

IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No: J

3121/98

In the matter between:

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First Applicant

Second Applicant

and

First Respondent

DIRECTOR GENERAL OF PROVINCIAL

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Second Respondent

AGRICULTURE, CONSERVATION AND

Third Respondent

REASONS FOR JUDGMENT

REVELAS J:

[1] The second applicant, a member of the first applicant, was employed by the Department of Agriculture, Conservation and Environment as an employee of the Gauteng Provincial division and held the position of the First Liaison Officer.

[2] The applicants have brought an application to this court, seeking to set aside a decision of the respondent's to dismiss her. The second applicant also sought reinstatement, retrospectively as from 1 September 1998, on the same terms and conditions which applied to her employment position on that date and the costs of the application.

[3] Although this is not apparent from the founding papers, the applicant sought to set aside the aforesaid decision in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 ("the LRA").

[4] The respondents' case is that the second respondent, never took a decision to dismiss the second applicant. The case for the respondents is that at all relevant times, there existed between the second applicant and Gauteng Province an employer employee relationship within the definition of "employer" and "employee" contained in section 213 of the LRA, as well the definition of an "officer", contained in section 1 of the Public Service Act, 1994 (Proclamation 103 of 1994); and the definition of "employer" and "employee" contained in section 1 of the Public Service Labour Relations Act, 1994 (proclamation 105 of 1994). In consequence of the foregoing, the provisions of Proclamation 103 of 1994 was at all relevant times applicable to the second applicant and more particularly section 17(5) of Proclamation 103, which stipulates as follows:

"(a)(i) an officer 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 discharged from the public service on account of misconduct (my emphasis) with effect from the date immediately succeeding his/her last day of attendance at his or her place of duty.

(ii) if such an officer assumes other employment, he or she shall be deemed to be charged as aforesaid irrespective of whether the said period has expired or not.

(b) if an officer who is deemed to have been so discharged reports for duty at any time after the expiry of the period referred in paragraph (a) the Commission may, notwithstanding anything to the contrary contained in any law, recommend that, subject to the approval of the relevant executing authority, he or she be reinstated in

the Public Service in his or her former or any other posts or position on such conditions as the Commission may recommend and in such 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 Commissioner may recommend.”

[5] The respondents’ argue that upon a proper interpretation of section 17 (5) (a)(i) an officer is at once deemed to have been discharged for misconduct as soon as he or she has absented himself or herself from his or her official without permission for more than a calender month and that such a discharge (or dismissal) does not depend on any **decision** on the part of the respondent or the department. Under these circumstances, the respondents argue, that an employee is dismissed by operation of law and not by the exercise of any discretion and this effectively results in an automatic dismissal which the respondents are legally obliged to implement.

[6] In terms of section 191 of the Act, an employee who is dismissed for misconduct, may not refer his or her dismissal dispute to the Labour Court but is obliged to refer the matter for conciliation first and if the dispute remains unresolved, the matter should be referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (“CCMA”).

[7] When I raised this issue, the respondents counsel indicated that he did not wish to make any propositions in this regard. Counsel on behalf of the applicants contended that, the application is brought in terms of section 158(1)(h) of the LRA, which is applicable to employees of the State, and the 2nd applicant is not required to go through the aforesaid route of conciliation and arbitration/adjudication, and the matter should be determined on the papers as a review.

[8] The Relevant Facts

On 16 September 1997, the second applicant applied to the third respondent be boarded on the grounds of ill health which application had apparently not yet been finalized at the time of this application. Consequently, she often on prolonged sick leave which had always been approved by her employer.

[9] In support of her application to be boarded on the basis of poor health, the second applicant furnished medical reports and the required form which was completed by a psychiatrist. According to the psychiatrist who treated the second applicant, she has a long, complicated medical history and suffers from serious psychiatric problems which would require long terms chemotherapy and psychiatric therapy which could possibly result in hospitalisation. The applicant was also diagnosed as suffering from medical problems related to her colon.

[10] On 11 August 1998, the second applicant brought a further application for sick leave. In support thereof she furnished a Doctor's certificate signed by Doctor A H Potgieter and in terms of this certificate the second applicant was to return to work on 29 August 1998, a Saturday, not a normal work day for the second applicant.

[11] On 31 August 1998 the second applicant alleges she visited her place of work with a further application for sick leave and this time the supporting medical certificate was issued by Doctor JJ Grové a psychiatrist. In terms thereof, she had sick leave until 16 October 1998. On Sunday, 27 September 1998, the third respondent sent a telegram to the second applicant which reads as follows:

“ You are expected to work Monday 28 September 1998. If not, you will be discharged.”

[12] The applicant, who believed that she would be on sick leave until 16 September 1998 because she had handed in such an application, phoned the third respondent's personnel officer, Ms Loubser, who was apparently not available, and the second applicant left a message on Mrs Loubser's answering service machine, to the effect that she had already submitted a sick leave form and consequently regarded herself to be on sick leave.

[13] On 29 September 1998, Ms Loubser informed the second applicant telephonically, that she was not in possession of the second applicant's sick leave form and the second applicant promised to furnish the forms the following day. However the second applicant explains that she intended to have a meeting with her employer and her union representative, but due to the unavailability of the third respondent, a meeting was scheduled for 8 October and she intended to take the application form to this meeting.

[14] On 2 October 1998, the third respondent sent a letter to the second applicant which reads as follows:

“ My telegram dated 22 September 1998 in the above regard as reference. You did not respond to this telegram and you are therefore discharged from the public

service according to section 17(5)(a)(i) of the Public Service Act of 1994.”

No mention was made of the communications between the the second applicant and Ms Loubser, who in any event never indicated to her that her services had already been terminated.

[15] The second applicant alleges that in the interim she has also received a letter from the third respondent, the relevant part of this reads as follows:

“ According to our records your last sick leave form submitted, which was not approved (my emphasis), was up to 28 August 1998. You have therefore been absent from work since 1 September 1998 without permission”

[16] In the same letter the second applicant is advised of the contents of section 17(5)(a)(i) of Proclamation 103 (“the proclamation”) and notified that in terms of that section, her services have been terminated with the third respondent with effect from 1 September 1998. This letter is signed by the third respondent.

[17] The second applicant thereafter wrote a letter dated 12 October 1998 demanding reinstatement.

[18] According to the third respondent no one suggested or proposed that the second applicant be discharged or dismissed in terms of section 17(1) or (2) of the Proclamation and that it was not an option under consideration during August 1998 when the second applicant submitted her application for leave. This application was considered by Ms Mokoena the Director : Finance and Administration of the third respondent, who decided not to recommend the granting of leave. She drafted a letter to the effect that leave would not be granted. She intended to dispatch a letter to the second applicant in this regard but this was not done. The reason therefore was that the matter was referred to the third respondent who took the matter over from Ms Mokoena.

[19] The third respondent describes in her answering affidavit, how she on 22 September 1998, despatched the telegram, referred to by the second applicant. The third respondent explained that the use of the word “dismissed” in that telegram, may create the impression that the services that the service of the second applicant were terminated, not by virtue of an automatic dismissal, but by virtue of a

decision taken by the respondents and this would be a wrong interpretation of her, perhaps unfortunate, choice of words. The third respondent argues that in context, and taken as a whole, with due regard to the express reference of the aforesaid section 17(5)(a) of the Proclamation, there can be no doubt that the only basis for the termination of her services, was the provisions of that section, and that no decision to dismiss was taken and accordingly there is no decision which falls to be set aside on review.

[20] The third respondent emphasises that in the letter of 2 October 1998, dispatched to the second applicant, it is recorded that previous sick leave of the second applicant for the period up to 28 August 1998 was not approved. The second applicant did not query this, nor dispute the decision not to grant her that sick leave. It is also denied by the third respondent that her department ever received an application for leave before on 2 October 1998.

[21] The third respondent also submitted that her department erred on the side of caution, and implemented section 17(5)(a)(i) with effect from 1 September 1998 and not 6 August 1998 as should have been the case. Hence the second applicant's services were terminated by operation of law in terms of section 17(5)(a)(i) of proclamation 103 of 1994, which also stipulates that the date with effect from which her services are so terminated is the date immediately succeeding his or her last day of attendance at her place of duty was 6 August 1998.

[22] The third respondent submits that, insofar as the second applicant refers to a further application for leave that was handed for sick leave to the end of 16 October 1998, no such application was ever received by the third respondent before 2 October 1998, or received by the department in question, and the second applicant definitely had no permission to be absent from work for the relevant period.

[23] It is also submitted by the third respondent, that it is the attitude of the respondents, that the second applicant is not entitled to a "hearing" before the provisions of section 17(5)(a)(i) of proclamation 103 of 1994 are to be implemented. The respondents do not have a choice as to whether those provisions are to be implemented or not, and are in terms of their constitutional and public responsibility, obliged to implement those provisions.

[24] The one power which the respondents in this regard is spelt out by section 17(5)(b) of the Proclamation in terms whereof a possible reinstatement of the second applicant can be considered.

[25] The respondents argue that, it is not the case for the second applicant that the respondents are amiss with regard to their obligations (and the corresponding right of the second applicant) under the last mentioned section, this aspect is left open. It is also emphasised that the respondents did not make any allegation to the effect that the second applicant absconded from work.

[26] The question is whether the **"decision taken or the act performed by the**

State in its capacity as employer” (section 158(1)(h) of the LRA) is reviewable in law.

[27] It is clear from the wording of section 17(5)(a)(i) of the Proclamation 103, that there is a deeming provision contained in this section and clearly there was no indication on the facts that a factual, voluntary and conscious decision was made to terminate the services of the second applicant. Her services were terminated by operation of law. Any decision to reinstate or not to reinstate the applicant as envisaged by section 17(1)(b) of the Proclamation, has not yet been taken.

[28] In my view, there is therefore no decision, as envisaged by section 158(1)(h) of the LRA, to be reviewed and consequently the application must fall to be set aside on this basis.

[29] Another reason why this court cannot entertain this application, is because the meaning of “dismissal” in terms of the LRA, is not as limited as envisaged by both the second applicant and the respondents. Even though the respondents do not have a choice as to whether the provisions of section 17(5)(a)(i) of the Proclamation 103 are to be implemented, and are and in terms of their constitutional and public responsibility, obliged to implement the provisions, the respondent’s role as envisaged in section 17(5)(a)(i) does not end there.

[30] The respondents do have a power in terms of section 17(5)(b) of the Public Service Act, in terms whereof they can, consider a possible reinstatement of the second applicant . She has not pursued this route and therefore her application is premature. It is not the case of the second applicant that the respondents are amiss with regard to their obligations.

[31] I have raised with the parties the question of conciliation and arbitration of this dispute. In my view, it is still open to the second applicant to attempt to pursue her rights in terms of section 17(1)(b) of the Proclamation. If she is unsuccessful, she may refer the dispute about her dismissal, to have the matter conciliated and arbitrated by the CCMA. Of course she would have to be granted condonation by the CCMA first.

[32] I have declined to interfere with any decision since no decision was taken, and the legal position with regard to the second applicant’s employment situation is as set out hereinafter before.

E REVELAS

f Hearing : 4 March 1997

f Judgment: 8 March 1999

Applicant: Advocate Hannes Haycock

Instructed by Wagener Muller Attorneys

Respondent: Advocate MM Oosthuizen

Instructed by the State Attorney