Not reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 420 / 2007

In the matter between:

DIRECTOR-GENERAL: OFFICE OF THE

PREMIER OF THE WESTERN CAPE **First applicant**

THE HEAD: HEALTH

DEPARTMENT OF HEALTH, WESTERN CAPE **Second applicant**

and

SOUTH AFRICAN MEDICAL ASSOCIATION

OBO B.H. BROENS **First respondent**

THE PUBLIC HEALTH AND WELFARE

SECTORAL BARGAINING COUNCIL **Second respondent**

LAWRENCE RAMABULANA N.O. **Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] Dr Hermanus Broens was employed as a principal medical officer at the Bellville community health centre. He was diagnosed with anxiety and depression with a social phobia. His psychiatrist recommended that he be redeployed in a non-clinical capacity. On 14 June 2004, he received a letter headed "**TERMINATION OF CONTRACT OF EMPLOYMENT"** from his employer, the Department of Health (the second applicant in these proceedings). On 7 July 2004, he received a second letter headed "**RE: TERMINATION OF SERVICE".**

[2] Dr Broens ("the employee") referred an unfair dismissal dispute to the Public Health and Welfare Sectoral Bargaining Council (the second respondent in these proceedings). The arbitrator (the third respondent in these proceedings) found that the dismissal was unfair on both procedural and substantive grounds. He ordered that the employee be reinstated retrospective to the date of his dismissal, and he ordered the Department of Health to appoint him in a non-clinical equivalent post.

[3] The applicants seek to review and set aside that arbitration award. Their primary argument is that the employee was not dismissed, but that the termination of his employment arose by operation of law in accordance with the provisions of section 17 (5) (a) (i) of the Public Service Act.[1] If that is so, they say, the Bargaining Council had no jurisdiction.

[4] In the event that the termination did constitute a dismissal and that the Bargaining Council did have jurisdiction, the applicants argue that the finding of an unfair dismissal and the reinstatement into a non-clinical position are reviewable.

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[1] Proclamation 103 published in *Government Gazette* 15791 of 3 June 1994.

CONDONATION

[5] The supplementary and replying affidavits were filed late. The main reason for the delay was that the parties had been in settlement negotiations. The employee and his representative trade union, the South African Medical Association, did not oppose the application for condonation. I agree that it is in the interests of justice that condonation be granted and the evidence and argument in the matter be fully ventilated.

BACKGROUND FACTS

[6] The employee was diagnosed in June 2002 with anxiety and depression with a social phobia. His psychiatrist recommended that he be deployed in a non-clinical capacity. On 21 January 2003 he met with the acting medical superintendent to discuss his possible redeployment to another position. It appears from the evidence at arbitration that, after that discussion, he was waiting for the Department to deploy him into a nonclinical position.

[7] In April 2003, the chief medical officer told the employee that there were no alternative posts available and that the Department intended to commence proceedings to declare him medically unfit to continue employment, i.e. to have him medically "boarded" in the common parlance of the workplace.

[8] On 15 September 2003, the Department notified the employee that it intended to commence with medical boarding procedures due to ill health. On 12 November 2003 the employee consulted a psychiatrist at the insistence of the Department in order to determine his ability to continue working. The psychiatrist recommended that he be placed in an alternative post as opposed to being medically boarded.

[9] It is not evident from the record of the arbitration proceedings that the Department at any stage informed the employee that it had accepted the psychiatrist's recommendation. What appears to be common cause is that the employee did not return to work after 12 November 2003. On his

version, he was sent into what was described by his counsel as "a state of bureaucratic limbo". He was not offered any alternative placement, nor was he boarded.

[10] The next proactive step by the Department was to send the employee. A letter on 14 June 2004. It is common cause that there was no discussion or consultation between the parties prior to that letter having been sent. The letter is headed, "**TERMINATION OF CONTRACT OF EMPLOYMENT".** It comprises one line, stating: "You are hereby notified that your contract of employment with the Department of Health, Provincial Government of the Western Cape is terminated with immediate effect."

[11] Some three weeks later, on 7 July 2004, the Department sent the employee another letter. This letter was headed, "**RE: TERMINATION OF SERVICE**"**.** It read as follows: "Due to the fact that you have been absent from official duty with prior permission for more than one calendar month since 13 October 2003, your services are deemed to be terminated due to misconduct in terms of section 17(5)(a)(i) of the Public Service Act, 1994, with effect from 13 October 2003. "

[12] The employee then referred an unfair dismissal dispute to the Bargaining Council. Conciliation failed and he referred the dispute to arbitration.[2] The employee testified on his own behalf. The Department called only one witness, the chief medical officer, Dr Robert Martell. Martell testified that he recalled having a meeting with the employee concerning his redeployment to a non-clinical function. As there was no such position available, Martell was instructed to terminate the employee's services and he drafted the letter of 14 June 2003.

[13] The arbitrator noted that the employer bears the onus of proving that the dismissal was fair. He noted that, though the employer had called the witness, "they failed to provide evidence of any wrongdoing on the part of the employee that would have necessitated the institution of disciplinary or

[2] It took more than 2 years from the referral to conciliation for the conciliation and subsequent arbitration to take place. The reasons for the delay are not clear from the record.

dismissal procedures. The witness, Dr Martell has no knowledge of [the employee's] absence and why and how it would have been necessary to dismiss the [employee]. According to him he acted on instructions."

[14] The arbitrator found that there was "no case against" against the employee and that his dismissal was unfair. He ordered the Department to reinstate the employee and to appoint him in a non-clinical equivalent post.

WAS THE EMPLOYEE DISMISSED?

[15] The applicants argued that the employee's contract of employment was terminated by operation of law, by virtue of the provisions of section 17(5)(a)(i) of the Public Service Act. They argue that he had been absent from his official duties for approximately nine months. They also argue that he was absent without the Department's permission.

[16] The relevant provision reads as follows:

> "An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty."

[17] The applicants argue that the employee did not apply for sick leave and that he was therefore absent without permission. Therefore, they say, the termination of his service falls within the deeming provision and he was not dismissed with in the definition of the Labour Relations Act. If that is so, the arbitrator did not have jurisdiction to deal with an unfair dismissal dispute.

[18] There are two problems with this submission. Firstly, when the Department terminated the employee's contract of employment on 14 June 2004, it made no mention of the provisions of the Public Service Act. Dr Martell could not shed any further light on the letter at arbitration, save to say that he had been instructed to write the letter. He could not explain why the

later letter of 7 July 2004 had been sent to the employee. He did not try to explain that the earlier letter had been sent in error or that subsequent facts came to light. In other words, when the Department purported to notify the employee on 7 July 2003 that his contract of employment had been terminated by operation of law, it had already dismissed him three weeks earlier, on 14 June 2004. And he could not have been discharged "with effect from the date immediately succeeding his or her last day of attendance at his place of duty", referring to 13 October, because he had been absent "for a period exceeding one calendar month" from that date. He only went to see the psychiatrist, at the Department's request, a month later, on 12 November 2003.

[19] Secondly, it appears from the record filed by the Bargaining Council that the arbitrator had considered the issue of jurisdiction in terms at conciliation stage on 2 March 2007. In terms of that ruling, both parties recorded their consent to have the matter arbitrated by the Bargaining Council. Specific reference was made to s 17 of the Public Service Act; yet the arbitrator recorded the parties' consent with regard to jurisdiction as follows: "The dismissal of the applicant is in terms of section 186 of the [Labour Relations] Act and arbitrable by the Bargaining Council." That ruling was not taken on review. Neither did the Department raise the jurisdictional point again at arbitration. It appears, therefore, that the parties had specifically agreed that the employee had been dismissed as contemplated in section 186 of the Labour Relations Act and that the Bargaining Council did have jurisdiction.

[20] In any event, there is no evidence that the employee was indeed absent without permission. The employer instituted a process in September 2003 to board the employee for ill-health. On 13 October 2003, it was noted at a Department meeting that "proceedings have… begun for his services to be terminated due to ill health (depression)". He was instructed to go to Stikland hospital for assessment on 29 October 2003. He saw a psychiatrist on 12 November 2003. Contrary to what was stated in the letter of 7 July 2004, therefore, he was not "absent from official duty without prior permission for more than one calendar month since 13

October 2003". It appears that, during this time, the Department was still considering his position and he was under the impression that the Department was still trying to find a suitable post for him. Alternatively, the Department would have had to proceed with the medical boarding procedure. They did not do that either.

[21] The facts of this case are distinguishable from those in the recent case of *Grootboom v NPA & another.*[3] In *Grootboom,* the employee went overseas without after his application for leave had been turned down. He clearly had no authorisation for his absence.

[22] In *Phenithi v Minister of Education & others*[4] the Supreme Court of Appeal explained the purpose of a similar deeming provision in the Employment of Educators Act[5] as follows:

> "In my view, the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. In such a case, there can be no unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'. Only the very clearest cases are covered. Where this is in fact not the case, the Act provides ample means to rectify or reverse the outcome."

[23] The case before me is not one of those "clearest cases". It is by no means clear that the employee had deserted. Even if the deeming provision in s 17(5) of the Public Service Act had been applicable, it would not have applied to the facts of this case.

[24] As Pillay J noted in *HOSPERSA & another v MEC for Health*[6]*:*

> "All in all, section 17 (5) is a Draconian procedure. It must be used sparingly and only when the code cannot be invoked when the employer has no other alternative. That would be so, for example, when the respondent is unaware of the whereabouts of employees and cannot contact them. Or, if the employees make it quite clear that they have no intention of returning to work. The code is a less restrictive means of achieving the same objective of enquiring into and

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[3] [2010] 9 BLLR 949 (LC)

[4] 2008 (1) SA 420 (SCA) para [19]

[5] Act 76 of 1998

[6] (2003) 24 *ILJ* 2320 (LC) para [37]

> remedying an employee's absence from work. It enables employees to invoke the rights to fair labour practice and administrative justice. All the jurisdictional prerequisites for proceeding in terms of section 17(5)(a)(i) must be present before it is invoked."

[25] On the facts of this case, not all the jurisdictional prerequisites for invoking the provisions of s17(5)(a) were present. It is by no means clear that he was absent without permission and the Department was still exploring alternatives at the time.

IS THE AWARD NEVERTHELESS REVIEWABLE?

[26] The applicants argued in the alternative that the award is nevertheless reviewable for unreasonableness, as contemplated in *Sidumo v Rustenburg Platinum Mines Ltd*.[7] Their main argument in this regard is that the arbitrator exceeded his powers as contemplated in section 145(2)(a)(iii) of the Labour Relations Act.

[27] The applicants' argument is that section 193 of the LRA provides for only three remedies for unfair dismissal, i.e. reinstatement; re-employment; or compensation. An order of reinstatement restores the *status quo ante.* The arbitrator cannot order reinstatement, the applicants argue, and then order the employer to appoint the employee in a different post.

[28] It does appear anomalous that section 193(2)(b) specifically gives the court or the arbitrator the power to order the employer to re-employ the employee, "either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;" yet it is silent on the terms of an order to reinstate. That must be so because, in the normal course, an order for reinstatement is indeed retrospective and is designed to place the employee back into the position that he or she occupied before dismissal. But does that mean that an arbitrator does not have the power to reinstate an employee, and yet to order the employer to place that employee in a different position?

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[7] 2008 (2) SA 24 (CC)

[29] In my view, a purposive interpretation of the Act does not preclude such an order. Reinstatement is the primary remedy in terms of section 193 (2). One of the exceptions is where "it is not reasonably practicable for the employer to reinstate or re-employee the employee." It is clear that, on the facts of this case, it is not reasonably practicable for the employer to reinstate the employee in the same position. That would be defeating the object. The very outcome of his referral to a psychiatrist was the recommendation that he should be placed in a non-clinical position. It cannot be that an arbitrator faced with these facts cannot use his discretion to order the employer to give effect to such a recommendation. The Commissioner may make any appropriate arbitration award in terms of the Act, including, but not limited to, an award that gives effect to the provisions and primary objects of the Act.[8] One of those objects is the effective resolution of labour disputes.[9] Had the arbitrator in this case simply reinstated the employee, it would not have resolved the underlying dispute.

CONCLUSION

[30] The decision reached by the arbitrator is not so unreasonable that no arbitrator could have come to the same decision. Neither am I satisfied that he has exceeded his powers by ordering the employer to appoint the employee in a non-clinical equivalent post.

[31] With regard to costs, I take into account that the effect of the arbitration award and of this judgement will be that the parties have to forge a new relationship. In those circumstances, I do not deem it prudent in law or fairness to make a costs order.

[32] The application for review is dismissed. There is no order as to costs.

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[8] s 138 (9)

[9] s 1(d)(iii)

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ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing:	11 November 2010
Date of judgment:	26 November 2010
For the applicants:	Adv EA de Villiers - Jansen
Instructed by:	The state attorney
For the respondent:	Adv CS Kahanovitz SC
Instructed by:	Bagraims Inc