REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C650/2012

In the matter between:

NUPSAW (obo WARREN SIYABULELA NOJEKWA)	Applicant
And	
MINISTER OF HEALTH: WESTERN CAPE	First Respondent
WESTERN CAPE DEPARTMENT OF HEALTH	Second Respondent

Date heard: 6 August 2014

Delivered: 23 January 23 2014

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review a decision by the First Respondent in terms of section 158(1)(h) of the LRA. The applicant seeks that :

"1. The applicants termination of service, alternatively discharge from the public service by the second respondent on 14 February 2012 be set aside.

2. It is declared that the respondents cannot and could not have invoked section 17 (3) (a)(i) of the Public Service Act 103 of 1994 on or about 14 February 2012, with reference to the applicant, alternatively, that the respondents cannot and could not have deemed the applicant had been discharged from the public service on account of unauthorised absenteeism for a period exceeding one calendar month in terms of section 17 (3)(a) (i) of the Public Service Act 103 of 1994.

3. The decision of first respondent to not approve the reinstatement of the applicant into the public service pursuant to deemed discharge, taken at or around 18 April 2012 is reviewed and set aside.

4. The respondents are directed to reinstate the applicant into the employer. The second respondent with effect from 14 February 2012 on terms and conditions no less favourable than those which applied at the time, with no loss of remuneration and other benefits."

[2] The applicant was employed by second respondent as a transport officer at Valkenburg hospital from 6 January 1995 until the date of his dismissal on 14 February 2012. His service was terminated in terms of section 17(3)(a)(i) of the PSA. He had started serving as a full-time shop steward in accordance with a collective agreement Resolution 1 of 2003. As from 1 January 2010, he served his first term in accordance with the agreement, followed by a second term from 1 January 2011 to 31 December 2011. He service as a full-time shop steward was renewable for a final term.

[3] According to the applicant, his union confirmed its intention to renew his term as full-time shop steward for the period 1 January 2012 to 31 December 2012 in writing, only on 6 February 2012. This confirmation was faxed to Valkenburg hospital by an official of the Department of Labour Relations of the second respondent. In response to this notification, the applicant received the notice of termination of his employment from Valkenburg.

[4] NUPSAW then wrote a letter to the Labour Relations Director of the third respondent dated 15 February as follows:

"We are in receipt of the termination of service due to unauthorised absenteeism of our Full-time Shop Steward receipt of a letter dated 14 February 2012 from Valkenburg hospital and subsequent communication from your office, dated the 15 February 2012. (sic)

The Union has communicated to your office on the 6 February 2012 for the release of Mr Nojekwa as a FTSS and we understand that we had erroneously acted in terms of the FTSS agreement before it was amended by sending the request to your office and not to the institution (Valkenburg hospital). This has only been brought to our attention by correspondence today 15 February 2012. In view of the aforementioned we humbly apologise for any inconvenience caused.

Therefore we do appeal that the termination be reversed."

[4] In reply to the above letter, a letter dated 18 April 2012 was received by the applicant from the first respondent, which read as follows:

" Dear Mr Nojekwa

Appeal against the termination of your services in terms of section 17 (3)(c) (i) of the Public Service Amendment Act of 2007

I have considered the evidence presented to me with regards to your deemed dismissal and find that your grounds for appeal does not justify reinstatement.

I therefore confirm your deemed dismissal in terms of section 17(30(a)(i) of the Public Service Amendment Act, 2007.

Kind regards

Theunis Botha

Minister of Health, Western Cape"

[5] On 9 July 2012, the union replied to the first respondent explaining that the letter it had written to the Director of the Labour relations and considered by first respondent was not:

"as an appeal, but as a request for that official to intervene on our member's behalf as he was aware of our members whereabouts as per the record of attendance of the provincial PHSDSBC dated 8 February 2012".

[6] The union proceeded to then make formal submissions to the first respondent in the same document, comprising some seven pages, plus annexures. The response to this document was a letter from the Head of Department of the third respondent stating that:

> "As directed by the Minister of Health in the Western Cape, the appeal, as requested by your union on 15 February 2012, was handled by the MEC, as the appeal authority. The outcome was communicated to Mr Nojekwa on 18 April 2012. The MEC cannot deal with another appeal which was received almost 5 months after discharging Mr Nojekwa. This is unfortunately not part of the dispute resolution process. Your understanding is appreciated."

[7] Section 17(3) (a) and (b) of the PSA provide that:

> "(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.
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> (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.
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> (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."

[8] The wording of section 17(3) (b) makes it clear that the relevant executive authority (in this case the first respondent) is empowered to make the decision to reinstate the employee 'on good cause shown'. The report and recommendation to confirm the termination of employment provided to the first respondent by the Director of Labour Relations in order for him to take his decision, stated *inter alia* as follows:

> "The 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. We have received a written request for Mr Nojekwa's reinstatement but without any motivation or reason why his reinstatement must be approved."

[9] In other words, it is clear from the report provided to and signed by the first respondent, that no motivation or reasons for the applicant employee's reinstatement were before him. It is further apparent that the Director of Labour Relations did not ask the applicant union to provide such reasons or motivation, which his report confirms were not contained in the letter sent by the union. In my view, in such circumstances, the first respondent made his decision without affording the affected employee a reasonable opportunity to make representations to him.

[10] This application was brought in terms of 158(1)(h) of the LRA which provides that the Labour Court may-

> 'review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law'.

[11] In **Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal**[1] the Constitutional Court was dealing with an appeal in a matter involving a section 158(1)(h) review of a decision relating to a

[1] (2014) 35 ILJ 613 (CC)

promotion of a government employee. The court per Skweyiya J had this to say:

> "[28] To me, the true nature of the application is one for judicial review under the principle of legality, sought in terms of s 158(1)(h). The principle of legality is applicable to all exercises of public power not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. Mr Khumalo's promotion is argued to be unlawful because of an alleged failure to comply with s 11 of the PSA…
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> [29] The rule of law is a founding value of our constitutional democracy.It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.
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> [30] Historically, public sector employment and private employment were regulated by distinct legal regimes in South Africa. Since the adoption of the LRA, public sector employment has largely been synchronized with the legal regulation of employment in the private sector. Section 23(1) of the Constitution further provides that '[e]veryone has the right to fair labour practices'. There is thus no longer a general distinction in principle between the protections afforded to private and public sector employees.
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> [31] In Chirwa, this court held:
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> 'The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion.'
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> Nevertheless, as acknowledged by Ngcobo J in Chirwa (citing the rationale of the drafters of the LRA):

'The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework.'

[32] In this matter, the constitutional and legislative framework must inform an approach which does not undermine the hard-won protections afforded to public sector employees whilst understanding the uniqueness of public sector employment. Of importance is the demand that decisions are made and executed lawfully, fairly and expeditiously…." (my emphasis)

[12] The failure by the first respondent to provide a reasonable opportunity to the applicant employee to make submissions before him, to be heard, in casu, offends the principle of legality and renders his decision to refuse reinstatement susceptible to review. Such an opportunity is especially important in a section 17 termination, in which an employee's only procedural protection is that provided by section 17(3)(1)(b). I therefore make the following order:

Order

1. The decision of the first respondent dated 18 April 2012 confirming the deemed dismissal of Warren Siyabulela Nojekwa is hereby reviewed and set aside;
2. The first respondent is to reconsider his decision in respect of the deemed dismissal, taking into account the motivation provided to him in "the notice of appeal" dated 9 July 2012.
3. The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

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H. Rabkin-Naicker

Judge of the Labour Court

Applicant: P. van Wyk NUPSAW

Third respondent: Adv Mugenkar instructed by the State Attorney