employee ignores the instruction to report to SS Gida*
- *He tenders his services in respect of his prior post (the gravamen of his dispute and which should have been referred timeously while rendering services as placed by the employer)*
- *The employee did not physically report for duty as instructed.*

In the circumstances I find that here to the deeming provisions of S 17(5) (a) (i) would also be applicable."

16]The Commissioner makes the comment (page 4 of the award) that:

"I am not convinced that the employee's period of employment was linked to that to the MEC as:

- No contract has been handed up*
- The Ministerial Handbook is a guideline*
- The provisions of the Ministerial Handbook at 14.1. (a)(ii).*

I am satisfied however, that irrespective of whether the employer acted correctly or not the employee's official duties would be those to which he was instructed to attend to by the employer from time to time."

17]The question is "Is the Ruling reviewable?". According to the Applicant the issues to be determined

"1. Whether the applicant's leave of absence or suspension was uplifted.

2. Was the applicant lawfully deployed or transferred to Victoria Hospital or SS Gida Hospital as the Middle Manager Administration or Middle Manager Health.

3. (i) audi alteram partem rule.

4. Whether the provisions of S175 (5) (a) applied;

4.1 (i) in what instances does it apply.

18]Regarding whether the Applicant's leave of absence was uplifted or not there can be no doubt that Applicant's Counsel misdirected himself when he argues that:

"With respect it is submitted that the third respondent if it had properly lifted the suspension should have returned the applicant to his previous place of employment without conditions. " Lift" in the South African Concise Oxford Dictionary means:-

"...formally remove or end."

The fact that the third respondent decided to file the

suspension and deploy the applicant to a suitable post was not lifting the suspension but was an act to offer a new post to the applicant.”¹

19]In my view there can be no doubt that the suspension was lifted. The Applicant actually states in paragraph 35 of this Heads of Argument that he actually reported for duty at the office of the Director: Human Resources. Had the Applicant not regarded his suspension as having been lifted he would not have reported for duty.

20]The Applicant rejected the offer of a transfer to SS Gida Hospital. Does the transfer amount to the suspension not being lifted? I am not convinced that that is so. As far as I am concerned the Applicant’s suspension was lifted but he decided to reject/ refuse his redeployment. This was a unilateral move by him. He actually wrote a letter wherein he wished to

“register my contemptuous rejection of your “final offer” and write you to further unilaterally take a decision you deem appropriate in the furtherance of your noble mission.”²

21]The Third Respondent may have erroneously suspended the Applicant but, there was clear “*bona fides*” on its part to lift the suspension and have Applicant report for duty albeit in another position. The Applicant could have challenged his redeployment while back at work. He elected to stay away.

22]Counsel for the Applicant argued that if there are no legislative prescripts regulating deployment or transfer of employees then employees have a right to refuse such deployment/transfer and declare a dispute if the employer insists. Counsel, however, does not cite his authority for such argument. I, therefore, find his argument not persuasive to be a ground for review in the instant matter.

23]It can not be said that the placing of the Applicant at SS Gida Hospital was unlawful simply because his duties were not explained to him as argued by his Counsel. No authority was given for this argument by counsel.

24]Finally, the contention by Applicant’s Counsel is that the Applicant did not abscond and that the issue was raised *mero motu* by the Arbitrator as opposed to the Third Respondent. This, according to Counsel, means that section 17(5)(a) (i) of the Public

1 Page 10 of Applicant’s Heads of Argument.

2 Page 48 of indexed bundle

Service Act of 1994 (Proclamation 103) does not apply to the instant case.

25]I beg to differ with the Applicant. Paragraph 38 of the Applicant's Heads of Argument reveals the opposite of what the Applicant states was raised by the Commissioner *mero motu*. The relevant paragraph reads as follows:

"It was only on the 6th December 2004 when the applicant presented himself in Bhisho for purposes of offering his services to the Department, that the applicant was presented with a letter dated 12 November 2004, indicating that if he failed to report for duty in the post of Midde (sic) Manager: Health, a post offered to him, without acceptable explanation, then he would be regarded as having absconded with effect from the 8th November 2004.

26]The preceding paragraph clearly indicates that the Third Respondent had raised the issue of abscondment with the Applicant. By the time the Commissioner asked to be addressed on same the Applicant had already been sensitized to it. That was back in 2009. Five years had elapsed with the Applicant not reporting for duty. There is no evidence that he reacted to the warning, by the Third Respondent, that he would be deemed to have absconded if he did not return to work. Within those five years he does not seem to have been bothered by the fact that the Third Respondent would invoke section 17 (5) (a)(i) of the Public Service Act of 1994.

27]I have taken note of the fact that the Applicant seeks to rely on several cases in support of his case. These are:

1. *"Hospersa & Another v MEC for Health (2003) 24 ILJ 2320(LC)*
2. *Phenithi v Minister of Education and Others (2008) (1) SA 420 (SCA)*
3. *Director General, Office of the Premier of the Western Cape & Another v South African Medical Association obo Broens & others (2001) JOL 26974 (LC)."*

28]I will not even attempt to distinguish these from the instant cases as they relate to totally different issues. The Applicant has merely enumerated them and stated what was held therein without applying them to his case.

Conclusion

29]The decision of the Arbitrator was well reasoned. I find that it is not so unreasonable that no other arbitrator could have come to the same decision. I, therefore, find no reason to interfere with the award.

30]In the premises I make the following Order:

1. The Application is dismissed.
2. I make no order as to costs

CAWE AJ

Appearances

For the Applicant: Adv. Nyangiwe

Instructed by: B Makadie Incorporated

For the Respondent: Adv. Simoyi

Instructed by: the State Attorney

Date of Hearing: 17 May 2011

Date of Judgement: August 2011