ARBITRATION AWARD

Panelist/s: Adv PM Venter
Case No: PSHS 531-10/11
Date of Award 17 September 2012

In the ARBITRATION between:

SAMA obo MOALUSI
(Applicant)

and

DEPARTMENT OF HEALTH: FREE STATE
(Respondent)

ARBITRATION AWARD

DETAILS OF HEARING:

1. The matter was arbitrated at the offices of the Respondent in Welkom on **4 September 2012** and parties had to submit their closing arguments by no later than **14 September 2012.**

2. The Applicant was represented by Mr. Buthelezi from SAMA whilst the Respondent was represented by Mr. Mncube, a Labour Relations Officer of the Respondent.

3. The matter was mechanically recorded and no interpreter was required.

BACKGROUND TO THE MATTER:

4. The matter was referred to the Bargaining Council in terms of Section 191 of the Labour Relations Act, 96 of 1995 (hereinafter referred to as "the LRA**"**).

5. The Applicant was employed as a Sessional Medical Officer since 1995. He earned R 37 024-00 per month and worked 6.4 hours per week performing autopsies.

6. The parties could not reach an agreement and the matter had to be arbitrated. Both procedural and substantive issues were in dispute.

7. At the commencement of these proceedings I was provided with exhibit "A" and "B" from the parties. Parties agreed to only submit written arguments and not to call any witnesses.

ISSUE TO BE DETERMINED:

8. I was called upon to decide whether or not the Applicant's dismissal was substantively and procedurally fair and in compliance with Sections 188 and 191 of the LRA.

SURVEY OF EVIDENCE AND ARGUMENTS:

CASE OF THE RESPONDENT:

Mr Mncube's arguments were, in essence, as follows:

9 In considering the matter, I should first and foremost dwell on the tenets on what constitutes a dismissal, and also to distinguish between repudiation of contract and a dismissal. The Respondent contends that the termination of the contract of the Applicant came into being due to repudiation of contract on the part of the Applicant and that the Respondent simply accepted such repudiation of contract by the

Applicant and that the Applicant repudiated his contract by having failed to tender his services.

10 In **Samancor Tubatse Ferrochrome v MEIBC & others – (2010) 19 LAC 1.11.12 and [2010] 8 BLLR 824 (LAC)** an accused employee, a furnace operator, was placed in custody for 150 days on suspicion of armed robbery. Due to this his contract was terminated. He could not render his service and the employer knew where he was. The employer chose "operational incapacity termination" of contract. The situation of the employee prevented him from rendering his service for an extended period of time and through means outside his control.

11 The Labour Relations Act, of 1995 provides for dismissal to exist in terms of section 185(1):

(a) An employer has terminated a contract with or without notice
(b) An employee reasonably expected the employer to renew a fixed term contract on same and similar terms but did so on less favourable terms or did not renew
(c) An employer refused to allow an employee to resume work after she took maternity leave.
(d) An employer dismissed employees for the same reason has offered to re-employ one or more of them and refused to re-employ another
(e) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee
(f) An employee terminated a contract with or without notice because the new employer after a transfer in terms of section 197A provided the employee with less favourable conditions than those of the old employee

12 It was the claim of the Applicant that he was dismissed for unknown reasons and if that claim can be held, then subsection (1)(a) would apply, however, in terms of subsection (1) (a) above, the Respondent did not wilfully intent or terminated the contract of the Applicant as a Session Medical Officer. The Respondent has simply accepted his repudiation of contract.

13 In considering the above provisions, one has to critically look at the sequence of events that led to the termination of the contract.

14 The Applicant did not report for duty from the 26 April 2010 until the 06 August 2010. The Respondent, after having established only on the 29 April 2010 that the Applicant was in Sandton for an operation via another Doctor working at the Forensic Pathology Services contacted the Applicant via his mobile on the 29/04/2010; 11/05/2010; and the 31/05/2010 only to find his voice mail. We refer the Commissioner to **page 38** of **Bundle B**.

15 The Respondent also invoked internal processes and communication to try and salvage the absence of the Applicant, by amongst others invoking the leave provisions for casual workers as the Applicant is a Session Doctor and not a full-time employee, I was referred to **pages 37**; **48; & 53**. On the 19 May 2010 the Respondent initiated the freezing of salary of the Applicant after the Respondent tried to establish the reasons for absence from work by the Applicant and to find out if the Applicant was going to report for work and when. See **pages 36 – 38** and **pages 40 - 44** of **Bundle B**.

16 No sick note or family member reported the illness of the Applicant as per the requirements of the 5 day sick leave policy (Determination on the leave of absence in the Public Service). It was incumbent upon the Applicant to have reported his absence from work at least within five work days of his absence from work; the Applicant did not comply with the prescripts as contained in these pieces of legislation and thereby failed to comply in terms of law. The Respondent cannot be blamed for the failure on the part of the Applicant to comply with the prescripts which he has full knowledge of, because he is a professional of very high standards, with due respect.

17 A letter from Dr. Spanenberg, dated 04/06/2010 was addressed to the Applicant supposedly only two months after the absence of the Applicant from work without permission. It is not clear when the letter reached the Respondent. The letter stated that the Applicant (Dr. Moalusi) undergone an operation on the 02/05/2010 and that he is not able to use his right arm but still undergoing rehabilitation. See **page 39** of **Bundle B**. The Applicant supposedly only signed an application for leave of absence on the 30/07/2010, another three months after his absence from work without permission, requesting temporary disability leave, we refer the Commissioner to **page 44** contained in **Bundle B**.

18 Another correspondence from Dr. Roger Nicholson dated 07 July 2010 concerning the Applicant stated that he sustained a brachial plexus in his right dominant arm and that incomplete recovery is expected. Dr. Nicholson, on the basis of the aforementioned, recommended light duty for the Applicant. See **page 45** of **Bundle B**. It has been determined that Forensic Pathology Service do not have what is called light duty, and a letter in response to the so called appeal for dismissal has been addressed to the Applicant in this regard. Also reports by a Chief Specialist, Dr. Monatisa have been generated and minutes after having met with the Applicant addressing the issue of light duty for Session Medical Officers, see pages **50; 57 – 58; & 71 – 76** of **Bundle B**.

19 During the month of August 2010 a letter was received from Audrey Mahlatsi who stated that she was the spouse of the Applicant. The spouse is requesting permission for the Applicant to resume duties in the month of August 2010. It is also mentioned that the Applicant was involved in an accident on the 02 May 2010. Further it is mentioned that the Applicant was transferred to Sandton Clinic to undergo further surgery on the 3rd May 2010. Also the spouse mentioned that the Applicant was discharged on the 27th May 2010 and was recuperating at home and attending treatment at both Welkom and Sandton Clinic. The spouse also stated that the Applicant's dominant right hand is completely paralysed. The letter goes on to state that the Applicant has acquired the services of a locum for his own business and has not resumed duty with the Respondent. It is also mentioned that the salary of the Applicant was stopped during the month of July. Lastly the letter state that the Specialist treating the Applicant asks that the Applicant resume duties with the Respondent if permission is granted. See pages **55 – 56** of **Bundle B**.

20 However noble the motive of the Applicant via his Spouse may be, it cannot in law serve as a basis to resurrect the Applicant`s contract of employment some four months after its termination in circumstances where the demise of the contract was brought about by impossibility to perform and repudiation of contract by the other party (the Applicant).

21 On the 31 August 2010 a letter with the caption: **Appeal against dismissal – Dr CMT Moalusi** from Laetitia Wolfswinkel: Labour Relations Advisor at South African Medical Association, was addressed to Dr. Monatisa and it mentions that the Applicant was dismissed as a Session Doctor within the Free State Department of Health. The letter

also stated that the substance for the dismissal is unknown and that the Applicant was **telephonically dismissed** on the 06 August 2010. See **page 51** of **Bundle B**.

22 On the 31st August 2010 a response by Dr. Monatisa was written to Laetitia Wolfswinkel. In the response, Dr. Monatisa stated that the Applicant was a contract employee with the Respondent and not on the permanent staff establishment of the Respondent. This implies that he cannot be accorded impairment benefits as those of a full-time employee. It is mentioned that the condition of his employment was the ability to perform his duties completely. And since his so called dismissal he has not performed his duties. The matter of termination of his contract was due to repudiation of his condition of contract which the Respondent simply accepted. Dr. Monatisa further mentioned that in terms of the documents provided by the Applicant both via his Spouse, Laetitia Wofswinkel (Labour Relations Advisor: SAMA) and treatment Specialists, it is indicative that the Applicant will not be able to continue with carrying out Autopsies. See **page 50** of **Bundle B**.

23 In terms of common law principles of contract, a contract terminates automatically when it becomes permanently impossible to perform the terms of the contract, due to no fault of the party. It is the contention of the Respondent that in the context of an employment contract impossibility of performance will result in the automatic termination of such a contract and will not constitute a dismissal. This may include physical impossibility such as acts of nature for example the illness or death of an employee, acts of state such as imprisonment that prevent an employee from working or an employer from providing employment. It may also include legal impossibility such as a statutory requirement that prohibits an employee from working. It follows therefore that Impossibility must be absolute and must not be attributed to the fault of either party.

24 Thus in the **CCMA award of FAWU obo Meyer v Rainbow Chickens [2003] 2 BALR 140 (CCMA*)*** the Commissioner held that the dismissal of a chicken slaughterer who could no longer perform his duties after his certification to slaughter by Halaal standards had been withdrawn by the Judicial Council was a justifiable dismissal for incapacity by virtue of supervening impossibility of performance.

25 The incapacity must result from illness or injury, or it seems from any circumstances that render employees incapable of performing the duties for which they are employed. Any physical disability therefore falls under this head. The Code also emphasises that special consideration should be given to work-related sickness or injury. Meetings were held internally and with the Applicant on the on the 21st, 24th November 2011 and 1st December 2011 respectively to try and settle the matter. The Applicant requested to consult and should have reverted to the Respondent on the 09 December 2011. The Applicant never reverted back as requested by himself as per the meeting held in Bloemfontein on the 1st December 2011.

26 Even if the employer committed a wrong the Labour Appeal Court held that the employer has the "right to right a wrong'. An employee's unreasonable refusal or walking away from accepting such a genuine offer of remedial action is not deserving of compensation, even if the dismissal was unfair. The Respondent brings the attention of the Commissioner to the ruling of the Labour Appeal Court in **Dr. D.C. Kemp t/a Centralmed / Rawlins [2009] BLLR 1027 [LAC]**.

CASE OF THE APPLICANT:

Mr Buthelezi's arguments were, in essence, as follows:

27 The Applicant was employed on fixed term contracts and had approximately 8 months left of his current contract.

28 On 2 May 2010 the Applicant was involved in a serious car accident and was transferred to Sandton Clinic. He lost the use of his right hand/arm as result of the accident.

29 The Applicant informed his supervisors of his whereabouts and certain managers even visited him in hospital. He never absconded and his wife also informed management of his absence.

30 The Applicant was dismissed without any form of inquiry and he was informed telephonically that his services are no longer required. This happened on 4 August 2010 and the reason was that he was unable to perform his duties.

31 The Applicant si able to perform certain duties as he has forensic pathology officers who can be supervised. The Applicant sought reinstatement.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

DISMISSAL

32 I had no doubt that the Applicant was dismissed. The Respondent never followed section 17 of the Public Service Act. In **HOSPERSA & ANOTHER v MEC HEALTH (2003) 12 BLLR 1242 (LC)** the Labour Court held that an employee will be deemed to be dismissed if his/ her whereabouts are unknown. This "draconian" rule should be used sparingly and where the whereabouts are known the employer must hold an inquiry. Where an employee disappears "without a trace" no hearing would be required.

33 In **PHENITHI v MINISTER OF EDUCATION & OTHERS (2005) 6 BLLR 616 (O)** the Free State Provincial Division of the Supreme Court ruled that section 14 of the Employment of Educators Act, 76 of 1998, is constitutional. This section is similar to section 17 (5)(a) of the Public Service Act that deals with desertion. *The court held that mere absence does not amount to desertion and the intention not to return should have been formed*. The court held that the employee, in this matter, had the intention of not returning and an inquiry would have been unnecessary. It is however important to note that the court held that she clearly formed the intention not to return to work and had "belatedly" changed her mind. The Supreme Court of Appeal was then approached and in **PHENTITHI v MINISTER OF EDUCATION & OTHERS (2006) 9 BLLR 821 (SCA)** it was held that dismissal is not a decision taken by the employer and not an administrative action where the employee has clearly deserted or formed the indication that he/ she will not return. The court also confirmed that this section is in line with our Constitution and Labour Relations Act. The SCA held that termination came into operation by means of operation of law and no administrative decision was taken. In other words where a deeming provision provides for abscondment such provision comes into automatic working after, for example the 14 days have lapsed. There can therefore be no mention of a "dismissal" in terms of the LRA as the employer took no decision. The SCA also confirmed that an employee cannot rely on the *audi alterem partem* rule as the employer exercised no discretion.

34 That much is clear but the SCA also held (on page 826 at 12) that section 14(1)(a) would not have come into operation if the 14 days were interrupted. The discharge would then be invalid in terms of this section. Ms Phentithi's sick certificate contained a date well after the termination and for this reason the SCA held that no interruption took place.

35 In the **FREE STATE GOVERNMENT v MAKAE & OTHERS (2006) 11 BLLR 1090 (LC)** Judge Francis found that all the requirements of a deeming provision must be met in order for a termination to be *ex lege*. This case is of significant value as it was decided after the Phenithi –judgment and relates to a Free State matter. He found that all 4 requirements (absence for 30 days, of an officer, absence and no permission) should be present and he also ruled that the mere notification of illness does not equal permission. This matter dealt with section 17 of the Public Service Act and confirmed the Phentithi principles.

36 In my view the Respondent was acutely aware of the whereabouts of the Applicant. The Applicant was in hospital and later applied for extended sick leave (which was also signed by management).

37 I therefore reject the argument that no dismissal took place.

PROCEDURAL FAIRNESS

38 The LRA provides clear guidelines for dismissal for incapacity (see Schedule 8 of the LRA). The Respondent failed to follow any of these processes and simply terminated the Applicant's services.

39 Whether the Applicant's services were terminated telephonically or in writing was immaterial. He was not provided with any opportunity to present his case and a decision was taken without following the audi alterem partem rule.

40 It therefore follows that the dismissal was procedurally unfair.

SUBSTANTIVE FAIRNESS

41 The Applicant was dismissed due to the fact that he is unable to perform his duties as Forensic Pathologist. The Applicant lost the use of his right arm/hand but argued that he is still able to perform some duties as there are Forensic Pathology Officers who can be supervised.

42 There were medical reports submitted by the Respondent that clearly stipulate that the Applicant is unable to his right arm/hand. He was provided with an opportunity to present evidence that he is able to perform his normal duties but he failed to do so.

43 The Applicant is furthermore using locums at his private practice and I was convinced that he can no longer perform duties of a Forensic Pathologist.

44 The dismissal was, in my view, substantively fair.

REMEDY:

45 The dismissal was substantively fair and it would be absurd to order reinstatement as the Applicant is unable to perform his duties.

46 I have decided to award four months compensation. I have considered that the Applicant is carrying his private practice, that he has served the Respondent for many years, that no inquiry was held and that he had approximately 8 months remaining of his fixed term contract.

AWARD:

47.1 The Applicant was dismissed by the Respondent.

47.2 The dismissal of the Applicant was substantively fair but procedurally unfair.

47.3 The Respondent, the Department of Health Free State Province, is ordered to pay compensation to the Applicant, Dr CMT Moalusi, in the amount of R 148 096-00 (R 37 024-00 X 4 months).

47.4 Said amount is to be paid within thirty (30) days of receipt of this award.

47.5 I make no order as to costs.

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Adv PM Venter

PHWSBC Arbitrator