



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D100/16

In the matter between:

MOGOERA LEEPILE SSM

First Applicant

KAMBULE MP

Second Applicant

MOKOENA KP

Third Applicant

and

MEC FOR THE DEPARTMENT OF

ECONOMIC DEVELOPMENT TOURISM

AND ENVIRONMENTAL DEVELOPMENT

Respondent

Heard: 22 November 2017

Delivered: 9 February 2018

Summary: Section 17 of the Public Service Act. In order to succeed with an application to be reinstated the employee must comply with section 173(b) by *inter alia* reporting for duty. This is a condition precedent to the application being considered. The applicants expressly did not report for duty. Application to review the refusal to reinstate dismissed with costs.

JUDGMENT

GUSH J

- [1] The applicants in this matter apply for the following relief:
- a. Condonation for the late referral of the matter;
 - b. the failure of the respondent reconsider the deemed dismissal;
 - c. alternatively, to review and set aside the decision of the respondent to uphold /confirm the deemed dismissal;
 - d. that the deemed dismissal on 3 July 2015 be declared unfair and be set aside;
 - e. that the applicants be reinstated and be paid their remuneration and benefits from the date of their dismissal; and
 - f. costs.
- [2] The applicants' application for condonation was not opposed and, at the commencement of the hearing, I granted condonation in so far as it was necessary.
- [3] It is necessary to set out a brief background to the circumstances that led to the applicants' deemed dismissal in order to consider the basis of the applicants claim.
- [4] The applicants were all employed by the respondent, between 1996 (first and second applicants) and 2006 (third applicant). On 1 November 2008, the applicants were "seconded to perform duties in the then Free State Liquor Authority "until further notice".ⁱ
- [5] During 2010, the Free State Liquor Authority (FSLA) was dissolved and a new entity was established namely the Free State Gambling and Liquor Authority (FSGLA). The employees of the FSLA were transferred to the FSGLA. The applicants, not being employees of the FSLA were not transferred.
- [6] As the applicants' secondment had come to an end, they were advised that they were to be re-absorbed into the respondent's department.

- [7] The applicants were apparently dissatisfied with the re-absorption into the respondent's department and engaged in protracted consultations with the respondent. The applicants went so far as to challenge the fact that they had not been transferred to the FSGLA in the Free State High Court. This application was dismissed.
- [8] During this time, the applicants religiously refused to report to the offices of the respondent in the positions allocated to them in the respondent's department but persisted in reporting only to the offices where they had performed their duties for the FSLA where they had previously been seconded.
- [9] This refusal to report for duty continued unabated inexplicably for a number of years. The situation was brought to head when the respondent eventually grasped the nettle and addressed letters to the applicants. The contents of the letters read:

‘Transfer: Yourself

1. During January 2011, provincial executive committee [EXCO] took a decision that the former employees appointed in Liquor Affairs sub-directorate must be absorbed within the department. Subsequent to various consultations with you since June 2011, a post ... was identified for you, but you never reported for duty at the indicated section.
2. You are given a final opportunity to report for duty at the indicated section with immediate effect after the receipt of this letter. Please report to Mr. T T Radikeledi: Director Business Regulations. Take note that if you fail to report for duty after receipt of this letter, section 17(3)(a)(i) of the Public Service Act, 1994 as amended, will be invoked. Further take note that if you fail to report to the indicated section, your salary will be frozen whilst the abscondment process is being finalised.ⁱⁱ

[10] Nothing could have been clearer. The applicants were instructed to report for duty and the consequences of their failure to do so was clearly set out. Section 17(3)(a)(i) reads

‘An employee, who absents himself from his official duties without permission from his 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... iii

[11] In response to these letters, the applicants’ attorney replied by letter firstly and disingenuously suggesting that the purpose of the letters was an instruction to the applicants to “transfer themselves”.

[12] The applicants’ letter continues to confirm and record that the applicants had not reported for duty nor worked for some five years. No mention is made by the applicants’ attorney of the consultations or the failed court application that to all intents and purposes resolved the dispute over the fact that the applicants were not transferred to the FSGLA. The letter simply and unequivocally records that the applicants will not report for duty as “it will be in the best interests of all parties to have a proper consultation process and/or formal meeting to discuss [the applicants] concerns... .iv

[13] Needless to say this response inevitably lead to the respondent issuing Section 17(3)(i) letters to the applicants advising them that they were deemed dismissed by virtue of the provisions of that section, as had been recorded in the previous letter.

[14] Quite correctly, the letters from the respondent specifically referred the applicants to the provisions of section 17(b) of the Act that spells out the process to be followed by employees who are deemed to have dismissed whereby they can apply on good cause shown to be reinstated.

[15] Section 17(b) provides that “If the employee who is deemed to have been so dismissed, **reports for duty** at any time after the expiry of [the period of absence] the relevant executive authority may, on good cause shown approve the reinstatement of the employee... .v (my emphasis)

- [16] The applicants, through their attorney, elected to make representations as is envisaged by Section 17(b). Conspicuous by its absence is any suggestion that the applicants had reported for duty. It is common cause from the pleadings that the applicants had at no stage reported for duty at the designated offices where they had been placed after the end of their secondment and their placement in the respondent's department.
- [17] The applicants had not reported for duty prior to the letter referred to in paragraph 9 above; they did not report for duty after having received the letter; despite that letter clearly and unequivocally instructing them to report and spelling out the consequences of not reporting; and finally, despite having been referred to Section 17(b) the applicants did not fulfil the condition precedent to having their dismissal reversed, viz. **REPORT FOR DUTY**.
- [18] The application of the deemed dismissal contemplated in Section 17(3)(a)(i) has long been held not to constitute a dismissal as contemplated by the Labour Relations Act 66 of 1995. It is a termination of employment by operation of law.
- [19] It is so that the refusal of the executive authority to reinstate may well constitute in appropriate circumstances an unfair dismissal. In order for the executive authority to even consider representations, good cause and reinstatement, the applicants in this matter were required to comply with the statutory condition precedent to having their representations considered. Reporting for duty enables the respondent to consider whether good cause had been shown and if so reinstatement. In the absence of any attempt by the applicants to report for duty, there can be no basis upon which the respondent can be required to consider the representations.
- [20] The statute requires the applicants to have reported for duty as a condition precedent to the respondent considering the application. Where this condition has not been satisfied, the executive authority (respondent) is not required to consider the representations.
- [21] At the commencement of these proceedings, the applicants were not aware that the respondent had refused their request for reinstatement without giving

reasons. Nothing hangs on this as in the absence of compliance with the statute by reporting for duty there is no basis for the respondent to consider the application.

[22] As far as costs are concerned taking into account the specific facts of this matter and in particular that the applicants have for a number of years steadfastly refused to report for duty whilst receiving their salaries; as well as the requirements of law and fairness, I am satisfied that costs should follow the result.

[23] For the reasons set out above, I make the following order:

The applicants' application is dismissed with costs.

D H Gush J

APPEARANCES:

FOR THE APPLICANTS:

Adv A Berry

Instructed by Pieter Peyper Attorneys

FOR THE RESPONDENT:

Adv Skosana SC; Adv Nondwangu

Instructed by State Attorney

ⁱ Pleadings para 5.2 page 10 and annexure ML1 and ML2 pages 22 and 23.

ⁱⁱ Pleadings annexures ML10, 11 and 12. Pages 57-58.

ⁱⁱⁱ Section 17(3)(i) of the Public Service Act, 1994.

^{iv} Pleadings annexure ML13 page 60/1.

^v Section 17(b) of the Public Service Act, 1994.