

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

REPORTABLE

CASE NO. J1099/01

IN THE MATTER BETWEEN:-

THE MINISTER OF JUSTICE

1ST APPLICANT

THE DEPARTMENT OF JUSTICE

2ND APPLICANT

AND

BOSCH, DAWIE, N.O.

1ST RESPONDENT

WEPENER, CHRISTO

2ND RESPONDENT

**GENERAL PUBLIC SERVICE SECTORIAL
BARGAINING COUNCIL**

3RD RESPONDENT

JUDGMENT

GUSH, A J

1. The first and second Applicant apply to review and set aside the award of the first respondent who found that the second Applicant had committed an unfair labour practice related to a related to the demotion of the 2nd Respondent and the provision of benefits to the second Respondent.
2. The parties agreed to proceed by stating a special case. It is recorded in the stated case that as the tape recordings of the arbitration proceedings were lost, it was not possible to file a complete record of the proceedings. The award by the 1st Respondent is reported and the parties agreed that, in the

absence of a record, and for the purposes of arguing the merits they would rely on the award reported as:

Department Of Justice V Wepener (2001) 22 ILJ 2082 (BCA)

3. The parties agreed that the Judgement was to be accepted in all respects save for:-

" those aspects dealing with the 1st Respondent's interpretation of the law, the conclusion of the findings on the points in dispute and the award (order) that was granted and the third bullet point of paragraph [17] of the award. In so far as the third bullet point is concerned the parties agree that the statement should be understood to mean that it was common cause that the 3rd Respondent was a competent person as contemplated in section 9(4) of the Magistrates' Court Act."

4. The parties agreed further that the question of law that the Court was to determine was whether the 1st Respondent's award stood to be reviewed and set aside "on the grounds that were listed in the stated case" under the heading *THE APPLICANTS CONTENTIONS*.
5. Although the background to the dispute is set out in the reported award of the 1st Respondent, I will briefly summarise it here.
6. The 2nd Respondent, an employee of the 2nd Applicant, held the rank of Senior Administrative Clerk. In 1995 the Respondent had been appointed to the relief component based at the Randburg Magistrates' Court. This did not in any way alter his rank. The relief component's responsibility was to relieve other staff employed by the 2nd Applicant. The relief functions performed by the relief component were confined to the roles of interpreter, State

Prosecutor or Acting Assistant Magistrate. The posts and locations where the relief component would perform and the nature of the relief function were determined and decided by the Chief Magistrate of Randburg from time to time.

7. Section 9(3) and (4) of the Magistrates Courts Act (the Act) governs the appointment of acting assistant magistrates.
8. At the time of the dispute Section 9(3) of the Act provided inter alia that “a person occupying the office of Chief Magistrate may appoint any competent person to act as assistant magistrate.” This sub section specifically provided for the appointment of “any other competent person” to act as an assistant magistrate whenever by reason of absence or incapacity an assistant magistrate is unable to carry out the functions of his or her office, or whenever such office becomes vacant, in the place of the absent or incapacitated magistrate during the absence or until the vacancy is filled.
9. Section 9(4) also allowed the appointment of a competent person to act as an assistant magistrate but specified that such acting appointment should be temporary.
10. From the date of his appointment in 1995 to the end of January the 2nd Respondent had been appointed temporarily to act as an assistant Magistrate in terms of section 9(4) of the Act. Where the appointment was for a duration of in excess of one month the appointment was renewed at the end of each month by the chief magistrate. It was common cause that the 2nd Respondent was only appointed to act in accordance with section 9(4) and consequently could only act on a temporary basis.
11. On the 31st January 2000 the 2nd Applicant's Regional Head for Gauteng informed the 2nd Respondent that he was *"relinquished of all functions of a*

judicial officer with immediate effect".

12. The matter came before the 1st Respondent who was required to determine whether the Applicant had committed an unfair labour practice against the 2nd Respondent by:-

12.1 unfairly demoting the 2nd Respondent; and

12.2 committing unfair conduct relating to the provision of benefits.

13. The 1st Respondent was required to decide two further subordinate issues namely;

13.1 whether the withdrawal of certain functions can amount to a demotion; and

13.2 whether non patrimonial losses can be taken into consideration when setting compensation.

Department Of Justice V Wepener Supra (at p2084 F & G)

14. The question of law which the parties require this Court to determine was specifically set out in the stated case viz whether the 1st Respondent's award stood to be reviewed and set aside on the grounds set out in the special case under the heading "*Applicants contentions*".
15. Given that the parties specifically agreed the grounds of review I include them as they appear in the stated case.

"The Applicants contend that:-

1. *to the extent that the 2nd Respondent sought reinstatement of his*

judicial functions, he ceased to be an employee as defined by the Labour Relations Act and the 1st Respondent:

1.1 lacked jurisdiction to hear the dispute: and

1.2 lacked the power to make an award which had the effect of reinstating the 2nd Respondent to those functions.

- 2. the 1st Respondent accordingly exceeded his powers and the award stands to be reviewed and set aside.*
- 3. the 2nd Respondent was not qualified to be appointed as an Acting Additional Magistrate. Although the 2nd Respondent was considered by the 2nd Applicant to be a competent person as contemplated in s9(4) of the Magistrates Courts Act, that section is subject to s10 of the Magistrates Courts Act which stipulates that no person may hold appointment as magistrate unless he or she “has passed the civil service lower examination declared by the Public Service Commission to be equivalent thereto”. The 2nd Respondent was accordingly disqualified by operation of law and not by any “act or omission” as contemplated in item 2(1)(b). The 1st Respondent accordingly failed to properly apply his mind and exceeded his powers and the award stands to be reviewed and set aside.*
- 4. Section 9(4) of the Magistrates Courts Act contemplates the appointment of a person on a “temporary basis” only. The 2nd Respondent had already been appointed as an Acting Additional Magistrate for a period of approximately five years and accordingly he had no right or legitimate expectation to continue in that post. The 1st Respondent failed to appreciate this and accordingly failed to properly apply his mind to the facts and issues before him. The award accordingly stands to be reviewed and set aside.*
- 5. The subsistence allowance was only payable in circumstances where*

relief duty was actually performed by the 2nd Respondent. The withdrawal of the 2nd Respondent's judicial functions had the effect that the 2nd Respondent ceased to perform relief duties and accordingly his entitlement to the subsistence allowance ceased. The 1st Respondent failed to properly apply his mind to this and his award stands to be reviewed and set aside.

6. *The 1st Respondent had no power to award sentimental damages and that the 1st respondent exceeded his powers in awarding the amount of R9 887.50. The award accordingly should be set aside to this extent.*

16. The 2nd Respondent contended in reply that:-

- 16.1 As the first four contentions weren't raised by the Applicant at the Arbitration, the Applicant was precluded from now raising them;
- 16.2 the 2nd Respondent had at all times been an employee and remained an employee;
- 16.3 Section 9 (4) of the Magistrates Courts Act was not subject to Section 10 of the Act.
- 16.4 the Applicants fourth contention that whether or not the 2nd Respondent had a legitimate expectation was irrelevant to the dispute arbitrated by the 1st Respondent.
- 16.5 the subsistence allowance was payable either as a reimbursive allowance for expenses actually incurred or as an all inclusive tariff.

It was contended that the 2nd Respondent having elected to receive the all inclusive tariff, he was not required to incur actual expenses in order to receive the allowance.

16.6 that the award made by the 1st Respondent did not separate sentimental damages from the actual amount which had not been paid to the 2nd Respondent; and

16.7 the award was justifiable in terms of the reasons given by the 1st respondent and that the 1st Respondent had committed no reviewable irregularity.

17. During arbitration the 2nd Respondent had complained that the decision of the 2nd Applicant that he be relinquished of all functions of a judicial officer with immediate effect constituted demotion. Placed in context, the 2nd Respondent had for some time and on a purely temporary basis only as envisaged by s9(4) of the Magistrates Courts Act acted as an additional magistrate. He was not vested with the functions of a judicial officer. On the occasions he had acted, he was expressly doing so only on a temporary basis.

18. Of necessity this raises the question as to whether the decision of the 2nd Applicant could constitute a demotion and particularly where it could constitute a “withdrawal of functions”.

19. The 1st Respondent in coming to the conclusion that the 2nd Respondent was demoted disregarded the expressly temporary nature of a s9(4) appointment and found that whether it was temporary or not was not relevant to the issue.

20. Demotion is defined in the *New Shorter Oxford Dictionary*, 1993 Edition as

“The act of demoting; reduction to a level such as class”

Whilst at common law demotion without consent is a repudiation of the contract of employment, the Labour Relations Act in section 186(2)(a) suggests that if done fairly, demotion is permitted.

Workplace Law: Grogan, 8th Edition p264 and 265

Van Der Riet v Leisurennet Ltd t/a Health & Racquet Club (1998) 5 BLLR 471 (LAC)

Norman Scoble: The Law of Master and Servant (1956) p176

21. Demotion must, in the context of a labour practice, mean at least that something to which the employee is entitled is taken away or withdrawn. That which is taken away can include status as well as a condition of employment.
22. The enquiry into whether or not a demotion has taken place must commence with determining whether or not the employee has had taken from him that to which he is entitled or enjoys as a matter of right. In this matter the directive that the 2nd Respondent was to be relinquished of all functions of a judicial officer, in order to constitute a demotion, must depend upon whether the second Respondent was either a judicial officer or at least enjoyed the right to be temporarily appointed as a judicial officer.
23. The second Respondent was on his own admission not a judicial officer. He did not have the qualifications. His appointment to the relief staff did not vest him with the status of a judicial officer nor an entitlement as of right to perform the functions of a judicial officer. It simply implied that he could be temporarily appointed to act as an assistant magistrate. No more. The right to appoint the 2nd Respondent was a right enjoyed by the Chief Magistrate of Randburg.

24. The effect of the directive was simply to curtail the Chief Magistrate of Randburg discretion to temporarily appoint the second Respondent as an assistant magistrate. The fact that he had been temporarily appointed in the past in terms of section 9(4) of the Act could not create an entitlement. At all times the second Respondent was a senior administrative clerk. The possibility or even the probability of a temporary assignment as an assistant magistrate could not confer status, rank or class on the applicant. In the absence of the directive, the 2nd Respondent was no longer temporarily appointed as an assistant magistrate by the Chief Magistrate of Randburg. He could not complain that he had been demoted.
25. The 1st Respondent simply assumed that the actions of the 2nd Applicant constituted a reduction in the 2nd Respondents status. This conclusion is not supported by the 2nd Respondents' reasoning. The 1st Respondent states:-

"The Departments actions amount to a removal of the discretion of the Chief Magistrate to appoint the grievant as an Acting Magistrate. There is ample evidence that there was a need for such relief capacity, and that the Chief Magistrate had been satisfied that the grievant was a person competent to be so appointed. It is clear that the Departments actions amounted to a reduction in status for the grievant."

26. The second Respondent was not of right entitled to be appointed temporarily as an acting assistant magistrate. The appointment lay in the discretion of the Chief Magistrate of Randburg. The possibility of appointment cannot confer status. The need for relief capacity and the competence or otherwise of the second Respondent does not alter this.
27. The directive issued by the second Applicant in the circumstance does not amount to a demotion. It could not have the effect of diminishing the second

Respondents status. It might well be the manner in which the directive was issued and the background circumstances were unfair but they do not contrive to constitute an unfair demotion.

28. It is clear therefore that the actions of the Applicant in preventing the 2nd Respondent from being appointed to the position of Acting Additional Magistrate was exactly and only that. It did not have the effect of rendering the appointment of the 2nd Respondent to the relief staff nugatory. It does not appear in the award of the 1st Respondent that this formed part of the 2nd Respondent's case. It must be assumed therefore that in those circumstances the 2nd Respondent was entitled to and would still remain a permanent member of the relief staff. His duties within the relief staff would however be confined to that of interpreter or prosecutor but not acting assistant magistrate.
29. The test to be applied in a review of an award is whether the award is rational and justifiable. It is not an appeal and the Court cannot review the decision of the 1st Respondent simply on the grounds that the 1st Respondent was incorrect.
30. In the matter of *Crown Chickens Proprietary Limited trading as Rocklands Poultry v Capp* (2002) 23 ILJ 863 (LAC) Nicholson J A deals with what constitutes grounds of review. Referring to the decisions in *Shoprite Checkers Proprietary Limited v Ramdoor NO and Others* (2001) 22 ILJ 1603 (LAC), *Pharmaceutical Manufacturers Association of SA and Others: in re ex parte application of the President of the RSA and Others* (3) BCLR 241 (CC) and *Carefone Proprietary Limited v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) he holds:-

"The decision of the arbitrator can also be set aside if it is not rationally

related to the purpose for which the power was given from an objective view or if it is not justifiable as to the reasons given... By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guess work and hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defenceable, not necessarily in every respect, but as regard to the important logical steps on the road to his order."

31. However, not only have the parties agreed on the specific grounds of review, the 2nd Respondent has questioned the right of the Applicant's to raise contentions which had not been raised at the arbitration.
32. Having considered the "*question of law for determination*" which formed part of the stated case and the Applicants' Heads of Argument it is clear that the question of whether the conduct of the Applicants, in removing the Chief Magistrate of Randburg's discretion to appoint the 2nd Respondent as an Acting Magistrate amounted to a demotion, is not an agreed ground of review.
33. Subsequent to Judgement having been reserved the Applicant filed what purported to be Supplementary Heads of Argument again submitting that the legal point not raised before the 1st Respondent could be argued on review and secondly that the 1st Respondent's award should be reviewed on the grounds that he had incorrectly found the actions of the Applicant to be tantamount to a demotion.
34. The Respondent objected to the filing of these Supplementary Heads.
35. Had the matter not proceeded by the noting of a special case and had the

parties not specifically agreed on the question of law for determination I am of the view that the question as to whether the acts of the 2nd Applicant amounted to a demotion, could have been argued.

36. Had I been in the position of being able to consider as a ground of review, whether the 1st Respondent's decision that the actions of the Applicant amounted to a demotion I would have concluded that the decision was reviewable.
37. The Applicants are however bound by the agreed grounds of review and in those circumstances I am unable to interfere with that aspect of the 1st Respondent's award viz that the second Applicants' directive constituted a demotion.
38. It is then necessary to consider the Applicants grounds of review as set out in the stated case.
39. The first ground is that in so far as the relief sought would result in the second Respondent becoming or at least expecting to be temporarily appointed as an assistant magistrate, the second Respondent ceased to be an employee and therefore the 1st Respondent did not have jurisdiction and accordingly exceeded his powers. There is no merit in this submission. The second Respondent's case was never that he should be appointed a magistrate and accordingly the 2nd Respondent was at all times an employee.
40. The second ground of review was that the second Respondent was not a competent person as contemplated in section 9(4) by virtue of the provisions of section 10 of the Act which require a magistrate to have certain minor qualifications and as a result the second Respondent could not be appointed. This too is without substance. Section 10 of the Act does not qualify section

9(4).

41. The third ground of review is based on the averment that as the appointment was temporary, the second Respondent could not have had a legitimate expectation to be appointed. Whilst this might be so the second Respondent's complaint was not based on a legitimate expectation. This ground also does not succeed.
42. The fourth and fifth grounds of review concern that part of the first Respondents' award, which deals with the provision of benefits and the award of sentimental damages.
43. The second part of the 1st Respondent's finding that the decision of the Applicant that the 2nd Respondent could not be appointed as a relief Magistrate resulted in an unfair act on the part of the Applicant regarding the provision of benefits was raised by the Applicant as a ground of review in the stated case. The Applicants aver that the subsistence allowance was only payable in circumstances where relief duty was actually performed and that in this respect the 1st Respondent had failed to properly apply his mind to this contention.
44. The 1st Respondent finds that the subsistence and travel allowance is a benefit for reasons that the 1st Respondent enumerates as follows:-

"It was a material benefit with a monetary value for employees and a cost for the employer (Sithole v Nogwaza NO and Others (1999) 20 ILJ 2710 (LC): [1999] 12 BLLR 1348 (LC))"; and

"It was a supplementary advantage conferred on employees for which no work is required (Northern Cape Provincial Administration v Hambridge NO and Others (1999) 20 ILJ 1910 (LC): [1997] 7 BLLR 698 (LC);

Schoeman and Another v Samsung Electronics SA Proprietary Limited (1997) 18 ILJ 1098 (LC); [1997] 10 BLLR 1364 (LC))"; and

"It was a benefit to which an employee would have been entitled by virtue of the Contract of Employment or a Collective Agreement or by virtue of a statute, e.g. the Public Service Act or any other applicable Act (Hospersa and Another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC))".

45. In my view none of these reasons are sustainable. Subsistence and travel is paid only in circumstances where an employee is required to perform his or her duties at a place other than the office at which they are stationed. Whilst it is accepted that subsistence and travel can be paid either by settling the employee's actual expenses or by the payment of a set amount it remains in essence a reimbursive payment and is at all times dependant upon the recipient actually being away from his usual place of work.
46. It can only be paid when the employee is actually stationed elsewhere and is not an amount which can in any way be construed in isolation as a material benefit nor a supplementary advantage for which no work is required nor is it an entitlement by virtue of the contract of employment or any other agreement.
47. The 2nd Respondent's evidence that he preferred to do relief duties as this supplemented his income does not convert the nature of the payment into a benefit. The 2nd Respondent in determining compensation takes into account the submission made by the 2nd Respondent that *'he would most likely have received a subsistence and travelling allowance for all or most of the period between 31st January 2000 and today'*. The nature and purpose of the allowance in either guise is to reimburse or compensate for expenses incurred for subsistence and for travelling costs. The word allowance itself is

defined in the New Shorter Oxford English dictionary as being “a limited quantity or sum especially of money or food granted to cover expenses or other requirements”.

48. The 1st Respondent fails to take into account that had the Applicant in fact been away from his normal place of work and received the allowance he would have of necessity incurred additional expenses. That in itself would have reduced the extent of the amount by which the 2nd Respondent's claims to have been prejudiced or unfairly deprived.
49. I am satisfied for the said reasons that the decision by the 1st Respondent, that as a consequence of the Applicant's instruction the 2nd Respondent was unfairly deprived of a benefit, is reviewable and should be set aside.
50. The fifth ground of review to be considered is whether an award of sentimental damages is justifiable. The Applicants argued that that portion of the monetary award relating to sentimental damages should be set aside on the grounds that in the absence of an injustice the Labour Relations Act does not permit the award of sentimental damages.
51. The Respondent's justification for awarding sentimental damages is:-

"The substantial lowering of the grievant's status and negative effect on his professional reputation;

The fact that the Department did nothing to correct erroneous and defamatory allegations regarding the grievant's lack of qualifications and implications of impropriety on his side, as published in the press, allegations which probably, at least in part, arose from information supplied to the press by departmental staff; and

The detrimental affect on the grievant's health due to stress and depression caused by the demotion, including serious loss of weight, consistent gastritis, anaemia and sleeping problem."

52. The reasons are premised on the 1st Respondents finding that the 2nd Respondent had been unfairly demoted. However, having considered sentimental damages the 1st Respondent does not directly distinguish between the sentimental damages and the compensation for the loss of benefits. The 1st Respondent awarded compensation in the amount of R40,000 arising from what he found to be an unfair labour practice committed by the 2nd Applicant in terms of item 2(1) of Schedule 7 of the LRA.
53. Damages are awarded as either patrimonial or sentimental. In order to succeed with a claim for sentimental damages, the party seeking such damages must establish that a wrong has been committed and that wrong constitutes an *inuria*. In this matter the wrong complained of which may have justified sentimental damages was an unfair demotion. Having found that the action of the second Applicant did not amount to an unfair demotion, it must follow that in the absence of a wrong the second Respondent is not entitled to sentimental damages.
54. As I cannot interfere with that part of the 1st Respondent declaring the second Respondent to have committed an unfair labour practice involving the demotion, I make the following order:
- 54.1 The Applicant's application succeeds in part.
- 54.2 The finding that the 2nd Applicant committed an unfair labour practice relating to the provision of benefits in terms of item 2(1) of Schedule 7 of the LRA is set aside.
- 54.3 The order that the Applicant pay the 2nd Respondent an amount of R40,000.00 within a period of forty-five days from the date of the award is set aside.

54.4 There is no order as to costs.

Gush AJ
28 September 2005

For the Applicant: Adv. G. Hulley
Instructed by: Geldenhys Lessing Maltji Inc.

For the Respondent: Adv. Heystek
Instructed by: State Attorney

Date of Judgment: 20 October 2005