REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 914/11

In the matter between:

DENOSA obo N E MANGENA **Applicant**

and

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

Heard: **31 January 2013**

Delivered: **14 February 2013**

Summary: Deemed discharge and application for reinstatement in terms of s 17(3) of Public Service Act, 1994. Legality review in terms of s 158(1)(h) of LRA. Principles outlined in *Weder v MEC, Dep of Health, Western Cape* [2012] ZALCCT 35 restated.

JUDGMENT

STEENKAMP J

Introduction

[1] This case turns, once again, on the application of s 17(3) of the Public Service Act[1] dealing with an application for reinstatement after a "deemed discharge" in terms of that Act.

[2] The facts of this case, and the applicable legal principles, are essentially on all fours with those in an earlier judgment of this Court in *Weder v MEC for the Department of Health, Western Cape.*[2] The same MEC and the same legal representatives were involved in that case. It is, therefore, somewhat surprising that the same respondent is back in the same Court opposing this application, perhaps expecting a different outcome.[3] But that is the dispute before me.

Background facts

[3] The applicant employee is Ms NE Mangena, a nurse who is represented in these proceedings by her trade union, the Democratic Nursing Organisation of South Africa (DENOSA). She was employed at GF Jooste hospital in Manenberg, Cape Town. She was absent from work for reasons of ill health from 8 February to 31 May 2010.

[4] The respondent is the Member of the Executive Council for the Department of Health of the Western Cape.[4] He implemented the "deemed discharge" provision of the PSA and the employee received no remuneration after April 2010.

[5] The employee and her union applied for reinstatement in terms of section 17(3)(b) of the PSA on 1 December 2010, together with comprehensive written submissions. They included medical certificates from her doctor

[1] Proclamation 108 of 1994 (the PSA).

[2] [2012] ZALCCT 35 (5 September 2012).

[3] I should note that I granted leave to appeal in *Weder*. That appeal has not been heard. Nevertheless, one would have hoped that the parties and their legal representatives may have been able to come to an interim agreement in this case, pending the appeal in *Weder*, rather than expecting the Court to replicate much the same facts and the same legal principles in this case as in *Weder*.

[4] The incumbent MEC at the relevant time was Mr Theuns Botha.

and psychiatrist confirming that she was unable to work at the time of her absence.

[6] The MEC issued his decision in terms of s 17(3)(b) on 18 March 2011. He provided no reasons. He simply stated:

> "I, after having considered the evidence presented to me with regards 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) in terms of the Public Service Amendment Act" [*sic*].

[7] The applicant seeks to have that decision reviewed and set aside in terms of section 158(1)(h) of the LRA[5]. It delivered its notice of motion on 16 November 2011, calling upon the MEC to deliver the record "together with such reasons as are required by law or desirable to provide". Still he provided no reasons.

[8] Mangena did not apply for sick leave. She telephoned her employer on 8 February 2010 and asked a staff member to inform her supervisor that she was off sick.

[9] The Head of Department sent her a letter on 19 March 2010, instructing her to report for work on 22 March. She did not. Instead, she phoned her supervisor; explained that she had not sent the hospital her medical certificates earlier; and then did so. The employer did not query the certificates; yet it implemented the "deemed discharge" provisions of section 17(3)(a) and stopped paying her.

Condonation

[10] The MEC declined to reinstate the employee in terms of s 17(3)(b) of the PSA and informed her of this decision on 18 March 2011. Her trade union launched this review application on her behalf on 16 November 2011, eight months later. They apply for condonation for its late filing.

[5] Labour Relations Act 66 of 1995.

[11] The application is brought in terms of s 158(1)(h) of the LRA. Unlike s 145, that section does not prescribe a time period of six weeks in which to bring the review application.

[12] In *Weder,*[6] I pointed out that the applicable time limits in the Promotion of Administrative Justice Act (PAJA)[7] do not apply either. In terms of PAJA[8], an applicant must bring a review application within 180 days. But since the judgment of the Constitutional Court in *Chirwa*[9] and *Gcaba*[10]*,* it seems clear that PAJA does not apply to review applications under the LRA. This principle was foreshadowed in *Sidumo*[11]*,* 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, as discussed in *Weder*, that the time period provided for in PAJA, therefore, does not apply to review applications in terms of s 158.

[13] The application therefore had to be brought within a 'reasonable time', as discussed in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*[12] . That principle has been reiterated in a post-Constitutional dispensation – for example by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd and Others:*[13]

> "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 decisions and the exercise of administrative functions."

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[6] *Supra* paras [5] – [8].

[7] Act 3 of 2000.

[8] Section 7(1).

[9] *Chirwa v Transnet Ltd and Others* (2008) 29 *ILJ* 73 (CC).

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

[11] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras [97] – [104].

[12] 1978 (1) SA 13 (A) 39A.

[13] 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.

[14] In considering what constitutes a 'reasonable time' in the context of s 158 of the LRA, I suggested in *Weder* that anything more than six weeks should at least trigger an application for condonation.

[15] In the case before me, the delay is lengthy. The extent of the delay must be considered together with the other factors outlined in *Melane v Santam Insurance Co Ltd*[14] and subsequent authorities.

[16] The reason for the delay is that Ms Mangena, advised at that stage by her trade union only and not their current attorneys, referred an unfair dismissal dispute to the Public Health and Social Development Bargaining Council. They did so within the prescribed time period. The respondent raised a point *in limine* that the Bargaining Council did not have jurisdiction, as the "deemed discharge" in terms of the PSA meant that the employee's employment terminated by operation of law and thus there was no dismissal. The Bargaining Council decided on or about 14 September 2011 that it had no jurisdiction. The trade union's provincial organiser, Bongani Lose, was unsure of the appropriate route to follow, given the legal complexity of the vexed issue of the proper interpretation of s 17 of the PSA. The union consulted its attorneys on 3 October 2011, ie about two weeks after having received the jurisdictional ruling. They obtained advice from counsel, leading to the decision to bring this application in terms of s 158(1)(h) of the LRA. Mr Lose does not explain why the attorneys could not have provided this advice, nor how long it took to obtain counsel's opinion. Nevertheless, they did bring the application within another six weeks. Lose also explains that another union official, Jubeida Behardien, who had been assisting the employee, was on leave from 4-21 November 2011. He does not explain why it was impossible to get hold of her in order to obtain instructions or information during that time.

[17] The explanation for the delay is open to severe criticism. The union, acknowledging the legal complexity of the matter (at least after having obtained the jurisdictional ruling), should have consulted its attorneys earlier in order to service its member properly. The attorneys should have

[14] 1962 (4) SA 531 (A).

acted more quickly. It is not good enough for attorneys in condonation applications to hide behind a need "to obtain counsel's opinion"; if they see fit to practice law, and they are appropriately qualified, they should be able to advise their clients.

[18] On the other hand, I take into account that the union did take reasonable steps initially to refer what they considered to be an unfair dismissal dispute timeously. When the Bargaining Council decided that it did not have jurisdiction, the applicant acted within a reasonable time. The extent of the delay and the reasons therefor must be considered together with the prospects of success. Given the earlier decision of this Court in *Weder*, it should be obvious that the prospects of success are excellent.

[19] The application for condonation is granted.

The applicable legal principles

[20] The applicable legal provisions were set out fully in *Weder*, I shall repeat them in summary form only.

The provisions of the Public Service Act

[21] 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."

[22] 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

[23] The applicant is brought in terms of s 158(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.

[24] Mr *Leslie*, for the applicant, argued, firstly, that the MEC's decision to refuse reinstatement in terms of s 17(3(b) constitutes administrative action and is reviewable in terms of PAJA; alternatively, on grounds of legality.

[25] As discussed in *Weder*, and given recent judicial precedent, I cannot agree that PAJA applies. The Constitutional Court decided in *Chirwa*[15] and *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]

[26] But, as discussed in *Weder* and reiterated by Mr *Leslie* in argument, 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.

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[15] *Supra.*

[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].

[27] 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.

[28] I asked counsel to provide me with an additional note on argument in the light of the LAC's decisions in *De Bruyn* and in *Grootboom*[21]. The latter was handed down after *Weder.*

[29] De Bruyn, a SAPS employee, lodged an application in the Labour Court in terms of s 158(1)(h) of the LRA seeking to review his employer's decision not to grant him temporary incapacity leave. The LAC confirmed that De Bruyn's remedy was to refer to his dispute to the appropriate bargaining council for arbitration. He could not elect to approach the court directly under s 158(1)(h). Relying on the decisions of the Constitutional Court in *Chirwa* and *Gcaba*, the LAC held that a public servant is confined to the labour law remedies available to him or her. A court will not hear an administrative review of a state employer's decision where it relates to, for example, to a dismissal or a transfer dispute. State employees do not have an extra string to their bow and they must follow the ordinary remedies available under the LRA.

[30] I agree with Mr Leslie that, as was the case in *Weder*, the finding of the LAC in *De Bruyn* has no bearing on the present matter. Mangena seeks to review and set aside the decision of her employer not to reinstate her following a "deemed discharge" under the PSA. This is not a dismissal or an unfair labour practice dispute. At the time of the decision under review, there was not even a contractual nexus between the parties (this had

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[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] *Grootboom v NPA* (Unreported decision of the LAC case no CA7/11, 21 September 2012).

terminated *ex lege* by virtue of the operation of s 17(3)(a)(i) of the PSA). *Chirwa* and *Gcaba* have not altered the court's jurisdiction to review decisions under s 17(3)(b) of the PSA. These authorities arguably prevent employees from seeking to review employer conduct when they have other labour law remedies available to them. In the present matter, Mangena has no other remedy available under the LRA. It is precisely this type of situation to which s 158(1)(h) is properly intended to apply.

[31] In the case before me, like in *Weder*, 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).

[32] In *Harri*[22], 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 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."

[33] That view appears to me to remain unchanged by the decision in *De Bruyn.*

[34] 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[23] and not s 17 of the Public Service Act. And, as he pointed out:[24]

> "Even if the decision not to reinstate the applicant did not constitute administrative action, this court retains review jurisdiction on the grounds of

[22] *Supra* paras [20] – [21].

[23] Act 76 of 1998.

[24] *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).

> 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."

[35] 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:[25]

> "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."

[36] I agree with those sentiments, unaltered by the LAC's decision in *De Bruyn.* Mr *De Villiers-Jansen,* for the respondent, relied on the decision of the Labour Court in *Grootboom*[26] to argue that the only power the employer has is to consider whether or not there are good reasons for the employee's absence "without authorisation" and to exercise the discretion given by the PSA. As I understood his argument, he meant to say that the employer need not be satisfied that the continued employment relationship would be intolerable in order not to reinstate in terms of s 17(3)(b) of the PSA.

[37] Counsel was not aware of the subsequent LAC judgment in *Grootboom*, hence my invitation to submit a further note on argument by 8 February 2013.

[38] The decision of the LAC in *Grootboom* takes the matter no further. The court upheld the dismissal of the review application on purely factual grounds. Nothing in the judgment disturbs the clear authority on this point emanating from *De Villiers* (in both the High Court (full bench) and the Labour Court). On the facts, Grootboom had failed to show good cause justifying his reinstatement. Those facts, however, bear no relation to the

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[25] Para [30].

[26] *Grootboom v National Prosecuting Authority & Another* (2010) 31 *ILJ* 1875 (LAC).

present matter. It is common cause that Mangena was absent on grounds of ill-health and that she had taken steps to inform her employer of the reason for her absence.

[39] In oral argument, Mr *de Villers-Jansen* also attempted to distinguish the provisions of the Employment of Educators Act from those of the PSA. He contended that, whereas a schedule to the EEA makes specific reference to the Code of the Good Practice on Dismissal, the PSA does not.

[40] This argument flows from the reasoning of the High Court decision in *De Villers*.[27] In essence, the High Court reasoned that:

40.1 a discharge under the EEA is deemed to be a dismissal on account of misconduct;

40.2 a deemed dismissal on account of misconduct should be treated in a similar fashion to a dismissal on account of misconduct under the EEA (which expressly referred to the LRA's Code on dismissal);

40.3 accordingly, a decision as to whether or not to reinstate an employee under s 14 of the EEA should be subjected to the same scrutiny as a dismissal under the LRA.

[41] This test was then expanded on by the decision of Van Niekerk J in the Labour Court in *De Villiers*[28] (para 30).

[42] To all intents and purposes, there is no difference between the provisions of the EEA and the PSA:

42.1 Section 17(3)(a)(i) stipulates that the termination is a deemed dismissal <u>on account of misconduct</u>.

42.2 Section 17(1)(a) expressly refers to the dismissal provisions of the LRA. (These would in any event apply to the dismissal of a public servant).

[43] Accordingly, for the purposes of determining what test should apply when considering reinstatement, the PSA is substantially identical to the EEA.

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[27] *De Villiers v Minister of Education* 2009 (2) SA 619 (C) para [20].

[28] *Supra* para [30].

I stand by my agreement with the test applied by Van Niekerk J in *De Villiers.*

Evaluation / Analysis

[44] The employee should have applied for sick leave and she should have provided her employer with the relevant medical certificates at the time. She did not; she only telephoned at the time and provided the certificates later. It is not contested that she was properly deemed to have been discharged in terms of s 17(3)(a) of the PSA. But that is not the principle that is under attack in this review; what the Court needs to consider is the decision by the MEC not to reinstate her in terms of s 17(3)(b) of the PSA.

Grounds of review

[45] The applicant has raised the following grounds of review:

45.1 The MEC committed a gross irregularity by failing to appreciate the nature of the inquiry before him.

45.2 The MEC's decision was irrational and unreasonable.

Reasons for decision

[46] 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.

[47] 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 in any event, it is apparent that the MEC did not have regard to the applicable test as set out in *De Villiers* and confirmed in *Weder*, i.e. whether the employee's conduct had rendered a 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.

Rationality

[48] On the evidence before him, the MEC's decision could in any event not have been rational. Mangena had an explanation for her absence from work, i.e. that she had been booked off sick; the MEC plainly disregarded this common cause fact. In those circumstances his decision to refuse reinstatement without more was arbitrary and irrational.

Conclusion

[49] The decision of the MEC to refuse reinstatement in terms of s 17(3)(b) of the PSA was arbitrary, irrational and unreasonable. It must be reviewed and set aside. The only remaining question is what to do next.

The appropriate remedy

[50] It would serve little purpose to remit the dispute to the MEC. That will cause only further delay. All the facts are before this Court.

[51] The employee wishes to be reinstated into the same post that she 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.

[52] 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 she was absent can be deemed to be leave without pay. But I would go further. The employee was absent from 8 February to 31 May 2010. She was paid until the end of March 2010. The MEC decided not to reinstate her on 18 March 2011. Her union took eight months to refer the dispute to the correct forum (albeit for reasons addressed under the heading of condonation). It would be inequitable to order the employer to pay her backpay for the full period when part of it is due to the applicant's delay, and not the respondent's.

[53] In my view, ot would be fair and equitable to order the employee's reinstatement retrospectively for 12 months.

Costs

[54] The respondent persisted with its opposition to this application in circumstances where he had no prospects of success, given the earlier judgment against him in *Weder*. He should pay the applicant's costs.

Order

[55] I therefore make the following order:

55.1 The application for condonation for the late filing of the review application is granted.

55.2 The decision of the respondent of 18 March 2011 is reviewed and set aside.

55.3 The respondent is ordered to reinstate the employee, Ms Mangena, to her former post retrospectively to 14 February 2012, on the same terms and conditions of employment as previously pertained, without the loss of any remuneration or benefits.

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

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Steenkamp J

APPEARANCES

APPLICANT:	GA Leslie
	Instructed by Chennels Albertyn.
RESPONDENT:	EA de Villiers-Jansen
	Instructed by the State Attorney.