

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION: MTHATHA)**

In the matter between:

CASE NO. 178/2015

TANDIKHAYA KETWA

APPLICANT

VS

MEC FOR HEALTH & 2 OTHERS

RESPONDENTS

JUDGMENT

DAWOOD, J:

1. The Applicant herein sought an order in the following terms:-

“

- 1. That Applicant's non-compliance with the Uniform Rules of Court as regards time frames, forms and service be and is hereby condoned and that leave be and is hereby granted to the Applicant to bring this application on the abridged terms;*

2. *That the Respondents' termination of Applicant from his employment be declared unlawful and set aside;*
3. *That the Respondent be and are hereby directed to re-instate forthwith the Applicant to his position as Senior Assistant Director in the same terms and conditions as before.*
4. *That the 1st Respondent be and is hereby directed to pay the Applicant all his salary as from June 2013.*
5. *That the Respondent pay costs of this application.*
6. *Granting to the Applicant such further and/or alternative relief as to this honourable court may deem meet."*

2. The Respondent raised the following points *in limine*:-

- a) That this court lacked jurisdiction in that:-
 - i) This is an employer and employee relationship;
 - ii) That the Applicant did not rely on a breach of contract; and
 - iii) That accordingly the High Court does not have concurrent jurisdiction with the Labour Court to adjudicate upon the matter.
- b) That the Applicant failed to exhaust internal remedies having regard to the fact that:
 - i) His termination was by operation of law in terms of section 17 (3) (a) of the Public Services Act of 1994;
 - ii) That section 17 (3) (b) provides an employee who presents himself for duties after his deemed dismissal an opportunity to report for work and to be re-instated on good cause shown;
 - iii) That the Applicant failed to present himself for work and accordingly failed to comply with section 17 (3) (b); and
 - iv) The court accordingly cannot adjudicate over the matter until the Applicant's internal remedies have been exhausted.

3. That there was undue delay in light of the fact that the Applicant's termination took effect in July 2013 and he only approached his attorney in November 2014 and the Respondent sought a dismissal of the Application on that basis.
4. The matter was set down for the determination of the points raised *in limine* by the Respondent.
5. I shall deal with each of the points raised in turn:

A) Jurisdiction:

- i) The Applicant has stated, correctly or incorrectly, that his constitutional rights were infringed and his rights were also infringed in terms of PAJA (Promotion of Administrative Justice Act 3 of 2000).
- ii) It is trite law that this court has concurrent jurisdiction with the Labour Court where there is a claim for the enforcement of contractual and constitutional rights of a party¹.
- iii) I am disposed to accept that there are sufficient averments on the papers to give this court concurrent jurisdiction with the Labour Court to adjudicate upon the application although that jurisdictional facts and basis could have been elucidated in clearer terms, the court does not have to consider whether or not the points have merit or were properly raised in order to determine jurisdiction but simply whether it was raised and gave issue that can be adjudicated upon by this court. The Applicants have done so in this case. The court does not need to, when determining the issue of jurisdiction, decide upon whether or not contractual or constitutional rights were breached.

¹ Makhanya v University of Zululand 2010 (1) SA 62 (SCA) at 71

- iv) The Respondent's first point *in limine* on lack of jurisdiction is accordingly dismissed.

B) FAILURE TO EXHAUST INTERNAL REMEDIES:

- i) The Applicant in paragraph 9 of his founding affidavit states that the letter delivered to his house on 26 June 2013 purportedly terminated his employment and refers to annexure TK1 as confirmation of the same.
- ii) Annexure TK1 in fact calls upon the Applicant to respond in writing as to why his absence cannot be taken as unauthorised leave of absence which could result in abscondment if he continues with this behaviour and he is required to submit himself to the sub-district manager within 5 working days.
- iii) TK1 is not a letter of termination.
- iv) The Applicant states he received TK1 in July 2013, however he has failed to state when in July he received this letter and whether or not he at that stage:-
 - a) responded in writing thereto; and
 - b) submitted himself to the sub-district manager upon receipt of the letter.
- v) I do not propose to deal with the merits as to whether or not the Applicant has established that his services were wrongfully terminated or not but clearly this letter is not what it purports to be, that is, a letter of termination and all the arguments based on the contents of this letter by the Applicant's representative regarding it not complying with section 17 (1) with regard to the mandatory period of absence before one is regarded as having absconded, has to be disregarded in the circumstances.
- vi) It is evident from the annexures put up by the Applicant that the Respondent relies on the provisions of section 17 (1) of the

Public Services Act 1994 (hereinafter referred to as the Act) as the basis for termination, that is, the deemed dismissal of the Applicant due to his failure to report to work for a period of 30 days.

- vii) The Applicant has failed to allege that he reported for duty after his deemed dismissal and showed good cause for his re-instatement in his former position.
- viii) Annexure TK2 also bears reference to a letter requesting the reversal of abscondment not re-instatement on good cause.
- ix) The Applicant persisted in alleging that his termination was wrongful as is evidenced from paragraph 10 of his founding affidavit.
- x) The Applicant has alleged that he wrote a letter to the second Respondent after September 2013 but he fails to annex a copy of the same neither has he stated what was contained therein.
- xi) The Applicant on his own version has failed to comply with section 17 (3) (b) of the Public Services Act, if he has regard to the following:-
 - a) the Applicant failed to state that he indeed presented himself for work after the deemed dismissal;
 - b) he accordingly failed to present reasons to justify a reversal of the decision to dismiss due to abscondment; and
 - c) the employer accordingly was not given an opportunity to accept or reject those reasons as constituting or not constituting good cause.
- xii) The Applicant has annexed a leave form and a medical certificate as well as a letter to show that he was present on the 11th of July 2013 for working purposes at the clinic,

- xiii) The leave form is not signed by the employer as having been authorised and the letter is dated 11 March 2014 pertaining to him being on duty on the 11 July 2013 so this letter could not have been presented prior thereto nor is it alleged that it was presented,
- xiv) The medical certificate is dated the 17th of July 2013 on the day that the Respondent stated that the letter of termination was given,
- xv) The Applicant does not state whether the medical certificates was obtained before or after service of the letter of termination,
- xvi) The Applicant also fails to state whether or not the medical certificate was submitted to his supervisor,
- xvii) The Applicant also does not state that he in fact returned to work on the 20th of July 2013,
- xviii) The Applicant, far more importantly, fails to state that he reported for work and furnished these explanations to his employer when he was informed that his absence was taken as abscondment in term section 17 (1) of the Act and he was accordingly deemed to have absconded, is automatically dismissed unless the employer directed otherwise² even without being notified of the same by his employer,
- xix) The Applicant was obliged to follow the procedure set out in section 17 (3) by operation of law,
- xx) The Applicant does not indicate anywhere that he has complied with these provisions and exhausted the internal remedies prior to approaching this court for relief nor has he sought condonation for failure to exhaust internal remedies,

²Minister van Onderwys en Kultuur v Louw 1995 (4) SA 383 (A)
Sindezama Mathew Mbobo v Minister of Education and others E.C.D case number 396/2000

- xxi) The point, in my view, that he failed to exhaust internal remedies is accordingly properly raised, and
- xxii) The point *in limine* raised by the Respondent that the Applicant has come to court prematurely by failing to first exhaust internal remedies available to him has been properly raised and his failure to exhaust internal remedies accordingly warrants the dismissal. This point *in limine* is accordingly upheld.

C) Undue delay:

- i) There is no need to deal with the final point *in limine* regarding undue delay in light of the finding in respect of the Applicant's failure to exhaust internal remedies but I shall deal with it for the sake of completeness.
 - a) The Applicant has put up some flimsy grounds for his failure to launch the application within a reasonable period, without any substantiation of the grounds or confirmation by the union representative.
 - b) The Applicant in any event has failed to apply for condonation for the late launching of the Application.
 - c) The Applicant was as per the letters from the Respondent "dismissed" on 18th July 2013.
 - d) The only response to his union representative that is put, is a letter dated 12th September 2013. The next letter that is annexed is one written on the 10th November 2014 and a response given on the 18th November 2014. The Application was only launched on the 23rd of January 2015, two months after the response was given and more than a year and a half after the termination.

- e) The period of time from the date of dismissal to date of launching the application, a period in excess of 18 months, constitutes an inordinate delay.
 - f) This period of time is unreasonable and warrants a proper full explanation and the seeking of condonation for the delay as part of the substantive relief sought in the notice of motion which was not done in this case.
 - g) The Applicant failed to do so.
 - h) The Respondent also insofar as it may be necessary to make a ruling on this point as well accordingly succeeds on this point *in limine* regarding inordinate delay in launching the Application.
 - i) The Application is accordingly dismissed on that basis of inordinate delay as well.
6. The Respondent failed on the first point *in limine* and succeeded in respect of the other two points *in limine* raised.
7. I am in light of that fact that the Applicant was successful on at least one point disposed to exercising my discretion and ordering each party to pay they own costs.
8. I accordingly make the following order:
- i) The Application is dismissed;
 - ii) Each party to pay his/its own costs.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

28 JULY 2016

JUDGMENT DELIVERED:

29 AUGUST 2016

FOR THE PLAINTIFFS:

MR MGXAJI

INSTRUCTED BY:

MESSRS MGXAJI AND CO

3 GELENCOMBE FLATS

45 LEEDS ROAD

MTHATHA

FOR THE DEFENDANTS:

MR MTSHABE

INSTRUCTED BY:

STATE ATTORNEY

BROADCAST HOUSE

94 SISSION STREET

FORTGALE

MTHATHA