



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 297/11

In the matter between:

MINISTER OF SOCIAL DEVELOPMENT

Applicant

and

MN MABUZA

First Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

Second Respondent

SECTORAL BARGAINING COUNCIL

LUFUNO RAMABULANO NO

Third Respondent

Heard: 19 December 2013

Delivered: 26 March 2014

Summary: Termination of employment by operation of law does not constitute dismissal. The employer does not make a decision whose fairness could be challenged.

JUDGMENT

MTHOMBENI, AJ

Introduction

- [1] This is an application in terms of which the applicant seeks to review and set aside a ruling of the third respondent, dated 16 November 2011, issued under the auspices of the second respondent.

Background

- [2] The first respondent was employed by applicant. His employment contract was terminated in terms of Section 17(5) (a) (i) of the Public Service Act 103 Of 1994 ("the PSA") after he had absented himself from duty without permission for a period exceeding one calendar month.
- [3] Aggrieved with the termination of his employment, the first respondent referred a dispute to the second respondent alleging unfair dismissal. The latter scheduled a conciliation meeting and appointed the third respondent to preside over.
- [3] The issue that the third respondent was required to determine was whether the second respondent had jurisdiction to deal with the matter. Following submissions by the parties, the third respondent made a ruling that the second respondent had jurisdiction to arbitrate on the dismissal of the first respondent.
- [4] The third respondent's ruling is the subject of this application. The first applicant opposed this application.

Third Respondent's ruling

- [5] In his analysis of evidence and findings, the third respondent states the following:

'10 The matter relates to the termination of applicant's employment on account of absenteeism and in terms of s 17 of the Public Service Act. Section 17 of the said act (sic) authorised(sic) the discharge of an

employee who is absent from work for a period of one calendar months (sic), it is alleged he absented himself the period November 2008 to February 2009.

- 11 From the documentation presented it appears applicant after the said absence and after having been terminated he made a representation and explained his circumstances the last representation being the (a) letter to the Minister, it is common cause the Minister rejected his representation.
- 12 I am of the opinion the confirmation of his termination after his representation constitute (sic) a dismissal in terms of Labour Relations Act 66 of 1995 and in making the representation which was considered and the outcome communicated to him applicant has well placed himself within the ambit of the Labour Relations Act.'

Grounds for review

[5] Mr Mokhari, on behalf of the applicant, made the following submissions:

- 5.1 The decision by the third respondent in finding that the second respondent has jurisdiction to adjudicate on termination of employment which by operation of law is a decision which no reasonable decision maker would have made.
- 5.2 The third respondent committed a gross irregularity in making a ruling which is contrary to the law.
- 5.3 The third respondent exceeded his powers in that he is not empowered to arbitrate over a dispute concerning termination of employment by operation of law.

Applicable legal principles

[6] Section 17 (5) of the PSA provides that:

‘(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 place of duty.

....

(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 contained in any law approve reinstatement of that officer in the public service in his or her post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absent on vacation or without pay on such other conditions as the said authority may determine.’

[7] This court has consistently held that employees whose contracts of employment have been terminated in terms of Section 17 (5) of the PSA or similar provision in the public service, have not been dismissed but their contracts of employment have been terminated by operation of law. (See *Nkopo v Public Health and Welfare Bargaining Council and Others* (2002) 23 ILJ 520 (LC); *Maidi v MEC for Department of Education and Others* (2003) 24 ILJ 1552 (LC); *Member of the Executive Council, Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration and Others* (2003) 24 ILJ 2155 (LC); *Seema v General Public Service Services Bargaining Council and Others* (2005) 26 ILJ 2037 (LC) and *MEC for Education and Culture v Mabiike and Others* (2005) 26 ILJ 2368 (LC).)

[8] These decisions were confirmed by the Supreme Court of Appeal in *Phenithi v Minister of Education and Others*,¹ where the court had the occasion to deal with

¹ (2006) 27 ILJ 477 (SCA) at para 19.

the provisions of Section 14 of the Educators Act 76 of 1998 which are almost identical to those of Section 17 of the PSA, said the following:

‘The discharge is by operation of the law. In my view, the provision creates an essential and reasonable mechanism for the employer to infer “desertion” “when the statutory prerequisites are fulfilled. In such a case there can be no unfairness, for the educator’s absence is taken by the statute to amount to a “desertion”.’

[9] In paragraph 12 of his ruling, the third respondent states:

‘I am of the opinion the confirmation of his termination after his representation constitute (sic) a dismissal in terms of the Labour Relations Act 66 of 1995 and in making the representation which was considered and the outcome communicated to him applicant has well placed himself within the ambit of the Labour Relations Act.’ (My emphasis).

[10] In this regard, I am convinced that the third respondent erred in law in that the first respondent’s contract of employment had already been terminated by operation of law, prior to Section 17 (5) (b) kicking in. The fact that the applicant did not exercise its discretion in favour of the first respondent is not, in my view, tantamount to a “dismissal. For the purpose of this application, I have not been called upon to determine whether the applicant exercised its discretion in an unconstitutional manner. Suffice to say that the exercise of discretion in the circumstances by the applicant does not constitute a “dismissal”.² [11] In my opinion, I concur with Mr Mokhari that the third respondent committed an irregularity when he made an error of law and also exceeded his powers when he made a ruling that the second respondent had jurisdiction to arbitrate on the dispute. Thus, the third respondents’ ruling falls to be reviewed and set aside.

[12] In my view, this is not a matter where the costs should follow the result.

² See *Phenithi v Minister of Education and Others* (2005) 26 ILJ 1231 (O) at para 4.

[13] In the result, I find that the third respondent arrived at a decision which a reasonable decision-maker would have made and order the following:

1. The second respondent does not have jurisdiction to arbitrate on the dispute that has been referred by the first respondent.
2. There is no order as to costs.

Mthombeni, AJ

Acting Judge of the Labour Court

APPEARANCES:

For Applicant: Advocate W Mokhari SC

Instructed by: The State Attorney

For the First Respondent: In person

LABOUR COURT