THE LABOUR COURT OF SOUTH AFRICA,

IN POLOKWANE

Of interest to other judges

CASE NO: JR 1576/14

In the matter between:

DEPARTMENT OF HOME AFFAIRS (LIMPOPO)	**First Applicant**
And	
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL	**First Respondent**
COMMISSIONER DANIEL SEOPELA (*N.O.*)	**Second Respondent**
NEHAWU OBO L M RAMOLEFE	**Third Respondent**
L M RAMOLEFE	**Fourth Respondent**

Heard: 21 May 2015

Delivered: 4 June 2015

LABOUR COURT

Summary: (Review – dismissal for unauthorised absence – employer dismissing employee for unauthorised absence after allowing him to resume work notwithstanding the provisions of s 17(3) (a) (i) of the Public Service Act – arbitrator failing to weigh evidence and disregarding material evidence – resultant findings irrational and causing him to ignore the most obvious reason for the employee's absence from work owing to him serving a criminal sentence)

JUDGMENT

LAGRANGE, J

Background

[1] The fourth respondent in this matter, Mr L M Ramolefe, ("Ramolefe") was dismissed on 18 June 2013 for being absent from work without permission for the period 1 October 2012 to 7 and January 2013. The arbitrator found that his dismissal was substantively unfair and ordered his reinstatement.

[2] Ramolefe was employed as an immigration officer stationed at Beitbridge border post. The circumstances leading to his absence from work during the period mentioned was that he had been charged and found guilty of misconduct which led to him being suspended for a period of two months without pay in July 2012. He was due to return to work on 1 October 2012 but could not do so because he was serving a prison sentence as a result of his conviction on criminal charges arising from the same misconduct for which he had been suspended without pay. In terms of the sentence handed down he had to serve two years imprisonment, of which one was suspended for five years.

[3] The applicant was aware of Ramolefe's incarceration and took the view that it was entitled to terminate his services in accordance with section 17 (3) (a) (i) of the Public Service Act who, 1994 as amended, which states:

> *"(3) (a)(i) 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*

LABOUR COURT

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."

[4] It is trite law that the effect of the section is automatic and requires no action on the part of the employer to take effect. However, notwithstanding an automatic termination by operation of the provision, if an employee does report for duty subsequently a remedy is provided in section 17(3)(b) of the Act, which reads:

"(b) 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."

[5] Even though section 17 (3) (a)(i) automatically terminated Ramolefe's employment at the end of October 2012, the applicant decided to give him an opportunity to make representations as to why his services should not be terminated in terms of the provision, as if it was the applicant that needed to decide if the section would take effect after he had been absent from work without permission for more than a month. A letter to this effect was given to Ramolefe on 4 November 2012. On 19 November 2012, Ramolefe responded saying that once he had a letter instructing him to return to work and if he then failed to do so only then could the applicant consider discharging him. On 12 December 2012, he was issued with a further letter from the applicant, which noted his failure to report for duty since 1 October 2012 and instructed him as follows:

LABOUR COURT

"This letter serves as a reminder that you must report at work immediately. Failure to do so at the Department will terminate your services in terms of section 17 (3 (a) (i) of the Public Service Act (1994) as amended."

[6] Ramolefe was only released from prison on 9 January 2013 and reported for work thereafter. He was allowed to return to work though he was placed in another Department and was charged with unauthorised absence from work without permission for the period 1 October 2012 until his return to work in January 2013.

The arbitrator's award

[7] The arbitrator concluded that there had been a breakdown of communication between Ramolefe and the applicant because the second letter to Ramolefe received by him 12 December 2012 did not address his request for a letter advising him when he should report for duty. The arbitrator then concluded:

"It is my considered view that the absence of the applicant [Ramolefe] is justifiable on the basis that the applicant asked the respondent to give him a letter informing him that he should report for duty."

[8] He also concluded that Ramolefe had complied with the instruction to report for work when he returned after being released in January 2013. The arbitrator accepted Ramolefe's version that he had been orally advised that he could expect a letter advising him of the date when he should return because the arbitrator took the view that the letter received on 12 December 2012 did not address Ramolefe's request for such a letter. At this juncture it must be mentioned that the Ramolefe's version of receiving such advice really was not put to the applicant's witness under cross examination. The arbitrator also decided that the applicant had not utilised section 17 (3 (a) (i) because it had proceeded to charge Ramolefe with misconduct.

The review

[9] A number of grounds of review were raised and it is not necessary to deal with all of them except those which merit consideration. Amongst those which stand out in

LABOUR COURT

this regard is a complaint that the Commissioner committed gross misconduct by failing to appreciate that Ramolefe's failure to report for duty was on account of being convicted of a crime committed in the course of his duties. Further, it contended that the Commissioner had exceeded his powers by reinstating Ramolefe who had been dismissed automatically by virtue of the operation of section17 (3 (a) (i). Lastly, the applicant claims that the arbitrator's conclusion was one that no reasonable arbitrator could have arrived at on the evidence before him.

[10] I have some sympathy with the arbitrator's finding that the applicant did not 'follow' section17 (3 (a) (i). It seems that the applicant had erroneously believed that it had an election whether or not the section took effect. Instead of simply waiting for the thirty day period to elapse and then dealing with Ramolefe on his return to work in terms of section 17 (3) (b), the applicant sought representations from Ramolefe before he had attempted to returned to work, but after the section had actually taken effect. The applicant added to the confusion by allowing Ramolefe to return to work upon his release and then invoking ordinary disciplinary proceedings as if section17 (3) (a) (i) had not taken effect. The applicant criticises the arbitrator for ignoring the automatic consequences of that section, whereas it did so itself.

[11] In any event, the real question is whether or not the arbitrator's finding that Ramolefe's dismissal was substantively fair for his unauthorised absence from work after allowing him to resume employment. In this regard, the applicant is on a sound footing. Firstly, he improperly attached decisive weight to Ramolefe's claim that he had been advised orally to expect a letter advising him of the date he should report for duty without even considering the fact that this version had not been raised with the applicant's witness. Secondly, he found that Ramolefe's failure to return to work was justifiable on this basis alone, as if Ramolefe's continued absence from work after the cessation of his suspension at the end of September 2012 was owing to the failure of the applicant to specify a date for returning to work.

LABOUR COURT

[12] Thirdly, the arbitrator could only arrive at his conclusion that Ramolefe's continued absence was justified by a completely disregarding the unambiguous instruction contained in the second letter he had received on 12 December 2012. That letter unequivocally instructed Ramolefe to report for work "immediately", which meant he should do so without delay. Even if the arbitrator believed the applicant was obliged to specify the date for Ramolefe to return to work, the instruction in the letter clearly was telling Ramolefe that his presence at the workplace was expected without any further delay. The arbitrator avoided the most obvious inference of the fact that Ramolefe failed to report until the second week of January 2013 despite receiving the applicant's letter on 12 December 2012, namely that he did not do so because he was still in prison as a result of being convicted of a crime, not because he was not sure when he should do so. It was completely disingenuous of the arbitrator to treat the reason for Ramolefe's continued absence as being based on a lack of clarity from the applicant about when he should report for work. Incidentally, the arbitrator did not even consider that it should not have been necessary for the applicant to even remind Ramolefe of his obligation to return to work once his period of suspension without pay had ended. The arbitrator's failure to consider the glaringly obvious reason for Ramolefe's absence made it necessary for him to adopt a completely distorted explanation for it, which also necessitated him ignoring the need to weigh evidence or, worse still, disregarding the unambiguous import of the letter of 12 December 2012.

[13] In the circumstances, the arbitrator's finding is not one that a rational arbitrator could have reached on the evidence before him and his award must be set aside.

[14] In reconsidering the arbitrator's finding that Ramolefe's dismissal was substantively unfair, it is apparent that the reason for his inability to report for work at the conclusion of his own paid suspension was his conviction of a crime relating to the same misconduct and accordingly the reason for his absence, though involuntary, was a direct consequence of his own action, and not the result of some fortuitous event beyond his control which befell him, such as an accident. In those circumstances, the sanction of dismissal was not inappropriate in my view.

LABOUR COURT

Order

[15] The arbitration award of the second respondent dated 20 April 2014 under case number GPPC1447/2013 is reviewed and set aside.

[16] The second respondent's finding that the fourth respondent's dismissal was substantively unfair is substituted with a finding that his dismissal was fair.

[17] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant: X Matyolo

Instructed by: H Maponya

For the Third and Fourth Respondents: P M Ramoshaba

Instructed by: Ndekwe Attorneys

LABOUR COURT