LABOUR APPEAL COURT

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 9/16

In the matter between:

D GANGARAM	**Appellant**
and	
MEC FOR THE DEPARTMENT OF HEALTH,	
KWAZULU-NATAL	**First Respondent**
HEAD OF DEPARTMENT OF HEALTH, **KWAZULU NATAL**	**Second Respondent**

Heard: **23 February 2017**

Delivered: **13 June 2017**

Summary: Employee deemed dismissed in terms of section 17 of the PSA – employee making representations for her reinstatement – employer failed to respond – employee implying that the failure to take a decision amount to a decision refusing her reinstatement susceptible to be set aside – Held that the point of departure is whether the employee was properly deemed to have been dismissed – that employer knew employee's whereabouts as employee submitted leave forms as justification for each absence – that in the absence of a refusal of the leave forms, employee rightly assuming that leave forms approved – that the jurisdictional requirements for the employee to be deemed dismissed because of being absent for a period exceeding one calendar month without permission have not been satisfied, and as such there was no need for her to make representations in terms of s17(3)(b) for her reinstatement. Appeal

upheld and Labour Court's judgment set aside – employee reinstated retrospectively.

Coram: Tlaletsi DJP, Landman JA and Phatshoane AJA

JUDGMENT

TLALETSI DJP

[1] This is an appeal against the order of the Labour Court (per Whitcher J) which dismissed an application brought in terms of s 158(1)(h) of the Labour Relations Act[1] (the LRA) wherein the appellant sought to review an alleged "decision" by the first respondent, her employer, not to reinstate her after she was purported to have been deemed dismissed by operation of law in terms of s17 (3) of the Public Service Act 1994[2] (the PSA).The appeal is with leave of the Labour Court.

[2] For a better understanding of the issue on appeal, a brief background that led to the dispute is apposite. These facts are extrapolated from the appellant's founding and supplementary affidavits. The respondents' answering affidavit was filed out of time, and the Labour Court refused to consider it for the purposes of the application. The matter was as a result decided on the version of the appellant. This decision is not challenged in this appeal.

[3] The appellant commenced her employment with the respondents in 1997 at the Emergency Medical Services housed at the "Control Centre". After improving her qualifications relevant to her work, she was promoted to the position of Emergency Care Practitioner, level 10 in January 2009. During the period 2002 to 2003, she sustained injuries to her "lumbosacral" spine which made it difficult for her to perform some of her duties. She was in constant pain. In 2003, her employer advised her to subject herself to one Dr Dasi, a neurosurgeon at Albert Luthuli Hospital for examination and help.

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[1] Act 66 of 1995.
[2] Act 103 of 1994 as amended by Act 30 of 2007.

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[4] After examining the appellant on 29 July 2003, Dr Dasi issued a letter in which he confirmed that she was indeed injured; that he had advised her about preventative back care, including avoiding lifting heavy objects and recommended that she be confined to office duties. The appellant was allowed to remain at the control centre as recommended.

[5] Over a period of time, the appellant continued to submit her medical reports to the respondents every time she had consulted a doctor. Her reason for consulting the doctors was because her medical condition did not improve. On 30 September 2007, she sustained an injury on duty. She consulted Dr Dasi who placed her on treatment of pain tablets. According to her, her condition deteriorated. The respondents paid for her treatment since she was injured on duty.

[6] On 5 August 2010, at a "relocation meeting" by one Ms Zungu, the appellant was informed that she was required to perform field work. This sudden change was triggered by a grievance lodged by one of the respondents' employees who was refusing to perform operational/field duties due to an alleged illness and relied on the appellant's situation to support her grievance. The appellant informed Ms Zungu that she was still unable to perform field work because of her medical condition and the medical doctor's recommendation. Ms Zungu undertook to investigate her medical condition and revert to her.

[7] On 24 August 2010, the appellant was served with a letter by Ms Zungu directing her to report to the Central Base at Oldhan House to commence operational duties as an "ALS Operational". Four days later on 28 August 2010, the appellant served a grievance on her shift supervisor contesting the instruction to relocate her from the Control Centre to the Central Base to perform operational duties contrary to her medical condition. The solution she desired was to remain at her current work environment.

[8] Despite the pending grievance, the appellant was served with another letter from Mr D Padayachi, the Communications Centre Manager. The letter referred to the letter from Ms Zungu of 24 August 2010 and advised her to

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report at the Central Base to perform operational duties. On 11 September 2010, the appellant reported for duty at the Central Base as directed. She was, however, unable to work and explained her predicament to the shift supervisor, Mr P Govendor, in a letter dated 11 September 2010.

[9] According to the appellant, she regularly attended on her physician and psychiatrist, and had been booked off sick due to major depression which activated her chronic back pain. She, at the end of each month, completed a leave of absence form and attached medical certificates. This situation endured for the period October 2010 to August 2011, and on each occasion, the officials at her workplace acknowledged receipt of the leave forms with the attached medical certificates.

[10] On 22 November 2010, Dr Dasi issued a letter after consulting the appellant indicating that she is under treatment and that carrying heavy weights should be strictly avoided. On 7 February 2011, some of the respondents' officials held a meeting concerning the appellant's condition at work. They informed her that she would only be allowed to work in the Control centre if her salary level was dropped from level 10 to level 4 alternatively that she must apply to be boarded due to her medical conditions. She was, however, unable to agree to the conditions imposed on her.

[11] According to the appellant, her attempt to obtain an interdict against the respondents was dismissed on 23 June 2011 on the grounds that she had to exhaust other alternatives remedies available to her. She was later advised by the respondents' legal advisor through her attorney to report for work at the Control centre and that she was neither demoted nor displaced. She reported for duty on 26 and 27 June 2011. On these days she was instructed to perform operational duties at the Central base.

[12] On 27 June 2011, the appellant referred an Unfair Labour Practice dispute for demotion to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).

[13] On 19 August 2011, Mr NW Sithole, the respondents' General Manager: Emergency Medical and Rescue Services KwaZulu-Natal, served a notice on

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the appellant informing her of her discharge from the Public Service in terms of section 17 of the Public Service Act, 1994. The notice dated 18 August 2011 reads thus:

> 'NOTICE OF DISCHARGE IN TERMS OF SECTION 17 OF THE PUBLIC SERVICE ACT, 1994"
>
> It has come to my attention that you have been absent from work for more than 30 days as from 11/09/2010 to date without a permission from your Line Manager. In the premises, you are advised that you are deemed to have been discharged from your employment in terms of section 17(5)(a)(i)[3] of the Public Service Act with effect from 11/09/2010
>
> Your emoluments have been terminated and all remuneration paid during period 11 September 2010 to date will be deducted from your pension once relevant process have been initiated.'

[14] In response to the aforesaid notice, the appellant wrote to the respondents through her attorneys advising that she does not accept the termination and reasons therefor; that she had lodged a grievance with PHSBC for which she was still awaiting an allocation of a case number; that her dismissal was unfair and that she intended challenging it. There was no response to the letter by any of the respondent's officials.

[15] On 1 September 2011, the appellant referred a dispute of unfair dismissal to the Bargaining Council. At the hearing of the dispute, the respondents raised a point *in limine* contesting the jurisdiction of the Bargaining Council on the basis that the appellant had not been dismissed as she was deemed dismissed in terms of s 17(3)(a)(i) of the PSA . The arbitrator upheld the point *in limine* and dismissed the referral and made no award as to costs.

[16] Aggrieved by the award of the arbitrator, the appellant submitted written representation on 16 January 2012 stating inter *alia* that:

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[3] Section 17(5) has since been substituted by s 25 of the Public Service Amendment Act 30 of 2007 and is now ss 17(3)(a) of the Public Service Act. There are no material differences between the two sections.

> 'Kindly advise us whether your office is willing to reconsider your stance on the discharge as our client is of the view that she was certainly not absent without leave or without just cause and that your department was aware of her absence. Our client also has been a valuable member of the EMRS for a considerable period of time and will surely be of use to the department given her expertise on and off the field. Our client is not in position to report for operational duties due to her health condition but she would however be willing to consider returning to the control room or a similar environment.
>
> We await your urgent response herein.'

[17] The respondents did not respond to the representation made by the appellant. The appellant wrote letters directly to the State Attorney on 7 February 2012, and to the Emergency Medical Rescue services on 17 February 2012, 14 March 2012 and 29 March 2012 respectively requesting a response to her representations, and alternatively to have a meeting with the Management for an amicable resolution of the dispute. Unfortunately, none of these efforts solicited any response from either the respondents or the State Attorney.

[18] The appellant lodged a review application with the Labour Court on 4 July 2012 seeking to review the arbitration award that dismissed her referral for lack of jurisdiction of the Bargaining Council. The review application was ultimately set down for hearing on 21 November 2013. On this day, the review application was withdrawn and her erstwhile attorneys were ordered to pay costs of the application *de bonis propris*.

[19] On 26 November 2013, the appellant made an application in terms of s 17(3)(a)(i) of the PSA to the first respondent in which she requested her reinstatement to her position. As part of the motivation for the application she attached copies of all the medical certificates and leave forms that she had submitted to the department. She once again did not receive any response from the first respondent. Her letter dated 26 March 2014 requesting a response suffered the same fate.

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[20] Upon receipt of further legal advice, the appellant launched the application in terms of s 158(1)(h) of the LRA which is the subject of this appeal after she was unsuccessful in the Labour Court.

[21] In the court *a quo*, the appellant contended that the failure by the respondents to respond to her application for reinstatement after being deemed dismissed is, by implication, a decision refusing to reinstate her. It is this alleged decision that the appellant sought to set aside and that the respondents be ordered to reinstate her retrospectively to the date of her alleged deemed dismissal. In short, the appellant accepted that she had been deemed dismissed by operation of law in terms of s 17(3)(a)(i) of the PSA and that she was entitled to be reinstated in view of the representations she made in terms of s 17(3)(b) of the PSA.

[22] The respondents in turn opposed the application on two bases. The first, was that the appellant had failed to show on the papers that there was any decision taken on 18 October 2011 as stated in the Notice of Motion. In my view, this is an overly technical defence because the respondents' officials must have known that reference to October was a typographical error because their own letter notifying the appellant of her discharge was in fact written and dated in August. This ground lacked merit and should have been out rightly dismissed. The second basis of opposition was that as a matter of fact, when the review application was launched by the appellant no decision had been taken by the relevant authority (the Head of the Department (HOD)) regarding the appellant's application for reinstatement; accordingly there was no "decision taken" to review in terms of s 158(1)(h) of the LRA.

[23] In dismissing the appellant's application for review, the court *a quo* accepted the respondents' contention that the appellant had failed to establish the existence of a "decision taken" by the respondents and thus a review was incompetent. The court *a quo* reasoned, *inter alia*, that all that the appellant had shown was a failure to respond within five months to the application for reinstatement and that since the appellant could not refer the court to any relevant legislation or policy prescribing the time period within which the HOD had to respond, an assumption that a decision to refuse had been taken is not

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correct because more was required for such an assumption to be made. The court *a quo* held that an appropriate relief that the appellant ought to have sought would have been an order that the HOD be compelled to make and deliver a decision on her application for reinstatement. The court however suggested to the HOD to immediately take a decision on the appellant's application for reinstatement.

[24] In this Court, Ms Naidoo on behalf of the appellant contested the findings of court *a quo* that the appellant failed to justify a conclusion that a decision had been taken; that she could only show that there has been a failure to respond within five months and failed or should have placed the respondents on terms to take a decision on her application for reinstatement. It was further contended that the court *a quo* erred in failing to consider the evidence presented by the appellant on the papers and as such committed a misdirection which led to the court arriving at a wrong conclusion.

[25] Predictably, Mr Choudree SC, who appeared on behalf of the respondents, contended that the judgment of the court *a quo* was unassailable; that the court *a quo* made correct factual and legal findings and that the appeal should be dismissed.

[26] In light of the approach I take of this matter, it shall not be necessary to deal with the contentions of the parties in any detail. I say this in view of the fact that the first inquiry should have been whether, given the facts and chronology of the events in the matter, it can be said that the appellant was properly deemed to have been dismissed in terms of s 17(5) of the PSA. Absent a correct deemed dismissal, there would be no need for the procedure set out in s 17(3)(b) of the PSA.

[27] Section 17(3) of the PSA provides:

> '(a) (i) An officer, other than a member of the services or an educator or a member of the National Intelligence Services, 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

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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 Commission may, notwithstanding anything to the contrary contained in any law, recommend that, subject to the approval of the relevant executing authority, he or she be reinstated in the public service in his or her former or any other post or position on such conditions as the Commission may recommend, 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 Commission may recommend.'

[28] In order for an employee to be deemed dismissed in terms of s 17(3)(a) of the PSA he/she must have absented himself/herself from official duties without permission of the employer or the HOD for a period exceeding one calendar month. Since the deemed dismissal takes effect by operation of law and not by any act on the part of the employer, the jurisdictional requirements prescribed by the legislature in s 17(3)(a) of the PSA must be met before an employee can be said to be deemed dismissed.

[29] In this matter, one may accept that the appellant did not report for duties. However, the uncontroverted evidence is that the appellant was sick and continued to, for a continuous period of her absence, complete sick leave forms with medical certificates attached and submitted them to her employer. Furthermore, in the absence of any indication that her sick leave was not approved, she was entitled to accept that her absence was with leave of the employer. Every time she submitted these documents the respondents' officials accepted and acknowledged receipt. These officials knew of her condition and whereabouts. The respondents, on the other hand, continued to pay her salary until August 2011. They would not have continued to pay her salary if she was absent without their permission.

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[30] Given the circumstances of her absence, it would be wrong to conclude that the appellant was absent without the permission of her employer. It would appear that the deeming provision was applied as an afterthought when nothing had been done by the respondents to address the appellant's situation. My conclusion in this regard is based on the fact that the notice communicating the alleged deemed dismissal was only issued on 18 August 2011 and applied retrospectively to 11 September 2010, ignoring what had been happening since then. My conclusion on the set of facts presented is, therefore, that the jurisdictional requirements for the appellant to be deemed dismissed because of being absent for a period exceeding one calendar month without the permission and or knowledge of the HOD, office or the institution 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.

[31] There is one matter which is of great concern to me. This relates to the conduct of the respondents' officials in their dealings with the appellant. Most of the time the appellant's letters could not solicit a courtesy of a response from the respondent. This is an unacceptable conduct from a public office such as that of the respondents run on tax payer's funds. The same applies to the failure by the respondents' officials to respond to the appellant's formal application for reinstatement. What is more perplexing is that their failure to respond is subsequently used as a defence to the review application that there had not been a decision taken that can be a subject of review. They are prepared to use their failure to do what is expected of them to their benefit.

[32] In the result, the appeal succeeds and the order of the court *a quo* is set aside and replaced with the following order:

a) The appellant is not deemed dismissed.

b) The respondents are to reinstate the appellant with immediate effect retrospectively to 11 August 2011 with benefits on the same terms and conditions that previously pertained to her as if she had not been dismissed.

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c) The respondents to pay the costs in the Labour Court and of the appeal.

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Tlaletsi DJP

Landman JA and Phatshoane AJA concur

APPEARANCES:

FOR THE APPELLANT:	Adv A Naidoo
	Instructed by R Ramdayal Attorneys
FOR THE RESPONDENT:	Adv RBG Choudree SC and F Abraham
	Instructed by The State Attorney, Durban.

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