IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR2148/08

In the matter between:

SAGA MOSES MAHLANGU APPLICANT

AND

MINISTR OF SPORT AND RECREATION RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this matter seeks to review and set aside the decision not to reinstate him after he was discharged by the respondent in terms of the deeming provisions of section 17(3)(a)(i) of the Public Service Act 103 of 1994. The review application is brought in terms of section 158(1) (f) of the Labour Relations Act 66 of 1995 (the LRA).

[2] The applicant has in his papers referred to sections 17 (3) (a) (i)[1] and 17 (5) (a) (i) of the PSA. The relationship between the two is explained in the following footnote below.

[3] The applicant has also brought an application for the condonation of the late filing of the review application. The application is late by some 5 (five) months due to the fact that the dispute was initially referred to conciliation during April 2008. The applicant has in the application for the late filing of his application tendered an explanation which in my view satisfies the requirements set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531(A),* in that it is a reasonable and satisfactory explanation. Accordingly, I see no reason why condonation should not be granted in the circumstances of this matter.

Background facts

[4] The facts in this matter are fairly common cause. On the 18th September 2007 the respondent addressed a letter to the applicant which reads as follows:

> *"Dear Mr Mahlangu*
>
> ***DISCHARGE IN TERMS OF SECTION 17(5)(a)(i) OF THE PUBLIC SERVICE ACT***

[1] Section 17 (5) of the PSA has been substituted by section 25 of the Act 30 of 2007 and is now sub-section 17 (3) (a) and (b). There are no, material differences between the sections. The changes brought in by the substitution relates to the word "officer which has changed to the world employee."

1. *You last reported for duty on the 11th July 2007.*

2. *You are in terms of Section 17(5)(a)(i) of the Public Service Act deemed to have been discharged from the Public Service with effect from the 11th July 2007 on account of abscondment.*

3. *You may in terms of Section 17(5)(b), make representations to the Executing Authority for your reinstatement to your original position and the Executing Authority may or may not reinstate you. If the Executing Authority decides to reinstate you, he may attach conditions to your reinstatement.*

4. *You are requested to furnish the Department with your Bank and Persal details in order for your Pension and other benefits to be processed. All the payments you have received whilst you were not on duty will be recovered from monies due to you.*

Yours Faithfully."

[5] The applicant made his submissions which reads as follows:

"APPLICATION FOR RE-APPOINTMENT

I write this letter to outline reasons why I am applying for reappointment.

I was given a letter which states that as I have not come to work for a period of more than 30 days I have therefore discharged myself from the public service.

During my absenteeism I was ill. I would wake up in the morning and feel dizzy and nervous. I also suffered relapse of depression and substance abuse.

I went to my family doctor who referred me to a cardiologist as he suspected that I may be suffering from a certain heart condition. After examining me, the cardiologist referred me to a psychologist. He referred me there as he found out about my recent depressive mood."

[6] The applicant thereafter set out several causes of his health condition and pointed out that he was alcoholic.

[7] After receipt of the submissions of the above submission, the respondent invited the applicant to attend a session for the purposes of evaluating his application for reinstatement. The applicant was further informed in that notice inviting him to attend the evaluation session that Dr J Chabalala was appointed to evaluate his health condition in relation to his application for reinstatement. On the 21st February 2008, Dr Chabalala presented a medical report on the health condition of the applicant. The report sets out several problems which confronted the

applicant in as far as his health condition was concerned. At the end thereof the report made a recommendation which reads as follows:

> *"I strongly recommend that he be sent to the centre (alcoholic rehabilitation centre) as soon as possible, even at government expense, which he may repay later. If successfully rehabilitated, all the physical complications he has will improve and even disappear. His psychological problems will also ease considerably. He will also be able to resume his duties without problems."*

[8] On the 16th January 2008, the applicant received a letter from the Minister of Sports and Recreation informing him that his representations have been considered and the *"conclusion is that there is a clear risk in reinstating you to your previous or any other position in the department"*. He was further informed in the same letter that *"in the public interest your application is hereby not granted"*.

[9] At the hearing of this matter on the 23rd September 2009, the parties after a brief debate on the matter in Court agreed that the matter be postponed pending submissions of additional heads of argument. The applicant in his heads of argument formulated the grounds for review as follows:

> *"3.1 The Respondent misdirected and/or misconducted himself and as such committed an irregularity in terminating*

Applicant's employment on the grounds advanced in his letter dated 16/01/08, under the circumstances at hand."

[10] In the supplementary heads of argument the applicant contends that the issues that should be considered are:

"(a) Whether a hearing/enquiry should have been held or ought still be held by the Respondent under the current facts and circumstances and in terms of procedural fairness…;

[11] In this respect the applicant submits that the respondent ought to have afforded the applicant a full, fair and proper hearing which would not have resulted in an arbitrary decision against him.

Termination of employment due to operation of the law

[12] In terms of Section 17(5) (a) of the Public Service Act 103 of 1998 (the PSA):

"An officer, other than a member of the services or an educator or the Agency or 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 dismissed from the public service on account of misconduct with effect from a date

immediately succeeding his or her last day of attendance at his or her place of duty"

[13] The interpretation of the provisions of section 17(5) (a) of the PSA has received attention in a number of Court cases. There is consensus as to the meaning and consequences of this subsection. In terms of this subsection an employee who absents himself or herself without authorisation for a period exceeding one calendar month is deemed to have been dismissed automatically by operation of the law. In *Phethini v Minister of Education and Others (2006) 27 ILJ 477 (SCA),* the Court in dealing with the provisions of section 14(1)(a)[2] of the Employment of Educators Act 76 of 1998, which has similar provisions as those of section 17(5) (a) of the PSA, held that when an employee is dismissed in terms of the deeming provision the employer does not commit an act or take a decision because the discharge is by operation of the law. Thus an employee deemed to be dismissed in terms of section 17(5) (a) has no right to a hearing.

[2] Section 14 (1) (a) of the Employment of Educators Act 76 of 1998 reads as follows "An educator appointed in a permanent capacity who (a) absent from work for a period exceeding 14 consecutive days without permission of the employer", and section 14 (2) reads as follows "if an educator who is deemed to have been discharge under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty at otherwise as the employer may determine."

[14] The authorities are also in agreement that the deeming provision as envisaged in terms of section 17(5)(a)(i) of the PSA, do not constitute a decision by the employer which could be reviewed in a Court of law. This means that in cases involving termination of employment of a public service employee due to unauthorised absenteeism in excess of one calendar month, the Court does not have jurisdiction to review the consequent termination of the employment relationship.

The provisions of section 17(5) (b) of the PSA

[15] In terms of section 17(5) (b) of the PSA, the employer has a discretion to reinstate an employee whose employment has been deemed terminated due to absence without authority for a period in excess of one calendar month. Section 17(b) of the PSA reads as follows:

> "*(b) If an officer who is deemed to have been so discharged, reports for duty at anytime after the expiry of the period referred to in paragraph (a), the relevant executing authority 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."

[16] In dealing with the provisions of section 17(5) (b) of the PSA this Court in the unreported case of *Grootboom v The National Prosecuting Authority and Another case number 606/08,* held that it was clear from the reading of the section that the deemed dismissal for misconduct relating to absence without authorisation remains even when the provisions of section 17(5) (b) comes into operation and therefore the deeming provision does not change into the decision of the employer when the employee is afforded the opportunity to make representation showing good cause why he or she should be reinstated. The issue of whether refusal to reinstate an employee by the employer should be subjected to scrutiny by the bargaining council or CCMA received attention in the unreported case of *Andre Johann De Villiers v Head of Department: Education Western Province case number C934/2008* and *MEC Public Works, Northern Province v Commission for Conciliation, Mediation and Arbitration & Others (2003) 24 ILJ 2155 (LC).*The view that the dismissal remain even when the provisions of section 17(5) (b) comes into operation was stated *De Villiers supra,*

when the Court quoted with approval what was said in *MEC Public Works, Northern Province supra.* In that case the Court is quoted as having said:

> *"In my view, a decision not to reinstate an employee whose employment has been terminated by operation of law is not a 'dismissal' for the purposes of s 186 of the LRA. In particular, s186 (a), which provides that 'where an employer has terminated a contract of employment with or without notice there is a 'dismissal', does not in my view apply. If the employer exercises his discretion in terns of s 17 (5) (b) (i) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer."*

[17] There is also authority which this Court followed in *Grootboom supra,* to the effect that the employer in exercising the discretion in terms of section 17(5) (b) of the PSA performs a statutory function and consequently the decision is administrative in nature. In *De Villiers supra,* the Court, at paragraph [21] held that:

> "[21*]* *For these reasons, I consider that the respondent's conduct in deciding in terms of s 14(2) of the EEA to refuse to reinstate the applicant constituted administrative action,*

and that this Court is entitled to exercise its review jurisdiction on this basis."

[18] In *Grootboom supra*, the Court further held that the decision not to reinstate the employee after he or she has made submission showing good cause was reviewable in terms of section 158(1) (h) of the LRA. In relation to the issue of showing good cause the Court observed as follows:

> *"It is clear in my view that the requirement of good cause in terms of section 17(5(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorisation. The employer in considering whether or not to reinstate the employee has to exercise a discretion given by section 17(5) (b) of the PSA. In this respect the decision by the employer has to be influenced by fairness and justice. In other words the employer does not have unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her*

mind to the submission made by the employee for the decision to be said to be reasonable and lawful."

[19] In my view based on the above analysis it is clear that section 17(5) (b) of the PSA requires the functionary who considers the submissions made by the employee to apply his or her mind before arriving at the conclusion as to whether or not the employee should be reinstated. It is also my view that in considering whether or not to reinstate an employee, one of the key factors to take into account is whether absence without authority on the part of the employee was wilful including objectively considering whether or the employment relationship has broken down due to what section 17 (5) (a) has already categorised as misconduct on part of the employee.

[20] In my view failure by the functionary of the State to apply his or her mind in considering whether or not to reinstate an employee who has been deemed to have been dismissed by the operation of the law renders the decision reviewable under section 158(1) (h) of the LRA which provides that the Labour Court may:

"(h) Review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."

Evaluation of the applicant's case

[21] The question that arises in the present instance is whether the applicant has made out a case warranting reviewing the decision of respondent not to reinstate him after the deemed termination of his employment. The key question in the assessment of the decision is whether or not the respondent applied his or her mind to the submission made the applicant.

[22] As indicated earlier in this judgement the reason given by the applicant for his absence was due to his health condition. The health condition was induced by the initial abuse of alcohol which came about because of family problems the applicant encountered in particular those relating to losing members of his family in a short space of time. It seems common cause that the respondent was aware of this condition because the investigation to make a submission regarding his absence was based on incapacity due to ill-health. In this respect the letter addressed to the applicant advising him of the investigation states in the part relevant to this matter that:

> *"SUBJECT: NOTICE OF DEPARTMENTAL INVESTIGATION FOR INCAPACITY: YOURSELF*
>
> *Dear Mr Mahlangu*

It has come to my notice that you have in the past days been absent from duty for a time that is reasonably long.

I have made enquiries from Mr L Fourie /Ms Shabangu, your immediate supervisors and was informed that your absence was due to ill health.

Your continuous absence from duty has resulted in your being temporarily unable to perform your work as expected in terms of your employment with the department."

[23] The diagnosis done by Dr Chabalala who was the doctor appointed by the respondent to conduct the investigation states under the heading "2. *Clinical problems(s),"*that:

"His main problem (refereeing to the applicant) is that he drinks alcohol excessively, and daily. He consumes up to 7 quarts of beer a day. This is equivalent to 5 litres of beer, a straight of Whisky or three bottles of wine per day. His drinking led to him completely neglecting his work, as he had a constant hangover He developed a range of physical and psychological problems as well as social and occupational failure.

[24] In conclusion and proposed solutions, Dr Chabalala recommended that the applicant be referred to an alcoholic rehabilitation centre as soon as possible. He further indicates that the health problems of the applicant will go away on completion of rehabilitation and will be able to resume his duties.

[25] The other medical report is that written by Dr Mashayamombe who treated the applicant after he was referred to him by Dr Chabalala. At the end of his report Dr Mashayamombe recommended that:

> "*1 That Mr Mahlangu is given a chance to return to his previous post in the Department of Sports and Recreation. He has now overcome his psycho-active substance dependence problem. Better productivity in the department can be expected now.*
>
> *2 That he should continue to take regular Tab. . .*
>
> 3 *That he should attend regularly all scheduled mental health review clinics in order to ensure that he has professional help at all time."*

[26] It is apparent that in considering whether or not to reinstate the applicant the respondent had before him or her both the submissions of the applicant and those of manager in the department. The Director- Labour Relations, recommended that the position of the applicant "*be kept*

vacant should the employer decides to re-instate him. It is also recommended that another position be reserved instead of keeping a critical finance position which he previously occupied."

[27] The recommendation of the Director-General reads as follows:

> *"The interests of the department are to have committed staff that can assist in executing the mandate of SRSA.*
>
> *Mr Mahlangu absconded from his post and has through his own action vacated his post. The department spent funds in order to assess him that is his fitness to return to work and render services to the public. In essence Dr Chabalala has affirmed that Mr Mahlangu has a serious problem. It in that score that I believe we shouldn't lose focus by trying now to spend tax payer's money in assisting him. I recommend that the EA should reject Mr Mahlangu's application for reinstatement and allow for the post to be filled with a competent person."*

[28] The Minister apparently after considering the above recommendations by both the Director-Labour Relations and the Director-General, states:

> *"1 as it is, Mr Mahlangu is NOT an employee of the Dept. He has crossed the path of the law.*
>
> *2 I do not understand how we will justify a further expenditure of R10 000,00*

3 I belief that the DG has a valid argument.

EAP should have dealt with the problem earlier."

[29] It would appear that the decision not to reinstate the applicant was informed by the above consideration. In this respect the Minister addressed a letter dated 16 January 2008, communicating his decision not to reinstate the applicant. The relevant parts of the letter read as follows:

> *"I have considered the representations that you table in support of your application.*
>
> *Due to the complexity of your application, I have decided to seek the opinion of experts in the area of psychiatry.*
>
> *I have also asked the Finance and Human Resources Directorate of the department respectively, to advice me on the factual circumstances leading to the termination of your service. I have analysed the report on your conduct prior to the termination of our services and also considered the observation and the report of the Health Risk report.*
>
> *My conclusion is that a clear risk in re-instating you your previous or any other positioning the Department.*
>
> *Therefore, in the public interest your application is hereby not granted."*

[30] It is an established approach of our law that a distinction should be drawn between a case of a person abusing alcohol and the one who is alcoholic. In the case of alcoholic abuse such conduct in general is regarded as misconduct and depending on the circumstances of a given case the employment relationship may be terminated for that reason. An alcoholic person is regarded as being ill and therefore his or her employment can be terminated on the basis of incapacity due to ill health. Different considerations applied in terminating employment due to misconduct and incapacity due to ill health. Termination for misconduct has to do with the fault of the employee whilst termination for incapacity is based on the principle of no fault on the part of the employee.

[31] The applicant in his notice of motion prays for the following:

> *1. In terms of section 158 (1) (h) of the Labour Relations Act No 66 of 1995 reviewing the decision of the Minister of Sport and Recreation in declining to reinstate the Applicant to his employment in terms of section 17 (3) of the Public Service Act, Proclamation 103 of 1994 as amended.*
>
> *2. That the conduct of the Respondent in declining to reinstate the Applicant to his employment in terms of section 17 (3) of the Public Service Act, Proclamation 103 of 1994 as*

amended be declared to have constituted an unfair dismissal in terms of Section 188 (1) (a) of the Labour Relations Act No 66 of 1995.

3. *Directing the Respondent to reinstate the Applicant retrospectively without loss of benefits or alternatively awarding compensation to the Applicant in the equivalent of 48 months at the rate of his salary at the time of dismissal with the necessary adjustment."*

[32] The prayer that the decision of the respondent should be declared to constitute an unfair dismissal is repeated in the founding affidavit at paragraph 5.1. The same approach is adopted in the supplementary heads of argument by counsel of the applicant. Mr Mathunyane, on behalf of the applicant submits that the applicant should have been afforded a hearing before the termination of his employment occurred.

[33] It is trite that in review matters the Court has to confine itself to the grounds of review pleaded by the applicant in his or her notice of motion and founding papers. In the present instance as indicated earlier the applicant's case is based on the notion of unfair dismissal in terms of the LRA. The forum for determining unfair dismissal based on misconduct is either the CCMA or the bargaining council. This Court has no jurisdiction to entertain disputes concerning dismissals for misconduct.

[34] The facts of this case do not point to a dismissal by the respondent but rather a termination of employment arising from the operation of the

law. As indicated earlier termination of the contract of employment as a result of the operation of the law does not constitute a dismissal by the employer.

[35] It does appear to me that there are merits in the complaint of the applicant about the consideration given to his submission. However, his case as pleaded in the papers does not concern the complaint about the decision to refuse to reinstate but rather the alleged unfair dismissal. I have already indicated that as a general rule this Court does not have jurisdiction to entertain unfair dismissal disputes relating to misconduct on the part of the employee.

[36] It is for the above reason that I find that the applicant's application stand to fail. I do not however, belief that it would be fair in the circumstances of this case to allow costs to follow the results.

[37] In the premises the applicant's case is struck off the roll with no order as to costs.

Molahlehi J

Date of Hearing : 11 November 2009

Date of Judgment : 3rd February 2010

Appearances

For the Applicant : Adv D S Mathunyane

Instructed by : Sambo-Mlahleki Attorneys

For the Respondent: Adv T Motshwane

Instructed by : The State Attorney