

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3), REVISED.

9 May 2005

SIGNATURE

A. E. Smi

09/05/2005

CASE NO: 6543/2004

In the matter between

JOHANNES WILHELM JACOBUS JOUBERT

Applicant

and

NATIONAL COMMISSIONER FOR THE SOUTH
AFRICAN POLICE SERVICES

First Respondent

THE MINISTER OF SAFETY & SECURITY

Second Respondent

JUDGMENT

ISMAIL A J

The applicant sought an order to set aside the decision of the respondents in not boarding him on medical grounds. The

respondents submitted that he was fit enough to perform alternative sedentary tasks. The order sought should be effected with retrospective effect to the date of the first medical council's decision. Furthermore that the respondents be ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

BACKGROUND

The applicant is an adult male inspector in the detective branch of the South African Police Services (SAPS) based at the Brooklyn, Pretoria.

The applicant joined the SAPS in 1991. Whilst on duty, and in the course of his employment, as a police officer he was involved in several motor vehicle accidents. These accidents occurred in February 1992; February 1999; November 1999 and 13 August 2002. The applicant specified how these accidents occurred in his founding papers. For the purpose of this judgment it is not necessary for me to specify how these accidents occurred.

The applicant deposed in his affidavit that prior to him sustaining the injuries he was actively involved in sports such as golf, absailing and squash. As a result of these accidents he is unable to participate in any of these activities.

His sustained back injuries and his cervical discs were degenerating and he is experiencing excruciating pain as a result thereof. He takes painkillers to relieve or reduce the pain. He complains of severe pain when sitting or standing for long periods and also when driving a motor vehicle.

He was examined by Dr Basson an orthopaedic surgeon on the 18 March 2003.

In summary Dr Basson found – *“’n vroeg degeneratiewe 5/6 servikale disk met klein sentra/e prolaps ... (en in) ou kompressie fraktuur D11 werwel ... en in L5/S1 spondiliese wat kongeitaal van aard is”*

The Medical Board made the following recommendations in light of Dr. Basson's report:

"This member has chronic back and neck ache due to previous injuries on duty. He was evaluated by Dr W J Basson. He found him 25% disabled but will be able to continue with alternative or sedentary duty"

Pursuant to the Medical Board's recommendation the applicant was allocated new duties and he was entrusted to perform administrative tasks.

The applicant thereafter consulted an occupational therapist, Evette van Wyk on 25 July 2003 who conducted various test and who made the following recommendation:

"Ek beveel aan dat Mnr. Joubert weens mediese redes nie meer geskik is om as inspekteur in die SAPO Brooklyn speurdiens te kan funksioneer nie asook soortgelyke en/ of alternatiewe beroepe waarvoor die klient oor die nodige ondervinding en kwalifikasie beskik"

The applicant's attorney wrote a letter dated 4 September 2003 addressed to the Head Personnel Services SAPS wherein he requested that the Medical Board to reconsider their findings in view of Miss van Wyk's report.

On 16 September 2003 the Medical Board responded to the applicant's attorney's letter in the following manner:

"this office maintains that the opinion of an orthopaedic specialist carries more weight than that of an Occupational Therapist although the two practitioners may well work as a team.

Therefore the initial decision to retain the member's services in an alternative placement cannot be reviewed at this stage"

The applicant thereafter consulted an orthopaedic surgeon Dr Swarts who compiled a report and made the following recommendation:

"opsommend het ons hier dan in pasient wat, so os hierbo beskryf, wel duidelik patologie en simptome in sy nek, regter skouer, lumbale rug en beide kniee het. Hy moet werk verrig as in polisieman en die aktiwiteit daar van is goed bekend.

Ek twyfel dus nie gat hierdie pasient ongeskik is vir hierdie aktiewe tipe werk nie en beveel aan dat hy beroepsongeskik verklaar word.

Die feit dat hy nie lank kan sit of staan nie, maak dit ook baie moeilik vir hom om in ander tipe werk te verig en in totaal sou ek skat dat hierdie pasient ongeveer 50-60% ongeskik is"

The report of Dr Swarts was dated the 3 November 2003.

On the 4 December 2003 a letter from SAPS was addressed to the applicant's attorney wherein the following was noted:

“The orthopaedic specialist report was considered and it has been decided that this Office abides by its decision that the employee must be placed in a alternative position.

Your client must resume duties on 2003-11-28”

LEGAL SUBMISSION AND ARGUMENTS

Ms van der Walt acting for the applicant submitted that Dr Basson's report did not take into account the findings of Radiologist. Whereas Dr Swarts took into account the radiologist reports. She also submitted that the decision of the Board was unfair, unfounded and arbitrary.

Mr Kruger acting for the respondents submitted that when the Board made its findings on the 13 May 2003 it relied on Dr. Basson's report. He also submitted that the argument that Dr. Basson did not pay attention to radiologists reports was unfounded as he stated at page 3 of his report:

"Klein disk op die 5/6 servikaal en onreelmatige eindplaat D11 is waargeneem. Verslag van gewone X/strale fotos dateer 20/1/2003 ook deur Dr. Bezuidenhout en Van Niekerk en Vennote, verslag word ingesluit, wat wel nie in hierdie radiology verslae gerapporteer word nie, maar wat ek opgemerk het met ondersoek van die X/strale fotos het die pasient wel .. "

Mr Kruger submitted that by the 13 May 2003 the Board had made its decision and that it was *functus officio*.

The Board despite having made its decision considered the reports of both Miss Van Wyk and Dr Swarts, as they were compelled to in terms of section 28(4)(f) of the South African Police Services Act 68, 1995. In response to the occupational therapist report the Board gave its reasons as stated above, namely that they considered the opinion of an orthopaedic surgeon to carry more weight. Pursuant to that an orthopaedic surgeon's report was obtained by the applicant.

The Board after receiving Dr. Swarts' report considered it and despite his recommendations chose the recommendations of Dr. Basson, as appears from their letter dated 4 December 2003.

Furthermore, the applicant in review proceedings had to show that there were procedural irregularities. Such irregularities would permit him to obtain the relief sought. In *casu* Mr Kruger submitted that the applicant was relying on the Boards decision being incorrect in law and this was not a ground for review.

(See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 T at 323G and *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 © at 217 para 28.)

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In **Davies v Chairman, Committee of the Johannesburg Stock Exchange** 1991 (4) SA 43 (W) at 46F-48G Zulman J referred to the following principles relating to judicial review:

- (1) The conduct of a statutory body exercising quasi-judicial functions is subject to review by the Supreme Court.
- (2) The issue before a court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review.
- (3) The remarks of Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* continue to apply.
- (4) A court has limited jurisdiction in review proceedings and supervises administrative action in appropriate cases on the basis of 'gross irregularity'.

- (5) There is no *onus* on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the *onus* rests upon the applicant for review to satisfy the court that good grounds exists to review the conduct complaint of.
- (6) The rules relating to judicial proceedings do not necessarily apply to quasi-judicial proceedings.
- (7) The body whose conduct is under review is entitled, subject to its own rules, to determine the rules of procedure it will follow.
- (8) The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a court of law, to hear witnesses orally, to permit the person charged to be legally represented, or to call witnesses or to cross-examine witnesses.

(9) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been 'a failure of justice'.

The Board was ultimately confronted with conflicting reports from experts and made a finding based on the report of Dr. Basson. It may be argued that the finding of the Board was incorrect, but this would not be an irregularity based on the procedural aspect of determination, that the applicant did not receive a 'fair hearing' or that the Board acted capriciously or that it did not apply its mind to the matter. [See ***Minister of Safety and Security v Van Duivenboden*** 2002 (6) SA 431 at 446 H 447 G].

In light of Davies' case *supra*, a court of review does not have to consider the correctness of the decision of the Board. A review court "*will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official.* "

In *Bato Star Fishing [Pty] Limited v Minister of Environmental Affairs* 2004 (4) SA 490 CC at 513 O'Regan stated:

“In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference he cited with approval Prof. Hoexter's account as follows:

‘(A) judicial willingness to appreciate the legitimate and conditionally ordained province of administrative agencies, to admit the expertise of those agencies in policy- laden or polycentric issues to accord the interpretation of fact and law due respect, and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and the refusal to tolerate corruption and mal-administration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by carefully weighing up the need for - and consequences of - judicial intervention. Above

all it ought to be shaped by conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal"

Schutz JA continues to say that '(j)udicial deference does not imply timidity or unreadiness to perform the judicial function.' I agree, the use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the needs for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.

Brand AJ referring to the phrase 'gross irregularity in the proceedings' in **Bester v Easigas [Pty] Limited & Another** 1993 (1) SA 30 (C) at 42 I stated :

"From these authorities it appears, firstly that the ground of review envisaged by the use of this phrase relates to the

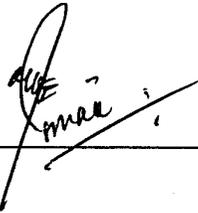
conduct of the proceedings and not to the *result* thereof. This appears clearly from the following dictum of Mason J in *Ellis v Morgan*; and *Ellis v Dessai* 1909 TS 576 at 581 -

'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the method of the trial, such as, for example, some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined'

(see also, for example, *R v Zackey* 1945 AD 505 at 509)"

In my view the Board's finding was based on the recommendation of Dr. Basson. The fact that the Board did follow Dr. Swarts and the occupational therapist's recommendation does not constitute a gross irregularity in its findings. Simply put they considered all the evidence and were of the view that the applicant was capable of working in a less strenuous job description.

In the light of the aforementioned decisions I am of the view that the application should be dismissed with costs.



Judgment delivered on 9 May 2005.

For the applicant: Adv van der Walt instructed by Plieter H Botha, Attorneys -Pretoria

For the Respondents: Adv Kruger instructed by the State Attorneys Pretoria.