



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR325/14

In the matter between:

DIRK JOHANNES VAN WYK

Applicant

and

**THE ACTING SUPERINTENDENT GENERAL
DEPARTMENT OF EDUCATION, NORTH WEST**

First Respondent

**THE MEMBER OF EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF EDUCATION
AND TRAINING, NORTH WEST**

Second Respondent

MINISTER OF EDUCATION

Third Respondent

Heard: 28 February 2018

Delivered: 8 May 2018

Summary: Review application – section 14 of the Employment of Educators Act 76 of 1998 – the enforcement of the deemed discharge in terms of section 14(1)(a) three months after the employee's return to work and dismissal of the appeal for reinstatement in terms of section 14(2) are reviewable on grounds of arbitrariness and irrationality.

JUDGMENT

NKUTHA-NKONTWANA J

Introduction

- [1] The applicant (Mr Van Wyk) was employed as an educator by the Department of Education, North West Province (the Department) since 1 April 2004. His services were terminated on 11 September 2012 in accordance with section 14(1)(a) of the Employment of Educators Act (the Act)¹ which states that:

'An educator appointed in a permanent capacity who...is absent from work for a period of 14 consecutive days without permission of the employer shall be deemed to have been discharged from services on account of misconduct ...with effect from the day following immediately after the last day on which the educator was present at work.'

- [2] Mr Van Wyk appealed his deemed discharge from services in terms of section 14(2) of the Act which states that:

'If an educator who is deemed to have been discharged under paragraph (a) ...of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.'

- [3] The first respondent (Dr Molale) refused to reinstate Mr Van Wyk, stating that he failed to show good cause. In this application, Mr Van Wyk seeks an order reviewing and setting aside Dr Molale's decision not to reinstate him. The application is opposed by the first and second respondents.

¹ 76 of 1998 as amended.

Pertinent facts

- [4] Mr Van Wyk was placed on precautionary suspension on 6 September 2012 following allegations of sexual harassment. He was asked to report at the Matlosana Area Office in Alabama (the Matlosana Office), 13 km from the school where had been posted and resided. He challenged his suspension through a letter dated 10 September 2012 from his attorneys of record. The Department responded to his letter on 17 September 2012, dismissing Mr Van Wyk's request to have his suspension uplifted. He was, however, assured that he would still have access to his place of residence at the school hostel.
- [5] In the period in-between, Mr Van Wyk did report at Matlosana Office from 7 to 10 September 2012. Even though he did not meet his supervisor, Mr Mogotsi, he did report to Ms Senyane. On 10 September 2017, he requested a day off in order to seek legal advice and Ms Senyane gave him permission.
- [6] Thereafter, Mr Van Wyk did not return to Matlosana Office until 22 October 2012. He maintained that he had taken ill and was booked off sick between 11 September and 19 October 2012. Ms Senyane was informed accordingly, so he further claimed. However, the Department denied that it had been informed of Mr Van Wyk's whereabouts. In any event, Mr Van Wyk managed to produce the medical certificates accounting for most of the days he had been absent.
- [7] He continued to report at Matlosana Office until 26 October 2012. Ms Senyane informed Mr Van Wyk not to report for duty anymore. He refused to accept the instruction unless it was reduced into writing. On 29 October 2012, Mr Van Wyk reported at Matlosana Office and met Mr Mogotsi for the first time. Mr Mogotsi instructed him to leave the premises. He refused to leave without a written communication. After some time, he was presented with a letter from the Kenneth Kaunda District Office (the District Office) dated 29 October 2012 addressed to the Matlosana Office stating that:

'Mr Van Wyk was instructed to report at the Area Office, Matlosana, with effect from 6 September 2012, a document submitted to this office reflected that he has not reported for duty from 11 September 2012 and has since been absent without permission.

In terms of the provisions of section 14(1)(a) of the Employment of Educators Act, 1998 (Act 78 of 1998) as amended, the educator is deemed to have been discharged on the account of misconduct as he absented himself from work for a period exceeding 14(fourteen) consecutive days without permission.

Considering that he now has reported for duty, it is important that he be provided with the opportunity to submit reasons for his absence and why he did not inform the employer of his whereabouts in order to revise or approve a possible reinstatement as per section 14(2) of the above mentioned Act.

It is thus requested that he be informed not to report for duty until the investigation into events has been finalised and to forward a written representation on his absence. Your office will however be informed of the outcome accordingly.'

- [8] However, on 6 November 2012, responding to Mr Van Wyk's attorney's letter dated 30 October 2012, the District Office stated, *inter alia*, that:

'...the legitimate rights of the employee were never prejudiced in this matter as he was provided with opportunity to submit reasons for his absence. We are also suffice to say that the employer maintained to accommodate him with full payment in which none of his benefits were affected. His services are not yet terminated as the submitted medical certificates are currently scrutinised to establish whether his absence was justified. If justified the disciplinary enquiry will be imposed and pursued in terms of the prescribed procedures as contemplated in Chapter 5 of the Employment of Educators Act, 1998...'

- [9] On 14 January 2013, Dr Molale terminated Mr Van Wyk's services purporting to act in terms of section 14(1)(a) of the Act retrospective to 11 September 2012 and that all the payments that have been made to Mr Van Wyk between 11 September 2012 to 14 January 2013 would be deducted from his pension contributions.

[10] Mr Van Wyk lodged an appeal in terms of section 14(2) of the Act through correspondence from his attorneys' of record dated 12 and 14 February 2013. Dr Molale responded on 3 May 2013, declining his appeal. He gave the following reasons:

- '- Your client, Mr Van Wyk, failed to show good cause why he should be reinstated and only managed to account for a selected number of days during his absence;
- It is clear from all reports received from various offices, officials and directorate that your client was wilful in his actions when he decided to abscond for lengthy period;
- Your client, Mr Van Wyk, mainly relied on medical certificates, some of which he obtained *ex post facto* and which as a result does not constitute a good cause in terms of the Act.'

[11] In these proceedings, Mr Van Wyk's impugn is pegged on the following reasons, *inter alia*:

- 11.1. That the respondents did not act fairly, reasonably and justifiably in considering his representations, and/or
- 11.2. That the respondents did not afford him an opportunity to be heard in order to explain his absence before making a decision; and/or
- 11.3. The decision not to reinstate him was arbitrary and irrational.

Section 158(h) review

[12] This application is brought in terms of section 158(1)(h) of the Labour Relations Act² (the LRA) which empowers this Court to review any conduct by the State in its capacity as the employer on any grounds that are permissible in law. In *Hendricks v Overstrand Municipality and Another*,³ the

² Act 66 of 1995 as amended.

³ (2015) 36 ILJ 163 (LAC); See also *National Commissioner of the South African Police and Another v Nienaber N.O. and Another* [2017] ZALCCT 17; (2017) 38 ILJ 1859 (LC); [2017] 8 BLLR 840 (LC) at paras 6 and 8.

Labour Appeal Court, expounding the grounds of review 'permissible in law', had the following to say:

[29] In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'. The findings of the LAC and the SCA in that regard in *Ntshangase* are not inconsistent with the findings of the Constitutional Court in *Gcaba* or *Chirwa*, which are restricted to conclusions that unfair dismissals and unfair labour practices will normally not constitute administrative action on account of adequate alternative remedies existing under the LRA. Neither *Gcaba* nor *Chirwa* made any reference to *Ntshangase*, or, as I have said, s 158(1)(h) of the LRA. *Chirwa* was decided before *Ntshangase*, while *Gcaba* was handed down shortly after it. More recently, in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*, the Constitutional Court cited *Ntshangase* with approval, indicating implicitly that it saw no inconsistency in the approach followed in that case with its own earlier pronouncements.'

[13] In a recent judgment in a case of *Ramonetha v Department of Roads and Transport Limpopo and Another*,⁴ the Labour Appeal Court reaffirmed this Court's power to exercise oversight in the form of a review in terms of section 158(1)(h) on the ground of legality and the following observations are pertinent:

[21] It is now trite that inherent in our constitutional order is the principle of legality in terms of which by virtue of the rule of law public functionaries, in their exercise of public power, are required to act within the powers granted to them by law and arrive at decisions which are lawful, not arbitrary and are rationally related to the purpose for which the power was given. There can be little doubt that the

⁴ (JA104/2016) [2017] ZALAC 68 para 21.

MEC's decision is capable of review under s158(1)(h) on the grounds of legality.'

[14] In *Ramonetha*, the Labour Appeal Court dealt with section 17(3)(a)(i) of the Public Service Act⁵ (the PSA) which is similar to section 14(1)(a) of the Act. The Department had allowed Mr Ramonetha to resume duties after he had been absent for more than 30 days. The disciplinary enquiry on a charge of misconduct was instituted and it was found that Mr Ramonetha had been discharged from service by operation of law in terms of section 17(3)(a)(i) of the PSA. Mr Ramonetha was informed that he had been discharged from service 11 months after his return to work. The MEC dismissed his appeal and his review application in this Court was also unsuccessful. In the appeal, the Labour Appeal Court, per Savage JA, held that:

'[23] By its nature, an employment contract is an agreement in which an employee works for an employer in exchange for remuneration.⁶ In accepting the appellant's tender of performance and remunerating him for his services, the only conclusion to be drawn on the facts is that, on his return to work, the Department implicitly reinstated the appellant into his employment with it. This is so given that his deemed dismissal took effect by operation of law in terms of s17(3)(a)(i) on "the date immediately succeeding the employee's last day of attendance at his or her place of duty" and not on any later date determined by the employer. The appellant could no longer be deemed to have been dismissed after he had been reinstated.

[24] If reinstatement did not follow his deemed dismissal, it is difficult to understand on what basis the Department then accepted the appellant's tender of his services and compensated him for those services rendered. Furthermore, the fact that an investigation may have been contemplated to determine the reason for the appellant's absence from work, or that such investigation in due course was undertaken, does not alter the fact that the law prescribed the date on which the appellant's deemed dismissal took effect. Nor does it alter

⁵ 103 of 1994 as amended.

⁶ *Board of Executors Ltd v McCafferty* (1997) ILJ 949 (LAC); [1997] 7 BLLR 835 (LAC).

the fact that the appellant had been reinstated into his employment subsequent to such deemed dismissal having been effected.

[25] The Department was, following the appellant's reinstatement, not entitled thereafter to rely on his deemed dismissal, when no further period of unauthorised absence from work had arisen after the appellant's return to work. Given such reinstatement, it was not open to the Department under s17(3)(a)(i), to indicate, as it did in its letter of 21 May 2012, 11 months after the appellant's return to work, that his contract of employment had been terminated by operation of law.

[26] It follows that in relying on the appellant's deemed dismissal after he had been reinstated, the MEC acted unlawfully, irrationally and outside of the powers granted to him by law. This is so in that it was not legally permissible for the Department on 21 May 2012 to rely on a deemed dismissal, which by operation of law had taken effect on "the date immediately succeeding the employee's last day of attendance at his or her place of duty" and when the employment relationship between the parties had thereafter been restored. The failure of the MEC on 3 September 2012 to find this to be so in considering the appellant's representations in terms of s17(3)(b), was therefore unlawful, arbitrary and irrational and the Labour Court erred in failing on review to find so.' (Emphasis added).

[15] In the present case, likewise, Mr Van Wyk was absent from duty for about 30 days consecutively. He returned on 22 October 2012 and reported at Matlosana Office every day until 26 October 2012. He was informed not to report for duty because he had been discharged from service in terms of section 14(1)(a) of the Act. When challenged, the District Office summersaulted and informed Mr van Wyk that he had not been discharged hence he continued to receive his salary even though he had been stopped from reporting for duty. He was informed that his medical certificates were being scrutinised in order to establish whether his absence was justified and to consider charging him for misconduct in terms of Chapter 5 of the Act.

[16] The deemed discharge of Mr Van Wyk was communicated on 14 January 2013, four months after 11 September 2012, the date he was deemed to

have been discharged in terms of section 14(1)(a) of the Act, and three months after he had returned to work and continued receiving his salary. Evidently, the *ex post facto* enforcement of the deeming provision was inconsistent with the position that the District Office had communicated to Mr Van Wyk in its letter dated 6 November 2012 wherein the Department was categorical that his services had not been terminated.

- [17] In my view, the only inference to be drawn in the circumstances is that, by accepting Mr Van Wyk's tender of his services on 22 October 2012 and continuing to pay his salary until 14 January 2013, the Department implicitly reinstated him. Hence, it threatened to pursue a disciplinary route in terms of Chapter 5 of the Act.
- [18] In the circumstances, it was improper for Dr Molale to enforce the deemed discharge when Mr Van Wyk had already been reinstated and remained on the pay roll. That decision was obviously irrational and *ultra vires*.
- [19] For completeness sake, I proceed to deal with the impugned decision not to reinstate Mr Van Wyk. It is clear from the record that he was off sick and had submitted the medical certificates which account for the days he had been absent as part of his appeal representation to the Department. The Department did not convene a hearing but dealt with the appeal on the basis of written representation. However, Dr Molale took issue with the medical certificates, particularly the fact that some were backdated and could not cover the whole period of Mr Van Wyk's absence. As a result, he found that the applicant failed to show good cause as required in terms of section 14(2) of the Act.
- [20] In *De Villiers v Head of Department: Education, Western Cape Province*,⁷ this Court, per Van Niekerk J, defined the applicable test to arriving at a decision whether an employee failed to show good cause in section 14(2) of Act to 'ordinarily 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

⁷ [2009] ZALC 139; (2010) 31 ILJ 1377 (LC) at paras 29 and 30.

conduct, the employer should as a general rule approve the reinstatement of the employee'. The findings in *De Villiers* were endorsed by the Labour Appeal Court 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*,⁸ dealing with a similar provision, the following was said:

[36] In my view, these principles are applicable to the decisions taken by the appellant. Section 17 (3) (1) (i) of the Act legislatively immunizes an employer from an unfair dismissal referral where an employee fails to report for work for a continuous period of at least fourteen days. 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'. (para 30)

[37] Correctly in my view, Van Niekerk J held that a contrary finding would represent a breach of an employee's right to fair labour practices and the right to equality (since the respondent in this case is treated in a manner which grossly departs from the manner in which other employees in a similar position are treated). The requirements of legality as outlined prevent the employee from being helpless pursuant to an employer's arbitrary decision. In particular, given an employee's rights to fair labour practices, the decision must be tested for rationality as outlined.' (Emphasis added).

[21] In the present case, it is not disputed that Mr Van Wyk had been booked off sick. The medical certificates constitute, at least, a *prima facie* proof that he was not fit to report for duty. Mr Van Wyk contended that it was practice at his school that the medical certificates would be submitted upon return to

⁸ [2014] ZALAC 13; [2014] 7 BLLR 687 (LAC); (2014) 35 ILJ 2131 (LAC) at paras 36 and 37.

work. In the absence of any evidence to the contrary, Mr Van Wyk's failure to report for duty could not have been interpreted as wilful.

- [22] Another consideration that eloped Dr Molale is that Mr Van Wyk had taken ill whilst he was on precautionary suspension from his duties as a teacher but reporting at Matlosana Office. Nonetheless, he continued residing at the school hostel. In essence, the school and the learners were not affected by his absence. It is, therefore, inconceivable how his absence due to ill-health could have rendered the continued employment intolerable.
- [23] Clearly, Dr Molale's decision was irrational as he failed to take into account the relevant facts and, as such, based his decision on irrelevant considerations.⁹

Conclusion

- [24] In all the circumstances, it is definite that Dr Molale acted irrationally and arbitrarily. It follows that the decision to enforce the deemed discharge in terms of section 14(1)(a) and the decision not to reinstate Mr Van Wyk in accordance with section 14(2) stand to be reviewed set aside for offending the principle of legality.
- [25] In view of the conclusion I have reached above, the only issue that is lingering is the relief. Mr Van Wyk requested that he be reinstated retrospectively without loss of benefits. There is no evidence on record as to why his requested should not be acceded to. Though he had been on suspension on allegation of misconduct, he had not been charged at the time of his deemed discharge. In my view, the *status quo ante* should be restored, which means that Mr Van Wyk would still be on precautionary suspension and reporting at Matlosana Office as a condition of his suspension.

⁹ See *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 39 where the Constitutional Court held that:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole'.

[26] However, when it comes to back payment, I have taken into consideration the manifest delay in prosecuting this matter. It is heard almost six years after the deemed discharge of Mr Van Wyk. Before approaching this Court, Mr Van Wyk had approached the Education Labour Relations Council (the ELRC). On 4 November 2013, the ELRC ruled that it had no jurisdiction to deal with the matter. On 2 September 2016, Van Niekerk J dismissed the matter due to non-appearance by Mr Van Wyk. He subsequently launched a rescission application which was granted by Prinsloo J on 26 May 2017. In my view, the Department should not be burdened with the delay that had been occasioned at the instance of Mr Van Wyk. It would, therefore, be fair to both parties that the back payment be limited to 24 months.

[27] Lastly, on the issue of costs, as per the recent Constitutional Court judgment in *Zungu v Premier of the Province of KwaZulu-Natal and Others*,¹⁰ the rule of practice that costs follow the result does not apply in matters before this Court as orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. In the present case, however, it is clear that the first and second respondents acted frivolously in opposing this application. Mr Van Wyk, an individual litigant, was forced to employ the services of his attorneys of record in order withstand the full might of the first and second respondents' opposition when they ought to have been better advised on the prospects of not succeeding given the circumstances on this case.

[28] In the premises, I make the following order

Order

1. The decisions by the first respondent to, firstly, enforce the applicant's deemed discharge in terms of section 14(1)(a) and, secondly, to dismiss the applicant's appeal in terms of section 14(2) of the Employment of Educators Act, 76 of 1998, are reviewed and set aside.

¹⁰ [2018] ZACC 1 at para 24 to 26.

2. The applicant is reinstated in the employ of the Department of Education, North West Province on the same terms and conditions as those which governed his employment immediately prior to his deemed discharge in terms of section 14(1)(a) of the Act with back payment equivalent to 24 months' salary.
3. The first and second respondents to pay the applicant's costs, excluding the costs of the rescission application.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate JC Marneweck

Instructed by

Pieter Strydom Attorneys

For the respondents:

Advocate MC Moagi

Instructed by

J Nkomo Attorneys