



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D533/2023

Not Reportable

In the matter between:

SIBUSISO JEROME ZIKHALI

Applicant

and

MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

First Respondent

THE KWAZULU-NATAL REGIONAL HEAD:
JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Second Respondent

Heard: 13 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 14h00 on 28 July 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant applied for orders in the following terms,

'Part A

1. *The decision of the first and / or second respondent of 11 August 2021 that the applicant is deemed to have been discharged from duty by hereby reviewed and set aside;*
2. *The respondents are to pay the costs of this application; and*
3. *Further and / or alternative relief.*

Alternatively, Part B

1. *That the respondents (employer) be ordered to make a decision in terms of section 173)(b) of the Public Service Act, 1994;*
2. *The respondents be ordered to pay the costs of this application; and*
3. *Further and / or alternative relief.'*

[2] The respondents opposed the application, having raised a point *in limine* as well as having articulated their defence on the merits.

Background

[3] The present application constitutes the second attempt on the part of the applicant to be reinstated to his position. Pursuant to the respondents having issued a notice to the applicant in terms of s17(3)(a)(i) of the Public Service Act, 1994 ('the PSA') on 26 August 2021 in terms of which he was informed of the termination of his services with effect from 1 June 2021 he referred a dispute to this court under case number D792/2021. In such referral he alleged that he had been dismissed, and that such dismissal had been both substantively and procedurally unfair.

[4] Upon the matter having been enrolled for trial, Van Niekerk J (as he then was) issued a directive to the parties in which they were notified that they would be required to address the issue of this court's jurisdiction in view of the fact that in terms of s17(3)(a)(i) of the PSA the applicant's employment had been terminated by operation of the law. Having heard argument on this issue, the matter was struck

from the roll for want of jurisdiction by way of a judgment handed down on 9 May 2023.

[5] Some nine months later, the applicant initiated the present application, in which described the relief sought by him as having been to,

‘3.1.1 Have the decision to terminate my employment in terms of section 17 of the PSA reviewed and set aside; and

3.1.2 Alternatively, have the respondents ordered to respond to my representations.’

Despite the findings of this court in its judgment under D792/2021, the applicant nonetheless continued to categorise the termination of his employment as a dismissal.

[6] The circumstances which led to the respondents’ reliance on s17(3)(a)(i) of the PSA are set out hereunder.

[7] The applicant was employed by the Department of Justice in April 1992 in his capacity as an interpreter. On the applicant’s version, unbearable working conditions in the Language Services Department of the Verulam Magistrate’s Court at which he had been placed led him to tendering his resignation from his employment to the Area Court Manager, Mr Dlamini. Mr Dlamini refused to accept his resignation and offered instead to move him to Administration. The applicant accepted the offer, withdrew his resignation, and applied for a transfer to become an administration officer. To this end he commenced training as a member of the administration staff in the Verulam Magistrate’s Court.

[8] Without any decision having been taken in relation to his application for transfer, he performed the services of an administration officer from 2018 until the end of December 2020. At that stage, he received correspondence from Mr Nzuzi, who had been appointed as the Area Court Manager in Mr Dlamini’s stead. The letter read,

- '1) Due to the current shortages in the language services within Verulam office, management has reviewed the staff complement in the office.*
- 2) Management has taken the decision to correctly place all the staff who are not performing their duties in terms of their appointments and job descriptions.*
- 3) You are required to report to the language services, the Principal court interpreter as from 07 December 2020. Should you wish to appeal this decision you can submit your appeal to Ms J Ngema (Director Court Operations) within five days after receiving letter.'*

[9] The applicant appealed the instruction requiring him to report to his substantive post which was never decided, with the respondents ultimately having informed him that he enjoyed no right of appeal.

[10] The applicant alleged that he had, in the meantime, reported to the Language Services Department, where he reported to the manager thereof, Ms Bennet. She refused to allow him to report for duty, having expressed the view that he no longer worked in that section. A similar fate befell him at the Administration Section where his name had been removed from the attendance register and he was denied access to the 'full use' of the computer he had been using. As there was then nowhere to which he could report for duty, he ceased to go to work at the beginning of 2021, although he reported to the Verulam Magistrate's Court almost weekly. Ms Bennet repeated her advice to him that she had no authority to accept him unless she was given a directive to do so by her superiors.

[11] At a meeting subsequently convened on 2 March 2021 and attended by various individuals in positions of authority vis a vis the applicant, including Mr Nzuza, the applicant was informed that he had no right to appeal the instruction given to him to perform the services of his substantive post, with which instruction he was required to comply. The applicant required this to be communicated with him in writing, which was not done.

[12] The next communication received from the Department by the applicant was a letter in which it demanded that the amount of R103 954.76 be repaid to it. Such

amount was claimed on the basis that the applicant had been absent from work but nonetheless remunerated from February 2021 to 31 May 2021 in circumstances in which he had exhausted both his annual and sick leave. On 24 August 2021, the applicant's attorney requested the department was requested to suspend its decision pending a formal enquiry regarding the applicant's absence from work.

[13] No response to his attorney's letter was received and instead, on 26 August 2021, by way of a letter dated 11 August 2021 Ms P Moodley, the Regional Head: KwaZulu-Natal, notified the applicant of his discharge from the Public Service,

'1. You are hereby informed that you are deemed to have been discharged from the Public service in terms of section 17(3)(a)(i) of the Public Service Act, 1994 with effect from 1 June 2021 due to the fact that you have absented yourself from official duties without permission for a period exceeding one calendar month.

2. In terms of section 17(3)(b) of the aforementioned Act, you may submit a written motivation presentation for re-instatement. Should you elect to do so please note that this submission must be delivered to the Deputy Director: Employee Relations, Mrs M Matthews, Room 329, Regional Office KZN, P/Bag x54372, Durban 4000. In the event such a request is received a submission will be made to the delegated authority for consideration and you will be informed of the outcome in writing.'

[14] Acting in terms of s17(3)(b) of the PSA the applicant delivered representations on 22 October 2021, which had not been responded to by the time he approached this court under D792/2021. Upon his claim having been struck for want of jurisdiction, he delivered supplementary representations on 23 May 2023 to Ms Matthews on 23 May 2023. In response to his submissions he was advised that that such representations had been transmitted to the delegated authority for that body's consideration. The applicant alleged that notwithstanding enquires made by his attorney, he received no response to his application for reinstatement.

[15] On the strength of the aforementioned facts, the applicant sought the relief set out above.

Analysis

[16] Despite the applicant having clearly articulated the relief sought by him in his Notice of Motion, by the hearing of this matter he had, in effect, abandoned his initial claims and sought to substitute them with others.

[17] The point *in limine* raised by the respondents related to the first of the applicant's claims, the respondents having asserted that the relief so sought was incapable of being granted by this court: as no decision had been taken to discharge the applicant in terms of s17(3)(a) of the PSA, no decision capable of being reviewed and set aside existed. The applicant disputed the correctness of such proposition in reply, having asserted that,

'It is common cause that a provision of law does not by itself take effect or application upon a set of facts, a person's intervention is necessary to give effect thereto. It is on this basis that the respondents' reliance on section 17(3)(a) constitutes a decision capable of being challenged.'

[18] The respondents' *in limine* point was correct, and the applicant correctly conceded as much in his Heads of Argument: the application of s17(3)(a)(i) of the PSA does not amount to a decision capable of being interfered with on review.¹

[19] This being so, the applicant sought orders that the applicant be deemed to have been discharged from the public service, together with an ancillary order that he be reinstated to his position on the same terms and conditions as pertained to him as if he had not been dismissed. The applicant suggested that such varied relief could competently be granted under the applicant's claim for *'further and / or alternative relief.'* From this, and the remainder of the argument posited in the applicant's Heads of Argument, this court understands that the applicant's varied relief was premised on his contentions that the factors required to be present in order

¹ See, for example, Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) at paragraph 16

for the respondents to have relied upon s17(3)(a) were not present, and that he is accordingly entitled to be reinstated to the respondents' employ.

[20] The question is then whether in the present proceedings the applicant is capable of obtaining relief other than that which was expressly sought by him in his Notice of Motion. It may firstly be mentioned an all encompassing prayer for *'further and / or alternative relief'* does not entitle a litigant to relief extraneous his or her pleaded case. It is trite both that parties are bound by their pleadings, and that a respondent is entitled to be made aware of the case it is required to meet.

[21] Such principles notwithstanding, the Constitutional Court in Grootboom² appears to have determined the appeal before it in circumstances similar to the one before this court, where the relief ultimately granted was not that which had been sought by the appellant in the Notice of Motion which had served before this court at the outset. The nature of the appellant's application was explained in the following terms by the Constitutional Court,

'The applicant instituted proceedings in the Labour Court in terms of section 158(1)(h) of the Labour Relations Act – to have his deemed discharge reviewed and set aside under section 6(2) of the Promotion of Administrative Justice Act – (PAJA).

*In dismissing the application the Labour Court held, first, that in terms of section 17(5)(a)(i) the applicant was discharged by operation of law and that therefore the respondents had not taken any decision that could be reviewed and set aside in terms of PAJA. ...*³

The Labour Appeal Court had likewise found that no decision had been taken which could be reviewed and set aside.⁴

[22] On this point, the Constitutional Court was in agreement with both this court and the Labour Appeal Court.⁵ Despite that the original application had constituted

² Footnote 1

³ At paragraphs 12 - 13

⁴ At paragraph 14

the review of a decision taken, and despite having found that no decision had been taken, the Constitutional Court nevertheless interrogated whether the factors upon which the provisions of s17(3)(a)(i) of the PSA would ordinarily become operative had been present when it had been invoked. Having found that the jurisdictional requirements embedded therein had not been satisfied, the appeal was upheld. In light of the fact that the original application was described as the review of a decision taken in terms of s17(3)(a)(i) of the PSA, it is not clear from the judgment on what basis the jurisdictional requirements of s17(3)(a)(i) of the PSA had been of relevance to the issue, nor on what legal basis (distinct from a review) the appeal was then upheld.

[23] This court finds itself confronted with a claim akin to that in Grootboom: an application to set aside a decision by way of review proceedings, with the applicant having conceded the absence of a decision in argument, and seeking instead a declarator that the provisions of s17(3)(a)(i) of the PSA were erroneously applied, together with an order of reinstatement. In light of the judgment of the Constitutional Court in Grootboom, wherein the court was seemingly disposed to dealing with the matter on a basis other than the review which had been sought *ab initio*, this court will be obliged to consider the issue of the applicability of s17(3)(a)(i) of the PSA, provided that the issues were adequately addressed in the parties' pleadings.

[24] Despite the applicant having sought relief in the form of a review of a decision taken, his failed in his founding affidavit to particularise a single reviewable irregularity in relation to what he alleged had been a decision taken by the respondents. Instead, in framing the legal issues to be determined he stated these to have been,

'Whether the respondents' reliance on section 17 of the PSA to terminate my employment was correct and / or lawful?

Whether I absented myself from duty for a period exceeding one calendar month immediately prior to 1 June 2021 which is the date on which my deemed dismissal took effect; and

Whether the respondents should be ordered to respond to my representations.'

⁵ At paragraph 16

[25] In consideration of the facts upon which the applicant relied, it is clear that his case was impliedly premised on an argument that the respondents had not been entitled to rely on s17(3)(a)(i) of the PSA. The respondents were alive to this issue and responded comprehensively to the applicant's assertions regarding his absence from work in their answering affidavit. The issue of the applicability of s17(3)(a)(i) of the PSA was addressed in both parties Heads of Argument, and was argued in the course of the hearing. This court is accordingly satisfied that despite the fact that the applicant did not seek such declaratory relief in his Notice of Motion, the respondents will not be prejudiced by this court determining the first part of the application on the basis of the applicability or otherwise of s17(3)(a) of the PSA.

[26] S17(3)(a)(i) of the PSA 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.'

The conditions which are required to be met in order for the provision to find application are set out therein: (i) the public servant must have absented himself from his or her official duties; (ii) without the permission of his or her head of department, office or institution; (iii) for a period in excess of one calendar month. Whether these conditions were met in the case of the applicant will be considered hereunder.

[27] The applicant was appointed to the substantive post of an interpreter, and was placed in the Language Services Department of the Verulam Magistrate's Court. Unsupported by any documentary evidence to substantiate his claim and denied by the respondents, he alleged that he applied for a transfer with a view to becoming an administration officer. Whether or not such application was made, on his own version

that application was never approved. Accordingly, despite that he may have been permitted to work elsewhere performing functions other than those required of him as an interpreter, the situation which prevailed until the end of 2020 was not one which was authorized in terms of any prescript governing the employment of individuals in the Public Service and his substantive post was never varied.

[28] Whatever informal arrangement may have prevailed under the erstwhile Area Court Manager's supervision, Mr Nzuza set about regularising the situation at the beginning of December 2020 at which time all staff who were not performing their duties in accordance with their appointments and job descriptions were instructed to report to their substantive posts for duty. This included the applicant who was instructed on 1 December 2020 to report to the Principal Court Interpreter with effect from 7 December 2020. Such instruction was repeated to him personally by Mr Nzuza at the meeting on 2 March 2021.

[29] On the applicant's version, he attempted to report to the Manager, Ms Amanda Bennet, immediately upon receipt of the first instruction and thereafter periodically until he eventually received notification that his services had been terminated by operation of the law. There are, however, a number of difficulties with the applicant's own version.

[30] Firstly, save for the *ipse dixit* of the applicant and Ms Bennet (whose affidavit was delivered only in reply) there is no extraneous, objective evidence corroborating any attempt on the applicant's part to have presented himself for duty at the Language Services Department at any time after having been instructed to do so in December 2020. Moreover, his own version that he reported was both vague and contradictory,

'Verulam is where I live and as such, although I stopped going to work, I almost reported to work on a weekly basis but Ms Amanda Bennet would tell me the same thing that she had no authority to accept me unless her superiors gave her a directive to do so.'

'This⁶ was said despite the fact that I had been reported to Language Services on a regular basis, every month and was rejected.'

'I admit that, at times I would come to court to visit my friends but would always ask Ms Amanda Bennet if I could start working and she would say no.'

[31] The affidavit delivered by Ms Bennet in reply merely confirmed the correctness of the allegations made by the applicant in his founding and replying affidavits, with her only amplification having concerned events post August 2021, upon the applicant having been given the letter in which he had been notified of the termination of his services.

[32] Wholly unexplained by either the applicant or Ms Bennet was why neither, when allegedly confronted with an apparent impasse concerning Ms Bennet's authority to receive the applicant into service in the Language Services Department, neither deemed it necessary to alert Mr Nzuza or anyone else in authority, as to the predicament in which they then found themselves.

[33] The final, and insurmountable difficulty with the applicant's case is that he failed even to allege that he had, in fact, reported to the functionary to whom he had been instructed to report at any time prior to the termination of his services. Mr Nzuza's letter was unambiguous: the applicant was required to report for duty to the Principal Court Interpreter. At no stage in the application was such designation ever attributed to Ms Bennet, whom the applicant himself described as *'the Manager'* and *'the responsible line Manager'*. She herself did not detail the official designation held by her in the course of her employment by the Department. On the applicant's own version, the first and only time he reported to the Principal Court Interpreter was in 2023, after his claim under D792/2021 had been dismissed.

[34] Having failed to establish in the present proceedings that he had reported for duty in accordance with the first instruction given to him, it is evident that he formed the view that the second instruction given to him in March 2021 could simply be disregarded as it had not been reduced to writing.

⁶ 'This' being the respondents' demand for repayment of the applicant's overpaid salary.

[35] Given the events which led to the application of s17(3)(a) of the PSA, there is no doubt that the factors necessary to trigger the effect thereof were indeed present: the applicant absented himself from his official duties as an interpreter, not only without the permission of the Head of Department, but in the face of two direct instructions to the contrary by the Area Court Manager, for a period in excess of six months. The applicant is accordingly not entitled to the declaratory order sought.

[36] Having conceded that the respondents had taken a decision to refuse him reinstatement, the further amended relief sought by the applicant was that such decision be reviewed and set aside on the basis of its alleged irrationality. Unlike the first part of the applicant's amended relief, the relief sought in relation to the decision not to reinstate him was not foreshadowed in his founding affidavit at all. Not only is it trite that an applicant in motion proceedings is required to establish his or her case in the founding affidavit, but in review proceedings, a litigant is required to comply with the specific procedural requirements relating thereto. In the circumstances of the applicant's claim having been to compel the respondents to take a decision in regard to his reinstatement, it was not open to him to seek something fundamentally at odds with such relief in reply.

[37] In light of the above, the application falls to be dismissed.

Costs

[38] The respondents asked that the applicant be ordered to pay its costs. Whilst it is tempting to find that the application was not actuated in good faith, it is nonetheless possible that it may have been no more than simply ill-conceived. As this court does not ordinarily grant costs orders against individual litigants in such circumstances, and the applicant is no longer employed, no order as to costs will be made.

Order

1. The application is dismissed.

2. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr Z Mbuyazi, instructed by Mbele & Ngcobo Attorneys Inc.

Respondents:

Mr N Winfred, instructed by the State Attorney, Kwazulu-Natal