



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case no: DA 06/2023

In the matter between:

MEC: DEPARTMENT OF EDUCATION, KZN

First Appellant

HOD: DEPARTMENT OF EDUCATION, KZN

Second Appellant

and

HENDRICK THEMBA CUMAIO

Respondent

Case no: DA 07/2023

In the matter between:

HENDRICK THEMBA CUMAIO

Appellant

and

MEC: DEPARTMENT OF EDUCATION, KZN

First Respondent

HOD: DEPARTMENT OF EDUCATION, KZN

Second Respondent

Heard: 23 August 2024

Delivered: 28 August 2024

Coram: Van Niekerk JA, Musi AJA and Jolwana AJA

JUDGMENT

VAN NIEKERK, JA

[1] There are two matters that serve before us. The first (DA 06/2023) is an appeal, with the leave of this Court, against a judgment of the Labour Court (per Lawrence AJ) delivered on 10 June 2023. The Labour Court was concerned with an application filed in terms of s 158 (1) (h) of the Labour Relations Act¹ (LRA) in which the respondent employee (employee) sought to review and set aside a decision made by the Department of Education, KwaZulu-Natal (Department) to refuse to reinstate him after invoking the provisions of s 14 (1)(a) of the Employment of Educators Act² (EEA). The Labour Court set aside the decision and reinstated the employee with effect from the date of judgment. The second (DA 07/2023) is an appeal against the limitation of the Labour Court's order of reinstatement. The employee seeks reinstatement with retrospective effect from the date of his deemed dismissal. The parties agreed that the matters should be consolidated and an order was granted to that effect.

[2] The material facts are largely a matter of common cause. In February 1991, the employee was employed by the Department as an educator. During 2010, the employee was booked off work after a specialist medical practitioner issued a medical certificate in which the employee was diagnosed with severe depressive episodes. Further periods of absence ensued, with the consequence that the employee's sick leave entitlement was exhausted in 2010. The employee applied for

¹ Act 66 of 1995, as amended.

² Act 76 of 1998.

temporary incapacity leave in terms of the Department's policy on incapacity and ill-health retirement. Between 2010 to December 2017, various periods of leave were approved, and others were not. In the interim, the parties were engaged in litigation in the High Court, the Labour Court and the bargaining council. That litigation concerned, among other things, the Department's decision to freeze the employee's salary and alleged unfair labour practices.

[3] The events that gave rise to the proceedings in the Labour Court occurred in the latter half of 2017. After a number of medical certificates issued during the preceding period, on 29 September 2017, the employee's specialist psychiatrist issued a certificate in which the employee was declared unfit for work and in need of long-term therapy. The specialist recommended sick leave for the period 1 October 2017 to 31 December 2017, with the reservation that the *"onus of granting this sick leave is legally with the patients (sic) employers"*.

[4] After learning during an arbitration hearing in August 2017 that the Department intended to invoke s 14(1)(a) of the EEA, on 7 November 2017, the employee addressed a letter to the Department, headed 'Request for gainful employment'. In that letter, the employee advised the Department that he would be reporting for work on 14 November 2017, and sought a position commensurate with his medical condition. A similar letter was sent to the Department on 8 November 2017. On 14 November 2017, the applicant reported for duty at the district office. He submitted a letter to the Department dated the same date in which he again requested placement in a position commensurate with his medical condition. The employee signed the register on 14 November 2017 and waited throughout the day for a response and assistance, but to no avail. The employee states that he again reported at the district office on 15 November 2017, when once more, again no assistance was forthcoming. This is not disputed by the Department. It would appear that on that date, a Mr Mabinza, the acting district director, notified legal services of the employee's attendance at the district office and was informed by legal services that the employee was appointed to and holds a post at Curriculum FET and that he should report there. Legal services advised Mr Mabinza that the employee should be informed accordingly. The employee states that he was never informed by Mr

Mabinza that he should report to Curriculum FET. This averment is disputed by the Department. The employee states that after reporting on 15 November 2017 and in the absence of any response to his presence or his correspondence, he went home to wait for the Department to respond.

[5] On 30 November 2017, the employee addressed a further letter to the Department noting the Department's 'deafening silence' and advising that he intended to take medical leave in terms of the certificate issued by his specialist psychiatrist on 29 September 2017. It will be recalled that the certificate declared the employee unfit for work and recommended sick leave until 31 December 2017. The employee concluded by saying: "*I sincerely hope that this rigmarole will have been solved by the time the Department re-opens in January 2018*".

[6] Further medical certificates were issued by the same specialist psychiatrist in respect of the periods following 1 January 2018.

[7] On 12 March 2018, the Department issued a letter to the employee recording his deemed discharge in terms of s 14 (1)(a) of the EEA, with effect from 29 November 2017. The letter reads as follows:

'It is noted that, notwithstanding attempts to locate your whereabouts, you have continued to be absent from duty for a period of fourteen (14) days without furnishing a valid application for leave. Your absence since 15/11/2017 is without permission of the employer, and, consequently you are deemed to be discharged from service on account of misconduct with the effect from 29/11/2017. Your discharge from service is in terms of section 14 (1)(a) in terms of the Employment of Educators Act 76 of 1998...

As termination of service is by operation of law in terms of 14(1)(a) of the mentioned Act, such termination is not dependant (sic) on the service of this letter.'

[8] The same letter advised the employee of his right to apply for reinstatement, on good cause shown. The employee states that he was unaware of the letter until he became aware of it during a later arbitration hearing involving the same parties.

On 13 November 2018, the employee's attorney made written submissions on the employee's behalf, seeking his reinstatement. In those submissions, it was contended that none of the facts necessary to trigger s 14 (1)(a) were present, and that the Department was at all times aware of the employee's medical incapacity and also his whereabouts and contact details. No response was received from the Department and the employee's attorney addressed follow-up correspondence to the Department on 30 November 2019, 23 January 2019, 13 February 2019, and 22 February 2019. There was no reply to any of these letters.

[9] In the absence of a response to his submissions on reinstatement, on 26 April 2019, the employee filed an application in terms of s 158 (1)(h) of the LRA in the Labour Court. The employee sought a declaratory order to the effect that the jurisdictional requirements necessary to trigger s 14(1)(a) were not present, that the employee's deemed dismissal was thus null and void, and that the Department's decision dated 15 March 2019 to refuse the application for reinstatement be reviewed and set aside. The employee put the Department on terms to respond to his representations by 15 March 2019, failing which he would consider the Department to have taken a decision on that date to refuse to reinstate him.

[10] The Department responded to the employee's submissions only on 21 May 2019, after the review application had been filed. The response recorded that the employee had failed to provide a legitimate and reasonable explanation for his absence and that the application for reinstatement had been declined. The employee avers that he did not receive the letter; it was only when the Department filed the record in the review application that he became aware that his application for reinstatement had been dismissed on 21 May 2019. The employee filed a supplementary affidavit as provided by Rule 7A³ in which he again disputed that he had been absent from work without permission as contemplated by s 14(1)(a), contended that the Department had failed to respond to an application for temporary incapacity leave, and averred that the Department was aware of his incapacity and his whereabouts.

³ Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court: GN 1665 of 1996 (repealed, effective 17 July 2024).

[11] In the answering affidavit filed by the Department, the deponent states that for the period 15 to 28 November 2017, the Department's "*cause of action was complete*" in that during that period, the employee had not submitted a valid leave application and that his continual absence from duty for 14 consecutive days was without the Department's permission. The Department accordingly denied that there were no jurisdictional facts present to invoke the deeming provisions of s 14 of the EEA. Further, the Department averred that the employee's deemed dismissal was rationally connected to the purpose underlying the Policy and Procedure on Incapacity Leave and Ill Health Retirement (PILLIR), being a framework for the management of incapacity and ill-health leave. Finally, the Department averred that after his failure to report for work for 14 consecutive days, a continued employment relationship with the employee had become intolerable.

[12] Referring to the judgment of this Court in *Member of the Executive Council for the Department of Education Western Cape Government v Jethro N.O & another*⁴ (*Jethro*), the Labour Court held that, having regard to the reasons provided by the Department, the decision not to reinstate the employee had not been properly and rationally taken. Specifically, the Department knew full well where the employee was at the relevant time, and expediently and "*without any rational application of the mind*" refused his application to avoid an onerous misconduct or incapacity process. Further, there was no reason why the employee should not be reinstated. In the result, the Labour Court upheld the review application, and without giving reasons for the limitation, reinstated the employee with effect from the date of the judgment, with no order as to costs.

[13] The Department appeals against the judgment on a number of grounds, amongst others, that the Labour Court erred by overlooking the fact that the employee had been away from service for a lengthy period on account of ill health, and that he could thus not be assumed to have fully recovered without him advising the Department that he was ready to commence duty with immediate effect; that the

⁴ [2019] ZALAC 38; [2019] 10 BLLR 1110 (LAC).

court erred by ignoring the fact that the employee had already submitted a medical certificate seeking a further three months sick leave from 1 October to 31 December 2017; that the court erred in finding that s 14 (1) of the EEA was a drastic measure; and that the order of reinstatement ought not to have been granted given that the employee was not ready to assume duty and that other measures, including compensation, were available in the event that the employee's discharge was found to be unlawful. The appeal in DA07/2023, as indicated above, is an appeal against the limitation of the order of retrospectivity to the date of judgment, and also against the Labour Court's refusal to grant costs in the employee's favour.

[14] Three days prior to the hearing, on 21 August 2024, the Constitutional Court delivered judgment in *Mamasedi v Chief of the South African Defence Force and Others*⁵ (*Mamasedi*). In that matter, a member of the regular force had been absent from duty from 29 November 2011 to 3 January 2012, a period of more than 30 calendar days. Section 59(3) of the Defence Act⁶ provides for a deemed dismissal in the event of a period of absence for a period exceeding 30 days. At issue was whether 'days' should be interpreted as calendar days or days on which the member was obliged to be on official duty. The Constitutional Court unanimously held that for the purposes of calculating the 30-day period, only the days on which the member was obliged to be on duty should be taken into account. Since the period of absence without permission was less than 30 days so calculated, s 59 (3) was never triggered. The Court considered that in these circumstances, the order of reinstatement sought by the member was incompetent since there was never any dismissal or discharge. The order granted was accordingly one in terms of which it was declared that for the period after the date of his purported discharge, the member had remained a member of the SANDF.

[15] In the present instance, the calculation of the 14-day period referred to in s 14(1)(a) was thus to be done by accounting not for calendar days, but only for those days on which the employee was obliged to be at work. It follows that the 14-day period on which the Department relied to invoke s 14(1)(a) had not yet expired on 29

⁵ (CCT 359/22) [2024] ZACC 17 (21 August 2024).

⁶ Act 42 of 2002.

November 2017, calculated as it was as calendar days. In short, the Department's calculation of the *dies* was incorrect. 14 consecutive days from 15 November 2017, correctly calculated, had not expired by 29 November 2017 and the Department's reliance on s 14(1)(a) was thus premature.

[16] Ms Khuzwayo SC, who appeared for the Department, sought to distinguish *Mamasedi*. She submitted that in *Mamasedi*, the member concerned had reported for duty the day after the expiry of the 30 calendar day period of absence on which the SANDF had relied as a basis to trigger his deemed discharge. In the present instance, so the submission went, the 14-day period referred to in the letter addressed to the employee on 12 March 2018 was an incorrect reflection of any period of absence by the employee, but the deemed discharge remained effective since the employee had been intentionally and continuously absent from work, without permission, beyond that period. There is no merit in this submission. First, the Department's pleaded case on review was that it was the employee's absence for the period 14 to 29 November 2017 that triggered its application of s 14. The letter advising the employee of his deemed discharge says as much: "*Your absence since 15 November 2017 is without permission of the employer and consequently you are deemed to be discharged on account of misconduct....*" (own emphasis). It was specifically the employee's alleged absence without permission specifically for the period 14 to 29 November 2017 that formed the basis of the decision to invoke s 14 (1)(a). Indeed, in the answering affidavit filed on behalf of the Department, the deponent states the following:

'I further wish to add that for the period between the 15th and the 28th of November 2017, that the Department's "cause of action" was complete in that during the period under discussion, the Applicant had not submitted a valid leave application as is required under PILLIR and that, therefore, his continued absence from duty for 14 consecutive days was without the Department's permission.'

[17] It is not open to the Department now to rely on any alleged absence from work in respect of any other period on which it did not rely to justify the employee's deemed discharge. The Department is bound by the confines of the pleadings that

served before the Labour Court, and it is not open to the Department at this late stage to seek to make out a new case on the facts. Secondly, on the facts, it is far from clear that the employee's absence from work after he reported for duty on 14 and 15 November 2017 was without permission. The employee made clear in his letter dated 14 November 2017 that he was tendering his services and awaited placement. On 30 November 2017, in the absence of any response from the Department, the employee recorded that he remained on medical leave, and stated that "*I have no option but to take the rest of the leave*". That period of leave extended from 1 October to 30 November 2017.

[18] In any event, the Department failed correctly to apply the principles that regulate a deemed discharge in terms of s 14 (1) (a) of the EEA and other, similar legislation. In *Jethro*, this Court stated that s 14 was to be used sparingly only in cases where the employer is unaware of the whereabouts of an absent employee or if the employee has evinced a clear intention not to return to work.⁷ In the present instance, the Department was at all material times fully apprised of the employee's whereabouts. Indeed, the Department was engaged in litigation with the employee in the High Court, the Labour Court and the bargaining council. There is no reason to interfere with the Labour Court's decision to review and set aside the refusal to reinstate the employee. As in *Jethro*, the employee's whereabouts were known, there was no suggestion that he had absconded, and he was contactable.

[19] Turning then to the appeal in DA07/2023 against the limited remedy granted by the Labour Court, the Court furnished no reasons for reinstating the employee only from the date of judgment. But as the Constitutional Court pointed out in *Mamasedi*, in a case where an employee is deemed discharged without any lawful basis, the remedy is not reinstatement, since there was no dismissal or discharge in the first place. The appropriate order in these circumstances is one declaring that the employee has been and continues to be an employee. In the present instance, because s 14(1)(a) was never triggered, the employee has been and continues to be an employee of the Department. He is entitled to an order to that effect. To the

⁷ *Jethro* at para 34.

extent that the Department submits that the employment relationship has broken down and that an award of compensation is appropriate, the employee does not claim an unfair dismissal. Reliance of s 193 of the LRA, to which we were referred, is misplaced. The employee challenged the refusal to reinstate him by way of a legality review. He succeeded because the requirements necessary to trigger his deemed dismissal were not present. In the absence of a deemed discharge, the decision to refuse to reinstate him was a nullity. In these circumstances, fairness does not enter the picture and s 193 finds no application.

[20] The granting of an order for costs in the Labour Court and this Court are regulated by s 162 and s 179 of the LRA respectively. Both sections provide that orders for costs may be made according to the requirements of the law and fairness. This means that costs do not ordinarily follow the result and that some basis, rooted in law and fairness, must exist for costs to be ordered. The Labour Court's judgment is silent on the issue of costs. In the present instance, it is necessary to take into account, both in respect of the proceedings before the Labour Court and before us, that since the inception of this dispute, the employee has attempted to seek an amicable resolution to his employment situation, *inter alia* by writing letters explaining his circumstances, requesting gainful employment and tendering his services. These were met by the 'deafening silence' to which the employee referred, a silence that is inexplicable. As early as 13 November 2018, the Department was advised that the requirements to trigger s 14(1)(a) were absent and the employee's reinstatement was demanded on that basis. The Department refused to comply with that demand, preferring to oppose the review application and file this appeal after the Labour Court's judgment in favour of the employee. Even at the stage of appeal, the Department chose to vigorously proceed with the appeal despite the judgment in *Mamasedi* being drawn to the parties' attention before the hearing. The employee is an individual who has been forced to expend his own resources in his quest for justice. Finally, the employee was substantially successful in the proceedings before the Labour Court, and he has substantially succeeded in this Court in his challenge to the limitation imposed by the Labour Court's order. Finally, the Department's failure to properly manage the employee's ill health and its impact on his employment, the unanswered correspondence and the failure properly to ensure that

important correspondence such as the letter of discharge and the refusal of the application for reinstatement actually reached the employee, demonstrate a manifest failure of efficient and effective human resource management. For all these reasons, the requirements of the law and fairness are best satisfied by an order for costs, both in respect of the proceedings in the Labour Court and in these proceedings.

[21] In the result, the following order is made:

Order

1. The appeal in DA 06/2023 is dismissed and the appeal in DA 07/2023 is upheld, to the extent that the order of the Labour Court is varied to read:
 - '1. The First and Second Respondents' decision not to reinstate the Applicant, made on 22 May 2019 in terms of s 14(2) of the Employment of Educators Act, 76 of 1998, is reviewed and set aside, with costs.
2. It is declared that for the period from 14 November 2017 to date, the Applicant has been and continues to be an employee of the Department of Education, KwaZulu-Natal.'
2. The Respondent in DA 06/2023 must report for work within seven calendar days of the date of this order.
3. The Appellants in DA 06/2023 are ordered to take all steps necessary to secure that the Respondent is paid his remuneration for the period 14 November 2017 to the date of handing down this judgment, within 30 calendar days of that date.
4. The Appellants in DA 06/2023 are ordered to pay the costs of the appeals in both DA 06/2023 and DA 07/2023.

A van Niekerk JA
Musi AJA *et* Jolwana AJA concur.

APPEARANCES:

FOR THE APPLICANT: Adv N Kuzwayo SC

Instructed by State Attorney

FOR THE RESPONDENT: A Naidoo

Instructed by Angeni Naidoo Law Firm

LABOUR APPEAL COURT