THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2580/12

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION **First Applicant**

DR ELIE MUTUNZI **Second Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH IN NORTH WEST **Respondent**

Heard: **14 May 2020 (Due to Covid19 lockdown, this matter was heard *via* video conferencing and both parties agreed to this arrangement)**

Delivered: **22 May 2020 (Due to Covid19 lockdown, this judgment was handed down electronically by emailing a copy to the parties and the 22nd May 2020 shall be deemed to be the date of the delivery of this judgment)**

Summary: An application to review and set aside a decision to invoke the provisions of section 17 (3) (a) (i) of the Public Services Act (PSA) alternatively a decision not to approve re-instatement of the applicant who was deemed discharged by the operation of law. Where one of the requirements is lacking the invocation of the provisions is unlawful and is bound to be reviewed and set

aside on the principle of legality. Where the decision is set aside on the basis that same is unlawful, the Court is empowered to order the *status quo ante*. Held: (1) The decision to invoke the provisions of section 17 (3) (a) (i) is reviewed and set aside. (2) The second applicant is reinstated to his position with immediate effect. Held: (2) The respondent to pay the applicant's costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a review application brought in terms of section 158 (1) (h) of the Labour Relations Act. In terms of that section this Court is empowered to review any decision taken or any act performed by the State in its capacity as an employer. Involved in this matter are two acts and or decisions. The first of which is when the respondent called into aid, the statutory provisions to effect the termination of the second applicant's employment. The second of which is when the respondent failed to approve the reinstatement of the second applicant. In this judgment, if a conclusion is arrived at that the statutory provisions were not evocable, then the consideration of the second act or decision would be academic. Put differently, it shall be the end of the matter for the respondent. Matters involving this section of the PSA remain difficult horses to ride. However given the approach I take at the end, it was unnecessary for me to ride the difficult horse, in my view, regarding the decision whether to approve reinstatement or not. Although it seemed that the question whether refusal to reinstate amounts to an administrative action or not is not settled[1], the Labour Appeal Court (LAC), later seems to have somewhat settled the issue in

[1] The LAC per Davis JA left the question open: [32] if correct, the approach adopted in De Villiers, supra would apply equally to the present disputes. But it may not be necessary to determine this specific question in order to resolve these disputes.

Ramonetha v Department of Roads and Transport Limpopo and another[2], when the court said:

> "[19] The current matter is concerned with the exercise of a power in terms of s17 (3) (b), which neither has its source in the contract of employment, nor falls within the ambit of the LRA's unfair dismissal or unfair labour practice jurisdiction. As such, the decision whether to approve the reinstatement of an employee on good cause shown, while the decision is taken by the state as an employer, it involves the exercise of public power by a public functionary."

[2] Similarly calling into aid a statutory provision is an act that involves exercise of public power. It is by now settled law that when the provisions of the section kick in, there is no need for a decision by a functionary. However, where a functionary calls into aid a statutory provision, which act in itself is an exercise of public power, such an act is susceptible to judicial scrutiny under the rubric of legality. It is by now settled law that section 158(1) (h) of the Labour Relations Act[3] (LRA) is available to review the decisions of the state in its capacity as an employer. I shall proceed to consider this matter under the provisions of the LRA as opposed to Promotion of Administrative Justice Act[4] (PAJA). It is also settled law that the principle applicable in section 158 (1) (h) is that of legality.[5]

Background facts

[3] The bulk of the relevant facts of this matter are common cause. The quibble is around the interpretation and meaning of those facts. The second applicant, Doctor Mutunzi (Mutunzi) was employed as a Medical Doctor by the Department of Health, which is under the leadership of the respondent (MEC

[2] [2018] 1 BLLR 16 (LAC).
[3] 66 of 1995, as amended.
[4] 3 of 2000.
[5] *Weder* at [33] …Irrespective of the classification of the decisions of the appellant as administrative action, appellant's actions are open to review in terms of s 158…on the ground of legality, a principle that has been developed significantly by the courts over the past decade.

for Health). Mutunzi was absent from work effective 28 December 2011 and returned to work on 10 April 2012.

[4] Two days after his return, Mutunzi received a letter from the Clinical Manager of Mafikeng Provincial Hospital (MPH), Doctor Mabote (Mabote). The letter sated the following to Mthunzi:

> "You are advised not to work until further notice."

[5] According to Mutunzi, the above amounted to a suspension from work. According to the respondent, Mutunzi was simply sent back home and the letter was a "follow up". Mutunzi wrote a detailed protestation letter and perspicuously made the point that he was placed on an unfair and unlawful suspension. He received the letter with astonishment and considered it as *coup d'état* following a meeting held on 10 April 2012, when his return was largely accepted. His letter was not dignified with any response.

[6] That notwithstanding, on 17 April 2012, the Acting Chief Executive officer of MPH, addressed a further letter to Mutunzi, which in parts reads as follows:

> **Re: Your deemed dismissal in terms of section 17 (3) (a) (i) of the Public Service Act, Act 103 of 1994 as amended**
>
> "Please be advised that you have been deemed as having been dismissed from the continued employment of the public services with effect from 1 February 2012 and that deemed dismissal is occasioned by your unauthorized absence in excess of one calendar month…
>
> In the event of you not being pleased with the above, you may, in terms of subsection (3) (b) of the same provision make written representation for the consideration of the Honourable MEC for possible reinstatement and until such date you shall, with respect, remain deemed as having been dismissed.

[7] On 7 May 2012, the first applicant addressed written representations to Dr M Masike, the MEC. On 14 July 2012, the MEC said the following to the representations:

> 1. The above matter refers.
> 2. It has come to our attention that while the Department was still in a process of considering your representations, you decided to lodge a dispute with the Public Health and Social Development Sectorial Bargaining Council.
> 3. Your decision to lodge a dispute at this stage, has undermined any further efforts of ensuring that your representations are dealt with internally.
> 4. The Department will not substantively deal with your representations. It is, however, worth noting, that the Department has attended to your dispute at the forum that you have chosen…we will await the outcome of take guidance thereof.

[8] On 20 August 2012, in response to the above correspondence, the first applicant implored the MEC to consider the representations nonetheless. On 7 September 2012, an Employment Relations Official, Bokaba, provided a response which in parts reads thus: -

> 5 Notwithstanding the above and even where Dr Mutunzi could have not abandoned the internal processes, his deemed dismissal would still not stand on the grounds that his representations did not *show good cause* for reinstatement as contemplated by the section under reference.

[9] Consequently, on 9 November 2012, the applicants launched the present application. The application is duly opposed by the MEC.

Grounds for review

[10] The pleading of the grounds was with considerable regret done in a haphazard manner. But on the reading of the founding affidavit as a whole, the following emerges:

1. The purpose of the application is to review and set aside the respondent's decision not to reinstate the Applicant in terms of section 17 (3) (b) of the Act **and** the initial discharge in terms of section 17 (3) (a)

2. The bulk of the other grounds are directed to the failure to approve the reinstatement following the *De Villiers*[6] decision of this Court.

[11] What the Court is able to decipher from the papers, is that the attack is on the initial decision to invoke the discharge, which was communicated to Mutunzi on 17 April 2012 and the decision not to reinstate him, which decision was communicated to him on 7 September 2012. The applicants' notice of motion specifically attacks the decision of September 2012.[7] In addition, the applicants seek a further and alternative relief.[8] In *Geza v Minister of Home Affairs and Another*[9], the following was said:

> "Whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*, Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever

[6] *De Villiers v Head of Department Education, Western Cape* [2010] 31 ILJ 1377 (LC)

[7] See paragraph 1 of the Notice of Motion.

[8] See paragraph 4 of the Notice of Motion.

[9] [2010] ZAECGHC 15 (22 February 2010) at para 12

> a court 'can vividly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not enlarge in any way "the terms of the express claim" as pointed out by Tindall JA'…[10]

[12] In the founding papers, Mutunzi amongst others states the following:

> 10. Dr Mutunzi took his annual leave from 28 December 2011 and left the country to visit his family abroad. Dr Mutunzi was scheduled to return to work on the 30 January 2012.

[13] According to the respondent, Mutunzi was dismissed with effect from 1 February 2012 for having being on an unauthorized absence in excess of one calendar month. The primary relief sought by Mutunzi is to review and set aside his dismissal effected in line with the section employed by the Department.

Evaluation

[14] As pointed out above two acts or decisions are implicated in this matter. I shall deal with the first decision communicated on 17 April 2012. In my view a Court decision on it is dispositive of the whole matter.

[15] By way of introduction, South Africa is founded on values of supremacy of the Constitution and the rule of law.[11] The principle of legality simply implies that any decision or act must be in line with the law. In *Minister of Defence and Military Veterans v Motau*[12] the following was said:

> "[69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public

[10] See also *Elefu v Lovedale Public Further Education and others* [2016] ZAECBHC 10 (11 October 2016) and *National Stadium South Africa (Pty) Ltd and others v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA)

[11] Section 1 (c) of the Constitution 108 of 1996.

[12] 2014 (8) BCLR 930 (CC)

> power to meet this standard it must be rationally related to the purpose for which the power was given…"

[16] As the Constitutional Court in *State Information Technology Agency SOC ltd v Gijima Holding (Pty) Ltd*[13] felicitously puts it, once there is compliance with the prescripts that is the end of the matter in a legality review. Crucial in this matter is the question whether the jurisdictional requisites of section 17 (3) (a) (i) were met. Both parties before me are in agreement that the requisites of the section are:

(a) There must be an employee;
(b) That employee must have absented himself from his official duty;
(c) His absence has to be without permission of the head of the department; and
(d) The absence should be in excess of a calendar month.

[17] In terms of the section once the requisites are met the dismissal takes effect on the date immediately succeeding the last day of attendance at his place of duty. Thus, the dismissal of Mutunzi should have taken effect from 29 December 2011, since his last day of attendance was 28 December 2011. Curiously, the letter addressed to Mutunzi refers to 1 February 2012, thus suggesting that his last date of attendance was 31 January 2012.

[18] In an instance where one of the requirements is lacking, the section cannot be invoked[14]. The question I now turn to is was the absence of Mutunzi without permission.

Was the absence of Mutunzi without permission?

[13] 2018 (2) BCLR 240 (CC).

[14] See *Grootboom v NPA and another* 2014 (2) SA 68 (CC) and *Gangaram v MEC for Department of Health Kwa-Zulu Natal and another* [2017] BLLR 1082 (LAC)

[19] Before I consider the factual allegations around this question, it is important to consider the language employed by the legislature. The phrase "without permission" is employed. Care must always be exercised when considering this phrase. In terms of section 20 (2) of the Basic Conditions of Employment Act (BCEA)[15], an employer is obligated to grant an employee annual leave. Perspicuously, if an employee takes annual leave, such an employee does not necessarily require the permission of an employer. Section 20 (10) of the BCEA provides that annual leave must be taken either in terms of an agreement or in terms of the provisions of the section. Section 20 (6) provides that an employer is obligated to permit an employee at the employee's written request to take leave during a period of unpaid leave. To my mind, once annual leave or any form of leave for that matter, is involved there can be not mention of absence without permission.

[20] The section is there to cater for abscondment. Such an abscondment may be converted into vocational leave if the executing authority is satisfied that it was not an abscondment in the first place. The phrase that *"his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave*" simply buttress the point that leave cannot be seen as absence without permission.

[21] The word permission must be given its literal dictionary meaning. Permission means an act of permitting, especially giving formal consent; authorization. Therefore, if an employee who is not on leave is absent for a period in excess of one calendar month, such an employee must exhibit a formal authorization from the Head of the Department. One myth that must be dispelled with immediate adequacy is that the permission need not be in writing. An oral permission is sufficient for the purposes of the section. Like oral agreements, it is difficult but not impossible to prove an oral arrangement.

[15] Act 75 of 1997

[22] Turning to the facts of this case, the first strange feature is that the provisions of the section were invoked on the return of Mutunzi. This Court fails to understand the reason of gaging Mutunzi to continue with his work on 12 April 2012. I am inclined to agree with Mutunzi that he was placed on suspension, something the Department is not entitled to without following the applicable prescripts on suspension. In any event, if it is accepted that Mutunzi ceased to be an employee on 1 February 2012, then the Department was not empowered to suspend him. That notwithstanding, the respondent's case on Mutunzi's allegation of annual leave was as follows:

> 50 Ad paragraph 10
>
> I admit that, according to what is recorded in the leave form, second respondent (applicant) took leave from 28 December 2011 which was due to end on 31 January 2012. Leave was not approved

[23] From the above evidence, it is clear that the issue is that the leave was not approved. To that end section 20 (6) of the BCEA does provide that at the written request of an employee, an employer is obligated to grant it. On 15 December 2011, Mutunzi made a written application for leave of absence.[16] The remarks of Dr Mabote, in not recommending – notably, permission was not an issue – He recorded thus: "*This leave was not discussed with the clinical manager for approval before the officer left*." The leave form does indicate that what Mutunzi was seeking to take was annual leave. *Ex facie* the form appears the following above the signature of Mutunzi: "*Furthermore, I full understand that if I do not have sufficient leave credits from my previous or current leave cycle to cover for my application, my capped leave as at 30 June 2000 will be automatically utilized.*" When it comes to annual leave the question is does an employee have days accumulated for that cycle or not? By law an approval of the supervisor is not required. The practice of the supervisor recommending is

[16] Annexure NWH1.

more operational and accords with the issue of timing within the contemplation of section 20 (10) (b) of the BCEA. I therefore conclude that the approval was not required. Thus the conclusion to arrive at is that Mutunzi was on annual leave and his absence is not one contemplated in the section under discussion.

[24] Turning to the period from 30 January 2012 up to and including 10 April 2012. The first issue to be disposed is that according to respondent, the deeming provisions kicked in on 1 February 2012. Accordingly, from 1 February 2012, Mutunzi was no longer an employee of the department. If this is accepted to be factually correct, then during this period Mutunzi was an employee for effectively two days. Of course the contention of the respondent is not legally correct. As pointed out above, if the period covered by the annual leave is for a moment considered to be a period of absence without permission within the contemplation of the section concerned, then the last day at work was 28 December 2012 and by end of January 2012 – the calendar month – the deeming provisions kick in but with effect from 29 December 2011. Therefore, the deemed dismissal date has to be 29 December 2011.

[25] Assuming for now that this period is to be taken into account for the purposes of the section concerned, I take into account that on 30 January 2012 – a day before the end of the annual leave, Mutunzi firstly applied orally and confirmed it in writing, for an unpaid leave of absence. The respondent's case on that period is as follows:

> Ad paragraph 11
>
> 51.1 I admit that there was a conversation between the second applicant and Dr Mabote as recorded in a letter dated 30 January 2012. What Mabote told him when refusing to extent the leave is now a matter of record.
>
> 51.2 What the second respondent (applicant) left out of the letter can only be seen as an attempt to conceal or withhold vital

information. According to Mabote, he made it clear to him that he could not extend leave that was never authorised.

51.3 …It is highly improbable that transmission by email would have failed to reach Mabote.

Ad paragraph 12

The contents therein contained and what is recorded from the letter of 30 January are admitted.

[26] Few comments are appropriate on this evidence. Firstly, the deponent admits the contents of the letter. The letter makes no reference to a refusal to extend the leave as having been mentioned in the telephonic conversation which preceded the latter. The contents of the telephonic conversation is captured in the letter. The conversation itself is not disputed. The deponent is hugely ambivalent as to whether Dr Mabote did or did not receive the letter of 30 January 2012. On the assumption that this Court gives Dr Mabote the benefit of doubt, his admission of the telephonic conversation and the contents of the letter is fatal to any denial of knowledge of the letter. Therefore, my conclusions are that Mutunzi did request for the extension of the annual leave and as pointed out above, the respondent was by law obliged to grant him that.

[27] In the final analysis, it is perspicuous that the jurisdictional requirements of the section were not met. This simply implies that the effect of the section – deemed dismissal – cannot come into play. On application of the principle of legality, the decision or action taken on 12 April 2012 to the effect that the provisions of the section had kicked in is invalid, ineffectual and has no force of law. Since Mutunzi was not deemed dismissed, it was not necessary for him to seek reinstatement by showing good cause[17].

The issue of the remedy

[17] Paragraph 30 of Gangaram judgment. "…the jurisdictional requirements …have not been satisfied, and as such there was no need for her to make representations in terms of s 17 (3) (b) for her reinstatement.

[28] An illegality is remedied by simply declaring it as such and for the *status quo ante* to prevail. The *status qou* before 12 April 2012 was that Mutunzi was an employee of the hospital. On 12 April he was unlawfully stopped from performing his duties. Given my conclusions above, the appropriate remedy would be to declare that Mutunzi was not deemed dismissed and order the respondent to reinstate him without a loss of any benefits effective 12 April 2012.

[29] One aspect that requires clarification is that as it was done in *De Villiers*, this Court, by reinstating Mutunzi, is not stepping in the shoes of the MEC, as empowered to approve reinstatement within the contemplation of section 17 (3) (b) of the PSA. In another judgment, I have taken a view, which is divergent from *De Villiers*, to the effect that the power in section 17 (3) (b) is reserved statutorily for the MEC, it being different, in my view, from the reinstatement power approbated to the Courts and the Dispute resolution bodies[18]. I still hold that view to date. However that issue does not arise in *casu*. However, I afforded the parties a further opportunity to consider the *Nyamane* case. The applicant's counsel agreed that on the weight of the authorities in the Labour Court, *Nyamane* is correct. In the event there is still doubt lingering on this point, the Supreme Court of Appeal (SCA) in *Minister of Defence and Military Veterans v Mamasedi*[19]*,* said the following:

> [25] The second reason is that Wentzel AJ purported to substitute her decision for that of the Chief of SANDF, she misdirected herself in doing so. Administrative decision-making powers are vested by legislation in administrators and not judges. When an administrative decision is set aside on review, generally speaking, it must be taken again by the administrator concerned. As a general rule, judges are precluded by the doctrine of the separation of powers, which allocates

[18] See *Nyamane v MEC: Free State Department of Health* [2019] 12 BLLR 1371 (LC) para 43-44.

[19] (622/2017) [2017] ZASCA 157 (24 November 2017)

> powers among the branches of government, from taking such decisions themselves. They also often do not have the expertise to do so.
>
> [27] …She simply was not in a position, let alone as good a position as the Chief of the SANDF, to take the decision to re-instate Mamasedi. Without the factual dispute having been resolved one way or the other, it could not be said that the decision was a foregone conclusion. There is furthermore, no indication that the Chief of the SANDF is biased or otherwise precluded from taking the decision again when the facts are properly determined.
>
> (My own emphasis)

Costs

[30] When it comes to costs, this Court possesses a wide discretion. I take a view that the approach taken by the respondent in this litigation was the most cavalier one. After suspending Mutunzi, and realizing that there is no legal basis to do so, simply called into aid, the most drastic provision of the PSA, whilst fully knowing that when Mutunzi left he had applied for leave – fact that Dr Mabote did not approve it is of no moment and does not discard the fact that the respondent had an idea of the whereabouts of Mutunzi. It would be unfair and unlawful[20] to deprive Mutunzi of his litigation costs. Accordingly, having been substantially successful, the applicants are entitled to their litigation costs.

[31] In the results, I make the following order:

Order

1. It is declared that Mutunzi is not deemed dismissed.

[20] Recently the Constitutional Court confirmed that the rule of costs following the results is still intact in the Labour Court.

2. The respondent is to reinstate Mutunzi with immediate effect retrospective 12 April 2012 with benefits on the same terms and conditions that previously applied to him as if he had not been dismissed.

3. The respondent is to pay the costs of this application.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate L A Roux.
Instructed by: Kruger Venter Inc, Welkom

For the Respondent: Advocate T L Manye
Instructed by: State Attorney – Bloemfontein