REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 993/11

In the matter between:

M T WEDER **Applicant**

and

MEC FOR THE DEPARTMENT OF HEALTH, WESTERN CAPE **Respondent**

Heard: **29 August 2012**

Delivered: **5 September 2012**

Summary: Legality review i.t.o. LRA s 158(1)(h). Refusal to reinstate employee in terms of s 17(3) of Public Service Act, 1994.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant was deemed to be discharged from his employment in terms

of s 17(3)(a)(i) of the Public Service Act, 1994 ("the Act").[1]

2] The applicant's trade union then made representations for his reinstatement in terms of s 17(3)(b) of the Act. The respondent, the Member of the Executive Council (being the relevant executive authority) refused the application for reinstatement. The applicant seeks to have that decision reviewed and set aside in terms of s 158(1)(h) of the Labour Relations Act ("the LRA").[2]

Condonation

3] Before I turn to the merits of the application, the Court has to consider three applications for condonation. The review application itself is arguably out of time; so are the answering and replying affidavits.

The review application and founding affidavit

4] The application for review was brought in terms of section 158(1)(h) of the LRA. That section does not prescribe a time limit for the filing of the application, in contradistinction to s 145(1)(a) that prescribes a time limit of six weeks from the date that the award was served on the applicant.

5] The applicant initially based his calculation on the applicable time limits on the Promotion of Administrative Justice Act (PAJA)[3]. In terms of PAJA[4], an applicant must bring a review application within 180 days. But, as I shall discuss more fully below, since the judgment of the Constitutional Court in *Chirwa*[5] and *Gcaba*[6], it seems clear that PAJA does not apply to review applications under the LRA. This principle was foreshadowed in *Sidumo*[7],

1 Proclamation 103 published in *Government Gazette* 15791 of 3 June 1994.

2 Act 66 of 1995.

3 Act 3 of 2000.

4 Section 7(1).

5 *Chirwa v Transnet Ltd and Others* (2008) 29 *ILJ* 73 (CC).

6 *Gcaba v Minister of Safety & Security and Others* (2010) 31 *ILJ* 296 (CC) paras [67] and [68].

7 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras

where Navsa AJ held that PAJA does not apply to arbitration awards in terms of s 145 of the LRA. It seems clear to me that the time period provided for in PAJA, therefore, does not apply to review applications in terms of s 158.

6] The application therefore had to be brought within a 'reasonable time'. In *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*[8] the court pointed out that:

> "In die afwesigheid van enige spesifieke tydsbepaling het ons Howe gedurende die afgelope 70 jaar herhaaldelik daarop gewys dat die verrigtinge binne redelike tyd ingestel moet word."
>
> And:[9]
>
> "Dit is wenslik en van belang dat finaliteit in verband met geregtelike en administratiewe handelinge binne redelike tyd bereik word. Dit kan teen die regspleging en die openbare belang strek om toe te laat dat sodanige beslissings of handelinge na tydsverloop van onredelike lang duur tersyde gestel word – *interest reipublicae ut sit finis litium* ....Oorwegings van hierdie aard vorm ongetwyfeld 'n deel van die onderliggende redes vir die bestaan van die reël."

7] This principle has been reiterated in a post-Constitutional dispensation – for example by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd and Others:*[10]

> "It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative

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[97] – [104].

8 1978 (1) SA 13 (A) 39A.

9 At 41 E-F.

10 2006 (2) SA 603 (SCA) at 612 E-F para [22], citing *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321.

decisions and the exercise of administrative functions."

8] What, then, is a 'reasonable time' in the context of s 158 of the LRA? It is tempting simply to assume that it should be six weeks, by analogy to the time period provided for in s 145. At the most, it cannot be more than the 180 days provided for in PAJA; in fact, given that PAJA does not apply and that the process is closely aligned to that set out in s 145 and rule 7A, I would suggest that anything more than six weeks should at least trigger an application for condonation.

9] In the case before the Court, the decision by the MEC not to reinstate the applicant was made on 31 May 2011.[11] The applicant delivered the application for review on 9 December 2011, about six months and 9 days later – in other words, about 9 days outside of the PAJA time limit and more than four months outside the six-week time period that would have applied in a s 145 review.

10] The delay appears, on the face of it, to be lengthy. The extent of the delay must be considered together with the other factors outlined in *Melane v Santam Insurance Co Ltd*[12] and subsequent authorities.

11] The reason for the delay is quite simple: The applicant, advised at that stage by his trade union and not his current attorneys, referred a dispute to the Bargaining Council and not to the Labour Court. He did so within the prescribed time period. The Bargaining Council apparently decided on 29 September 2011 that it had no jurisdiction. The applicant received that ruling on 28 October 2011. He then referred a dispute to this Court within six weeks.

12] The explanation for the delay is compelling. The applicant took reasonable steps to refer the dispute timeously, albeit initially to the wrong forum. I do not consider the extent of the delay, coupled with the reasons therefor, to be so unreasonable that the applicant should be deprived of a hearing. The application for condonation is granted.

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11 It is not clear if the MEC conveyed the decision to the applicant on the same day.

12 1962 (4) SA 531 (A).

The answering and replying affidavits

13] The answering affidavit was filed some 15 days out of time and the replying affidavit 10 days late. Neither party opposed the other's application for condonation in this regard. Neither party was prejudiced. I deemed it to be in the interests of justice to grant condonation in both these applications.

Background facts

14] The applicant was employed as a nursing assistant at Valkenburg Hospital, dealing with patients with psychiatric problems. He was diagnosed with schizophrenia more than ten years ago. However, the circumstances leading to his deemed discharge in this case stemmed from a different illness. In December 2009 he was diagnosed with pulmonary tuberculosis. He was placed on sick leave from 29 December 2009 until 1 March 2010.

15] It appears that the applicant informed his employer on two occasions that he was on sick leave. He says under oath that he spoke to a sister Busi and a Mr Simang per telephone on 26 January and 5 February 2010. The deponent to the MEC's answering affidavit, Faizel Rodriques[13], denies this; however, he has no personal knowledge of the alleged telephone conversations and neither Busi nor Msimang filed answering or confirmatory affidavits. In these circumstances the evidence of the applicant must be accepted and the respondent's version – which is based on uncorroborated hearsay -- disregarded, despite the normal rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[14] In any event, it is common cause that the applicant informed the employer's area manager, Ms Isaacs, of the reason for his absence on 4 January 2010.

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13 The MEC, Theuns Botha, did not depose to an affidavit. The deponent to the answering affidavit is a manager employed at the office of "the Director, Labour Relations". It is not clear whether he is employed by the Western Cape Department of Health. He says that he is authorised to depose to the affidavit by the MEC and the applicant did not take issue with this in reply.

14 1984 (3) SA 623 (A).

16] On 11 February 2010 the Senior Medical Superintendent of the Department of Health informed the applicant that his service had been terminated as from 20 January 2010. The letter stated that he had been absent without permission for more than a calendar month; and that, therefore, he was deemed to be discharged in terms of s 17(3)(a)(i) read with s 17(2)(d) of the Act.

17] Almost a year later, on 8 February 2011, the applicant's trade union made representations on his behalf, calling for his reinstatement in terms of section 17(3)(b) of the Act. The union included the medical certificates showing that the applicant had been booked off for pulmonary tuberculosis during the relevant time of absence, even though it mistakenly referred to his schizophrenia in the covering letter. The fact remains that it is common cause that the applicant had been booked off as a result of illness.

18] The MEC did not take issue with the long delay. On 31 May 2011 he wrote to the applicant in the following terms:

> "I, having considered the evidence presented to me with regards [*sic*] to your deemed dismissal, find that the grounds for your appeal does [*sic*] not justify your reinstatement.
>
> I therefore confirm that your deemed dismissal in terms of section 17(3)(a)(i) of the Public Service Amendment Act." [*sic*]

19] The MEC did not give reasons for his decision – neither at the time, nor when the applicant called upon him to do so in the notice of motion.

Analysis

The provisions of the Public Service Act

20] The relevant subsection of the Act 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 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."

21] The purpose of the application is to review and set aside the MEC's decision not to reinstate the applicant in terms of section 17(3)(b) of the Act, and not the initial discharge in terms of section 17(3)(a).

Legality review in terms of s 158 of the LRA

22] The applicant is brought in terms of s 15(1)(h) of the LRA. That section empowers this Court to review any decision taken by the State in its capacity as employer, on such grounds as are permissible in law.

23] In the applicant's heads of argument his counsel sought to argue, firstly, that the decision to refuse reinstatement in terms of s 17(3(b) constitutes administrative action and is reviewable in terms of PAJA.

24] Given recent judicial precedent, that argument cannot be upheld. As I pointed out above, the Constitutional Court decided in *Chirwa*[15] and

15 *Supra.*

Gcaba[16] that the dismissal of a public servant is not an 'administrative act' as defined in PAJA and therefore not reviewable in terms of PAJA. That view was recently reiterated by the Labour Appeal Court in *PSA obo De Bruyn v Minister of Safety & Security.*[17]

25] But that is not the only possible statutory basis for the review. The application is brought in terms of s 158(1)(h) of the LRA. In *De Bruyn*[18] the Court sounded a cautionary note. It stated that this Court will not entertain an application to review 'any act performed by the State in its capacity as employer' in terms of s 158(1)(h) of the LRA as a matter of course.

26] Nevertheless, having had regard to the judgments of this Court in *De Villiers*[19] and *Harri*[20]*,* the Labour Appeal Court did not overturn the effect of those judgments. It merely pointed out that not all review applications in terms of s 158(1)(h) will be entertained and that, in certain cases, the LRA may oust the jurisdiction of the Labour Court; for example, where the LRA requires that a dispute be resolved through arbitration in terms of s 157(5) or a binding collective agreement.

27] In the case before me, the applicant did attempt to refer the dispute to arbitration. The Bargaining Council held that it did not have jurisdiction, hence the referral to this Court. I am satisfied that this is a case where the Court does have jurisdiction to entertain the matter in terms of s 158(1)(h).

28] In *Harri*[21], this Court expressed the following view:

> "The Constitutional Court has thus put it beyond dispute in *Chirwa* and *Gcaba* that the dismissal of a public service employee does not constitute

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16 *Supra.*

17 *Public Servants Association of South Africa on behalf of PWJ de Bruyn v Minister of Safety and Security and Another* (Case no JA 91/09), 15 May 2012 (unreported).

18 *Supra* paras [24] – [31].

19 *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 *ILJ* 1377 (LC).

20 *National Commissioner of the South African Police Service v Harri N.O.* (2011) 32 *ILJ* 1175 (LC).

21 *Supra* paras [20] – [21].

> administrative action. Why, then, should the state as employer be able to review a decision by its own functionary in this case?
>
> The distinction appears to me to lie in the fact that, in this case, the state is acting *qua* employer; and the functionary is fulfilling his or her duties in terms of legislation."

29] That review appears to me to remain unchanged by the decision in *De Bruyn.*

30] In *De Villiers,* Van Niekerk J came to the conclusion that s 158(1)(h) applied in the case of a refusal to reinstate an employee in a case very similar to the current one, except that, in *De Villiers*, he dealt with the similarly worded provisions in s 14 of the Employment of Educators Act[22] and not s 17 of the Public Service Act. And, as he pointed out:[23]

> "Even if the decision not to reinstate the applicant did not constitute administrative action, this court retains review jurisdiction on the grounds of legality (at least), which incorporates most, if not all, of the grounds of review relied upon by applicant in his founding affidavit. These would certainly require that functionaries exercise public power in a manner that is not irrational or arbitrary, and that they be accountable for the manner in which that power is exercised."

31] Referring to the requirement of 'good cause' is s 14 of the Employment of Educators Act – similarly worded to the same requirement in s 17(3)(b) of the Public Service Act – Van Niekerk J concluded:[24]

> "This would ordinarily 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."

32] It is against this legal background that the review application must be

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22 Act 76 of 1998.

23 *De Villiers (supra)* para [27] at 1392 E (footnotes omitted). See also *Mogola & another v Head of Department: Department of Education* (2012) 33 *ILJ* 1203 (LC).

24 Para [30].

considered.

Grounds of review

33] The applicant has raised the following grounds of review:

33.1 The MEC has altogether failed to appreciate the nature of the enquiry before him. Although he provided no reasons for his decision, it is plain that he did not have regard to the legal test set out in *De Villiers* (ie whether the employee's conduct had rendered a continued employment relationship intolerable).

33.2 The applicant's dismissal was not justified in circumstances where he had a good explanation for his absence from work, ie that he was on sick leave because of pulmonary tuberculosis.

Evaluation

34] Having regard to the test set out in *De Villiers,* the decision of the MEC cannot be said to have been rational. It was, on the contrary, irrational and arbitrary.

35] Firstly, it is difficult to assess whether a decision could have been reasonable and rational when the decision-maker offers no reasons for the decision. But, on the evidence before him, the MEC's decision could not have been rational.

36] The MEC could not have considered whether the employee's continued employment would have been intolerable. The employee did not commit misconduct; he was on sick leave. He could perhaps have done more to make the Department aware of the reasons for his absence; but he did, in fact, inform his employer, and the reason for his absence is common cause.

37] In any event, the absence was not wilful or deliberate. The applicant was suffering from a serious illness and his physician booked him off sick for that reason. There is no indication that the MEC took this into account.

Conclusion

38] The decision of the MEC not to reinstate the applicant was arbitrary and irrational. The decision must be reviewed and set aside.

The appropriate relief

39] The applicant has submitted that the Court should substitute its own decision for that of the MEC, ie that the Court should order that the applicant be reinstated.

40] I agree that it would merely cause a further delay to refer this matter back to the MEC for a decision. All the facts are before the court and I agree that the applicant should be reinstated. The only question that concerns me is the extent of the retrospectivity and the terms and conditions on which, and position into which, the applicant should be reinstated.

41] In *Director-General: Office of the Western Cape and another v SAMA obo Broens and others*[25] the Labour Appeal Court upheld the finding of this Court[26] that the dismissal of the employee was unfair; however, it held that the Court could not order the Department of Health to reinstate the employee into a different post.

42] In the current scenario, the applicant wished to be reinstated into the same post that he held before his deemed discharge. The respondents led no evidence to indicate that this would not be reasonably practicable. In those circumstances, I see no reason why he should not be reinstated as envisaged by s 193 of the LRA.

43] However, the reinstatement should not have full retrospective effect. The Public Service Act makes provision for a scenario such as this one. In terms of s 17(3)(b) the period during which he was absent should be deemed to be leave without pay. That period should run from 29 December 2009 until the date of the impugned decision, that is 31 May

25 Labour Appeal Court (CA 5/2011), 26 April 2012, unreported (*coram* Davis JA, Molemela AJA and Murphy AJA).

26 (2011) 32 *ILJ* 1077 (LC).

2011.

44] Both parties asked that costs should follow the result. I see no reason to disagree.

Order

45] I therefore order as follows:

45.1 The applications for condonation for the late filing of the review application, the answering and replying affidavits are granted.

45.2 The decision of the respondent of 31 May 2011 is reviewed and set aside.

45.3 The respondent is ordered to reinstate the applicant to his former post retrospectively to 31 May 2011, on the same terms and conditions of employment as previously pertained, without the loss of any remuneration or benefits; save that the employee is not entitled to any remuneration for the period 29 December 2009 to 31 May 2011.

45.4 The respondent is ordered to pay the applicant's costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPLICANT: Suzanna Harvey

	Instructed by Chennells Albertyn.
	(Heads of argument drafted by Graham Leslie).
RESPONDENT:	Ewald de Villiers - Jansen
	Instructed by the State Attorney.
	(Heads of argument drafted by Cecil Tsegarie).