REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 742/11

In the matter between:

PSA obo SMIT	**Applicant**
and	
JOSEPH MPHAPHULI N.O.	**First Respondent**
PHSDSBC	**Second Respondent**
DEPARTMENT OF HEALTH, WESTERN CAPE	**Third Respondent**
MEC FOR HEALTH, WESTERN CAPE	**Fourth Respondent**

Heard: **6 March 2014**

Delivered: **16 April 2014**

Summary: Public Service Act s 17(3) – whether employee dismissed or services terminated by operation of law. Review of arbitration award; alternatively, review of decision by MEC not allowing employee's reinstatement. LRA s 158(1)(h). Judgments in *Grootboom, Weder* and *Mangena* considered.

JUDGMENT

STEENKAMP J

Introduction

[1] This application comprises two applications for review. Both applications arise from the termination of the employment of Ms M E Smit. She is represented as the applicant by her trade union, the Public Servants Association (PSA). She was employed by the Department of Health (the third respondent). The Department says that her employment was terminated by operation of law in terms of s 17 of the Public Service Act[1]. She claims she was dismissed. The first respondent (the arbitrator) found in the Department's favour. The applicant seeks to have that award reviewed and set aside in terms of s 145 of the Labour Relations Act.[2] Alternatively, she seeks to review and set aside the decision of the fourth respondent, the Member of the Executive Council for Health in the Western Cape. He refused to reinstate her into her position in terms of s 17(3)(b) of the Public Service Act. That review application is brought in terms of s 158(1)(h) of the LRA.

[2] The applicant also applied for condonation. Section 158 does not prescribe a time period. The review application was brought within a reasonable time and the applicant had good prospects of success. I considered it in the interests of justice to grant condonation.

Background facts

[3] The employee worked for the Department as a professional nurse at the Hermanus provincial hospital from 1 August 2003 to 30 November 2009. Her services were terminated on 30 November 2009, purportedly in terms of s 17 of the Public Service Act, as she had been absent from work without leave for more than 30 days, that is from 26 October 2009 to the date of termination.

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[1] Public Service Act, 1994 (Proclamation 103 of 1994). Section 17(5) of the Act has been substituted by section 25 of the Public Service Amendment Act 30 of 2007, and is now subsection 17(3)(a) and (b) of the Public Service Act.

[2] Act 66 of 1995 (the LRA).

[4] The employee's absence arose from an injury on duty in 2008. She consulted an orthopaedic surgeon, Dr Richard du Toit, in December 2008. He suspected cartilage injury. He put her on crutches and prescribed treatment. Her condition did not improve. Despite further treatment throughout 2009, the knee problem persisted. Dr du Toit advised the employee on 26 October 2009 to stay off work until such time as an arthroscopy could be done. That was eventually done on 26 November 2009. Dr du Toit then recommended a knee replacement. That was eventually done on 15 February 2010.

[5] At the arbitration, the employee testified that she presented the Department with medical certificates after every event of treatment, consultation or surgery throughout 2009 until 26 October. She received a telephone call from the Department on 30 October 2009 to tell her that she would be dismissed if she did not return to work. However, she had been booked off by Dr du Toit for the arthroscopy on 26 November 2009. She sent the final medical certificate to the Department on 3 December 2009, but her services had already been terminated on 30 November 2009.

[6] The employee reported to Mrs Bouwer, a nursing manager at Hermanus provincial hospital. Mrs Bouwer testified at arbitration that the employee had not contacted her from 26 October 2009 to the termination of her employment on 30 November 2009. However, she did hear that the employee had telephoned to report sick on 26 October 2009. She sent the employee the letter of 30 November 2009 informing her that services were being terminated forthwith. She only received a medical certificate issued by Dr du Toit on 3 December 2009.

[7] On 3 December 2009 the PSA addressed a letter on behalf of the employee to the Director: Overberg District for the Department of Health, Dr N Maharaj, requesting her reinstatement in terms of section 17(5)(b) of the Public Service Act. The letter set out the following factors to be taken into account to show "good cause" as required by that subsection:

7.1 The Act had been incorrectly applied as the employee had notified Mrs Bouwer that she was due for an operation on her knee and that

her orthopaedic surgeon, Dr du Toit, had booked off sick until the surgery;

7.2 the medical certificate was sent to Mrs Bouwer immediately and she was informed by Ms Smit of the operation;

7.3 the injury happened on duty;

7.4 the Department was aware of this and decided not to accept the medical certificate; and

7.5 the Department was fully aware of where to find the employee.

[8] Dr Maharaj wrote to the PSA on 9 December 2009 advising them to direct their "appeal" to the MEC for Health. The PSA did so. The MEC, Theuns Botha, respondent on 30 March 2010. He declined to reinstate the employee and confirmed the termination of her services. He did not provide any reasons.

The arbitration award

[9] The arbitrator considered section 17(5)(a)(i) of the Public Service Act, which reads as follows:

> "An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absent 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 discharged 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."

10. The arbitrator took into account Mrs Bouwer's evidence that the employee was absent for more than a calendar month, i.e. from 25 October 2009 to 30 November 2009. The employee did not offer any evidence to counter Bouwer's evidence that the employee did not account for her absence and did not have permission to be absent. On the evidence before him, the employee did not have permission to be absent. Therefore, her employment was terminated by operation of law in terms of s 17 of the Public Service Act.

The MEC's decision

[11] The letter of the MEC to the employee dated 30 March 2010 reads, in full, as follows:

> "After thorough consideration of all relevant facts pertaining to the termination of your services, I have decided to confirm the termination of your services in terms of the Public Service Act of 1994 as amended by Act 30 of 2007, section 17(3)(a)(1) (hereafter referred to as the Act) with effect from 26 October 2009.
>
> Any overpayment of salary will be recovered from your pension payouts.
>
> Kindly acknowledge receipt of this letter."

[12] The MEC did not provide any reasons for his decision.

Evaluation / Analysis

[13] Section 17(5)(a)(i) of the Public Service Act – and similar provisions in the Employment of Educators Act – has been the subject of much litigation. Eventually, it was considered by the Constitutional Court in *Grootboom*[3]. Unfortunately, the highest court decided that case on the facts and did not give much guidance on the proper interpretation of the section.

[14] In *Grootboom*, Bosielo AJ found on the facts that the employee in that case had not absented himself from his employment as he had been placed on suspension. It was therefore impossible for him to absent himself from his place of employment within the meaning of section 17(5)(a)(i) from when his employer expressly required his absence from the workplace. That meant that he was absent with the permission of his employer. Therefore, one of the essential requirements of section 17(5)(a)(i) had not been met. Unfortunately, given that finding, the constitutional court did not consider the judgements of the Supreme Court of Appeal in *Phenithi*[4] or any of the judgements of this court dealing with the same subsection.

[3] *Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR 1 (CC).

[4] *Phenithi v Minister of Education & others* 2008 (1) SA 420 (SCA), [2006] 9 BLLR 821 (SCA).

The first review application: s 145 of the LRA

[15] The applicant submitted that the decision of the arbitrator was unreasonable in accordance with the test set out in *Sidumo*[5] because the arbitrator did not consider whether all the jurisdictional prerequisites for invoking the deeming provision in section 17(5)(a)(i) were present; and that he failed to consider an earlier jurisdictional ruling made by Commissioner C S Mbileni in which that commissioner found that the deeming provision had been incorrectly applied in the circumstances of this case.

[16] Mr *May* argued that the arbitrator failed to consider the argument that s 17(5)(a)(i) should be read with section 17(1)(a) and that the Department was obliged to follow the procedures provided for in the LRA in dismissals based on misconduct. He relied for this argument on the case of *Seema.*[6] In that case, Leeuw AJ expressed the view[7] that, since section 17(5)(a)(i) provides that a person who has been discharged by operation of law is deemed to have been discharged on account of misconduct, the employer must apply the procedures provided for in the LRA in dismissals based on misconduct.

[17] But an error of law is not in itself sufficient for an award to be set aside. It is only of any consequence if its effect is to render the outcome unreasonable.[8] In this case, the arbitrator properly considered the evidence before him. The evidence was that the employee was absent from work from 26 October 2009 until the date of her termination, 30 November 2009. She did not inform Mrs Bouwer of her absence or request her permission. The arbitrator's conclusion that the deeming provision came into play, was reasonable.

[18] The arbitrator also considered the jurisdictional prerequisites. Those were that:

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[5] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

[6] *Seema v GPSSBC & others* [2005] 11 BLLR 1142 (LC).

[7] At para [20].

[8] *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

18.1 the employee was absent from her duties for more than a calendar month; and

18.2 she did not have the permission of her head of department.

[19] The award is not reviewable on those grounds. The arbitrator's conclusion is not so unreasonable that no other arbitrator could have come to the same conclusion.

[20] The further ground raised by the applicant is the earlier jurisdictional ruling of Commissioner Mbileni. That commissioner ruled that the Bargaining Council (the second respondent) did have jurisdiction to arbitrate the dismissal dispute referred to it by the applicant. In the course of his evaluation, he expressed the opinion that the relevant subsection was incorrectly applied and that the Department should have followed "the incapacity route".

[21] The arbitrator (the first respondent) was obviously not bound by the views expressed by the previous commissioner when he made his jurisdictional ruling. The arbitrator considered all the evidence that was led before him. He approached the arbitration and reached his conclusion in accordance with the guidelines recently set out by the Labour Appeal Court in *Goldfields*:[9]

> "(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?".

[22] In this case, the arbitrator conducted the arbitration in exactly these terms. The decision that he arrived at based on the evidence before him, was a reasonable one. The arbitration award is not open to review.

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[9] *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others* [2014] 1 BLLR 20 (LAC).para [20].

The second review application: s 158(1)(h) of the LRA

[23] The Public Service Act makes provision for the reinstatement of an employee by the MEC. Section 17(5)(b) provides that:

> "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) [i.e. after a calendar month's absence] the relevant executing authority[10] 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."

[24] The MEC, Mr Theuns Botha, gave no reasons for his decision. The decision, embodied in his letter to the employee of 30 March 2010, is as devoid of reasons as were his decisions that were overturned on review by this Court in *Weder*[11] and *Mangena*[12]. In those cases, as in this one, the applicant sought to review the MEC's decision in terms of section 158(1)(h) of the LRA. This Court had regard to its earlier judgements in *De Villiers*[13] and *Harri*[14] and came to the conclusion that the decision of the Labour Appeal Court in *De Bruyn*[15] did not overturn the effect of those judgements.

[25] In *Weder*[16] this Court pointed out that it is difficult to assess whether a decision could have been reasonable and rational when the decision-maker offers no reasons for the decision. And in *CUSA v Tao Ying Metal Industries*[17] the Constitutional Court said:

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[10] In this case, the MEC for Health (the fourth respondent).

[11] *Weder v MEC for the Department of Health, Western Cape* [2013] 1 BLLR 94 (LC).

[12] *DENOSA obo Mangena v MEC for the Department of Health, Western Cape* [2013] 5 BLLR 479 (LC).

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

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

[15] *PSA obo De Bruyn v Minister of Safety & Security* [2012] 9 BLLR 888 (LAC).

[16] *Supra* at para [35].

[17] [2009] 1 BLLR 1 (CC) para [140]-[141].

> "The first obligation on an arbitrator in determining a matter is to set out the reasons, even if only briefly, for any decision. However, beyond the dicta referred to above, there is no further discussion in the Commissioner's award of the text of the exemption and its meaning. ... If the Commissioner had in fact applied her mind to the question of the meaning of the exemption, one would have expected at least some discussion of its text. This is nowhere evident in the award. In my view, it cannot be concluded that the Commissioner did apply her mind to the meaning of the exemption."

[26] The same must hold true of the MEC's decision. Without him having given any reasons for his decision, it cannot be said to be reasonable. How can it be ascertained if it was reasonable, if he gave no reasons? It simply begs the question.

[27] The High Court recently reiterated that principle in *Cape Bar Council v Judicial Service Commission*[18] when it quoted with approval the following dictum:

> '(T)he duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of the sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallize the issues should litigation arise'[19].

[28] And, as Cora Hoexter notes, "the giving of reasons is commonly regarded as one of the more fundamental requirements of administrative justice and

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[18] [2012] 2 All SA 143 (WCC) para [30].

[19] ' [Footnotes omitted] (per Mokgoro and Sachs JJ in their minority judgment in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) para 159).

an important component of procedural fairness."[20] And s 5(3) of the Promotion of Administrative Justice Act[21] enjoins a reviewing court to presume, if no reasons are given, that the administrative action was taken without good reason.

[29] The Department's Deputy Director for Labour Relations, Faizel Rodriques, attempts to provide reasons for the MEC's decision in his answering affidavit. But he is not the executing authority in terms of the Public Service Act and the powers of the MEC to decide on reinstatement have not been delegated to him. Rodriques represented the Department at the arbitration. The MEC did not depose to so much as a confirmatory affidavit. Rodriques states that the MEC "considered" various documents and "took into account that the applicant's representations did not challenge the validity of the second medical opinion that there was nothing wrong with Ms Smit's knee and that she could carry out her functions. Finally, the MEC, in light of Ms Smit's failure to respond to the letters sent to her to return to work, considered the continued employment relationship intolerable."

[30] All of this constitutes inadmissible hearsay. There is no indication how this information is within Rodriques's personal knowledge and there is no affidavit by the MEC. Quite simply, there is no evidence before the Court that the MEC applied his mind to the applicant's representations and how he came to the decision not to reinstate the employee.

[31] In these circumstances, the MEC's decision is irrational and unreasonable. It must be reviewed and set aside.

Conclusion

[32] The application for review of the arbitration award in terms of s 145 of the LRA is dismissed. The application for review of the MEC's decision in terms of s 158(1)(h) of the LRA is upheld.

[20] Hoexter, *Administrative Law in South Africa* (Juta 2007) at 413.

[21] Act 3 of 2000 (PAJA).

[33] It is for the MEC, and not for this Court, to apply his mind to the applicant's representations properly. The matter should be remitted to him to consider the representations made in terms of s 17(5)(b) of the Public Service Act.

[34] With regard to costs, I take into account that neither party was entirely successful. The employee is being represented by her trade union and she will not be personally out of pocket. In law and fairness, a costs order is not appropriate.

Order

[35] I therefore make the following order:

35.1 The application for the review of the first respondent's award in terms of s 145 of the LRA is dismissed.

35.2 The decision of the fourth respondent (the MEC for Health, Western Cape) is reviewed and set aside in terms of s 158(1)(h) of the LRA.

35.3 The matter is remitted to the fourth respondent for a fresh decision in terms of s 17(3)(b) of the Public Service Act.

35.4 The fourth respondent must make his decision within 30 days of this judgment and he must present the applicant with full reasons for his decision.

35.5 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	C J May of Adams & May attorneys.
THIRD AND FOURTH RESPONDENTS:	E A de Villiers-Jansen Instructed by the State Attorney, Cape Town.