



**IN THE LABOUR COURT OF SOUTH AFRICA,  
DURBAN**

**REPUBLIC OF SOUTH AFRICA**

Not Reportable

Case No D687/10

In the matter between:

**NOKUTHULA VERONICA NHLEBELA**

Applicant

and

**MEC FOR EDUCATION**

First Respondent

**HEAD OF DEPARTMENT OF EDUCATION**

Second Respondent

**Heard: 18 December 2013**

**Delivered: 31 July 2015**

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**JUDGMENT**

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ALEXANDER AJ

## Introduction

1 This is an application, in terms of Section 158(1)(h) of the Labour Relations Act 66 of 1995 ("the LRA"), to review and set aside the decision of the second respondent not to approve the applicant's reinstatement after she was deemed to be discharged in terms of Section 17 of the Public Service Act, 1994. There is also an application for condonation for the late filing of the applicant's review application, which is opposed.

2 Both parties have incorrectly stated that the application for reinstatement and the second respondent's refusal was made in terms of Section 17(5)(a) of the Public Service Act. The Public Service Act was amended in terms of Section 43 of the Public Service Amendment Act, No. 30 of 2007, with effect from 1 April 2008 and the relevant section is Section 17(3)(a) and (b) and not Section 17(5).

3 Section 17(3) reads as follows:

"(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 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)...

- (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 ...”*

#### **Background facts in relation to the filing of the review application**

- 4 The applicant was absent from work from 20 February 2008 and was discharged on 2 September 2008 on account of misconduct in terms of Section 17(3)(a)(i) of the Public Service Act. The applicant made a written application for reinstatement to the Reinstatement Committee, in terms of Section 17(3)(b), in a letter, dated 20 November 2008. Reinstatement was refused by the Reinstatement Committee seven months later in a letter, dated 30 June 2009, which was signed by Dr RC Lubisi, the Superintendent General, on 3 July 2009.
- 5 The applicant's union, NUPSAW, referred an unfair dismissal dispute on behalf of the applicant to the General Public Service Sectoral Bargaining Council (“the Bargaining Council”) on 11 August 2009. It was not settled at conciliation on 3 September 2009 and nor was the issue of jurisdiction raised by the second respondent at this meeting. The matter was subsequently set down for arbitration some ten months later on 2 July 2010. At a pre-arbitration conference held prior to the arbitration, the representative for the second respondent explained that the second

respondent intended raising a point *in limine* at the arbitration that the Bargaining Council had no jurisdiction to arbitrate the dispute because the applicant had not been dismissed in terms of the LRA, and instead her employment had been terminated by operation of law in terms of Section 17 of the Public Service Act. At the arbitration, the applicant accepted that the termination of her employment was by operation of law and proceeded to withdraw the dispute.

- 6 The applicant launched this review application on or about 9 September 2010. The application was launched 453 days after the second respondent refused to approve the reinstatement of the applicant.

#### **The law in relation to condonation applications**

- 7 This is an application in terms of Section 158(1)(h) of the LRA, which is required to be lodged within a reasonable time unless good cause is shown.

- 8 In *Melane v Santam Insurance Company Limited*<sup>1</sup>, the court held:

*“On good cause shown, the Court may permit the employee to refer dispute after the relevant time limits have expired. In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.”*

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<sup>1</sup> (1962) 4 SA 531 (AD)

## **Applicant's condonation application**

### **9 Degree of lateness**

9.1 As stated above, the applicant's review application was lodged 453 days after the second respondent refused to approve her reinstatement. This is an exceptionally long delay which requires a very good explanation.

### **10 Explanation for the delay**

10.1 The applicant's explanation for the delay is that it was her trade union that made the incorrect decision to refer the dispute to the Bargaining Council and that her review application was filed within a period of six weeks after the matter was withdrawn at the Bargaining Council.

10.2 The applicant's union referred an unfair dismissal dispute approximately five weeks after her written application for reinstatement was dismissed and launched this application approximately two months after the withdrawal of the referral to the Bargaining Council. The major reason for the delay from September 2009 until July 2010 was as a result of the failure by the Bargaining Council to set the matter down for arbitration. Had the Bargaining Council set the matter down for arbitration earlier or the second respondent raised the issue of jurisdiction at conciliation, the unfair dismissal dispute would have been withdrawn earlier and this review application would have been launched earlier than September 2010.

## **11 Prospects of success**

11.1 In relation to the prospects of success, I am required to determine whether the applicant has good prospects of success in reviewing and setting aside the decision of the second respondent refusing to approve reinstatement. The salient facts are set out below.

11.2 In January 2007 the applicant got stuck in the Cango Caves for approximately ten hours, was taken to the Karoo Private Clinic and was discharged the following day. She suffered a bruised abdomen, experienced spinal pain and a nervous breakdown. She initially attended the Crompton Hospital in Pinetown and was later referred to a neurologist at the Westville Hospital which did not ease her pain and nervousness. After attending various hospitals and receiving treatment from various doctors, she was advised to attend a traditional healer. She discussed her situation with the Assistant Director, Mr RZ Khumalo, who understood her circumstances. There is no affidavit from Khumalo disputing that the applicant discussed her situation with him at the time.

11.3 When the applicant did not report for work from 20 February 2008, the second respondent sent her a letter, dated 17 March 2008, requiring her to report for duty immediately, and certainly by no later than 26 March 2008, with proof that she had been booked off sick by her doctor.

11.4 After the applicant received the second respondent's letter, dated 17 March 2008, the applicant addressed a letter to the second respondent, dated 27 March 2008, stating that she had been seriously ill, that she

was being treated by a traditional healer and not a medical doctor and therefore did not have any medical certificates. She further stated that she could not say when she would be returning to work but promised that she would resume her duties as soon as she recovered. She requested the second respondent to use her capped leave of absence for the 25 working days that she had been absent from 20 February to 27 March 2008. Attached to this letter was an application for leave of absence for the period 20 February to 27 March 2008.

11.5 Before the second respondent received the applicant's response, the second respondent sent a further letter to the applicant, dated 28 March 2008, stating that she had not responded to the first respondent's letter, dated 17 March 2008, and requiring the applicant to provide medical certificates by no later than 4 April 2008, failing which the contract of employment would be terminated in terms of Section 17(1) of the Public Service Act. Section 17(1) refers to a dismissal in terms of the LRA and not a dismissal in terms of the Public Service Act.

11.6 After the first respondent received the letter from the applicant, dated 27 March 2008, the second respondent sent a further letter to the applicant, dated 7 April 2008, stating that she was required to produce a medical certificate from a recognised medical doctor on or before 16 April 2008 and that the second respondent could only appoint a substitute in her absence if capped leave was approved for her. She was told if she did not provide a medical certificate disciplinary action would be taken against her. She was not told that she would be discharged by operation

of law in terms of the Public Service Act. In her affidavit, the applicant states that she received this letter from the first respondent on 20 May 2008 and on the same day had an appointment with Dr Ashwin Valjee, a specialist psychiatrist.

11.7 Mrs Masondo, who was the applicant's Supervisor, recommended to the Director: Labour Relations in a letter, dated 25 April 2008, that a charge of insubordination and misconduct should be laid against the applicant, alternatively she should be boarded on the basis of ill health and inability to perform her operational duties.

11.8 The applicant telephoned Ms PFL Gumede, the State Accountant: Budget, and asked her to collect the medical certificates from her. It is not clear from the application papers when exactly the medical certificates were collected from the applicant.

11.9 The proof provided by the applicant for her absence for illness or injury for the period from 20 February 2008 was as follows:

11.9.1 No medical certificate for the period 20 February until 20 March 2008 (although the applicant did state that she was receiving treatment from a traditional healer for therapy and convalescence);

11.9.2 A medical certificate from Dr Ashwin Valjee, stating that the applicant was suffering from a severe depressive episode and post-traumatic stress disorder and should take sick leave for



the period 20 March until 21 May 2008 and that she was in need of long term therapy;

11.9.3 A medical certificate from Mrs J Thabethe, a counselling psychologist, who confirmed that she was rendering psychotherapeutic services to the applicant from 20 May 2008;

11.9.4 No medical certificate for the period of absence from 22 May 2008 until 30 June 2008;

11.9.5 A medical certificate from Dr Ashwin Valjee stating that she should be on sick leave from 1 July until 31 July 2008 for therapy and convalescence and that she was in need of long term therapy;

11.9.6 A medical certificate from Dr Ashwin Valjee stating that she required therapy and convalescence and should take sick leave from 1 August 2008 until 31 August 2008 and that she was in need of long term therapy;

11.9.7 A medical certificate from Dr Ashwin Valjee stating that she should take sick leave from 1 to 30 September 2008 for therapy and convalescence and that she was in need of long term therapy.

11.10 The second respondent informed the applicant in a letter, dated 2 September 2008, that the applicant had been discharged from service on the grounds of misconduct by operation of law, in terms of Section

17(5)(a)(i) of the Public Service Act (as stated above, at that stage Section 17(5)(a)(i) had been repealed and replaced with Section 17(3)(a)(i)). This was the first correspondence between the parties since May 2008. The applicant was told that she was entitled to apply for reinstatement by showing good cause through furnishing proper and substantive reasons for her absence.

11.11 The applicant made submissions for reinstatement in a letter to the Reinstatement Committee, dated 20 November 2008, which stated as follows:

11.11.1 In January 2007 she was trapped in the Congo Caves and thereafter suffered a great deal of pain but continued to work;

11.11.2 When the pain became so unbearable she approached management (Masinga and Khumalo) for capped leave, which was agreed to between all the parties;

11.11.3 In May 2008 she received a letter from Khumalo (dated 7 April 2008) requiring her to produce a medical certificate from a recognised medical doctor on or about 16 April 2008;

11.11.4 She duly provided four medical certificates from Dr Ashwin Valjee and one from Mrs J Thabethe;

11.11.5 At all times she made her superiors aware of her whereabouts.

11.12 The Reinstatement Advisory Committee considered the applicant's request for reinstatement and highlighted that:

11.12.1 The applicant had not provided proof from a medical practitioner of the injuries or pain that she was suffering from;

11.12.2 In relation to her allegation that her supervisors knew of her absence, the letters, dated 17 and 28 March 2008, from Masinga to the applicant reflected that her supervisors did not know the reasons for her absence, and called upon her to provide proper medical certificates and warned her of the consequences;

11.12.3 She did not have permission to be absent from work and she did not submit leave forms for the period 20 February until 20 May 2008.

11.13 On the basis that the applicant had failed to provide medical certificates as an explanation for her absence, the Reinstatement Advisory Committee made a recommendation that she had not shown good cause and accordingly the applicant ought not to be reinstated. The findings of the Reinstatement Advisory Committee were confirmed in a letter from the Reinstatement Committee to the applicant, which was approved by the Superintendent General on 3 July 2009 (which was approximately eight months after the applicant made her submissions for reinstatement).

## Decision on the condonation application

- 12 The delay in launching the review application is exceptionally long and requires a very good explanation. It is true that NUPSAW should have known that the Bargaining Council does not have jurisdiction to arbitrate these types of disputes and that a review application, such as this, should have been launched within a reasonable time of the decision of the Reinstatement Committee not to reinstate the applicant. Having said this, the reasons for the delay include the second respondent's failure to raise the issue of jurisdiction at the conciliation meeting and the ten month delay by the Bargaining Council in setting the unfair dismissal dispute down for arbitration.
- 13 Notwithstanding the long delay, I am satisfied that the applicant enjoys extremely strong prospects of success and for this reason the applicant is granted condonation for the late filing of this review application.

## The law in relation to Section 17

- 14 In *MEC for the Department of Health, Western Cape v Weder, In Re: MEC for the Department of Health, Western Cape v Democratic Nursing Organisation of South Africa obo Mangena*<sup>2</sup> the Court held that the decision of the *MEC for the Department of Health* (in that case) not to reinstate the employee is open to review in terms of Section 158(1)(h) of the LRA on the grounds of legality. The principle of legality is a parallel system of review for action which falls outside of the strict definition of

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<sup>2</sup> [2014] 7 BLLR 687 (LAC),

administrative action as provided for in the Promotion of Administrative Justice Act 3 of 2000.

- 15 In *Pharmaceutical Manufacturers, Association of South Africa and Another*.<sup>3</sup> the Court laid down the core elements of legality as follows:

*“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.”*

- 16 In *Democratic Alliance v President of the Republic of South Africa and Others*<sup>4</sup> Yacoob ADCJ held, *“If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.”*

- 17 In *Judicial Service Commission and Another v Cape Bar Council and Another*<sup>5</sup> a further requirement was added to the principle of legality,:

*“As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: ‘Trust me, I have good reasons, but I am not prepared to provide them?’*

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<sup>3</sup> In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC), at paragraph 85,

<sup>4</sup> 2013 (1) SA 248 (CC) paragraph 39.

<sup>5</sup> 2013 (1) SA 170 (SCA) paragraph 44.

*Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge.”*

- 18 In *De Villiers v Education, Western Cape Province*<sup>6</sup> Van Niekerk J (dealing with S14(2) of the Employment of Educators Act 76 of 1998) said: “no other employer enjoys the right to consider reinstatement of its employee within its sole discretion”. The requirement of “good cause” should be interpreted to mean “that unless the employer, having regard to the full conspectus of relevant facts and circumstances is satisfied that a continued employment relationship has been rendered intolerable by the employee’s conduct, the employer should as a general rule approve the reinstatement of the employee”.
- 19 Van Niekerk J held further that a contrary finding would represent a breach of an employee’s right to fair labour practices and the right to equality (since the respondent in this type of case is treated in a manner which grossly departs from the manner in which other employees in a similar position are treated). The requirements of legality prevent the employee from being helpless pursuant to an employer’s arbitrary decision. In particular, given an employee’s rights to fair labour practices, the decision must be tested for rationality.

### **Application of the law to the facts**

- 20 In her application for reinstatement to the Reinstatement Committee, the applicant stated that she was under incredible pain after an accident at

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<sup>6</sup> (2010) 31 ILJ 1377 (LC) at para 30

the Congo Caves near George in January 2007 and therefore she approached her immediate supervisor at the time, Masinga, and the Assistant Director, Khumalo, to apply for capped leave, which was agreed to between all the parties. She also provided a detailed explanation for her absence from work, together with medical certificates, and stated that at all times her superiors were made aware of her whereabouts, and in particular Londiwe Gumede, her supervisor at the time, knew her whereabouts and was in constant contact with her.

21 The application came before the Reinstatement Committee on 26 February and 26 March 2009. The minutes reflect that it was agreed that she could take capped leave and that her supervisors knew of her whereabouts and failed to contact her. Furthermore, she had presented medical certificates for the periods 20 March to 21 May 2008, 23 May to 30 June 2008 and 1 to 31 August 2008. The minutes further reflect that the Committee required submissions from the Service Centre, a response to whether her supervisors knew of her absence and failed to contact her and whether she had submitted leave forms or had the permission of her employer to be absent from work.

22 The minutes reflect that the Committee reconvened on 26 March 2009 and considered that the applicant had been told in a letter from the second respondent, dated 7 April 2008, to provide medical certificates from recognised medical practitioners for her periods of absence. The minutes further record that her supervisors did contact her and warn her that her explanations for her absences were unacceptable and called

upon her to provide proper medical certificates and warned her of the consequences. The minutes also record that she did not submit leave forms or have the permission of the second respondent to be absent. The Committee concluded that the medical certificates were unacceptable because they did not provide an explanation for her periods of absence and her continued absence from work had prejudiced the employer. For these reasons, the Committee recommended that she should not be reinstated. The minutes reflect that the Committee did not consider whether the continued employment of the applicant had been rendered intolerable by her absence.

23 The Superintendent General approved the recommendation on 3 July 2009 not to approve the applicant's application for reinstatement because she had not shown good cause for reinstatement, and the medical certificates that she produced did not provide a reasonable explanation for her absence and she had caused prejudice to her employer. Similarly, the Superintendent General approved the recommendation without considering whether the continued employment of the applicant had been rendered intolerable by her absence.

24 Whilst the applicant did not provide a medical certificate for the period from 20 February until 20 March 2008 when she attended a traditional healer, she did provide medical certificates from Dr Ashwin Valjee, a specialist psychiatrist, for most of the period from 20 March until 31 August 2008. There is no evidence that the applicant was not suffering from ill health for this period and that she wilfully and deliberately failed to



provide the second respondent with reasons for her absence. Since there is no indication in the minutes of the Reinstatement Committee meetings on 26 February and 26 March 2009, and in the approval by the Superintendent General on 3 July 2009 (or even in the respondents' answering affidavit) why the continued employment of the applicant had been rendered intolerable by her conduct, the reasons for refusing to reinstate the applicant are arbitrary, irrational and unreasonable.

25 Having found that there were inadequate reasons for rejecting the representations made by the applicant for reinstatement, it serves no purpose to remit the dispute to the second respondent and follows that the applicant ought to be reinstated retrospective to the date of her discharge on 20 February 2008. Both parties are responsible for the delay at different times from September 2008 and therefore the backpay awarded to the applicant is limited to 12 months.

26 In dealing with the issue of costs, both parties sought costs and accordingly the respondents are ordered to pay the applicant's costs.

#### **Order**

27 I accordingly make the following Order:

27.1 The application for condonation for the late filing of the review application is granted;

27.2 The decision of the second respondent, dated 3 July 2009, not to approve the applicant's reinstatement is reviewed and set aside and replaced with a decision reinstating the applicant retrospective to the date of her discharge on 20 February 2008 with 12 months' backpay;

27.3 The respondents are ordered to pay the applicant's costs.

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ALEXANDER AJ

LABOUR COURT

Appearances:

For the applicant : M. Mahase

Instructed by : Ntlokwana and Associates

For the respondents : Advocate S. Jikela

Instructed by : State Attorney KZN

LABOUR COURT