

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

In the matter between

REPORTABLE

Case Number: JR 563/03

LESIBA EPHRAIM SEEMA

APPLICANT

And

GENERAL PUBLIC SERVICES SECTORIAL 1st RESPONDENT
BARGAINING COUNCIL

COMMISSIONER MICHAEL MASHEGO 2nd RESPONDENT

DEPARTMENT OF JUSTICE 3rd RESPONDENT

JUDGEMENT

LEEUEW A.J

INTRODUCTION

- (1) This is an application in terms of Section 145 of the Labour Relations Act No 66 of 1995 (The Labour Relations Act) brought by the applicant for an order in the following terms:

“1. That the arbitration award dated 28 February 2003 under case PSGA 3584 be reviewed and set aside and be replaced by the following terms:

- 1.1 That the dismissal is both substantively and procedurally unfair.
- 1.2 That the applicant be re-instated and compensated in terms of section 194(2) of the Labour Relations Act No 66 of 1995, as amended.
- 1.3 That the costs of this application be paid by the Respondent
- 1.4 Further and /or alternative relief”.

Background information

- (2) It is common cause that the Applicant was employed by the Third Respondent as a Senior Court Interpreter at the Magistrate’s Court Mokerong in the Limpopo Province.
- (3) He was charged and convicted of two (2) counts of theft, two counts of obstruction and/or defeating the ends of Justice and Contempt of Court and sentenced to twenty four (24) twenty four months, six (6) months and ninety (90) days imprisonment respectively. He was incarcerated from May 2001 to August 2002 which is a period of 1(one) year and 3(three) months.

- (4) The Third Respondent terminated the applicant's services with effect from 26th January 2001 per letter dated 9th July 2002, the reason being that he was guilty of misconduct in terms of section 17(2)(e) of the Public Service Act 104 of 1994("Public Service Act").
- (5) Subsequent to the abovementioned letter, the third Respondent caused to be written a letter dated 22nd July 2002 to the Applicant wherein cognisance was taken of the reason for dismissal. In this letter, the Third Respondent notified Applicant that he was discharged from public service with effect from the 26th January 2001, the reason being that he was not "gainfully employed". The same section 17(2) (e) of the Public Services Act was repeated in this letter.
- (6) The Applicant referred the matter to the General Public Service Sectoral Bargaining Council ("The Bargaining Council") where it was heard on the 18th February 2003. The Commissioner made a finding that the Applicant's dismissal was substantively fair but procedurally unfair and ordered no compensation.

Submissions

- (7) The Applicant's grounds for review can be summarised as follows (as they appear in his founding affidavit): The dismissal was procedurally and substantively unfair because
- i) He was not given an opportunity to explain his absence from work as well as present mitigating factors in his favour;
 - ii) He has appealed against the conviction and sentence to the High Court and therefore ought not to have been dismissed pending the finalisation of that appeal.
 - iii) The fact that he was in prison on its own cannot be a ground for dismissal, and
 - (iv) that the employer condoned his absence from work in that it took almost one and half years for the employer to dismiss him despite his incarceration and can therefore not raise same as a ground for dismissal.
- (8) These grounds were not pursued by the Applicant's attorney in

his written and oral submissions save to state that the only basis on which Applicant could be dismissed from employment, would be by virtue of his incapacity, misconduct or employer's operational requirements. Furthermore, that the applicant's dismissal was not justifiable in terms of the provisions of section 188(1) of the Labour Relations Act.

- (9) On behalf of the Third Respondent, Mr Mogatle in his Answering Affidavit alleges that the Third Respondent erroneously referred to section 17(2) (e) of the Public Service Act and that the same mistake was repeated in the letter dated 22 July 2002, which according to him was a typographical error; he intimated that the correct section ought to have been section 17(2) (c) of the Public Service Act.
- (10) It was Mr Mogatle's testimony at the Arbitration hearing that the Applicant was not dismissed because of misconduct but that his services were terminated because he was not "gainfully employed". He further stated that the Applicant was as a result thereof in breach of his employment contract.
- He referred to the provisions of section 30(a) of the Public Service Act which provide that **"every officer and employee shall place the whole of his or her time at the disposal of the State"**.
- (11) It was Mr Mogatle's evidence that it was not necessary to conduct a disciplinary enquiry against the applicant since he was

not charged for misconduct. The applicant committed a breach of contract which was accepted by the employer. For failure to conduct a pre-dismissal enquiry, Third Respondent relies on the provisions of Schedule 8 under Section 4(4) of the Labour Relations Act which provide: **“that in exceptional circumstances, if the employer cannot reasonably be expected to comply with the guidelines, the employer may dispense with pre-dismissal procedure”**. It is further submitted that the hearing was unnecessary because the Applicant could not have been considered for reinstatement or re-employment as a result of his incarceration.

- (12) There is no counter review by the Third Respondent against the Second Respondent’s ruling that the Applicant’s dismissal was procedurally unfair, but it is submitted on behalf of the Third Respondent that the dismissal was both substantively and procedurally fair. I have already alluded to the Third Respondent’s submissions in this regard.

The Law:

- (13) The Third Respondent submits that the Applicant was dismissed because he was unable to render his services as an interpreter. Section 17(2) (c) of the Public Service Act provides that **“Every officer, other than a member of the services or an educator or a member of the Agency or the Service, may be discharged from the public service.**

(a)

(b)

- (c) If, for reasons other than his or her own unfitness or incapacity, his or her discharge will promote efficiency or economy in the department or office in which he or she is employed, or will otherwise be in the interest of the public service;

- (14) Furthermore, the Public Service Act provides in Section 17(5)(a)(i) that “An officer, other than, 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 with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty”.

- (15) I must here remark that neither the Applicant nor the Second and Third Respondent made mention of this provision and no reliance was placed on this section by the Third Respondent when the Applicant was discharged from employment. The effect of Section 17(5) (a) (i) is that the applicant’s employment was terminated by operation of law.

- (16) Our Courts have applied the abovementioned provision and similar provisions differently and it will be necessary to refer to but a few:

(a) In the case of **Minister Van Onderwys en Kultuur en Andere v Louw 1995(4)SA 838 (A) at 388G-I** the court, in interpreting Section 72(1) of the then Education Affairs Act (House of Assembly)70 of 1988,

a provision similar to Section 17(5)(a)(i) of the Public Service Act, held that the coming into operation of the deeming provision is not dependant upon any decision, and that the *audi alteram partem* rule is not applicable; that an employer merely notifies an employee about his discharge which occurred by operation of law. This decision was followed and applied amongst others in the cases of **Public Servants Association of SA and Another v Premier Gauteng and Others (1999) 20 ILJ 2106(LC)** , **Nkopo v Public Health and Welfare Bargaining Council & Others (2002) 23 ILJ 520 (LC)**.

- (17) In the latter case, Landman J, held that there was no dismissal which could be found to be unfair as contemplated in the Labour Relations Act. Neither party in this case, like in the present, had taken this point on review.

The same view was followed in the case **MEC, Public Works, Northern Province v CCMA & Others (2003) 10 BLLR 1027 (LC)** where the point was not taken by either party to the dispute as well as the Commissioner. The matter was referred back to the CCMA.

- (18) **Freud A.J** in the **MEC for Public Works Northern Province v CCMA** supra held the view that the decision by the employer in exercising his discretion not to reinstate in terms of section 17(5) (b)(ii) has the effect that the contract of employment remains terminated by law and not terminated by the employer. Compare also **South African Broadcasting Corporation v CCMA & Others (2001) 4 BLLR 449 (LC) at 454 H**, where Sutherland AJ held that "... it is not the act of desertion which terminates the contract of employment, but the act of the employer who elects to

exercise his right to terminate the contract in the face of that breach (See **Stewart Wrightson (Pty) Limited v Thorpe 1977 (2) SA 943 (SCA) at 953 E**)”. The court held that the Commissioner was correct in ruling that the termination of employment was dismissal. This seems to be the submission by Third Respondent’s Counsel in this matter.

- (19) The case of **Minister van Onderwys en Kultuur en Ander v Louw supra** was decided prior to the enactment of the Labour Relations Act although the majority of cases which applied this case also took the view that dismissal by operation of law is not dismissal in accordance with Section 186 of the Labour Relations Act.

See also **Ntabeni v MEC for Education, Eastern Cape (2001) ILJ 2619(TK) & Maidi v MEC for Department of Education & Others (2003) 24 ILJ 1552(LC)**.

- (20) Section 17(1) (a) of the Public Service Act provides that “Subject to the provisions of paragraph (b), the power to discharge an officer or employee shall vest in the relevant executing authority and the said power shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995(Act No 66 of 1995)”. I am of the view that since section 17(5) (a) (i) of the Public Service Act, provides that a person who has been discharged by operation of law shall be deemed to have been discharged from Public Service on account of misconduct, the

employer must apply the procedures provided for in the Labour Relations Act in dismissals based on misconduct.

- (21) The other view held by our courts is that Section 17(5) (a) deprives employees of their right to challenge their dismissals. Section 17(5)(b), provides that : “If an officer or employee who is deemed to have been discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a) the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the Public Service in his or her former or any other post or position, and in such case the period of his absence 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”.
- (22) This provision was interpreted by the Court as granting the employee an opportunity to present his case to the employer and give reasons as to why he or she should be reinstated after his persistent absence from work. See **South African Broadcasting Corporation v CCMA & Others supra and Hospersa & Another v MEC for Health (2003) 12 BLLR 1242 (LC)**. I agree with this interpretation: that though discharged from employment by operation of the deeming provision, the employee still has the opportunity to present his or her case to the employer for the purpose of determining whether he or she can be reinstated, on good cause shown. Compare also **Phenithi v**

Minister of Education & Others (2005) 6 BLLR 614 (O) at 621 G.

Was the Applicant's dismissal Substantively and Procedurally fair?

(23) In finding that the Applicant's dismissal was procedurally unfair, the Commissioner found that the Third Respondent did not place any exceptional circumstances before him that would justify dispensing with the pre-dismissal procedure provided for in section 17(5)(a)(i) of the Public Service Act read with Schedule 8 of the Labour Relations Act supra.

(24) He held the view that the Third Respondent was aware of the whereabouts of the Applicant who was in prison and could be accessed in order to afford him the opportunity to present his case in a disciplinary enquiry. I agree with the view held by the Commissioner and find that he did not misdirect himself in coming to this finding.

(25) The Commissioner held that **“the principal obligation of an employee under the contract of service is to put their (sic) personal services at the disposal of the employer...The employer cannot be expected to wait for an employee who is languishing in a state penitentiary.....**

The inquiry is not whether or not he is guilty but whether as a result of his incarceration after having been found guilty by a

competent court, he could render services or notI am therefore convinced that the Employer had a valid reason to terminate the contract of Employment”.

- (26) I find nothing wrong in the Ruling by the Commissioner that the Applicant’s dismissal was substantively fair because the applicant was not available to render services to the employer by virtue of the crimes he allegedly committed and for which he was convicted and sentenced in a competent Court of Law. After the expiry of the one month period, the applicant was deemed to have been discharged albeit not on account of contravention of Section 17(2) (c) but on account of Section 17(2) (e) of the Public Service Act.
- (27) At this stage, the question of breach of contract or dismissal in accordance with Section 17 (2) (c) of the Public Service Act is not of relevance because substantively, the discharge or dismissal was by operation of law.
- (28) The applicant chose to rely on Section 17(2)(c) of the Public Service Act in dismissing the Applicant from employment, instead of relying on the deeming provisions of Section 17(5) (a) (i) of the Public Service Act. Mere absence from work is not conclusive evidence that the Applicant did not have the intention to return; applicant ought to have been summoned from prison and adequately informed about the consequence of his continued absence from work. See **Phenithi v Minister of Education & Others** supra.

- (29) The deeming provision in Section 17(5)(a)(i) directs that in the circumstances where the applicant was absent for a period of one month, he shall be deemed to have been “dismissed on account of misconduct”(Section 17(2)(c)).The third Respondent was correct in referring to Section 17(2)(c) in the dismissal letter but failed to follow the procedure prescribed by the Labour Relations Act applicable when an employee is dismissed on account of misconduct (See Schedule 8 Code of Good Conduct – Section 3 and 4 thereof).

Conclusion

- (30) I am of the view that section 17(5) (a) (i) must be read with Section 17(2) (e) and Section 17 (1) (a) of the Public Service Act. I hold the view that the dismissal was substantively fair in view of the provisions of Section 17(5) (a) (i) read with Section 17(2) (e) of the Public Service Act because the dismissal was by operation of law.
- (31) With regard to the Procedural aspect of the dismissal I am of the view that such dismissal was unfair in view of Third Respondent’s failure to afford the Applicant the opportunity to present his case and motivate his reinstatement in accordance with the provisions of Section 17(5) (b) read with Section 4 of Schedule 8 of the Labour Relations Act (Code of Good Practice). In this case, the Third Respondent informed the Applicant that he was dismissed but omitted to inform him of the provisions of Section 17(5) (a) (i) and

(b) of the Public Service Act. This provision is not peremptory and it would seem it is upon the Applicant to act in accordance with this section. **Compare Phenithi v Minister of Education & Others supra.**

(32) The Commissioner decided not to award any compensation in this matter, although no reasons have been furnished for such election. The Applicant seeks an order for reinstatement as well as compensation in terms of Section 194(2) of the Labour Relations Act. In view of the legal interpretation alluded to above, I am of the view that the Applicant was dismissed by operation of law and thus may be entitled to whatever monetary benefit if any, if he succeeds after having invoked the provisions of section 17(5)(b) of the Public Service Act.

(33) In view of the fact that neither the Applicant nor the Third Respondent had taken the points raised with regard to the provisions of section 17(5) of the Public Service Act, and which issues were pertinent for the appropriate adjudication of this matter, I will not make a cost order against either party.

34) The arbitration award dated 28th February 2003 is hereby reviewed and set aside and the following order is substituted therefor:

(a) The dispute is referred back to the First Respondent for arbitration *de novo* before a Commissioner other than the

Second Respondent.

(b) There is no order as to costs.

M M LEEUW
ACTING JUDGE OF THE LABOUR COURT

Date of Hearing : 13 MAY 2005

Applicant's Counsel :

Instructing Attorneys : MOHLABA MOSHOANA

Respondent's Counsel : H. KOOVERSTE

Instructing Attorneys : STATE ATTORNEY

Date of Judgement : 12 August 2005

