

IN THE LABOUR COURT OF SOUTH AFRICAHELD AT DURBANCASE NO: D520/2004

In the matter between:

5 ALLEN ZIBUSE ZULU

APPLICANT

and

DEPARTMENT OF EDUCATION AND

CULTURE (KZN)

RESPONDENT

10

JUDGMENT

NEL A J:

[1] This is an application brought on motion in which the
15 applicant seeks an order calling upon the respondent to
show cause why the termination of the applicant's
services should not be set aside and reversed with
immediate effect. A further prayer in the notice of motion
is that the applicant should be allowed to resume work on
20 the same conditions as before his termination from
employment.

[2] It is apparent that the applicant's employment herein was
terminated by the respondent, the Department of
25 Education and Culture (KZN) ("the Department") in terms

of section 17(5)(a)(i) of the Public Service Act 103 of 1994 (“the PSA”). This section reads as follows:

- 5 “(5)(a)(i) An officer, other than a member of the
services or an educator or a member of the
Agency or the Service, who absents himself or
herself from his or her official duties without
permission of his or her head of department,
10 office or institution for a period exceeding one
calendar month, shall be deemed to have
been discharged from the public service on
account of misconduct with effect from the
date immediately succeeding his or her last
15 day of attendance at his or her place of duty.
- (ii) If such an officer assumes other employment,
he or she shall be deemed to have been
discharged as aforesaid irrespective of
20 whether the said period has expired or not.
- (b) If an officer who was deemed to have been so
discharged, reports for duty at any time after the expiry
of the period referred to in paragraph (a), the relevant
executing authority may, on good cause shown and
25 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.”

5 [3] The facts herein are in dispute. In summary, the common
cause facts, or those alleged by the respondent herein,
disclose that the applicant had been absent from work
from 1 November 1997. On 23 September 1998 - more
than ten months later – the applicant was sent a letter by
10 the Department, which informed him that he had been
discharged in terms of section 17(5)(a)(i) of the PSA. The
reason was that the applicant had absented himself from
duty without permission of his head of department and
had failed to give a reasonable explanation for the
15 absence. Before this notification, the applicant had
apparently been requested to return to work on two
occasions, namely on 25 May 1998 and 16 June 1998.
The applicant did not respond to these two queries.

20 [4] The applicant contends that he received the letter of 23 September
1998 only in March 1999. He denies that he was absent from work
for the full month of November 1997. He alleges that he was present
at the respondent for the full month of November 1997. In
contradiction of this proposition, however, he alleges that he fell ill on
25 17 November 1997, went to the Doctor and was booked off ill till 3

December 1997. He alleges further that the medical certificate was presented to the respondent, who in turn says it only got it on 26 April 1999.

5 [5] What the applicant does in fact admit was that his absence from work commenced on 4 December 1997, when he says he was arrested and transferred to Westville Prison. He alleged that the Department was fully aware of his absence and the reasons therefor. The employer also denies this allegation of the applicant. It says that it reported an
10 alleged fraud by the applicant and some other officials to the South African Police on 18 June 1996, some 18 months before the applicant's arrest on 4 December 1997. The applicant says that he was released from prison on 17 March 1998. When he reported for duty on 18 March 1999, a representative of the Department told him
15 that he had to stay away from the office until such time as the applicant received direction from his head office on his matter.

20 [6] Of relevance is that the respondent alleges in its answering affidavit that, having been invited in the letter of 23 September 1998, to show good cause in terms of section 17(5)(b) of the PSA for his absence, the applicant did not respond thereto until 26 April 1999. More importantly the respondent alleges that the applicant did not proffer an explanation for the delay in his response, either in his letter dated 26 April 1999 or in his founding affidavit.

[7] It would appear from the papers before me that the applicant was on 25 October 2002 advised that, notwithstanding the fact that he had indicated that he experienced a case of sudden illness or unavoidable circumstances, he still had an obligation to inform his supervisor of the reasons for this absence. He was also obliged to give an indication of the date when he intended resuming duties.

[8] The Department contended that because the applicant had failed to meet his obligations of informing his supervisor of the reasons for his absence from duty until the period of one calendar month had expired, the provisions of PSA had been invoked and his employment terminated from the public service by operation of law. The Department went further to state that as the applicant had failed to provide proper and substantive reasons for his absence, as well as for his reasons for failing to inform his supervisor accordingly, it refused to reinstate the applicant. It must be remembered that this notice by the Department, refusing to reinstate the applicant, was dated 25 October 2002. The notice of motion herein is dated 19 October 2004, and it was served in this court on 20 October 2004, a good two years after applicant had been notified that the Department had refused to reinstate him.

[9] On the facts before me, it is apparent that the conduct of

the applicant fell within the prerequisites for the Department to invoke the provisions of section 17(5)(a) of the PSA. The applicant has failed to make out a case before me that the provisions of section 17(5)(a) of the PSA did not apply to him. On the respondent's version, which I must rely on in motion proceedings, together with the applicant's uncontroverted allegations, when there are conflicting versions between the applicant and the respondent, the applicant had absented himself from his official duties. He had no permission to do so and his absence was for more than one calendar month. Accordingly, section 17(5)(a) of the PSA found application.

[10] The Court accordingly being satisfied on the facts before it that the Department was entitled to invoke the provisions of section 17(5)(a) of the PSA, it follows that the applicant's services with the Department terminated by operation of law. Under these circumstances, when the applicant wanted to report for duty again, he bore the onus to show good cause why his employer should reinstate him. In the event the Department considered the applicant's contentions contained in his letter dated 26 April 1999, but concluded that the applicant had failed

to provide proper and substantive reasons for his absence.

5 [11] The applicant has not made out any case on the papers
before this Court why it should interfere with this
decision of the Department. That being the case, it
follows that the application should be dismissed. No
reasons have been placed before me why costs should
10 not follow the result and accordingly the following order
is made:

1. The application is dismissed.
2. The applicant is ordered to pay the respondent's
15 costs.

DEON NEL

20 ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 16 FEBRUARY 2007

DATE OF JUDGMENT: _____

APPEARANCES

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FOR THE APPLICANT: MR S C CELE, UNION OFFICIAL OF
NUPSAW.

FOR THE RESPONDENT: ADVOCATE S BOSWA-LEROTHOLI,
INSTRUCTED BY THE STATE ATTORNEY.

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