

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1453/06

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SA

obo MS L VAN DER WALT

Applicant

and

THE MINISTER OF PUBLIC ENTERPRISE

1st Respondent

DEPARTMENT OF PUBLIC ENTERPRISE

2nd Respondent

JUDGMENT

—
FRANCIS J

Introduction

1. The Public Servants Association of SA (PSA) on behalf of the applicant, brought an application for the following relief:

“1.1 The applicant’s termination of service, alternatively discharge from the Public Service by the second respondent on or about 17 July 2007 is reviewed and set aside.

- 1.2 It is declared that the respondents cannot and could not have invoked section 17(5)(a)(i) of the Public Service Act 103 of 1994 (PSA) on or about 17 July 2007 with reference to the applicant, alternatively that the respondents cannot and could not have deemed the applicant to have been discharged from the Public Service on account of misconduct in terms of section 17(5)(a)(i) of the PSA.*

ALTERNATIVELY

- 1.3 The decision or action of the respondents to not approved the reinstatement of the applicant into the Public Service pursuant to a deemed discharge, taken at or*

around 29 October 2007, is reviewed and set aside.

1.4 *The respondents are directed to reinstate the applicant into the employ of the second respondent with effect from 17 July 2007 on terms and conditions no less favourable than those which applied at the time, with no loss of remuneration and other benefits.”*

2. The application was opposed by the respondents, i.e. the Minister of Public Enterprise (the first respondent and the Department of Public Enterprise (the second respondent hereafter called the department).

Background facts

3. The applicant is a former employee of the department. She commenced employment with the department on 7 March 2001. On or about 15 June 2007 she received a letter from the director general of the department which indicated that she had committed an offence and acts of misconduct. Further that it was the department's intention to thoroughly investigate the matter and that it had been decided to suspend her from duty with full emoluments as a precautionary measure with immediate effect until 16 July 2007. She vacated the office on the same day and went home.
4. On 16 July 2007, the applicant's attorney of record received an undated letter from the state attorney which indicated that disciplinary proceedings were to be instituted against her; that she had been suspended in contemplation of disciplinary action until 16 July 2007 and that in accordance with the letter of suspension she had to resume duties by 17 July 2007; it set out a number of alleged disciplinary infractions by her; indicated that

investigations were still being conducted and would be completed within the next 60 days; indicated that the department intended further suspending her pending the finalisation of the investigation and/or disciplinary hearing and invited her attorney to contact the state attorney and, should there be any representations from her side concerning the further suspension, it should be forwarded to the state attorney.

5. The applicant did not return to work on 17 July 2007 and contended that she was under the impression that her suspension had been extended in order for further investigations to take place and that the next correspondence from the state attorney would be the notification of a disciplinary hearing date.
6. The applicant received a letter dated 16 October 2007 from the department informing her that her suspension had expired on 16 July 2007 and that she had been expected to resume duties by 17 July 2007 and that her suspension had not been extended and that because she did not resume duties on 17 July 2007, she had been on unauthorised absence and that she was deemed to have been discharged from the Public Service on account of misconduct with effect from 17 July 2007, in terms of section 17(5)(a)(i) of the PSA. She was directed to comply with the provisions of section 17(5)(b) within 5 days by, *inter alia* reporting for duties and making representations regarding her reinstatement.
7. The applicant failed to report for duty and to show good cause why she should be reinstated. In a letter received from her attorneys dated 19 October 2007 she expressed her shock concerning the deemed discharge; that it was a clear indication in the letter received on 17 July 2007 that there was an intention to further suspend her for up to 60

days; the discussion between Ms Hamman and Mr Chowe, and the last mentioned indicated that the suspension was being extended; her discussion with Mr Mlatsi; that there had been no further communication to undo the indication that her suspension would be extended; that she had been lawfully and reasonably been under the impression that she was still under suspension and that she wished to resume duties.

8. The state attorney responded in a letter dated 29 October 2007, in which Chowe denied stating that her suspension had been extended beyond 17 July 2007 and indicated that she had neither reported for duties nor made any representations concerning possible further suspension, that the department did not further suspend her, and that in the circumstances they could not assist her.
9. Further letters were exchanged between the applicant's attorneys and the state attorney on 29 October 2007, 1 November 2007 and 7 November 2007. On 15 November 2007 the applicant referred an unfair dismissal dispute to the relevant bargaining council. The matter was set down for arbitration. An arbitration award was received by the applicant on 12 May 2008 wherein the arbitrator found that the bargaining council did not have jurisdiction to arbitrate the matter as she had not been dismissed as contemplated in section 186 of the Labour Relations Act 66 of 1995 (the LRA), but that her services had been terminated rather through operation of law in terms of section 17 of the PSA.

The review and declarator application

10. The applicant brought this application and contended that the respondents could not have relied upon or invoked section 17(5)(a)(i) of the PSA, alternatively that this provision did

not apply for the following reasons:

- 10.1 She did not intentionally absent herself from her official duties;
 - 10.2 Her absence beyond 16 July 2007 was not without permission, alternatively she was reasonably under the impression that the previous period of suspension had been extended.
11. In the alternative, it was contended that even if the respondents could lawfully and reasonably have relied upon section 17(5)(a)(i) of the PSA (which was not admitted), the respondents failure to reinstate her in terms of or under conditions contemplated in section 17(5)(b) of the PSA was unreasonable because of the following:
- 11.1 She showed good cause for reinstatement through her attorney's letter to the state attorney dated 19 October 2007.
 - 11.2 The good cause lay therein that her attorney and she had gained the impression from the state attorney's undated letter received on 16 July 2007, and from her attorney's telephonic discussion with the human resources director and from her visit to the department on 20 July 2007, that her suspension was being extended and that she needed to resume duties by 17 July 2007.
 - 11.3 She had no reason to think otherwise.

11.4 There was no willfulness or *mala fides* on her side and she was reasonably under the impression that she was under extended suspension because of further investigations.

12. The applicant contended that it was unreasonable in the circumstances sketched, for the respondents to have deemed her to be discharged on account of misconduct, alternatively to not have reinstated her, and that either decision was one that a reasonable decision-maker could not have made in the circumstances. She had been severely prejudiced because she was now unemployed simply because of what appears to have been, at the very least, a misunderstanding or an unfortunate sequence of events. She was further prejudiced by the fact that her attempt to pursue her dismissal through the alleged unfair dismissal principles and processes contained in the LRA, have failed, not on the merits, but because of a legal technicality.

Analysis of the facts and arguments raised

13. It is common cause that the applicant was employed by the second respondent. She was placed on suspension from 15 June 2007 to 16 July 2007. On 16 July 2007 her attorneys received a letter from the state attorney calling on her to report for duty on 17 July 2007. She did not report for duty on 17 July 2007 or thereafter. It is further common cause that she was not suspended thereafter and her suspension was not extended. It is further common cause that she was advised of her discharge ninety days after she had been absent

from work in terms of section 17(5)(a)(i) of the PSA. She was invited to make representations in terms of section 17(5)(b) of the PSA which she did not do. The applicant declared a dispute and referred it to the relevant bargaining council. The arbitrator who heard the matter found that the bargaining council lacked jurisdiction since the termination of her services was through operation of section 17 of the PSA.

14. Section 17 of the PSA before it was amended read 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 exceeding his or her last day of attendance at his or her place of duty.*
- (ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.*
- (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 executing authority may, on good cause shown and notwithstanding anything to*

the contrary contained 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.

15. There are several judgments of this Court dealing with the provisions of section 17(5) of the PSA. I have also dealt with the said provision in *Free State Prov Govt (Dept of Agriculture) v Maake (in his capacity as commissioner of the CCMA) and others* [2006] 11 BLLR 1090 (LC). In *Phenithi v Minister of Education & Others* [2006] 9 BLLR 821 SCA, the Supreme Court of Appeal dealt with the provisions of section 14(1)(a) of the Employment of Educators Act 76 of 1998 which are similar to section 17(5) of the PSA. The court found that the appellant's discharge did not constitute administrative action capable of review and setting aside. The coming into operation of the deeming provision requires no decision.
16. There are certain requirements that must be satisfied before section 17(5)(a) of the PSA applies. An employee would be deemed to be discharged if he or she has absented herself or himself from his or her official duties without permission from his or her head of department for a period exceeding one month. Once it is shown that she was absent for more than a month without permission, she will be deemed to be discharged.
17. It is trite that the deeming provisions as envisaged in terms of section 17(5)(a)(i) or corresponding 17(3)(a)(i) of the PSA do not constitute a decision which is reviewable in a

court of law and is accordingly not reviewable. The requirements of section 17(5)(a)(i) of the PSA have been shown to exist and the applicant cannot challenge her discharge on review since this is by operation of law. The applicant has not made out a case for the review of the decision of 16 October 2007 or for a declarator.

18. The applicant is not left without a remedy. She must report for duty and make representations in terms of section 17(5)(b) of the PSA and show good cause. It is at this stage where she can raise the issue around why she did not report for work like she has done in terms of her letters. Should the department refuse to consider her representations or find that she has not shown good cause, she could then declare a dispute and refer it to the relevant bargaining council and after that if need be on review.
19. The application stands to be dismissed.
20. I do not believe that this is a matter where costs should follow the result.
20. In the circumstances I make the following order:
 - 20.1 The application is dismissed.
 - 20.2 There is no order as to costs.

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : F J VAN DER MERWE INSTRUCTED BY
BOUWERS (ROODEPOORT) INC

FOR RESPONDENTS : B R TOKOTA SC WITH D T SKOSANA
INSTRUCTED BY STATE ATTORNEY

DATE OF HEARING : 19 JUNE 2009

DATE OF JUDGMENT : 28 JULY 2009