



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C333/2015

Not Reportable

In the matter between:

URSULA CONSTANCE GALANT

Applicant

and

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE**

1st Respondent

**THE PROVINCIAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE: WESTERN CAPE**

2nd Respondent

Heard: March 23 2016

Delivered: October 13 2016

JUDGMENT

RABKIN-NAICKER, J

[1] The applicant (Galant) seeks the inter alia following relief:

- “1. That the decision of the First and/or Second Respondents to discharge the Applicant in terms of section 17(3) of the Public Service Act is reviewed and set aside;
2. The First and Second Respondent shall reinstate the Applicant with retrospective effect from the date of discharge.”

[2] Galant was informed on the 28 November 2014 that her employment had terminated in terms of s 17(3)(a)(i) of the PSA and that the termination was effective from 21 November 2014. She was informed of her right to make representations for her reinstatement in terms of section 17(3)(b) of the PSA.

[3] On 26 March 2015, the following letter was received by her headed “Consideration: Dismissal 17(3)...”:

- “1. Your representations dated 2014-12-10, 2015-02-06 and 2015-02-18 refer.
2. Having regard to the contents of your representations, the Provincial Commissioner decided that you failed to provide the employer sufficient reasons justifying your absence, in that:
 - you were informed that should you fail to resume your duties within one month from 2014-10-20 you will be deemed to be dismissed in terms of Section 17(3)(a) (i) of the Public Service Act 1994.

- you had no authority for being absent from 2014-10-20 until 2014-11-20;

3. You failed to furnish the employer with good cause to have you reinstated.
4. Your re- instatement is thus not approved.”

[4] Galant’s founding affidavit sets out the legal basis for the review she seeks .She states in paragraph 4 of the affidavit that:

“This is an application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 against a decision of the Provincial Commissioner of the Western Cape to discharge me in terms of section 17(3)(a)(i) of the Public Service Act 103 of 1994.”¹

[5] In her affidavit she states that:

“I respectfully submit that the discharge in terms of section 17(3)(a) was unlawful. The employer was fully aware of my ill health which arose from an injury on duty. I further submit that the officers who visited me on numerous occasions had a duty to inform me about the correct procedures to be complied with during a long sick leave period – i.e. the applications for temporary and permanent ill health with paid sick leave. I was advised that the PILR provides for a duty on fellow employees to assist in situations where the ‘patient’ is not in a position to comply with the legal requirements of the policy.

¹ Section 17(3)(a)(i) of the Act provides:

‘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.’

The employer knew from the outset what the reasons for my absence were, they knew about the hospitalization and the mental condition, yet, despite the medical certificates and the proof of hospitalization, Colonel van Lill discharged me for desertion in terms of section 17(3)."

- [6] Colonel van Lill is the Provincial Commander: Firearms, Liquor & Second Hand Goods Control: Western Cape, heading the unit in which Galant was based. He was signatory to the letter she received in terms of section 17(3)(a).
- [7] No reference is made in the founding papers to a review of the decision taken by the second respondent in terms of section 17 (3) (b) of the PSA. That section provides that if an employee who is deemed to have been dismissed as contemplated in s 17(3)(a)(i), reports for duty at any time after the expiry of the period referred to in subsection (3)(a)(i), 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. The relevant executive authority in this case was the second respondent who considered the representations by and on behalf of Galant and declined to reinstate her.
- [8] In other words, the legal basis of the application before me is limited to the question as to whether the jurisdictional facts existed for the invocation of section 17(3)(a) (i) of the PSA. In the founding affidavit Galant records that she was admitted to Melomed Medical Centre by Dr Khalid Dhansay a Specialist Psychiatrist for major depression for the period 24 July to 15 August 2015, and her Commanders were informed of this. She avers that she was again hospitalized at the Centre for the period 22 August 2014 to 27 August 2014. On the 22 September, a Dr Lekas booked her off for 'major depression' until 3 October 2014.
- [9] Shortly after this she was handed a notice signed by Captain Van Lill informing her to resume duty by 10 October 2014, otherwise her salary would be stopped. She was invited to make representations as to why her absence should not be regarded

as leave without pay. On 17 October 2014 Galant received a further letter from Colonel van Lill which read as follows:

- “1. My correspondence 0104867-8/2 dated 25 September 2014 (temporary incapacity leave) and 7 October 2014 (2 notices to return to work) refers.
2. Your representations were considered and found that it does not justify your absence from work.
3. It is noted that you booked off sick for various illnesses during your absence and you were informed that your sick certificates were not accepted by the employer.
4. On 13 October 2014 Head Office was informed to stop your salary.
5. With due regard to the contents of all the correspondence served on you, you are hereby instructed to resume your duties on Monday 20 October 2014.
6. Should you fail to resume your duties within one calendar month from 20 October 2014 you will be deemed to be dismissed in terms of section 17(3)(a)(i) of the Public Service Act.”

[10] I note that Galant refers to being booked off until 3 October 2014 by Dr Lekas. The employer gave her one calendar month from the 20 October 2014 to return to work in the letter above. She was given the letter of deemed dismissal on 28 November 2014. Given that this review is not concerned with the decision by the second respondent in terms of section 17(3)(b), the events after the 30 day period expired are not relevant to the court's determination of whether the jurisdictional facts existed for the deemed dismissal to be effected.

[11] The jurisdictional facts are to be gleaned from section 17(1)(a)(i) which bears repeating i.e.: '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.', have been judicially considered. The Constitutional Court in **Grootboom v National Prosecuting Authority & another** summarised the provision's meaning thus:

"This section allows for the deemed discharge, by mere operation of law and without prior notice or hearing, of any officer, other than a member of the military, police or correctional services or an educator or a member of the National Intelligence Services, who absents himself or herself from his or her official duties for longer than one calendar month without his or her employer's permission."²

- [12] In other words the jurisdictional facts for the deemed dismissal to be activated ex lege are twofold, first that there has been a 30 calendar days absence, and secondly that the employer has not been given permission for that absence. The Supreme Court of Appeal, has stated in **Solidarity & another v Public Health & Welfare Sectoral Bargaining Council & others** ³ :

"[10] A 'deemed dismissal' in terms of s 17(5)(a)(i) of the PSA follows by operation of law. Accordingly, the notice of 19 October 2007 to the employee purportedly in terms of that section, was purely a communication of a consequence that, in the employer's view, followed by operation of law (*Minister van Onderwys & Kultuur & andere v Louw* 1995 (4) SA 383 (A) at 388). Plainly, that section only finds application to an employee who 'absents himself or herself from his or her official duties without permission'."

- [13] In both the **Grootboom** and the **Solidarity** cases (supra), the court found that the jurisdictional fact of absence 'without permission' had not been met as the employees in question had been suspended and were thus not absent at the behest of their respective employers.⁴

² (2014) 35 ILJ 121 (CC); the court referred to the section as it was before the amendments to the PSA, (i.e. section 17(5)(1)) by virtue of Act 30 of 2007, and emphasized that the section was in all essentials unchanged.

³ 35 ILJ 2105 (SCA) 2105 (SCA)

⁴ At paragraphs 40 and 10 respectively

[14] The facts in this matter stand to be distinguished. The employee was not absent at the behest of her own employer and on her own version was not given permission to be absent for the thirty day period in question. The issues regarding leave without pay, the applicable policies and prescripts regarding Incapacity leave and Ill Health retirement, as well as those for Incapacity Assessment for psychiatric conditions referred to by the applicant in her founding papers, as well as representations in relation to these, were issues serving before the second respondent when he took his decision not to reinstate the applicant in terms of section 17(3) (b). Unfortunately for Ms Gallant, no legal basis for review of that decision was contained in the founding affidavit. The founding affidavit encapsulates her cause of action as follows:

“The employer knew from the outset what the reasons for my absence were, they knew about the hospitalization and the mental condition, yet despite the medical certificates and the proof of hospitalization, Colonel van Lill discharged me for desertion in terms of section 17(3).”

[15] The application must therefore fail on the basis that it was ill-conceived, as reflected in the founding papers.

[16] I therefore make the following order:

16.1 The application is dismissed.

16.2 There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: JA Nortje instructed by Heidi van der Meulen Attorneys

Respondents: T.J Golden S.C. instructed by State Attorney

Labour Court