



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 59211/2009

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	9/4/13
	SIGNATURE

11/4/2013

In the matter between:

GRACE KHULONG

APPLICANT

and

MINISTER OF HEALTH

FIRST RESPONDENT

THE DIRECTOR GENERAL
NATIONAL DEPARTMENT OF HEALTH

SECOND RESPONDENT

EMPLOYMENT RELATIONS DIRECTOR

THIRD RESPONDENT

JUDGMENT

MABENA AJ:

[1] The Applicant instituted this application seeking the following prayers:

- 1.1 That the decision of discharging the Applicant from the Public Service with effect from 15 September 2010 be set aside;
- 1.2 *Alternatively*, that the decision of discharging the Applicant from the Public Service with effect from 15 September 2010 be declared invalid and/ or unlawful;
- 1.3 That the Applicant be reinstated to her substantive post of Security Manager at a level of Deputy Director on grade 12 which she occupied prior to her being discharged from the Public Service with effect from 15 September 2010;
- 1.4 That the reinstatement be ordered with full back pay without any loss of service history and benefit;
- 1.5 Cost in the event of opposition.

[2] This matter has a prolonged history. It initially came before this court on an urgent basis, then being an application for an interdict. My Brother Eberson AJ granted an order *ex parte* on 23 September 2009.

- [3] This matter was enrolled on the opposed roll on 26 July 2010. My Brother Rabie J granted an order that the matter be removed from the roll and the costs issue reserved.
- [4] On 29 November 2010 this matter came before my Brother Van De Venter AJ and was postponed *sine die* and the costs issue reserved. An order was also made to the effect that should the matter be re-enrolled, a new application be launched and be heard simultaneously with the application being heard.
- [5] On 24 April 2012, this matter came before my Sister Teffo J whereupon removed from the unopposed roll with a directive that it be placed on an opposed roll.
- [6] On 31 July 2012 the matter came before my Brother Bertelsmann J and was postponed *sine die*. The Respondents were ordered to pay wasted costs on a scale as between an attorney and client. An order regarding further filing affidavits was also made.

[7] On 3 September 2012 the matter came before my Brother Fabricius J and was postponed *sine die* and the First and Second Respondent were ordered to pay wasted costs of the application on an attorney and client scale. The Second Respondent was ordered to comply with paragraph 3 of the order granted by my Brother Bertelsmann on 31 July 2012, in regard to the filing and delivery of an answering affidavit and a condonation application within 10 days from the date of the order. The Second Respondent was also ordered to file written heads of argument dealing with the following:

7.1 The jurisdiction of this Court to hear this matter;

7.2 Whether Applicant was discharged *ex lege* 30 September 2010; and

7.3 Whether any disciplinary enquiry is pending, and if so, what it's status is.

[8] This matter came before me on 19 November 2012. Many issues were raised on behalf of the Respondents, *inter alia*, issues that included irregular steps taken by the Applicant. I will however

confine myself to the central issues delineated by the order granted by my Brother Fabricius J on 3 September 2012.

[9] On the question of jurisdiction, persuasive submissions were advanced on behalf of the parties. The Respondent's Counsel referred this Court to the provisions of Section 169 of the Constitution, Act 108 of 1996, Section 157 of the Labour Relations Act, Act 68 of 1995 and Section 1 of PAJA respectively, to persuade this Court that indeed, this Court is not seized with the jurisdiction to hear this matter.

[10] Argument was vigorous on behalf of the Applicant that the provisions of Section 17 (3) (a) and 17 (5) (a) (i) of the Public Service Act 103 of 1994 (PSA) entails a deeming provision. If employment terminates by operation of a deeming provision, this paints a different picture altogether. It is common cause and / or no longer in dispute that the Applicant was discharged from service in terms of Section 17 (3) (a) and Section 17 (5) (a) (i) of the Public Service Act 103 of 1994.

[11] The reasons stated in the letter of termination dated 30 September 2010 are that:

" 2. You are in terms of Section 17 (3) (a) and 17 (5) (a) (i) of the Public Service Act deemed to have been discharged from the Public Service with effect from the 15 September 2010 on account of abscondment."

[12] It was argued on behalf of the Applicant that the discharge from service is not a consequence of a discretionary decision but merely a notification of a result which occurred *ex lege*. The employer did not act in any way to end the employment contract. The PSA deals primarily with the organisation and administration of the Public Service and therefore that cannot be classified as labour legislation. In MEC, Public Works, Northern Province vs. CCMA and Others (2003) 10 BLLR 10 27 (LC) the Court held that:

"...if the deeming provision of the Act applies, there is no dismissal as contemplated in Section 186 of the LAR. The operation of the deeming provision is not dependent on any prior decision by the employer: if its requirements are met, employment terminates by operation of law". The services are therefore terminated *ex lege*.

[13] Regard being had to the decision in *M G Phenithi v Minister of Education and Others* (CC) Case number 18/05 (the unreported but reportable, heard on 8 November 2005 and delivered on 14 December 2005) the Court emphasized that deeming provisions do not depend upon any decision and accordingly they do not constitute administrative action.

[14] Having had regard to the above submissions, it has become inescapable to conclude that this Court does have jurisdiction to hear this matter.

[15] By analogy of reason and chronologically, the next issue for determination to be made is the lawfulness and / or otherwise of the discharge of the Applicant from the Public Service with effect from 15 September 2010. I summarize same in the succeeding paragraphs.

[16] It is common cause that:

16.1 The Applicant was suspended from Public Service with effect from 2 March 2009.

16.2 That the internal disciplinary hearing was scheduled to 25 September 2009.

16.3 That the Applicant was discharged with effect from 15 September 2010.

16.4 That the internal disciplinary hearing that was scheduled for 25 September 2009 was cancelled.

16.5 That the aforesaid suspension was never lifted.

[17] I am satisfied that the Applicant did not willingly and intentionally elect to absent herself from her place of employment. Therefore the decision to discharge the Applicant from service under the provisions of the PSA Act, is invalid and unlawful.

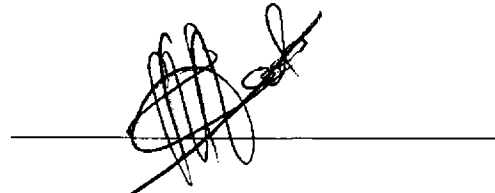
[18] It was submitted on behalf of the Respondents that it would neither possible nor in the interest of justice that reinstatement be ordered taking into account the inordinate delay in this matter.

This argument is untenable because the delay in finalising this matter was occasioned by the Respondents through postponements and removal of this matter from the roll as fully alluded to above. I am of the view that the Applicant has succeeded in making out a case for the prayers set out in the Notice of Motion.

[19] Therefore, I make the following order:

1. The Applicant's application is upheld.
2. That the decision of discharging the Applicant from the Public Service with effect from 15 September 2010 is set aside.
3. That the Applicant be reinstated to her post of a security manager at a level of a Deputy Director on grade 12 with effect from 15 September 2010.
4. The reinstatement in paragraph 3 above is with full back pay including history service and benefits.

5. The Respondents to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'Mh MABENA', is written over a horizontal line.

**MH MABENA
ACTING JUDGE
NORTH GAUTENG HIGH COURT
PRETORIA**