ARBITRATION AWARD

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS874-16/17**

Commissioner: **A C E Reynolds**

Date of Award: **8 June 2017**

In the matter between:

Noelle Sharifa de Bruyn (Union/Applicant)

and

Department of Health- Western Cape (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was referred for arbitration to the Public Health and Social Development Sectoral Bargaining Council (the PHSDSBC) for a dispute relating to an alleged unfair dismissal for an unknown reason referred in terms of section 191(5)(a)(iii) of the Labour Relations Act 66 of 1995 as amended (the LRA) and was completed over three sittings, the first scheduled at 10h00 on 14 March 2017, the second scheduled at 10h00 on 20 April 2017 and the third scheduled at 09h00 on 31 May 2017. The first two sittings were held at the premises of the Department of Health in George and the final sitting at the premises of the George Provincial Hospital.

2. A preliminary issue was raised by the applicant at the commencement of the first sitting of the arbitration on 14 March 2017 relating to an application for the arbitration to be postponed so that she could arrange for appropriate representation. The respondent also raised points *in limine* to be dealt with as preliminary issues on 14 March 2017. The arbitration was accordingly suspended for the purpose of dealing with the applicant's

application for postponement and the respondent's points *in limine*. After hearing the parties' submissions a verbal ruling was issued granting postponement, which was confirmed in a written ruling issued on 20 March 2017. The arbitration continued on 20 April 2017 and 31 May 2017 after the applicant had arranged for legal representation. The respondent was also given the opportunity to arrange for alternative representation, which they did do.

3. Present for the employee party at the first sitting on 14 March 2017 was Ms Noelle Sharifa de Bruyn (the referring employee or applicant). Present at that sitting for the employer party (the respondent) was Mr Abraham Solomon (Labour Relations Officer as the respondent's representative) and Mr Cedric Jacobs (Assistant Director Labour Relations as observer). Present for the applicant party at the sittings of 20 April 2017 and 31 May 2017 were Ms Deseré Barnard (Attorney with Cilliers Odendaal Attorneys as the applicant's legal representative) and Ms Noelle Sharifa de Bruyn, the applicant. Present for the respondent at these two sittings was Mr Ayanda Mniki (Assistant Director Labour Relations as the respondent's new representative).

4. The respondent raised a point *in limine* at the commencement of the second sitting of the arbitration on 20 April 2017, submitting that the PHSDSBC would not have jurisdiction to arbitrate the dispute if an unfair dismissal is alleged since in their version the applicant was never employed by the respondent for a dismissal to have taken place. The PHSDSBC would also not have jurisdiction to arbitrate the dispute if it related to an appointment since it arose after her previous contract with the respondent had ended.

5. The applicant party submitted in response to this point *in limine* that the applicant alleged that she was employed by the respondent on 1 September 2016 and dismissed on 26 September 2016. They were therefore not relying on a reasonable expectation in terms of section 186(2)(b) of the LRA. In order to determine jurisdiction for the dispute the arbitrator would need to hear the entire evidence of the parties to establish whether a contract of employment was concluded, that the applicant was an employee in terms of the LRA, and that a dismissal had taken place. It would then need to be determined whether such a dismissal was unfair.

6. The respondent replied to the applicant party's submissions that since it was clarified that they were not relying on a reasonable expectation and were claiming the existence of an employment contract and an unfair dismissal, that the onus of proof would be on them to show that a contract of employment existed. In the circumstances the respondent did not object to the arbitration continuing in order for the evidence in this regard to be tested.

7. It was agreed that the first sitting of the arbitration would be conducted in Afrikaans. The second and third sittings were conducted in English. Digital and electronic recordings were made of the proceedings, with my electronic record serving as the English translation, where applicable. A full explanation of the arbitration proceedings were provided for the benefit of the then unrepresented applicant at the first sitting of the arbitration, which included the onus of proof and the basic rules of evidence.

ISSUE TO BE DECIDED

8. The purpose of this arbitration is to determine whether the respondent had concluded an employment contract with the applicant, that the applicant was an employee as defined in the LRA, that she was subsequently dismissed by the respondent and if so, whether this was dismissal was fair on both procedural and substantive grounds. The relief sought was reinstatement, alternatively compensation. The onus of proof was on the applicant party to prove the existence of an employment relationship and a dismissal, whereafter the onus would shift to the respondent to prove the fairness of the dismissal, if a dismissal is found.

BACKGROUND TO THE DISPUTE

The following facts were common cause:

9. The applicant was previously employed by the respondent on a temporary contract in the position of Administration Clerk: Admissions at Beaufort West Provincial Hospital. This contract expired on 30 June 2016. An advertisement was placed in the respondent's internal intranet service for the position of Administration Clerk: Admissions at George Provincial Hospital advertised as Post 10 in Bulletin G16/2016, with a closing date of 13 May 2016. The applicant applied for this position and was invited to attend an interview in George on 2 June 2016. The invitation to attend the interview was sent to her via sms by Ms Phiebe Doro, an Administration Clerk in Human Resources Department at George Provincial Hospital, which interview the applicant did attend. The remuneration for the advertised post was at Post Level 5 of R132399 per annum, or R11033,25 per month.

The following facts were in dispute:

10. Whether the applicant was contacted telephonically by Ms Phiebe Doro and informed on 23 August 2016 that she was the successful candidate for the position.

11. Whether Ms Doro on the same day of 23 August 2016 informed a colleague of the applicant at Beaufort West Provincial Hospital, Ms Betty Mduku, that the applicant was successful and had been appointed.

12. Whether Ms Doro on 26 August 2016 informed the applicant that she can commence employment on 5 September 2016.

13. Whether Ms Doro again informed the applicant on 31 August 2016 that she was appointed and that the appointment letter was just a formality that they were waiting upon.

14. Whether on 2 September 2016 Ms Doro personally in her office in George confirmed with the applicant that she was appointed and gave her the bank form as contained in page 4 of the applicant's bundle of documents for the purposes of salary processing.

15. Whether Ms Doro again on 12 September 2016 saw the applicant personally in her office and assured her that the position was hers and that she was appointed.

16. What Mr Zaahir Emandien, Assistant Director Human Resources Management at George Provincial Hospital said to the applicant on 23 September 2016 over the telephone.

17. What Ms Doro said to the applicant over the telephone on 26 September 2016 regarding the reasons for the cancellation of her appointment and what was overheard by the applicant's landlady Ms Themba du Bruyn, over speakerphone.

18. Whether an offer of employment was made to the applicant by Ms Doro on behalf of the respondent, whether the offer was accepted, whether a binding contract came into being, and whether that contract was then unilaterally terminated by the respondent on 26 September 2016 and constituted a dismissal.

19. If a dismissal had taken place in the above circumstances, whether it was fair on both procedural and substantive grounds.

SURVEY OF ARGUMENTS

20. Ms Noelle Sharifa de Bruyn and MsThemba du Bruyn, the applicant's landlady, testified under oath for the applicant party. It was agreed that the applicant party's second witness Ms Themba du Bruyn would testify first due to her commitments.

21. Mr Zaahir Emandien, Assistant Director Human Resources Management at George Provincial Hospital, and Ms Phiebe Doro, Administration Clerk Human Resources Department at George Provincial Hospital, testified under oath for the respondent.

22. Documents were handed in by both parties at the commencement of the second sitting of the arbitration on 20 April 2017, with additional documents added during the proceedings and admitted to what they purported to be, although not necessarily their content. Documents written in Afrikaans were translated for the benefit of the respondent's representative.

23. Verbal closing arguments were presented by the parties at the conclusion of the final sitting of the arbitration on 31 May 2017, which are not repeated here but have been taken into consideration in arriving at the award.

24. Only the evidence relevant to the facts in dispute are summarised below and that which was established as common cause is not repeated, unless relevant.

ARGUMENT FOR THE APPLICANT

25. The applicant party's case was that the applicant was employed on a fixed term contract at Beaufort West Provincial Hospital from April 2015 to June 2016. While she was so employed she saw an advertisement on the respondent's intranet internal mail for the position of Administration Clerk: Admissions at George Provincial Hospital. She complied with all the requirements, submitted her CV before the closing date and was invited for an interview for the position on 2 June 2016 by Ms Phiebe Doro of Human Resources Department at George Provincial Hospital. She was provided transport to attend the interview, which she did. On 23 August 2016 she was informed telephonically by Ms Doro that she was the successful candidate, that she had got the position and had to start on1 September 2016. She also received the same confirmation via a colleague of hers at Beaufort West Hospital, Ms Betty Mduku, that Ms Doro had also confirmed the applicant's apointment with her, Ms Mduku. The applicant's evidence would be that she was extremely excited and happy about this, since she had responsibilities, which included a disabled child. She made

arrangements to move from Beaufort West to George, which included looking for accommodation. On 26 August 2016 Ms Doro contacted the applicant telephonically on behalf of the respondent to inform her that they realised that it was too short notice for her to start 1 September 2016, and that she couild commence duties on 5 September 2016 to allow her more time, which she accepted. Ms Doro telephoned the applicant again on 31 August 2016 and told her that they were waiting for her letter of appointment from Head Office but that she had nothing to worry about since she had been appointed and that it was only a formality. The applicant then came to George and on 2 September 2016 she personally attended the offices of Ms Doro where Ms Doro again assured her she was appointed in the position and gave her a form to take to SARS to have the salary arrangements processed so long. Ms Doro told the applicant she must just wait for her, Ms Doro, to confirm on what date she actually had to commence her duties. On 12 September 2016 the applicant again went to see Ms Doro in George at her office at the hospital and Ms Doro again assured the applicant that she was appointed and she will call her when she has to start working. In the following two weeks the applicant called Ms Doro on numerous occasions and Ms Doro did not accept any of these calls. On 23 September 2016 the applicant was in a state of panic and asked to speak to the Head of Human Resources at George Provincial Hospital, Mr Zaahir Emandien. She explained the situation to Mr Emandien and that she was appointed in the position of Admissions Clerk from 1 September 2016. Mr Emandien had told her he was sorry for the inconvenience and that Ms Doro would telephone her on the Monday. On Monday 26 September 2016 the applicant telephoned Ms Doro from her landlady's landline. The telephone was put on speakerphone during this conversation and her landlady, Ms Themba du Bruyn, heard the entire conversation. During this conversation Ms Doro told her for the first time that she did not get the position and that it was given to another candidate. The applicant would not accept that and Ms Doro explained that there was faction fighting in the Department of Health and some people preferred to give the position to another person. Ms Doro also told her that the person who got the postion had a criminal record for drunk driving and that she was extremely sorry about what had happened and would look for another job for the applicant, which the applicant did not accept either. Their case was that Ms Doro, as duly appointed by the respondent, had offered the position to the applicant and once there was an offer and acceptance of the offer, a binding contract came into being. There was no requirement in law that a contract of this nature should be in writing. The respondent had therefore appointed the applicant validly and she was then dismissed. Both procedural and substantive unfairness was alleged, with no procedure followed and for no fair reason since she was merely told over the telephone that the position had been given to somebody else. As relief the applicant sought reinstatement and appointment in the position concerned, alternatively compensation if there was no suitable vacancy.

26. Ms Themba du Bruyn, the applicant's landlady, testified as follows under oath in her evidence in chief: She ran an accommodation establishment in George at 10 Nerina Avenue, Bergsig, George East and was not related to the applicant although their surnames sounded the same, but are spelt differently. The applicant had contacted her for accommodation sometime during August or September 2016 by telephone in response to their internet advertisement. They had been in business for the past nine years and advertised for out of towners, either young working adults or students. Their advertisement stated that applicants must be formally employed or in the process of being employed, with sufficient proof that there will be a source of income. Students had to provide proof of registration with an accredited service provider and an active student number. During the applicant's telephone call she mentioned that she was in the process of starting work at George Hospital, that all processes had been completed and that she was awaiting the formal confirmation of employment and contract of employment from the respondent's Cape Town office. They accepted the applicant and she paid the deposit, with the understanding that when she came to George to view the accommodation she would bring the paperwork as proof of her employment. When the applicant arrived a week later she perused the documentation from the respondent that the applicant had in a file with her. She clearly recalled the letter of invitation to the interview and some correspondence between her and Ms Phindi (Phiebe Doro), surname not recalled. Since she possessed a Human Resouces Diploma from Boston College she was satisfied, based on the documents, that the applicant would be commencing employment, whereafter the applicant was shown her room and moved in. The applicant could not pay the rent that day as the understanding was that she was starting work soon earning an income and would pay the rent when she gets paid. She enquired and heard that the applicant had a sister in Beaufort West whose children she was raising and also had a disabled child there. She and her husband decided that no normal person with a disabled child would come to George without the prospect of work and gave her a week to pay them some form of rent. The applicant's sister assisted in paying the rent money at the end of the week. She could see that there was a problem and that the applicant was not working. She spoke to the sister to find out how long she would be able to carry the applicant's rent and the sister promised that another independent party was told that the applicant must call back because she has got the job and needs to start work. They then decided to carry the applicant's rent under those conditions and that she would pay the rent when she started work. She asked the applicant to tell her the truth on what had happened and initiated the call on 23 September 2016 to Phindi (Ms Doro) to establish the situation, which she put on speakerphone, since the rent must be payable the first of every month in advance and the applicant's rent was already behind. She described what she overheard on speaker during the conversation between the applicant and Ms Doro. The conversation according to her went as follows after they had greeted one another: The applicant said *"please tell me where do I stand now, if the date of starting the job is still the same or has changed, I have called numerous times and you did not respond to my calls and I did see you at the hospital, you looked in a hurry*

that day." Phindi (Ms Doro) replied *"Sharifa I really don't know and I am actually feeling very bad about this thing as I was the one who was requested to do all the conversations with you and all the confirmations with you are through me. There are factions in the department who want you, and includes me but the other faction established they want someone else".* The applicant said *"how can they do that, I have given up everything to come down to George"* and Ms Phindi replied "*I am also angry about the whole thing as the person the other faction wants has a criminal record and lacks the experience that you have in the Health Government Sector".* The applicant started crying and got emotional and wanted to terminate the call. Ms Phindi said "*listen here, keep talking and do not lose contact and I will keep you abreast about other opportunities that come by".* Ms Phindi also said to her *"if you want better clarification why the contract fell apart please contact Mr Emandien if you think he can give better clarification what happened with your employment."* The applicant replied *"that is exactly what I am going to do."* Ms Phindi kept on saying *"I am so sorry, this has never happened before".* This call happened the morning of 23 September 2016. The afternoon of the same day she asked the applicant to call Mr Emandien from their landline. She stood close to the applicant when she made the call and put the telephone on speaker again. According to her this is what she overheard relating to this conversation: The applicant introduced herself and told Mr Emandien that she was offered a position and now believes that it has been taken away and wanted to know the reason why. Mr Emandien answered *"I really don't even have a clue who you are and I am sorry there was never such a thing and as far as I am concerned that position has been frozen, nobody has been employed in that position yet".* The applicant asked *"how can that be frozen when I was called to George for the interview, why did the person who called me not say the position was frozen?"* Mr Emandien said *"I do not know, it is something you must talk to Phindi (Phiebe) as I do not know anything about this whole thing".* On 26 September 2016 after that call she told the applicant to try and get some funds and not to leave and return to Beaufort West and to see a psychologist, since she could see that the applicant was a broken person. She told the applicant that they were not going to evict her and that she wanted satisfaction as to who was wrong. She contacted a friend who ran a recruitment agency and assisted the applicant to find employment in the nail bar at Fancourt where she earns a small stipend to tide her over. She confirmed that the applicant spoke to Phindi (Phiebe) Doro in the conversation of 23 September 2016 and the reason why Ms Doro repeatedly said she was sorry was because the position that was offered to the applicant was taken away because somebody else was preferred by a faction there, who she believed was not suitable since he had a criminal record and according to her had limited experience.

27. Ms du Bruyn testified as follows under cross-examination: In the conversation of 23 September 2016 which she heard on speaker Ms Doro confirmed and said to the applicant in a remorseful tone *"I did say to you we are waiting on the final confirmation from Cape Town and since then a lot of things have happened*

and I was requested to communicate and confirm these things with you, I feel very bad as there is someone the other faction want, I feel so bad as this other person has less experience and has a criminal record." Before this call of 23 September 2016 the applicant had used her landline to telephone Ms Doro, during which Ms Doro requested something about whether the applicant had sent the thing to confirm the banking details but did not say at that point that the position had fallen away. She responded to the question on whether she was privy to a conversation before 23 September 2016 whereby Ms Doro indicated to the applicant that she was the successful candidate, that she initally heard this from the applicant when she enquired about accommodation and then later after the applicant moved in when the applicant called Ms Doro from her wireless landline telephone and asked whether she was still starting on 5 September 2016. The call was initially on speaker when Ms Doro replied that she (the applicant) was not working there, followed by a lengthy conversation about the starting date. She asked the applicant to put the speaker off since she was busy working and did not hear Ms Doro's responses after that. She responded to the statement that Ms Doro would testify that she never told the applicant that she had been appointed but was only told that she was recommended for the post, that there would somehow be no truth in that statement based on the evidence that the applicant produced when she was accepted for accommodation and asked what the applicant and Ms Doro would have been communicating about all that time if there was never something like that. She responded to the version that the applicant may have misunderstood Ms Doro and thought that she was appointed while Ms Doro made it clear that they were waiting on approval from Head Office, that there are certain steps that are followed by Human Resource practitioners in all recruitment processes, which had not been complied with since in the rejection stage no reason need to be given to an unsuccessful candidate nor told what the internal processes are and who the successful candidate was. Ms Doro could not produce documentation to substantiate that the applicant was employed or declined with the evidence only produced now at the arbitration why she was unsuccessful, which Ms Doro could have told the applicant over the telephone instead of still communicating with the applicant and leading her on. She had not worked in a Human Resources Department in the public service, but the initial recruitment steps are the same, which each organisation tailor makes for itself. She could not comment on whether the first conversation that the applicant had with Ms Doro was when Ms Doro telephoned the applicant to ask if she was still available for an extra post which became available even though her appointment was not approved yet. Although she never heard any conversation in which Ms Doro told the applicant that she was successful and appointed, she questioned why Ms Doro then apologised to the applicant. This was unprofessional if Ms Doro did this because she pitied the applicant since as Human Resources practitioners they are not in the business to pity people over the telephone when they reject them and to give reasons for this. Ms Doro should not have engaged and apologised to the applicant and mention internal issues to an outsider and that a colleague had a criminal record, and should have severed all ties with the applicant. As an unbiased and independent

person she felt if this was done by somebody else that person would have been fired. She could not dismiss what she heard over the telephone and as a third party she knows that Mr Mbele (the successful candidate) had a criminal record. She did not have an interest in the outcome since the applicant was still not paying rent but due to morality and professionalism she could not put an unemployed person on the street and could present proof of the applicant's sister's intention to pay her rent, which they did not accept. The correspondence that the applicant had in the file that she came with was the letter of invitation for the interview and the paper for the proof of banking details. These documents and the telephone calls that she witnessed was evidence to her that the applicant was in the process of being employed. She commented on the version that Ms Doro would testify that the reason that she spoke to the applicant more than once was because the applicant kept on contacting her to find out about the post since she had informed the applicant that she was waiting on the outcome on whether her appointment was approved of not, that the applicant would not have kept on if she knew she was rejected, for if she was rejected then there was no reason for Ms Doro to entertain her.

28. Ms du Bruyn testified as follows under re-examination: She confirmed that she overheard a conversation in which the applicant asked if she was still supposed to start on 5 September 2016. It did not make sense to her that the applicant would ask this if she was rejected or a decision had not been made yet to appoint her, which is why she wanted to establish if the applicant was really crazy or misquoting the situation. The applicant would not ask about a starting date if she had no job. When she spoke to the applicant's sister the sister told her that the applicant could not answer the telephone and a colleague took the call (from Ms Doro) because the applicant was out, which was part of the reason why she kept the applicant on in the accommodation. (An objection was raised by the respondent's representative that this was not raised during cross-examination, as well as the record of the whatsapp messages from Ms Betty Mduku, the applicant's colleague. I agreed to check the record and established that the latter was not raised during cross-examination, but that the conversation with the applicant's sister was already testified to in the witness's evidence in chief.)

29. Ms Noelle Sharifa de Bruyn, the applicant, testified as follows under oath in her evidence in chief: She confirmed the facts that were common cause and the sequence of events as presented in the applicant party's statement of case, which are not repeated here again for the sake of brevity, save to record the applicant's additional evidence in this regard. On 23 August 2016 after the interview she was called telephonically by Ms Doro and informed verbally that she was the candidate who got the position and that if she accepted the job she must do so immediately since she must start on 1 September 2016. At the time they also discussed her accommodation in George when Ms Doro asked her where she will stay and she responded that she

would start looking for a place immediately. Reference was made to the record of the whatsapp messages from her colleague Ms Betty Mduku in Beaufort West, which she confirmed happened on 23 August 2016. In the whatsapp messages Ms Mduku informed her that she was called by Ms Phiebe Doro from George Hospital and told that she (the applicant) was the successful candidate and must call Ms Doro urgently since she was not available. The messages as well as Ms Mduku's affidavit were read out for the record. She heard from Ms Doro again on her birthday of 26 August 2016, when Ms Doro called to inform her that they had a meeting and decided it was too short notice for her to start on 1 September 2016 because she still had to get accommodation and they decided that she must rather start on Monday 5 September 2016, which she assured Ms Doro she would do and that there was no problem from her side. Ms Doro then told her that she must make sure that she is at her office at 06h00 by Monday morning because they had a lot of papers to sign. Ms Doro contacted her again on 31 August 2016. At that time they discussed the appointment letter and Ms Doro assured her that they are just waiting for the appointment letter and that it was a hiccup from Head Office and that she must not worry and just make sure she is in George to commence duties. She was still in Beaufort West at the time and starting to make accommodation arrangements. Since she knew no one in George she went into the internet which is how she got in touch with Ms Themba du Bruyn to arrange the accommodation as testified to by Ms du Bruyn. She travelled to George with a friend on 1 September 2016 and went to see Ms Doro personally on 2 September 2016. On 2 September 2016 they discussed her commencement and Ms Doro told her that she could not start working without an appointment letter. She asked Ms Doro why it was taking so long and Ms Doro told her to worry about nothing, since it was only a hiccup and the position was hers. Ms Doro had in her office a brown official file with her name on, which she showed to her to assure her and told her that it only missed the appointment letter. Ms Doro asked if she still had her Persal number, which she gave to her. Ms Doro completed in her handwriting the application form to pay her salary into a banking account and also told her to get her banking details and go to SARS since they needed all new documentation and could not use her Beaufort West documents. Ms Doro told her too on that day that she would call her the moment she received the appointment letter whereafter she could start immediately. On 12 September 2016 she followed up again with Ms Doro in her office and told her on that occasion that she is now in George and found a place to stay and asked again why it was taking so long. Ms Doro told her that she did not know why it was taking so long and that she must please be patient, she knew how the applicant felt, was becoming impatient herself and that she will telephone her the moment she received the appointment letter. Another lady then came into Ms Doro's office and they had to conclude their conversation. She called Ms Doro numerous times after that, which were then not answered by Ms Doro. On 23 September 2016 she asked her landlady to use her telephone and call the hospital. She asked for the Head of Human Resources and they informed her it was Mr Zaahir Emandien and they put her through to his number. She explained the whole dealings that happened to her to him as well as the conversations

with Ms Doro contacting her and verbally informing her the job was hers and that they were just waiting for the letter of appointment from Head Office, that it has been a month now and she was very worried and still waiting for the contract to start in the position. Mr Emandien asked who she spoke to and she told him it was Ms Doro. He said he was not aware of the telephone conversations between her and Ms Doro and told her he was very sorry about the inconvenience that she was going through and did not know about this. He also said that they were in a meeting about the position that morning and that the position was still being discussed and in process, also that he did not know why Ms Doro contacted her about the job and that he would talk to Ms Doro and get her to contact her (the applicant) on the Monday regarding the position. Ms Doro did not contact her on Monday 26 September 2016 and she called Ms Doro from her landlady Ms du Bruyn's landline with the telephone on speaker since her landlady said she wanted to hear the conversation. She asked Ms Doro why she had not answered her telephone calls since she had called her numerous times and was very worried and not getting feedback about when she could start in her position. Ms Doro then told her that she was so sorry but the position was given to another candidate. She was devastated and shocked when she heard this news and asked Ms Doro why she was telling her that the job was given to another person when she had promised it to her as the successful candidate. Ms Doro told her that there was conflict about this position and that some wanted to give it to her as the successful candidate and some wanted to give it to another candidate, and apologised profusely to her. Ms Doro added that the candidate that they gave the job to had a criminal record since he was caught drunk driving and did not have any experience. She had the applicant's CV and she was the excellent candidate and excellent in her interview and did not know why this is happening. Ms Doro also told her that she could call her if she had anything she needed to ask and that she could always apply if there was another opening. She cried and was very upset after that conversation. (At this point the applicant start crying and a break was taken for her to compose herself.) She was a single mother with a mentally and physically disabled daughter and the sole provider for her family and her sister. After Ms Doro telephoned her the first time she was very excited and told her daughter that she had got a permanent position with medical aid for specialists and speech therapists for her. Through the assistance of her landlady she got employment at Fancourt at R4000,00 per month to assist in peak times while she was pursuing this case. Her landlady was presently letting her stay for free but will recover the money from her in the future. She owed a lot of money, including to the landlady. She did not need to be reinstated in the position that she had applied for, just to be reinstated on the same salary level 5 even at another clinic or hospital. The job was offered to her and she accepted it immediately based on the terms and conditions as advertised. The content of the advertisement for the post was read out for the record. She confirmed that she heard for the first time on 26 September 2016 that she did not have the job any more, which is when she was dismissed and why she referred an unfair dismissal dispute.

30. A document pack containing the appointment documents provided to new employees was handed in as evidence at this stage. The applicant party stated that they would not be leading any supplementary evidence in chief relating to these documents and did not object to the respondent cross-examining the applicant on these documents.

31. Ms de Bruyn testified as follows under cross-examination: By the time she got the message from Ms Betty Mduku that Ms Doro had telephoned about the post, she had already spoken to Ms Doro when Ms Doro telephoned her on 23 August 2016. Besides herself Ms Betty Mduku spoke to Ms Doro about the post. Her sister was her twin sister and was involved from the start. Her sister never spoke to Ms Doro but knew everything about it. She responded to the version of Ms Doro that she telephoned the applicant on that day to find out if she was still available for the post she had applied for since the panel recommended her for the post and wanted to know if she was still interested in the post and never said that she was appointed and successful, that it was totally not the conversation between them. Ms Doro had telephoned her to inform that she was the successful candidate for the position, offered her the position and asked if she accepted it immediately since she must start on 1 September 2016, with nothing said that she would be recommended for the post. She had accepted the offer and said she would start on 1 September 2016, about which she was very happy. There was no confusion whatsoever about her being a possible candidate who may get the job. She questioned why Ms Doro did not consider the respondent's policies and norms before offering her the job, which should not be made her problem. Ms Doro would be lying if she said that she never told her that she was appointed. She confirmed that she telephoned Mr Emandien and he told her that post was still in process. Although her landlady's testimony was that Mr Emandien had said the post was frozen both their versions were acceptable for whether the post was frozen or still in process it was the same thing. Her landlady must have misunderstood what Mr Emandien said. She responded to the version that Ms Doro would testify that she never gave her the bank form separately since all appointment forms are given to candidates in a package and the form that she submitted was not the form that they use, that when she went into the office Ms Doro had a file with various forms and she retrieved that form from the file and told her what while they are waiting for the appointment letter and she is in George she could get the SARS number and whatever is needed so that she will have it with her when Ms Doro calls her. The form that was referred to in the appointment pack was the same form but in a different format. When Ms Doro spoke to her about equity she told her that the position was not hers anymore and was given to a candidate who fell under equity and had a criminal record. If she was not appointed because of equity targets she questioned why the job was offered to her before the internal discussion in Human Resources Department about equity and why she was put through all this if the policies and procedures were not followed first. The policy and equity should have been sorted out first before the job was offered to her. It was absolutely not her understanding of the

conversation with Ms Doro that the reason why they telephoned her before the approval was done and appointment letter was issued was because they wanted to know if she was still available for another vacant post. She was speechless that Ms Doro would indicate that she never spoke to her and told her to come to her office Monday at 06h00 and that this was improbable since Ms Doro only started work at 07h30, because she did not know when Ms Doro started working in the morning but told her to be there 06h00 Monday morning to sign papers and that she perhaps had to go into a meeting at 07h30. She did not misunderstand when asked if she was still available as she would not have left everything, her family, home and child behind to come to a place where she knew nobody, had to get a place to stay and be left stranded with no money because of a misunderstanding. It was insulting to say she misunderstood Ms Doro's communications, which meant that they employed misunderstood people.

32. Ms de Bruyn testified as follows under re-examination: The applicant party wanted to introduce new evidence in chief which could be added for cross-examination, which the respondent decided not to cross-examine the witness on. Reference was made to the applicant's cell phone call log which was included in the applicant party's bundle of documents. She confirmed that the call log indicated calls made to and from George Hospital for the period 23 August 2016 to 12 September 2016 as testified to. These reflected the numerous calls she made to Ms Doro of which Ms Doro did not answer many.

ARGUMENT FOR THE RESPONDENT

33. The respondent's case was that the applicant was never appointed nor informed that she has been appointed in the disputed post. They would through their witnesses prove that the applicant was never appointed nor was ever declared nor approved as the successful candidate. Evidence would also be lead of the process that the Public Service follows for the recruitment and selection of suitable candidates, whereby the suitable candidate is recommended by the selection panel to the Delegated Authority, and includes the employment equity targets of the institution and region. The Delegated Authority must satisfy him/herself that the the appointment complies with all the criteria and only then will give his/her approval and inform the institution to make the appointment, which includes the letter of appointment and Annexure B attached to the letter of appointment which the successful candidate must sign to confirm acceptance of employment. Mr Zaahir Emandien, the Assistant Director Human Resources Management at George Provincial Hospital, would explain that process and lead evidence that the appointment documents were never sent to the applicant and that no approval was done by the Delegated Authority for the employment of the applicant. Ms Phiebe Doro, the Administration Clerk in Human Resources Department at George Provincial Hospital would testify that she never informed the applicant that she was the successful candidate and that her appointment

was approved. She communicated to the applicant that they were recommending her for the post and the reason why she had to contact the applicant was because the respondent wanted to find out if she was still available for the post. The respondent had initially advertised only one post, but later got two more vacant posts. If posts become vacant within six months the respondent will, instead of starting all over again with the recruitment process, look at the candidates who had performed well in the initial interviews and go back to that list of candidates. They will first check if a candidate is still available since candidates sometimes find other employment in the meantime, and will only then recommend the candidate to the Executing Authority. This was a process well known within the institution, which is what was done in the case of the applicant and she was informed that they are recommending her and the decision of the Executing Authority is awaited. There contention was that if ever the applicant was informed that she was only recommended it could not be regarded as an appointment. They would rather accept an argument that a reasonable expectation of employment was created, but not that a contract or employment was concluded by informing the applciant that she was recommended for the post. The reason why the applicant was not appointed was because the Delegated Authority noticed that her appointment would not comply with the respondent's equity targets and that appointments already made were not in compliance with the equity targets. They disputed that a contract of employment was concluded between Ms Doro and the applicant since Ms Doro does not have the authority to conclude a contract, with the Delegated Authority being the only one to approve and appointment and Ms Doro only able to send a letter of appointment once the appointment has been concluded.

34. Mr Zaahir Emandien, Assistant Director Human Resources Management at George Provincial Hospital, testified as follows in his evidence in chief: He confirmed the appointment packs that were provided to new employees. He explained his involvement in the institution's recruitment and selection process and that his role is to ensure the process is followed fairly. The Human Resources Department facilitates the process to ensure a fair process and arranges logistics for candidates. Reference was made to the documents that the chairperson of the selection panel is required to complete after interviews have been concluded, which includes the motivation to nominate and appoint the suitable candidate. He will check the documents once they are completed for fairness, the interview questionnaires, the scorings and equity. If there is any deviation he will discuss it with the entire panel for them to reconsider the recommendation. Once he is satisfied with the process he will submit the nomination to either the Chief Executive Officer of George Provincial Hospital who is the Delegated Authority for the approval of in equity appointments or to the Empoyment Equity Manager at the Chief Director's Office who is the Delegated Authority for out of equity appointments based on the respondent's numerical targets in terms of the Employment Equity Act. What happened with the process which the applicant was involved in is that there was initially a round of interviews for a vacant post

in the Admissions Department. They filled two vacances in that process. Both nominated candidates were out of equity and their appointment was approved by the Equity Manager. Subsequent to that they had another vacancy in Admissions. The practice is if a vacancy occurs again within six months of the initial recruitment process they will still use that process to recruit and appoint additional people from the same applicants without re-advertising the position. In this case another vacant post came up and they looked at the next candidate on the scoring, which was the applicant. A new motivation was completed for her nomination but because she was out of equity for that specific category they had to submit it the Employment Equity Manager for her approval. The Employment Equity Manager's response as contained in an e-mail of 5 September 2016 was that the request to appoint the applicant was not approved since that there was an equity candidate who was found suitable for appointment by the panel. He explained the PS12 Rank Order Suitability form which was part of the respondent's bundle of documents and showed that the first or highest scoring candidate in the interview process was W N Blaauw, with L Toll the second hightest scoring and the applicant the third highest scoring candidate. Mr M M Mbele was the first in equity candidate who scored 56% overall rating, which was still within the panel's pass mark for the interview. The only reason why the applicant was not appointed was because of equity and it was only because of the Equity Manager's decision that they appointed Mr Mbele. Reference was made to the respondent's Recruitment and Selection policy, which states at clause 12.3.19 that selection panels have no decision-making powers. A person cannot be given the outcome of the interviews once the panel has made a nomination. They can only notify the successful candidate after the Delegated Authority has approved the appointment. He explained again why the applicant was contacted before the approval was given and that since she was the next highest candidate she was contacted to check if she was still interested in the post because of the time period from the initial recruitment process. The only reason why they contacted candidates was so that they did not waste additional time to go through a process and nominate someone who is no longer interested. When they receive approval from the Delegated Authority to appoint somebody they will complete an appointment letter and an Annexure B which is the acceptance of the appointment as well as the employment contract. The appointment letter and employment contract are signed off by the Chief Executive Officer (CEO) or the Acting CEO if the CEO is absent. Once these documents are signed off they are sent to the successful candidate, which is the only time that one receives confirmation that you have been successful. When someone is mandated to telephone a candidate to find out about his/her availability and whether he/she is still interested in the post, that person will generally say that they are still busy with the process and had not made a nomination yet and ask if he/she is still interested in the position since there is still a vacancy. The person cannot take for granted that it means he/she has been appointed because they have not yet issued an appointment letter. The advertisement also indicates that if you have not been contacted within three months that you can regard yourself as being unsuccessful. He himself, if he called a candidate, would inform them

that they are still busy with the process and that you are not the the successful candidate yet at it is only a nomination at this point. His staff are aware of what the interaction should be and the implications since they are reminded of this regularly and it is discussed regularly at meetings. After he received the telephone call from the applicant in which she indicated that Ms Doro had told her that she was successful and had to start at a certain time he on Ms Doro's return from leave (she was on leave at the time) had an interview with her to explain to him what exactly happened. He also told Ms Doro to submit a statement in her language of preference, which would be translated if required, which she e-mailed to him in IsiXhosa and was duly translated. Ms Doro's side of the story was that she did not indicate to anybody nor the applicant that she has been successful for the post. Ms Doro did not have any authority to appoint candidates. The applicant was not appointed by the respondent since they do not do verbal appointments, with all their appointments done in writing. A person will only assume duty once the Annexure B is forwarded that indicates that the post is accepted and the employment pack comprising numerous documents has been completed for the Persal system. They do not issue individual documents such as the bank form contained in the applicant party's bundle of documents to successful candidates, unless they are already in employment. Based on her application the applicant had worked in various other Government Departments previously. That bank form was available at all institutions, not only at this institution. A different bank form was used currently. Clause 12.3.15 of the respondent's Recruitment and Selection policy relating to Employment Equity Plan and monthly numerical targets stating that the candidate who has scored the highest points in the selection process may be overlooked and a candidate with a relatively lower score may be considered as the most suitable candidate overall in order to meet these targets, was read out for the record, which is what happened in the case of the applicant.

35. Mr Emandien testified as follows under cross-examination: As Assistant Director Human Resource Management he reported to the Deputy Director Human Resources and Facility Management who in turn reports to the CEO of the institution and is also stationed at George Provincial Hospital. He has reporting to himself a Senior Administrative Officer Human Resource Management, which post is currently vacant, two Administrative Officers who report to the vacant Senior Administration Office post and then six Clerks who report into the two Administrative Officer posts. He also had reporting to him a Senior Administrative Officer Labour Relations and Human Resource Development. Ms Phiebe Doro is one of the six Clerks reporting to the Administrative Officers. He has occupied this position for about four years at the George Hospital. Ms Doro prior to being employed at George Hospital also worked as a Human Resources Clerk in the same capacity at Riversdale Hospital. He did not himself normally sit in with the interview panel at George Hospital, but only if he was requested to be part of the panel. He explained the recruitment and selection process and, amongst other steps, that shortlisted candidates will only be invited for interviews once he has signed off the

panel's shortlist. Candidates invited for interviews are contacted telephonically and in cases where proof of the invitation is required they also e-mail an invitation. They will in most cases make travel arrangemetns for out of town candidates and pay for a bus ticket to attend the interview, such in the applicant's case. The details of the interview (selection) panel for the applicant's selection panel would be contained in the RS6 form. The CEO would approve the composition of the panel prior to the shortlisting process. Ms Doro was on the applicant's panel as the Human Resources representative, with the details of that panel contained in the respondent's bundle of documents. The applicant would be interviewed alone and would only be given any documentation prior to or during the interview if a practical needs to be completed. The respondent's Recruitment and Selection Policy would not be given to any of the candidates. It would also not be e-mailed or furnished to any of the candidates prior to the interview by them. It was also not normally given to candidates after the interview and the Policy was available to anybody who asked for it and was a Departmental Policy which guides all involved in the process from the respondent's side and is is not shared with candidates. He was not aware if anybody referred the applicant to the Policy during the interview. He responded to the statement that the respondent was relying on clauses in the Recruitment and Selection Policy which were never brought to the attention of the applicant that the cover page of the bulletins which the Department sends out with the advertisements has a clause that indicates that equity candidates will be given preference. He was not party to Ms Doro's approach to the applicant on 23 August 2016 informing her that she was the successful candidate and must immediately indicate if she accepts the position, but as he stated before all appointments are done in writing with an appointment letter, Annexure B and employment contract. Their practice is, of which all Clerks in the entire Human Resources Department are very much aware, that no appointments are done verbally or acceptance requested telephonically. With reference to the whatsapp messages and affidavit of Ms Betty Mduku which the applicant party regarded as independent corroboration of Ms Doro's approach to the applicant, he was not part of that conversation and did not know the content of it, but that it could be the misinterpretation of information. He was not sure whether the handwriting on the bank form that the applicant stated Ms Doro provided to her was that of Ms Doro, but they did not complete bank forms for employees and gave blank forms to employees to complete themselves. He confirmed what he had said to the applicant when she telephoned him on 23 September 2016 and that he apologised and told the applicant that they are still busy with the process and that no appointment had been made. He confirmed again that nobody in his Department would appoint anybody verbally and the only reason that Ms Doro contacted the applicant was only to establish if she was still interested in the position. A starting date could not be discussed in these circumstances since Ms Doro did not have that delegated authority. He responded to the statement that if a staff member acted contrary to the Recruitment and Selection Policy that such action will bind the employer/respondent, that an appointment is only made with an appointment letter. He agreed that it would be a shocking thing to happen to anybody if everything

happened as the applicant described and a staff member acted outside the policy to the detriment of the respondent and the person was told three weeks to a month later that somebody else was appointed.

36. Mr Emandien testified as follows under re-examination: Whatever Ms Doro said to him after he asked her about what she said to the applicant he asked her to put in an e-mail. He read out Ms Doro's translated e-mail of 1 November 2016 for the record. Since this statement is relevant to the proceedings, the English content was that Ms Doro received a call from Ms Burger the Chairperson of the Admissions post panel on 23 September (August?) to call one of the candidates who came for an interview, being the applicant, to find out if she is still working at Beaufort West Hospital or not. She called the applicant as requested on the same date but could not get hold of her at work. She called her on her cell phone where she managed to get hold of her and asked her if she was still working at Beaufort West Hospital to which the applicant replied that she was, but on contract. When the applicant asked her whether she got the post or not she replied that she did not and that the Chairperson is busy drafting a recommendation which will be sent to Cape Town via the Hospital Manager where the decision will come from and she will be informed on outcomes. The applicant called her on 23 October (September?) about the post when she told her that Cape Town decided to take one of the candidates on equity. The applicant questioned her and she told the applicant that one of the gentlemen within equity was appointed with a criminal record. A copy of the IsiXhosa and translated e-mail was provided to the parties since it was not in the bundles of documents.

37. Ms Phiebe Doro, Human Resources Clerk at George Provincial Hospital, testified as follows in her evidence in chief: Her role in the recruitment and selection process was to represent Human Resources Department in the whole process. She had been doing this kind of work since 2009. When the panel finished the interviews the Chairperson took the whole package of those interviewed and the panel decides on the candidate selected for recommendation for appointment. She was just a representative of Human Resources to ensure they are doing the right things and has no say in the process. Once a nomination is made and if the candidate is in equity the whole package goes to the CEO to sign off the documents and a contract is preprared, without dealing with the candidate yet at that stage. The contract, salary determination and the Annexure B acceptance of the post is taken to the CEO again for approval. If the appointment will be out of equity everything goes to Cape Town for approval. If the appointment is approved a contract is prepared and signed off by the CEO in George. After the CEO has signed the contract the contract and Annexure B are sent to the successful candidate for acceptance and signature, which will also inform them of that candidate's starting date. Once the signed Annexure B is received it is sent to the Departmental Supervisor to inform the Department when the candidate is going to start. After that the candidate is telephoned to inform the candidate that the Annexure B has been receivded. The starting date is then also confirmed with the

candidate and the appointment pack is provided to the candidate. She explained the interactions that she had with the applicant in this case. The Chairperson of the panel telephoned her and asked her if the candidate (the applicant) is still available because they have a vacant Admissions Clerk post. The reason why they did that is sometimes they have already got a job and he or she may no longer be interested in the post. Before they go through the whole process they first want to know if he or she is still available. With reference to her e-mail statement of 1 November 2016, she telephoned the applicant but could not get hold of her on her cell phone and telephoned her work at Beaufort West. She got hold of a woman and did not ask her name. She asked the woman if the applicant is still with them and she replied the applicant was not at work and would try and get hold of her. She did not tell this woman what it was about since it was not right to tell her why she was looking for the applicant. She did tell her she was Phiebe from George Hospital looking for de Bruyn (the applicant). She did not get hold of the applicant and left a message for the applicant to phone her. The applicant phoned her back and she asked her if she is still available because there was a post in Admissions to which she said yes. It was pointed out to her that there were two different translated e-mails of her statement of 1 November 2016 on which the last sentence about a criminal record did not appear on the one, which was there in the IsiXhosa version, with the parties having accepted the version which contained the reference to the criminal record. She referred to her statement and explained that Mr Emandien requested her to write the statement on what happened with the applicant. She requested that she write it in her own language in IsiXhosa to express herself correctly. She did not speak to that lady, Ms Betty Mduku who answered the telephone, about the post or anybody getting the post since she could not do that and promise the applicant the post, therefore Ms Mduku was not telling the truth in her statement. She never said to the applicant that she could start on 5 September 2016. She did not indicate to the applicant that she was still waiting for the letter of appointment and it was just a formality that she had got the job since she could not promise anybody work without signing a contract. She could only inform the person she has got the job after the CEO had signed the contract. She did not tell the applicant to look for accommodation so that she is already in George by the time the appointment letter is available, since she also could not tell her to come to George to work if she has not signed a contract that has been signed by the CEO. She did not create an expectation with the candidate that she was successful when she spoke to her. She only told the applicant that she was the third person from the scores which is why they asked her if she is still available and that the recommendation for approval must first go to Cape Town for approval since it is out of equity. She never promised the applicant the job and she did not think that the applicant could think that she got the job because she did not sign a contract. Only Black females and Coloured females were out of equity for the post in Admissions, with the remainder all in equity. The relevance of the criminal record for the Black male who was appointed and was fourth and after the applicant in the scoring was that they did not know if it was going to count against him. They were told that since he is not going to drive cars and will only be in Admissions that

it will not affect him, which is why he was appointed in the post of Admissions Clerk. What both Ms Mduku and the applicant said about her telling them that the applicant was successful for the post was not true.

38. Ms Doro testified as follows under cross-examination: She was satisfied that the English translation of her e-mail statement accepted into record which referred to the criminal record was more or less the same as the IsiXhosa version. She wrote this e-mail on the request of Mr Emandien, who wanted her to explain what happened between her and the applicant and what was said in the conversations between the two of them and when it stopped. Her e-mail explained her full involvement with the applicant, with nothing left out. She did not know Ms Betty Mduku and had no dealings with her before. Although she did not know Ms Mduku at all, Ms Mduku was lying because she never said what Ms Mduku stated was said. She was referred to the whatsapp messages between Ms Mduku and the applicant contained in the applicant's bundle of documents, which were translated for her in English from the Afrikaans. She confirmed she spoke to a female person at Beaufort West Hospital, did not know who it was, and asked her to get the applicant to contact her on the same day of 23 August 2016. Ms Mduku was lying if she said in the whatsapp message to the applicant she must phone Febi (Phiebe) urgently at George Hospital who said she got the work. She did not know where Ms Mduku got this from or why she would make this up. The English translation of Ms Mudku's affidavit of 31 March 2017 relating to the events of 23 August 2016 was read out to her, to which she responded that she did introduce herself as Phiebe Doro and wanted to speak to Sharifa de Bruyn, the applicant, and that the person (Ms Mduku) did say that the applicant was at home. She denied that she asked to speak to Ms Mduku's supervisor and said nothing else, but only asked for the applicant. She did not ask Ms Mduku for the applicant's cell number as she had it on the applicant's CV and only told Ms Mduku that she could not get hold of the applicant and asked where she was. She said nothing to her about whether she had got a job for the applicant and never said that the applicant must contact her urgently since she must start on 1 September 2016. She did not know why Ms Mduku would fabricate what was said in her affidavit. She denied the statement that Ms Mduku's version fitted with the sequence of events and that the only person not telling the truth was her. She never had any contact again with the applicant after 23 August 2016 when she asked about her availability and told the applicant on that day that she would come back to her when the recommendation comes back from Cape Town and the contract is signed. The applicant called her on 23 October 2016 (should be 26 September 2016?)) and she explained to the applicant about equity and why the other person was appointed. The applicant did not make numerous telephone calls to George Hospital and spoke to her on several occasions since she did not communicate with the applicant again and she was not the only person working at George Hospital who goes through the switchboard. The applicant did not speak to her on 26 August 2016 and if it was through the switchboard, it was not her since she only telephoned the applicant once through the switchbaord. She responded to the applicant's testimony that she (Ms Doro) asked

the applicant when the applicant called her on 31 August 2016 whether she had got accommodation and that she (Ms Doro) told her that she need not worry that the paperwork was not in order yet and it was just a hiccup and that there was not enough time and she should only start work on 5 September 2016, that she could not promise the applicant a job without a contract. She did not see the applicant personally in her office on 2 September 2016 to discuss the situation since the applicant did not come to her office but met her at the photocopy machine on that day. She was busy making photocopies when the applicant came up the stairs to her office. She told the applicant she could not get a place to stay in George because she had not got a contract of employment and cannot stay in George without a contract. She agreed that she had previously stated that the version that she gave Mr Emandien was the full version of her contact with the applicant and that she had only had contact with the applicant on two occasions, which she had also confirmed three to four times when questioned. She had stated that because the applicant said that she was in her office and had omitted mention of the applicant's visit of 2 September 2016 because Mr Emandien had only asked about telephone calls and not about meeting with the applicant. When questioned about this she confirmed that she only had contact with the applicant on those two instances because she was not asked about personal contact and what type of contact she had with the applicant. She did not make mention of the applicant's personal visit of 2 September 2016 in her letter to Mr Emandien since she may have forgotten about that personal contact with the applicant at the photocopy machine. She responded to the applicant's testimony that when the applicant was in her office on 2 September 2016 she took out a file with documents and told her she must not worry and has got the job, that the applicant was not in her office and she could not promise her a job. The handwriting on the bank form which the applicant testified she received from her (Ms Doro) in her office was not her handwriting. She did not and could not fill in the one form only since she had to give the candidate the whole appointment pack. She responded to the applicant's testimony that ten days later on 12 September 2016 the applicant again visited her in her office and she informed the applicant that she was still waiting for the appointment letter from Head Office and that she could start working when it arrived, that the applicant was not in her office that day and she could not promise her a job without signing a contract. She could not remember that the applicant spoke to her again over the telephone on 26 September 2016 to find out what was going on, but then recalled that all she knew was that she told the applicant about equity and that Head Office sent e-mails and it was out of her hands. She denied the applicant's testimony that she apologised repeatedly during this telephone conversation and that she knew what happened was wrong and spoke about the different factions in the Department, since she was working in Human Resources and cannot divulge their secrets, therefore she did not know what the applicant was talking about. She had also signed a code of conduct of confidentiality in Human Resources and did not know about or divulge anything about conflicts, but was just doing her work. Ms Mduku and the applicant had both lied in their versions. Ms du Bruyn was also lying unless she brought the voicemail, since she said nothing. She had not acted outside

the scope of her employment by informing the applicant that she had got the job and was not now covering her tracks, and would never ruin somebody's life.

39. Ms Doro testified as follows under re-examination: She only spoke about the telephone contact with the applicant because her Manager only asked her about the telephone contact. She forgot about the photocopier incident because the applicant met her while she was busy at the photocopier . She apologised for omitting this from her statement, but the applicant was not in her office. When she was cross-examined by the applicant's representative the representative did not explain to her if it was face to face contact or by telephone, which is why she did not mention the personal contact. Her e-mail statement was made on 1 November 2016 and she could not remember everything that took place at the time.

ANALYSIS OF EVIDENCE AND ARGUMENT

40. I am required, on the balance of probabilities, to firstly determine whether the respondent, through the actions of Ms Phiebe Doro, Administration Clerk in the Human Resources Department of George Provincial Hospital, had verbally concluded a contract of employment with the applicant, Ms Noelle Sharifa de Bruyn, on 23 August 2016 for her to commence service on 1 September 2016 in the position of Administration Clerk: Admissions at George Provincial Hospital. Secondly, in the event that a valid contract of employment and employment relationship is established, whether the applicant was an employee as defined in section 213 of the LRA. Thirdly, if the applicant is found to be an employee, whether she was dismissed on 26 September 2016 by the respondent. Finally, if a dismissal is found, whether this dismissal was fair on both procedural and substantive grounds, as well as the appropriate relief if unfairness is found. It is also noted that the onus of proof was on the applicant party to prove the existence of an employment relationship as well as a dismissal, whereafter the onus would shift to the respondent to prove the fairness of the dismissal, if a dismissal is found.

41. I am reminded that the respondent raised a point *in limine* at the commencement of the second sitting of the arbitration that the PHSDSBC would not have jurisdiction to arbitrate the dispute since in their version the applicant was never employed by the respondent for a dismissal to have taken place, and that the parties then agreed that the arbitration would continue and their entire evidence would be heard in order for me to determine the jurisdictional and other issues in dispute.

42. Only the evidence that I consider relevant to determining the matter will be referred to. After considering the evidence presented, the following is found, on the balance of probabilities and under the circumstances of this case, with brief reasons provided as required by section138 (7) of the LRA:

43. The first obvious hurdle that needs to be overcome in this matter is that of jurisdiction. I am mindful that I am only empowered to arbitrate an alleged unfair dismissal dispute, as this dispute has been referred, in terms of the provisions of the LRA if the referring employee or applicant is an employee as defined in the LRA and that a dismissal had taken place as contemplated in the LRA.

Section 213 of the LRA defines an "employee" as follows:
'employee' *means –*
(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer,

Section 186 of the LRA relating to the meaning of dismissal and unfair labour practice states as follows, as applicable to this case:
(1) ***'Dismissal'*** *means that –*
(a) an employer has terminated employment with our without notice;

44. To address the issue of whether the applicant was an employee or not, it needs to be established whether an employment relationship or contract of employment had existed between the employee (the applicant) and the employer (the respondent) at the time that the dispute arose.

45. An employment relationship normally comes into being when a contract of employment is concluded between an employer and an employee. This need not be reduced to writing, provided the main or essential elements of such a contractual relationship are present, as explained by John Grogan in *Workplace Law* Seventh Edition at page 26, of which the relevant extracts are quoted below:

Like any contract the locatio conductio operarum (contract of employment) commences when the parties have agreed to its essential terms, unless both parties have agreed to suspend its operation for a particular period.

Whether the agreement of the parties gives rise to a binding contract of service is determined according to the general principles of law of contract. Of these principles, the most important are the following:

- *There must at the time of contracting have been consensus between the parties in the sense that they both had the serious intention to create mutual rights and duties to which they would be legally bound, and they must have each been aware that the other had this intention.*
- *Each party must have the capacity to act in the sense that he or she is legally capable of performing the act which gives rise to the formation of the contract.*
- *The rights and duties assumed must be possible to perform.*
- *The rights and duties assumed must be permitted by law.*
- *If formalities are prescribed for the formation of the contract, they must be observed.*

46. With respect to the formalities required in order to establish a binding contract of employment, which the respondent argued had not been complied with in terms of its Recruitment and Selection Policy in the Public Service, Grogan states further at page 28:

The parties are not required by common law to observe any formalities when concluding a contract of employment. Once there is either express or tacit agreement on the nature of the employee's duties and on the remuneration, the contract becomes operative. There is no common law requirement that contracts of employment must be in writing, although this is always desirable for the sake of clarity and the avoidance of later disputes.

A number of statutes require certain employment contracts to be in writing. Examples are those of merchant seamen and of apprenticeship. In addition, those of apprentices and candidate attorneys must also be registered with the appropriate authorities. Furthermore, where parties wish to alter provisions of the BCEA by agreement, they must do so in writing. The BCEA also requires employers to provide employees with certain information in writing which, once done, would amount to a written contract. However, non-observance of these formalities will not necessarily render the contract null and void.

47. As Grogan points out, the provisions of the Basic Conditions of Employment Act 75 of 1997 as amended (the BCEA) which generally governs contracts of employment also needs be considered, with reference to section 4 of the BCEA relating to the inclusion of provisions in contracts of employment, which states that a basic condition of employment constitutes a term of any contract of employment, with certain exceptions, which are not regarded as relevant to this case. Section 29 of the BCEA relating to written particulars of

employment specifically at 29(1) states that an employer must supply an employee, when the employee commences employment, with certain particulars in writing, with the list of the required particulars not repeated here. This is interpreted as a mandatory requirement only when an employee commences employment, with no reference made as to how the offer and acceptance of the employment is to take place, which is where the principles of the law of contract are then understood to become applicable.

48. In this matter the issues in dispute and the evidence of the parties confirmed that there is a dispute about whether a contract of employment had in the first place come into existence between the applicant and respondent. The applicant party's version was that the respondent's Human Resources representative, Ms Phiebe Doro, had verbally informed herself and another party, Ms Betty Mduku, that the applicant was successful for the position of Admissions Clerk at George Provincial Hospital, had to start at a certain date and should arrange accommodation in George, which she did. This was followed by subsequent verbal confirmations which the applicant received from Ms Doro. According to them there was a clear offer of employment and acceptance by the applicant whereby a valid contract of employment was concluded since all the essential requirements of a valid contract had applied, and that the applicant was an employee based on case law referred to. The principle of vicarious liability was also raised by the applicant party, whereby the respondent as the employer could be held responsible for any unlawful actions committed within the scope of her employment by their employee Ms Doro.

49. The respondent's version was that they had a Recruitment and Selection Policy which was strictly applied within the Department of Health, with only the appropriate Delegated Authority being empowered to approve appointments before successful candidates are notified in writing of their appointment, and that no verbal offers of employment are ever made to candidates, of which Policy all their Human Resources personnel are aware. Their witness Ms Doro had denied making certain statements to the applicant and Ms Mduku and had merely approached the applicant to establish if she is still available for another similar vacancy which had arisen, and that since she was still available she would be recommended for the post and would be advised of the outcome. Ms Mduku was also not present to testify and be cross-examined on her affidavit and Ms Doro's communication with her, of which certain of the contents were denied by Ms Doro. In their view the applicant in her excitement and hope had misunderstood Ms Doro's communications and had assumed that she was already accepted as the successful candidate for the post, which was eventually filled by an equity candidate, for which she did not qualify. A contract of employment had therefore not been concluded, there was no employment relationship established and the applicant was therefore not an employee to whom a dismissal could apply.

50. With respect to whether the applicant would be deemed to be an employee if a valid employment and contractual relationship is established, it has been determined by the Courts that a dispute can arise and be determined before work or employment commences for a successful candidate for a position to fall under the defined scope of an "employee", such as in the following case cited by the applicant party:

In the case of *Jack v Director-General Department of Environmental Affairs* (2002) 11 LC 6.9.3 the parties had concluded a contract of employment and Mr Jack was informed after he had resigned from his previous employment and prior to the starting date with the Department that the contract was revoked due to an administrative error. The Court found that the tendering of services and the payment of remuneration were delayed or suspended until the employee actually commences employment and ruled that Mr Jack was an employee of the Department.

I also refer to the matter of *Wyeth SA (Pty) Ltd v Manqele and Others* (2005) 26 ILJ 749 (LAC) in which it was held that the definition of employee in section 213 of the LRA can be read to include a person who has concluded a contract of employment, the commencement of which is deferred to a future date. It is therefore not a requirement that a person must "work" for another in order to be an "employee", which extends the LRA definition to a person who has contracted to work.

51. The applicant party had also cited the case of the *University of the North v Franks and Others* (2002) 8 BLLR 401 (LAC) which they regarded as relevant to this matter, that involved a retrenchment exercise in which voluntary severance packages were offered to staff members by one of the professors on behalf of the Executive Committee. About 141 staff members accepted the offer. The offers were then withdrawn in that they erroneously did not comply with the Council's Resolutions. Van Dijkhorst AJA held that where an offer is either expressly or tacitly stated to be irrevocable for a given period and communicated to an offeree it becomes irrevocable upon receipt unless the offeree rejects the irrevocability.

52. It should however be noted that in the abovementioned cited cases the existence of an employment contract or an offer and its acceptance were not in dispute, which are distinguishable from the present matter.

53. In my view the LRA does not provide for and have remedies for the determination of disputes surrounding a contract of employment, with reference to the matter of *Makhanya v University of Zululand* (2009) 8 BLLR (SCA) in which it was held that the CCMA (which would also apply to a Bargaining Council) does not have jurisdiction to arbitrate pure contractual claims, which is interpreted to include disputes relating to the

existence of a contact of employment. Section 77(3) of the BCEA relating to the jurisdiction of the Labour Court would instead apply to such disputes, which reads as follows:

77(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

54. It is noted that neither party raised the point *in limine* that I may not have jurisdiction to arbitrate the dispute if the existence of a contract of employment or employment relationship is challenged. I can however not ignore this jurisdictional limitation, for to determine such a matter further would be beyond the powers conferred to me by the LRA and could attract unnecessary review proceedings which would not be in the interest of either party, despite my observations based on the evidence presented and the credibility of witnesses that the probabilities tend to support the applicant party's version of what had transpired in this matter, and that there is a reservation as to whether all the essential elements such as the formalities for establishing a valid contract of employment in the Public Service had applied in the circumstances of this case.

55. An exception to this jurisdictional limitation regarding contractual disputes was established in the matter of *Cook4Life CC v CCMA and Others* (2013) 34 ILJ 2018 (LC) in which an employee claimed he was induced by duress to enter into a termination settlement agreement (or contract). The Court held that in that instance the CCMA was empowered to pronounce on the agreement as part of its jurisdiction to determine the existence of a dismissal. This case however also related to a matter where the prior employment relationship and the status of the employee as an "employee" was not in dispute. These circumstances therefore do not apply in this matter where the existence of an employment relationship is in dispute.

56. Furthermore, this forum is in my view also not empowered to address and determine the issue of vicarious liability of an employer in respect of an employee who committed a delict within the scope of his or her employment and the employer had created risk or harm to others through the actions of an employee who acted negligently or in an improper manner.

57. In the circumstances I find that I am unable to arbitrate this dispute further until the existence of a contract of employment or employment relationship has been determined in the appropriate forum, being either the Labour Court or Civil Court.

AWARD

58. The PHSDSBC does not have jurisdiction to arbitrate this dispute about the existence of a contract of employment, which requires to be determined by either the Labour Court or Civil Court in terms of section 77(3) of the BCEA.

59. No order as to costs is made.

Panellist: A C E Reynolds