

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1698 / 18

In the matter between:

CHRISTINA KEDIBONE MOKOTSANE

Applicant

and

NORTH WEST MEC FOR HEALTH

First Respondent

PROVINCIAL DEPARTMENT OF HEALTH

NORTH WEST PROVINCE

Second Respondent

Heard: 16 July 2019

Delivered: 15 October 2019

JUDGMENT

SAUNDERS, AJ

Introduction

[1] In this matter, the applicant brought an application in terms of section 158(1)(h) of the Labour Relations Act¹ (the LRA) to review and set aside an

¹ Act 66 of 1995.

appeal outcome handed down by the first respondent, in terms of which the applicant's appeal representations for reinstatement following a purported deemed termination of employment for desertion, were refused. The applicant seeks consequential relief to the effect that she be reinstated with retrospective effect to the date of her deemed discharge.

- [2] The appeal outcome sought to be challenged by the applicant was handed down on 2 August 2018 and received on 16 August 2018. The applicant's review application was brought on 28 September 2018.
- [3] Despite an apparent opposition by the first and second respondents at the hearing of the matter, much of the factual matrix was admitted, which factual matrix shall be set out below.

The relevant background

- [4] The applicant was employed by the second respondent prior to her deemed dismissal. The applicant, with two other employees, was placed on precautionary suspension for suspected theft on 8 July 2015, pending the outcome of an investigation. A criminal case was opened, which the Director of Public Prosecutions declined to prosecute and thereafter the respondents uplifted the suspension of the applicant's two colleagues on or about 22 October 2015. The applicant's suspension was not uplifted.
- [5] On 22 October 2015, the same day on which the applicant's colleagues' suspensions were uplifted, the applicant received a letter dated 2 September 2015 notifying her that her employment had been terminated on the basis that she had been absent from work as from 27 July 2015. This letter referenced section 17(3)(a)(i) of the Public Service Act² which letter stated:

"An officer who absents himself/herself from his official duties without permission of his/her head of department, office or institution for a period exceeding one (1) calendar month, shall be deemed to have been discharged from the public service on an account of misconduct with effect from the date immediately succeeding his/her last day of attendance at his/her place of duty."

² Act 30 of 1994.

[6] Upon intervention by the applicant's union who undertook to investigate the matter and according to the respondents, a letter was given to the applicant uplifting her suspension and when she failed to report for work, her employment was terminated. The applicant's version is that she did not receive this letter. The applicant continued to engage with the respondents over the course of many months, and ultimately instructed her attorney to correspond with the respondents requesting her reinstatement on the basis of good cause shown.

[7] This reinstatement request was declined on 2 August 2018 and communicated to the applicant on 16 August 2018. It is this decision which the applicant seeks to review and set aside. The reason given for this refusal was:

"because you did not show any good cause for not reporting for duty for the period in question."

[8] In the opposing papers filed by the respondents, the untenable proposal put forward was that the applicant was invited to make representations regarding her suspension and in the absence of these representations, she would not be placed on suspension. On the basis that no representations were made, the respondents aver that no suspension took place and therefore the applicant was ultimately deemed to be dismissed by operation of law. This is in complete contradiction to the suspension letters given to the individuals, including the applicant, and counsel for the respondents did not persist with this in argument.

[9] The applicant, via her legal representatives, tendered her services and made representations regarding her belief that she was on suspension. She persisted in her view that she had been placed on suspension which should have been uplifted at the same time the suspension of her colleagues was uplifted.

Applicable legal principles

[10] The decision to reinstate an employee in terms of the "deemed dismissal" provisions are legislated public powers and as such, parties to a dispute cannot exercise the traditional mechanisms as set out in the LRA. This was

specifically recognized in *Ramonetha v Department of Roads and Transport, Limpopo and Another*³ where the Court said:

“The current matter is concerned with the exercise of a power in terms of s17(3)(b), which neither has its source in the contract of employment, nor falls within the ambit of either the LRA’s unfair dismissal or unfair labour practice jurisdiction. As such, the decision whether to approve the reinstatement of an employee on good cause shown, while a decision taken by the state as employer, involves the exercise of a legislated public power by a public functionary.”

[11] In the founding affidavit, the applicant state that the decision not to reinstate the applicant was premised on the failure to show good cause but that this is not rationally connected to the submissions because the applicant did not report for duty due to her suspension. She was always available to return to work but did not do so as her suspension was never uplifted.

[12] Furthermore, the applicant argued that the decision-making body did not apply its mind to the submissions. There was no basis to claim that the decision to fail to reinstate was either “reasonable” or “lawful” and does not meet the test set out in the matter of *De Villiers v Head of Department: Education, Western Cape Province* ⁴ more specifically at paragraph [27] wherein Van Niekerk J found:

“...More recently, in *Ntshangase v MEC for Finance, KwaZulu-Natal & another* (2009) 30 ILJ 2653 (SCA); [2009] 12 BLLR 1170 (SCA), a case dealing with a decision taken by a person appointed to chair a disciplinary enquiry into allegations of misconduct by a public sector employee, the SCA held:

'Undoubtedly this section [s 158(1)(h)] provides in explicit terms that a decision taken by Dorkin who acted qua his employer can be reviewed on such grounds as are permissible in law. The ground relied on by the second respondent for the review of Dorkin's decision is rationality, which is one of the recognized grounds of review. I am therefore of the view that Dorkin's decision can be taken on review under s 158(1)(h) of the LRA.'

³ (2018) 39 ILJ 384 (LAC) at para 19. See also *MEC for the Department of Health, Western Cape v Weder*; *MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 2131 (LAC) at paras 33 and 36 – 37.

⁴ (2010) 31 ILJ 1377 (LC).

Even if the decision not to reinstate applicant did not constitute administrative action, this court retains review jurisdiction on the ground of legality (at least), which incorporates most, if not all, of the grounds of review relied upon by applicant in his founding affidavit. These would certainly require that functionaries exercise public power in a manner that is not irrational or arbitrary, and that they be accountable for the manner in which that power is exercised.”

[13] In sum, the applicant’s review application in this case is indeed competent under section 158(1)(h) of the LRA, and should be considered by this Court. As this application is founded on the principle of legality, it must be evaluated based on the principles as summarized above.

[14] The substance of the applicant’s appeal grounds is simply an explanation as to how and when she became aware of the purported dismissal and her investigations surrounding this. The respondents reply simply stated that no good cause was shown by the applicant. It took the matter no further. The decision of the respondents was clearly irrational and unreasonable and stands to be set aside.

Conclusion

[15] For all the reasons set out above and considered in argument by counsel, I am of the view that the applicant has made out a case for the relief that she seeks.

[16] This then only leaves the issue of costs. In terms of the provisions of section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. The respondents did oppose the matter but, to all intents and purposes, abandoned a true opposition in court at the hearing. I am mindful of the following dictum, to which I was referred to, in *Zungu v Premier of the Province of KwaZulu-Natal and Others*⁵ where the Constitutional Court said:

‘... The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party’s costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. ...

⁵ (2018) 39 ILJ 523 (CC) at paras 23 – 24.

The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

‘The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.’

[17] In striking a fair balance in this instance, it is my view that the respondents should bear the costs of this application. The deemed dismissal provision in the public service is a rather draconian provision, which the respondents exercised for no rational reason connected to the facts at hand. There was no need for the matter to be opposed when it was essentially abandoned in argument. I do not intend to further prejudice the applicant by making her bear her own costs. The appropriate order where it comes to costs is to make an order that the respondent pay the costs.

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

Order

1. The decision of the first respondent is reviewed and set aside;
 2. The second respondent is ordered to reinstate the applicant retrospectively on the same terms and conditions of employment as previously enjoyed;
 3. The respondents to pay the applicant’s costs jointly and severally.
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S Saunders

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate CP Naude

Instructed by: Isaac Teke Mothibe Attorneys

For the Respondents: Advocate T Moneri

Instructed by: The State Attorney

LABOUR COURT