



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1740/12

In the matter between:

MMDIRA G MALOKA

Applicant

~~and~~ And

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT

First Respondent

THE CHIEF MASTER OF THE HIGH COURT,

PRETORIA

Second Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT

Third Respondent

Heard: 8 October 2014

Delivered: 18 March 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] This is an application in terms of section 158(1)(h) of the Labour Relations Act, (“LRA”) to review the Second Respondent’s decision not to reinstate the Applicant

subsequent to the applicant's termination of services in terms of section 17(3)(a) of the Public Service Act ("PSA").

- [2] The muddled manner in which the Applicant approached its case is attributed to its long history. As such, I do not intend to deal with irrelevant historical facts and it will become clearer later in this judgment as to what are pertinent issues. Nonetheless, I must state upfront that these proceedings were instituted prior to the First Respondent issuing its decision of 17 July 2012, which effectively confirmed the Applicant's termination of services.
- [3] Subsequently, the Applicant filed supplementary heads of argument wherein she abandoned prayers 1, 2, 3 and 5 of her notice of motion and, in effect, the relief sought is as follows:

- '1. *Reviewing and setting aside termination of the Applicant's services in terms of section 17(3)(a) of the Public Service Act.*
2. *Directing the first and second respondents to reinstate the Applicant in a position as estate controller with effect from 18 October 2011.*
3. *Condoning the non-compliance of Rule 7A of the Rules of the Honourable Court.*
4. *Costs of the application.*
5. *Further and alternative relief.'*

Factual background

- [4] Applicant was arrested on 18 October 2011 regarding allegations of fraud. On 19 October 2011, the Applicant was released on bail. According to the Applicant, she reported for duty on 19 October 2011, but left early because of medical reasons and Ms Phaka, her supervisor, was aware. The allegations of fraud were never pursued in a disciplinary hearing or criminal action.
- [5] On 25 October 2011, the Applicant was served with a letter of possible precautionary suspension. However, according to the First Respondent the precautionary suspension was never followed through.

- [6] The Applicant remained off duty under the impression that she was on suspension. On 17 November 2011, she was notified by Ms Phaka to report for duty because she had to fill the leave forms as her suspension was never effected.
- [7] Indeed, on 18 November 2011, the Applicant reported for duty and signed leave forms for the period from which she was arrested, 19 October to 17 November 2011.
- [8] On 5 December 2011, the Applicant reported for duty as normal. However, on 8 December 2011 she was issued with a letter dated 23 November 2011 invoking the provisions of section 17(3)(a)(i) of the PSA.
- [9] The Applicant referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council ("GPSSBC"). On 25 April 2012, the arbitrator ruled that the GPSSBC lacked jurisdiction to handle the matter because the Applicant's services were terminated by operation of law and advised the Applicant to invoke section 17(3)(b) of the PSA by making submissions to the First Respondent to show good cause why she should be reinstated.
- [10] The Applicant submitted the said representation to the First Respondent on 25 May 2012. First Respondent's response is contained in a letter dated 17 July 2012 and is as follows:

'...The position of the Department still remains that Ms Maloka absented herself from her official duties without permission of head of department, office or institution for period exceeding one calendar month, thereby invoking section 17(3)(a) of the Public Service Act upon herself

No compelling reason has been advanced to convince me that she should be reinstated.'

- [11] In essence, the First Respondent found that the Applicant failed to show good cause and accordingly confirmed her termination.

Applicable legal principles

- [12] The provisions of section 17(3) of the PSA are as follows:

- (a)(i) *An employee, other than a member of the services or an educator or a member of the Intelligence Services, 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 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.*
- (ii) *If such an employee assumes other employment, he or she shall be deemed to have been dismissed 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 executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee 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.'*

Jurisdiction

[13] The Court's jurisdiction to decide the matter is not disputed. In any event, the Labour Appeal Court settled this issue in *MEC for the Department of Health, Western Cape v Weder, In Re: MEC for the Department of Health, Western Cape v Democratic Nursing Organization of South Africa obo Mangena*¹ where it stated that:

'Irrespective of the classification of the decisions of appellant as administrative action, appellant's actions are open to review in terms of s 158 (1) (a) of the LRA on the ground of legality, a principle that has been developed significantly by the courts over the past decade. So much so, that a parallel system of review for action which falls outside of the strict definition of administrative action in terms of the poorly drafted PAJA, has developed.'

¹ [2014] 7 BLLR 687 (LAC); (2014) 35 ILJ 2131 (LAC) at para 33.

Section 17(3)(a) of the PSA

- [14] The Applicant patently persists with her attack on the application of section 17(3)(a)(i) of the PSA despite the GPSSBC's ruling on this issue. By the same token, the Applicant went ahead and invoked section 17(3)(b) of the PSA and unfortunately, as stated above, the First Respondent communicated its decision in this regard after these proceedings were instituted. It is my view, however, that by taking further steps to invoke section 17(3)(b) of the PSA, the Applicant's attack on section 17(3)(a)(i) of the PSA was rendered moot.
- [15] The principles relating to mootness have been well established in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*² in which the Constitutional Court said:

'A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

The Section 17(3)(b) of the PSA

- [16] Accordingly, the main issue to be decided is whether the Second Respondent passed legality test within the context of review. It is trite that public functionaries are required to act within the powers granted to them by law. The Constitutional Court laid down the core element of principle legality in *Pharmaceutical Manufacturers, Association of South Africa: In re Ex Parte President of the Republic of South Africa*.³ The Court stated the following:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

² 2000 (1) BCLR 39 (CC); See also *Radio Pretoria v Chairman of the Independent Communication Authority of South Africa and Another* 2005 (3) BCLR 231 (CC).

³ 2000 (2) SA 6775 (CC) at para 85.

- [17] In *Weder/Mangena*, the Labour Appeal Court held that these principles are applicable to the decisions taken by an employer in terms of section 17(3)(b) of the PSA. Referring to a well written judgment of Van Niekerk J in *De Villiers v Education, Western Cape Province*,⁴ the Labour Appeal Court stated that:

*'Save for this legislation, as Van Niekerk J remarked in De Villiers, supra, 'no other employer enjoys the right to consider reinstatement of its employees within its sole discretion'. Thus, it followed that the requirement of 'good cause referred to in s 14(2) (or in the present case s 17(3)(b)) should be interpreted to mean 'that unless the employer, having regard to the full conspectus of relevant facts and circumstances is satisfied that a continued employment relationship has been rendered intolerable by the employee's conduct, the employer should as a general rule approve the reinstatement of the employee.'*⁵

- [18] It is therefore, imperative that the First Respondent's decision be tested for rationality as outlined above, in particular, given the Applicant's constitutional right to fair labour practice.

Analysis and application

- [19] Coming to the issue at hand, it is common cause that consequent to the arbitration award, the Applicant filed a detailed submissions in terms of section 17(3)(b) of the PSA and to no avail. The First Respondent solely relied on the arbitrator's ruling that the Applicant's absence was unauthorised to justify its decision not to reinstate her.
- [20] It is clear that the First Respondent misconstrued the purpose of section 17(3)(b) of the PSA. The arbitrator correctly held that the bargaining council lacked jurisdiction to deal with the matter since the Applicant had absented herself for 30 consecutive days and, as such, her absence automatically triggered the application of section 17(3)(a)(1) of the PSA. However, in paragraph 28 of the arbitration award, the arbitrator observed pertinently that:

⁴ [2010] 31 ILJ 1377 (LC).

⁵ *Supra* at para 36.

'From the evidence it is clear that while the Applicant may have had justification for being away from work for more than one month calendar, she did not have authorisation required by section 17(3)(a)(i) of the PSA'.

[21] Unlike the Second Respondent, the arbitrator was alive to the issues beyond his scope of jurisdiction, in particular evidence sought to justify the Applicant's absence from work. He, also, correctly advised the Applicant to place that evidence before the Second Respondent in terms of section 17(3)(b) of the PSA. Therefore, the arbitrator's findings could not be used as a basis to refuse the Applicant reinstatement.

[22] In her attorney's letter dated 25 May 2012, the Applicant submitted, *inter alia*, the following reasons in support of her request for reinstatement:

18.1 My client's circumstances being understandably distraught at the reality of her son dying and her having to fetch and carry him to hospital and to nurse him at home and being incapacitated for work.

18.2 The fact that my client and her supervisor, Willica Phaka, was under the reasonable impression that she had been suspended and did not report for duty because she believed she was under suspension and stayed at home.

18.3 The prosecution against my client for alleged fraudulent activities was withdrawn by the State.

18.4 The Master's office held no disciplinary enquiry to establish my client's alleged fraudulent activity despite Mahole having used the words "pending the finalisation of a disciplinary hearing investigation into all fraudulent activities" in her letter dated 25 October 2011.

18.5 My client's absence from the office could only have commenced on the 19 October 2011 after her arrest on the 17 October 2011 and her release on bail on the 18 October 2011 and her reporting for work in the afternoon of the 18 October 2011.

18.6 The period of one calendar month referred to in your letter dated 23 November 2011 would thus have started on 19 October 2011 and the last day thereof would have been 18 November 2011. Willica Phaka testified

that my client in fact reported for work on 18 November 2011 and the calendar month was thus interrupted and was never completed.

18.7 *My client qualified for leave for period 19 October 2011 to 2 December 2011 and had permission of Willica Phaka to be away from her official duties for part of this period.*

19. ...

20. *There is nothing to suggest that my client's reinstatement would cause disruption in the workplace or that good working relationship between her and her colleagues cannot be restored.'*

[23] It is undisputed that the Applicant kept contact with Ms Phaka throughout her absence from work and that at some stage both of them were under the impression that she was on suspension. That impression was reasonable, I believe, since the First respondent had communicated its intention to suspend the Applicant. As such, her suspension remained an enigma and, up until 8 December 2011, even her managers were uncertain about her situation.

[24] In the Applicant's supplementary affidavit filed as directed by this Court, annexed thereto is Mr Freddie Legoka's affidavit, a mortician who assisted her with the burial of her son. According to him, he met the Applicant at her place of work on 18 November 2011 and witnessed her filling some leave forms and submitted them back to her supervisor the same day.

[25] It is common cause that the said leave forms never reached the management. However, nothing turns on the lost leave forms because when the Applicant returned back to work on the 5th of December 2011, a second set of leave forms was completed and handed over to management. Mr Cilliers, Applicant's manager, conceded during arbitration that it was not an anomaly to file leave forms after leave had been taken, subject to the approval by a manager or a senior official.

[26] Furthermore, the Applicant managed to file her son's death certificate as proof that she had been distressed by his illness and his subsequent passing. It is, therefore, disingenuous of the Respondents to submit in their heads of argument that the Applicant failed to satisfactorily explain the absence without authority simply by

failing to submit doctor's notes and also by failing to submit her son's death certificate. There is no evidence on record to support these assertions. On the contrary, the First Respondent's answering affidavit placed much emphasis on the fact that the Applicant was absent without authorisation and obviously was premised on the arbitrator's findings.

- [27] In the premises, it cannot be said that the Applicant was wilfully absent from work. Also, there is no evidence proffered by the Second Respondent to support its assertion that it had taken into consideration the Applicant's submissions chronicling her circumstances and satisfied itself that continued employment relationship had been rendered intolerable by her conduct.
- [28] The interpretation given by Van Niekerk J in the case of *De Villiers* and endorsed by the Labour Appeal is spot on as it is in line with the Constitutional Court approach eloquently crystallised by Olivier JA in *Govender v Minister of Safety and Security*⁶ by stating the following:

'This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges:

- (a) *to examine the objects and purport of the Act or the section under consideration;*
- (b) *to examine the ambit and meaning of the rights protected by the Constitution;*
- (c) *to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, i.e. by protecting the rights therein protected;*
- (d) *if such interpretation is possible, to give effect to it, and*
- (e) *if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.'*

⁶ 2001 (4) SA 273 (SCA) at para 11.

- [29] To adopt any other mode of interpretation would lead to absurdity, especially given the Applicant's right to fair labour practice. It is my view that the Second Respondent obviously relied on the arbitrator's findings and as a result failed to consider the Applicant's written submissions which patently make a good case for her reinstatement.

Conclusion

- [30] The Second Respondent's decision not to reinstate the Applicant was capricious and absurd. The decision must be reviewed and set aside.

Relief

- [31] The Applicant has submitted that the Court should substitute the First Respondent's decision of 17 July 2012 with its decision ordering that she be reinstated into the same post that she held before her statutory termination. Certainly, given the history of this litigation, it makes sense not to refer it back to the First Respondent for a decision.
- [32] Section 193 of the LRA is a relevant guideline in these matters. As such, the following sentiments expressed by the Constitutional Court on reinstatement in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁷ are apposite:

'Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a

⁷ [2008] 12 BLLR 1129 (CC) at para 36.

Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.'

[33] There is no evidence led by the Respondents to indicate that Applicant's reinstatement would not be reasonably practicable. However, I am of the view that the reinstatement should not have full retrospective effect. The Applicant has been represented by her attorneys of record since the commencement of this litigation. However, Applicant's approach to this litigation is fraught with procedural bungles which caused unnecessary delay. By way of example, instead of invoking the provisions of 17(3)(b) of the PSA, she referred the matter to the GPSSBC and, consequently, the First Respondent's decision not to reinstate was only made on 17 July 2012.

[34] Therefore, the period during which the Applicant was absent from work should be deemed to be leave without pay in accordance with section 17(3)(b) of the PSA. That period should run from 18 October 2011 until 17 July 2012.

Costs

[35] For the same reasons alluded to above, I am of the opinion that it would be unfair to award cost against the Respondents.

Order

[36] In the circumstances, I make the following order:

1. That the First Respondent's decision not to reinstate the Applicant is reviewed and set aside;
2. The First Respondent is ordered to reinstate the applicant to her former post retrospectively to 17 July 2012, on the same terms and conditions of

employment as previously held and without the loss of any remuneration or benefits;

3. The Applicant is not entitled to any remuneration for the period 18 October 2011 to 17 July 2012; and
4. There is no order as to costs.

LABOUR COURT

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate P Kitkstein

Briefed by Keith Whitaker Attorneys

FOR THE RESPONDENTS:

M Bothma

Briefed by the State Attorneys

LABOUR COURT