



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no:JR 1487/2011

In the matter between:

JJ FELTMANN

APPLICANT

and

MINISTER OF SAFETY AND SECURITY

FIRST RESPONDENT

SECTION HEAD: MEDICAL ADMINISTRATION

SOUTH AFRICAN POLICE SERVICES

SECOND RESPONDENT

Application argued: 29 September 2015

Judgment delivered: 1 October 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The applicant is a warrant officer in the South African Police Services (SAPS). In 2010, the applicant applied for ill-health retirement on account of his having been diagnosed with post-traumatic stress disorder. In a letter addressed to the applicant on 24 December 2010, the second respondent advised the applicant that his application for ill-health retirement had been refused and that he was required to resume his duties in an alternative, suitably low-stress position on or before 10 January 2011. The second respondent is the party who made the decision under review. In this application, the applicant seeks to review and set aside that decision.
- [2] The founding affidavit deposed to by the applicant sets out a chronology of events relevant to the decision taken by the second respondent and subsequent developments. The applicant refers specifically to an assessment report prepared by a Ms E Kingsley and a Dr S Motaung, annexed to the founding affidavit, which recommends that the application for ill-health retirement be declined and that the applicant should be considered for an alternative administrative position within the SAPS with minimal exposure to traumatic incidents and material. It was also recommended that the applicant attend a comprehensive vocational rehabilitation programme to improve his work skills and to assist with suitable alternative placement options, and that the applicant's current psychiatric treatment regime be reviewed and adjusted where necessary, and that regular psychotherapy sessions should continue. The recommendation

made in the report was effectively endorsed by the second respondent, whose decision is reflected in almost identical terms.

- [3] What is remarkable about the founding affidavit is that it makes no reference to the basis on which the review is sought and contains no grounds for review; indeed, it is not clear from the founding papers whether the applicant contends that the decision taken by the second respondent constituted administrative action (either for the purposes of the Promotion of Administrative Justice Act, 3 of 2000, or for any other purpose) nor is it clear, assuming for present purposes that the applicant seeks an administrative law remedy, precisely what the basis for review might be. In his replying affidavit, for the first time, the applicant makes clear that the present application is brought in terms of s 158 (1) (h) of the Labour Relations Act (LRA), a provision which empowers this court to review any decision taken or any act performed by the state in its capacity as employer on any grounds that are permissible in law. Given the broad basis on which this review jurisdiction is expressed, it is incumbent on an applicant at least to make out a proper case for review and specifically, to state the basis on which this court's intervention is sought. No such basis is articulated in the replying affidavit or the heads of argument filed on the applicant's behalf. The replying affidavit introduces what would appear to be a number of challenges to the recommendation of the health risk manager, the failure to convene a board of enquiry, and the failure by the health risk manager to have regard to the relevant information and in particular, the report submitted by Dr Grove. Dr Grove, who examined the applicant in 2009, diagnosed post-traumatic stress disorder and expressed the opinion that the applicant could be reintegrated into the SAPS only with great difficulty. Subsequent examinations were carried out by another psychiatrist, Dr Allwood, and an occupational therapist, Ms Naidoo. Dr Allwood expressed the opinion that the applicant was severely disabled and would not be able to be redeployed in the SAPS or in any related work. Ms Naidoo expressed the view that the applicant was not suitable to return to his previous occupation, but that he should be re-assessed in six months and that the vocational rehabilitation programme could explore alternate employment options. The

applicant's primary complaint, it would appear, is that the second respondent based his decision on the opinion expressed by Ms Naidoo and that to the extent that his opinion contrasted with that expressed by a psychiatrist to the effect of that the applicant was permanently unfit for any duties within the SAPS, the second respondent's decision is 'entirely inexplicable and irrational'.

- [4] It was only during the course of argument that the precise basis for the review application was articulated – the applicant's counsel relied on the doctrine of legality in support of the relief sought.
- [5] I pause at this juncture to restate the well-established rule that in motion proceedings, an applicant's case stands or falls by the notice of motion and the founding affidavit. In *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) at paragraph 29, the Constitutional Court said the following:

It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. The case cannot be made out in the replying affidavit for the first time.

This approach has been applied by this court. For example, in *De Beer v Minister of Safety and Security and another* (2011) 32 ILJ 2506 (LC) the court held that:

It is a trite principle that in application proceedings the affidavits constitute the pleadings and the evidence, and that an applicant must make out a case in its founding papers.

The founding affidavit should contain, in the evidence it sets out, all of the averments necessary to secure the relief sought. As was pointed out by Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D):

Where proceedings are brought by way of application, the petition is not the equivalent of a declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that the case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at trial and if there is absent from the petition such facts as would be

necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.

- [6] In my view, the founding papers disclose no cause of action. There is no more than a faint but bald averment to the effect that the decision was unjustifiable and not rationally linked to the objective facts. What the founding affidavit discloses is that the upshot of the applicant's complaint amounts to his dissatisfaction with the outcome of his application for ill-health retirement; in other words, a challenge to the correctness of the decision. The present application accordingly stands to be dismissed simply on the basis that the applicant has manifestly failed to make out a cause of action (and in particular, a case for review) in his founding affidavit. However, even if I were to afford the papers a generous reading and have regard to the arguments submitted on the applicant's behalf concerning the application of the principle of legality in the context of review, for the reasons that follow, the outcome would be no different.
- [7] In *MEC for Health v Weder* [2014] 7 BLLR 687 (LAC), the Labour Appeal Court recently examined the review powers conferred on this court by the LRA. The court observed that irrespective of the classification of the decisions of the appellant in that instance as administrative action, the appellant's actions were open to review on the ground of legality. The court went on to note that the principle of legality required public functionaries to act within the powers granted to them by law, and further, required the executive and public functionaries to exercise their powers for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. An expression of the former principle is to be found in the seminal judgment of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and others: in the: ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC), where the court said the following:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass

constitutional scrutiny the exercise of public power by the Executive another functionaries must, at least, comply with this requirement.

- [8] In other words, a legality review is competent either where the functionary exercised a power that he or she had no power to perform (in other words, acted *ultra vires* his or her power) or acted in a manner that is irrational, in the sense that he or she acted capriciously or arbitrarily. In essence, this requires that the functionary's actions or decisions are rationally related to the purpose for which the power in question was given.
- [9] On the basis that these principles are applicable for present purposes to the decision taken by the second respondent, the relevant prescripts are contained in what was referred to as the National Instruction 2/2004 and the Policy and Procedure on Incapacity Leave. The policy sets out the various types of leave available in cases of illness, disease and various degrees of incapacity. Applications for ill-health retirement or permanent capacity are regulated by the policy. The policy provides in paragraph 7.4.3 that if both the employer and employee are convinced that the employee never be able to render an effective service at his or her level rank they may proceed with the process of termination of service on grounds of ill-health. That process is regulated by paragraph 8. Paragraph 8.6 deals with the assessment process. For present purposes, it is sufficient to state that the process must be conducted by the health risk manager, having regard to the factors listed in paragraph 8.6.2. The health risk manager may request additional information which may emanate either from the employer, an external source or service provider. When sufficient information is available to the health risk manager, the employer must apply the assessment criteria set out in paragraph 8.6.6. Once he was she has done so, the health risk manager must make a report to the employer it then falls to the employer, after a consideration of the report, to decide whether the employees incapacity is of a permanent or temporary nature, whether to grant incapacity leave, the outcome of the investigation having regard to alternative employment or the adaptation of the employee's duties work circumstances to accommodate the employee and whether to retire the employee on grounds of ill-health.

- [10] In the present instance, the SAPS took the view that the applicant had indeed suffered a disability. It is not in dispute that the applicant suffers from post-traumatic stress syndrome. What the SAPS did not accept was that the applicant could never be employed again in the service. The second respondent considered that the applicant may be capable of working in a different environment and in coming to this conclusion, it had regard to the findings of the occupational therapist, Ms Naidoo. In her report, Ms Naidoo stated that the applicant himself was of the view that he could work again, although he felt that he could no longer work for the SAPS. She considered him to be a suitable candidate for vocation rehabilitation and recommended that he be reassessed in six months' time. The reason advanced by the applicant for his inability to continue working was recorded by Ms Naidoo. She expresses it thus:

He feels he is unable to cope with the organisation and politics within the SAPS. He reports that he attempted to resign from the SAPS but this was refused.

Ms Naidoo notes further that the applicant expressed the opinion that he could work again, and that he could be involved in the running of a hotel or bed and breakfast.

- [11] I fail to appreciate on what basis it can be said that the decision taken was not rationally connected to the information that served before him. To the extent that the applicant submits (again, for the first time in argument) that the SAPS was as a matter of law entitled only to consider the report of a psychiatrist and that it was not entitled to have regard to Ms Naidoo's report, there is nothing in the national instructional the policy to support that submission. Annexure G to the policy (guidelines for incapacity assessment - handed up for the first time in argument) simply states that incapacity applications in psychiatric grounds ought to be assessed and treated by a psychiatrist. In the present instance, this was done. The policy does not state that any such application should only be assessed by psychiatrist, or that the opinion of other medical professional is irrelevant. In so far as any return to work is concerned, the guidelines state (in paragraph 2.5.6) that the return of a patient to work where he or she is reminded of past, traumatic

events can exacerbate the situation, but that this does not preclude the patient from working in a different environment, where these factors are not present.

[12] In short, the decision taken by the second respondent requires the applicant to do no more than undergo treatment while working in an alternative environment with appropriate psychiatric treatment in order to review his situation. That decision is consistent with the purpose of the policy – its stated purpose is to prevent premature and incorrect decisions on the one hand, and to ensure the genuine cases are not discriminated against on the other. By recognizing the applicant's condition and affording him the opportunity of alternative employment in a non-stressful environment with ongoing rehabilitation and review, the decision of the second respondent in my view is manifestly rationally connected to the purpose of the policy, and there is accordingly no basis for this court to interfere with it. There is no basis therefore for this court, as it was invited to do, to remit the decision for reconsideration after further investigation and updated reports.

[//] Mr Hulley SC, who appeared for the respondents, charitably did not pursue the issue of costs and I intend therefore to make no order as to costs either in respect of the proceedings when the application was finally argued or the previous occasions when for one or another reason, the application did not proceed and costs were reserved.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv E van As, instructed by Len Dekker and Associates

For the respondents: Adv G Hulley SC, instructed by the state attorney.

Labour Court