

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5209/06

In the matter between:

MPHETHENG LUCAS RANTSO

Applicant

and

MEC DEPARTMENT OF HEALTH

Respondent

JUDGMENT: CILLIé, J

HEARD ON: 22 NOVEMBER 2007

DELIVERED ON: 29 NOVEMBER 2007

- [1] Does the High Court have jurisdiction to decide on a refusal to reinstate an employee as envisaged in section 17(5)(b) of the Public Service Act No. 103 of 1994? Mr. Motlounq for the respondent (employer) says that the Labour Court has exclusive jurisdiction to hear such matters. Mr. Phalatsi for the applicant (employee) submits that this court at least have concurrent jurisdiction.

[2] The background against which this has to be decided is the following (I mention only those events that is relevant to the question to be decided). The employee was employed by the employer in excess of 20 years. On occasions in the past he successfully applied for study leave. On 25 February 2005 he completed the required application form for study leave for the period 28 February 2005 to 18 April 2005. When he returned to work on 19 April 2005 he found his office locked. On enquiry he learned that he was discharged from employment for being absent from work in excess of one month without leave. It is common cause that it turned out that his application had been refused. The reason for such refusal is irrelevant at this stage. There is a dispute whether the employee was timeously informed of the refusal. I will deal later herein with the effect there-of. The employee says that on the strength of a practice in the past he accepted that his application for study leave would be successful. A deponent on behalf of the employer says that he personally informed the employee on the very same day when the application was made (25 February 2005)

that the application was refused (see paragraph 9 of the opposing affidavit, on page 40 of the papers). The employee denies this in his replying affidavit and states that only after his return he learned of its refusal (see paragraph 8.2.3 of the founding affidavit, on page 10 of the papers and paragraph 6 of the replying affidavit on page 72 of the papers). The employee says that he was lured into believing that his application would be approved on the strength of the procedure that had been followed on previous occasions.

[3] Section 17(5)(a)(1) and section 17(5)(b) of the Public Services Act No. 103 of 1994 reads as follows:

“(5)(a)(i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately

succeeding his or her last day of attendance at his or her place of duty.”

“5(b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary containing in any law, approve the reinstatement of that officer 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.”

[4] The employee proceeded to submit his complaint to the Public Health and Welfare Sectorial Bargaining Council (PHWSBC). Relying on what I shall call the Louw line of decisions (see *infra*) the Commissioner held that the PHWSBC does not have jurisdiction to entertain the matter. This resulted in the present application. The relief the applicant initially sought from this court is simple: An order reinstating the applicant to his employment. When the matter was heard on the 1st March 2007 it became clear that the employer was never requested to exercise his power in terms of section 17(5)(b) quoted above. The employee was granted a postponement in order to do so.

[5] The employee's request to the employer to exercise his discretion in terms of section 17(5)(b) was sent to the employer on the 9th of March 2007. No response from the employer was forthcoming. In a letter dated 6 June 2007 the employer was requested to react thereto. In a letter dated 19 June 2007 (sent to the employee under cover of a letter dated the 12th of July 2007) the employer conveyed that he decided "to confirm your discharge". I accept that this is to be understood as that the employer decided not to reinstate the employee. The employee requested reasons for the decision. This was returned in the following terms: "He failed to show any good cause as to why his discharge should be reconsidered".

[6] The employee thereupon amended his notice of motion now requiring an order that the employer's decision not to reinstate be set aside.

[7] Since MINISTER VAN ONDERWYS EN KULTUUR v LOUW 1995 (4) SA 383 it is settled law that absence from

work in excess of the stated period brings the deeming provision in operation; the termination of employment follows by operation of law and no dismissal as contemplated in the relevant labour legislation occurred. As no decision was taken to dismiss it excludes any reviewability in a court of law. It is unnecessary to burden this judgment with a reference to all the reported judgments to that effect. The latest thereof is **PHENITHI v MINISTER OF EDUCATION & OTHERS** 2006 (2) BLLR 821 S.C.A. and **HEAD OF DEPARTMENT OF EDUCATION v SADTU AND SITHOLE**, case number JA68/05 of the Labour Appeal Court dated 27/9/07.

- [8] The difference in effect between section 17(5)(a)(1) and section 17(5)(b) must be appreciated. Section 17(5)(a)(1) takes effect without any decision by the employer. Section 17(5)(b) on the other hand requires the employer to decide on reinstatement. A refusal to reinstate therefore is a decision by the employer reviewable by a court of law. That was confirmed by Mpati DP in **PHENITHI** *supra* at

page 831 e. Revelas J's judgment in **PUBLIC SERVANTS**

ASSOCIATION OF SA & ANOTHER v PREMIER

GAUTENG & OTHERS 1999 ILJ 2106 LC was to the same effect.

- [9] The question however is reviewable by which court? Revelas J in the matter referred to *supra* leaves little doubt that the procedure provided for by the Labour Relations Act would be permissible. She said the following:

“[30] The respondents do have a power in terms of s 17(5)(b) of the Public Service Act, in terms whereof they can consider a possible reinstatement of the second applicant. She has not pursued this route and therefore her application is premature. It is not the case of the second applicant that the respondents are amiss with regard to their obligations.

[31] I have raised with the parties the question of conciliation and arbitration of this dispute. In my view, it is still open to the second applicant to attempt to pursue her rights in terms of s 17(5)(b) of the proclamation. If she is unsuccessful, she may refer the dispute about her

dismissal to have the matter conciliated and arbitrated by the CCMA. Of course she would have to be granted condonation by the CCMA first.”

She did not however said whether the High Court would have concurrent jurisdiction. Mpati DP in **PHENITHI v MINISTER OF EDUCATION & OTHERS** *supra* on page 831 paragraph 27 however said the following:

“[27] As a last port of call Mr Khang contended that the provisions of section 14(1)(a) oust the jurisdiction of the High Court. He based his submission on the arbitrator’s finding that the Council had no jurisdiction in the matter since the section was pre-emptory. This contention has no substance. If, as was held in Louw’s case the educator concerned were to allege that he/she had the necessary consent to be absent from work and that allegation is disputed, the factual dispute is justiciable by a court of law. Similarly, if the employer was to be requested to “direct otherwise” (in terms of the section) and refuses to do so, his/her decision (to refuse) is reviewable. The same would apply in the case of a refusal to reinstate under section 14(2).”

(The reference to section 14(2) is to other but similar legislation.)

[10] The employee's complaint is in essence that the employer in refusing to reinstate acted capriciously and even maliciously. The reasons belatedly furnished by the employer he says is indicative of a failure by the employer to apply his mind to what section 17(5)(b) requires him to do. This in essence is an allegation that his constitutional right to fair labour practices has been violated. Section 185 of the Labour Relations Act of 1995 gives every employee the right not to be subjected to unfair labour practices. Section 186(2)(c) defines a failure or refusal by an employer to reinstate or re-employ a former employee brought about by any unfair act or omission as an unfair labour practice.

[11] In **TRANSNET LTD & OTHERS v CHIRWA** 2007 (2) SA 198 SCA, Mthiyane JA quoted with approval what was said in **MBAYEKA AND ANOTHER v MEC FOR WELFARE**

EASTERN CAPE 2001 (4) BCLR 374 Tk in the following terms:

“The labour court will never enjoy exclusive constitutional jurisdiction even in matters where the cause of action is confined to an alleged violation of the right to fair labour practices simply because that is a constitutional right in terms of section 23 of the Constitution.”

[12] On the strength of this I came to the conclusion that this court do have jurisdiction to hear this matter. That conclusion I reached despite the temptation to succumb to the warning that “the ordinary courts should be careful in employment related matters not to usurp the labour court’s remedial powers and there skills and expertise”. See Cameron JA in **BOXER SUPERSTORE MTHATHA AND ANOTHER v MBENYA** 2007 (5) SA 450 (SCA) on 454 G. Clearly this is a matter that could more efficiently be dealt with by the Labour Court. That however is not the test to be applied in jurisdictional questions like this.

[13] As indicated *supra* there is a factual dispute whether the employee was informed on the 25th of February 2005 that his application was refused. As I see the matter a finding on that dispute might have an important if not decisive impact on the outcome of this application. Mr. Phalatsi on behalf of the employee invited me to decide in his client's favour on the papers as it is. I find that impossible. This factual dispute cannot be resolved without a referral for the hearing of oral evidence.

[14] This matter is therefore referred for the hearing of oral evidence in terms of Rule of Courts 6(5)(g). The parties will be allowed to lead the oral evidence of the deponents in the application. If any party wishes to present the evidence of any witness who is not a deponent notice of that is to be given to the other party and the court supported by an affidavit of that witness, at least 15 days before the hearing of oral evidence. The costs thus far will be costs in the application.

C.B. CILLIé, J

On behalf of the applicant:

Mr. N. W. Phalatsi
Instructed by:
N W Phalatsi & Partners
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On behalf of the respondent:

Mr. S. E. Motloun
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