



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: J 825/11

In the matter between:

**SOUTH AFRICAN MEDICAL
ASSOCIATION**

Applicant

on behalf of

Dr E.D. MEYER – VAN DEN HEEVER

and

Dr S KHAN

and

UNIVERSITY OF LIMPOPO

Respondent

Heard: 20 April 2012

Delivered: 17 May 2012

Summary: Specific performance of employment contract – maternity leave – unilateral variation.

JUDGMENT

STEENKAMP J

Introduction

- 1] The applicant, the South African Medical Association, represents two of its members, Dr Ellenore Meyer-Van den Heever and Dr Shahista Khan. (I shall refer to them collectively as “the applicants”). It is important for the purposes of this case that both doctors are women. They say they are contractually entitled to 120 days’ paid maternity leave; and that the respondent, the University of Limpopo, has unilaterally amended that entitlement by converting it to unpaid leave.
- 2] The applicants seek specific performance of their employment contracts. They initially brought an urgent application. That application was struck from the roll for lack of urgency on 2 June 2011. On 10 June 2011, the applicants filed an amended notice of motion seeking the following relief:
 - 2.1 ‘Declaring that Dr Meyer-Van den Heever’s conditions of service remain those set out in her employment contract forming Annexure NS1 to the founding affidavit, incorporating the conditions of service forming Annexure NS3 to the founding affidavit (“the conditions of service”), but subject to any salary increments subsequent to the conclusion of her employment contract.
 - 2.2 Declaring that Dr Khan's conditions of service remain those set out in her employment contract forming Annexure NS 2 to the founding affidavit, incorporating the conditions of service, but subject to any salary increments subsequent to the conclusion of her employment contract.
 - 2.3 Declaring that the amendments purportedly effected to the contract of employment of Dr Meyer-Van den Heever and Dr Khan by the circular forming Annexure "NS4" to the founding affidavit and the respondent's "human resources policies and procedures" document referred to in the founding affidavit ("the circular and the policy document") and/or “LL9” to the answering affidavit are unlawful,

constitute a breach of contract, invalid and of no legal effect.

- 2.4 Directing the respondent to pay to Dr Meyer-Van den Heever maternity leave of 120 days on full salary in terms of clause F13 of the conditions of service where maternity leave is taken and sick leave up to 120 calendar days in a three-year cycle on full pay in terms of clause 3.3 of the employment contract, provided that she is sick and the conditions specified in her employment contract and the conditions of service are satisfied.
 - 2.5 Directing the respondent to pay to Dr Khan maternity leave of 120 days on full salary in terms of clause F13 of the conditions of service where maternity leave is taken and sick leave up to 120 calendar days in a three-year cycle on full pay in terms of clause 3.3 of the employment contract, provided that she is sick and the conditions specified in her employment contract and the conditions of service are satisfied.
 - 2.6 Declaring that the respondent was and is contractually bound to consult with Dr Meyer-Van den Heever and Dr Khan before amending their contracts of employment.
 - 2.7 Directing that the costs of the application be paid by the respondent.
 - 2.8 Granting the applicant further and/or alternative relief.'
- 3] Although both doctors have since left the University's employ, both of them have gone on maternity leave and have had their children. Therefore they persist with the monetary relief sought. I am therefore satisfied that the application has not become moot.

Jurisdiction

- 4] The applicants ground their claim for specific performance in s 77(3) read with s 77A(e) of the Basic Conditions of Employment Act¹ (BCEA).

¹ Act 75 of 1997.

- 5] Even though the applicants may have sought other relief or pursued other remedies, this court has jurisdiction to entertain a claim for specific performance. In *Fatima Abrahams v Drake & Scull Facilities Management SA (Pty) Ltd*² I pointed out that jurisdiction is founded on the pleaded claim, and not on some other claim that is not pleaded.

Background: the contractual provisions

Dr Meyer-van den Heever

- 6] Dr Meyer was employed by the University under a full-time fixed term contract for a period of five years in the position of senior lecturer. She started working for the University on 1 September 2010. Clause 2 of her contract of employment provides that:

“Your appointment is subject to –

the provisions of the Higher Education Act, 1997 (Act 101 of 1997), the conditions of service determined thereunder, the unemployment insurance act, 1966 (Act city of 1966), the regulations promulgated thereunder and present and future amendments to the aforementioned acts, conditions of service and regulations.

Both the University of Limpopo conditions of service and the staff code are available on request at the Human Resources Department on the day you commence duties which obligate you to ascertain yourself [*sic*] with the contents thereof.”

And clause 3 provides for –

“120 calendar days sick leave in a three year cycle (medical certificate must be provided).”

- 7] The University’s conditions of service further provided for 120 days’ maternity leave “with full pay”.

2 [2011] ZALCCT 30 (11/11/11) paras [28] – [36], with reference to *SAMSA v McKenzie* (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA).

Dr Khan

8] Dr Khan was employed as a full-time senior lecturer on a three year fixed term contract. Although she signed her contract of employment afresh in January 2011, the terms and conditions of employment were agreed to in October 2010 and are embodied in the contract.

9] Dr Khan's letter of appointment drew her attention to the fact that –

“...all appointments are subject to the articles contained in the conditions of service of the University. Appointments are further subject to decisions lawfully taken by Council of the University on matters pertaining to its employees.”

10] Those “conditions of service” were the same as those pertaining to Dr Meyer, ie including the provisions of four months’ (120 days’) paid maternity leave.

Amendments to the conditions of employment

11] On 10 December 2010, the University sent out a document entitled “Information Circular: New Human Resources Policies.” It was not sent to Dr Khan. It was sent to Dr Meyer's university email address, but she was on leave at the time and only received it in January 2011.

12] The circular stated:

“The University will be implementing the following policies amongst others in the new year with effect from 1 January 2011.

- Retirement Policy
- Leave Policy
- Dependants [*sic*] Study Benefits Policy
- Working Hours Policy
- Subsistence Allowance Policy

- Education, Training and Development Policy
- Employee Study Assistance Policy
- Disciplinary Policy

The Human Resources Department is currently working on the full implementation of these and other policies. There will be on-going communication regarding all the changes that will be effected as a result of the new policies. Appendix A for details.”

- 13] Appendix A to the circular provided for four months’ unpaid maternity leave for all “non-permanent” employees. It is common cause that this incorporated academic personnel employed on fixed term contracts, such as the applicants.
- 14] The applicants did not agree to these amendments. They were being prejudiced, as they were both pregnant at the time.
- 15] The university alleges that their consent was not required; alternatively, that it was obtained, either through consultation with a body known as the Joint Bargaining Forum or on the principle of majoritarianism.

Legal questions

- 16] The legal questions that arise from these facts may be summarised as follows:
- 16.1 Are the terms of employment contractually enforceable?
- 16.2 Did the University unilaterally change the terms of employment?
- 16.3 If so, was the University empowered to do it?
- 16.4 If not, did the University seek and obtain consensus?

Are the terms of employment contractually enforceable?

- 17] The applicants base their claim squarely on the provisions of their

employment contracts, read with the University's conditions of service at the time; and the provisions of s 77 (3) of the BCEA.

- 18] The University conceded that maternity leave formed part of the applicants' conditions of service, despite the fact that it is referred to as a "policy".
- 19] As I have stated above, and having had regard to the authorities considered in *Abrahams v Drake & Scull*³, the University was not entitled to amend the applicants' conditions of employment unilaterally. Those terms are contractually enforceable. In *Drake & Scull*, I had regard to the following *dictum* in *Wiltshire & others v University of the North*⁴ that makes the position clear:

"Section 151(2) of the Labour Relations Act establishes the Labour Court as a superior court with the authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction. This read with section 158(1) of the Labour Relations Act establishes that this Court has jurisdiction to make an order of specific performance."

Was there a unilateral variation?

- 20] It is clear from the facts that the University did unilaterally amend the applicants' conditions of employment relating to maternity leave (subject to the discussion on possible consent through the Joint Bargaining Forum hereunder).

Was the university empowered to amend the conditions of service unilaterally?

- 21] But, argued Mr *Hulley*, those conditions are subject to s 34(3) of the Higher Education Act.⁵ That section provides that:

3 *Supra* paras [32] – [41].

4 [2006] 1 BLLR 82 (LC) para [64].

5 Act 101 of 1997.

“The [university] council must determine the conditions of service, disciplinary provisions, privileges and functions of the employees of the public higher education institution, subject to the applicable labour law.”⁶

- 22] The argument is then, if I understood it correctly, that the University was empowered to change the applicants’ conditions of service, because there was no non-variation clause in the contracts; and because the University did act in accordance with “the applicable labour law”.
- 23] As will become more apparent in my further analysis of the arguments raised on behalf of the University, I do not agree. The University pointed out, quite rightly, in its heads of argument that the BCEA prescribes minimum periods of leave and attendant benefits. That takes its argument no further. The parties had contracted to extend those benefits to 120 days’ paid maternity leave; and the University altered that benefit without the applicants’ consent. The fact that it is not in breach of the BCEA is irrelevant to the applicants’ case (and, therefore, the University’s defence).
- 24] The alternative argument is that the University did comply with “the applicable labour laws” by engaging its employees in collective bargaining before amending their conditions of employment. I shall now consider that argument.

Did the university seek and obtain consensus?

- 25] The University’s alternative argument is that it did, in fact, obtain consensus through a process of collective bargaining with an entity known as the Joint Bargaining Forum (JBF).
- 26] It is uncontested that the applicants did not nominate the individuals on the JBF to represent them; in fact, their uncontested evidence that they gave no mandate to anyone on that body to represent them.
- 27] The University relied in its argument on a case arising on appeal from the old Industrial Court, *Ramolesane & Another v Andres Mentis & Another*.⁷

⁶ His underlining.

⁷ (1991) 12 ILJ 329 (LAC).

But in that case, the employees concerned were members of a trade union; and it was correctly held that, based on the principle of majoritarianism, the trade union members were bound by agreements reached by the union on their behalf.

- 28] In the case before me, Drs Meyer and Khan are members of a trade union – SAMA – that represents them in these proceedings. That union was not part of the JBF and did not participate in its deliberations. It did not consent to the unilateral change to the applicants' conditions of employment, nor to any of its other members'.
- 29] Of course, a majority union and an employer may conclude a collective agreement that binds non-parties in terms of s 23(1)(d) of the Labour Relations Act⁸ - but only if those employees are identified in the agreement and it expressly binds them. That did not happen in this case.

⁸ Act 66 of 1995.

Conclusion

30] The applicants are entitled to the relief sought. The University unilaterally varied their conditions of employment. It was not entitled in law to do so. In terms of ss 77A(e) and 77 (3) of the BCEA, the applicants are entitled to specific performance.

31] The applicants are also entitled to their costs.

Order

32] Neither Dr Meyer nor Dr Khan seeks relief in the form initially set out in the notice of motion any longer, as they have both left the University. However, the relief sought is not moot, as they have both taken three months' (unpaid) maternity leave. I therefore grant the relief in the amended form argued for, in the following terms:

32.1 It is declared that Dr Meyer-van den Heever's conditions of service remained those set out in her employment contract forming annexure "NS1" to the founding affidavit, incorporating the conditions of service forming annexure "NS3" to the founding affidavit ("the conditions of service"), but subject to any salary increments subsequent to conclusion of her employment contract.

32.2 It is declared that Dr Khan's conditions of service remained those set out in her employment contract forming annexure "NS2" to the founding affidavit, incorporating the conditions of service, but subject to any salary increments subsequent to conclusion of her employment contract.

32.3 It is declared that the amendments purportedly effected to the contracts of employment of Dr Meyer-van den Heever and Dr Khan by the circular forming annexure "NS4" to the founding affidavit and the respondent's "Human Resources and Policies and Procedures" document referred to in the founding affidavit, ("the circular and the

policy document”) and “LL9” to the answering affidavit are invalid and of no legal effect.

32.4 The respondent is ordered to pay to Dr Meyer-van den Heever maternity leave of 3 months on full salary in terms of clause F13 of the conditions of service plus interest thereupon from the date of this judgement.

32.5 The respondent is ordered to pay to Dr Khan maternity leave of 3 months on full salary in terms of clause F13 of the conditions of service plus interest thereupon from the date of this judgment.

32.6 The respondent is ordered to pay the applicants’ costs.

Steenkamp J

Judge of the Labour Court of South Africa

APPLICANTS: Adv F Boda

Instructed by Eversheds.

RESPONDENT: Adv G Hulley

Instructed by Maserumule Inc.

