

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JS 331/2004

NOT REPORTABLE

In the matter between:

DR MALCOLM NAUDE

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF HEALTH MPUMALANGA

Respondent

JUDGMENT BY:

C.J. MUSI, AJ

DELIVERED ON:

21 October 2008

- [1] This judgment relates, essentially, to two issues, firstly, whether the applicant was employed by the respondent with effect from 1 June 2001, and secondly, whether he was

dismissed for reasons related to his conscience and or professional ethics.

- [2] The applicant, a medical doctor, was appointed as a community service medical officer at the Rob Ferreira Hospital (RFH) for one year, from 1 June 2000 to 31 May 2001. During March or April 2001, he applied to the Member of the Executive Council for Department of Health, Mpumalanga Province (the respondent) to have his post translated to that of a Junior Medical Officer, with effect from 1 June 2001. He simultaneously applied for six months unpaid leave, which meant that he would actually start working on 1 December 2001. The respondent denies ever having received his application for translation and special leave.
- [3] Dr Malcolm Naude (the applicant) testified that the degree MBChB was conferred on him in 1997 by the University of Pretoria (U.P). In December 1998, he completed his internship year at Bloemfontein. He had a student loan

amounting to approximately R200 000 00. In order to pay his student loan he went to practice in the United Kingdom (UK) in 1999. On his return to South Africa in 2000 he had already paid half of the loan amount.

- [4] He started with his compulsory one year community service year at the RFH on 1 June 2000. The contract expired on 31 May 2001. In terms of that contract he was appointed on a salary notch of R93 924 00 pa. The contract further stipulated that:

"You are informed that unless advised to the contrary in writing by the Head of Department: Health Services, Mpumalanga your contract shall terminate after 1 year's service. You are also advised that no person other than the Head of Department: Health Services is authorised to inform you whether or not your contract will be extended when agreed upon by both parties, and unless you are so advised by the said person, you cannot expect this agreement to be reviewed."

- [5] This contract expired at the end of May 2001. He was impressed with RFH and decided to apply for the translation of his post. He spoke to Dr Von Mollendorff (Von Mollendorff),

the senior medical superintendent at RFH, who advised him to apply simultaneously for translation and six months unpaid leave. The reason for the unpaid leave was because he wanted to return to the UK in order to work there and pay of the remainder of his study loan. During mid April 2001 he filled in the necessary forms. The necessary route forms as well as a motivation were also filled in. At a later stage, Dr Von Mollendorff asked him for a letter motivating his application for unpaid leave and to state clearly his plan to return to RFH. After he wrote the letter he received no feedback or query. He was pressed for time because he had to make arrangements to return to the UK and an answer in relation to his applications was of paramount importance. If his application for leave was unsuccessful he would probably not have gone to the UK. He also did not want to give up his position at RFH, if he was offered one.

- [6] He recalled going to Von Mollendorff's office to enquire about his applications and to tell him that he is pressed for time because he has to make arrangements to leave for the UK. Von Mollendorff phoned Mr James Khaliswayo (Khaliswayo) to ask him about his appointment as well as the appointment of

specialists. Von Mollendorff then informed him that Khaliswayo said he need not worry because his applications for appointment and special leave were approved. He was overjoyed because he did not expect his unusual application for leave to be approved.

- [7] During his community service year the respondent was embattled in a bitter dispute with the Greater Nelspruit Rape Intervention Project (GRIP). GRIP established and ran a rape crisis centre at RFH. Their primary activity was to assist rape survivors and also to give them access to post exposure prophylaxis (PEP). These anti retrovirals (ARV's) were given to rape victims after it was prescribed by a medical doctor at no costs to the RFH or the Department of Health, Mpumalanga. The money was sourced from donors. The procedure, at first, was to give patients a prescription and they would go to a private pharmacy and get the drugs. GRIP paid. He spoke to Von Mollendorff and they established a room dedicated to treating rape survivors. They had a cabinet with the necessary medication. The State provided the starter pack consisting of medication geared at preventing pregnancy and sexually transmitted infections. GRIP provided the PEP's at

no costs to the state. Survivors were also counselled and tested, with their consent. At one stage the respondent applied for an eviction order against GRIP.

- [8] In the eviction matter the applicant, on 7 June 2001, deposed to an affidavit in favour of GRIP. In his affidavit he inter alia stated the following:

"9. I am advised that the applicant has alleged that GRIP's occupation of the care room prevents or obstructs the Department of Health from discharging its duty to supply health care to rape survivors. This allegation cannot be sustained. It is simply not true. GRIP's involvement has significantly improved the quality of health services provided to rape survivors at the hospital and has greatly benefited the hospital, its doctors, the staff and the community that the Rob Ferreira Hospital serves.

10. The four nurses who have been trained by the Department to provide counselling to rape survivors at the hospital cannot provide the same quality, or quantity, of care to rape survivors that the respondent does.

10.1 The hospital is already understaffed and all these nurses already perform onerous responsibilities

as casualty, psychiatric or maternity nurses, and it is not reasonable to expect them to take time out of their busy schedules to care for rape survivors on a routine or regular basis. At the very least such additional responsibilities will impact negatively on the quality and quantity of the services that are currently provided in their respective departments.

- 10.2 The four nurses can also not reasonably provide a 24 hour per day, 7 day per week service when they may be required to attend at the hospital on short notice at any time of the day or night. This is particularly so in circumstances where staff are dependent on public transport to get to and from the hospital from the townships where they reside.
- 10.3 In a context where the hospital is unable to guarantee the availability of essential drugs and other basic necessities for want of money, it is extremely unlikely that the hospital will be able to maintain the supply of care packs and other materials and services which GRIP currently provides to rape survivors at no cost to the state.

- 10.4 The nurses will not be allowed to counsel rape survivors on the use and availability of anti-retroviral drugs nor will the applicant make such drugs available.
11. I confirm that at the time GIP was first ejected from the hospital, the doctors were told by the Superintendent that he had been directed by the MEC to instruct us not to prescribe anti-retroviral drugs to rape survivors. This instruction caused a great deal of dissatisfaction amongst the doctors. The Hospital Superintendent subsequently requested the MEC to confirm the instruction in writing but the MEC has failed, or refused, to do so.
12. Most of the doctors, myself among them, have chosen to disregard the instruction and we continue to make out private prescriptions for anti-retroviral drugs to rape survivors where they are indicated. These scripts are dispensed at an outside private pharmacy. The drugs are paid for by GRIP. I, and the other community service doctors, use the hospital practice number and hospital stationery for prescriptions. The other doctors use their private practice numbers and stationery when they do so, so as not to fall foul of the prohibition.

13. The MEC's blanket instruction to state doctors not to prescribe anti-retroviral drugs, violates the hospital's patient's rights and offends against the norms and ethical codes applicable to physicians.
14. In this regard I would refer this Honourable Court to the Statements of the World Medical Association (WMA) which is an international organisation representing physicians. The Association founded in 1947 strives to ensure the independence of physicians and to work for the highest possible standards of ethical behaviour and care by physicians at all times. The WMA is an independent confederation of free professional associations, funded by the annual contributions of its members which comprise physicians' associations in approximately seventy countries. Copies of the original conventions and declarations of the WMA which are referred to can be made available to the Court if required.
 - 14.1 The world Medical Association's Declaration on Physician Independence and Professional Freedom, adopted in October 1986, declares *inter alia* that;

"Physicians must have the professional freedom to care for their patients without interference. The exercise of the physician's professional judgement and discretion in making clinical and ethical decisions in the care and treatment of patients must be preserved and protected.

Physicians must have the professional independence to represent and defend the health needs of patients against all who would deny or restrict needed care for those who are sick or injured.

The World Medical Association and its national medical associations therefore rededicate themselves to maintaining and assuring the continuation of professional autonomy in the care of patients which is an essential principle of ethics."

- 14.2 The WMA has identified twelve principles for the provision of health care in any national health care system, principle (xi) reads;

"xi) In the higher interest of the patient there should be no restriction on the physician's right to prescribe drugs or any other treatment deemed appropriate by current medical standards."

14.3 The WMA International code of Medical Ethics states *inter alia*;

"A physician shall in all types of medical practice, be dedicated to providing competent medical service in full technical and moral independence; with compassion and respect for human dignity.

A physician shall always bear in mind the obligation of preserving human life.

The health of my patient will be my first considerations."

15. The MEC's actions offend against these principles and imperil the lives of women and children rape survivors. This is quite unacceptable to me as it is to the

overwhelming majority of my physician colleagues and co-workers.”

- [9] He supported GRIP because he saw that the quality of care changed when they started working with GRIP. GRIP made things work effectively and efficiently. He felt strongly that it was not the government's place to decide what kind of treatment a doctor should give a patient. He was of the view that the MEC's stand against GRIP was blatant interference by the government in the doctor-patient relationship. His view was also that the government was not in favour of any forms of HIV drug based therapy, because at the time beetroot, garlic and olive oil took precedent over medication. Rape survivors did not have access to ARV's. Paradoxically, though, if any medical personnel at any health facility under the auspices of the respondent pricked himself or herself with a needle suspected of containing HIV contaminated blood that person would, in terms of the respondent's policy, have a right to PEP at government expense.
- [10] On 30 June 2001, whilst he was in the UK, he received an e-mail from Barbara Kenyon, the Chief Executive Officer of

GRIP, to the effect that he was dismissed by the respondent. On the same day he wrote an e-mail to Von Mollendorff's Secretary for Von Mollendorff's attention. He did not receive any reply.

[11] He contacted the Aids Law Project at the University of the Witwatersrand to assist him.

[12] On 9 July 2001 he wrote a letter to the Department of Health, Mpumalanga's Personnel Department wherein he stated the following:

"It has been brought to my attention that the Medical Superintendent of Rob Ferreira Hospital has been told that I am no longer employed by yourselves. This is contrary to our agreement that I have been employed by yourselves as a junior medical officer with effect from 1 June 2001, and that I am currently on unpaid leave. My appointment was confirmed by Mr J Hlaletshwayo (sic) of Human Resources Department to Dr Von Mollendorff of Rob Ferreira Hospital in May 2001.

In the light of my acceptance of the appointment, I assume the subsequent message to the medical Superintendant was

incorrect. If however, you have decided to terminate my employment, which I find hard to believe, please furnish me with written reasons and when such decision was taken. In this event, your urgent response is requested so I can address the issue without any delay.

However unless instructed otherwise, I will report for duty as previously agreed, on 1 December 2001.

I trust this clarifies the situation and I look forward to working at the hospital on my return from leave."

He received no written response to the letter. The department said they are sorting out the problem. Nothing happened. His legal representative, Ms Anita Kleinsmidt, informed him that she had contacted Mr Tshukudu who informed her that this matter had been a big mistake and that he should fill in other forms. He did. They received no feedback. Tshukudu was later removed from the matter.

[13] Ms Mnisi, legal advisor to the respondent, took over the matter and informed him that he is not an employee of the

respondent. She wrote the following letter on 17 October 2001 to Ms Kleinsmidt:

"According to information kept at this office, Dr Malcolm Naude was obliged to do community service work for a period of twelve months which contractual obligation expired on 31 May 2001.

We need to state that it is standard procedure of the department that all vacant funded posts for Medical Officers must be advertised in the PSC circular, as well as in the media in order to give medical officers an option to apply wherever they would like to be considered for appointment.

A total number of 8 posts of medical officer were advertised at Rob Ferreira Hospital and all doctors who were serving therein together with Dr Naude will be advised to apply for possible consideration. (See attached copy of advertisement for your information.

According to our records, Dr Malcolm Naude is not an employee of the department of Health. He will be considered together with all applicants after the closing date, should he apply accordingly."

- [14] On 20 or 21 November 2001 he received a letter dated 16 November 2001 from the Department of Health: Mpumalanga inviting him to attend an interview on 23 November 2001. He responded on 26 November 2001 and pointed out that he will not be able to attend the interview because he is in the UK and secondly because he was already appointed in June 2001.
- [15] During cross-examination he confirmed that he was never informed, in writing, that he was appointed as a junior medical officer. He testified that it was standard practice that appointments were communicated orally and the written confirmation followed. He conceded that he organised doctors to sign an open letter addressed to the respondent in relation to GRIP and the provision of ARV's. It was also put to him that Khaliswayo had no authority to appoint personnel and that Khaliswayo will say that he will only phone when he had appointment letters and he would then fax it and later post the original appointment letter. It was also put to him that he was not appointed because his documents were lost.

- [16] Doctor Matthys Johannes Von Mollendorff testified that he obtained the degree MBChB (UP) in 1979. He has practiced in several public hospitals since then. On 30 September 1999 he was appointed as a Senior Medical Superintendant at RFH.
- [17] He confirmed that the applicant started his community service year on 1 June 2000. Other community service doctors normally started in the beginning of the year. After completion of their community service year, doctors are generally translated to junior medical officers or they start specialising or they go overseas.
- [18] He testified that in order to fast track the appointment of junior medical officers a simplified translation process was agreed upon. On 27 October 2000 Dr Molly Smit wrote a memorandum to medical superintendants titled translation of community servers to medical officers. The memorandum inter alia states that:

“Each hospital to identify the officers that have indicated that they intend applying for a medical officer’s post, and forward these as a single motivation per hospital,

accompanied by the individual Z83's of the applicants. The motivation to be accompanied by the assurance that funded posts (are) available after consideration of the 2001 allocation of community servers, signed by the District Managers.

This list must then be handed to Ms Monyamane, the director of Human Resources who will expedite the appointment process. It is the Departments goal to ensure that professional services are not hampered by delays in appointments, and the reassurance has been given by the Director that she will attend to all professional applications as soon as possible..."

This memorandum was necessitated by the fact that doctors received confirmation of their translation very late. This meant that some doctors could not, timeously, apply to other hospitals because they wait long for news or confirmation of their translations.

- [19] The Ehlangeni District and Sub-District Management committee was formed to create uniformity of practice in the different health facilities in Mpumalanga. In terms of paragraph 8 of the committee's policy document the "*executing*

authority must first approve the advertisement of posts, interviews, appointments, transfers and resignations before any action can be taken by the health facilities. As a general rule all posts except "critical ones" must be advertised first before they are filled." Critical posts according to Von Mollendorff included doctors and radiographers. There was therefore no need to advertise any of the posts for junior medical officers at RFH.

[20] He confirmed that the applicant applied for translation and six months unpaid leave. He took all the forms including the route forms and gave it to Mrs Mathebula, the acting district manager, at the time, on 21 April 2001. She was very helpful. She signed the forms indicating that she recommended the applications. She promised to take it to Rosemary Monyamane, the Director of Human Resources. He confirmed that the applicant wrote additional motivations on 18 April 2001 and 3 May 2001 respectively. He does not know why the applicant wrote these letters.

[21] On 25 April 2001 he asked Khaliswayo what the status of the applicants' applications was. He could not assist. There was total chaos in the human resources department. They never

send feedback or acknowledgements. As a rule, forms got lost or were misplaced. The popular excuse was that the forms are on the MEC's desk. The problem was so widespread that the MEC wrote a letter on 12 June 2000 wherein she stated that:

"(I)t has come to my attention that my name is being used to cover-up administrative backlogs by human resource managers or personnel in the department, which is out of order and not acceptable. My role in the Department should not be misinterpreted and limited to administrative defections or connotations but should be elucidated to such an extent that even a layman on the street will understand it to be.

I would like to warn all those who use my name to protect the wrongs they do even at the district level to stop doing that as from today. In future I will not hesitate to take brutal steps against all those who shall endeavour to be defiant in their conduct when they are expected to do their daily duties."

[22] The Superintendents held monthly meetings. All matrons, primary health care co-ordinators and representatives from

human resources attended the meetings. During these meetings there were constant complaints about the chaos in relation to appointments. During one such meeting, he asked Khaliswayo about the applicant's applications. He got no answer. After the meeting, he, Khaliswayo, David Mdluli and Ms Mathebula sat at a table. He told Ms Mathebula that the human resources department's attitude towards appointments or the manner in which they dealt with appointments is unacceptable. He reminded Mathebula about the forms he gave her, she remembered. He gave her, there and then, another bundle of application forms and route forms in relation to the applicant. She signed it and gave it to Khaliswayo and requested him to attend to it, urgently. He took the documents and put it in his briefcase.

- [23] During May 2001 the applicant came to his office. Whilst the applicant was in his office, Khaliswayo called and told him that the applications of the nine specialists have been approved. He asked Khaliswayo about the applicant's applications for translation and unpaid leave. Khaliswayo told him that it has been approved and that the written confirmation will follow. It often happened that people were appointed after verbal

communication and the written confirmation is only received 3 or 4 weeks later. He informed the applicant that his applications have been approved and that he may go ahead and make the necessary arrangements to travel to the UK.

[24] After three to four weeks he received the written confirmation in relation to the specialist but nothing in respect of the applicant. He made enquiries to no avail. Nobody could tell him where the applicant's papers were.

[25] During June 2001 Ms Mnisi, the MEC's legal advisor, called him to enquire about the whereabouts of the applicant. He told her that he is on leave. She said that the applicant was never appointed. Khaliswayo also called him about the applicant. He told Khaliswayo that they approved his translation and leave. Khaliswayo told him that the MEC decided to "*disapprove*" it. He called Barbara Kenyon and told her that it looks like the MEC decided not to approve the applicant's appointment. She contacted the applicant and the applicant contacted him. The applicant requested him to write a letter to the department asking them to "*disapprove*" his application in writing.

[26] On 11 July 2001 he wrote a letter to Ms Mathebula setting out the history of the matter and also specifically referred to the two occasions on which he gave her the applications. He also referred to his telephonic conversations with Ms Mnisi and Mr Khaliswayo. He received no reply.

[27] He further testified that it was stated government policy that there should be co-operation between government and civil society, including CBO's and NGO's, in the fight against HIV/AIDS and STD's. As part of their victim empowerment program, which was in line with government policy, they established a care room for rape survivors. GRIP was introduced to him by members of the government's victim empowerment team on 23 February 2000. GRIP assisted RFH by providing furniture for the care room. The district manager Ms Kareen Swart, endorsed the services of GRIP. During January 2000 Mr Johan Bosch, chairperson of the provincial victim empowerment team, wrote to the respondent asking her to supply ARV's to rape survivors. He received no reply.

[28] The care room was opened in April 2000. On 2 October 2000 he, Barbara Kenyon and the district manager went to speak to Dr Karim, the Head of Department of the Mpumalanga health department (HOD) in connection with GRIP supplying ARV's. He said that it was against government policy but they could do it if RFH is declared a pilot site. At Dr Karim's request, a memorandum was written on 2 October 2000, requesting that RFH be declared a pilot site for giving PEP. Dr Karim visited the care room on 2 October 2000. He was convinced that it was a good service. On 3 October 2000 the respondent called RFH and spoke to the matron, Thembi Khoza, and instructed her to evict GRIP and lock the care room. The care room was locked. The incident received media attention. On 9 October 2000 the respondent called a meeting with the entire management of RFH and the district manager. The respondent was furious and wanted to know who gave GRIP access to RFH. She said that ARV's are poisonous. They were all instructed to write reports on their collaboration with GRIP and their support for ARV's. Shortly after this meeting, on 25 October 2000, officials from the labour relations department visited RFH to speak to the management of RFH. The next day (26 October 2000) they heard that the district

manager has been suspended. They also received letters to the effect that all senior managers at RFH would be charged with misconduct. He was also charged. The charges were later withdrawn. The respondent vowed to make sure that they are severely punished. GRIP was later reinstated on condition that they should not dispense medicine. Something which, they in any event, did not do. The respondent tried on numerous occasions to evict GRIP. At one stage the respondent got an eviction order which was later rescinded. The respondent then successfully applied for another eviction order.

- [29] During a meeting with the respondent they informed her that rape survivors beg doctors to give them medication to prevent them from becoming HIV positive. They requested her permission to issue scripts so that survivors could get ARV's at private pharmacies. She refused. She requested him to write a memorandum informing medical doctors that they should not write scripts for ARV's. He pointed out that it is policy and that she should write the memorandum. She then instructed him to write the memorandum.

- [30] He called a meeting with the doctors at RFH and informed them about the respondent's instructions. He also informed them that they must act according to their consciences, bearing in mind that their patients come first. His view is that a doctor should be free to act, at all times, in the best interest of a patient without interference by an employer or politician.
- [31] He further testified that he was charged with misconduct in December 2001 and dismissed on 22 February 2002. He referred the matter to the CCMA. The department decided to withdraw all charges and it was ordered to compensate him with a year's salary, which he has not yet received.
- [32] He also pointed out that it is not standard procedure to advertise medical officer's posts. He confirmed that on Ms Kleinsmidt's request he sent her copies of the applicants' application forms.
- [33] He also confirmed the occupational injuries policy i.e. that medical personnel are given PEP if they injure themselves at work, the so called needle stick injuries policy.

- [34] Subsequent to his dismissal he acted as a locum. He is employed at an AIDS clinic since 2004.
- [35] During cross examination he confirmed that there were never advertisements for junior medical officers. He also testified that Mathebula informed him that he can forget the applicant will never be appointed in the health department Mpumalanga. He confirmed that Mr Tshukudu was very helpful and he trusted that Tshukudu might convince the respondent to appoint the applicant.
- [36] Anita Kleinsmidt practices as an attorney since 1991. She testified that during 2000 and 2001 she was employed by the AIDS LAW Project at WITS.
- [37] The applicant approached them during July 2001 to assist him. On 19 July 2001, she wrote a letter to Ms Monyamane wherein she requested her to confirm whether the applicant has been dismissed or whether he is still an employee. She received no reply. She referred the dispute to the Public Service Co-ordinating Bargaining Council. On 30 July 2001

she sent the referral and covering letter to Ms Monyamane by registered mail.

- [38] She had contact with a Mr Armstrong Malope in the labour relations department of the Mpumalanga Department of Health. At some stage someone from the bargaining council called her to enquire about the status of the referral. She called Malope and told him about the call from the bargaining council. He said he will get back to her. She received no response from Malope. He however told her that the respondent has the final say in respect of all appointments.
- [39] In her endeavour to solve the problem she asked Von Mollendorff for information in relation to the applicant's employment. He sent her the applicants' employment particulars.
- [40] She subsequently received a message from Malope that she should contact Tshukudu, the then Chief Director Health Support Services. She called Tshukudu and he intimated that they needed doctors and that the applicant may begin as soon as his unpaid leave is finish. He requested her to submit new

forms as this was just a case of lost forms. She told him that the appointment date must be 1 June 2001 and that the unpaid leave should also be approved. On 13 September 2001 she sent a letter to Tshukudu wherein she stated the following:

"Our client has completed a fresh set of application forms for the post of medical officer following the alleged loss of his application forms by the Department of Health, Mpumalanga.

On 22 August 2001 we sent to you by fax the Route forms which accompanied the initial application on 21 April 2001. Our client should not be prejudiced by the Departments' "loss" of his application forms and the translation of his post from community service doctor to medical officer should therefore be dated effective from 1 June 2001.

Should this not be the case, we will treat this matter as an unfair labour practice and proceed accordingly.

We therefore await to hear from you urgently whether the Department will backdate the medical officer appointment."

[41] She received no response. On 8 October 2001 she wrote to Tshukudu, again, and made reference to her letter of 13 September 2001. She further stated that should she not hear from him by the close of business on 10 October 2001 she will have no choice but to instruct the bargaining council that they could not resolve the matter amicably. She did not hear from him. Von Mollendorff later told her that the matter has been taken away from Tshukudu.

[42] On 17 October 2001 she received a letter from Mnisi stating that it was:

“the standard procedure of the department that all vacant funded posts for medical officers must be advertised in the PSC circular, as well as in the media in order to give medical officers an option to apply wherever they would like to be considered for appointment...

According to our records Dr Malcolm Naude is not an employee of the Department of health...”

[43] Kleinsmidt testified that Mnisi’s letter came as a complete surprise because up to that stage no mention was ever made

of advertisements or interviews. It was also the first time that the department responded in relation to the applicants' status. On 19 November 2001 she responded to this letter and disputed the fact that it was standard procedure to advertise posts for medical officers.

[44] She also appeared on behalf of GRIP in the eviction proceedings. On 30 October 2000 she attended a meeting with the respondent. During that meeting they pointed out to the respondent that children who are raped were more vulnerable and susceptible to the HIV. They asked the respondent to make an exception so that doctors could prescribe ARV's for children. The respondent was however violently opposed to the suggestion and stated that no exception would be allowed. She also said that *her* doctors would not prescribe ARV's.

[45] Mr James Khaliswayo, the first witness to testify on the respondent's behalf, testified that in 2001 he was a deputy director, human resources administration in the Health Department, Mpumalanga. Neither he nor Monyamane had authority to appoint any person in the department. He

confirmed that there was a procedure to translate from a community service doctor to a medical officer.

[46] He testified that it was policy that all posts, including junior medical officer's posts, had to be advertised except critical posts. Critical positions, according to him, were those when doctors wanted to start immediately or posts that had to be filled immediately.

[47] He started working in the public service in 1982 in human resources. He has never dealt with an application for appointment coupled with an application for special leave.

[48] There was no relationship between the department and the applicant after 31 May 2001. He could not find any document stating that the applicant was employed as a junior medical officer. He was the person that took applications to the respondent and he received the appointments from the respondent. He would then inform the superintendent and write the appointment letter.

- [49] He denied ever having received the applicant's forms from Von Mollendorff or Mathebula. He also denied telling Von Mollendorff that the applicant has been appointed. He could not recall speaking to Von Mollendorff about the nine specialist's posts.
- [50] During the first or second week of June 2001 he went to Mr David Mdluli's, deputy director administration, office. Mdluli gave him the applicant's application for unpaid leave. He took the documents to the director, Monyamane, who approved it. Thereafter he took it to the respondent. The respondent called him and asked him why they submitted an application for unpaid leave when the person is not even employed by the department.
- [51] He also recalled speaking to Von Mollendorff in June 2001 about the application. He told Von Mollendorff that the application has not been approved because the applicant's contract expired on 31 May 2001. After that the matter was dealt with by Tshukudu. During early June, Mnisi went to his office and informed him that there was an enquiry as to whether the applicant was appointed or not. He checked on

the system and saw that the applicant's contract expired on 31 May 2001.

[52] Ms Mantwa Gladys Mnisi testified that she is the legal advisor to the health MEC Mpumalanga since 1999. During June 2001 she and the respondent were in consultation with counsel and the state attorney in the matter between the respondent and GRIP. They read the applicants affidavit. The respondent requested her to find out whether the applicant is employed by the department. She called Von Mollendorff and he confirmed that the applicant works at RFH. She went to Khaliswayo to verify. Khaliswayo told her that the applicant's contract expired on 31 May 2001.

[53] During August or October 2001 Monyamane called her and informed her that they received several letters from the Aids Law Project in relation to the applicant. Monyamane asked her to respond to the letters. She considered the appointment policies and discussed the matter with the respondent. The respondent, who has a very good memory, confirmed that she did not appoint the applicant. She could not find any document indicating that the applicant has been appointed.

She then wrote the letter dated 17 October 2001, wherein she set out the procedure and indicated that the applicant was not an employee of the Department of Health.

[54] She confirmed that all posts, except critical ones, had to be advertised. Critical posts were those posts where the applicant wanted to start immediately or posts that had to be filled urgently. She confirmed that it was standard practice for posts for medical officers to be advertised in the lowvelder, a local newspaper.

[55] Ms Gladness Mantwa Mathebula testified that she was employed by the Health Department Mpumalanga as a director of the Ehlanzeni district. She could not recall that Von Mollendorff gave her forms in relation to the applicant. The procedure was that documents would be sent to her office where someone would sign for them. She could also not recall Von Mollendorff giving her the second set of documents on 21 April 2001. She would not receive documents in that way, because she has a secretary and they would record all documents received. She also denied saying to Von

Mollendorff that the applicant will never work for the department.

[56] Mr Rabeng Tshukudu, the last witness, testified that during 2001 he was the Chief Director Corporate Services, Mpumalanga Department of Health. He confirmed that he also handled the applicant's matter. According to him, all that the department received was the applicant's application for leave. They could not trace his application for appointment. It was said that the applicant sent his application to Khaliswayo. He could not find any indication that the applicant was appointed. The applicant's application for appointment was submitted much later. The matter then went to the legal department because there was litigation against the health department.

[57] The issues that have to be determined are:

- Whether or not the applicant was appointed as a junior medical officer by the Mpumalanga Department of Health with effect from 1 June 2001.
- If he was appointed whether he was dismissed for reasons related to him acting according to his

conscience and or for reasons related to him acting in accordance with professional medical ethics.

- [58] The applicant bears the onus to prove the existence of an employment relationship. He also bears the onus to establish the existence of the dismissal. See section 192 of the Labour Relations Act 66 of 1995 (the Act). The applicant alleges that his dismissal is an automatically unfair dismissal. In terms of section 187(1)(f) of the Act a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee *“directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”*

In **Kroukam v SA Airlink (PTY)LTD** (2005) 26 ILJ 2153 (LAC) at paragraph 28 Davis JA said the following:

“In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show

that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal"

[59] The presumptions of an employment relationship and definition of an employee in the Act as well as in the Basic condition of Employment Act (BCEA) do not assist the applicant at all. See section 200A and 213 of the Act and sections 1, 83 and 83A of the BCEA. I do not deem it necessary to repeat these sections in this judgment. The applicant, because of his unpaid leave application, did not render a service to the department after 31 May 2001. He was also not entitled to any remuneration between 1 June 2001 and 1 December 2001. The applicant's case is also not that he was a prospective employee that was treated unfairly.

[60] The applicant struck me as a truthful, credible and reliable witness. Although the facts of this matter relates to issues that happened in 2000 and 2001 he could lucidly recall what happened. He is contradicted by Von Mollendorff in relation to the further letters of motivation. His evidence was that Von Mollendorff requested him to write the letters. Von Mollendorff testified that the applicant wrote the letters, unsolicited, and requested that they be kept in his file. Those letters were

written after the applications were lodged. It is improbable that the applicant, who did not know the procedure, would have decided to write those letters. It would also not make sense for him to write motivations to be kept in his file. On the probabilities, the applicant's version that Von Mollendorff requested him to write the letters is more plausible. I accept the applicant's version in relation to this issue.

- [61] In relation to the phone call that was made or received from Khaliswayo the probabilities also favour the applicant's evidence. His evidence is that he went to Von Mollendorff to enquire about his application and that Von Mollendorff then called Khaliswayo. Von Mollendorff said that Khaliswayo called him coincidentally, whilst the applicant was in his office. The fact of the matter, however, is that the applicant heard Von Mollendorff speaking about the specialists and about his applications. It is only after this conversation, and after being told that his applications have been approved, that he finalised his arrangements. He remembered the incident very well. I accept the applicant's version that Von Mollendorff made the call to Khaliswayo. Likewise I also accept his version in relation to the background of this matter.

[62] Von Mollendorff also struck me as a consistent and honest witness who tried, to the best of his abilities, to recall what happened during 2001. His evidence is also consistent with the probabilities of this case. The contradictions between his and the applicant's evidence referred to above was in my view not designed to deliberately mislead. It was more bona fide mistakes that the witness made. He wrote a letter to Mathebula informing her about his telephonic conversation with Khaliswayo. He received no response. When Mnisi called him to enquire about the whereabouts or status of the applicant his answer was also consistent with his evidence that the applicant was working at RFH. His evidence that he submitted the applicant's applications is also supported by the fact that the application for leave was found at Mdluli's office. It was never put or suggested to Von Mollendorff that he only submitted the leave application. The leave form and the application for employment forms were according to Von Mollendorff's submitted together. I have no reason to doubt this.

- [63] Ms Kleinsmidt's evidence is of a very formal nature. She made notes of all her conversations and dealings with officials of the Department of Health: Mpumalanga. There are no improbabilities in her evidence. I have no reason to doubt the veracity thereof. I accept her evidence.
- [64] Mr Khaliswayo's evidence does not pass muster. It attracts serious criticism and is in some if not most respects improbable. His evidence is also at odds with the respondent's case.
- [65] Von Mollendorff's evidence that the Department's human resources division was in a chaotic state was never challenged by the respondent. In fact the respondent agreed with Von Mollendorff that chaos reigned at the human resources division. Khaliswayo on the other hand testified that there were no problems in that section.
- [66] Khaliswayo's testimony that he received the applicant's application for unpaid leave forms from Mdluli and that he gave same to Rosemary Monyamane (Director Human Resources) who signed it was never put to the applicant or

any of his witnesses. In fact, the pleaded case and the case that was put to the witnesses was that no application for unpaid leave forms or application for employment forms were received by the respondent.

- [67] His evidence in relation to what critical appointments are, is improbable and disingenuous. His explanation of critical appointments is that it is those appointments where the doctor wants to start immediately. This is at odds with Von Mollendorff's evidence that critical appointments were specific posts for example doctors and radiographers because of the acute shortage of such persons. It is common case that RFH had more vacancies than it could fill with all its community service doctors that were engaged by the hospital at that stage. In fact when the posts were advertised the department advertised eight (8) vacancies when in fact there were fourteen (14) vacancies. The translation policy conceived by Dr Smit and Ms Monyamane was also, clearly, geared at retaining community service doctors by allowing them to translate without responding to advertisements. Von Mollendorff also testified that the applicant, because of his previous experience, could manage the casualty and intensive

care wards and could do most operations. The applicant was, because of this reason too, a critical appointment.

- [68] Khaliswayo's evidence was that it was departmental policy to actively recruit community service doctors to stay in Mpumalanga as junior medical officers. No such overtures were made to the applicant. According to Khaliswayo it was Monyamane's responsibility to recruit doctors.
- [69] According to Khaliswayo he received the application for unpaid leave in June 2001 from Mdluli. The forms were signed by Von Mollendorff during April 2001. He did not query why Mdluli sat on the forms for so long or why Von Mollendorff signed them in April but only submitted them much later.
- [70] According to Khaliswayo, Ms Monyamane signed the application for leave forms. He thinks that Gladness Mathebula also signed the forms. The respondent did not produce any of the forms signed by either Mathebula or Monyamane or both of them.

- [71] It is strange that neither Khaliswayo nor Monyamane called Von Mollendorff to ask or confront him about the fact that he submitted application for unpaid leave forms on behalf of the applicant knowing, full and well, that the applicant is not employed by the department. Logic, in any event, dictates that Khaliswayo should have written to Von Mollendorff to inform him that the respondent has not approved the application for unpaid leave because the applicant is not an employee. Instead, they just went into a suspicious silent mode about applicant's status.
- [72] Khaliswayo testified that posts for junior medical officers were advertised in the past. When he was requested to produce a copy of an advertisement in any newspaper for a vacancy of junior medical officer at RFH he could not. Even after this matter was postponed for a few days no such advertisement could be produced by the respondent.
- [73] Khaliswayo tried, unsuccessfully, to give a possible reason why the applicant was not appointed. He said that the respondent wanted to transform previously "*white hospitals*" by appointing more black doctors to those hospitals. His

evidence is that black doctors were clamouring for positions at previously "*white hospitals*" like RFH to the extent that they would approach the respondent personally. This does not make sense and it flies in the face of the fact that there were 14 vacancies at RFH. This proposition was never suggested to the applicant during cross examination. It was also not the respondent's case that the applicant was not appointed because the respondent wanted to appoint black doctors at RFH as part of her transformation strategy.

[74] I am of the view that Khaliswayo's evidence should be rejected where it is at variance with Von Mollendorff's evidence.

[75] Mrs Mathebula's evidence was not helpful. She could not recall most of the things that allegedly happened during 2001. She could not remember attending the superintendent's forum meeting in April 2001. She could not remember signing the applicant's route forms in his application for appointment and unpaid leave. She could not remember receiving the letter dated 11 July 2001 from Von Mollendorff, in relation to outstanding matters that had to be attended to by the human resources division. She could not independently recall

incidences and relied on procedure that should have been followed. Von Mollendorff's evidence was clear that due to the urgency of the matter he took the forms to her. This was contrary to standard practice. Von Mollendorff also gave her the second set of forms at a meeting. This was also not standard practice. Civil service checks and balances on which she relied are of no assistance in this matter. I am not impressed by her amnesia. Her denials that she received the forms are rejected.

- [76] Mr Tshukudu too was not immune to the amnesia that plagued some of the officials in the department in relation to the applicant's matter. He could not recall speaking to Kleinsmidt. It is clear from Kleinsmidt's evidence and the fax transmission receipts that she communicated with him and followed up the conversations with faxes to which she received no reply. Tshukudu admitted that he said this was an administrative problem - a question of lost forms. In Riena Charles' affidavit in opposition to the applicant's case in the Public Health and Welfare Sectoral Bargaining Council she stated that she consulted with Tshukudu and he vehemently and categorically denied the allegation that he said inter alia that this was a

simple matter of lost forms, which could be easily sorted out. Tshukudu deposed to a confirmatory affidavit wherein he confirmed the contents of Charles' affidavit in as far as it related to him.

[77] In the same matter the applicant alleged that Tshukudu told Kleinsmidt *"that the file has been taken away from him and that the matter was now being dealt with by Mnisi"*. This was also vehemently and categorically denied. It was pointed out that Mnisi has always been one of the officials dealing with matters of this nature. When he was asked during these proceedings how Kleinsmidt would know that the matter was taken away from him his answer was that it is possible that he spoke to her. That is a far cry from a categorical and vehement denial.

[78] He confirmed receiving the letter dated 13 September 2001 from Kleinsmidt. He confirmed that he did not respond to it because the matter was already referred to Mnisi. This evidence is contradicted by Mnisi who testified that she received the documents in relation to this matter on 17 October 2001 and responded, immediately, thereto. His

evidence that he gave Mnisi the documents is also contradicted by Mnisi - she said that she got it from Monyamane.

[79] Tshukudu testified that he spoke to Von Mollendorff about the applicant's applications. This was never put to Von Mollendorff.

[80] I find it extremely strange that Tshukudu was not informed that the leave application forms reached the respondent's office.

[81] Tshukudu's evidence that he referred the matter to Mnisi when the matter became a legal matter is not true and not supported by the objective facts. When he got involved the matter was already referred to the bargaining council. It was therefore already a legal matter.

[82] He admits to saying to Von Mollendorff or Kleinsmidt that he or she may send in duplicate application forms. When Kleinsmidt and Von Mollendorff sent him the route forms and application forms he strangely does not action on them neither does he respond to any of Kleinsmidt's letters.

- [83] Tshukudu's evidence, in as far as it differs with Von Mollendorff and or Kleinsmidt's evidence, falls to be rejected for lack of credibility.
- [84] Ms Mnisi also did not impress me as a credible witness. She testified that she considered the relevant policies before she wrote the letter dated 17 October 2001. She was later constrained to admit that she did not consider the policies at all and only wrote generally. When she was asked whether there were other advertisements for junior medical officers' posts prior to the one that she attached to her letter she answered in the affirmative. When I requested her to favour me with a copy of such advertisement, unsurprisingly, she could not. Even after the adjournment of this matter for Tshukudu's evidence the respondent could not favour me with any such advertisement. Clearly, her assertion in the letter is not true. In fact Kleinsmidt also disputed this and challenged her to produce such advertisement. She could not.
- [85] It was pointed out to her that the policy was that critical posts need not be advertised. Her evidence was that critical posts

meant posts that have to be filled urgently or immediately. This is at variance with Charles' affidavit, which she confirmed, to the effect that the applicant would not have been given six months paid or unpaid leave due to the critical shortage of doctors. Clearly all doctor's posts were critical posts. I find it preposterous that officials in the health sector who know or are supposed to be aware of the acute shortage of doctors could insist that doctor's posts are not critical.

[86] When she was asked about the respondent's attitude in relation to providing ARV's her answer was embarrassingly vague and untruthful. At some stage she said that she does not know what the respondent's attitude was or she never objected thoroughly (whatever that means) to ARV's being provided. She later stated that the respondent was not against GRIP being given accommodation at RFH.

[87] When she was asked about her knowledge of the department's policy on ARV provision she shamefully said that there was no policy except the so called needle prick policy for medical personnel. When she was asked whether there was a policy not to give ARV's to rape survivors she was adamant

that there was no policy at all. It was put to her that in one of the applications to evict GRIP from RFH the respondent as the applicant in that matter stated the following under oath:

"I wish further to inform the court that the question of the supplying of certain anti-retroviral medicine at the hospital causes problems for the Department in the sense that people are getting discontent in other sections after having taken notice or heard of the anti-retroviral medicine supplied by respondent at the two hospitals and insist on receiving the medicine at other hospitals under authority.

It is at this stage not the policy of the Government to supply those medicines and it causes problems for the Department to try and explain to ordinary people what the reason is why it is not supplied, while the Rob Ferreira and Themba Hospitals do supply these medicines."

Mnisi as the respondent's Legal advisor and the person who dealt, on her own admission, with the eviction applications ought to have known about the respondent's stance against the supply of ARV's.

- [88] It is clear that the fight against GRIP was bigger than the simplistic issue of them occupying space at RFH. Even this Mnisi did not want to concede.
- [89] I have already pointed out the contradictions between her evidence and that of Tshukudu. I will not repeat it.
- [90] I find that Mnisi is also a very unreliable witness who tried everything to sugar coat the respondent's words and deeds and if needs be at the expense of her own integrity.
- [91] I find that the applicant presented by far a more compelling, plausible and probable case. Mr Scheepers, on behalf of the respondent, correctly, in my view, conceded that there were unsatisfactory aspects in the respondent's case.
- [91] Mr Scheepers, however, argued that there is no evidence that the applicant was ever appointed by the respondent. The respondent, who according to Mnisi, had an excellent memory, is the only person who could tell me whether she did or did not appoint the applicant. She was not called to testify. No reason was proffered as to why she was not called.

[92] In the absence of any direct evidence this matter must be decided on the totality of the credible and acceptable evidence presented by the parties. The absence of direct evidence leaves a gap in the applicant's case. This is however not unusual. The void caused by the lack of direct evidence may be filled by circumstantial evidence. Circumstantial evidence invariably leads to the judicial officer making inferences based on the totality of the evidence. The inferential leap to close the evidential gap must however be consistent with the proved facts. It should be the only reasonable and probable inference. It should obviously not be far fetched and at variance with the proved facts. Circumstantial evidence, to restate the obvious, is evidence.

[93] The totality of the evidence, inescapably, suggests that the respondent kept the department on a tight leach. She was tyrannical and dictatorial in her management style. Those who opposed her became victims of her wreath; Charles, Careen Swart, Von Mollendorff, the medical doctors at RFH and GRIP bear testimony to that. Her unrelenting opposition to GRIP and the supply of ARV's to rape survivors would not even

allow her to make a concession for rape survivors who are children. According to Khaliswayo, the respondent even refused to delegate human resources functions to her Head of Department, Riena Charles. The situation degenerated to the level where a group calling themselves the hospital staff at RFH and other concerned parties wrote an open letter to the respondent in relation to her actions against GRIP and the Rape Crisis Centre at RFH. In the open letter she is *inter alia* accused of displaying a blatant disregard for the community which she is serving. In the same letter it is also stated that:

“(T)he manner in which you have treated officials from GRIP and the hospital management at Rob Ferreira. You are referred to constant verbal threats of suspension that are not followed up in writing, the suspension actual of Ms Careen Swart ...”

The open letter was signed by most of the doctors at RFH. By going public with their complaints against the first respondent and her objection to the issuing of ARV's to rape survivors they effectively did what the respondent thought is her

exclusive prerogative; using public platforms to state her case unopposed.

- [94] The respondent's management style probably explains why she instilled such fear in officials with the department. With this background I revert to the proven facts.
- [95] It is uncontested that application forms for translation from community service doctor to junior medical officer and six months unpaid leave were completed during April 2001 by the applicant. I find that Von Mollendorff gave Mathebula another set of forms on 25 April 2001. Von Mollendorff's recollection of this meeting is clear and lucid. Mathebula and Khaliswayo could not recall attending the meeting but they were adamant that Von Mollendorff did not give them the forms.
- [96] Mathebula, still in typical civil service mode, denied having received any forms because there was no paper trail. The absence of a paper trail or official stamp does not explain how the forms landed up in Mdluli's, who worked in her office, possession. Clearly they must have been submitted by Von Mollendorff to her office.

- [97] The leave application forms and the employment application forms were sent together. It is implausible that Von Mollendorff, an experienced administrator, would send the application for leave forms without the application for employment forms to the relevant people. The leave was dependent on the applicant being employed and not the other way round. The applicant's evidence is clear; he would have stayed if the application for leave was turned down.
- [98] Khaliswayo's evidence that he submitted the leave forms to the director, who approved it, and then to the respondent, who did not approve it was never part of the respondent's case. Khaliswayo says he telephoned Von Mollendorff to inform him that the application for leave has not been approved. This was also not part of the respondent's case. Why does Khaliswayo mention this at the eleventh hour?
- [99] It is clearly an attempt to sow confusion in relation to the telephone calls that he made to Von Mollendorff. Von Mollendorff alleges that he called to say that the respondent now "*disapproved*" the application. If he says that he called to

say that she did not approve the application for leave it is so close to the truth that it may sound plausible. Is it indeed plausible?

[100] There was a dire need for doctors. The department's policy was to retain community service doctors by efficiently translating them to junior medical officers. The applicant, unlike most community service doctors, started his community service in the middle of the year. There was no one else applying for translation at the time. I find it strange that Khaliswayo would under these circumstances just call and say the application for leave has not been approved without asking Von Mollendorff why he sent an application for leave whilst the person is not an employee. In line with the policy of retaining community service doctors, one would have expected Khaliswayo to suggest that Von Mollendorff speak to the applicant to convince him to apply for translation or for an appointment at a future date. The applicant had to have certainty in relation to his employment before going to the UK. He only booked a flight after he had confirmation of his appointment, via Von Mollendorff. It is highly improbable that Von Mollendorff would have lied to the applicant in relation to

his conversation with Khaliswayo. Von Mollendorff's evidence is that he made numerous calls to find out about the applications. He also supplied two subsequent copies of the applications to the department. Why would Von Mollendorff put in so much effort only to ultimately mislead the applicant? Khaliswayo does not remember the issue of the nine specialists. Von Mollendorff and the applicant recall the conversation in relation to the nine specialists. It was never put or suggested to Von Mollendorff that his evidence in relation to the nine specialists is not true. The respondent could in any event objectively ascertain whether the nine specialists were indeed appointed by looking at documents that she ought to have in her possession in relation to the appointment of the nine specialists.

[101] Khaliswayo confirmed that it was standard practice for him to call to confirm an appointment but that he would only do so when he has written confirmation or notification from the respondent. Given the respondent's management style and her previous warnings, that officials should respond to queries in writing and that they should not unduly use her office as an excuse for delays; it is improbable that Khaliswayo would

convey that the applications have been approved if he had nothing in writing.

[102] It must be remembered that formal letters of appointment is written by Khaliswayo after the respondent has approved the application. This process also takes time. In the case of the nine specialists the appointments were approved by the respondent, a call made to Von Mollendorff in this respect and only two or three weeks later did the formal letters of appointment arrive.

[103] It is extremely strange that the human resources division, the labour relations division or the corporate services division could not just write to the applicant and inform him that he was never appointed as a junior medical officer. This was the centre of the dispute. Instead, he was sent from pillar to post and had to resubmit forms when a straight answer that he should apply for vacant posts should have sufficed from the beginning. It is clear that no one in human resources, labour relations or corporate services wanted to respond to the applicant because they were faced with a novel dilemma. The respondent appointed the applicant and the process was

reversed. All trace of the applications had to be erased. It fell on the respondent's legal advisor to do the dirty work.

[104] Mnisi is a person that was an apologist for the respondent.

She submitted, thankfully, I suppose, to the whims and fancies of the respondent. As stated above she tried to sugar coat the respondent's behaviour and attitude forgetting that one teaspoon of sugar cannot sweeten a barrel of vinegar.

[105] I find, on a conspectus of the evidence, that the respondent approved the applicant's application for translation and unpaid leave. That Khaliswayo communicated the approval after he saw it in writing. That the respondent became aware that the applicant made common cause with her detractors and deposed to an affidavit expressing his conscientious objection, medical ethics and his deep seated belief that the doctor-patient relationship is sacred and that no one should interfere therewith. The ineluctable inference is that the investigation revealed that his appointment was approved but that the formal letter of appointment was not yet dispatched. Khaliswayo was instructed not to dispatch it. Faced with this dilemma Khaliswayo had to call Von Mollendorff to undo his

previous telephone call by telling him that the respondent has disapproved the applications. The date of this call is the effective date of dismissal. None of the officials dared question the respondent. Likewise none of them dared tell the truth lest they be dealt with. They decided to remain silent and pass the buck to where it belonged, the respondent's office. It then ultimately fell to Mnisi to tell the ultimate lie, viz that the applicant was never appointed and that he should, in terms of the policy, apply for a post. They then advertised, for the first time, vacant posts for junior medical officers, in the local newspaper.

[106] A further question that remains to be answered, which to a limited extent has already been dealt with, is why was his appointment withdrawn. The respondent could not, based on its case, give any explanation for the withdrawal of the appointment. Some of the respondent's witnesses endeavoured to give a reason for his non-appointment as being the advancement of transformation. The transformation argument cannot fly. There was a critical shortage of doctors. No black doctors applied for translation or appointment. The

applicant was the only community service doctor at RFH who qualified to be translated, at that stage.

[107] The applicant took a principled stance against the respondent's policy not to give rape survivors access to ARV's. She, respondent, did not even want doctors to prescribe ARV's for patients in order for them to purchase it, with money that GRIP sourced, at a private pharmacy. Von Mollendorff was requested, no instructed, to convey this to the doctors at RFH. He informed the doctors but also requested them to act according to their consciences. Clearly Von Mollendorff was mindful of the difficult choices that the doctors would have to make. Ethical rules of a profession are part of the self regulating mechanisms that many professions set for their members. Ethical rules are normally objective moral codes or standards that members of a profession must abide. Those rules must be respected and obeyed. Ethical rules are the religious rules of a profession. Failure to observe those rules normally spells doom for the transgressor. If a member of that particular profession does not abide by those rules he/she risks being declared unfit to be a member of that profession. A medical practitioner therefore has a duty to adhere to

professional ethical norms. The dismissal of a medical practitioner for acting in accordance with the dictates of his or her professional ethics is in my view arbitrary and illegitimate.

[108] Applicant was not prepared to do violence to his conscience or medical ethics in support of a policy which he experienced as being against those principles. He took a stance and openly opposed the respondent's policy against the supply or prescription of ARV's and her campaign against GRIP. He clearly set out in his affidavit, portions of which are quoted in paragraph 8 above, that he is bound by professional medical ethics to treat patients to the best of his professional ability without political interference. The respondent, as the evidence clearly shows, did not tolerate any challenge from officials, GRIP or medical staff. Applicant's stance must have been a painful torn in her flesh. She could not have taken it in her stride as Mnisi suggested. Mathebula's statement to Von Mollendorff that the applicant will never be appointed in the department was not made from an uninformed position. She knew what she was talking about.

[109] In the absence of any explanation why the applicant's employment was terminated one only has to look at the facts even on the respondent's version and they lead to the conclusion. There was an acute shortage of doctors. The applicant was more experienced than the average community service doctor or newly appointed junior medical officer. There were vacancies. The applicant applied for translation. Instead of translating him seamlessly his forms got "lost" repeatedly, or was never received. Even after this when the department had an opportunity to recruit him to commence in December 2001 they don't do that, instead they put a stumble block in his way. They advertise posts for the first time and invite him for an interview on short notice knowing full well that he is in the UK. He never applied in response to the advertisement. It is clear that he was *persona non grata*, because of his stance against the respondent, but more importantly because he insisted to act in accordance with the dictates of his conscience and in adherence to medical professional ethics. This whole advertisement and interview process was just a sham in an endeavour to sanitise a tainted and flawed termination of his employment.

[110] In my view, as stated above, the applicant was appointed by the respondent. His employment was subsequently terminated. The only reason why his appointment was terminated was because of his stance in favour of GRIP providing services to rape survivors and his stance as a matter of professional conscience and ethics in favour of issuing ARV's to rape survivors. The respondent acted oblivious of any definitive division in her power to appoint doctors and her lack of power to prescribe to doctors how they should care for their patients. She misused her power to appoint doctors as a tool to interfere with the doctor patient relationship. The applicant rightfully resisted her attempts at interference. The dismissal would not have occurred if the applicant had thankfully and sycophantically submitted to the will and policy of the respondent. The applicant's stance against the respondent's irrational policy; in favour of his conscience and professional ethics was in my view the determinant and, dare I say, the only reason why he was dismissed. His dismissal was therefore automatically unfair.

[111] The respondent argued that the applicant suffered no financial prejudice as a result of his dismissal. He was in any event on

unpaid leave and was engaged in other employment in the UK where he earned far more than what he would have earned as a junior medical officer. He did not render a single hour's service to the respondent as a junior medical officer.

[112] The applicant testified that due to his dismissal he stayed a month longer in the UK. On his return, he specialised in chemical pathology and earned more than a junior medical doctor.

[113] The fact however is that he had to change his plans. His evidence was that he wanted to stay at RFH for a year or two in order to gain more experience and then he would have specialised. In CEPPWAWU and Another v Glass and Aluminium 2000 CC (2002) 5 BLLR 399 LAC at paragraph 50 and 52 Nicholson JA said:

“ the amount of compensation that is awarded to an employee whose dismissal has been found to be automatically unfair must reflect an appreciation of the fact that, save in exceptional circumstances, such employee would be the most deserving of an order of reinstatement

with full retrospective effect to the date of dismissal as to place the employee in the same position he would have been in had he not been dismissed, but also to penalize the employer for dismissing the employee for a prohibited reason... It would also have been imperative to send a clear message to all employers, who may be tempted to dismiss employees for any of the prohibited reasons, that such conduct is totally unacceptable and would be met with severe disapproval by this court.”

Generally compensation is not a punitive measure, however as illustrated in the above quotation in cases of automatically unfair dismissals a punitive element comes to the fore.

[114] The applicant has asked for compensation equal to 24 months salary – which is the maximum compensation that this Court may award. Such an award would not in the circumstances of this case be just and equitable taking into consideration the fact that the applicant did not render any service at all, to the respondent. He was always employed. He specialised earlier than he envisaged. In his with prejudice offer to the respondent he suggested R100 000.00 as compensation, which is equal to the annual salary of a junior medical officer at

the time. In my view such an amount would effectively show the severe disapproval of this Court to the actions of the respondent. It would under the circumstances be fair.

[115] The applicant has been successful. This litigation could have been avoided. The applicant tried in various ways to avoid the litigation. The applicant went through considerable lengths to affirm his right not to be discriminated against. The respondent as a representative of the people has a duty to adhere to the tenets of the constitution. She has not done so. She has flagrantly violated the Constitution and the Act. It would only be fair and equitable that the respondent pays the applicant's costs.

[116] I accordingly make the following order:

- (a) The applicant's dismissal by the respondent was automatically unfair.**
- (b) The respondent is ordered to pay the applicant compensation in the amount of R100 000.00, i.e. approximately ten months remuneration.**
- (c) The respondent is ordered to pay the applicant's costs.**


CAGNEY MUSI, AJ

Date of Hearing: 16 May 2008, 27 May 2008

On behalf of the Applicant: Adv La Grange
Instructed by: Aids Law Project

On behalf of the Respondent: Adv G.J. Scheepers
Instructed by: Morgan Sithole & Associates