

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO. 702/2016

Date heard: 31 January 2019

Date delivered 26/02/2019

In the matter between:

MANDISA OLIPHANT

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF HEALTH,

EASTERN CAPE PROVINCE

First Respondent

THE HEAD OF THE DEPARTMENT,

DEPARTMENT OF HEALTH,

JUDGMENT

LAING AJ:

[1.] The applicant has brought an application for an order directing the first respondent to take steps to consider the applicant's appeal for reinstatement as an employee in the Department of Health and to advise the applicant thereof within ten days of the date of service of the order. This follows the applicant's having been deemed to have been dismissed in terms of sub-section 17(3)(a)(i) of the Public Service Act, 1994 ('the PSA') by reason of her having absented herself from duties without permission for a period exceeding one calendar month.

Factual background

[2.] The applicant was employed as the Chief Executive Officer at Komani Hospital, Queenstown. On 12 July 2011, the Department suspended her, pending the outcome of investigations into alleged misconduct. Consequently, the applicant referred a dispute to the relevant bargaining council, which culminated in an agreement on 1 August 2011 to the

effect that, *inter alia*, the suspension would be lifted and that the applicant would be placed at another institution on a temporary basis within 50 kilometres of her erstwhile place of employment. The agreement took effect on 11 January 2012.

[3.] Thereafter, the applicant allegedly made several attempts to meet with a senior official to discuss her temporary placement. She reported for duty at the Labour Relations Office in Bhisho in July 2012 but was instructed to return home. Further interaction with officials proved fruitless and it became clear to the applicant that the Department did not have a post for her. This resulted in the applicant's becoming severely depressed. Acting upon the advice of her psychologist, the applicant applied for sick leave and submitted medical certificates in support thereof.

[4.] Disciplinary proceedings against the applicant commenced later that year. The proceedings became protracted but ultimately resulted in a finding on 4 December 2013 that the applicant had been absent without permission for more than one calendar month and was deemed to be dismissed. Consequently, the applicant referred the matter to the bargaining council. The commissioner ruled on 28 January 2015 that the council did not have jurisdiction to deal with the matter. By that stage, however, the parties had agreed to follow the processes available in terms of section 17 of the PSA and the applicant would lodge a dispute with the first respondent.

[5.] A few months afterwards, the applicant made application to the first respondent for reinstatement in terms of sub-section 17(3)(b). The provisions thereof permit the first respondent to approve the reinstatement of an employee deemed to have been dismissed

under sub-section 17(3)(a)(i) where the employee has reported for duty after the period of absence which formed the basis for his or her dismissal and where he or she has showed good cause. In her application, the applicant explained the contact and interaction that she had had with officials in various attempts to give effect to the agreement that had previously been reached by the parties for the applicant to be placed at another institution on a temporary basis. Furthermore, she described her depression and how this had resulted in her absenteeism.

[6.] The first respondent did not respond to the applicant's application. On 15 January 2016, the applicant's attorneys wrote to the first respondent, requesting a decision. The first respondent has yet to make a decision and this forms the subject of the present application.

[7.] The respondents confirm that the applicant was dismissed from the public service in terms of sub-section 17(3)(a)(i) of the PSA. They also allege that the applicant has never reported for duty, which is a prerequisite for reinstatement under sub-section 17(3)(b). Importantly, the respondents allege that the applicant withdrew her application for reinstatement and that there is no decision for the first respondent to make.

[8.] In an affidavit deposed to on behalf of the respondents, a Mr Sipumeze Makitshi asserts that he is a member of an appeals committee that was appointed by the first respondent to deliberate on representations made under sub-section 17(3)(b) and to make recommendations. He states that he chairs the committee, which had invited the applicant to explain certain discrepancies in her application. Mr Makitshi goes on to say that she accepted the invitation and attended a meeting of the committee with her union representative in the

first respondent's boardroom on 28 October 2015. The meeting was also attended by a Mr Myeki and a Mr Mlambo, who are presumably employees of the first respondent, although this is not apparent from the papers.

[9.] At the meeting, the union representative allegedly informed the committee that the applicant there and then withdrew her application because she wished to pursue other options. Mr Makitshi avers that the committee accepted her withdrawal. It also advised the applicant to communicate her withdrawal in writing and pointed out that she was late in making representations and would have to seek condonation.

[10.] The applicant has failed to communicate her withdrawal in writing. Consequently, argues Mr Makitshi, there is no need for the first respondent to deal with the matter further.

[11.] The applicant emphatically denies that she withdrew her application for reinstatement. Whereas she admits to having attended the above meeting at the request of her union, she avers that the purpose thereof was never explained to her. As a result of her confusion, the applicant requested that the meeting be adjourned so that she could obtain clarity and consider her position. Moreover, she refutes that the minutes of the meeting, attached to Mr Makitshi's affidavit, represent what actually transpired.

[12.] To the respondents' allegation that she has never reported for duty, the applicant points out that the respondents have always been aware of her circumstances and had previously requested her to return home.

Issues for determination

[13.] The respondents' contentions raise the prospect of a dispute of fact and the attendant need to consider whether this is a matter where the court should direct that oral evidence be heard. This would also determine whether or not the applicant is entitled to the relief that she seeks. Accordingly, the issues before the court are the following: (a.) did the applicant withdraw her application for reinstatement; and (b.) if not, then is she entitled to have her application considered by the first respondent and to be informed of the latter's decision within the stipulated timeframe?

Legal framework and application of principles

Whether the applicant withdrew her application for reinstatement

[14.] In terms of rule 6(5)(g) of the Uniform Rules of Court, the court may, *inter alia*, direct that oral evidence be heard where an application cannot properly be decided on affidavit. The general principle is that a final order will only be granted where the facts stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. See *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C), at 235, and the long line of cases that have followed. Possibly the most quoted case in relation to the above is *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623, where

Van Wyk J's statement of the general principle was cited with approval. However, Corbett JA went on to add a qualification, at 634I-635C:

...In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case, *supra* at 924A).

[15.] Counsel for the respondents drew the court's attention to the above qualification and also to the case of *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* [2006] JOL 18830 (SCA), where the continued application of *Plascon-Evans Paints* in relation to the exception to the general principle was affirmed. Interestingly, in *Yarram Trading*, the Supreme Court of Appeal relied on Corbett JA's statement to invoke the exception, at [30], and to reject the appellant's denial of the respondent's allegations. This was done on the basis of the correspondence included in the papers.

[16.] Within the context of the discretion given to a court under rule 6(5)(g), respondents' counsel pointed out that it is necessary to decide whether there is a real dispute of fact. Counsel referred to *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), where Murray AJP held, at 1162, that

[t]he crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.

“In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee, against whom the ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor.”

(per Watermeyer CJ, in *Preston v Cuthbert & Co Ltd* (*supra*, at p. 428)).

[17.] A real dispute of fact that cannot be decided on the papers would, of course, justify the court's exercising its discretion and directing that oral evidence be heard. However, *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC), at 608F, is authority for the proposition that a denial that is so far-fetched or clearly untenable as to be rejected on the papers cannot provide the evidential basis for a genuine dispute of fact. In other words, there is no real dispute of fact where a court is satisfied that the allegation or denial made by the respondent is unconvincing, implausible or simply indefensible. A court

in those circumstances would have a basis upon which to refuse to exercise the discretion afforded under rule 6(5)(g).

[18.] In the present matter, Mr Makitshi alleges on behalf of the respondents that the applicant withdrew her application for reinstatement during the course of a meeting of the appeals committee held on 28 October 2015. There are several difficulties with this allegation.

[19.] As a starting point, Mr Makitshi describes himself as the Director: Human Resources Information Systems. Ostensibly he represents the first respondent, who is the executive authority mentioned in sub-section 17(3)(b) of the PSA. The applicant's counsel argued that there is no confirmatory affidavit from the first respondent in relation to Mr Makitshi's averments, meaning that the latter constitutes hearsay evidence. There is indeed no confirmatory or supporting affidavit from the first respondent. The only apparent connection between Mr Makitshi and the first respondent, in the present circumstances, is that he chaired a so-called appeals committee that dealt with the applicant's application for reinstatement. In general, however, it is trite to state that hearsay evidence is inadmissible. See the discussion in Schwikkard PJ *et al*, *Principles of Evidence* (Juta, 4th edition, 2016), at 287-92.

[20.] In the same vein, Mr Makitshi alleges in his affidavit that the applicant's withdrawal of her application was communicated to the committee by her union representative. However, the name of the representative is not stated and there are no confirmatory or supporting affidavits to substantiate the allegation. The probative value of the allegation is questionable; there is nothing to indicate that the allegation must not also be deemed as hearsay.

[21.] Furthermore, the applicant has taken issue with the appeals committee itself, saying that there is no legal basis for the creation thereof. This court agrees with the applicant. Whereas sub-section 42A(4) of the PSA permits the first respondent to delegate powers to the second respondent and to authorise the second respondent to perform duties imposed under the PSA, there is nothing in the PSA itself that allows the creation of an appeals committee to deliberate on applications for reinstatement, such as the one that forms the subject of these proceedings.

[22.] The principle of legality underpins South African administrative law. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Municipal Council* 1999 (1) SA 374 (CC), the Constitutional Court held, at para 45, that

‘the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’

[23.] This means that an organ of state, an administrative body, an official or any other person exercising or performing a public power or function may only do so where lawful authority exists. This is a fundamental principle of administrative law, described as follows by Baxter:

[p]ublic authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act. Moreover, on account of the

institutional nature of law the public authority *itself* exists as an office or body created by law. A valid exercise of administrative power requires both a *lawful authorization* for the act concerned and the exercise of that power by the proper or *lawful authority*.

See Baxter L, *Administrative Law* (Juta & Co Ltd, 1984), at 384.

[24.] The above passage was quoted by Plasket J in the unreported case of *Nelson Mandela Bay Metropolitan Municipality and Another v MTN Service Provider and Others* (1661/12) [2014] ZAECPHC 84 (4 December 2014). The court held, at [36], that a pre-evaluation committee that was established by the municipality for purposes of public procurement had no lawful existence because no provision had been made therefor in the applicable legal framework. Accordingly, the committee had no lawful authority to disqualify bids, which it had purported to do.

[25.] From the above, it follows that unless the PSA expressly grants authority for the establishment of an appeals committee, the administrative body to which Mr Makitshi refers in his affidavit cannot exercise or perform the powers or functions of either the first or second respondent. Whereas there may indeed be legislation that permits the respondents to create a committee to assist with administrative matters, no such body is envisaged under the PSA. There is no legal basis for a so-called appeals committee to deliberate on an application for reinstatement and to make recommendations thereon to the respondents.

[26.] If the applicant did indeed withdraw her application then the withdrawal was not something that should have come before the committee. Quite simply, the committee was not lawfully authorized to consider any alleged withdrawal or to treat it as such in reporting to the first respondent. For the withdrawal to have been effective, the applicant would have been required to give notice thereof to the executive authority who was empowered to make a decision thereon, i.e. the first respondent, alternatively the second respondent in the event that the relevant powers had been delegated to him or her.

[27.] There is little to demonstrate, on a balance of probabilities, that the applicant actually withdrew her application. The evidence used by Mr Makitshi to support his contentions to that effect consists of a single item, viz. the unsigned minutes of the meeting held on 28 October 2015. A copy of the minutes has been attached to the papers. The applicant has highlighted the deficiencies of the minutes in her reply, pointing out that the document does not record that either the applicant or her union representative was present and is also unsigned. Intriguingly, there is no confirmation from the apparent author of the minutes, a Ms Hlana, that they are an accurate reflection of what transpired. There are also no confirmatory or supporting affidavits from the remaining participants at the meeting, Mr Myeki and Mr Mlambo.

[28.] The applicant has correctly argued, too, that a verbal withdrawal of her application would not have sufficed. This seems to have been recognised by Mr Makitshi, who explains that the committee advised the applicant to communicate her withdrawal in writing. He goes on to state that

[the committee] also advised the applicant that she was very late to make representations to the first respondent for her reinstatement and in this regard condonation would also have to be brought [sic].

[29.] Accordingly, it would not be unreasonable to deduce that the committee required the applicant to confirm her alleged withdrawal in writing; alternatively, if she intended to pursue the application for reinstatement then she would be required to seek condonation for its late delivery. Whatever the merits of the committee's request, it is clear that the applicant's actual position on the matter was unclear to the committee. At that stage, it could not have been said with certainty that the applicant had actually withdrawn her application.

[30.] In the circumstances, the allegations made by the respondents to the effect that the applicant had withdrawn her application for reinstatement are unconvincing and implausible. Moreover, in light of the hearsay contained in Mr Makitshi's affidavit and the apparent unlawfulness of the nature and conduct of the appeals committee, the allegations are indefensible.

[31.] Accordingly, the court is persuaded that the respondents' allegations can be rejected merely on the papers. No real dispute arises. The court is also satisfied with the inherent credibility of the applicant's factual averments to the effect that she never withdrew her application.

Whether the applicant is entitled to have her application considered

[32.] The basis for the applicant's application can be found in sub-section 17(3)(b) of the PSA. The provisions thereof state as follows:

(b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.

[33.] Counsel for the applicant has referred to *National Union of Metalworkers of SA on behalf of Magadla and AMT Services (Pty) Ltd* (2003) 24 ILJ 1769 (BCA) as authority for the requirement that an employer must enquire into the reasons for an employee's prolonged and unexplained absence from employment. The same principle emerges in *Magagula v Department of Health* [2004] 2 BALR 156 (PHWSBC).

[34.] Furthermore, *South African Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 487 (LC) is cited to assert the principle that statutory employers are entitled to rely on sub-section 17(3)(a)(i) of the PSA only in exceptional circumstances. The employee must have well and truly disappeared or is unresponsive to attempts made to contact him or her and to allow the employee to show good cause why he or she should not be dismissed. See, too, *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 18 (21 October 2013), where the Constitutional Court held that there must be strict compliance with the requirements of the statutory provisions regarding a deemed dismissal.

[35.] In addition, counsel for the applicant mentioned *Gangaram v Member of the Executive Council for the Department of Health, Kwazulu-Natal and Another* [2017] 11 BLLR 1082 (LAC). The facts of the case are similar to those in the present matter. The appellant had been ill and for a continuous period of her absence she completed and submitted sick leave forms, together with medical certificates. The court held that in the absence of any indication that her sick leave was not approved, the appellant was entitled to accept that her absence was with the leave of her employer. Moreover, the respondent's officials knew of her condition and her whereabouts and continued to pay her salary. The requirements for a deemed dismissal under sub-section 17(3)(a)(i) had not been met and there was no need for the appellant to make application for her reinstatement in terms of sub-section 17(3)(b).

[36.] The case law to which counsel for the applicant has drawn the court's attention is indicative of the careful manner in which section 17 of the PSA must be approached as a whole. A deemed dismissal is a harsh measure in labour law and should only be relied upon by an employer as a final resort. Consequently, it is the view of this court that any provision in section 17 that permits an employee an opportunity to demonstrate why he or she should not be deemed to have been dismissed must be interpreted and applied generously.

[37.] For present purposes, however, the court is not called upon to make a finding in relation to the applicant's application for reinstatement. There is no need to investigate whether the applicant has indeed reported for duty and whether good cause has been shown. The relief sought by the applicant is merely that her application be considered by the first

respondent and that she be advised of the decision in that regard. The court cannot usurp the powers of the first respondent. Whether the requirements of sub-section 17(3)(b) of the PSA have been met is something to be decided by the first respondent, alternatively the second respondent in the event that such powers have been delegated to him or her. If it transpires that the first or second respondent refuses to grant the application for reinstatement then the applicant is at liberty to take such decision on review to the Labour Court in terms of sub-section 158 (1) (h) of the Labour Relations Act 66 of 1995. See *PAWUSA v Department of Education, Free State Province* 2008 ILJ 3013 (LC).

[38.] The text of sub-section 17(3)(b) presupposes that an executive authority such as the first respondent must consider representations or submissions for reinstatement. The applicant's application constitutes such representations or submissions. In accordance with the court's earlier discussion of the matter, the court is satisfied with the inherent credibility of the applicant's factual averments to the effect that she never withdrew her application. There is no reason why the provisions of sub-section 17(3)(b) should not be give effect. The applicant is entitled to have her application considered.

Relief and order

[39.] The court is satisfied that: (a.) the applicant did not withdraw her application for reinstatement; and (b.) she is entitled to have her application considered by the first respondent and to be informed of the latter's decision within the stipulated timeframe. In relation to the timeframe involved, the applicant has stipulated a period of ten days. Given the period of the applicant's absence, the lengthy history of the dispute, and the realities of

bureaucratic processes, it would be fair to the first respondent for the court to grant alternative relief and to direct that the applicant be informed of the first respondent's decision within 30 days of the date of the order.

[40.] With regard to costs, the applicant has been substantially successful in her application. There is no reason why costs should not follow the result.

[41.] The following order is made:

(a.) the first respondent is directed to take such administrative or other steps as may be necessary, reasonable or requisite to consider the applicant's application for reinstatement in terms of sub-section 17(3)(b) of the Public Service Act, 1994 and to advise the applicant of the decision taken in respect thereof within 30 days of the date of this order; and

(b.) the first respondent is ordered to pay the applicant's costs.

JGA Laing

Acting Judge of the High Court

Appearances:

For the applicant:

For the respondent: