IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NUMBER: J542/2008

In the matter between:

HOSPERSA	**1ST APPLICANT**
DR A KAPLAN	**2ND APPLICANT**
And	
THE MEC FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT	**RESPONDENT**

JUDGMENT

AC BASSON, J

1] The First Applicant in this matter is the Health and Other Service Personnel Trade Union of South Africa ("HOSPERSA") on behalf of Dr A Kaplan ("Kaplan" – the Second Applicant) who is employed as a

principal medical officer at the Hillbrow Community Centre. The Centre falls under the jurisdiction and control of the Respondent.

2] In terms of the Notice of Motion, the Applicants apply for an order that Kaplan be paid her full remuneration for the months of February and March 2008 and for such further months as she may be employed.

3] This matter came before my learned sister Acting Judge De Swart on 4 April 2008. I have asked for a transcript of the proceedings before De Swart, AJ. The matter became opposed on that day. It is clear from that transcript that the learned Judge was of the view that the matter was not so urgent that it had to be dealt with on that day. However, she concluded that she was nonetheless persuaded that the matter was of sufficient urgency that it needs to be dealt with within a week. The matter was thereafter postponed to 10 April 2008 for hearing. The Respondent was ordered to file its answering affidavit by 17H00 on Monday 7 April 2008 and the Applicants was ordered to file its replying affidavit, if any, by 13H00 on Wednesday 9 April 2008.

4] In light of the fact that my learned sister has decided and disposed of the issue or urgency, the only issue that remains to be decided by this

Court is the merits of the application. Before I turn to the merits of this application, it must first be decided whether or not the Court should have regard to the answering affidavit filed on behalf of the Respondent. The Respondent's answering affidavit was only filed on 9 April 2008 which is approximately one and a half days late. The late filing of the affidavit was not accompanied by a condonation application nor did the Respondent formally apply for condonation on the day of the hearing. Mr. Khoza on behalf of the Respondent tried to tender an explanation for the late filing from the bar which is unacceptable. In light of the fact that no proper explanation for the delay was properly before this Court and in light of the fact that the Respondent had defied a court order in respect of the filing of their papers, the Court proceeded to decide the matter on the basis of the Applicants' papers only.

5] The Applicant has been employed at the Hilbrow Community Health Centre from February 2006. She states in her founding papers that she was transferred to the Hilbrow Centre from Johannesburg General Hospital. She was informed that her working conditions would be exactly the same at the Hilbrow Centre. It, however, transpired that that was not the case and that she was expected to see between 60 –

70 patients per day which means that she has approximately one patient every six to seven minutes on any given day. Kaplan considers this requirement to be an unacceptable working condition because it does not enable her as a doctor to render a proper service to her patients. It should also be pointed out that Kaplan suffers from poliomyelitis and post polka syndrome and as a result suffers disabilities in her right leg. She, however, stresses that this disability has never prevented her from working and seeing a reasonable number of patients per day. Kaplan developed a very acrimonious relationship with Dr S Moosa who is the head of Family Medicine at Hilbrow who *inter alia* said to her that "*you are disabled you have to resign*". She was also unreasonably threatened with disciplinary action in respect of her failure to see more than 25 patients per day. On 10 November 2006 Kaplan lodged a grievance both in respect of her unilateral transfer to the Hilbrow Centre, harassment and the poor working conditions at the Hilbrow Centre. In March 1007 Kaplan was removed from all work in the clinic until the issue of her seeing merely 25 patients per day had been resolved. She was then instructed to report to Dr Mossa's office where he and a Dr Malope provided her with "tasks". The effect of this instruction was to remove her from all clinical work and to require her to do clerical work. HOSPERSA lodged

a complaint about this incident. This complaint yielded limited success in a meeting on 27 March 2007 when it was agreed that Kaplan will be allocated clinical work like any other doctor and that she was no longer required to work as Dr Moosa's general assistant. Kaplan received a final written warning on 28 August 2007 for not seeing what her superiors considered to be a sufficient number of patients per day. On 2 October 2007 Kaplan was accused of being a racist by Dr Malope who shouted at her: *"You do not like to treat black patients, you are a racist, you turn patients away, you are treating patients with disrespect, you are an old lady, I am sick and tired of you, something is going to happen to you.*" Dr Malope then assaulted Kaplan by hitting her on her face and hands. Malope then picked up a baumanometer and waived it to her face and again shouted at her that "*something is going to happen to you".* The incident was reported to Dr Malope's senior and a charge was laid at the South African Police.

6] On 9 October 2007 Kaplan was placed on a precautionary transfer and was told that she would be transferred to Lilian Ngoyi Community Health Centre. The reasons for the precautionary transfer were as follows:

> "*It is alleged that you have committed a serious offence; and it is feared that you may repeat the offence. It is believed that your presence at the Hilbrow Community Centre may jeopardize the investigation into the alleged misconduct."*

7] Kaplan was not told what the serious offence was that she had allegedly committed or why it was feared that she would repeat the offence or why her presence would jeopardize the investigation into the alleged misconduct. She further denies that there was any *bona fide* or legitimate reason to place her on a precautionary transfer in respect of misconduct. Kaplan, however, continued to work for the remainder of the month at Hilbrow Centre and was even required to work overtime.

8] Kaplan was informed by the Respondent that she was afforded an opportunity to make representations as to why she should not be transferred (I will return to this letter hereinbelow). Kaplan made such representations. In brief she points out in her letter that there was no basis for the precautionary transfer. I have already referred to the fact that Kaplan had raised a grievance. She has also referred a dispute about an unfair labour practice to the Bargaining Council for

adjudication. She further denies that she is guilty of any misconduct. Kaplan further points out that Lilian Ngoyi was a remote location far from the workplace where she is currently employed and as a disabled person it is extremely difficult and perilous for her to commute to Lilian Ngoyi. No response was received from the Respondent in respect of her representations. In this regard it was argued on behalf of Kaplan that her transfer did not in fact take effect in light of the fact that the Respondent never communicated a final decision in respect of her transfer after she had submitted her representations. Put differently, the Respondent has never provided Kaplan with a clear statement that the transfer had indeed taken effect; when it had so taken effect; and/or on what factual and legal basis this decision was taken.

9] Further representations were submitted to the Respondent on 7 November 2007. In this letter it is specifically stated that Kaplan is not refusing to be transferred from Hilbrow, but that the transfer to Lilian Ngoyi will served to create severe health difficulties for her. A letter from her orthopedic surgeon dated 6 November 2007 is also attached. Her doctor clearly states in this letter that the transfer, which will involve a 40 kilometers travel, will be detrimental to her health and disabilities. No response was received from the Respondent.

10] Kaplan states that she is "*very willing and desirous to work for the respondent at other institutions that are within similar distance*" from her home as Hilbrow. More in particular, she is willing to work at Helen Joseph Hospital where there is a post available. On 12 December 2007 Kaplan received a phone call from Mr Maluleke who is an HR Official from Human Resources of the Respondent. He informed her that he was sorry for all that she had been put thorough and that she should go on leave and upon her return she must report at Helen Joseph. However, on the next day Maluleke informed Kaplan that the Labour Department of the Respondent did not agree to her reporting for duty at Helen Joseph.

11] The precautionary transfer was apparently made in terms of clause 7.2 of the Disciplinary Code and Procedure of the Public Service. In terms of this procedure and if an employee is transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days depending on the complexity of the matter and the length of the investigation. In terms of this clause the Respondent was therefore required to hold a hearing by not later than 9 December 2007. This did not happen and only on 6 February 2008

Kaplan was served with a notice to attend a hearing which is approximately two months outside this time period. The charges relate to the fact that Kaplan performs poorly in that she does not see the required 60 patients per day. She is also charged with failing to carry out a lawful order in that she did not go and work at Lilian Ngoyi when instructed to do so.

Salary

12] Until 15 February 2008, Kaplan always received her monthly salary through the bank on the 15th of each month. On 15 February 2008, without any notice whatsoever, the Respondent reversed payment of Kaplan's salary. On 15 March 2008 her salary was again not paid. I have already pointed out that Kaplan was not given any prior notice nor was she afforded an opportunity to show cause why her salary should not be cancelled.

13] Kaplan concedes that she did not report for work at Lilian Ngoyi but reiterates that this was because of her severe health difficulties that driving to work to this remote clinic will pose to her health. Kaplan did inform her employer of this fact but received no response and had in fact elected to ignore her representations in respect of her health. It is

also further important to point out that although Kaplan did not report for work at Lilian Ngoyi, she did in fact report at Hilbrow every day and signed the attendance register.

14] It was submitted on behalf of Kaplan that, to the extent that there has been non-rendition of services by herself to the Respondent, it was not occasioned by any default on her part and that the Respondent therefore remained liable to pay her. It was further submitted that the default leading to the non-rendition of services was occasioned entirely by the Respondent by unilaterally, unlawfully and unfairly and without reasonable justification sought to transfer her to a place where, to the knowledge of the Respondent, it was impossible for her to render her services. As a result the Respondent acted unlawfully and unfairly by failing to pay her salary in circumstances where Kaplan has to the best of her ability and to the knowledge of the Respondent attempted to render services to the Respondent, demonstrated that she was willing and able to render her services to the Respondent and also demonstrated her willingness to render her services at a workplace that is closer to her place of residence. It was further submitted that the Respondent had acted in breach of section 32(3) of the Basic Conditions of Employment Act 75 of 1997 in terms of which

an employer must pay remuneration not later than 7 days after the completion of the period for which the remuneration is payable.

15] It is clear from the papers that Kaplan has at all times expressed and demonstrated her ability and willingness to render her services to the Respondent. This she did through letters and the fact that she had physically reported at the Hilbrow clinic.

16] The dispute in respect of Kaplan's transfer to Lilian Ngoyi is currently the subject of arbitration (the unfair labour practice dispute). It is therefore not for this Court to express an opinion in respect of the merits of that dispute. This Court is confined to the dispute in respect of the non-payment of Kaplan's salary in terms of which the Respondent has unilaterally and without any attempt to afford Kaplan the *audi alteram partem* withdrawn her salary.

17] An employee has a common law right to be paid her salary. If through the default on the part of the employee his or her services are not rendered, the wage must be diminished in proportion to the time during which the services where not rendered (see *Boyd v Stuttaford* 1910 AD 101, 104-105). The position is, however, different where the

employee's inability to perform her duties is her employer's doing. See in this regard *Myers v SA Railways & Harbours* 1924 AD 85 where the Court held as follows at 90C:

> "If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no service had been rendered by him."

In terms of the common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our labour law that an employer may not suspend an employee without pay and may only do so it they have contracted to that effect, either when the contract was first entered into or if a collective agreement provides for such penalty, or when the employee is faced with dismissal and agrees to unpaid suspension as an alternative penalty (see Grogan *Workplace Law* 2007 at p. 103).

Evaluation of the merits

18] There are various reasons why Kaplan is entitled to the relief sought in the Notice of Motion: (i) Firstly, the papers support a conclusion that a final decision to transfer Kaplan has not been taken. Furthermore, in

light of the fact that she has tendered her services at her workplace, she is entitled to her salary. (ii) In the alternative and secondly, the contract of employment is still capable of being performed despite the fact that there is a dispute in respect of the transfer. (iii) Thirdly, a unilateral withdrawal of salary is in breach of the Basic Conditions of Employment Act 75 of 1977. (iv) Fourthly, the Respondent unilaterally withdrew Kaplan's salary without affording her the *audi alteram partem* and without any prior notice whatsoever. I will now briefly return to each of these considerations.

Was there a transfer?

19] I have already pointed out that it appears from the papers that a final decision to transfer Kaplan to Lilian Ngoyi has in fact not been taken with the result that Kaplan is still posted at the Hilbrow Clinic where she has consistently tendered her services throughout this dispute. This conclusion is supported by the fact that the Respondent has never communicated any response to Kaplan's representations in respect of her transfer. In coming to this conclusion, regard was had to the letter dated 9 October 2007 in terms of which Kaplan was informed that she is to be transferred. In this letter Kaplan is specifically informed that she is afforded an opportunity to respond to the possible

transfer before ("prior to") a final decision is taken:

> "3. Prior to the implementation of the decision you are, however, afforded an opportunity to respond to the possible precautionary transfer and indicate why, in your opinion, you should not be transferred. Such written response should reach Dr. Manitshana's office not later than Thursday the 11*th* *October 2007 at 16H00.*
>
> *Should you fail to respond to this letter it will be assumed that you do not wish to provide any input and you will be transferred as follows with immediate effect: …"*

20] I have already pointed out that Kaplan did made representations and that she even submitted a letter from her doctor as to why she could not be transferred. The Respondent has elected not to respond to her representations with the result that it would appear that a final decision to transfer has not been taken. In this respect I again refer to paragraph 3 of the said letter which makes it clear that a decision to transfer will only be implemented after Kaplan has responded to that letter. The Respondent did not respond to her representations and thus it can be assumed that a final decision to transfer has not been taken. If regard is had to the disciplinary code and procedures for the

public service it is clear from paragraph 2 subparagraph 2.4(c) that written reasons will be given for a decision taken. No final decision in writing has been communicated to Kaplan after her written representations. Instead the Respondent has elected to unilaterally withdraw Kaplan's salary.

Continued enforceability of the contract

21] In the particular circumstances of this case, the facts show that, notwithstanding the problems posed by the transfer to Lillian Ngoyi and the dispute currently before the Bargaining Council, the contract is still capable of performance and the contract thus falls to be enforced. It is clear from the facts that Kaplan is willing and able to render services at Helen Joseph and at Hillbrow. Kaplan has in fact reported at Hilbrow and therefore tendered her services to the Respondent.

22] In so far as Kaplan's was able to work at Helen Joseph, the Respondent, at least as late as on 12 December 2007 via Mr. Maluleke of HR showed that the Respondent was able to favourably consider her request.

Basic Conditions of Employment Act 75 of 1977

23] There is no basis in law why Kapan's right to her salary and/or benefits should be interfered with if regard is had to s 32(1) of Basic Conditions of Employment Act 75 of 1977. I have already referred to the fact that Kaplan had at all times tendered her services and expressed a wilingess to perform her duties.

Audi alteram partem

24] Kaplan was not forewarned nor afforded an opportunity to be heard prior to the unilateral withdrawal of her salary. In fact, her salary for February 2008 was electronically paid into her bank account only to be reversed. As a result, Kaplan was not afforded an opportunity to make representations to the Respondent why her salary should not be withdrawn and what hardship will follow as a result of the non-payment of her salary. This is unfair and smacks of highhandedness. It is a fundamental principle that an employee should and must be afforded the *audi alteram partem* before a decision is taken which adversely affects the rights of an employee. It is likewise a fundamental principle in our labour law that an employee cannot be dismissed without affording the employee the *audi alteram partem* and it is only in highly

exceptional circumstances that this Court will accept a departure from this principle. Where an employee is suspended, the same principle applies. I can see no reason why this principle should not be applied before suspending or withdrawing an employee's salary. Kaplan sets out in her papers the hardship that followed the non-payment of her salary: She is the mother of an adopted child who is three years old. She has to pay her daughters crèche fees, medical aid and other basic cost of living expenses.

25] In *Muller & Others v Chairman of the Ministers' Council: House of Representatives & Others* (1991) 12 *ILJ* 761 (C) at 766 the Court endorsed the right to a hearing before suspension in the following terms. Although these comments were made in the context of a suspension, the same principles apply in my view in respect of the right to be heard before withdrawing an employee's salary.

> "The question, as we see it, is whether the person involved is entitled to be heard not on the ultimate question of whether the charge is or is not made out but on the question under consideration at that time, namely, whether or not he should be suspended as an interim step . . . . Plainly, the decision to suspend the appellant was a statutory decision

> which adversely affects [his] rights and legitimate expectations. It is likely to have profound emotional, social and financial effects on him.': '[He] was entitled to be heard on the question whether he should be suspended without salary during that interim period. It may well be that there is little that the appellant could have said or done that was likely to influence the decision on that question. It may well be that the decision would have been the same if he had been given the opportunity of being heard. The fact remains, however, that he was given no opportunity whatsoever of being heard on the question whether he should be suspended without salary." (At 773-4

The Court in this case emhasised the implications of a suspension of a public service officer without pay. Such suspension unquestionably constitutes a serious disruption of an employee's rights. I am in agreement with the submission on behalf of Kaplan that the implications of being deprived of one's pay are equally obvious. It was fundamentally unfair to have deprived Kaplan of her salary in the circumstances particularly without having afforded her an opportunity to make representations as to why her salary should not be withdrawn.

26] Lastly, I should also point out that Kaplan has, since this dispute was

referred to this Court, been informed that the precautionary transfer has been uplifted with immediate effect. No reasons are given for the summary upliftment of the transfer. This is an extraordinary change in events in light of the fact that Kaplan was initially informed that her presence at Hilbrow would prejudice the investigation. It is further extraordinary since it appears from the papers that a final decision in respect of Kaplan's transfer in the first place has, in any event, not been taken.

27] In light of the aforegoing I am satisfied that the Applicant is entitled to the relief sought in the Notice of Motion. In respect of costs it was argued on behalf of the Respondent that costs should not be awarded. I can see no reason why the Respondent should not be ordered to pay the costs in circumstances where an employee had to resort to bringing an application to put a stop to the high-handed and unilateral conduct of her employer. The Respondent is, however, only ordered to pay the costs in respect of the 4th and 11th of April 2008 since the postponement on 10 April 2008 was occasioned by the fact that the Court experienced a power failure.

28] In the event the following order is made:

1. The Respondent is ordered to pay Dr A Kaplan her full remuneration for the months of February 2008 and March 2008 and for such further months as she may be employed.

2. The Respondent is ordered to pay the Applicant's costs but only in respect of the proceedings held on 4 and 11 April 2008.

……..

AC BASSON, J
Date of hearing: 10 and 11 April 2008

Date of Judgement: 22 April 2008
For the Applicant:
Adv Buirski instructed by Fairbridges

For the Respondent:

Adv Khoza instructed by the State Attorney