IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: **7991/07**

DATE: **26 JUNE 2007**

In the matter of:

TREATMENT ACTION CAMPAIGN & 5 OTHERS **Applicants**

and

MEC OF HEALTH & 3 OTHERS **Respondents**

Judgment

DESAI, J

This application, which relates to the alleged disruption of health services in Khayelitsha, arises from the public sector strike currently in progress. As the matter is one of obvious urgency, I deal with it on that basis. I shall, if necessary, amplify this judgment in due course.

It appears that the State, as an employer, and certain trade unions representing employees of the State, have been engaged in negotiations concerning the wages and working conditions of the said employees. The negotiations reached an impasse resulting in some employees of the State exercising their right to embark on strike action in support of their cause.

The respondents contend that not all employees of the State have the right to embark on strike. Apparently those engaged in so-called essential services are legally forbidden from engaging in strike action. In any event, on 31 May 2007 the Labour Court, per Francis J under case number J1276/07, issued an interdict prohibiting employees engaged in essential services from striking.

The strike commenced on 1 June 2007 and it seems that certain employees engaged in essential services failed to comply with the abovementioned order. Pursuant thereto, on 4 June 2007, the Labour Court order and an ultimatum to return to work were, according to respondents, brought to the attention of all employees engaged in essential services as well as the relevant trade unions. Thereafter the decision was made to dismiss the said employees. According to Mr Thami Mseleku, the Director General for the National Department of Health, it was necessary for the respondents – "... to act decisively ... by bringing the striking workers to book."

Mr Mseleku's conclusion that no employee has been dismissed unlawfully, if I may venture an opinion, is certainly open to considerable doubt in the light of some of the affidavits placed before me.

The dismissals that form the subject matter of this application occurred in Khayelitsha. On 11 June 2007 41 workers at the clinics in Khayelitsha were dismissed. A breakdown of the dismissed staff in Khayelitsha is as follows.

Site B Day Hospital which includes the Ubuntu Clinic – 30 staff.

Nolungile Community Health Centre – 1 staff member.

Michael Mapongwana Centre – 10 staff

It is not in dispute that the Ubuntu Clinic where most of the dismissals took place saw in excess of 600 patients daily.

The first Applicant, that is the TAC, contending that the decision by the respondents to summarily dismiss some health and support workers at the Khayelitsha clinics severely disrupted an already attenuated service and had the potential to cause irreparable harm to many chronically ill patients, demanded in writing from the Respondents the reinstatement of the dismissed employees at the Khayelitsha health facilities. The demand was rejected by the first Respondent and the other respondents did not reply.

What followed is this application. Besides the TAC, the other applicants are children and adults who require ongoing care and treatment for illnesses ranging from HIV Aids and asthma to common acute infections from the clinics in Khayelitsha.

The respondents are the relevant health and public service and administration authorities.

In their notice of motion the applicants seek wide-ranging relief. The declarators sought relate largely to the legality of the dismissals. It is contended both that the dismissals were procedurally unfair and that the dismissals amount to an invasion of the applicants' constitutionally guaranteed right to adequate health care and other similar rights. The relief sought also focuses on both the reinstatement of the dismissed health care workers and the restoration of a reasonably functioning health service.

I think two distinct issues arise for determination in this matter. The first relates to whether I am at liberty to reinstate the dismissed workers. The second is a more complex issue. It relates to whether the applicants' constitutional rights have been infringed by the dismissals and, if so, what order is to follow.

As Mr MTK Moerane, SC, who appeared with Mr P Coppin, SC, and Mr B Vally on behalf of the third and fourth respondents, has correctly pointed out, none of the dismissed employees, nor their trade unions, are applicants in this matter. The applicants do not have any relationship with the respondents or with the dismissed employees. The dismissed employees, who are not named, have not sought to secure their reinstatement through an application in this court.

Ray Japhta, the head of the Collective Bargaining for the National Education Health and Allied Workers Union (NEHAWU) confirms in his affidavit:

> **"that the fairness of the dismissal of the employees will be dealt with in terms of the provisions of the Labour Relations Act and the constitution of the Public Health and Welfare Sector Bargaining Council in due course. A dispute has not yet been referred to**

the Council pending the outcome of the broader negotiation process, but will be referred as soon as it becomes necessary to do so."

It is apparent from what Japhta says, that the fairness or otherwise of the dismissals is to be determined in other fora.

The applicants do not have the necessary authority to act on behalf of the dismissed employees. They are not parties to the employment contracts and are not entitled to seek relief which seeks the restoration of the employment contracts.

In terms of the Labour Relations Act dismissed employees or their trade unions have several remedies to challenge their dismissals. The dismissals can be referred to the relevant Bargaining Council for conciliation, and if the conciliation fails, it can be referred either to arbitration or to the Labour Court for adjudication. It seems that this application, insofar as it seeks the reinstatement of the dismissed employees, amounts to an attempt to circumvent the Labour Relations Act.

The applicants contend that this matter primarily concerns access to health services and the inter-related rights to life and dignity. They argue that as a direct consequence of the respondents' conduct in dismissing a significant number of healthcare professionals, persons in Khayelitsha have been unable to access chronic and emergency medical services. The respondents' conduct, in their view, constitutes an infringement of the rule of law, the State's obligations in terms of the Constitution and, in particular, the right of access to adequate public health care services including, *inter alia*, the rights to emergency medical care, reproductive health and basic health services for children.

Mr P Hodes, SC, who appeared with Mr A Katz and Ms N Bawa on behalf of the applicants, has focused the Court's attention on three affidavits which in effect are unchallenged and afford compelling evidence of irreparable harm to patients of the clinics in Khayelitsha.

Dr Srinivasan Govender, is a senior family physician who provides overall clinical guidance and quality improvement at the clinics in Khayelitsha, he states in his affidavit from page 87 of the record:

> **"In the last 12 months we have battled to maintain an adequate level of service delivery. We have been struggling to implement a proper system within our reception areas, within trauma services and in chronic units. Our efforts have been largely hampered by the lack of sufficient staff, in other words before the strike we were barley functioning because of the staff constraints. The strike has therefore meant that we can only really render emergency services. We have a triage system where patients that are not considered emergency cases are turned away."**

He then goes on to say –

> **"Before the nationwide industrial strike we were struggling to maintain a basic standard of service mainly because of infrastructure and staffing restraints. And understandably, the strike and the dismissal of staff have worsened the situation. In my view all areas of service have been critically affected... Since the strike began I have personally observed staff at Site B Day Hospital providing essential emergency services. This is because staff agreed to prioritise certain services."**

Then on page 90 of his affidavit he makes the following observations in regard to the strike.

> **"It is important to note that I have been to Site B, Site C and Michael Mpongwana every single day since the strike commenced and I have never been intimidated or threatened by any health worker. If 31 members of staff are not allowed to come back to work at Site B our ability to provide basic emergency services and other services in the medium to long term will be critically jeopardised. Their inability to come to work will seriously disrupt services delivery. Even if dismissed staff were to be replaced, realistically, the positions would have to be advertised which could take two to three months. If locums were to be sourced I am unsure who will fund that given our extremely tight budgetary constraints."**

Mr Mseleku comments upon Dr Govender's affidavit as follows. He says –

> **"The entire affidavit of Dr Govender is based on conjecture, speculation and hearsay. Whilst I appreciate Dr Govender's sympathy for patients he has made out no case for the reinstatement of dismissed workers."**

It may be so that Dr Govender has not made out a case for the reinstatement of dismissed employees. His affidavit, however, paints a graphic picture of the constraints under which doctors and nurses work in Khayelitsha to give their patients an acceptable level of medical care. His conclusions of possible irreparable harm caused by their dismissals are premised upon his experience and cannot be easily disregarded.

Dr Eric Goemaere, a doctor working for Medicins Sans Frontieres, the MSF, and based in Khayelitsha similarly states his concerns about the dismissals. I refer also to his affidavit on page 73 of the record:

> **"I am concerned primarily with the deleterious impact on patients, service provision and workers in the health services as a result of the summary dismissals in Khayelitsha as a consequence of the public service strike."**

And on page 77 of his affidavit –

> **"The harm done to patients by the summary dismissals will be irreparable. For instance, the dismissal of data capturers and nurses would adversely affect patients' adherence to their treatment regimes. The remarkable adherence rate achieved in the Western Cape ARV programme would be compromised. Non adherence to treatment can lead to the development of drug resistant HIV and limit the treatment options available to the individual patients. In my clinical experience I have observed that adherence problems lead to drug resistant HIV."**

Then on page 79 he says –

> **"The crisis in the health system can be illustrated from our experience at the Ubuntu HIV TB Clinic at Site B Day Hospital in Khayelitsha as well. There are five posts available for professional nurses in that clinic. Two have been vacant since 2003. Now two of the remaining three nurses at the Ubuntu Clinic have been dismissed. A Clinic that needs five nurses now has one to do clinical work and undertake management responsibilities. "**

Finally, he says on page 81 –

> **"Thirty (30) of the 41 healthcare workers dismissed in the Khayelitsha district are from only one clinic – the site B Day Hospital. This disproportionately affects this clinic that**

> **remained functional during the strike and is unfair on the people of Khayelitsha. Ten of the dismissed workers are from Michael Mapongwana and one from Nolungile (Site C). That means that people using already overburdened public health services in the Khayelitsha clinics will suffer a much more serious negative impact. The dismissals have happened with immediate effect and without a contingency (my underlining) plan being in place. This puts our services at very serious risk particularly at Site B which cannot operate without 30 of its staff members."**

Dr Goemaere's views cannot be simply dismissed as jaundiced or without a legal or factual basis as the respondents attempt to do. Dr Goemaere has extensive experience. He has experience in several countries including Third World countries. He is a professional whose views must be accorded due respect. He has worked extensively in Khayelitsha and it seems fully appreciates the problems with regard to medical services in that area.

Finally in this regard there is the affidavit of Sister Mpumulelo Matangana. She is not – I need to emphasise that – not a union member, was not on strike, and is a chief professional nurse with 17 years experience. She is employed as Unit Manager at the Ubuntu Clinic. Her team manages more than 2000 patients and they see about 180 patients daily. Her comments are telling and warrant restatement for the purposes of this judgment. She says –

> **"Because the trained nurse and the trained data capturers in the team I manage and supervise were dismissed the burden of the patient load now falls on the shoulders of fewer staff. Now the doctors and I have to do nursing, parking, data capturing and filing patient records. This means that patients are not getting proper care and treatment. Because of the dismissals, patients have to wait an even longer time and we fear that they may default on their treatment."**

She goes on to say –

> **"The irreparable harm caused to more than 2000 children and adults in our care at Ubuntu Clinic can be measured in illness and death. The new patients that come to our clinics every day will be deferred and they will suffer. We are not opening any new folders. On average we start 80 new patients per month on treatment. This month we have only been able to start three patients."**

This hardly warrants comment. Her words are self-explanatory. The impact is noted.

That then the factual background with regard to the alleged infringement of constitutionally guaranteed rights. The applicants contend that the principal rights infringed are contained in Section 27 and 28 of the Constitution which deal with the right to have access to healthcare services. South Africa has also ratified the International Covenant on Economic Social and Cultural Rights, the ICESCR, which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. I shall revert to the ICESCR shortly.

This matter relates to the negative obligation on the State to respect socio-economic rights – in other words the rights can be negatively protected from improper invasion. (See: In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA 744 (CC).) The "negative obligation" applies equally to the right of access to healthcare services. (In this regard see the Minister of Health and Other v The TAC and others 2002(5) SA 721 (CC).)

In the case of the Bon Vista Mansions v Southern Metropolitan Local Council 2002(6) BCLR 625 (W) which dealt with the negative obligation to respect existing water supply, reference was made to an analysis of the ICESCR, which pointed out that:

> **"… in order to respect a right the State must refrain from actions which serve to deprive individuals of their rights."**

(See Craven: The International Covenant on Economic Social and Cultural Rights, Clarendon, Oxford 1995 at p110.)

It is apparent from the affidavits referred to herein, that health services in Khayaletsha have been severely curtailed as a result of the dismissals. These steps were taken without proper contingency plans being adopted. The involvement of the army was short-lived and did little to alleviate the problem. As the doctors and Sister Nompumelelo Matangana pointed out there are real prospects of irreparable harm to health services and the health of chronically ill patients which include children. The staff at the Khayelitsha clinics were dismissed without proper thought being given to the deleterious effect of that decision upon the health of the weak, disabled and ill of Khayelitsha.

The applicants, and those whom they represent, have a clear right to be afforded some protection against an invasion of the constitutionally guaranteed rights. They are in jeopardy of irreparable harm and have had no option but to approach this Court for appropriate relief.

In the result I make the following order:

1. **A rule *nisi* is issued calling upon the respondents to show cause on Monday 20, August 2007, why a final order shall not be made in the following terms.**

   1.1. **Ordering the respondents to restore and guarantee the provision of reasonably functioning health services in Khayelitsha including emergency, chronic, child and reproductive health services.**

   1.2. **Directing the respondents to pay the costs of this application jointly and severally, the one paying the others to be absolved, which costs are to include the costs of two counsel.**

2. **Directing that paragraph 1.1 above operates as an interim interdict pending the return date.**