REPUBLIC OF SOUTH AFRICA

IN THE APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case no: PA 2/2012

In the matter between:-

BONISILE MAKADE **Appellant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **First Respondent**

JOHN CHEERE ROBERTSON N.O. **Second respondent**

DEPARTMENT OF HEALTH EASTERN CAPE **Third Respondent**

(First, Second and Third Respondents in the Court *a quo*)

Heard: **25 March 2014**

Delivered: **19 August 2014**

Summary: Termination of employment by operation of law in terms of s17 of the PSA. Employer lifting employee's suspension and deploying employee to another position. Employee not reporting for duty –Employer warning employee of consequences of absconding. Commissioner and court *a quo* finding that employee not dismissed but employment terminated by operation of law. Court *a quo's* judgment upheld. Appeal dismissed with costs.

CORAM: **NDLOVU JA, MOLEMELA AJA *et* SUTHERLAND AJA**

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Cawe AJ) dismissing an application to review the second respondent's decision in which he found that the appellant was dismissed from the Public Service by operation of law. The appeal is brought with leave of the court *a quo*.

Background facts

[2] The appellant was previously employed by the third respondent as a nurse. He subsequently qualified as and practiced as an attorney. He was seconded to the office of the Member of the Executive Council (MEC) for Health in the Eastern Cape Province with effect from June 2000. On 9 May 2001, the appellant was informed that with effect from 1 June 2001 he was appointed as Administrative Secretary in the office of the MEC in line with Public Service Act and Chapter 14 of the Ministerial Handbook. The appellant was granted consent to carry on with his practice for as long as there was no conflict of interest with his duties.

[3] On 14 April 2003, the MEC suspended the appellant. The letter did not specify the reason for the suspension and merely stated as follows:

> 'You are hereby advised that with effect from 14 April 2003 you should take a leave of absence pending the discussion on your future deployment in the office of the MEC. You are to report to this office on 22 April 2003 at 08h30'.

[4] A letter dated 30 April 2003 authorised by the then Acting Superintendent General advised the appellant that his leave of absence was extended until further notice. On 21 August 2003, the appellant received a charge sheet setting out that he was being charged with insubordination pertaining to an incident that occurred on 14 April 2003. The disciplinary hearing was scheduled for 28 August 2003 but did not proceed due to the fact that the appellant had not been given sufficient notice.

[5] There was a lull in the matter until 26 March 2004, when the appellant received a letter from the third respondent, dated 11 February 2004, informing him that his suspension was lifted, that the charges that had been levelled against him were withdrawn and that he was deployed to the post of Middle Manager (Deputy

Director: Hospital Administration) at Victoria Hospital, Victoria East. The relevant part of the letter was couched as follows:

> 'You are hereby informed that your suspension is hereby lifted, the charges levelled against you are withdrawn and you are to be deployed to the above post [Middle Manager at Victoria Hospital, Victoria East] with effect from 1 March 2004.'

[6] The appellant replied in a letter dated 28 March 2004, raising concerns about the proposed deployment and rejecting the third respondent's offer. He stated as follows:

> 'I am willing to return to my post as I made my services available to Department of Health from date of my appointment until to date …This matter may still be resolved amicably by allowing me [to] resume duties with immediate effect in my present post.'

[7] It was only on 28 October 2004 that the third respondent responded to the appellant's letter, stating that as a "final offer" the appellant was to report for duty on Monday 1 November 2004 "to The Director: Human Resources Management, situated at no 1 Independence Avenue, Dukumbana Building, Bisho". On 1 November 2004, the appellant indeed reported to the afore-mentioned office, only to be presented with a letter informing him that 'a suitable post' had been identified for him at SS Gida Hospital, where he was to be placed in the post of Middle Manager: Health with effect from 8 November 2004.

[8] The appellant did not report for duty as instructed and instead wrote a letter to the third respondent rejecting the offer on the grounds that the proposed deployment amounted to a unilateral change to the terms and conditions of his employment. He also bemoaned the fact that the job functions that the offered post would entail were not clearly defined to him.

[9] On 6 December 2004, the third appellant wrote to the appellant stating that his complaints could be raised in terms of the grievance procedure. The appellant was further warned that failure to report for duty by 8 December 2004 would be regarded as abscondment. On 6 December 2004, the appellant handed in a letter at Bhisho advising the third respondent that he was tendering his services on the same terms and conditions applicable to the post he held prior to his

suspension. He concluded his letter as follows: "I therefore request the Department to provide me with resources and necessities to resume my job."

[10] On the same date, i.e. 6 December 2004 the third respondent wrote a letter stating:

> 'The Department's offer to you remains namely, that you are to report to the SS Gida Hospital against the post of Middle Manager: Health …. Failure to report without any acceptable explanation would be regarded as abscondment effective from 8 December 2004."

[11] On the same date, i.e. 6 December 2004 the appellant referred a dispute characterised as "unilateral change to terms and conditions of employment." In the dispute, he *inter alia* complained that he was given a "letter of placement elsewhere without being given an opportunity to be heard or reasons for that."

[12] The appellant subsequently referred an Unfair Labour Practice dispute to the first respondent. The matter was duly arbitrated and an award was issued in terms of which the arbitrator ruled that the first respondent did not have jurisdiction to entertain the dispute on the grounds that the appellant had failed to exhaust internal remedies prior to his referral of the dispute to the first respondent.

[13] Pursuant to the arbitrator's ruling, the appellant then lodged a grievance internally. The dispute could, however, not be resolved. The appellant subsequently referred a new Unfair Labour Practice dispute to the first respondent. On the scheduled date of the hearing, the third respondent was in default and the matter was heard in its absence. The Commissioner who heard the dispute, however, failed to deliver an award. The appellant then referred the dispute afresh, culminating in the arbitration hearing that the second respondent presided over. At the commencement of the hearing, the second respondent requested the parties' legal representatives to address him on the effect of section 17(5)(a)(i) of the Public Service Act (PSA) of 1994 (Proclamation 103) alternatively section 17(3)(A)(I) of the PSA as amended. The matter was argued and the second respondent concluded that the appellant's failure to report for duty as instructed was tantamount to abscondment as contemplated in section 17(5)(a) of the PSA.

He then found that the requirements of section 17(5)(a)(i) are applicable. He stated as follows:

> 'I find that the employee fell foul of section 17(5)(a)(i) in this regard and notwithstanding: his written challenges; whether or not the employer acted correctly; the employer's subsequent 'final offer' to the employee contained in a letter of 28 October 2004 and requiring the employee to report to SS Gida with effect from 8 November 2004. His employment with the Department of Health terminated by operation of law."

[14] The second respondent then went on to issue the following ruling:

> '1. The employee (Mr Makade) was dismissed from the Public Service by operation of law.
>
> 2. The PHSDSBC does not have jurisdiction to hear the employee's dispute as referred.
>
> 3. The employee's dispute referred under case reference PSHA 489-07/08 is dismissed.
>
> 4. There is no order as to costs.
>
> 5. Note: The parties agree that the period within which to bring review proceedings will only run from the date of receipt of this written Ruling.'

The labour court proceedings

[15] The court *a quo* considered the chronology of events and concluded that by the time the appellant was offered a post at Victoria East Hospital, his suspension had already been lifted. The court *a quo* reasoned that its conclusion in this regard was bolstered by the fact that the appellant had, according to his own assertion *reported for duty* at the office of the Director: Human Resources. The court *a quo* further concluded that the third respondent may have erroneously suspended the appellant but there were "clear *bona fides*" on its part to lift the suspension and have the applicant report for duty, albeit in another position. The court *a quo* was not persuaded by the appellant's contention that the issue pertaining to the applicability of section 17(5)(a)(i) of the PSA was raised by the second respondent *mero motu* and instead found that the third respondent had relied on it when it

warned the appellant that he would be regarded as having absconded if he did not report for duty in the post of middle Manager Health. The court *a quo* found that there was no evidence of the appellant having reacted to the third respondent's warning. The court *a quo* found that the second respondent's decision was well reasoned and thus dismissed the application for review.

Evaluation

[16] It must be borne in mind that the test to apply in a review is not whether the decision reached by the commissioner was correct but whether it falls within the range of reasonable decisions that could have been made. In *Herholdt v Nedbank* (Cosatu as *amicus curiae*) reviewing courts were reminded of the distinction between a review and an appeal in the following terms:

> 'While the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions. ...A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[1]

[17] Having perused the record, I agree with the court *a quo's* and the second respondent's finding that the appellant's suspension was lifted. This is evident from the contents of the letter dated 11 February 2004, which expressly stated that the appellant's suspension was lifted. It is the latter part of the letter in question that is worrisome. It would seem to me that the appellant's suspension was immediately replaced by a transfer to another post with effect from 1 March 2004, still at the Deputy Director level but in another town in the Eastern Cape. Evidently, the purported transfer or deployment was not preceded by any consultation. The appellant's referral of a dispute under those circumstances is hardly surprising. However, this does not detract from the fact that the suspension was lifted.

[1] 2013 (6) SA 224 (SCA) at para 13.

[18] My conclusion that the suspension was lifted is based on the third respondent's letter dated 11 February 2004, which expressly stated so. This was followed by numerous letters which instructed the appellant to report for duty, albeit at different hospitals and not in the same position he previously held. In the end, the third respondent had remained adamant that the appellant report for duty at SS Gida hospital, failing which he would be regarded as having absconded. I am of the view that the appellant knew very well that his suspension was lifted, hence his own assertion that on 1 November 2004 he *reported for duty* at the office of the Director: Human Resources. I am also fortified in this view by his initial characterisation of the dispute as "unilateral change of employment conditions", followed by "unfair labour practice relating to deployment without consultation", as opposed to "unfair labour practice relating to suspension".

[19] Counsel for the appellant referred us to the case of *Grootboom v National Prosecuting Authority and Others*[2] in which the Constitutional Court held that since the suspended employee's absence from the workplace was as a result of his suspension, that meant that he was absent from the workplace with the permission of his employer resulting in one of the essential requirements of section 17(5)(a)(i) not being met. I am of the view that this case (i.e. *Grootboom* case) is, on the facts, distinguishable from the case under consideration and is therefore not applicable. The main distinguishing factor is that whereas in the *Grootboom* case it was common cause that the employee was still on suspension at all times material to that dispute, in this case, the appellant's suspension had already been lifted. The commissioner's conclusion that the suspension was lifted is not unreasonable. As correctly pointed out by the court *a quo*, it is evident from the letter dated 11 February 2004 that the appellants' suspension was lifted and this conclusion is bolstered by his subsequent reporting for duty on 1 of November 2004. The third respondent was adamant that the appellant should report for duty at S S Gida Hospital, as borne out by the letter of 6 December 2004. It is common cause that the appellant never reported on duty to render service to the third respondent after this date. The third respondent stopped paying the appellant's salary in July 2005. In light of all

[2] 2014 (1) BCLR 65 (CC).

these circumstances, it can hardly be argued that the third respondent had granted the appellant permission for his lengthy absence.

[20] I now turn to the second respondent's decision on the applicability of section 17(5)(a)(i) of the PSA. It is common cause that the second respondent invited the parties to make submissions on the applicability of the afore-mentioned section of the PSA. The letters submitted in the proceedings, including the third respondent's letter of 6 December 2004, where reference to a conclusion of abscondment was made, all constituted evidence in the arbitration proceedings. It was common cause that the appellant never reported for duty after 6 December 2004. All the facts pointed in the direction of a dismissal by operation of law as envisaged in section 17(5)(a) of the PSA.

[21] It is trite that the requirements for the operation of the deeming provision in terms of section 17 of the PSA are as follows:

(i) The person concerned must be an employee;

(ii) The employee must have absented himself or herself from his/her official duties;

(iii) The absence of the employee must have been without permission from the Head of Department;

(iv) The period of absence must have exceeded one calendar month.

[22] In *Phenithi v Minister of Education and Others,*[3] it was held that an employee who is deemed to be discharged by operation of law is not "dismissed" and the employer does not act or take a decision because the discharge is by operation of law. In *Grootboom v National Prosecuting Authority and Others* (LAC decision),[4] the court re-iterated this principle and stated that the deeming provision applies once the circumstances set out in section 17(5)(a)(i) exist. It is significant that the Constitutional Court in the case of *Grootboom*[5], did not disapprove of this principle despite overturning the decision of the Labour Appeal Court.

[3] (2006) 27 ILJ 477 (SCA) at paras 7 and 20.
[4] [2013] 5 BLLR 452 (LAC)at para 38.
[5] Supra.

[23] It was quite evident from the correspondence exchanged between the parties and handed to the second respondent, that the four jurisdictional requirements set out in paragraph 21 were all present. If we accept that when these four requirements are present, then the deeming provisions of section 17 apply and that where the deeming provisions apply the employer does not make a decision, then it is clear that the second respondent, being the commissioner that presided over the matter, had a basis for asking the parties to make submissions on the applicability of section 17(5)(a)(i) of the PSA in order to ascertain whether the first respondent had jurisdiction to adjudicate the dispute.

[24] I am of the view that even though the applicability of section 17(5)(a)(i) of PSA was not identified as an issue in dispute in the pre-arbitration minutes and was also not raised by the third respondent as a point *in limine,* this did not in any way preclude the second respondent from considering it, given the accepted facts as borne out by correspondence. He, as a commissioner determining the dispute, was obliged to establish whether the first respondent had jurisdiction to adjudicate the dispute irrespective of whether the issue was raised by the litigants or not. There is a plethora of Labour Court authorities on this aspect and this trite principle need not be restated here. Also see *Government of South Africa v von Abo.*[6] Having considered all the circumstances, I am of the view that there is nothing unreasonable about the second respondent's conclusion that the appellant's dismissal was by operation of law and that the first respondent consequently had no jurisdiction to adjudicate the dispute.

[25] Insofar as the appellant seemed to rely on his referral of his grievance to the first respondent as a reason why the deeming provision did not apply, I am not persuaded by such a proposition. There is nothing in section 17(5) that suggests that the deeming provision would not come into operation if a dispute was still pending at the CCMA or any Bargaining Council. Surely, the mere referral of a dispute to a bargaining council by an employee who is not reporting for duty without having been instructed not to do so, or without the employer's permission, cannot serve as bar to the coming into operation of the deeming provision, for even after the referral of a dispute (other than an unfair dismissal

[6] 2011 (5) SA 262 (SCA) at 270 D – H.

dispute) the employee remains subject to the authority of the employer and has to report for duty where he has been deployed by the employer pending the determination of the dispute. If there is no evidence that an employee had permission to be absent from his duties, even if the employer knew what the reason for the absence was, that does not mean that the deeming provision does not come into operation. See *Free State Provincial Government (Department of Agriculture) v Makae and Others.*[7]

[26] The very facts of this case demonstrate the fallacy of such reasoning. The appellant was repeatedly instructed to report for duty at SS Gida Hospital and he repeatedly refused despite being warned that his failure to report for duty would be regarded as abscondment. By the time the matter was heard by the second respondent, the appellant had already been absent from the workplace for about four years. If the appellant's proposition was meritorious, the upshot would have been that the third respondent would have had to retain the appellant on its payroll for that period, without having had the benefit of the appellant's service at all and while the appellant was probably continuing with his practice as an attorney.

[27] Considering that the proper interpretation of a deeming provision is that once the necessary facts are present, an employee is deemed to be discharged, I am of the view that the court *a quo* had no reason to interfere with the ruling of the second respondent.

[28] There is no basis for tampering with the judgment of the court *a quo*. I would accordingly make the following order:-

(1) The appeal is dismissed with costs.

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M.B. Molemela AJA

[7] [2006] 11 BLLR 1090 (LC) at para 33.

I concur.

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Ndlovu JA

I concur.

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Sutherland AJA

APPEARANCES:

FOR THE APPELLANT:	Adv X S Nyangiwe
	Instructed by B Makade INC
FOR THE THIRD RESPONDENT:	Adv M Simoyi
	Instructed by State Attorneys