REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGEMENT

Not Reportable/~~Reportable~~

Case No: **JR 1870/2013**

In the matter between:

M E SELLO **Applicant**

and

THE DEVISIONAL COMMISSIONER, HUMAN RESOURCE DEVELOPMENT, SAPS **1st Respondent**

THE COMMISSIONER, SAPS OPERATIONAL AND TACTICAL ACADCEMY, MOLOTO THE PROVINCIAL COMMISSIONER, SAPS GAUTENG **2nd Respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **3rd Respondent**

HEARD: 21 April 2016

DELIVERED: 8 September 2016

SUMMARY: This is an application the decision not to reinstate the employee in terms of s 17 of the PSA.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant in this matter instituted the review proceedings to have the first respondent's decision not to reinstate him.

[2] The applicant had also applied for condonation for the late filing of the review application but that issue seems to have fallen away as a result of the order made by Brassey AJ which is discussed latter in this judgment. In case my interpretation of that order is incorrect, I deal very briefly below with the condonation application.

[3] The test to apply in considering an application for condonation is whether it would be in the interest of justice to refuse or grant condonation having regard to all the relevant factors. The factors to consider are well established and well known in our jurisprudence and thus need no repeat in this judgment.

[4] In the present matter the interest of justice favours the granting the condonation particularly when regard is had to the prospect of success and the issue of prejudice. It should be noted in this respect that, although the respondents raised the issue of the delay in the answering affidavit the condonation application itself is unopposed. The delay in filing the review application is accordingly condoned.

[5] The review application was consequent to the deemed discharge of the applicant from his employment in terms of section 17 (3) (a) (i) of the PSA.

[6] The review application was initially set down for hearing on 9 September 2015. On that day Brassey AJ, made the order, the essence of which was, for the purposes of this judgment, that the first respondent was granted leave to consider the submission made by the applicant for the consideration of his reinstatement in terms of section 17 (3) (b) of the PSA. The other relevant aspect of the order was that the first respondent was to render his written decision in relation to the submission made by the applicant by no later than 15 October 2015.

[7] The matter came before this court again on 21 April 2016. It is common cause that the first respondent has failed to complied with the order of Brassey AJ. In this respect counsel for the first respondent could not provide any reason as to why there was no compliance with that order. She however, requested a further opportunity to consider the submission made by the applicant and to thereafter make a decision. This request was refused, for the reason that no explanation had been proffered as to why there was no compliance with the order and more importantly consideration was given to the fact that the matter has been dragging on for more than six years.

Background facts

[8] It is common cause that during September 2010, the applicant who was in the employ of the second respondent failed to attend work for a period exceeding 30 days. The reason for this according to him was that he became sick and was then advised by his traditional medical practitioner (the practitioner) not to attend work. The practitioner placed him under a prolonged treatment which had to be done in isolation of other people. He underwent the treatment from 9 September 2010 to 3 December 2010. He states in his founding affidavit that he contacted his supervisor to inform him about his reasons for not attending work.

[9] The applicant further stated in his founding affidavit that he on 20 October 2010, contacted the supervisor and informed him that he would be reporting for work on 26 October 2010. This is confirmed in a letter from the second respondent to the first respondent which reads as follows:

> "Member number 19 5082… Sello has been absent from duty as from 2010 – 09 – 08 till to date.
>
> The member is a shift worker (A-shift) and other members who are working in the very same with him who are staying at Tafelkop were asked to relay the message to FSS ME Sello to contact our office but no response came from the member.
>
> There has been no indication of any sick notes or letter from the member. When the member was supposed to be on duty, attempts were made to contact the member again but cellphone number does not exist.
>
> The member contacted our office on 2010 – 10 – 20, stating that he will be on duty on 2010 – 10 – 26, and the member spoke to myself… a mess Section Head.
>
> A new cell number was obtained by myself on 2010 – 10 – 26… I contacted the member on 2010 – 10 – 26 and the member stated that he is sick and that he will be on duty next year."

[10] On 26 October 2010, the applicant was contacted by his supervisor who wanted to know when he would be reporting for work. He indicated that he would be returning to work soon but could not say exactly when because that depended on the practitioner.

[11] It is common cause that during November 2010, the second respondent attended at the applicant's home at Tafelkop to find out about him. After hearing about the visit the applicant and the practitioner reported at the workplace and spoke to the second respondent who advised that the applicant should present a sick note on his return. However, it is apparent that at this point the first respondent had already suggested that the applicant be dismissed.

[12] On 18 November 2010, the first respondent received the letter from the second respondent wherein the provisions of section 17 (3) (a) of the PSA were evoked. This means that the applicant's employment contract was terminated by the operation of the law.

[13] On 6 December 2010, the applicant reported for work and presented the sick note from the practitioner. He was then informed that he had already been dismissed on 24 November 2010, in terms of section 17 (3) of the PSA. Aggrieved by this decision the applicant referred the dispute concerning an alleged unfair dismissal to the bargaining council, which could not entertain the dispute because it lacked jurisdiction.

[14] On 22 April 2013, the applicant's legal representative made submissions in terms of section 17 (3) (b) of the PSA. The first respondent responded to the submission in a letter dated 28 April 2013 which reads as follows::

> "DISMISSAL: 0955082-8 FSS ME SELLO: SAPS OPERAATIONAL AND TACTICAL ACEDEMY MOLOTO
>
> 1. Letter T K Kharametsane /MBA1/0037 dated 2013-04-22 refers.
> 2. The above member had absented himself without reasonable cause from 2010 – 09 – 08 until 2010 –11 – 24 and was subsequently dismissed from the SAPS in terms of Section 17 (3) (A) 1 of the Public Service Act 1994 (Amendment 30 of 2007)
> 3. Service Termination documentary were later finalised and sent to Head Office.
> 4. . . .
> 5. Our office is of the opinion that we acted fair in administering the member's dismissal in terms of the relevant information received from the Academy.
> 6. Your kind assistance is appreciated."

Grounds of review

[15] The applicant contends that the decision not to reinstate him is reviewable for the following reasons:

a. The first respondent did not apply his mind to the facts on the submissions made by him when he made the decision not to reinstate him;
b. The first respondent failed to give reasons for his decision;
c. The respondents were aware of his whereabouts and further that during the period of his absence he met with the second respondent who advised him to submit his medical certificate when he reports for duty;

[16] The applicant further contends, based on the above that the decision of the first respondent not to reinstate him is unreasonable.

The decision of the first respondent

[17] The decision of the first respondent not to reinstate the applicant appears from paragraph 5 of the letter dated 28 April 2013 quoted above.

The legal principles

[18] It is trite that an employment contract of a person employed in terms of the PSA may be terminated by the operation of the law if he or she absent himself or herself from duty for a period exceeding 30 days. In terms of section 17 (3) (b) of the PSA executing authority may however on good cause shown by the employee who has been deemed to have been dismissed, order that he or she be reinstated.

[19] The interpretation of section 17 of the PSA has received attention in numerous judgments of the courts. The leading case in this regard is that of *De Villiers v*

Head of the Department of Education, Western Cape Province,[1] where Van Niekerk J, in considering a similar provision under the Employment of Educators Act,[2] held that the functionaries in the public service in exercising their powers under that subsection are required to do so in a manner that is not irrational or arbitrary. In considering a submission for reinstatement by an employee the employer has to take into account the totality of the facts and the circumstances of the employee including whether the conduct of the employee had rendered the employment relationship intolerable.[3]

[20] The approach adopted in *De Villiers* was affirmed in *DENOSA obo Mangena v MEC of the Department of Health*,[4] where Steenkamp J held that:

> "Firstly, it is difficult to assess whether a decision could have been reasonable and rational when the decision-maker offers no reason for the decision. But in any event it is apparent that the MEC did not conform to the applicable test as set out in the *De Villiers* and confirmed in *Weder*, Supra i.e whether the employee's conducted had rendered the continued employment relationship intolerable. Even in his answering papers before this Court he persisted with an erroneous version of the test, arguing that the only question is whether the employee was absent from work without permission."

Evaluation

[21] It is manifestly clear from the reading of the order made by Brassey AJ that at that stage the first respondent had not considered the submissions which were made by the applicant on 11 April 2013, otherwise the order would not have been necessary in that regard. The first respondent in the order was granted the opportunity to render his or her decision by not later than 15 October 2015.

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[1] (2010) 31ILJ 1377 (LC).
[2] Act number 76 of 1998.
[3] See *De Villiers* supra.
[4] [2013] 5 BLLR 479 (LC).

[22] The matter was then postponed to 21 April 2016. It is common cause that when this matter served before this court on that day the first respondent had not complied with the order. At the hearing of the matter by this court the first respondent sought a further postponement of the matter on the ground that he or she needed a further opportunity to comply with the terms of the order. The application or request was made from the bar with no explanation as to why the application was not made earlier and also why the order was not complied with.

[23] The postponement was refused and it was directed that the matter be heard on papers as they stood. The matter was then argued on the basis that the decision not to reinstate the applicant had already been taken by the first respondent.

[24] It is important to note that the challenge in this review application is directed at the decision of the first respondent. The deponent to the founding affidavit is Mr Mphahlele, the director legal services, stationed at the head office. There is no indication in the affidavit or in any of the annexures that he was ever involved in this matter. There is also no confirmatory affidavit from the first respondent whose decision is the subject of this review application. As indicated earlier the decision is challenged, amongst other things, on the basis that it was irrational and more importantly that the first respondent failed to apply his mind in taking the decision not to reinstate the applicant.

[25] It is apparent from the reading of the above letter which purports to provide the reason/s for the refusal to reinstate the applicant that the decision was based on the information received from the Academy. However, the letter does not indicate which information from the Academy was used to inform the decision.

[26] It is trite that in the review application the court assesses the facts which were considered by the decision-maker at the time the decision was made. It is not for the respondent to place the facts which did not served before the decision-maker in the answering affidavit in defending the decision that is the subject of a review

challenge. In this respect paragraph 38.4 of the respondents answering affidavit states the following:

> "38.4 In addition to the reasons stated in "MES11" the applicant's explanation for his absence without authority was found not to be unsatisfactorily by the first respondent as his reason is that he was put in isolation by his traditional doctor while the second respondent was informed that the applicant was at home during the period of September and November 2010."

[27] The above does not advance the case of the respondents because the facts relied on are not mentioned in the letter and also the contents thereof have not been confirmed by the first respondent.

[28] The issue in this matter is whether the first respondent considered the submission made by the applicant and if so did he set out on what basis it would not be appropriate to reinstate him. This would have included whether there was evidence before him that the employment relationship had broken down.

[29] There is no evidence from the first respondent as to what was he told by the Academy neither does he say that he accepted such information and why he rejected the submission made by the applicant. There is also no evidence of the breakdown in the employment relationship.

[30] In my view it is clear from the above discussion that the decision made by the first respondent not to reinstate the applicant is irrational and arbitrary. The first respondent failed to apply his mind to the facts as were properly placed before him.

[31] I accordingly find that the applicant has made out a case to review the decision of the first respondent of refusing to reinstate him. I see no reason in fairness and law why costs should not be allowed to follow the results.

Order

[32] In the premises the following order is made:

1. The decision by the first respondent to dismiss the applicant's application made in terms of section 17(3) (b) of the Public Service Act, 103 of 1994, is reviewed and set aside.

2. The applicant is reinstated in the employ of the respondent on the same terms and conditions as those which governed his employment immediately prior to his deemed discharge in terms of section 17(3) (1) (i) of the Public Service Act, save that the applicant shall not be entitled to receive any salary or emoluments in respect of the period when he was absent from work, being 8 September 2010 to 28 April 2013, being the date when the first respondent dismissed the applicant's substantive application for reinstatement.

3. The first respondent is to pay the costs of the applicant including the costs of 9 September 2015 occasioned by the postponement.

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Molahlehi E M
Judge of the Labour Court
South Africa

APPEARENCES:

For the Applicant : Thapelo Kharamentsane Attorneys

For the Respondents : The State Attorney.