LL/IH Case No 384/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

JOHANN F PFUHL Appellant

and

MINISTER OF JUSTICE Respondent

COURT: HOEXTER, VAN HEERDEN, KUMLEBEN, F H GROSSKOPF and HOWIE JJA

HEARD: 9 MAY 1994

DELIVERED : 20 SEPTEMBER 1994

JUDGMENT

VAN HEERDEN JA:

During March 1992 the appellant brought review proceedings against the respondent in the Cape Provincial Division. The substantive relief sought by him was an order setting aside a decision to terminate his services as an employee in the Depart-ment of Justice. The main ground advanced in support of the application was that the audi alteram partem ("audi") principle applied; and that since he had not been afforded a hearing prior to his dismissal, the Department was not entitled to terminate his employment. The application, which was opposed by the respondent, was dismissed by the court a quo (per Friedman JP), and that decision has been reported: 1992 (3) SA 744.

The salient allegations in the various affidavits lodged in the court a quo are fully summa-rised in the judgment of Friedman JP (at pp 745-749), and there is no need for repetition in this judgment. At this stage it suffices to draw attention to the

following:

1) During June 1989 the appellant, a quadriplegic with limited use of his arms, received a letter from an official in the Department of Justice. It read:

> "Goedkeuring is verleen dat u as 'n staats-aanklaer te Landdroskantoor, Wynberg, in 'n tydelike hoedanigheid op drie maande proef met ingang van 1 Augustus 1989 aangestel kan word."

2) During the period 1 August 1989 to 30 April 1990 the appellant appeared almost exclusively in the Wynberg maintenance court. That court was situated on the first floor of the court building and, unlike the ordinary criminal courts situated on the second and fourth floors, was readily accessible to a person in a wheelchair.

3) Various reports emanating from the Wynberg magistrate's court, dated 28 September 1989, were forwarded to Mr Booysen, Chief Director, Administration, Department of Justice, who, under

delegated authority, had appointed the appellant as prosecutor. Those reports conveyed to him that because of the appellant's disability he could not be used effectively in the ordinary criminal courts. This was also the opinion of the chief magistrate of Wynberg, to whom Mr Booysen had spoken after receipt of the reports.

4) At this stage, and prior to the expiry of the three month period of probation, Mr Booysen decided that the period of his employment should not be extended. For reasons which are not material to this appeal, the appellant was not informed of the decision prior to the expiration of that period on 31 October 1989. In the result the appellant continued to prosecute in the Wynberg maintenance court after that date and even received an increase in salary.

5) During March 1990 Mr Booysen received a recommendation from the Director : Personnel Management suggesting that in the light of various

reports the appellant's employment should be terminated. On 13 March Mr Booysen decided to accept the recommendation. The upshot was the receipt by the appellant (on 30 March) of a telegram terminating his services on 30 April and also a letter, dated 29 March 1990, from the Director-General : Justice. The letter was received by the appellant during early April and the material paragraph read as follows:

> "Dit spyt my om u mee te deel dat ek vanweë die vereistes wat die pos van Staatsaanklaer stel en met inagneming van u gesondheidstoestand nie 'n keuse net as om u dienste met ingang van 1 Mei 1990 te beëindig nie."

As indicated above, it was the appellant's case that this termination of his services was invalid because of the Department's failure to apply the audi rule.

It was rightly common cause in the court a quo that the appellant's appointment was governed by the Public Service Act 111 of 1984 ("the Act") and the Public Service Staff Code ("the Code") referred to in

s 36 of the Act, and that he had been appointed as a temporary employee and not as an officer. S 12 of the Act deals with employment on probation. It reads as follows :

"(1) The appointment of a person and the transfer and promotion of an officer in the A or B division shall be made on probation -

(a) unless, in the case of an appointment in -
(i) the A division, the Commission recommends otherwise; or (ii) the B division, the person having the power to approve such an appointment, directs otherwise; or

(b) if, in the case of a promotion or transfer in -
(i) the A division, the Commission so recommends; or
(ii) the B division, the person having the power to approve such a transfer or promotion, so directs.

(2) (a) Subject to the provisions of paragraphs (b) and (c) and subsection (3A), the period of probation so recommended or directed shall not be less than 12 calendar months.

b) If an officer who is serving on probation is transferred or promoted to another post, a lesser period of service on probation may be recommended or directed in the new post, which together with the period of probation served in the former post, shall total at least 12 calendar

months.

(c) The period of probation of an officer shall be extended by the number of days' leave taken by him during the period of probation or any extension thereof. (3) If the head of the office, branch, subdepartment, institution or department certifies that during the period of probation or extended period of probation, the officer concerned has been diligent and his conduct uniformly satisfactory and that he is in all respects suitable for the post which he holds, and if the officer has complied with all the conditions to which his appointment, transfer or promotion was subject, the person having the power to make the appointment, transfer or promotion concerned, may confirm that appointment, transfer or promotion, but if the probationary appointment, transfer or promotion is not so confirmed -

(a) the head of department shall, in the case of an officer serving in the A division, report the reasons for the non-confirmation to the Commission, which shall, subject to the provisions of subsection (5) make such recommendation in the matter as it may deem fit;

(b) the person having the power to make the appointment, transfer or promotion concerned may, in the case of an officer serving in the B division, extend the period of probation or act according to the provisions of subsection (4).

(3A) If the promotion of an officer is made on probation and the only condition of such promotion is that the officer shall comply with the training requirements directed by the Commission, such promotion shall, notwith-

standing provisions to the contrary in this Act, be deemed to have been confirmed with effect from the day immediately succeeding the date upon which that officer complied with those requirements.

(4)(a) Notwithstanding anything to the contrary contained in subsection (2) or in Chapter VI, but subject to the provisions of paragraph (b) and subsection (5), an officer who is serving on probation may be discharged from the public service by the person having the power of discharge, either during or at or after the expiry of the period of probation -

(i) by the giving of one month's notice; or

(ii) forthwith, if his conduct or performance is unsatisfactory.

(b) Before an officer serving in the A division is so discharged, the Commissioner shall first make a recommendation. (5)(a) Notwithstanding anything to the contrary contained in sections 13 and 28, but subject to the provisions of paragraph (b), a person whose transfer or promotion on probation is not confirmed and who immediately prior to that transfer or promotion on probation was an officer, other than an officer on probation, shall be transferred to the post formerly held by him, or to a post of equivalent grading, and shall receive such salary as he would have received in his former post if he had not been transferred or promoted on probation.

(b) In the case of the transfer of an officer serving in the A division, the Commission shall first make a recommendation."

Save as explained below, the provisions of

s 12(2)(b) and (c) and (3A), to which reference is made in subsection 2(a), are not material to this appeal. (Subsection (3A) was amended by Act 47 of 1993, but in respects not significant for present purposes.)

The court a quo found :

(a) that s 12(1), as well as para 10 of Chapter B III II of the Code, prescribe that the appointment of both an officer and an employee must be on probation ;

(b) that the probationary period may not be less than 12 months, and

(c) that the provisions of s 12(1) and (2) and the said para 10 of the Code override any contractual term in conflict therewith, and that consequently the appellant was as a matter of law appointed for a probationary period of 12 months (at p 749 E - I).

The court apparently also accepted as correct the attitude of counsel on both sides that although

the Act and the Code are silent on the early termination of the probationary appointment of an employee, he cannot be in a better position than an officer, and that consequently the appellant's employment on probation could be terminated under s 12(4)(a); i.e. either forthwith, if his conduct or performance was unsatisfactory, or by the giving of one month's notice (at p 750 H - I).

Relying in the main on the judgment of this court in Moodley v Minister of Education and Culture, House of Delegates 1989(3) SA 221(A), Friedman JP went on to hold that as a necessary implication of the Act an employee who is on probation is not entitled to be heard before it is decided to terminate his employment on one month's notice (at p 753 J) . He also rejected two further contentions advanced on behalf of the appellant; viz, that the decision in casu was vitiated by an incorrect factual perception, or, alternatively, that

the papers gave rise to disputes of fact which should be referred for oral evidence. For the reasons set out below, it will be unnecessary to consider those contentions.

The finding that s 12(1) of the Act applies to employees, was clearly based on a tacit premiss which appears to have been common cause in the court a. quo; i.e. that the words "a person" include an officer and an employee. On a purely linguistic approach, and having regard only to the provisions of the subsection, there is something to be said for this view. There are, however, weightier considerations pointing the other way.

The words "a person" appear in a number of the provisions of the Act, but no purpose would be served by attempting to determine their meaning in each instance. Suffice it to say that the words sometimes include both officers and employees, whilst in other provisions they are used in contradistinction to

officers and/or employees. One notes, however, that in s 12, but for the use of the words in subsections (1) and (5)(a), the references are all confined to an officer. Moreover, in s 12(5)(a) the words clearly denote somebody who was an officer when transferred or promoted on probation and thereafter remained an officer.

S 12(4)(a) in my view provides the clearest pointer to the legislature's intention. Nowhere in the Act is provision made for the discharge of an employee serving on probation. By contrast, that subsection in terms deals with the termination of the probationary appointment of an officer, and if the legislature intended that the appointment of an employee should be on probation, it is not easy to grasp why the word "officer", and not the words "a person", appears in s 12(4)(a).

Furthermore, unlike s 12(3) which governs the confirmation of the probationary appointment of an

officer, there is no provision in the Act which deals with the confirmation of such an appointment of an employee. In sum, were one to hold that the words "a person" in s 12(1) includes an employee, the curious situation would be that the legislature failed to attach any specific legal consequences to the probationary employment of an employee.

The question remains : why were those words, and not the words "an officer", used in s 12(1)? A plausible answer is that a person only becomes an officer when he is appointed as such. In other words, at the time when such an appointment is under consideration, he is not yet an officer.

Even as regards officers a probationary period may be less than 12 months. This is so because s 12(2)(a) merely prescribes that the period of probation "so recommended or directed" shall not be less than 12 months. This phrase has reference to s 12(1)(b) in terms of which the transfer or promotion

of an officer must be on probation if the prescribed recommendation or direction is made. Hence, in the absence of such a recommendation or direction, s 12(2) does not prescribe a minimum period of probation.

I turn to the relevant provisions of the Code. Para 10(1) of Chapter B III II reads thus :

> "(l)In terms of section 12(2) of the Public Service Act, 1984, the minimum probationary period is twelve calendar months. All appointments, except those as Foreign Service Officer, Grade VI, Information Officer, Pupil Health Inspector and Pupil Technician (all work fields) and other equivalent pupilage grades as well as those meant in paragraph 16(1), should be effected on twelve calendar months probation. The probationary period in respect of the former two ranks is two years and in respect of Pupil Health Inspectors two and a half years while pupil technicians are appointed on three years' probation where the three-year National Diploma for Technicians is the minimum requirement for appointment and four years probation where the four-year National Diploma for Technicians is prescribed as minimum requirement. The probationary period of a candidate who holds a Junior (or equivalent) Certificate and who is appointed as a Pupil Agricultural Officer or a Pupil Superintendent: Horticulture, is five years."

The first sentence of para 10(1) does no more than to repeat, without any significant additional provision, the gist of s 12(2) of the Act. True, the next sentence says that all appointments, save for those specifically mentioned, should be effected on 12 months' probation, but this must be read in conjunction with para 15. For the rest para 10(1) simply designates varying, and longer, probationary periods for certain specified posts which are no doubt held by officers. Para 11 deals only with quarterly progress reports in respect of officers and pupil technicians on probation. Paragraphs 12, 13 and 14 are confined to officers. Finally there is para 15 which applies the contents of paras 10 -14 _mutatis mutandis_ to "candidates for permanent employment in posts referred to in section s 7(1)(c)(i)" of the Act. They are however, candidates for employment on the fixed establishment. They do not include a temporary employee - such as

the appellant - appointed under s 7(l)(c)(ii) of the Act.

Of course, if para 10(1) was intended to apply to appointments of employees, there would have been no need to provide in para 15 that para 10 shall apply mutatis mutandis to a specific class of employees. But since para 15 does so provide, the most likely inference is that the draftsman of the Code did not intend para 10(1) to govern the appointment of employees. This inference is strengthened by the absence of a tenable explanation how the appointment, under s 7(l)(c)(ii) of the Act, of an employee under a special contract can be accommodated under para 10(1) should it be construed as relating to all appointments.

It may be that on a proper interpretation of para 10(1) the requirement that all appointments must be on probation relates only to such which in terms of s 12(2) of the Act must be made for a probationary

7 period of not less than 12 months. But whatever the true ambit of the subparagraph may be, it does not in my opinion deal with the appointment of employees.

In the result I hold the view that neither the Act nor the Code required that the appellant's appointment be made on probation. Consequently, although the designation of the appellant's appointment as "op....proef" was devoid of legal consequences under the express provisions of the Act and the Code, his appointment for a period of three months was perfectly valid.

In passing I may mention that counsel for the respondent accepted that the words "a person" in s 12(1) of the Act do not include an employee.

Now, we know that after the expiry of his written appointment on 31 October 1989 the appellant continued to prosecute in the Wynberg Magistrate's Court; that he was paid his monthly salary, and that he even received an increase. There is little doubt

that Mr Booysen was fully aware of these facts, but it was only towards the end of March 1990 that he decided to accept a recommendation to terminate the appellant's services. True, in affidavits filed on behalf of the respondent, officials of the Department state that during a conversation with the appellant in October 1989, they attempted to convey to him, in as delicate a manner as possible, that he was not suitable for the post of prosecutor, but they refrain from saying that they intimated to him that he would not be re-appointed. Nor do they allege that they had the authority to do so.

In the light of what has been said above, it would be idle to suggest that during the period of six months between 1 November 1989 and 30 April 1990 there was no longer any contractual relationship between the appellant and the Department. Objectively viewed, their conduct points clearly to a mutual intent to bring about some form of tacit

relocation of the pre-existing relationship.

That much was conceded by counsel for the respondent in supplementary Heads of Argument prepared by him after the oral hearing of the appeal. (Both parties were requested by this court to file such Heads.) Relying on certain authorities he submitted, however, that the new agreement brought about by the tacit relocation contained the same terms as the original one. Consequently, so the argument continued, the appellant's further employment was also on probation - presumably for two consecutive periods of three months each. I do not agree. There is no general rule that a tacit relocation is governed by all the terms of the original agreement, and in particular by one relating to the duration of that agreement. In every case the provisions of the new agreement fall to be determined from the parties' conduct and such other considerations as may be relevant. *In casu* the

appellant's probationary employment had come to an end and, as said, that employment was not required or governed by specific provisions of the Act or the Code. Hence the readiest inference from the parties' conduct is that the appellant was tacitly re-appointed, under s 7(l)(c)(ii) of the Act, as a temporary employee for an indefinite period. That being so, his employment could, in terms of para 5 of Chapter B XV II of the Code, have been terminated by one month's notice. However, by virtue of the decision of this Court in Administrator, Natal v Sibiya 1992 (4) SA 532, he was entitled to be heard before a decision to terminate his services was taken. The failure to afford him a hearing therefore invalidated that decision.

In conclusion I should mention that the parties were in agreement that this appeal does not give rise to a constitutional issue.

The appeal succeeds with costs, including the costs of two counsel, and the following is substituted for the order made by the court a quo :

> "The application is allowed with costs, including the costs of two counsel, and the respondent's decision to terminate the appellant's services, as conveyed to him in the letter dated 29 March 1990, is set aside."

H J O VAN HEERDEN JA

AGREED : HOEXTER JA
KUMLEBEN JA FH
GROSSKOPF JA
HOWIE JA