THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 442/13
Reportable

In the matter between:

SOLIDARITY	**FIRST APPELLANT**
JACOBUS ADRIAAN HENDRIK KOTZE	**SECOND APPELLANT**
and	
THE PUBLIC HEALTH & WELFARE SECTORAL BARGAINING COUNCIL	**FIRST RESPONDENT**
COMMISSIONER C L DICKENS N.O.	**SECOND RESPONDENT**
DEPARTMENT OF HEALTH: FREE STATE	**THIRD RESPONDENT**

Neutral citation: *Solidarity v The Public Health & Welfare Sectoral Bargaining Council* (442/13) [2014] ZASCA 70 (28 May 2014)

Bench: Ponnan, Bosielo and Theron JJA and Hancke and Swain AJJA

Heard: **6 MAY 2014**

Delivered: **28 MAY 2014**

Summary: Employment – deemed discharge from public service by operation of law – s 17(5)(*a*) of the Public Service Act 103 of 1994 – whether employee on suspension absent from duties without permission.

ORDER

On appeal from: Labour Appeal Court, Johannesburg (Tlaletsi JA (Waglay AJP concurring), Murphy AJA dissenting sitting as court of appeal):

(1) The appeal is upheld.

(2) The order of the Labour Appeal Court is set aside and in its stead is substituted the following order:

'(a) The appeal succeeds with costs.

(b) The order of the Labour Court is set aside and substituted with:

"(i) The arbitration award issued by the second respondent, Commissioner CL Dickens NO, under case number PSHS453-07/08 on 27 September 2008 is reviewed and set aside;

(ii) The matter is remitted to the first respondent, the Public Health and Welfare Sectoral Bargaining Council, to arbitrate the dispute referred to it by the first applicant, Solidarity, on behalf Jacobus Adriaan Hendrik Kotze."'

JUDGMENT

PONNAN JA (BOSIELO and THERON JJA and HANCKE and SWAIN AJJA concurring):

[1] On 4 July 2007 the second appellant, Jacobus Adriaan Hendrik Kotze (the employee), who had been in the employ of the third respondent, the Department of Health: Free State (the employer), for 17 years was placed on what was described by

the employer as a 'precautionary suspension' pending the finalisation of an investigation into allegations of misconduct levelled against him. With effect from 23 July 2007 and whilst under suspension, the employee, without having first obtained the permission of the employer, secured employment in Pretoria with a firm called Compu Africa, which was owned by one of his relatives.

[2] On 19 October 2007 the employee received a letter from the employer which ran thus:

'**DISCHARGE FROM SERVICE: YOURSELF: PERSAL NUMBER: 12545015**

1. Kindly take [notice] that you are deemed to be discharged from the Public Service with effect from 3 July 2007 when you accepted alternative employment whilst you were still in service of the Department of Health.

2. Above-mentioned discharge is [imminent] in terms of Section 17(5)(a)(ii) read in conjunction with Section 30(b) of the Public Service Act, 1994, which stipulates the following: "If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not".

3. All benefits will be paid to you and all debt you [owe] the Government will be recovered from your pension.'

[3] When the employee's attempt to have that decision reviewed internally proved unsuccessful, he referred a dispute to the third respondent, the Public Health and Welfare Sectoral Bargaining Council (the council). Conciliation under the auspices of the council having failed, a certificate of non-resolution issued and the matter proceeded to arbitration before the second respondent, CL Dickens NO (the commissioner).

[4] The commissioner held:

'The effect of Section 17(5)(a)(i) & (ii) is that provided the requirements are satisfied the employment contract terminates by operation of law. As this termination is triggered by the occurrence of an event and is not based on an Employer's decision, there is no dismissal as contemplated by Section 186 of the Labour Relations Act.'

She accordingly concluded:

'The Bargaining Council does not have the jurisdiction to hear this matter as a deemed dismissal does not constitute a dismissal for purposes of the Labour Relations Act.'

Aggrieved by that conclusion, the employee, as the second applicant, and duly represented by the first appellant, his trade union (Solidarity), as the first, approached the Labour Court (LC) for an order in the following terms:

'a) Reviewing and setting aside the Arbitration award issued by the Second Respondent under case number PSHS453-07/08 on the 27th of September 2008, and received by the Applicants on the 14th of October 2008;

b) Refer[ing] the matter back for rehearing before a Commissioner other than the Second Respondent in terms of Section 145 of the Labour Relations Act 66 of 1995.

c) Alternatively, remitting the matter back to the First Respondent for [the hearing of the] matter *de novo* before a different Commissioner.'

[5] The LC (Molahlehi J) dismissed the application. In so doing, the learned Judge held:

'[15] In the present instance the applicant was suspended on the 4th July 2007, he then assumed employment with another employer on 23 July 2007 without authorisation from the respondent. Obtaining work with another employer amounted to absenting himself without authority. Although the applicant was on suspension, he was still accountable to the respondent even during the period of suspension. He therefore required authorisation to absent himself to attend employment with the third party. He also required authorisation to undertake employment with another employer even during his suspension. In [taking] employment with Compu Africa the applicant absented himself from his work without authorisation of his employer. Objectively speaking the applicant could not make himself available if the suspension was to be [uplifted] and was to be immediately instructed to report for work. Unlike in the case of absconding in the private sector cases the respondent did not dismiss the applicant but the dismissal occurred by the operation of the law. The requirement of a fair reason before termination does not apply. In other words the employer does not have to show what steps it took to locate the whereabouts of applicant before [invoking] the deeming provisions of the PSA.

[16] It needs to be emphasised the applicant took employment with Compu Africa without authorization by the respondent. In accepting employment with Compu Africa the employee absented himself from work without the authorization of the respondent and thereby subjected his contract to termination by the operation of the law.

[17] It is for the above reasons that I am of the view that the commissioner cannot be faulted for arriving at the conclusion that the first respondent did not have jurisdiction to entertain the dispute of the applicant as there was no dismissal. It is also for these reasons that I found that the case of the applicant [stands] to fail. I however do not [believe] that it would be fair to allow costs to follow the results.'

[6] With the leave of the LC, the employee and Solidarity appealed to the Labour Appeal Court (the LAC). The LAC (per Tlaletsi JA (Waglay AJP concurring) with Murphy AJA dissenting) dismissed the appeal with costs. According to Tlaletsi JA:

'The issue that was raised before the Commissioner as a point *in limine* was whether the Bargaining Council had jurisdiction to entertain the matter. The question that had to be asked in determining whether the Bargaining Council had jurisdiction is whether the employee had been dismissed. If there was no dismissal, the Bargaining Council would not have jurisdiction. The issue of jurisdiction does not depend on a finding of the Commissioner but on whether, objectively speaking, the facts that would in law clothe the Bargaining Council with jurisdiction indeed existed. If such facts were not present it would then mean that the Bargaining Council did not have jurisdiction, notwithstanding any finding by the Commissioner to the contrary . . . .'

That issue, Tlaletsi JA approached thus:

'[13] For a deemed discharge provided for in s 17(5)(a)(ii) to take effect, no act or decision on the part of the employer is required. The discharge takes effect by operation of law as soon as the jurisdictional requirements are met. The jurisdictional requirements for the deemed discharge to take place is: it must be an employee who is not excluded; who is absent without permission; assumes other employment without the permission of the employer. All what the head of the institution then does is to convey to the employee what has taken effect by operation of law. The head of the institution does not have the power to stop or suspend what takes effect by operation of law. It is therefore not within the head of the institution to decide or make an election on what cause to follow and ignore what has taken effect by operation of law and follow a procedure that he is in his opinion less draconian.

[14] I have already expressed my views on the HOSPERSA decision in a recent judgment of this Court in [*Grootboom v National Prosecution Authority* (2013) 34 *ILJ* 282 (LAC) para 38] . . .

[16] In this case there is no doubt that the employee did not have the permission of the head of the department when he assumed other employment. The question that must be considered is whether the fact that he was on precautionary suspension pending an investigation and a disciplinary enquiry for misconduct could be deemed to have been discharged when he

assumed new employment. Furthermore, whether when on suspension he could be said to have been absent without permission.

[17] A situation anomalous to the one at hand arose in *Masina v Minister of Justice, Kwazulu Government*. In that case an employee who was on suspension pending an investigation of misconduct allegations assumed other employment. He was informed that he was deemed discharged in terms of the applicable legislation. The then AD held, *inter alia*, that assuming other employment must be comparable to resignation or incompatible with continued employment with the department and:

"There is authority that in a case of wrongful dismissal the onus is on the employee to prove the agreement and his subsequent dismissal; and that the onus thereafter is on the employer to justify it . . ."

In my view, the above test is applicable in the facts and circumstances of this case in determining whether the second appellant absents himself from his official duties without the permission of his head of the institution and assumed other employment.

[18] In my view, the employee's conduct fell within the circumstances envisaged in s 17(5)(a)(i) and (ii) of the PSA. He is an officer who assumed other employment without the permission of the executing authority. The employee even though on suspension, remained an employee of the department and was subject to its authority in terms of the contract of employment . . . Accepting or assuming other employment amounts to being absent from duty because the employee is now rendering his services to another employer which conduct is irreconcilable with his employment with the department while under suspension. He left the Free State where he was stationed and moved to Pretoria to put his labour at the disposal of the new employer. In the circumstances, I am of the view that he was deemed to be discharged and there was no decision to dismiss him. The Bargaining Council therefore, lacked jurisdiction to entertain his dispute since he was not dismissed.'

[7] The further appeal by the appellants against the judgment of the LAC is with the special leave of this court. Of the three respondents, only the employer participated in the proceedings in the LC and the LAC. In this court the employer filed a notice with the registrar withdrawing its opposition to the appeal and intimating that it would abide the decision of the court. At the request of this court, Mr Grobler of the Bloemfontein Bar appeared as *amicus curiae*, and the court is indebted to him for his assistance in the matter.

[8] The Labour Relations Act 66 of 1995 (the LRA) provides: if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute for conciliation and arbitration to a bargaining council, if the parties to the dispute fall within the registered scope of that council (s 191); and, in any proceedings concerning any dismissal, the employee bears the onus of establishing the existence of the dismissal (s 192). In this case the commissioner's conclusion flowed from his having found that the employee had not discharged the onus resting upon him of proving that he had been dismissed. Instead, so he held, the 'employment contract terminates by operation of law'. Both the LC and the majority of the LAC agreed with that finding.

[9] The principal thrust of the employee's argument is that s 17(5)(*a*) of the Public Service Act 103 of 1994 (the PSA) did not find application inasmuch as the employer had failed to prove that he had absented himself from his official duties as contemplated by that section. To the extent here relevant, s 17(5) provides:

'(*a*)(i) An officer . . . who absents 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 discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last 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 whether the said period has expired or not.

(*b*) 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 other conditions as the said authority may determine.'

[10] A 'deemed dismissal' in terms of s 17(5)(*a*)(i) of the PSA follows by operation of law. Accordingly, the notice of 19 October 2007 to the employee purportedly in terms of that section, was purely a communication of a consequence that, in the employer's

view, followed by operation of law (*Minister van Onderwys en Kultuur v Louw* 1995 (4) SA 383 (A) at 388). Plainly, that section only finds application to an employee who 'absents himself or herself from his or her official duties without permission'. Foundational to the judgment of the majority of the LAC was the premise that the employee was absent from duty without permission when he accepted outside work. This is obviously incorrect. The employee was indeed absent from duty. But, having been suspended, he was absent at his employer's behest. And, not having been assigned alternative duties, for the duration of his suspension he had no duties. Logically therefore, he could thus not conceivably 'absent himself from his official duties'. In *Grootboom v National Prosecuting Authority* 2014 (1) BCLR 65 (CC) para 42 the Constitutional Court held:

'It is so that the applicant was absent from his employment. He was absent because he was suspended. This means that he was absent with the permission of his employer. Therefore, one of the essential requirements of s 17(5)(a)(i) has not been met.'

In arriving at that conclusion, the Constitutional Court overruled the LAC, which in its judgment - the subject of that appeal, namely, *Grootboom v National Prosecution Authority & another* (2013) 34 *ILJ* 282 (LAC) - had held (para 37):

'The fact that the appellant was on precautionary suspension and was not required to report for duty is, in my view, not a bar to the application of section 17(5)(a) of the PSA.'

[11] The finding by the majority that the employee had effectively resigned by assuming alternative employment is equally untenable. There was no evidence that the employee's temporary employment with Compu Africa was indeed incompatible with his obligations to the employer. The employee was under suspension when he commenced work with Compu Africa. Self-evidently, his suspension relieved him of his obligation to render his services to the employer. The employee's only obligation in return for his salary was to make himself available should his suspension be lifted. His suspension had not been lifted when he received the notice in terms of s 17(5) of the PSA. It bears noting that an employee's entitlement to payment and an employer's obligation to pay arises not from the actual rendering by an employee of his services but from his making those services available to his employer (*Johannesburg Municipality v O'Sullivan* 1923

AD 201). That principle was endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) para 54 in these terms:

'As long as an employee makes himself or herself available to perform his or her contractual obligation in terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services.'

[12] Moreover, *Masinga v Minister of Justice, Kwazulu Government* [1995] 2 All SA 350 (A), which the majority of the LAC called in aid, is not authority for the proposition that assuming alternative employment equates to a resignation. As Murphy AJA correctly observed in his dissenting judgment, the deeming provision in that case differed quite significantly from that here under consideration. The relevant provision (s 19(29) of the KwaZulu Public Service Act 18 of 1985), which occupied the attention of the court in *Masinga* read:

'An officer who has been suspended from duty in terms of sub-section (4) or against whom a charge has been preferred under this section and who resigns from the Public Service or assumes other employment before such charge has been dealt with to finality . . . shall be deemed to have been discharged on account of misconduct . . . .'

Of that provision, Nienaber JA stated (*Masinga* at 351):

'Before dealing with the evidence, such as it was, it is helpful to consider the purpose of s 19(29). According to Didcott J:

"It is to prevent someone who is facing charges of misconduct from ducking these charges by resigning and attracting the advantages of a resignation in good standing. It is to ensure that, if anybody resigns while he is facing charges, he will be in as bad a position as he would have been if the charges had been found proved and he had been dismissed on account of them. So what is prevented is, as I say, a resignation in an attempt to avoid the charges and to prevent the misconduct from being investigated and its presence or otherwise determined."

The court *a quo* agreed with this analysis and so do I.'

Nienaber JA added:

'An officer who resigns while under suspension shall be deemed to be discharged on account of misconduct. In effect it means that his resignation is deemed to be an admission of misconduct justifying a discharge from a date specified by the minister. So too, if the officer, without formally resigning, assumes other employment. The phrase "assumes other employment" is thus used as an elaboration or extension of the concept of "resignation". "Assuming other employment"

must therefore be comparable in effect to a resignation; the "other employment", in a word, must be incompatible with continued employment with the department. It would be incompatible, on a par with resignation, if his new conditions of service should prevent him from resuming employment with the department at will if his suspension is lifted e.g. if he is obliged to give notice to his new employer to do so. It would likewise be incompatible with his occupation as a prosecutor if the nature of his new employment would tend to create a conflict of interests, e.g. if his new employer had an interest in exploiting confidential information at his disposal or is engaged in criminal pursuits. These are mere examples. They are not applicable in this case. Here the only real issue is whether his work in the CLP could prevent him from resuming employment with the department forthwith if his suspension were lifted.'

After alluding to the evidence adduced in that case, the learned Judge of Appeal concluded (at 354):

'The evidence of Chaplin was that the appellant was initially employed on a casual basis for which he was paid by the hour. There is nothing to suggest that the basis of his employment changed thereafter. On the face of it Chaplin's further statement:

"He was not appointed on University conditions of service and there was no contract between him and the University."

can only mean, judged on the probabilities, that his employment was an *ad hoc* one, a loose arrangement, which the appellant could terminate at will. And if that is so the appellant's employment with the university was not incompatible with his employment with the department while he remained under suspension, no more so than if he hawked fruit or sold insurance on commission or did casual paint work for a building contractor.'

It must therefore follow that reliance on *Masinga* was misplaced.

[13] In advising the employee of his discharge from service, the employer asserted that it was invoking 'Section 17(5)(a)(ii) read in conjunction with Section 30(b) of the [PSA].' Somewhat surprisingly, s 17(5)(*a*)(i) of the PSA was not alluded to in that notice. That notwithstanding, the commissioner and both courts below approached the matter as if the employer had indeed placed reliance on s 17(5)(*a*)(i). The finding of Tlaletsi JA in favour of the employer appears to be predicated on a reading of s 17(5)(*a*)(ii) to the effect that the assumption of outside employment by a suspended employee in and of itself automatically leads to a deemed discharge. But that is not what that subsection states. It provides that if 'such an officer' assumes other employment, he or she shall be

deemed to have been discharged 'as aforesaid irrespective of whether the said period has expired or not' (my emphasis). Section 17(5)(*a*)(ii) is not intended to provide for a deemed discharge by operation of law whenever an employee assumes other employment. That subsection, which merely provides for the one calendar month envisaged in subsection (i) to be abridged if certain requirements are met, is not a self-standing provision. Linguistically, the phrase 'such an officer' in subsection (ii) is plainly a reference to 'the officer' contemplated in subsection (i). And, 'the officer' contemplated in subsection (i) is 'an officer' 'who absents himself . . . from his . . . official duties without permission . . . for a period exceeding one calendar month'. It thus follows that unless the requirements of subsection (i) are met, subsection (ii) does not find application. Here, as the employee was not an employee who had absented himself without permission as envisaged in subsection (i), s 17(5)(*a*)(ii) did not find application.

[14] That leaves s 30(*b*) of the PSA, which provides:

'[N]o officer or employee shall perform or engage himself or herself to perform remunerative work outside his or her employment in the public service, without permission. . . .'

The employee may well have breached this provision, but in the light of the conclusion of the commissioner that the council lacked jurisdiction, it did not occupy the attention of either of the courts below. Nor could it, for whether he had breached that provision fell to be decided by a duly convened disciplinary enquiry. That did not occur. In any event had such a tribunal terminated the employee's employment that would have constituted a dismissal for misconduct. That is in the nature of a dispute in respect of which the council would not have suffered a want of jurisdiction. Thus whether s 30(b) does indeed find application to a suspended employee is a question which neither of the courts below had to consider. Nor does this court.

[15] It must follow that the commissioner's conclusion and also the conclusions by the LC and LAC that the council lacked jurisdiction cannot be sustained. Accordingly, the appeal must succeed. Counsel for the appellant urged upon us that in that event, given the time that has elapsed, we should order the employee's re-instatement. I do not believe that we can accede to counsel's request. The effect of the council's order was to

dismiss the employee's claim (that he had been unfairly dismissed) for want of jurisdiction. Having taken the view that it lacked jurisdiction – erroneously as it now turns out – the council did not enter into the merits. Nor could it. (See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).) That it must now do. The matter must thus be remitted to it.

[16] As to costs: The LC, in dismissing the employee's application, made no order as to costs. Counsel for the appellant intimated from the Bar in this court that he would abide that order. In dismissing the appeal, the majority of the LAC ordered each party 'to pay [its] own costs'. Murphy AJA, who would have upheld the appeal, inclined to the view that the employer should pay the costs of that appeal. There, undoubtedly, is much to recommend that approach.

[17] In the result:

(1) The appeal is upheld.

(2) The order of the Labour Appeal Court is set aside and in its stead is substituted the following order:

'(a) The appeal succeeds with costs.

(b) The order of the Labour Court is set aside and substituted with:

"(i) The arbitration award issued by the second respondent, Commissioner CL Dickens NO, under case number PSHS453-07/08 on 27 September 2008 is reviewed and set aside;

(ii) The matter is remitted to the first respondent, the Public Health and Welfare Sectoral Bargaining Council, to arbitrate the dispute referred to it by the first applicant, Solidarity, on behalf Jacobus Adriaan Hendrik Kotze."'

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V M PONNAN

JUDGE OF APPEAL

APPEARANCES:

For Appellants:	J Grogan
	Instructed by: Serfontein Viljoen & Swart, Pretoria Vermaak & Dennis Inc, Bloemfontein
Amicus Curiae:	S Grobler
	Instructed by: Claude Reid Attorneys Bloemfontein