REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

CASE no. D 137/2010

In the matter between:

NEHAWU	First Applicant
PT MAPHANGA	Second Applicant
and	
S McGLADDERY N.O	First Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Second Respondent
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent

Date of Hearing: 1 September 2011

Date of Judgment: November 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an application to review and set aside a ruling issued by the First Respondent under the auspices of the Second Respondent. It is also an application to review and set aside the deemed discharge of the Applicant from the public service on 1 October 2008. The Order prayed for reads as follows:

'1. (a). The conduct of the Third Respondent in deeming to discharge the Applicant in terms of section 17(5) of the Public Service Act is reviewed and set aside,

(b) The Third Respondent is ordered to reinstate the Applicant with back pay effective from 1 October 2008; and or alternatively;

2. That the jurisdictional ruling under case number GPBC 615/09, made by the First Respondent is reviewed and set aside and replaced by the following orders:

(a) that the Second Respondent has jurisdiction to hear the application brought by the Applicant under case number GPBC 615/09;

(b) that the deemed discharge of the Applicant by the Third Respondent constituted a dismissal for misconduct in terms of the Labour Relations Act 66 of 1995 as opposed to termination by operation of law;

(c) Alternatively, that the matter is referred back for a hearing afresh before another commissioner under the auspices of the Second Respondent.

3. The costs of this application are to be paid by those Respondents who oppose it.'

[2] The application is opposed by the Third Respondent ("the employer").

Factual Background

[3] The factual background is long and detailed. It is not necessary for me to decide any of the factual issues as this matter turns on points of law. However, for the sake of completeness the facts are summarised hereunder. The Second Applicant ("the employee") was employed as a senior interpreter at the Umlazi Magistrate's Court as at the date of discharge from service. The employee commenced employment with the employer on 20 February 1980.

[4] The employee had been absent from work for a period of five months from 21 July 2008 to 19 December 2008. It is alleged by the employee that she had sent medical certificates to the employer for the period of her absence. This is disputed by the employer.

[5] The employer submitted that the submission of medical certificates was not the proper procedure for obtaining authorisation for leave of absence; the employee had not filled in the requisite leave forms and that the absence was not authorised and that she was absent without permission.

[6] The medical certificates attached to the founding affidavit are dated:

1. 10 September 2008 (for a fractured ankle and where she is recorded as being unfit for duty from 8 September 2008 to 30 September 2008);

2. 1 October 2008 (for a fractured ankle and where she is recorded as not being fit for duty from 1 to 13 October 2008)

3. 20 October 2008 (for a fractured ankle);

4. 22 October 2008 (for a fractured ankle and she is recorded as not being fit for duty from 20 to 24 October 2008 but could assume light duties on 27 October 2008);

5. 7 November 2008 (for a fractured ankle and chronic vital myalgia where she is recorded as not being fit for duty from 21 July 2008).

6. 15 December 2008 (for a fractured ankle and chronic vital myalgia where sick leave was recommended from 21 July 2008 to 19 December 2008).

[7] The employer, through its area court manager, Mrs Pienaar (Pienaar) addressed a detailed letter dated 3 November 2008 to the employee. In this letter (the historical letter) the employer informed her that:

1. She had been absent from duty for various dates since 26 November 2007 to 3 November 2008 and such absences were without permission.

2. Her last leave form was dated 4 July 2008 and since then she had not applied for or was granted leave from duty.

3. She had not submitted leave forms for the various dates of absence from 7 July 2008 to 3 November 2008.

4. Her supervisor, Mr Zondi, (Zondi) advised that she had been absent from duty from December 2007 to May 2008. That the employee worked for 11 days in July 2008 and that she did not work in August, September and October 2008.

5. Zondi tried calling the employee on her cell phone on 15 and 16 September 2008. Her phone was not answered. He tried again on 29 September 2008 and was informed by a person called Sibongile that the employee was at a funeral. The employee returned Zondi's call and agreed to report for duty the next day. The employee did not report for duty as agreed.

6. Zondi then arranged a meeting with the employee on 2 October 2008 which she did not attend. The employee did not provide any explanation for her non-attendance.

7. On 3 October 2008, Zondi sent a letter to the employee inviting her to the office on 6 October 2008. She did not attend the office. No explanation was provided by the employee.

8. As the employee's vacation and sick leave were exhausted, she had to apply for incapacity leave. The forms were sent to her home on 8 October 2008 but nobody was at the employee's home to receive the forms.

9. The forms were again sent on 9 October 2008. The messenger who was to deliver the forms was informed by the employee's boyfriend that she had gone to Medical Towers. The boyfriend called the employee and she advised that she would attend her office before returning home that day, which she did.

10. At a meeting attended by the employee, Zondi and Pienaar, it was agreed that the employee would complete the forms and submit them by 16 October 2008.

11. Despite taking the forms, the employee did not submit them and on 20 October 2008 informed the employer that she was to undergo an operation on 21 October 2008. As her doctor was at a conference she could not submit the forms. Since 20 October 2008 the employer had not heard from the employee.

12. The employee was instructed to report for duty on 7 November 2008, failing which disciplinary action would be taken against the employee.

[8] A significant portion of the historical letter is disputed by the employee. Item 10 of the above summary is, however, common cause.

[9] The employee submits that she had the required incapacity leave form ready for submission on 22 December 2008. However before she could submit it, she received on 17 December 2008 a letter dated 15 December 2008 from the employer. This letter (the termination letter) advised her that;

1. The employee was absent from work for more than one month.

2. She was deemed to be discharged from service. The discharge was in terms of section 17(5)(a)(i) of the Public Service Act 1994 (the Act) and the discharge was effective from 1 October 2008.

3. Should she wish to be reinstated in terms of section 17(5)(b) of the Act, she would have to make written representations to Pienaar by 5 January 2009.

4. The request for reinstatement would be forwarded to the Minister of Justice and Constitutional Development for consideration.

[10] On seeing her doctor on 15 December 2008, she was recorded as being fit to resume duty on 20 December 2008, however 20th December 2008 was a Saturday and she did not work on Saturdays. The employee reported for duty on Monday 22 December 2008 where she was informed that her services were no longer required.

[11] The employee submitted written representations for reinstatement on 31 December 2008. In her representations, the employee submitted that she had informed Zondi that she had been diagnosed in July 2008 with a fractured ankle and chronic vital myalgia. She was pronounced not 'fit for duty' from 21 July 2008 to an unspecified date. Although it is recorded that the medical certificate and the leave form are attached to the representations, they were not placed before this Court. The only form attached to the pleadings is that for temporary incapacity leave which was signed by the employee on 7 November 2008.

[12] The employee also submitted in her representations that she was given the incorrect leave forms and when the correct forms were given to her she handed them to her doctor to complete. It is not clear to this Court what those incorrect leave forms were and which periods they covered as they are not annexed to the papers.

[13] She also recorded that the final medical certificate from her doctor covered the period from 21 July 2008 to 19 December 2008.

[14] She did not receive a response to the representations for reinstatement. The First Applicant ("the union") then wrote a letter dated 2 June 2009 requesting a meeting to present the employee's case.

[15] A follow up letter dated 19 June 2009 was sent to the employer by the union, informing it that should it not respond within seven days, it would declare an unfair dismissal dispute to be lodged with the second respondent ("the bargaining council").

[16] On 9 July 2009, the employee referred an unfair dismissal dispute to the bargaining council.

[17] The Minister of Justice and Constitutional Development issued a letter dated 31 July 2009 noting receipt of the letter dated 2 June 2009 and informing the union that that letter was being dealt with by the human resources branch of the national office.

[18] The dispute was conciliated telephonically on 11 September 2009 and a certificate was issued. The matter was referred to arbitration on 22 September 2009.

[19] The arbitration hearing was held on 9 December 2009 where the employer raised a *point in limine* that the bargaining council did not have jurisdiction to hear the dismissal as the termination was by operation of law.

[20] The employee submitted to the commissioner that she was challenging the termination by operation of law. The employee further submitted that section 17(5) had been repealed as at the date of her dismissal and she could only be dismissed in terms of section 17(3) which required the dismissal to be in terms of the LRA. She submitted that she was entitled to be heard before being dismissed and the failure of the employer to hold a hearing rendered the dismissal unfair.

[21] A ruling dated 29 December 2009 was issued by the First Respondent ("the commissioner") to the effect that the bargaining council did not have jurisdiction to hear the matter as the termination came about by operation of law as opposed to the employer exercising its discretion and electing to dismiss the employee. The

commissioner held that the termination was a deemed dismissal in terms of section 17(3) of the PSA.

[22] The employee lodged this review application in February 2010.

[23] In a letter dated 23 June 2011, the employer informed the employee that her application for reinstatement was not approved.

The review application

The ruling by the commissioner

[24] The review application in respect of the ruling by the commissioner is premised on the ground that the commissioner erred in concluding that the termination was by operation of law. The employee submits that she was unfairly dismissed, the LRA applies and the bargaining council therefore has jurisdiction to hear the dispute.

[25] The *Phenithi* case (*Phenithi v Minister of Education and Other*[1]*s* [2006] 9 BLLR 821 (SCA) held that terminations by employers by operation of law are not decisions by employers and are not reviewable actions. In other words, employers do not exercise any discretion whatsoever when terminating employment through statutory provisions like the old section 17 (5) or the current section 17 (3). Other cases have held that, when deciding whether to reinstate the employee on good cause the employer exercises a discretion. This decision constitutes administrative action. The exercise of the discretion when deciding whether good cause has been shown is a discretionary matter and such decision may be reviewable in terms of section 158 (1)(h) of the LRA. [See *Grootboom v National Prosecuting Authority and Another,*[2] *Mahlangu v Minister of Sport and Recreation* (2010) 31 ILJ 1907 LC and *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 ILJ 1377 (LC)].

[26] I will not deal here with the differences between the repealed section 17(5) and the current section 17(3) save to state that I accept that they are of the same import. For

[1] [2006] 9 BLLR 821 (SCA).
[2] (2010) 31 ILJ 1875 (LC).

this reason the cases referred to above are significant and are applicable to the facts before me.

[27] From the above cases, it is clear that there is a two stage process present in terminations by operation of law in the public sector. The first stage is where the employer effects a termination where the employee has been absent without authorisation for more than one calendar month. There is no dismissal of the employee and the rights to a hearing prior to the dismissal do not apply.

[28] The second stage is where the employee makes an application to be reinstated on good cause shown. At this stage the employer exercises a discretion in deciding whether good cause has been shown and whether the employee should be reinstated. Good cause may include grounds such as the employee was not absent for more than one calendar month or that the employee did in fact obtain authorisation for the absence or that the employee was not in a position to make the necessary application for leave prior to being absent without leave and where the absence is for a good reason, for example if the employee was in critical care in hospital and not physically or mentally able to make the application. Clearly the grounds are not limited to these examples cited here.

[29] If these grounds exist, the employee would have to record them in her application to be reinstated. If the employer does not properly consider these grounds or ignores them and refuses the application for reinstatement, then that decision not to reinstate her may be reviewable.

[30] At the time that the *point in limine* was argued before the commissioner, the decision in respect of reinstatement was not issued by the employer. The only issue before the commissioner was whether the termination was by operation of law or a dismissal in terms of the LRA. Molahlehi J in the *Grootboom* case (at paragraphs 38 to 41) held that the termination by operation of law does not covert into a dismissal, it remains a termination by operation of law. The employee has a remedy in her being able to challenge the non-reinstatement by way of a review application in this Court.

[31] The employee also submits that the commissioner ought to have determined whether the employee was absent for more than one calendar month when the termination was effected. From a reading of the transcribed hand written notes and the ruling of the commissioner it is clear that this issue was not raised during the hearing. There was no need for the commissioner to consider this issue as it was not raised as an issue in dispute.

[32] Further, this issue is so important that it goes to the nub of the issue whether the dismissal was by operation of law or an unfair dismissal. Had it been raised, evidence would have had to have been placed before the commissioner not only on whether one calendar month had passed as at the date of termination, but also whether the employee had the required approved leave for the other months (given her submission that she was absent from duty from July to December 2008) and whether the necessary medical certificates had been received by the employer. However as the employee had not raised this issue as an issue in dispute, the commissioner correctly decided the *point in limine* on the basis that the absence for more than one month was common cause or not in dispute. There was therefore no avenue available to the commissioner to make a finding that it was not a termination by operation of law and that the bargaining council in those circumstances had jurisdiction to hear the matter. The employee, not having raised this issue before the commissioner, accordingly cannot rely on this ground in its review application.

[33] In the premises I find that the decision by the commissioner is a decision that a reasonable commissioner would have made. I see no reason to interfere with that decision.

<u>The deemed discharge by the employer</u>

[34] The review in respect of the employer's termination by operation of law is premised on the ground that the discharge occurred in terms of a non-existent section of the Act.

Section 17 (3) of the Act provides:

‘17 Termination of employment

(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 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.

(ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not.

(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.’

[35] The employee submits that the old section 17 (5) in terms of which she was dismissed did not apply as at the date of her dismissal as it was repealed and replaced by section 17(3) above.

[36] The relevant portions of the repealed section 17 (5) provided as follows:

‘(5)(a)(i) An officer, other than a member of the services or an educator or the Agency or Service 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 a date immediately succeeding his or 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 have been dismissed 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 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 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.'

[37] As can be seen from the above quoted sections 17(3) and 17(5) the only differences are that the words “officer” and “discharged” are replaced with the words “employee” and “dismissed” respectively. Apart from clarifying that the deemed discharge is a dismissal, the new section 17 (3) carries the same meaning and intention of the old section 17 (5).

[38] The intention of the two sections remain the same – that is if an employee is absent from duty without permission from the employer for more than one calendar month the employee shall be deemed to be dismissed from duty. The employee may be reinstated on good cause shown. It has been accepted by this Court that the two sections have the same application [See *Public Servants Association of SA obo Van der Walt v Minister of Public Enterprises and Another* (2010) 31 ILJ 420 (LC)].

[39] The employee submitted that any dismissal contemplated in terms of section 17(3) had to comply with the LRA as section 17(1) provides that the power to dismiss shall be exercised in accordance with the LRA.

[40] I disagree with this submission. The reference to a hearing in terms of the LRA is limited to those instances in terms of section 17 (1) and (2) where an employee may be dismissed for incapacity due to ill health or injury or poor work performance; operational requirements or misconduct. To my mind, these forms of dismissal are distinct from terminations by operation of law as recorded in section 17 (3).

[41] The employee submits further that the employer had informed the employee that she would be subjected to a disciplinary hearing prior to dismissing her but it had changed its mind. There is no evidence of any steps take by the employer to hold a disciplinary hearing. I find that the employer could elect between the two avenues and opted to carry out a statutory termination.

[42] I therefore do not find that there was an onus on the employer to hold a hearing prior to terminating the relationship by operation of law.

[43] Further, this Court's power is limited to reviewing the decision of the employer not to reinstate the employee. The findings of Molahlehi J in the *Grootboom* matter are apposite insofar as the employer's discretion is concerned. At paragraph 56 thereof that Court held:

'It is clear in my view that the requirement of good cause in terms of s 17(5)(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorization. The employer in considering whether or not to reinstate the employee has to exercise a discretion given by s 17(5)(b) of the PSA. In this respect the decision by the employer has to be influenced by fairness and justice. In other words, the employer does not have an unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her mind to the submission made by the employee for the decision to be said to be reasonable and lawful. The key factor amongst others, which the employer has to take into account, is whether or not the unauthorized absence was wilful on the part of the employee. '

[44] There are no submissions before me in support of a review of the decision not to reinstate the employee. Had these submissions been made I would have had to apply the test in the Grootboom matter (recorded in paragraph 43 above) to determine if the discretion exercised in not reinstating the employee was properly exercised. The employee's relief is limited to reviewing the conduct of the employer in terminating her services. As referred to earlier, the termination by operation of law is the first stage of the process. This Court does not have the power to review the termination as the employer does not exercise any discretion in so doing.

[45] As the employee has not made out a case to support the review of the decision not to reinstate her, the employee is not entitled to the relief prayed for.

[46] I accordingly make the following order:

1. The application is dismissed with costs.

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Reddy AJ

APPEARANCES:

1. FOR THE APPLICANTS: Mr Myeza of NEHAWU
2. FOR THE THIRD RESPONDENT: Ms Pungula instructed by the State Attorney.