



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 42/2020

In the matter between:

MEC FOR HEALTH (NORTH WEST PROVINCE) Appellant

and

SOUTH AFRICAN MEDICAL ASSOCIATION First Respondent

DR ELIE MUTUNZI Second Respondent

Date of Appeal: 16 September 2021. Decided on submissions.

Delivered: Deemed to be the date the judgment is emailed to the parties 18 October 2021.

Coram: Waglay JP, Coppin JA, et Kubushi AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the whole order of the Labour Court (Moshoana J) made in respect of a review application brought by the second respondent (“Dr Mutunzi”) to declare that he is deemed not to be dismissed (i.e. as contemplated in section 17 of the Public Service Act¹ (“the PSA”)) and directing the appellant to, with immediate effect, reinstate him to his employment, retrospective to the

¹ Public Service Act, 103 of 1994.

date of his deemed dismissal, on the same terms and conditions as if he had not been dismissed, and further directing the appellant to pay the costs. Leave to appeal was granted on petition to this Court.

Condonation

- [2] The appellant applied for condonation for the late noting of the appeal. The notice of appeal which was due on 22 October 2020 was only filed one court day later on 26 October 2020. The appellant explains in a substantive application for condonation, which was not opposed, that the delay was due to a rotation of staff necessitated by the exigencies caused by the Covid pandemic; that the respondents have not suffered any prejudice as a result of the late noting and that the appellant has excellent prospects of success in this appeal. A proper case has been made for the grant of the condonation sought.

Factual matrix

- [3] After having been absent from his employment for a period exceeding three calendar months, Dr Mutunzi was informed by Mr L. R Lebotse, Acting Chief Executive Officer of the Mafikeng Provincial Hospital ("the hospital"), where he had been employed, that he was deemed to be dismissed from his employment with effect from 1 February 2012 due to his unauthorised absence from his employment for a period in excess of one calendar month, and as contemplated in section 17(3)(a)(i) of the PSA.
- [4] The letter further (*inter alia*) informed Dr Mutunzi that if he was not pleased with that intimation he could make further representations to the appellant for his possible reinstatement.
- [5] Disgruntled by the information, Dr Mutunzi complained in writing to, *inter alia*, Dr Mabote, the clinical manager at the hospital, and caused a letter dated 7 May 2012 to be sent, on his behalf, by the first respondent ("SAMA") to the appellant and to the head of Labour Relations at the North West Provincial Department of Health.

- [6] In the letter, SAMA, *inter alia*, explains the absence of Dr Mutunzi: that he did not intend to abscond from his duties and had indicated to his employer that he intended resuming his duties as soon as his personal problems were solved; that he acted in good faith and that he had sought the employer's permission for his absence and was "truly under the impression that all was in order". SAMA then requests, on behalf of Dr Mutunzi, that he be allowed to resume his duties at the hospital and to remain in occupation of the accommodation that had been provided to him by the employer.
- [7] The letter concludes as follows: "We submit that Dr Mutunzi has a clear disciplinary record and has been a loyal employee since his appointment in the public service of South Africa on 5 May, 2007. We further submit that Dr Mutunzi regrets the actions which gave rise to the dismissal and therefore undertakes to ensure that same does not occur again. We would greatly appreciate a favourable response to our humble request..."
- [8] Besides taking those measures, Dr Mutunzi also lodged a dispute with the Public Health and Social Development Sectoral Bargaining Council ("the bargaining council").
- [9] In a letter by Dr Masike, on behalf of the appellant, to Dr Mutunzi, dated 14 July 2012, Dr Masike states that it has come to their attention that Dr Mutunzi has lodged such a dispute even though the Department was in the process of considering the representations made by SAMA on his behalf for his reinstatement. Dr Masike further states that such lodgement has "undermined any further efforts to ensure that his representations are dealt with internally"; that the Department will "not substantively deal with" his representations and will attend to the dispute at the bargaining council. The letter concludes by directing Dr Mutunzi, with immediate effect, to vacate the hospital premises that had been provided to him by the employer as accommodation.
- [10] SAMA responded to Dr Masike's letter in a letter dated 20 August 2012. In it they confirm that Dr Mutunzi had lodged a dispute with the bargaining council, but then intimate that the arbitrator at the bargaining council had held that, in light of Dr Mutunzi's deemed dismissal in terms of section 17 of the PSA, the

bargaining council did not have jurisdiction, but that Dr Mutunzi was nevertheless entitled to make representations to the appellant in terms of that section for his reinstatement. The letter concludes with a request that the office of the appellant replies to Dr Mutunzi's representations.

- [11] In a letter dated 7 September 2012, from a Mr D Bokaba of Employment Relations in the Provincial Department of Health, to SAMA, he confirms that the dispute that Dr Mutunzi referred to the bargaining council was dismissed, and states that the Department had "no intention to re-open the matter" and even if Dr Mutunzi did not abandon the internal processes, his deemed dismissal would still stand on the basis that his representations did not show good cause for his reinstatement as contemplated in section 17 of the PSA. No further reasons for the decision were furnished in the letter which was, seemingly, only received by SAMA and Dr Mutunzi on 26 September 2012.
- [12] Presumably, as a direct consequence of the letter from Mr Bokaba, SAMA and Dr Mutunzi, during November 2012, brought an application in the Labour Court for an order: (a) reviewing and setting aside the decision of the appellant as communicated in the letter of Mr Bokaba dated 7 September 2012 (the notice of motion seemingly erroneously refers to 6 September 2012) in terms of section 158(1)(h) of the Labour Relations Act² ("LRA"); (b) reinstating Dr Mutunzi to his former post retrospectively (i.e. to 20 April 2012) on the same terms and conditions of employment that pertained then and without a loss of any remuneration or benefits; and (c) directing the appellant to pay the costs of the application in the event of opposition. The initial founding affidavit was subsequently supplemented.
- [13] Apparently SAMA and Dr Mutunzi obtained a judgment by default which the appellant eventually got rescinded after having overcome several procedural obstacles. The appellant then caused an answering affidavit to be filed in the main review application, deposed to by Ms Hunter, an Administrator and Accounting officer in the North West Provincial Department of Health. SAMA and Dr Mutunzi filed an affidavit in reply.

² Act 66 of 1995.

Decision of the court a quo

- [14] Even though it was essentially confronted with a review of the appellant's decision which, effectively, rejected SAMA and Dr Mutunzi's representations and request for reinstatement made in terms of section 17(3)(a) of the PSA, the court *a quo* elected to determine whether the deeming provision in section 17 of the PSA had come into effect in the first place. Referring to section 17, the court *a quo* held: "matters involving this section of the Public Service Act (PSA) remain difficult horses to ride. However, given the approach I take at the end, it was unnecessary for me to ride this difficult horse for long. In my view, with regard to the decision to approve the reinstatement or not, its fate ends once a conclusion is reached that one of the jurisdictional facts is absent."
- [15] Even after the court *a quo* had referred to the grounds of review (albeit cursorily), it essentially determined the application on the jurisdictional point, concluding that the deeming provision never came into effect and that it was not necessary for Dr Mutunzi to have sought reinstatement as contemplated in section 17. The court *a quo* held: "[i]n the final analysis it is perspicuous that not all the jurisdictional requirements of the section [were met]. This simply implies that the effect of the section – deemed dismissal – cannot be invoked. On application of the principle of legality, the decision or action taken on 12 April 2012 to the effect that the provisions of the section had kicked-in [was] invalid, ineffectual and has no force of law. Since [Dr Mutunzi] was not deemed dismissed, it was not necessary for him to seek reinstatement by showing good cause."
- [16] The court *a quo* came to the conclusion that the deemed dismissal provision did not come into effect, based on its interpretation of the leave provisions in section 20 of the Basic Conditions of Employment Act³ ("the BCEA"). It found (effectively) that an employee does not require the approval of his or her employer to take annual leave. According to the court *a quo*, since Dr Mutunzi was on annual leave, his absence for the period from 28 December 2011 up to

³ Act 75 of 1997.

30 January 2012 was not of the kind contemplated in section 17 of the PSA. Secondly, in respect of his absence for the period from 30 January to 10 April 2012, according to the court *a quo*, Dr Mutunzi had applied firstly, orally and then in writing for unpaid leave of absence and the employer was obliged to grant his request.

- [17] In respect of the remedy, the court *a quo* had no difficulty in itself directing the reinstatement of Dr Mutunzi. It concluded that it had such power and found justification for that view in a dictum from a decision of a Kenyan court of appeal in the matter of *Kenyatta University*⁴, to the effect that judicial review is only concerned with the process followed and not with the merits of the decision reviewed and that in considering there whether the litigant was qualified to be awarded a Phd “the court was undertaking the statutory role of the University”. The court *a quo* preferred that approach, notwithstanding local authority to the contrary, which it attempted to distinguish. In view of the approach that is taken in this appeal it is not necessary to engage that issue any further.
- [18] Counsel for the appellant, in their heads of argument, confined themselves to addressing the narrow question, namely, whether the jurisdictional facts for the coming into effect of section 17(3)(a)(i) of the PSA were present, and the respondents’ counsel, in turn, also confined himself to that very narrow question.
- [19] It is argued on behalf of the appellant, in essence, that the court *a quo* erred in its conclusion that the jurisdictional requirements for the section’s operation were not present. In particular, the appellant contends, that by reason of his absence from work without permission for a period in excess of one calendar month, Dr Mutunzi had “brought himself within the net of section 17(3)(a)(i).”
- [20] The appellant further contends the following: that the respondents did not seek a declaratory order as granted by the court *a quo*, or at all, and that the respondents never made out the case for such relief; further, that the court *a quo*, in any event, did not have the power to order reinstatement consequent upon granting the declaratory order; that an order of reinstatement was only

⁴ *Kenyatta University and 2 others v Elena D Korir* [2016] eKLR <http://www.kenyalaw.org> at page 9.

appropriate in instances where the dismissal is found to be unfair and not where it is found to be invalid; that there was no decision on 17 April 2012, or at all, to dismiss Dr Mutunzi from his employment and that the letter of that date merely informed him of the effect of the operation of the law. It was further contended that the court *a quo* had found incorrectly that the act of informing Dr Mutunzi accordingly was an exercise of public power reviewable in terms of the constitutional principle of legality.

- [21] The appellant further argued that it was never Dr Mutunzi's case that his absence from his employment was with permission; that the court *a quo*'s interpretation of the leave provisions in section 20 of the BCEA was wrong; and that its interpretation of section 17(3)(a) of the PSA was similarly wrong; that it was common cause that Dr Mutunzi was absent from work for more than one calendar month and that he did not have permission for such absence, and that in those circumstances the jurisdictional requirements of the relevant section had been met.

Discussion

- [22] It is now trite that the deemed dismissal provision in section 17(3)(a) of the PSA does not require a decision in order to operate. It operates automatically in terms of the law if all the requirements of the section are met. If a person to whom the section applies, absents himself from his employment without permission for a period exceeding one calendar month, in terms of the law, as stipulated in that section, he (or she) "shall be deemed to have been dismissed 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

- [23] It was in issue on the papers whether Dr Mutunzi, on his version, was scheduled to go on annual leave at the beginning of December 2011 or that he delayed his leave as requested by the hospital because he was assisting with the shortage of doctors as experienced by the hospital at that point in time. On the

⁵ See, *inter alia*, *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 69 (CC); *Phenithi v Minister of Education and others* 2008 (1) SA 420 (SCA); *Minister of Defence and Military Veterans and another v Mamasedi* 2018 (2) SA 305 (SCA).

appellant's version, in terms of its leave policies, Dr Mutunzi had to apply for leave and get permission for his leave from Dr Mabote, the clinical head of the hospital, or his delegate, Dr Lofembu, who were authorised in that regard. When Dr Mutunzi took what he regarded as his "annual leave" on 28 December 2011 it was not with the requisite permission. It is not disputed that at no stage before he took the "leave" did Dr Mutunzi discuss it with any of them.

[24] It is further the appellant's version that when Dr Mutunzi contacted Dr Mabote in January 2012 his absence was not authorised. The leave form which was purportedly completed by Dr Mutunzi on 15 December 2011 was only seen by Dr Mabote on his return to work after 9 January 2012. Dr Mabote had recorded on the form that the leave was not discussed with the clinical manager before Dr Mutunzi absented himself from 28 December 2011 to 31 January 2012; and that that period of absence was not treated as annual leave, but was treated as "unauthorised leave without pay."

[25] There was also a dispute about the content of a discussion between Dr Mutunzi and Dr Mabote in mid-January 2012 when Dr Mutunzi had telephoned Dr Mabote. According to Dr Mutunzi it was to inform that he had family problems and that he was not able to return to South Africa as per his original plan. According to Dr Mabote this conversation had taken place a few days before 30 January 2012 and he had informed Dr Mutunzi in no uncertain terms that he could not further extend his absence that had never been authorised in the first place. Dr Mutunzi elected out of his own to remain on extended, albeit unauthorised leave, despite Dr Mabote's refusal to approve the same.

[26] It is admitted that when Dr Mutunzi returned to work on 10 April 2012 he had been informed by Dr Mabote that his work had been assigned to another doctor and that on 12 April 2012 a letter had been given to Dr Mutunzi by Dr Mabote informing Dr Mutunzi that the issue concerning his absence had been referred to the Labour Relations Unit.

[27] It is not clear from the judgment how the court *a quo* resolved the factual disputes regarding the leave. Seemingly, it overcame the difficulty of resolving those disputes by its construction of section 20 of the BCEA, in particular to the

effect that section 20(6) means that approval for annual leave was not required, and that, accordingly, Dr Mutunzi was on annual leave for the period 28 December 2011 to 30 January 2012, and that his absence from his employment for that period was not what was contemplated in section 17 (3) (a) of the PSA.

[28] Even in respect of the second period, that is from 1 February to 10 April 2012, the court *a quo*, seemingly, having effectively found that Dr Mutunzi had requested an extension of his annual leave (i.e. the first period), on its interpretation of section 20 of the BCEA, reasoned that the appellant was obliged to give him such an extension, and, accordingly that the second period was also not an unauthorised absence as contemplated in section 17(3)(a) of the PSA.

[29] Regarding the disputes of fact, it was clearly not open to the court *a quo* to decide the matter on the probabilities. It is trite that application proceedings do not lend themselves to such assessment.⁶ Further, it was not open to the court *a quo*, to arbitrarily prefer the version of Dr Mutunzi above that of Dr Mabote. The proper course was to decide the matter on the version of the respondent, unless that version was so far-fetched and obviously improbable that it could have been rejected out of hand.⁷

[30] The court *a quo* ought to have found that Dr Mutunzi took time off from 28 December 2011 to 31 January 2012, which was not authorised; that he purportedly filed a request-for-leave form in respect of that period on 15 December 2011, but never discussed this with any of his superiors whom he was obliged to discuss it with; that the leave form only came to the attention of Dr Mabote when he returned from leave himself and that Dr Mabote had endorsed on the form that Dr Mutunzi's leave was not discussed with the clinical manager for approval before Dr Mutunzi left and that the period of absence was treated as unauthorised and unpaid. The court *a quo* should further have found that in the telephonic conversation Dr Mutunzi had with Dr Mabote a few days before 30 January 2012, in which Dr Mutunzi requested an extension of his

⁶ See, inter alia, *Zuma v National Director of Public Prosecutions* 2009 (2) SA 277 (SCA).

⁷ See, inter alia, *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA).

absence, Dr Mabote had made it clear to Dr Mutunzi that he would not extend, what was already unauthorised leave, any further; and that despite this intimation Dr Mutunzi continued to absent himself from his duties at the hospital until he eventually returned to work on 10 April 2012.

- [31] Even if one discounts the first period, i.e. gives Dr Mutunzi the benefit of the doubt and assumes that it was authorised, which I do not, his absence from his duties well exceeded one calendar month. If one also takes into account the first period, then his absence exceeded three calendar months.
- [32] Unfortunately, the court *a quo* erred in its interpretation of section 20 of the BCEA. The section does not lend itself to a reasonable interpretation that Dr Mutunzi did not require permission for the first, or the second period of his absence.
- [33] The court *a quo* not only erred in finding that when Dr Mutunzi absented himself from his official duties from 28 December 2011 to 30 January 2012 (i.e. the first period) he was on annual leave, having come to that conclusion on the mere say-so of Dr Mutunzi, but also erred in principle in its interpretation of section 20 of the BCEA. The section does not mean that when an employee's leave is due he or she can take it without the approval of the employer.
- [34] In its interpretation, the court *a quo* first referred to section 20(2) and concluded, in effect, that the section meant that an employer is obliged to grant an employee annual leave, but then added "[p]erspicuously if an employee takes annual leave, such an employee does not necessarily require the permission of an employer", and that despite the fact that the next subsection which the court *a quo* referred to, namely section 20(10), which is mandatory in its wording, provides that "annual leave must be taken – (a) in accordance with an agreement between the employer and employee; or (b) if there is no agreement in terms of paragraph (a), at the time determined by the employer in accordance with this section."
- [35] Firstly, section 20(2) does not provide that an employee does not require (or necessarily require) the permission of an employer before going on annual leave. It is very likely that chaos would ensue in the workplace if everyone could

go on annual leave as and when they pleased, simply because it was due, without the employer's sanction. The legislation never envisaged such an outcome, therefore, section 20(10) was enacted, the wording of which is clear and unambiguous.

[36] The court *a quo* did not refer to an agreement as envisaged in subsection 10(a), nor did it refer to the position envisaged in subsection 10(b). Further, there is anyway no allegation that the employer in this instance determined that Dr Mutunzi could go on annual leave from 28 December 2011 to 30 January 2012, or at all.

[37] The court *a quo* seemingly also found that section 20(6) made it possible for Dr Mutunzi to extend his absence from work without permission. But, that is a misreading of the subsection. Subsection (6) refers back to subsection (5) which provides that: "[a]n employer may not require or permit an employee to take annual leave during – (a) any other period of leave to which the employee is entitled in terms of this chapter; or (b) any period of notice of termination of employment." Subsection (6) then provides that: "despite subsection (5), an employer must permit an employee, at the employee's written request, to take leave during a period of unpaid leave. The "leave" envisaged here is annual leave and the "unpaid leave" envisaged in the subsection is clearly authorised unpaid leave. So that during a period of authorised unpaid leave the employer must permit the employee to take paid leave if it is requested by the employee in writing. This, of course, has to be subject to the caveat that the paid leave must be due.

[38] Regrettably, the court *a quo*'s reasoning, namely, that "once annual leave or any other form of leave for that matter is involved there can be no mention of absence without permission" is flawed, as it is based on the false premise that any form of leave can be taken without the permission of the employer.

[39] The deemed dismissal envisaged in section 17(3)(a) of the PSA takes effect when an employee, to whom the section applies, absents himself without permission of his head of Department, office or institution for a period exceeding

one calendar month. If permission for an absence is required, it must be obtained in order to avoid the operation of the section.

- [40] There is no doubt on the facts, properly found, that Dr Mutunzi absented himself from his official duties at the hospital without having obtained the requisite permission. All of the jurisdictional requirements for the operation of the deeming provision were thus in place immediately after his unauthorised absence exceeded one calendar month. The conclusion of the court *a quo* to the contrary is, unfortunately, not correct.
- [41] It is apparent from the letter written by SAMA on behalf of Dr Mutunzi and dated 7 May 2012, that neither they, nor Dr Mutunzi, contended that his absence from his duties was with the permission of the employer. On the contrary, the letter purports to explain the absence as having been due to Dr Mutunzi's "personal problems" that were not resolved. It alleges that Dr Mutunzi had sought permission from the employer and was "truly under the impression that all was in order" (even though no rational basis for such belief is disclosed). More significantly, the letter purports to be in compliance with section 17(3)(b) which requires an employee, who is deemed to be dismissed as contemplated in subsection (3)(a), to show good cause for his or her reinstatement by the relevant executive authority.
- [42] The review application brought by SAMA and Dr Mutunzi was to review and set aside, on stated grounds, (*inter alia*) the decision of the relevant authority, namely the appellant, not to reinstate Dr Mutunzi. Unfortunately, in light of its conclusion that the deeming provision in section 17(3)(a) never came into effect, because of a lack of jurisdictional facts, the court *a quo*, did not deal at all with the merits of that review.
- [43] Neither counsel have dealt with the merits of the review in their heads of argument, having confined their submissions to the findings of the court *a quo* on the coming into effect of the deeming provision.
- [44] This Court's power to deal with a review ground not dealt with by the Labour Court is circumscribed. This Court is legally competent, in terms of the latter part of section 174(b) of the LRA, to finalise a matter on appeal before it and

not to remit the matter back to the Labour Court if there has already been an inordinate delay in finalising it, or if such a course would entail a further long delay and further costs. However the exercise of that power has been held by this Court in *Sinuko*⁸ to depend upon the facts and circumstances of the matter before it.

[45] The general rule in respect of reviews is that it is the function of the Labour Court to review decisions, including awards. A departure from that rule is exceptional and depends on whether, in a particular case, the interests of justice and convenience will be best served by this Court finalising the matter and not remitting it. Other important factors include whether the issues were fully canvassed before the Labour Court, whether there is likely to be prejudice if the matter is not remitted and whether finalisation of this matter by this Court is requested by the parties⁹. The list is not closed¹⁰.

[46] In this matter, as pointed out above, there was no request by any of the parties that this Court finalise the review which was technically not dealt with on its merits by the court *a quo*. In fact, no arguments are proffered by any of the parties concerning the merits of the review. There would clearly be prejudice if this Court deals with those grounds in such circumstances, without the benefit of full argument and the judgment of the Labour Court on the merits. Thus, it is not in the interest of justice for this Court, in those circumstances, to effectively sit as a court of first instance in respect of the merits of that review. It is quintessentially a matter for remission to the Labour Court.

⁸ *National Union of Metalworkers of SA obo Sinuko v Powertech Transformers (DPM) and others* [2014] 2 BLLR 133 (LAC) paras 27 -42 et seq.

⁹ *Ibid.*

¹⁰ *Ibid.*

[47] Taking all the facts and circumstances, as well as the law and fairness into account, a costs order does not appear to be justified, both, in respect of this appeal and the hearing in the court *a quo*.

[48] In the result:

48.1 The late noting of the appeal is condoned;

48.2 The appeal is upheld;

48.3 The order of the court *a quo* is set aside;

48.4 The matter is referred back to the Labour Court for a hearing on the merits of the review, *de novo*, before a different judge;

48.5 There are no costs orders.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES: (There was no oral hearing. This matter was decided on the basis of the written submissions of the parties as agreed by them)

FOR THE APPELLANTS:

MJ Ramaepadi SC and SB Nhlapho

Instructed by the State Attorney

FOR THE FIRST RESPONDENT:

MJ Van As

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