



THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA17/2024

In the matter between:

MASABATA BONAKELE

Appellant

and

DEPARTMENT OF HEALTH

First Respondent

Heard: 14 May 2025

Delivered: 04 June 2025

Coram: Savage JA, Waglay and Musi AJJA

Summary: Deemed dismissal under section 17(3)(a)(i) of Public Service Act, 1994 – whereabouts of appellant known – employee effectively suspended from duty when barred entry to the workplace – notice of deemed discharge from duty set aside – back pay capped at 12 months compensation

JUDGMENT

SAVAGE JA

Introduction

[1] This appeal, with the leave of the Labour Court, concerns section 17(3)(a)(i) of the Public Service Act,¹ (the PSA) which 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.’

[2] This section allows for the deemed discharge of an employee, by operation of law and without prior notice or hearing, where the employee has been absent from work without permission for longer than one calendar month.²

[3] The appellant, Ms Masabata Bonakele, was employed as a professional nurse by the respondent, the Department of Health, at the Christiana District Hospital in the North West province (the hospital). She was absent without permission from 5 January 2023 for more than one month and on 10 March 2023 was deemed to have been dismissed from the public service under section 17(3)(i).

[4] Aggrieved with her deemed dismissal, the appellant sought a declaratory order in the Labour Court that she did not absent herself from her official duties without permission and that she remained employed on no less favourable terms and conditions in the same or similar position she occupied prior to her dismissal. She sought that the respondent be ordered to compensate her retrospectively from the date of her dismissal. The Labour Court dismissed her application for declaratory and consequential relief, with no order as to costs.

Relevant background

¹ Act 103 of 1994.

² See *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 1.

[5] During October 2022 the appellant complained of threats, harassment and workplace victimisation to the Member of the Executive Council (MEC) for Health in the North West. Prior to this the respondent's Chief Director in the North West had visited the hospital on 30 September 2022 after a number of threats were made against the Acting Head of the hospital, Dr Masala. The appellant and two other union officials refused to meet with Dr Masala and on 1 October 2022 the appellant's reporting lines were changed to require her to report to the Acting Chief Executive Officer (CEO) of the hospital, Mr Moalusi, who also served as her Head of Department (HOD). After Dr Masala found a threatening pamphlet attached to his door, on 21 November 2022 he obtained an interim protection order against the appellant and the two other union officials. That interim order was ultimately not made final. The appellant denied responsibility for the pamphlet. The same day the appellant claimed to have been booked off sick until 1 December 2022 for depression although she produced no medical certificate to support this.

[6] The appellant did not return to work on 1 December 2022 and, after she was instructed by the CEO to return, she reported for duty in early December 2022. She explained that her absence had been related to depression and anxiety and on 20 December 2022 the CEO referred her to the respondent's health and welfare department for assistance.

[7] From 5 January 2023 the appellant was again absent from work without permission. The respondent asked her to attend a meeting at the workplace on 16 January 2023. The meeting did not proceed as the appellant and her two co-employees insisted that a Labour Relations Officer attend the meeting. The appellant continued not to report for duty. On 6 February 2023, the CEO wrote to her, indicating that she had been absent without leave from 5 January 2023 and instructing her to report for duty. He informed her that her failure to report for duty for 30 consecutive days would constitute abscondment.

[8] On 10 February 2023 a second letter was sent to the appellant in which she was given a final instruction to report for duty given her continued absence without leave. She was informed in the letter that her failure to report for duty for 30

consecutive days constituted abscondment and that *“the necessary steps will be taken to obtain approval from the Head of Department to terminate your services.”*

The letter also recorded that the appellant’s request for special leave had not been recommended because the existence of a protection order did not prevent her from coming to work. The appellant failed to report for duty, nor did she reply to the letter.

[9] The appellant and her two co-employees were requested by the CEO to attend a meeting at the workplace on 14 February 2023. At this meeting the appellant refused to discuss a proposal that she and her colleagues be transferred. They left the meeting chanting and refused to engage with the respondent in a collegial manner. The CEO thereafter informed the security manager that the appellant was prohibited from entering the hospital. On 14 February 2023 the respondent’s Chief Director in the North West sent notice to the National Public Service Workers Union: North West of the respondent’s intention to take disciplinary action against its office bearers, being the appellant and her two co-employees. On 20 February 2023 the HOD informed the appellant that a request to terminate her services had been submitted to the respondent’s provincial department on the basis that she had been absent from work from 5 January 2023.

[10] On 10 March 2023 the Chief Director informed the appellant that her services had been terminated in terms of section 17(3)(a)(i). The appellant appealed against her deemed dismissal to the MEC on 22 March 2023 seeking that she be reinstated. No response to the appeal was received and the appellant was not reinstated.

Judgment of the Labour Court

[11] The Labour Court found that the appellant had not reported for duty after 5 January 2023 and had not performed her duties from that date until 14 February 2023 when she was effectively suspended. She was therefore found to have been absent from work without permission for more than a calendar month.

[12] The Court took the view that the decisions in *MEC, Department of Education, Western Cape Government v Jethro and another NNO*³ and *National Education, Health and Allied Workers' Union obo Ngomane v Department of Employment and Labour and others*⁴ were distinguishable in that both concerned applications to review the decision of a state department not to reinstate an applicant who had applied for reinstatement under section 17(3)(b).⁵

[13] The Court had regard to the decision in *Gangaram v Member of the Executive Council for the Department of Health, KwaZulu-Natal and another*⁶ (*Gangaram*) in which it was found that the employee, having regard to the facts, was entitled to accept that her absence was with leave of the employer.⁷ In that matter, the deeming provision was found to have been applied as an afterthought and there was no need for her to make representations in terms of section 17(3)(b) to seek her reinstatement.

[14] The Labour Court distinguished the appellant's matter from *Gangaram* on the basis that the facts showed that she was absent from work without permission from 5 January onwards until 14 February 2023, when she was effectively suspended and that she had not produced a medical certificate in terms of which she was booked off for ill-health.

[15] The Court, applying the rules applicable to motion proceedings, accepted the respondent's version that the appellant and her two colleagues were engaged in a concerted campaign against Dr Masala, and that the deterioration in the relationship

³ (2019) 40 ILJ 2318 (LAC).

⁴ [2023] 9 BLLR 964 (LC).

⁵ Section 17(3)(b) states:

'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.'

⁶ [2017] 11 BLLR 1082 (LAC).

⁷ *Gangaram* (Ibid) at para 29.

originated with them. Since the appellant's absence from work was without permission and was not due to reasons beyond her control, nor was there an objective basis for her to believe that she was not required to report for work and perform her duties, the application for declaratory and consequential relief was refused.

Discussion

[16] The appellant appeals against the Labour Court's refusal to declare that she remained employed by the respondent on the basis that although she was absent without permission, the respondent was aware of her whereabouts and the reasons for her absence. There is no dispute that the appellant attended two meetings at her workplace, on 16 January 2023 and 14 February 2023, at the request of the respondent. Following the second meeting she was barred entry to the workplace which led the Labour Court to find that she had effectively been suspended by the respondent from work. On 10 February 2023 the appellant was given a final instruction in writing to return to work and warned that she faced being deemed to have been dismissed under section 17(3)(a)(i). However, following this notice, and immediately after the second meeting on 14 February 2023, the respondent elected to bar the appellant entry to the workplace and to give notice to her union of impending disciplinary action to be taken against her.

[17] The Labour Court was correct in finding that by so doing the respondent effectively suspended the appellant from duty; and by the time she was given notice of the termination of her services in terms of section 17(3)(a)(i) on 10 March 2023, she had already been effectively suspended from work for almost a month. It followed that the respondent had on 14 February 2023 already taken a decision not to invoke the provisions of section 17(3)(a)(i) but to discipline her for misconduct. It was therefore not open to it after 14 February 2023 to change course and revert to its earlier expressed intent.

[18] Although a deemed dismissal in terms of section 17(3)(a)(i) is one by operation of law, it is not simply brought into effect after the expiry of the 30-day period. The facts must support the provision being brought into operation against an

employee and the conduct of the employer must illustrate a clear intent to rely on such provision.

[19] There can be no doubt that in the facts of this matter that, as was the case in *Gangaram*,⁸ section 17(3)(a)(i) was not a course of action available to the respondent. This was so given that the respondent was aware of the appellant's whereabouts, the reasons for it and the respondent had elected not to invoke the provision when it effectively suspended the appellant from duty on 14 February 2023 and indicated its intent to proceed with disciplinary action against her. The facts show that after giving notice that it intended to pursue such disciplinary action, section 17(3)(i) was invoked by the respondent as an afterthought.

[20] Declaratory relief may be granted where a person has an "*existing, future or contingent right or obligation*" and the Court decides that the case is a proper one for the exercise of the discretion conferred on it to grant such relief.⁹ On appeal a court will interfere with the exercise of such a discretion on grounds of misdirection or irregularity by the court *a quo*. In the absence of either, an appeal court will ordinarily not be entitled to substitute its discretion for that of the court *a quo*.¹⁰

[21] For the reasons stated the appellant holds a right to an order setting aside the notice of deemed dismissal given to her by the respondent on 10 March 2023 and an order declaring that she remains an employee of the respondent. In finding differently the Labour Court committed a material misdirection and this Court is therefore entitled to substitute its discretion for that of the Labour Court.

[22] As to the consequential relief sought by the appellant, there is no dispute that the appellant refused to report for duty, refused to accept a transfer and elected not to lodge a grievance against the transfer proposed. Her conduct, despite her

⁸ Id fn 6.

⁹ *Durban City Council v Association of Building Societies* 1942 AD 27 at 32; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and another* 1995 (4) SA 1 (A) at 14F; *Cordiant Trading CC v Daimler Chrysler Financial Services (debis) (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA) at para 16.

¹⁰ See *Reinecke v Incorporated General Insurance* [1974] 2 All SA 80 (A); 1974 (2) SA 84 (A).

employment as a professional nurse, was far short of what was reasonably expected of her, more so given the undisputed and pressing need for her services. Given such conduct, in the exercise of this Court's discretion on the appropriate remedy to be ordered on appeal, we consider it appropriate that an order be granted in respect of consequential relief that the respondent pay to the appellant compensation in the form of back pay capped at twelve (12) months' salary.

[23] Having regard to considerations of law and fairness, we find no reason to grant an order as to costs in the matter.

[24] The following order is therefore made:

Order

1. The appeal succeeds with no order as to costs.
2. The orders of the Labour Court are set aside and substituted as follows:
 - '1. The notice of dismissal given to the applicant by the respondent on 10 March 2023 is set aside with the result that the deemed dismissal of the applicant in terms of section 17(3)(1) of the Public Service Act, 1994 is declared to be of no force and effect;
 - 2 The applicant continues to be employed by the respondent, in the same or similar position occupied by her immediately prior to her dismissal on 10 March 2023.
 3. The respondent is to pay the applicant compensation in the form of back pay capped at 12 months' salary within ten (10) days of this order.
 4. There is no order of costs.'
 3. The appellant is to report for duty within ten (10) days of the date of this order.

Savage JA

Musi and Waglay AJJA agree.

APPEARANCES:

FOR THE APPELLANT:

T du Preez

Instructed by Symington & de Kok Inc.

FOR THE RESPONDENTS: G Zonke

Instructed by the State Attorney, Mafikeng

LABOUR APPEAL COURT