



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1488/15

In the matter between:

NEHAWU obo ANDREW NDWENI

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF SOCIAL DEVELOPMENT**

First Respondent

DEPARTMENT OF SOCIAL DEVELOPMENT

Second Respondent

Heard: 09 February 2017

Delivered: 14 March 2017

JUDGMENT

TLHOTLHALEMAJE J

Introduction and background

[1] NEHAWU on behalf of its member Mr. Andrew Ndweni approached the Court in terms of the provisions of section 158(1)(h) of the Labour Relations Act,¹ to

¹ Act 66 of 1995 as amended. Section 158(1)(h) provides—

seek an order reviewing, setting aside and/ or substituting the decision of the first respondent, (MEC) in terms of which the latter refused to reinstate Ndweni to his previous position pursuant to his discharge from service in terms of the provisions of section 17(3)(a)(i) of the Public Service Act (The PSA).²

[2] Ndweni was employed by the second respondent (the Department) as a Messenger/Driver. There is a dispute as to whether he had reported for duty on 13 February 2014 or not. The respondents' contention is that there is no record of his presence at work on that day, and an attendance register was referred to in support of this contention. Ndweni's version however was that whilst on duty, he was overcome by a medical condition, which resulted in his body being covered in sores and blisters. He further alleged that he had informed his immediate supervisor, the late Ms Risky De Beer (De Beer), of his ailment, and was granted permission to leave the workplace to seek medical attention. Ndweni further averred the following:

- a) He had consulted with a Dr Manoto on 13 February 2014 and was declared unfit for duty until and including 12 March 2014, having been diagnosed with a '*Dermatological Condition*';
- b) On 14 February 2014, he telephonically contacted De Beer, informing her that he was declared unfit for duty until 12 March 2014;
- c) On 18 February 2014, he sent a text message to his Manager, Ms Sylvia Zwane, and informed her that he was unfit to report for duty. There is a dispute in respect of the content of the text message, with the respondents contending that Ndweni informed Zwane that he will be reporting for duty on 19 February 2014, whilst Ndweni's contention was

“(1) The Labour Court may—

...

- (h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.”

² Act 103 of 1994. This section provides that:

“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.”

that he had stated he was unable to report for duty, and had said nothing about returning to work the next day;

- d) On an unspecified date during February 2014, Ndweni had called the Transport Officer, Mpho Lengopeng to come to his residence to collect a state vehicle. The said Lengopeng came to his house accompanied by another employee, Doleka Mathuntsi, to collect the state vehicle which he had kept since 13 February 2014;
- e) On 25 March 2014, Ndweni had requested a Mr Oupa Seboa, another driver employed by the Department to deliver a copy of his medical certificate to De Beer. According to Ndweni, Seboa could not locate De Beer and had attempted to deliver the copy to Zwane. At first, Zwane refused to accept the medical certificate, as the Labour Relations Office had authority to do so. Zwane had ultimately agreed to accept the copy. The respondents on the other hand deny these allegations, and contended that the Department was only furnished with a copy of the medical certificate on 26 March 2014, and directly from Ndweni upon his return for duty;
- f) On 26 March 2014, and upon reporting duty, Zwane informed Ndweni not to resume with his functions and that he must approach the Labour Relations Office for further instructions;
- g) A meeting took place between Ndweni and Mr Mbentse of the Labour Relations Office, and Ndweni was informed that he was deemed to have absconded and that the Department was awaiting a letter from its Head in regards to the issue of his absenteeism. Ndweni was advised to return home and await further communication from the Department;
- h) On 09 April 2014, Ndweni was requested to avail himself at the offices of the Head of Department and upon his arrival, was handed a letter which read as follows:

"DISCHARGE FROM THE PUBLIC SERVICE IN TERMS OF SECTION 17 (3) (A) OF THE PUBLIC SERVICE ACT 1994

You are hereby informed that you have been discharged from the Public Service in terms of section 17 (3) (a) (i) of the Public Service Act 1994 which reads as follows;

.....

Your discharge from service will be effective as from 13 February 2014, as it is the day succeeding the last day on which you reported for duty. Please note that you have a right to appeal to the Executive Authority as stated in section 17 (3) (b) of the Public Service Act 1994 (As amended) that

.....

Kind regards

Ms WR Tshabalala

Head of Department"

- [3] On 23 April 2014, Ndweni with the assistance of NEHAWU, made representations to the MEC in terms of section 17(3)(b) of the PSA.³ A period of about one month passed without an outcome being received and Ndweni and NEHAWU then approached the Public Health and Social Development Sectoral Bargaining Council (The PHSDSBC) with a referral alleging unfair dismissal. On 29 May 2014, Commissioner JN Matshekga of the Bargaining Council issued a jurisdictional ruling in terms of which it was held that the Council lacked jurisdiction to determine the matter.
- [4] The MEC had responded to the representations in terms of which she had refused to reverse the discharge. The responses and further correspondence between her and NEHAWU in regards to the reasons for not reversing the decision will be dealt with in due course.

Grounds for review

³ Section 17(3)(b) which provides that:

"(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."

[5] Four interrelated grounds were advanced in contending that the decision of the MEC not to reinstate Ndweni was reviewable:

- a) The first was that the MEC failed to furnish full reasons for her decision;
- b) The second was that the MEC failed to apply her mind to the representation made to her, and failed to properly consider the explanation advanced for the absenteeism and the documentary evidence (medical certificate) attached to the representations;
- c) The third ground was that the MEC failed to consider on factual grounds whether Ndweni had in fact absconded from his employ;
- d) The fourth was that the MEC failed to apply her mind to whether Ndweni had in fact been absent for a period exceeding 30 consecutive calendar days.

Evaluation

[6] It is trite that to the extent that an employment contract of a person is regulated by the provisions of the PSA, such a contract may be terminated by operation of the law if that person absents himself or herself from duty for a period exceeding 30 days in accordance with the provisions of section 17(3)(a)(i) of the PSA. For these provisions to be operative, the employee must have absented him/herself; that employee must have been absent from his/her official duties without permission of his head of department, office or institution; and the absence must have been for a period exceeding one calendar month. In terms of section 17(3)(b) of the PSA, the executing authority may however on good cause shown by the employee who has been deemed to have been dismissed, order that he or she be reinstated.

[7] The first issue to be determined therefore in this case is whether the requirements set out in section 17(3)(a)(i) of the PSA to justify the discharge were present. This requires an examination of the facts as presented before the Court.

- [8] It can be accepted on the facts that Ndweni, as a member of the services had absented himself from his official duties between 13 February 2014 until his return on 26 March 2014. This amounts to a period of 34 full calendar days.
- [9] The second leg of the enquiry pertains to whether he had the requisite permission from his head of Department, office or institution. Ndweni's contention was that he sought and obtained the permission of De Beer when he left on 13 February 2014. The respondents' contention on the other hand was to deny that Ndweni was even at work on the day in question, and had attached an attendance register⁴ to the answering affidavit in support of these contentions. In reply, thereto, Ndweni contended that at the time that he fell ill, he had not yet signed the attendance register and had left without signing it.
- [10] The difficulties with Ndweni's contentions is that he does not give a satisfactory account that can attest to his presence at work on the day in question. In the absence of De Beer's evidence in this regard, all that was placed before the Court is the attendance register, which Ndweni did not dispute. According to the register, his colleagues reported for duty at varying times between 06h45 and 08h00. As I understood his version, having obtained permission from De Beer, he then left the workplace in a state vehicle, and the concern is that if he could drive himself to a doctor, I fail to appreciate how he could have been so sick as to be not able to sign the attendance register before he left the workplace. His explanation in this regard is inadequate, and I will accept that indeed he had not reported for duty on the day in question. Consequently, he could not have obtained permission from De Beer to be absent from duty. Crucially in respect of this issue, nowhere in his representations⁵ did he even mention that he had obtained permission from De Beer to leave on 13 February 2014. All that he had mentioned was that he had "communicated his sick leave with his supervisor".
- [11] The provisions of section 14 of the Department's policy on 'Determination of Leave of Absence in the Public Service' further places an obligation on the

⁴ Annexure 'NS11' to the Replying Affidavit.

⁵ Annexure 'AD5' to the Founding Affidavit.

employee to immediately and personally notify his or her supervisor of illness preventing him or her from reporting for duty. Section 14.5 of the provisions further places an obligation on the employee to submit an application for sick leave personally or through a relative or fellow employee within five working days after the first absence. It took Ndweni until 18 February 2014 to contact Zwane via a text message to inform him of his inability to report for duty. Even then, the above provisions were not complied with, and on his version, a copy of the medical certificate was only handed in on 25 March 2014.

- [12] Having established that Ndweni had not on 13 February 2014 obtained any permission from De Beer to be absent as he had not reported for duty, even if it is accepted that he had sent a text message to Zwane his manager on 18 February 2014, that in itself was not sufficient for the purposes of seeking permission to be absent. On Zwane's version, Ndweni had indicated his intentions to report back for duty on 19 February 2014. He however failed to do so until 26 March 2014.
- [13] It was further undisputed by Ndweni that De Beer had contacted him on 19 March 2014, and he had promised to send through a copy of his medical certificate the following day. He however failed to do so, and on his version, had handed in a copy on 25 March 2014, a day just before his return.
- [14] In the light of the above factors, I am satisfied that on the facts, Ndweni was absent from duty for a period exceeding 30 calendar days. He had not obtained permission from his manager or relevant authority to absent himself from duty. The respondents therefore had cause to invoke the provisions of section 17(3)(a)(i) of the PSA.
- [15] The last leg of the enquiry is whether in accordance with the provisions of section 17(3)(b), Ndweni had shown good cause to justify the setting aside of his discharge by the MEC. The functionaries in the public service in exercising their powers under that subsection are required to do so in a manner that is not irrational or arbitrary, and must act fairly, reasonably and justifiably.⁶ Thus, a

⁶ *MEC for Education and Culture v Mabika & Others* (2005) 26 ILJ 2368 (LC) at 2373C.

failure or omission by the executive authority to provide reasons for a refusal to reinstate would sustain a ground of review.⁷ This is so in that negative inferences are bound to be drawn as to whether the decision maker acted in good faith, or whether the decision was influenced by ulterior or improper motives.⁸ The reasons furnished by the executive authority need not however be to the satisfaction of the affected employee.

- [16] The requirement that the decision maker must give reasons entails not merely regurgitating the statutory provisions upon which the decision is based. It requires of a decision maker to demonstrate that he or she had applied her mind to the representations made by the employee as to the reasons why the sanction should be reversed.
- [17] Because the discharge in terms of these provisions is not regarded as a dismissal in the ordinary sense, and further because the appeal stage is effectively the last internal avenue for the affected employee to state his case and salvage continued employment, it is my view that first, for good cause to be shown, there is an obligation on the affected employee to place substantial representations before the decision maker as to why the decision should be reversed. This implies that to the extent that the employee was absent for a period of more than thirty days, he or she must justify the absence, inclusive of details surrounding the nature of his ailment, his whereabouts during the period of absence, and anything that could have prevented him or her from resuming duties.⁹ Further to the extent that the factors that triggered the discharge were present, it is up to the employee to convince the executive authority that its confirmation was not warranted given the circumstances of his or her case.
- [18] To reiterate, it would not be sufficient for an employee to simply allege that he or she had called the manager to inform him or her of her absence or to merely present a copy of a medical certificate upon his or return. There is a need to

⁷ *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* [2014] 7 BLLR 687 (LAC).

⁸ See *Dendy v University of the Witwatersrand and Others* [2005] ZAGPHC 39; 2005 (5) SA 357 (W) ([2005] 2 All SA 490) in para 53.

⁹ *Grootboom v National Prosecuting Authority & another* 2010 31 ILJ 1875.

justify the absence with sufficient details, and to state why the discharge should be reversed.

- [19] A second consideration in my view is that since a discharge does not follow a disciplinary hearing or any form of formal enquiry, there is an onerous burden on the decision maker to demonstrate that the representations made were carefully considered and responded to with sufficient particularity, to justify why the sanction cannot be reversed. Confronted with similar provisions as applicable under the Employment of Educators Act,¹⁰ Van Niekerk J in *De Villiers v Head of the Department of Education, Western Cape Province*,¹¹ held that in considering a submission for reinstatement by an employee, the employer must take into account the totality of the facts and the circumstances of the employee including whether the conduct of the employee had rendered the employment relationship intolerable.¹²
- [20] Thus, if the employee's representations are lacking in particularity, the decision maker's response cannot be reviewable if it is equally lacking in particularity. Axiomatically, where the representations were substantial and detailed, it would be difficult to assess whether a decision could have been reasonable and rational when the decision maker offers no reasons for the decision.¹³ The courts in such instances should give the affected employee the benefit of the doubt.
- [21] Ndweni sought to justify his absence from work based on his contention that he was booked off sick during that period. The starting point is that there are inherent difficulties with a copy of a medical certificate that he had submitted to justify his absence. In his founding affidavit, Ndweni had alleged that he had consulted with Dr Manoto on 13 February 2014, and was booked off until 12 March 2014. The medical certificate however, is dated 12 March 2014, almost a month since he had allegedly seen the doctor.

¹⁰ No 76 of 1998.

¹¹ (2010) 31 ILJ 1377 (LC).

¹² Id at para 30.

¹³ See *PSA obo Smit v Mphaphuli NO and Others* (LC) (unreported case no C742/11) where the Court had referred to *Weder v Member of the Executive Council for the Department of Health, Western Cape* [2013] 1 BLLR 94 (LC) at 35.

- [22] In his affidavit, nowhere does Ndweni indicate that at any time during his absence, particularly on 12 March 2014, did he ever consult Dr Manoto again. If indeed he was incapacitated as he had alleged, and had consulted with Dr Manoto on 13 February 2014 as he had claimed, and was booked off until 12 March 2014, this implies that he had nothing to present to the employer to substantiate his allegations that he was sick from the period of his absence until 26 March 2014 when he returned to work and presented that medical certificate.
- [23] Worse still, Ndweni had waited until 25 March 2016, a day just before his return to ask Seboa to deliver his copy of the medical certificate. There is no explanation if there is any truth in it, as to the reason he had waited between 12 March 2014 and 25 March 2014 before he could provide the employer with a copy of his medical certificate. In any event, as at 25 March 2014, he was supposed to have reported for duty at least 13 days earlier, and there does not appear to have been any attempt to proffer an explanation for his absence after 12 March 2014.
- [24] This Court has over time had to deal with instances of absenteeism, where employees for some strange reason seem to hold the view that a mere submission of a copy of a medical certificate was sufficient to justify prolonged periods of absenteeism, especially in circumstances where permission was not obtained. Most copies of medical certificates seen and relied upon by employees, are normally issued in cryptic, incomprehensible and unreadable terms, and one cannot for instance, determine from such copies whether a '*Dermatological Condition*' as in this case, justified absence of over one month from the workplace. Ndweni's contention that he was informed by his doctor that the diagnosed condition was contagious amounts to nothing but hearsay.
- [25] It has long been held by the Labour Appeal Court in *Mgobhozi*¹⁴ that medical certificates are no different to other documentary evidence, and therefore constitutes hearsay in the absence of an affidavit from the doctor concerned. It is therefore not sufficient for employees to simply obtain a copy of a medical

¹⁴ *Mgobhozi v Naidoo NO & others* (2006) 27 ILJ 786 (LAC).

certificate as in this case, long after the first day of absence from work, and to merely present it with an expectation that the employer must simply accept it with no questions asked. Sick leave abuse amongst employees, whether in the public or private sector is a reality, and employers are entitled to be suspicious and skeptical of copies of medical certificates that do not make sense or say little about the employees' alleged ailment, especially those copies that are presented after prolonged periods of absence from work, and which appear to have been post-dated.

- [26] The insistence on further information from the concerned doctor in the form of an affidavit is purely meant to curb sick leave abuse. It is not far-fetched to conclude that it appears to be a simple matter for employees to obtain copies of medical certificates. Furthermore, this requirement is even more apposite in this case, where the copy of the medical certificate is post-dated, and with no attempt by Ndweni to explain the reason he had only secured a copy one month after he had allegedly seen the doctor. At most, it would have been expected of him or the concerned doctor, to explain the reason a copy was not given to him on the date of the alleged consultation, particularly where the duty was upon Ndweni to immediately furnish the employer with a copy from the first date or short period of absence, in view of the requirements of section 14 of the policy on 'Determination of Leave of Absence in the Public Service'.

The representations and responses

- [27] The representations to the MEC for the purposes of section 17(3)(b) of the PSA made by Ndweni as assisted by his NEHAWU representative were as follows:

“
.....

My reasons for appeal are as follows;

1. **No proper procedures were following regarding the case.**
2. **No investigations were conducted and the affected being called for a hearing.**
3. **I was booked off sick by Dr M. Manoto from 13th February 2014 to 12th March 2014. See attached medical certificate.**

4. I have communicated my sick leave with my supervisor (I have proof)
5. The discharge letter does not reflect the specific period of my absenteeism from work.
6. Refer to labour relations act of 2002 (Sic)

.....

The official termination of service should be immediately retracted and a proper investigation procedures to be followed according to the Labour Relations Act.

I wish to provide evidence or proof that I did not commit any misconduct

....."15

[28] On 19 June 2015, some 14 months since the submission of the representations in terms of subsection (3)(b), the MEC furnished her decision to Ndweni, advising him that the decision to discharge him remained unchanged. The letter from the MEC reads as follows:

“RE: APPEAL AGAINST SANCTION

Your letter of appeal bears reference.

I acknowledge with thanks receipt of your appeal and noted all its contents.

The Department has noted the allegations of misconduct against you on the basis of abscondment as you absented yourself from work without permission for a period exceeding one calendar month.

Having noted all matters that were raised, I have had an opportunity to apply my mind on your request and the following is the outcome of the appeal:

1. I uphold the decision taken by the Department.

If you object, you may direct your dispute to the PHSDSBC within 30 days of receipt.

Yours faithfully

Ms Nonhlanhla Faith Mazibuko

Member of the Executive Council

Department of Social Development”

[29] On 15 July 2015, NEHAWU sent correspondence to the MEC, requesting further reasons for the decision in the light of the previous correspondence not

¹⁵ Annexure ‘ADS5’ to the Founding Affidavit.

indicating the dates and/or period Ndweni is alleged to have absconded. It was further pointed out that during his absence from work due to ill-health, De Beer and Zwane knew of his whereabouts, inclusive of the sick note that was delivered to Zwane. The correspondence further indicated that the previous correspondence from the MEC did not give reasons and/or basis upon which the request for reinstatement was refused, and the basis for rejecting his representations.

[30] The MEC's response on 28 July 2015 was as follows:

"RE: NEHAWU'S ENQUIRY ON MR NDWENI'S APPEAL

Please note that, after careful consideration of Mr Ndweni's application as provided by section 17(3)(b) of the Public Service Act, I could not sanction his reinstatement, due to the following;

- Mr Ndweni's employment contract was terminated by 'Operation of the law'- section 17 930 (a) (i) of the Public Service Act.
- Mr Ndweni's representation to the Executive Authority could not justify the unreasonableness of the duration of his absence and disruption of work.

It further needs to be noted that Mr Ndweni's rights were fully observed by the department hence he was duly advised to lodge a dispute with Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) in the event of any dissatisfaction with the appeal outcome.

Hope the information will provide clarity regarding your enquiry

Yours faithfully

Ms Nonhlanhla Faith Mazibuko

....."

[31] It is trite that in review applications, the court assesses the facts which were considered by the decision-maker at the time that the decision was made.¹⁶ It is thus not helpful for the parties to place evidence before the court that was not placed before the decision maker prior to the decision being made.

¹⁶ *M E Sello v The Divisional Commissioner, Human Resource Development, SAPS Case No: JR 1870/2013.*

- [32] In this case, the main attack against the MEC was that she failed to apply her mind to the representations made and to give reasons for her decision. Amongst other complaints raised was that there was no attempt to contact Ndweni during his period of absence to establish his whereabouts. This contention comes about bearing in mind that Ndweni had denied that the employer attempted to telephonically contact him twice without success. The only concession he had made was that De Beer had indeed contacted him on 19 March 2014, and that he had promised to send through a copy of his medical certificate the following day, which he never did. In my view however, it does not make sense for Ndweni to concede having received one telephone call and deny having received others which he did not respond to.
- [33] I accept that the first response of the MEC on 19 June 2015 as to why the decision could not be reversed was lacking in particularity. It was not sufficient for the MEC to simply make a statement that she had 'noted' all matters that were raised and 'applied her mind' to the request, and thereafter upheld the decision. She needed to have indicated what matters were raised and noted, and how she had applied her mind to the request.
- [34] In respect of the MEC's second response of 28 July 2015, the starting point is that because the discharge was by operation of the law, there was no requirement that respondents had to follow 'proper procedures', or have formal investigations, or convene a hearing as Ndweni had contended. Once the factors that triggered the provisions of section 17(3)(a)(i) were present, the discharge took effect. There was therefore no basis for the MEC to respond with any particularity to these grounds, as Ndweni's representations in terms of section 17(3)(b) served as an avenue for him to plead his case.
- [35] In respect of other grounds relied upon by Ndweni, viz, that he had communicated his sick leave with his supervisor; or that the discharge letter did not reflect specific period of absenteeism or that he had produced a medical certificate, the MEC's response was that those representation, could not justify the unreasonableness of the duration of his absence and disruption of work. In my view, the response is again lacking in detail. It was required of the MEC to indicate on what basis she had rejected those submissions, and not to simply state that they were unreasonable.

- [36] Significant with the respondents' case is that in the record before the Court, there is correspondence to the Head of the Department from the Department's Director, HRM on 31 March 2014,¹⁷ which appears to have formed the basis of the initial decision to effect the discharge. This correspondence elaborated in detail why the discharge should take place. Following the appointment of the current MEC, further correspondence was sent to her on 15 May 2016¹⁸ to give her background in respect of Ndweni's dispute.
- [37] As already stated elsewhere in this judgment, because of the implications of a discharge by operation of the law, the employee is entitled to be furnished with detailed reasons why his representations do not show good cause. If the above-mentioned correspondence addressed to the Head of the Department was the basis of the MEC's decision, and in addition to the internal memorandum addressed to the Labour Relations Office by Zwane on 25 March 2014,¹⁹ *prima facie*, she had justifiable reasons to conclude that Ndweni had not shown good cause.
- [38] The concern, however, is that the MEC nevertheless elected to dispose of the matter in scant terms which did not indicate on what basis a conclusion was reached that "*Ndweni's representation could not justify the unreasonableness of the duration of his absence and disruption of work*". Ndweni and NEHAWU were entitled to full reasons for that decision. It is acknowledged that Members of Executive Councils have busy schedules, and it would be unreasonable to expect of them to attend to appeals personally with specific particularity. This however was not necessary in this case, in that all the information as contained in the correspondence and memorandum referred to above was available to her. Thus, all she needed to do in giving her reasons, or at least, her delegates, was to refer to those documents to justify the decision, and if not, to at least to attach that correspondence to her decision.
- [39] Even more worrying in this case is that the deponent to the answering affidavit (Nomfundo Gratitude Sidzamba) the Department's Deputy Director of Legal

¹⁷ Page 40 of Respondent's Index to Record.

¹⁸ Page 109. Index to Record.

¹⁹ Page 1 of Respondents' Record.

Services made numerous references to the MEC as this application centred around her decision. Sadly however, no attempt was even made by the respondents to secure a confirmatory affidavit from the MEC to confirm any averments in respect of the justification for her decision. It was not sufficient for the Department to simply make allegations that the MEC had taken regard of this or other factor, when there is no confirmation from her in that regard. It therefore follows that there is no basis for a conclusion to be reached that the MEC had indeed applied her mind to the representations.

- [40] To the extent that it was argued that there was no evidence to suggest that the MEC had considered whether the conduct of Ndweni had rendered the employment relationship intolerable or not, it has since been clarified in *Impala Platinum Limited v Zirk Bernardus Jansen & Others*²⁰ that an employer can justify its decision to impose the sanction of dismissal in circumstances where no evidence on the breakdown of the trust relationship has been led. Thus, the nature of the employee's misconduct can on its own lead to a conclusion that the employment relationship was unsustainable.
- [41] In circumstances where a discharge took place by operation of the law, whether a continued employment relationship is sustainable or not can only be ascertained from a variety of factors including *inter alia*, whether an employee has shown good cause for the absence; the length of the absence outside of the 30 calendar day period; whether there was any attempt to comply with the employer's policies relating to leave of absence; and the impact of the absence on the employer's operations in the light of the employee's position and functions.
- [42] To the extent that this Court is not satisfied with the adequacy of the reasons given by the MEC for her decision, the next issue to be determined is whether based on that fact alone, can that decision be reviewed and set aside? In coming to a conclusion in this regard, the following is taken into account:
- a) The jurisdictional factors to invoke the provisions of section 17(3)(a)(i) of the PSA were present in this case in that Ndweni did not obtain

²⁰ Case No: (JA100/14).

permission to be absent from work, and that absence exceeded a period of thirty calendar days;

- b) Ndweni, had sought to rely on a copy of the medical certificate issued on 12 March 2014. The court has expressed its doubts about any weight to be attached to that certificate. Be that as it may, it was for the MEC to indicate on what basis she had rejected that copy, and she had not done so in her reasons for the decision;
- c) The MEC, despite all the material available to her from the department, had not at the time that she made her decision, furnished Ndweni with adequate reasons for her decision. If she had considered any material that was furnished to her regarding the discharge, there is nothing to suggest or confirm that she took that into account in coming to her conclusions and decision not to reinstate;
- d) There is nothing in the pleadings, that suggests that Ndweni's absence from work (as a Driver/Messenger) had any particular impact on the Department's operations. The suggestion by the MEC that the absence disrupted work is unsubstantiated, and one needs to understand in what manner the absence had caused disruption in the Department for a conclusion to be reached that the employment relationship is unsustainable.

[43] Having taken the above into account, I am of the view that the decision of the MEC ought to be reviewed and set aside. In terms of the provisions of section 17(3)(b) of the PSA, the MEC, even if not satisfied with the representations, had options available to her. Thus, she could have approved the reinstatement of Ndweni in his former or any other post or position, and/or deemed the period of his absence from official duty as absence on vacation leave without pay or leave, or reinstated on such other conditions as she could have determined.

[44] As it was correctly pointed out on behalf of Ndweni, the Court is placed in a position to either review, set aside or substitute the decision of the MEC in the light of the material before it, and I intend to do so.

[45] In considering the appropriate relief, other than the factors already alluded to, it is also taken into account that Ndweni did not approach the Court with clean hands. There was no justification for his absence and the only fatal blow to the respondents' case was that the MEC had not provided sufficient or adequate reasons for rejecting his representations in terms of the provisions of section 17(3)(b) of the PSA. In consideration of these factors, Ndweni is entitled to reinstatement but not without conditions, as he was clearly the author of the circumstances he found himself in.

[46] I have further had regard to the issue of costs, and in my view, particularly to the extent that the applicants were represented by a Union official, there is no basis in law or fairness to justify a cost order.

Order

[47] Accordingly, the following order is made:

- 1) The decision of the first respondent not to reinstate Andrew Ndweni following his discharge from service in accordance with the provisions of section 17(3)(a)(i) of the Public Service Act 103 of 1994 is reviewed, set aside, and substituted with an order that:

"Andrew Ndweni is to be reinstated in the second respondent's employ, and on the same terms and conditions as applicable to his position as at the date of his discharge."
- 2) The reinstatement order as above is without retrospective effect, and Andrew Ndweni is not entitled to any remuneration and/or benefits from the date of the discharge until 03 April 2017 when he shall be expected to report for duty.
- 3) There is no order as to costs.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances

For the Applicant: M Maraka (Union official) of NEHAWU

For the Respondents: Adv. T Motloenya

Heads of argument drafted by: Adv. L Stroom

Instructed by: The State Attorney, Johannesburg

LABOUR COURT