

SOUTH AFRICA / JUDGMENT

Van Rensburg and Others v Minister of Safety and Security (J2231/08, J2188/08, J2232/08) [2008] ZALC 148; [2009] 4 BLLR 400 (LC) (28 November 2008) [2008] ZALC 148

COURT

Labour Court

BEFORE

Molahlehi

CASE / FILE NUMBER

J2231/08, J2188/08, J2232/08

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: J2231/08

Case No: J2188/08

Case No: J2232/08

In the matter between:

JANSE VAN RENSBURG 1st
Applicant
DANIEL JOSHUA PIENAAR 2nd
Applicant
CHRISTOFFEL BARNARD 3rd
Applicant
And
THE MINISTER OF SAFETY
AND SECURITY Respondent

JUDGMENT

Molahlehi J

Introduction

The three applicants brought separate urgent applications under case numbers J2231/08, J2188/08 and J2232/08. In terms of these applications the applicants sought orders on an urgent basis ordering the respondent to continue paying their salaries and reinstating their medical aid benefits pending the finalisation of the dispute which each had initiated.

The facts of the case being the same save for slight difference on the specifics, the parties agreed that the cases be heard together.

The essence of the applicants' cases in the three applications was that they were each not able to cope with their work as police officers because of the stress associated with having been exposed to several incidences of trauma during the course of carrying out their duties as officers. They were all diagnosed with Post Traumatic Stress Disorder (PTSD).

Background facts

The case of Mr Barnard

The case of Barnard is slightly different to the others in that he was sent for medical evaluation by the respondent. After considering the medical report and despite the recommendations of the doctor, the respondent insisted that he should report for duty. In this regard the respondent offered to place Barnard in a less stressful position. He refused to heed the call to report for duty.

The brief background facts of the case of Barnard is that:

He was diagnosed with PTSD during November 2006, and at that time he was attached to the Silverton Police Station-detective services.

Because of his medical condition associated with the stress, he could not cope with his police duties and was accordingly placed on sick leave

His PTSD was diagnosed by an independent psychiatrist.

Mr Barnard's contention was that his absence from work should be treated as occupational injury and decess leave and that he had already been granted temporary leave due to that ill-health from the period 17 November 2006 to 9 February 2007. He further contended that the period of absence for occupational injuries and decess is dealt with several bargaining council's and National Instructions issued by the respondent dating back to 2000.

Barnard specifically relied on the provisions resolution 7 of 2000 of the Public Service Coordinating Bargaining Council (the PSCBC), which at clause 12 provides as follows:

"Employee who as a result of their work, suffers occupational injuries or contact occupational decess, shall be granted occupational injuries and decess leave for the period they cannot work."

In this regard Barnard's interpreted clause 12 of Resolution 7 to mean that he was entitled to occupational injuries and deceases leave for the duration that he was not able to work. His view was that the respondent did not have any discretion as to

whether or not grant him leave. He relied also on National Instruction which reads as follows:

"a. An employee who sustains an Occupational decease is entitled to occupational injury and decease leave with full pay, from the time that he/she to work:

- (i) until he/she can resume work, or
 - (ii) until he/she is discharged from the service after an inquiry has been held as contemplated in section 34 of the Act.
- b. An employee who is absent from work due to an alleged occupational injury or an occupational disease, must complete and submit the documents required for temporary incapacity leave and the documents must be referred to the Health Risk Manager for verification and validation of the period of absence."

It is on the basis of the above that Barnard contended in his founding affidavit that he has a "clear right to my salary due to the fact that I suffer from an occupational decease... "

The case of Mr Pienaar

The case of Mr Pienaar is briefly that he was on sick leave since 23 August 2005. He received a letter from the Provincial Commissioner, Gauteng on 19 August 2008 wherein it was indicated to him that in terms of resolution 7 of 2000 of the PSCBC he was entitled to 36 days normal sick leave and that the period had been exhausted and was accordingly no longer entitled to remuneration. It

was further indicated in the same letter that he did not apply for ill-health retirement and should therefore resume his duties. He was also called upon to make representation as to why his salary should not be suspended.

Pienaar did not report for work as in his view he was still on sick leave and the psychiatrist had declared him unfit to resume duties. In his founding affidavit he contended that he did not understand why he should follow internal procedures when the same officer who dismissed his representation would be the same person who would consider his grievance. He further contended that it would take up to six months to process a grievance through the PSCBC and by that time he would be without a salary and benefits.

The case of Mr Van Rensburg

Mr Van Rensburg, like the others testifies in his founding affidavit that he had been diagnosed with PTSD during 2004, whilst he was attached to the detective services at Brankhorstspuit Police Station. Because of this he could not cope with his duties

and took sick leave on the advice of his doctor from 7th January 2004 until 29 October 2004.

On 7th September 2007, whilst on sick leave, Mr Van Rensburg was informed telephonically by one of the officers at the Brooklyn police station to attend a meeting where he would be required to make a representation about why his salary should not be suspended. The following representation was made at that meeting:

“12.10.1 That my application for Temporary Incapacity Leave was not forwarded to the relevant people who deal with it;

12.10.2 That my doctor is of the view that I am unable to report for duty;

12.10.3 That I need to receive treatment for 24 months in terms of Government Gazette 23629 Volume 445 dated 19 July 2002; and

12.10.4 That where I was found unfit for duty that my Medical Board should be finalized within 6 months.”

On 3 September 2008, Mr Van Rensburg was presented with a letter from the Provincial Commissioner, Gauteng which indicated that due to the fact that he did not resume duties in a less stressful environment his salary would be suspended.

The legal principles governing urgent applications

It is trite that before an order sought on the basis of urgency can be granted the applicant must satisfy the following requirements:

a clear right or, alternatively, at least a prima facie right;

a well grounded apprehension of irreparable harm if the interim interdict is not granted.

that the balance of convenience favours the granting of the interim relief; and

the applicant has no other alternative relief.

It is clear that the applicants sought some form of mandamus through an urgent interdict, in that the payment of their salaries had already been stopped by the time they filed their applications. In other words they are seeking to stop an alleged interference with their rights which interference has on their version already occurred.

In my view the applicants have failed to make out a case for urgency in that the circumstances of their respective cases indicate that they were each aware of the intention of the respondent to stop payment of their salaries prior to effecting such a decision.

During arguments counsel for the applicants conceded that each of the applicants had alternative remedies in that they could refer their disputes concerning these matters to the bargaining council but however contended that in seeking this relief it would take up to six months before the bargaining council can finalise their claims. In other words the applicants were not relying on absence of alternative remedy when they approached the Court on the urgent basis but rather on the basis of delay in finalising their claims through that alternative remedies.

The applicants have also failed to make out a case for the existence of a prima facie right although admitting some doubt. For the applicants to succeed in establishing a prima facie right they needed to show on their papers compliance with the provisions

of clause 7.5 of resolution 7 of 2000 of the PSCBC, by showing that they were either on temporary disability leave or permanent

disability leave approved by the respondent or leave for occupational injuries and diseases.

Clause 7.5.1 provides that employees whose normal sick leave credits have been exhausted in a circle and requires to be away from work due to disability which is

not permanent may be granted leave on full pay. Clause 7.5.2 provides that an employee whose degree of disability has been certified as permanent shall with the approval of the employer be granted a maximum of 30 days pending an inquiry into the possible alternative employment or arrangement to have the duties or the work circumstances adapted to accommodate the employee due to his or her

condition. The employer may grant leave for occupational injuries and deceases in terms of clause 7.6 where an employee may have

suffered occupational injuries or contracted occupational decease.

It is clear from the above that an employee would not qualify for payment of his or her salary whilst absent from work due to temporary or permanent disability or occupational injuries and deceases unless such absence is with the approval of the employer.

In the present instance the essence of the applicants contention concerning the existence of the right to receive their salaries is on the basis of the medical reports they had and not on the approval for being absent by the employer on any of the grounds stated above. In other words the respondent never granted any of the applicants permission to be away from work on any of the grounds set out in clause 7 of the PSCBC resolution.

In the unreported case of Raland Schoeman v The National Commissioner of the South African Police case number 2244/06, the Eastern Cape High Court was faced with facts which are similar to those of the present case. In that case, as is the case in the present instance the applicant, employee, sought an order interdicting the respondent from suspending payment of his salary pending the finalization of her application medical boarding.

The Court in Roland Schoeman's case after considering the provisions of resolution 7 of 2000 and in particular clause 7.5.2 held that:

"An any additional sick leave is within the discretion of the employer, as it is within the approval of the employer. The fact that the SAPS has granted tacitly or by implication additional sick leave does not mean that the SAPS is not entitled to revoke its approval. "

In another unreported case of Hester Carolina Kapp v The National Commissioner of South African Police Service case number 609/2005, the Court held that :

“[42] If the Fifth Applicant was, as is alleged by the Respondents, not on authorised sick leave, the Respondents were to order her to return to work and, upon her failure to do so, to institute disciplinary proceedings against her, to suspend her from duty and to cease the payment of her salary”

In its conclusion the Court found that it is apparent from Resolution 7 of 2000, read with the Provincial Order National instruction, that absence from duty by a member is only permitted if such member is on authorised leave as envisaged in clauses 7.4.7.5 and 7.6 of Resolution 7 of 2000.

In *Spies v National Commissioner of SAPS and others* [2008] JOL 21525 (LC), this Court in dealing with facts which are similar to the cases currently before it, held:

“[22] The question of whether the applicant was entitled to be paid for unauthorized sick leave is an issue that arises within the interpretation and application of Resolution 7 of 2000 as amended by Resolution 5 of 2001. It is therefore an issue which would have appropriately been dealt in terms of section 24 of the Labour Relations Act 66 of 1995, and be processed through the procedures of the Safety and Security Bargaining Council (SSSBC). The applicant has, in my view, failed to show that he has a prima facie right to be paid his salary while on an unauthorized leave. I do not agree with the applicant’s counsel that such right is found in the provisions of the National Instruction issued by the National Commissioner.”

I am of the view that each of the applicants’ application stands to be dismissed. The circumstances of these cases undoubtedly dictate that the costs should both in law and fairness follow the results.

In the circumstances I make the following orders in respect of each of the applications under cases numbers: J2231/08, J2188/08 and J2232/08:

Each application is dismissed.

Each applicant is to pay the respondent’s costs for their respective applications.

Date of Hearing: 23rd October 2008

Date of Judgement: 28th November 2008

APPEARANCES:

For the Applicant: Adv R Bourwer

Instructed by: Johnson Gouws

For the Respondent: Adv W Mokhare

Instructed by: The State Attorney

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