



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS430-16/17**

Date of award: **2 May 2018**

In the matter between:

Dr M Patel

(Union/ Applicant)

and

Department of Health- Gauteng

(Respondent)

Details of hearing and representation

1. The matter was scheduled for arbitration on 13 October 2016, 5 & 6 December 2016 and remained part heard and it was heard again on 9 April 2018 at the Department of Health offices at Bank of Lisbon Building in Johannesburg. Mr I Lawrance, an attorney appeared on behalf of Dr. M Patel (hereinafter referred to as the Applicant) and Ms K Mphunye who is a Labour Relations Officer represented the Department of Health in Gauteng province (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of argument by 16 April 2018 and they only did so on 18 April 2018.

Preliminary points:

3. There were no preliminary points raised.

Issues to be decided

4. I am to decide whether or not there was an employment relationship between the applicant and the respondent between the period 25 January 2016 and 1 March 2016; if yes,
5. I have to determine whether or not the termination of that employment relationship constituted a dismissal as anticipated in the Labour Relations Act 66 of 1995 ("the Act"); if yes; I have to determine whether or not that dismissal was substantively and procedurally fair.

Background to the dispute

6. The applicant had applied for the Medical Officer's post at Chris Hani Baragwanath Academic Hospital. She was shortlisted and interviewed telephonically. The applicant was later advised that she was a successful candidate. On 30 November 2015 the respondent made a preliminary offer of employment to the applicant with certain conditions. Amongst others; it was stated that the job offer was preliminary in nature and was made purely on the submission of the required documents to initiate contractual engagement; namely;
 - Application form (Z83), CV and certified copy of your South African identity document;

- Certified copies of all your qualifications;
- Certified copies of relevant registration with the Health Professions Council of South Africa as Independent Practice Medical Practitioner;
- Proof of the Health Professions Council of South Africa card for current year;
- Service certificates, where applicable. In the event where you are having previous relevant experience you have to submit to the Human Resource Management certified copies of such service certificates. The service certificates must comply with the following:

Company Name, Job Title, Which speciality area, Locum or Permanent position (if locum state how many hours per week), Start and End Date (yy/mm/dd), Name of Contact person with contact details and institutional stamp.

For this service certificates to be recognised for salary purposes, you have to submit them within one calendar month after assumption of duty. In the event where service certificates are submitted after one month of assumption of duty it will only be considered for possible salary adjustments on the first date of the month following the approval of the Chief Executive Officer.

Kindly also take note that you can only assume duty after you have submitted all relevant appointment documents to the Human Resource Department and if you have been issued with an appointment letter.

For further details/enquires kindly enquire from Ms N Hlele at Tel 011 933 0292 or email Nonhlanhla.Hlele@gauteng.gov.za: Fax no: 086 459 4491

7. On 8 December 2015 the applicant accepted a preliminary offer of employment. On the same day Ms Hlele asked the applicant to submit her Independent Practice Medical Practitioner Registration Certificate and the Card. Subsequently, there were email exchanges between the applicant and Ms Hlele

regarding these items. In the midst of that the applicant involved the Head of Neurosurgical Department, Dr John Ouma. Eventually, on 21 January 2016 Dr Ouma advised the applicant through an email to commence duties on 25 January 2016. On 22 January 2016 Dr Ouma also advised the applicant that she would be received by Dr Madumo on 25 January 2016 at 09h00 in Ward G3. Indeed, the applicant reported for duty on 25 January 2016 and she was rostered accordingly. On 26 February 2016 Ms Hlele advised the applicant that she was working illegally. Eventually, on 16 February 2016 the Health Professions Council of South Africa (“the HPCSA”) issued the applicant with registration certificate as an Independent Practice Medical Practitioner. Thereafter, the applicant stopped working on 1 March 2016. On 8 March 2016 the respondent issued the applicant with an appointment letter. On 9 March 2016 the applicant accepted the appointment. The acceptance of job offer stated that the applicant will commence her duties on 9 March 2016. However, the applicant did not commence duties on 9 March 2016; she stated that she could not commence her duties before receiving a letter of confirmation to commence duties signed by Dr Ouma. Nonetheless, there was no letter of confirmation received from Dr Ouma as expected by the applicant. As such, she did not commence her duties on 9 March 2016 as it was stated in the job offer. The applicant held a view that she could not commence duties without a letter of confirmation signed by Dr Ouma.

8. In pursuit of her belief on 22 June 2016 the applicant sent a letter of demand to the respondent through her attorney. Amongst others; the applicant demanded that the respondent should provide her with a confirmation of appointment as a Medical Officer at the Neurosurgical Department; A letter of motivation for her to be paid her wages in full for services rendered for the period 25 January 2016 to 1 March 2016; Payment of her wages in full for the period of 2 March 2016 to June 2016, being damages suffered as a result of the failure by the respondent to comply with its contractual obligations in terms of the contract of employment.
9. It was also stated that should the respondent fail to revert to the applicant on or before the close of business on 28 June 2016 the applicant reserved her rights

to institute legal proceedings against the respondent including her right to refer an unfair dismissal dispute to the Council. The respondent did not comply with any of the applicant's demands.

10. In the belief that the respondent's action constituted unfair dismissal, the applicant referred a dispute in terms of section 191(5) (a) (iii) of the Act to the Council. The applicant sought, as remedy, compensation as provided for in section 193 read with section 194 of the Act.
11. On the other hand, the respondent, contended that applicant had been given a preliminary job offer with conditions; the applicant failed to meet all the conditions; accordingly, there was no dismissal effected by the respondent. The respondent averred that it should be ruled that the applicant absconded.

Survey of evidence and arguments

12. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The applicant testified and the respondent led evidence of Ms Amelia Werth and Ms Nonhlanhla Hlele. Their respective cases and evidence may be summarized as follows;

Applicant's case

13. It was the applicant's case that she was offered employment by the respondent to commence her duties on 9 March 2016. However, the respondent instructed her not to commence employment on 9 March 2016. The respondent's action amounted to repudiation of the contract of employment. It was also the applicant's case that she was entitled to receive her salary for the period between 25 January 2016 and 1 March 2016 for rendering personal services. When the respondent directed her to stop working that further confirmed repudiation of the contract of employment. The respondent also failed to follow fair procedures in

effecting her dismissal. It was on this basis that the applicant contended her dismissal was both substantively and procedurally unfair.

Evidence of Dr Maryam Patel

14. She completed her medical studies in 2010 at GSR Medical College in Mauritius. Thereafter, she commenced her two-year internship in 2011. She was doing her internship at RR Khan Hospital in Chatsworth. She then commenced her community service and completed it. Once you have completed your community service you may practice as a medical doctor. Both her internship and community service were registered with the HPCSA.
15. After completing her community service, she was employed by the Department of Health as a medical practitioner in January 2014; and she was based at Port Shepstone Hospital. She was still using the same persal no: issued to her when she joined the respondent.
16. When she was employed at Port Shepstone Hospital the process followed was not the same as at Chris Hani Baragwanath Academic Hospital. In the previous hospital she was just issued with a full contract of employment. In 2015 she was employed at both Groote Schuur Hospital and Red Cross Hospital.
17. She did not see the advert for the post at Chris Hani Baragwanath Academic Hospital. She spoke to Dr Joseph Ouma and she asked her to submit Z83 form and her qualifications. Thereafter, she was telephonically interviewed by the panel and Dr Ouma. She was then issued with a preliminary job offer. She signed the preliminary job offer and returned it to the respondent Afterwards; she was contacted by Ms Nonhlanhla Hlele to submit all the required documentation. She submitted all the relevant documents to Ms Hlele. However, Ms Hlele informed her that she had submitted wrong documents. Ms Hlele was wrong because she had submitted the correct documents.

18. There was only an administration bungle at HPCSA concerning her registration. At the time she wrote to HPCSA pointing out a mistake on her registration which reflected that she was serving community service. She had completed her community service in 2013. On 9 December 2015 she submitted her registration card from HPCSA to Ms Hlele. She also advised Ms Hlele through an email on 12 January 2016 that she had contacted the HPCSA Director to resolve her registration issue. Amongst others; she advised Ms Hlele that the issue of her registration as a medical practitioner will take a day to be finalised.

19. On 22 January 2016 Dr Ouma advised her to come and commence duties on 25 January 2016. Indeed, on 25 January 2016 she started working as directed by Dr Ouma. She was received by Dr Madumo. She was starting to work at 08h00 and knocking off at 16h00. She was on a duty call until 27 January 2016. She was also working overtime but she was not paid even a cent. She was also included in the Neurosurgical Department Roster. Ms Amelia Werth who was senior than Ms Hlele denied that she had informed Dr Ouma that her appointment documents were being finalised. Ms Werth also advised her that she need to sort out payment of the days she had worked with Dr Ouma.

20. On 26 February 2016 she called Dr Selepe, Superintendent and informed him that she has been advised that she was working illegally. She then requested Dr Selepe to sort the matter out. However, Dr Selepe informed her that she was not in the hospital to attend to the matter. Dr Selepe advised that the matter should be discussed on the following Monday between herself, Dr Ouma and him. The meeting did not take place as was suggested by Dr Selepe; however, he called Ms Nonhlanhla Xulu from Human Resource Department to establish what the problem was. She then explained to Ms Xulu that she had commenced employment on Dr Ouma's instruction. Ms Xulu advised that Dr Ouma should motivate her appoint from the date of her registration (16 February 2016) with HPCSA. She also explained to Ms Xulu that she had worked for the Department of Health as a medical officer for the period of two years in two different provinces.

21. Eventually, Dr Ouma denied that he advised her to commence duties on 25 January 2016. He also put her off on 1 March 2016 on the basis that she was not appointed by Human Resource Department.
22. On 12 February 2016 she advised Ms Hlele that she has commenced her duties. She also enquired whether she will be paid at the end of February 2016. Ms Hlele did not respond to her email but they discussed the matter telephonically. Ms Hlele advised her to talk to Dr Ouma about her registration. On 16 February 2016 Dr Ouma allowed her to go and sort out the registration at HPCSA in Pretoria. On this day her registration was sorted out and she sent the registration certificate to Ms Hlele on the same day. On 17 February 2016 she physically handed the registration certificate to Ms Hlele.
23. On 19 February 2016 Ms Hlele asked her to assist in obtaining a reference from her referee Prof Fieggen. In her view the references should have been sorted out when she first applied for the job. It was the respondent's responsibility to sought references from her referees. However, on 26 February 2016 she received a completed reference form from one of her referees, Mr Naidoo, at the time Prof Fieggen was away and he could not complete the reference form. Nonetheless, she advised Ms Hlele accordingly but she did not respond to her email at the time. She then called Ms Hlele and she informed her that they need about a week to get all the documents finalised.
24. Thereafter, Ms Xulu advised her to wait for the Chief Executive Officer ("the CEO") to sign her contract of employment. On 8 March 2016 she received a call to come and sign the contract of employment at Human Resource Department. On 9 March 2016 she came and signed the contract of employment. She was supposed to start working on 9 March 2016. However, she could not start since Ms Xulu had informed her that she should wait for Dr Ouma to sign her offer of employment and the completion of her salary structure. However, that did not happen. She then made quite a number of enquiries concerning what Ms Xulu

told her but there was nothing fort coming. She then decided to go back to Durban.

25. On 30 & 31 March 2016 she received a call from Tshepo from the respondent's Labour Relations Department informing her to report for duty. On 31 March 2016 she also received an email from Vollie Adoons stating that she had submitted all the necessary documents and was expected to commence her duties on 9 March 2016. He further advised that the date of commencement had been revised to 1 April 2016; as such she was expected to commence her duties on 1 April 2016. She informed her trade union official Ms Keletso Makwe from SAMA of these communications. She also advised Ms Makwe that she refused to deal with them due to improper manner they have been handling her issue. However, SAMA did not help her and she ended up approaching her attorney for assistance. Her attorney served the respondent with a letter of demand.

Respondent's case

26. It was the respondent's case that there was no employer/employee relationship between the parties on 25 January 2016. The applicant was officially appointed on 9 March 2016. The applicant also committed her herself to commence her duties on 9 March 2016. However, she refused to commence her duties despite being formally directed to do so in writing by Mr Vollie Adoons. It was on this basis that the respondent contended that there was no dismissal effected by itself.

Evidence of Amelia Werth

27. She was employed by respondent as an Assistant Director: Recruitment and Selection. Amongst others; she was responsible for receiving the applications for the vacant posts. Management of shortlisting and monitoring of the interviews.

28. In advertising medical doctors' posts, they use a generic advert generated by the Central Office. The applicant had applied for the medical officer's post at Grade I. Amongst others; the advert had stated that a successful candidate would be appointed in line with the requirements of the HPCSA. It was also stated that the appointee should be registered with the HPCSA as a medical practitioner.
29. In this instance the applicant was given a preliminary job offer because she had not submitted all the required documentation. The appointment would have been made once all the required documents have been received. The preliminary job offer stated that she could not commence her duties before submitting all the required documents. Ms Hlele informed the applicant not to commence her duties before submitting the required documents. She also informed the applicant not to commence work until submitting all the required documentation. She did not agree with Dr Ouma that the applicant should commence her duties on 25 January 2016.
30. On 8 March 2016 the applicant was issued with a contract of employment. She came and signed the contract of employment on 9 March 2016. She was expected to commence employment on the same day. She also signed the relevant document confirming that she was going to start working on 9 March 2016.

Evidence of Nonhlanhla Hlele

31. She was employed as Human Resource Clerk. After the interviews the applicant was recommended for the job. They then made a recommendation to the CEO. Thereafter, she made a preliminary job offer to the applicant. The medical officers would be issued with a preliminary job offer so that they could submit all the required documentation. The applicant was required to submit Z83 form, certified copies of all her qualifications and the proof of her registration with the HPCSA.

32. She sent the applicant an email requesting the outstanding documents. She did not receive the outstanding documents and she ended up escalating the matter to Ms Amelia Werth to intervene. At the time the applicant did not submit the registration with HPCSA as an Independent Practice Medical Practitioner.
33. She was not aware that the applicant was dismissed.

Analysis of evidence and arguments

34. In the present dispute it was common cause that applicant was issued with a preliminary job offer on 30 November 2016. The said offer stated that kindly note that you can only assume duty after you have submitted all relevant appointment documents to the Human Resource Department (“the HRD”) and you have been issued with appointment letter. It was also common cause that the applicant was issued with the registration certificate as an Independent Practice Medical Practitioner by HPCSA on 16 February 2016. She then submitted the registration documentation on the same day to Hlele at HRD.
35. According to the applicant she was instructed by Dr Ouma to commence duties on 25 January 2016 and there was email from Dr Ouma to that effect. As such; the applicant reported for duty on 25 January 2016 and she was received by Dr Madumo. She was reporting for duty at 08h00 and knocking off at 16h00. She was on a duty call until 27 January 2016. She was also working overtime; however, she was not paid for the personal services rendered between 25 January 2016 and 1 March 2016.
36. On the other hand the respondent maintained that there was no employer/employee relationship between the parties as at 25 January 2016. In support of this contention the respondent stated the applicant was officially appointed on 9 March 2016. However, the applicant refused to commence her duties despite being formally directed to do so telephonically and in writing by Adoons from its HRD.

37. It was established through evidence of both parties that as at 25 January 2016 there was no contract of employment had been concluded. The applicant had not complied with all the requirements for the appointment at the time. It is so because she had not submitted the registration certificate as an Independent Practice Medical Practitioner with the HPCSA. Therefore, the respondent was correct that between 25 January 2016 and 1 March 2016 she was working illegally. At that stage she had not been issued with a letter of appointment and there was no contract of employment that had been entered into between the parties.
38. This why the respondent argued that the applicant was not entitled to any salary; as she demanded through her lawyer. During cross examination it was put to the applicant that upon submitting all the appointment documents her salary had already been structured; as such, Xulu could have not asked her to submit anything to structure her salary afterwards. The applicant confirmed that her salary had been structured after submitting all the documents. Accordingly, I find it highly improbable that there was anything outstanding when the applicant was issued with a letter of appointment and signed it on 9 March 2016; as she wanted me to believe. Therefore, her version that amongst other things she was waiting for her salary to be structured was misleading and it must be rejected.
39. I am failing to comprehend what were the reasons for the applicant to refuse to commence her duties as agreed to by both parties. In the email sent to the applicant by Adoons from HRD on 31 March 2016 it clearly stated that:
- You have submitted all the necessary documents to the Human Resource Department and was expected to commence duty on the 09 March 2016;
 - However, you were expecting to receive an acceptance letter from Dr JR Ouma (HOD);
 - On explanation that the Human Resource Department is the appropriate office to issue with the appointment letter; you have agreed to report for duty on the 01 April 2016;

- You are therefore, requested to report for duty on the 01 April 2016 and if you have challenges in meeting the date; you are requested to communicate with the writer hereof;
 - As per procedure, you are further informed that your appointment letter will have to be revised to the date of appointment i.e. 01 April 2016;
 - However, should you elect not to honour the above-mentioned request within the coming five working days i.e. 08 April 2016; the Hospital shall reserve the right to consider any of the runner-up for the post.
40. Only on 22 June 2016 the applicant sent a letter of demand through her attorney to the respondent. The respondent did not respond to that letter.
41. Thereafter, the applicant elected to refer an alleged unfair dismissal to the Council. In my view the evidence produced in these proceedings did not support the applicant's case that the respondent repudiated her contract of employment on 9 March 2016. As such, there can be no substance in the allegation that she was dismissed as alleged. The documentary and verbal evidence confirm convincingly that no contract of employment was concluded as at 25 January 2016. I fully agree with the respondent's representative Dr Ouma did not have authority to direct her to commence duties. It was clearly stated in the preliminary job offer when and how she will commence duties. Therefore, the applicant was the author of her own demise; the applicant was not illiterate; she was well positioned to read and understand the content of the preliminary job offer. The applicant's appointment to the post of Medical Officer's Post at Chris Hani Baragwanath Academic Hospital was conditional at the time (25 January 2016). She was not expected to commence work without fulfilling all the job requirements. The preliminary job offer stated clearly that the job offer was preliminary in nature and was made purely on the submission of the required documents to initiate contractual engagement.
42. Accordingly, in the present dispute, as a matter of law, no contract could come into being without the express suspensive condition (registration certificate as an Independent Practice Medical Practitioner with HPCSA) being fulfilled. The

operation of the contract therefore depended upon a future and uncertain event. As it turned out the contract of employment was dependent on submission of the registration certificate as an Independent Practice Medical Practitioner with HPCSA. Despite that when the contract of employment was concluded on 9 March 2016; the applicant also failed to comply with the conditions of that contract of employment. She refused to commence her duties before receiving a letter of acceptance from Dr Ouma. She insisted on receiving a letter of confirmation from Dr Ouma despite being clarified by Adoons that there was no requirement of receiving such a letter before commencing her duties.

43. I consider that point in favour of the respondent; despite the applicant's attitude the respondent indulged her and gave her more time to come and start working but the applicant refused.
44. In my view the applicant's submissions are untenable in law and overlook the compelling fact that the applicant's appointment was conditional upon submission of the registration certificate as an Independent Practice Medical Practitioner from HPCSA. She was neither employed nor dismissed by the respondent when she stops to render her personal services on 1 March 2016. The last but not least when she refused to commence her duties on 9 March 2016 there was no dismissal effected by the respondent (**See Phera v Education Labour Relations Council & others (2012) 33 ILJ 2839 (LAC) 2012 ILJ p2839**).
45. In this instance there was no dismissal on or before 9 March 2016 as the applicant wanted me to believe. Section 186 (1) of the Act defines a dismissal for the purposes of the Act's application. Dismissal includes that "an employer has terminated a contract of employment with or without notice".
46. It is my conclusion that there was no dismissal as defined in section 186 of the Act as stated above. As such the termination of the applicant's employment did not fall within the ambit of the Act. In my view, the applicant was excluded from

challenging such termination through conciliation and arbitration as provided for in the Act.

47. Consequently, I find that the applicant led no evidence to discharge onus of proving that she was entitled to receive salary for the period 25 January 2016 and 1 March 2016 and proving that the respondent had repudiated her contract of employment; as such dismissing her unfairly. In my view the applicant has failed to discharge the onus to establish the existence of a dismissal as set out in section 192 (1) of the Act.

48. In the circumstances I make the following award:

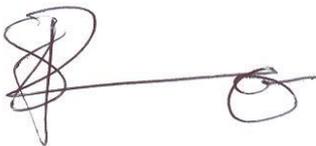
Award:

49. The termination of the applicant's contract of employment does not fall within the purview of section 186 of the Act. As such, the applicant is excluded from the remedies provided for in section 193 and 194 of the Act.

50. Dr Maryam Patel's application is dismissed and she is not entitled to any relief.

51. No order as to costs is made.

52. This file should be closed.



Bhekinhlanhla Stanley Mthethwa