

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR60/2008

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH

Applicant

and

M D KHOETHA

1st Respondent

M V PHATSHOANE N.O.

2nd Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

3rd Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award dated 18 December 2007 under case number PSHS256-07/08 issued by the second respondent (the commissioner), after she had found that the requirements of section 17(5)(a)(i) of the Public Service Act 103 of 1994 (the PSA) were not met and that the first respondent's dismissal was both procedurally and substantively unfair. She ordered the applicant to reinstate the first respondent to his position as senior security officer at Elizabeth Ross hospital from date of the award being 18 December 2007 without any retrospective remuneration.
2. The applicant applied for condonation for the late filing of the review application.

The first respondent did not oppose the condonation application. A proper case has been made out for condonation and condonation is granted.

Background facts

3. The first respondent was discharged by the applicant in terms of section 17(5)(a)(i) of the PSA after he had refused to work at the Elizabeth Ross hospital but instead reported for duty at the Thabo Mofutsanyana district office. He was informed in writing that his services were deemed to be discharged in terms of section 17(5)(a)(i) of the PSA but that he could make representations in terms of section 17(5)(b) of the PSA. He duly made those representations. He was unsuccessful and thereafter referred an unfair dismissal dispute to the third respondent, the Public Health and Social Development Sectoral Bargaining Council (the bargaining council).

The arbitration proceedings

4. The unfair dismissal dispute was set down for arbitration. At the commencement of the arbitration, the applicant raised a point *in limine* that the first respondent was dismissed in terms of section 17(5)(a)(i) of the PSA by operation of law and that the bargaining council did not have jurisdiction to arbitrate the dispute. The commissioner directed the parties to lead evidence on the discharge as effected in terms of section 17(5)(a) of the PSA and said that she would deal with the point *in limine* in her award. She informed the parties that the award would be final in that if she found that the dismissal was correctly effected by operation of law, the request for arbitration would be dismissed but if she found that section 17(5)(a)(i) of the PSA was not applicable, then the fairness of the dismissal would be determined.

5. The applicant called Itumeleng Walter Patlane as its sole witness. He testified that he is a senior employment relations officer. He was appointed as an investigation officer, to investigate certain alleged acts of threats directed by the first respondent to a certain Motsitsi, a labour relations officer at Thabo Mofutsanyana district of the applicant. The first respondent was furnished with a letter dated 15 February 2005 about his placement at Elizabeth Ross hospital. The letter erroneously stated that he was placed at Thabo Mofutsanyana district. This placement error was subsequently corrected around 3 August 2005 after the first respondent received a letter stating that he was placed at Elizabeth Ross hospital with retention of his current rank and salary. He refused to report at the Elizabeth Ross hospital as directed. On 23 June 2006 the acting chief executive officer directed a further request that he report for work at Elizabeth Ross hospital. The first respondent wrote a letter to the acting CEO saying that he could not report at Elizabeth Ross hospital and that he did not want to report there and that he should be removed from the records of the Elizabeth Ross hospital and be put on the records of Maluti a Phofung. He continued reporting for work at Thabo Mofutsanyana district office where he was not assigned any duties. He was suspended due to the complaints received from Motsitsi about the threats but his suspension was uplifted in a letter dated 22 March 2007 and was requested to report at Elizabeth Ross hospital. He refused to do so. He lodged an appeal against a final written warning and made reference to being placed at the Elizabeth Ross hospital. He was informed that his placement was purely administrative and had nothing to do with the final written warning that he had appealed against but he still refused to report at the Elizabeth Ross hospital and continued reporting at Thabo Mofutsanyana district office. He stayed mostly at a certain lady's office. The applicant was aware that he was reporting there. He was asked to report at Elizabeth Ross hospital with

effect from 26 March 2007. He did not report for the period of 22 March to 30 April 2007. He was then discharged from service in terms of a letter dated 30 April 2007 in terms of section 17(5)(a)(i) of the PSA with immediate effect. He was advised that he could make representations to the applicant about why he could not be discharged from service. He made those representations for reinstatement but was advised in a letter dated 15 June 2007 that they were not upheld.

6. The first respondent testified that before he was employed by the department of health (the department), he previously worked for the department of public works for the period 1990 to 1997 as a senior security officer. Around 1 November 1997 the department wanted his lateral transfer from public works. He was then released to support management in caring for state property. He was at the time of his dismissal earning R4 103.75 per month. He was dismissed on 30 April 2007 by the applicant. He said that at all relevant times during the alleged period of absence from official duties, he was rendering his services at Thabo Mofutsanyana district office where he had been placed since 1999. He confirmed that he did not report for work at the Elizabeth Ross hospital. He said that there was a procedure within the applicant to determine his whereabouts and the department should have called him to an enquiry so that he could defend himself. On 4 January 2005 he received a letter from his manager stating that he had to report for work at the department of public safety. Around 15 February 2005 he received a letter from the head of the department approving his placement at Thabo Mofutsanyana district with effect from 1 November 2004. He again received the same letter on 22 June 2005 stating that his placement at Thabo Mofutsanyana had been cancelled by one Henrietta van Zyl - a senior admin officer and was replaced by hand with Elizabeth Ross hospital. He then took the cancelled letter to Motsitsi and Maruane and enquired from them about the legality of the hand written cancellation on the letter from the head of department by an official, and they did not agree that such type of cancellation was possible. Motsitsi was of the view that the letter was forged. They then requested him to write a letter about the incident which he did. On 3 May 2005 he sent a letter to Dries Fourie but did not

receive a response from him. In February 2006 he sent an email to the MEC and received a response that his complaint had been forwarded to Mr Kgasu, the security manager to investigate and to advise the head of department on his findings. A meeting was convened on 20 December 2006 to discuss the problems around security. On 4 January 2007 the general manager of Thabo Mofutsanyana wrote a letter stating that he was to be allocated as shift supervisor until further notice at Qwa Qwa clinics. Around 17 January 2007 he received a suspension letter which suspension endured until 23 March 2007. Following the upliftment of the suspension, he still reported at Thabo Mofutsanyana district. Because he had received another letter saying that he had to report for work at Elizabeth Ross hospital he appealed through his attorney against this decision. The latest placement letter did not inform him to go to Elizabeth Ross hospital but merely advised him to report for work at the hospital. He felt that he ought to have been consulted before his placement at Elizabeth Ross hospital. He went to the office of the CEO at Elizabeth Ross hospital where a certain Radebe told him that he had to wait until the appeal authorities had finalised his appeal. He was eventually discharged from the public service after he received a letter of discharge. The discharge letter stated that he had received a letter from the district informing him that he had to resume duties at Elizabeth Ross hospital. He denied that he had received such a letter. He had appealed and whilst he was waiting for the outcome of his appeal, he received the discharge letter. He stated that before the suspension, he was reporting at the district office and resumed duties and reported at the same office after the upliftment of the suspension. He had been reporting there without fail. He denied that he had absented himself from his duty as alleged and appealed to the applicant to intervene and set aside the alleged dismissal. His appeal was dismissed in a letter dated 15 June 2007 and his salary was stopped in August 2007.

7. The first respondent called Aletta Mabuya as his witness. She testified that she is a senior admin officer human resources at Thabo Mofutsanyana district for the past 25 years. The applicant was transferred from public works to the department around October 2004 and she and other human resources officials of the department processed his transfer. One Nongwanya, a chief security officer confirmed that all security officers were on the staff establishment of Elizabeth Ross hospital, but physically working at Maluti-a-Phofung. At some point a certain Ms Tsibuli chased him out of the district saying that they did not have security officers' posts and that he had to report for work at the department of public works. She had tried to explain to Tsibuli that they had security officers physically at Thabo Mofutsanyana though they were on the staff establishment of the Elizabeth Ross hospital. At that stage the then CEO of Elizabeth Ross hospital, Mr Mosemege and Nkabinde - the assistant manager at Elizabeth Ross hospital indicated that they needed security officers back at Elizabeth Ross hospital. The first respondent however was not part of the security guards according to her records. Around January 2007 the first respondent was allocated work at the district office of Thabo Mofutsanyana to head the security shift and to be responsible for all the Qwa Qwa clinics. Patlane, the applicant's witness, came to her office and told her that he was investigating a matter between her and the first respondent. He did not have any appointment letter to conduct the investigation. She and the first respondent were both suspended on 17 January 2007 and on 23 March 2007 their suspensions were uplifted. They were informed that they had to report at the district office and they also received warnings. On reporting for work subsequent to the suspension, no one allocated work to the first respondent however but he did shift supervision. She denied that he sat in her office the whole day and not

performing tasks. As a human resources officer, employees in the same way as the first respondent, quite often came to her office with queries. He had at all times been reporting at the district office and attended to some security officer problems at the workplace. It was unofficial of the department to effect hand written cancellation on a letter coming from the office of the head of department in a manner that van Zyl had done to the head of department's letter confirming the appointment of the first respondent at Elizabeth Ross hospital.

8. The commissioner issued her award. She recorded in her award that the first respondent was dismissed by operation of law in terms of section 17(5)(a)(i) of the PSA around 30 April 2007, for reasons that he had failed to report for work at Elizabeth Ross hospital with effect from 26 March 2007. Subsequent to his discharge he made representations to the applicant for his reinstatement in terms of section 17(5)(b) of the PSA. His dismissal was confirmed by the executing authority and he was discharged from the public service on 6 July 2007. The first respondent contended that his dismissal was both procedurally and substantively unfair in that he reported for work at Thabo Mofutsanyana district office of the applicant at all relevant and material times during the period of the alleged absence from work. She recorded the issue that she was required to decide and the evidence led. It is not necessary to repeat it. She said that the applicant had argued that the bargaining council did not have jurisdiction to arbitrate the dismissal dispute as the dismissal came into effect by operation of law. She pointed out that the Labour Court had expressed very different views on the jurisdiction of the bargaining council to determine the fairness of dismissals, where it was affected by operation of law. She found that four requirements needed to be satisfied before the provisions of section 17(5)(a)(i) of the

PSA would apply. These are, (i) the person must be an officer or an employee; (ii) the employee must absent himself from official duties; (iii) his absence was without permission from his head of department and the (iv) was that it exceeded a calendar month. The commissioner said that once all four requirements have been met, it would then be deemed that the first respondent was discharged from the public service because of misconduct. Should any of the requirements not be met, the deeming provisions of the section would not come into operation and the dismissal would not be *ex lege*.

9. The commissioner said that it was common cause that the first respondent was an employee of the applicant. She said that she would address the rest of the remainder of the requirements of section 17(5)(a)(i) of the PSA collectively since all of them relate to absence from official duties. According to the first respondent, he was not absent from work. His testimony on this score was confirmed by the applicant who however indicated that he was not at his assigned workstation. The commissioner said that it was common cause that the first respondent was informed in writing on numerous occasions since mid 2005 to March 2007 to report for work at Elizabeth Ross hospital. He did not report for work as directed and at all relevant time was reporting for work at Thabo Mofutsanyana district office of the applicant and in the applicant's *ipse dixit* they were aware that he was reporting at the Thabo Mofutsanyana district. The commissioner said that it followed from the common cause facts that she had to determine whether reporting at Thabo Mofutsanyana district office as opposed to reporting at Elizabeth Ross hospital constituted absence from official duties as intended in terms of section 17(5)(a)(i) of the PSA entitling the applicant to invoke the applicability of this section to effect the first respondent's

discharge. The applicant's witness testified that the first respondent was seen on countless occasions at one lady's office at Thabo Mofutsanyana district office allegedly his girlfriend. He testified that he was engaged to conduct an investigation of misconduct on the first respondent on an unrelated incident, and at the time of this investigation he found the first respondent at the Thabo Mofutsanyana district office of the applicant. The commissioner said that the whereabouts of the first respondent was known to the applicant and it was equally not in dispute that he was present at work albeit at a different workstation where he was not supposed to be rendering service. In her view section 17(5)(a) of the PSA presupposes an element of desertion, abandonment and or absconding from work with no intention to return to work. She referred to the decision of *Phenithi v Minister of Education and other* (2006) 27 ILJ 477 (SCA) at paragraph 19 where it is stated as follows:

"In my view, the provision creates an essential and reasonable mechanism for the employer to infer desertion when the statutory prerequisites are fulfilled. In such a case there can be no unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'....."

10. The commissioner said that the first respondent did not desert his employer. It was common cause that he was at work albeit not at Elizabeth Ross hospital where he was required to render his services by the applicant. She said that in the final analysis she was not persuaded that the applicant satisfied the requirements for the applicability of section 17(5)(a)(i) of the PSA since he was not absent from work in the strict sense. The commissioner said that the applicant should have disciplined him on account of his insubordination and or gross dereliction of duty due to his failure to attend to his work at Elizabeth Ross hospital. The applicant wrongly chose an easier way out by

invoking section 17(5)(a)(i) of the PSA in circumstances where this was not necessary. She found that the bargaining council had jurisdiction to determine the alleged unfair dismissal dispute subject to the provision of the Labour Relations Act 66 of 1995 (the LRA).

11. The commissioner then dealt with the fairness of the first respondent's dismissal and found that it was both procedurally and substantively unfair and ordered his reinstatement without any retrospective remuneration. It is not necessary to deal with this since this finding is not challenged on review.

The grounds of review

12. The applicant was unhappy with the award and brought a review application. It was contended that the commissioner committed a gross irregularity and the award falls to be set aside. The commissioner misapplied the provisions of section 17(5)(a)(i) of the PSA. The section refers to an officer or employee absenting himself or herself from his or her official duties. By reporting at the district office, the first respondent was not executing his official duties and accordingly his absence from the Elizabeth Ross Hospital was absence as defined by section 17(5)(a)(i) of the PSA. The commissioner's interpretation of the subsection was incorrect and it is clear from the reference to 'the last day of attendance at his or her place of duty'. The commissioner erred further in holding that the applicant had a choice about the implementation and the coming into effect of the subsection. This was entirely inconsistent with the deeming effect of the subsection. It comes into effect without the intervention of any party.

Analysis of the facts and arguments raised

13. The first respondent was previously employed by the department of public works as a senior security officer and was transferred to the department. He was required to report for duty at the Elizabeth Ross hospital but did not do so and instead reported at Thabo Mofutsanyana district office. He was informed in writing on numerous occasions to report for duty at the Elizabeth Ross hospital but failed to do so. He was then issued with a discharge letter in terms of section 17(5)(a) of the PSA but was informed that he could make representations to the applicant. He duly did so and was informed that his representations had failed. He then referred an unfair dismissal dispute to the bargaining council. The applicant raised a point *in limine* at the arbitration hearing that the bargaining council did not have jurisdiction to hear the dismissal dispute since it was a discharge in terms of section 17(5)(a) of the PSA. The commissioner after hearing evidence found that the requirements of section 17(5)(a) were not met and that the bargaining council had the requisite jurisdiction and the first respondent's dismissal was both substantively and procedurally unfair.
14. The applicant brought an application to review the arbitration award. The challenge is limited to the jurisdictional ruling. It takes no issue with the commissioner's finding on the fairness of the dismissal and the order of reinstatement. Section 17(5)(a)(i) of the PSA before it was amended provides as follows:

“An officer, other than a member of the services or an educator or a member of the agency or the service who absents himself/herself from his/her official duties without permission of his/her Head of Department, 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 date immediately succeeding his/her last

day of attendance at his/her place of duty.”

15. Section 17(5)(b) of the PSA provides as follows:

“If an officer who is 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 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 conditions as the said authority may determine.”

16. This Court has in several of its judgments set out what the requirements are in deciding whether the provisions of section 17(5)(a)(i) of the PSA have been met. These are:

16.1 the employee must be an officer;

16.2 the employee must have absented himself or herself from official duties;

16.3 the absence must be without permission from the head of department or delegated official.

16.4 the period exceeded one calendar month.

17. It is trite that any factual enquiry about whether the requirements of section 17(5)(a)

(i) of the PSA have been met, is justiciable by a court of law and/or the bargaining council. Once it is found that the requirements have been met, the bargaining council will lack jurisdiction to hear the dispute on the basis of section 17(5)(a)(i) of the PSA. If the requirements have not been met, the said provisions would not have come into operation and the discharge would be invalid and the dismissal will be substantively and procedurally unfair. It is trite that the test to be applied when reviewing a jurisdictional ruling is whether objectively speaking the facts that would give the bargaining council or CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the bargaining council would not have jurisdiction despite its finding to the contrary. See *Minister van Onderwys & Kultuur v Louw* 1995 (4) SA 383 (A) at 388G-H:

“The deeming provision comes into operation if a person in the position of the respondent (i) without the consent of the ‘Head of Education’ (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi rule, which in its classic formulation, is applicable when an administrative - and discretionary - decision may detrimentally affect the rights, privileges or liberty of a person.”

See also *Phenithi v Minister of Education & others* (2006) 27 ILJ 477 (SEA).

18. The applicant’s representative had contended that a failure to reinstate an employee in

terms of section 17(5)(b) of the PSA was not a dismissal and that the bargaining council did not have the requisite jurisdiction to hear the matter. It was contended that the first respondent was to report for duty at Elizabeth Ross hospital but had reported at the Thabo Mofutsanyana district office. He had been informed in writing on numerous occasions to do so but did not and continued to report at Thabo Mofutsanyana district office. The commissioner in finding that the first respondent was not absent from work in the strict sense of the word erred. It was contended that the commissioner misapplied the provisions of section 17(5)(a)(i) of the PSA since it refers to an employee absenting himself or herself from his or her official duties. By reporting at the district office he was not executing his official duties and was absent from Elizabeth Ross hospital as defined in section 17(5)(a)(i) of the PSA. The commissioner's interpretation of the subsection is incorrect. The commissioner erred further in holding that the applicant has a choice about the implementation and the coming into effect of the subsection. This she did by referring to the applicant invoking the subsection. This so it was contended was entirely inconsistent with the deeming effect of the subsection since it comes into effect without intervention of any party.

19. The first respondent's case is that at all relevant and material times during the period of his alleged absence from work he was reporting for work at the Thabo Mofutsanyana district office and not at the Elizabeth Ross hospital.
20. I have previously in this judgment referred to the commissioner's award. It is not necessary to repeat this in full. She said that the parties were *ad idem* that the first respondent was an employee of the department. She said that she would address the

remainder of the requirements collectively since all of them relate to the absence from official duties and according to the first respondent, he was not absent from work. His testimony on this score was confirmed by the applicant who however indicated that he was not at his assigned workstation. It was common cause that the first respondent was informed in writing on numerous occasions since mid 2005 to March 2007 to report for work at Elizabeth Ross hospital but did not report for work as directed. At all relevant times he was reporting for work at Thabo Mofutsanyana district office and the applicant was aware that he was reporting there. She had to determine from the common cause facts whether by reporting at the Thabo Mofustanyana district office as opposed to reporting at Elizabeth Ross hospital constituted absence from official duties as intended in terms of section 17(5)(a)(i) of the PSA entitling the applicant to invoke the applicability of this section to effect the discharge of the first respondent.

21. The commissioner said that the applicant's witness testified that the first respondent was seen on countless of occasions at one lady's office at the Thabo Mofutsanyana district office allegedly his girlfriend. He testified that he was engaged to conduct an investigation of misconduct on the first respondent on an unrelated incident, and at the time of this investigation he found the first respondent at the Thabo Mofutsanyana district office of the applicant. The commissioner said that the whereabouts of the first respondent were known to the applicant and it was equally not in dispute that he was present at work albeit at a different workstation where he was not supposed to be rendering service. In her view, section 17(5)(a) of the PSA presupposes an element of desertion, abandonment and or absconding from work with no intention to return to work. She relied on *Phenithi* at paragraph 19.

22. The commissioner said that the first respondent did not desert his employer. It was common cause that he was at work albeit not at Elizabeth Ross Hospital where he was required to render his services by the applicant. She said she was not persuaded that the applicant satisfied the requirements for the applicability of section 17(5)(a)(i) of the PSA since he was not absent from work in the strict sense. The applicant should have subjected the first respondent to discipline on account of his repeated insubordination and or gross dereliction of duty due to his failure to attend to his work at Elizabeth Ross hospital. Section 17(5)(a)(i) of the PSA should not have been invoked because the first respondent was reporting for work at a different work station and the applicant was aware of the situation. As opposed to disciplining the first respondent for his wayward behaviour and being on a frolic of his own, the applicant wrongly in the commissioner's view chose an easier way out by invoking section 17(5)(a)(i) of the PSA in circumstances where this was not necessary. The commissioner said that section 17(5)(a)(i) of the PSA is a draconian procedure which must be used sparingly and only when the code could not be invoked and when the applicant has no alternative at its disposal. This case showed that the applicant did not have a full appreciation of the circumstances in which section 17(5)(a) of the PSA should be invoked. She found that the bargaining council has jurisdiction to determine the alleged unfair dismissal dispute of the first respondent subject to the provisions of the LRA.
23. I have considered the commissioner's award. The commissioner has referred to the conflicting judgments of this Court about what the requirements of section 17(5)(a)(i) of the PSA are. At the end of the day she found that the requirements of section 17(5)

(a)(i) of the PSA were not met in that the first respondent was not absent from his official duties but was performing duties where he was not instructed to do so. It is clear from the objective facts placed before the commissioner that the first respondent was not absent from his official duties. He was performing duties but not where he was instructed to do so. It is not necessary to deal with what the commissioner had said about whether the applicant should have invoked the provisions of section 17(5)(a)(i) of the PSA. Those statements were said *obiter*. The fact is that the commissioner found that the first respondent was present at work but at a different workstation and that the requirements of the section had not been met. The position would have been different if the first respondent was not reporting for duty at all. Since the commissioner has found that the provisions of section 17(5)(a)(i) of the PSA were not met, it becomes unnecessary to deal with whether a dispute can be referred to the bargaining council after representations were rejected in terms of section 17(5)(b) of the PSA.

24. I am satisfied that the commissioner correctly found that the bargaining council had jurisdiction to hear the dispute. The commissioner has not committed any reviewable irregularity.
25. Since the applicant did not deem it necessary to challenge the commissioner's findings that the dismissal was procedurally and substantively unfair, it becomes unnecessary to deal with this.
26. The application stands to be dismissed.
27. The first respondent had applied to make the arbitration award an order of court in

terms of section 158(1)(c) of the LRA. There is no reason why the application should not be granted.

28. There is no reason why costs should not follow the result.

29. In the circumstances I make the following order:

29.1 The late filing of the review application is granted.

29.2 The review application is dismissed.

29.3 The arbitration award dated 18 December 2007 under case number PSHS 256-07/08 issued by commissioner M V Phatshoane of the Public Health & Social Development Sectoral Bargaining Council is made an order of court in terms of section 158(1)(c) of the LRA.

29.4 The applicant is to pay the costs of the applications.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : I P GOUGH OF STATE
ATTORNEY

FOR THIRD RESPONDENT : ATTORNEY M M BALOYI

DATE OF HEARING : 10 JUNE 2010

DATE OF JUDGMENT

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