



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case number: J1851/2016

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH

AFRICA obo SHADRACK MOHLALA

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

GOVERNMENT PRINTING WORKS

Second Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Third Respondent

TIYANI MAKHUBELE N.O

Fourth Respondent

Heard: 22 August 2018

Delivered: 06 September 2018

Summary: Application to declare that the Applicant's dismissal dispute referred to the GPSSBC remains valid and that the dispute be set down for arbitration. Section 17 of the Public Service Act discharge.

JUDGMENT

Introduction:

[1] The Applicant acting on behalf of Mr Mohlala filed an application wherein relief was sought to the effect that Mr Mohlala is not deemed to be dismissed as contemplated by the provisions of section 17(3)(a) of the Public Service Act¹ (PSA), with alternative prayers for relief. In argument, Mr Pretorius acting on behalf of the Applicant abandoned all the relief sought but for the prayer that Mr Mohlala's unfair dismissal dispute that had been referred to the Third Respondent (GPSSBC) is valid and extant and that it be set down for arbitration.

[2] The application is opposed by the Second Respondent (the employer).

Background facts:

[3] The employer appointed Mr Mohlala in 2010 as a printer's assistant. On his own version he became addicted to drugs and prior to February 2014, he abused drugs on a daily basis.

[4] It is evident from an attendance register that Mr Mohlala's mother visited the employer's premises on 21 January 2014. His version is that his mother approached the employer's management and more specifically Mr Ntimba, proposing that she would enrol Mr Mohlala for rehabilitation at her own cost and she was told that she could take him for rehabilitation, but that he would not be paid his salary during the period of his absence. On 22 January 2014 Mr Mohlala was called to the office of Mr Monjane, where Mr Ntimba was present and they told him that they discussed the issue with his mother and agreed that he should go to a rehabilitation centre. Mr Mohlala was advised not to report for duty as from 1 February 2014 until 1 May 2014 and that his absence would be regarded as a three months' suspension without pay, pending his rehabilitation.

[5] This version is disputed by Mr Ntimba. He does not dispute that Mr Mohlala's mother visited the employer's premises on 21 January 2014, but denies that she had a meeting with him on the said date. Mr Ntimba further disputes that he was present when Mr Monjane may have called Mr Mohlala on 22 January 2014.

[6] It is common cause that Mr Mohlala's mother visited Mr Ntimba on 17 February 2014 and that she advised him that Mr Mohlala was enrolled for

¹ Act 103 of 1994.

rehabilitation and that she presented Mr Ntimba with a letter from the 'Church of Christ Assemblies' dated 1 February 2014. The said letter indicated that Mr Mohlala was admitted on 1 February 2014 due to problems with heroin and that he could not be released to go back to work before 1 May 2014. Mr Ntimba's version is that he told Mr Mohlala's mother that he has to apply for special leave in terms of the special leave policy.

- [7] Mr Mohlala's version is that he was forcefully taken for rehabilitation by members of the 'Church of Christ Assemblies' who took him to an undisclosed location where he was chained to the floor and left in a locked room so that he was unable to maintain his addiction. Mr Mohlala submitted that he was detained against his will and had no prospect to escape.
- [8] Mr Mohlala was released from rehabilitation on 1 May 2014 and he was unable to report for duty on Friday 2 May 2014 as he had no money or means to travel from Polokwane to Pretoria and his mother was only able to make arrangements for him to be collected in Polokwane on 5 May 2014.
- [9] Mr Mohlala reported for duty on 6 May 2014 when he was informed that his services were terminated in terms of the provisions of section 17(3) of the PSA and that he could make representations to Mr Rossouw, the then Acting General Manager: Human Resources. Mr Mohlala made oral representations to Mr Rossouw, who subsequently issued a written outcome. In the outcome Mr Rossouw stated that the employer has listened to the reasons for Mr Mohlala's unauthorised absence but the employer was not convinced that the reasons are genuine and that it was not the first time Mr Mohlala conducted himself in this manner. The employer decided to endorse the termination of Mr Mohlala's services in terms of section 17(3)(a)(i) of the PSA.
- [10] On 4 June 2014, the Applicant referred an unfair dismissal dispute to the GPSSBC.
- [11] On 23 September 2014 the Fourth Respondent (Mr Makhubele) issued a letter regarding the Applicant's referral. Mr Makhubele is the GPSSBC's 'Administrator: Resident Panellist Unit'. He is not a duly appointed conciliating or arbitrating commissioner, appointed to adjudicate and determine the Applicant's referred unfair dismissal dispute. In his capacity as the administrator, Mr Makhubele issued the aforesaid letter and indicated that the

Applicant's referral form had been screened and found not to be properly referred, that the GPSSBC will be unable to process the application and that the case will be closed. This was done as there was a deemed dismissal in terms of section 17 of the PSA, wherefore the GPSSBC lacks jurisdiction to hear the matter.

- [12] The Applicant's unfair dismissal dispute was never set down for conciliation or arbitration. Mr Makhubele merely closed the file.
- [13] On 11 May 2015, the Applicant's attorneys of record submitted a written application for reinstatement and representations, as provided for in section 17(3)(b) of the PSA to the First Respondent (the Minister). The submission was followed up with a number of letters to the Minister requesting an outcome to the application for reinstatement and to date the Minister has not provided an answer or an outcome.

The relief

- [14] The Applicant seeks an order to declare that Mr Mohlala's unfair dismissal dispute that had been referred to the GPSSBC is valid and extant and that it be set down for arbitration.
- [15] In my view the relief sought is premised on two grounds. Firstly, that Mr Makhubele had no authority to close the file and to decide that the GPSSBC had no jurisdiction. The result of doing so is that the dispute was not further processed.
- [16] Secondly, the question whether Mr Mohlala was dismissed or deemed to be discharged is a factual dispute which is to be determined at arbitration.

Mr Makhubele's authority to close the file

- [17] In respect of the Applicant's case that Mr Makhubele had no authority to close the file and effectively decided not to process the matter further, the employer raised a point *in limine*. This is that the application filed by the Applicant is an irregular step in that the Applicant should have filed a review application because Mr Makhubele's decision constituted a ruling, when he executed his duties as a panellist and the determination to close the file, is a ruling that should have been taken on review.
- [18] There is no merit in the point *in limine*.

- [19] Mr Makhubele wrote a letter in his capacity as administrator and the letter he wrote merely communicated his decision to close the file after he screened the referral. This letter is no more than a clerical decision and cannot and does not constitute a ruling, as contemplated in the Labour Relations Act² (LRA). Mr Makhubele was not appointed as commissioner to conciliate and arbitrate the dispute and no decision he took, could be a ruling or arbitration award that could be subject to review in terms of the provisions of section 145 or 158 of the LRA.
- [20] Furthermore, it is not open for the administrator to decide on whether the GPSSBC has or does not have jurisdiction when the dispute relates to a deemed discharge in terms of section 17 (3) of the PSA. The administrator is not entitled to make such a decision outside the prescribed dispute resolution process.
- [21] Section 191 of the LRA provides that a dispute about the fairness of a dismissal may be referred to the bargaining council and once referred, the bargaining council must attempt to resolve it through conciliation and if that fails, the dispute must be arbitrated. In the process, parties are free to raise jurisdictional issues, which must be considered and decided by the presiding commissioner.
- [22] It is not open to the administrator to decide the issue of jurisdiction and to close the file for that reason, without setting it down for conciliation in the ordinary course.
- [23] Mr Makhubele's decision to 'close the file' has no legal effect, wherefore it follows that the dispute referred to the GPSSBC is still a live and extant dispute.

Section 17(3) of the Public Service Act

- [24] The Applicant seeks an order that the GPSSBC be directed to set down the dispute for arbitration in the ordinary course because the question whether Mr Mohlala was dismissed or deemed to be discharged is a factual dispute which is to be determined at arbitration.
- [25] The employer's case is that in circumstances where Mr Mohlala's services were terminated in terms of section 17(3) of the PSA, there is no basis upon

² Act 66 of 1996 as amended.

which the referral to the GPSSBC can remain valid and extant. Effectively, once section 17 of the PSA is raised as reason for termination, that should be the end of the matter as the bargaining council has no jurisdiction to determine an *ex lege* termination where no dismissal occurred.

- [26] For purposes of this application, section 17(3)(a) of the PSA is relevant and it provides as follows:

'(3)(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 a date immediately succeeding his or her last day of attendance at his or her place of duty'

- [27] A discharge in terms of the provisions of section 17(3)(a)(i) of the PSA constitutes a termination of employment by operation of law and therefore no dismissal exists that could be challenged on the basis of unfairness.

- [28] Before the provisions of section 17(3)(a)(i) of the PSA could be relied upon, an employee must be absent for a period exceeding one calendar month and the employer has to show that the employee was absent without permission and once it is shown, section 17(3)(a)(i) of the PSA operates without any act on the part of the employer. The question as to whether the requirements of section 17(3)(a)(i) of the PSA have been met or not, is a factual enquiry.

- [29] Whether the GPSSBC has jurisdiction or not, is a factual question in the form of a conditional syllogism, "if X, then Y", where X is the condition and Y the consequent. If the condition is present, the consequent must necessarily also be present. In a section 17(3) discharge, the condition is that all the requirements of section 17(3) must be met, and if this condition exists, the consequence is that the GPSSBC would not have jurisdiction to adjudicate the dispute.

- [30] Whether or not there was a dismissal as contemplated by section 186 of the LRA or whether there was a deemed dismissal in terms of the provisions of section 17(3) of the PSA, is the first issue to be determined.

- [31] In *casu* it is clear from the facts placed before me that there is a dispute as to whether Mr Mohlala had permission to be absent or not and this is an issue that has to be considered and decided to determine whether the jurisdictional pre-conditions have been met for the operation of section 17(3)(i)(a) of the PSA.
- [32] If the requirements of section 17(3)(a)(i) have been met, the bargaining council has no jurisdiction to hear the dispute. If the requirements have not been met, the discharge will not be *ex lege* and the fairness of the dismissal should be considered.
- [33] Mr Kirstein for the employer submitted that the Applicant is not entitled to the relief it seeks because of the delay in bringing this application. Although there is no prescribed period within which an application such as the present application has to be filed, the application had to be filed within a reasonable time and the Applicant did not bring this application within a reasonable time.
- [34] There is indeed a lengthy delay from the period Mr Makhubele issued his letter in September 2014 and the filing of this application in August 2016. Mr Pretorius for the Applicant submitted that the Applicant made representations to the Minister in terms of the provisions of section 17(3)(b) of the PSA and till today the Minister has made no effort to consider those submissions and to take a decision in terms of the said section.
- [35] The stance adopted by the employer in this application is that it was not required of the Minister to attend to the Applicant's written representations as the issue had been dealt with by the Chief Executive Officer, who was authorized to discharge employees in terms of section 17(3) of the PSA. The delegations attached to the employer's answering affidavit and upon which the employer placed reliance for the stance it adopted, show that the only delegation to discharge an employee is in terms of section 17(1) of the PSA and that there is no delegation in terms of section 17(3) of the PSA.
- [36] Be that as it may, the representations made by the Applicant to the Minister remained unanswered.
- [37] Although the delay is significant, I am mindful of the fact that there is no prescribed time period and the fact that steps were taken to approach the Minister. A significant delay always raises issues of prejudice and *in casu* I

have to strike a balance between the interests and prejudice of the employer and Mr Mohlala. I am inclined to grant the relief sought by the Applicant, notwithstanding the delay, because the LRA affords an employee the right to have his or her dispute determined via the dispute resolution procedures and this right should not be taken away lightly. In my view the interests of both parties will be best served if the matter is to be properly ventilated and decided upon in an arbitration process.

[38] This Court has a wide discretion in respect of costs. Neither of the parties sought a cost order and this is indeed a matter where the interests of justice and fairness will be best served by making no order as to costs.

[39] In the premises, I make the following order:

Order

1. The Applicant's unfair dismissal dispute referred to the Third Respondent on 4 June 2015 is declared to be extant;
2. The Third Respondent is directed to set the dispute down for arbitration;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Pretorius of Macgregor Erasmus Attorneys

For the Second Respondent: Advocate P Kirstein

Instructed by: VDT Attorneys Inc