

SOUTH AFRICA / JUDGMENT

NEHAWU obo James v General Public Service Sectoral Bargaining Council and Others

(JR1285/17) [2021] ZALCJHB 465 (16 March 2021)

[2021] ZALCJHB 465

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JR1285/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

case

no: JR1285/17

In the

matter between:

NEHAWU
obo LUPHUMULO
JAMES
Applicant
and
THE GENERAL PUBLIC SERVICE SECTORAL
BARGAINING
COUNCIL
First Respondent
COMMISSIONER
MONDE
BOYCE
Second Respondent
DEPARTMENT
OF SAFETY AND
LIAISON
Third Respondent

Heard:

11 March 2021

Delivered:	16 March 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 16th March 2021 is deemed to be the date of delivery of this judgment).
Summary:	Application to review a jurisdictional ruling – where the jurisdictional requirements of section 17 of the Public Services Act (PSA) are not met, there is no termination by operation of law. The effect thereof is that an employee must be allowed to resume duty. There is no room for a claim for unfair dismissal. The bargaining council lacks jurisdiction where there is no dismissal within the meaning of section 186 of the Labour Relations Act (LRA). The second respondent was correct in concluding that the bargaining council lacked jurisdiction. Held: [1] The application for review is dismissed. Held: [2] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application in terms of which the applicant seeks to review and set aside a jurisdictional ruling issued by the second respondent. The second respondent ruled that the bargaining council lacked jurisdiction to entertain the dispute. Aggrieved thereby, the applicant launched the present application. The application is duly opposed.

Background

Facts

- [2] The dispute involved herein is archaic. It spans a period of a decade and two years. Mr James Luphumulo (James) was employed by the Department of Safety and Liaison in the Eastern Cape Provincial Government as a Community Liaison Officer (CLO). From 11 May 2009 up to and including 30 June 2009, James was allegedly absent from his official duties without permission of his head of the department. Owing to the provisions of section 17 (5) (a) (i) of the Public Services Act[1] (PSA), James was terminated as an employee of the department. On 30 June 2009, the head of the department informed James in writing that he has been discharged by operation of the section. On 7 July 2009, James requested the Member of the Executive Council (MEC) to exercise statutory powers contemplated in the section 17 (5) (b) and approve his reinstatement. On 24 August 2009, James was informed that his discharge was confirmed by the MEC.
- [3] Instead of challenging the exercise of the statutory power, James referred a dispute alleging unfair dismissal to the bargaining council. The appointed commissioner Robertson (Robertson) assumed jurisdiction and concluded that the dismissal of James was fair. Aggrieved thereby, James launched a review application. The application served before my

sister Lallie J. In a written judgment, my sister, reviewed and set aside the arbitration award issued by Robertson and remitted the dispute back to the bargaining council. Her written judgment was delivered on 24 August 2014.

- [4] The dispute was again enrolled for an arbitration hearing before the second respondent, Mr Boyce. The second respondent subsequently

issued the impugned ruling. He concluded that James was not dismissed within the meaning of the LRA.

Evaluation

- [5] The applicable test in matters of this nature is that of correctness as opposed to reasonableness.[2] The applicant submits that where the jurisdictional requirements of section 17 (5) (a) (i) are found to be absent, a commissioner retains jurisdiction to entertain a claim for unfair dismissal. James contends that because on certain days he reported for duty albeit he did not perform duties, the requirements of the section were not met – he was not absent for a period exceeding 30 days. This contention cannot be correct. The mischief sought to be prevented in the section is that of employees or officials not performing official duties. This is consistent with the purpose of section 195 of the Constitution. It cannot be correct to suggest that the presence of a warm body is sufficient to meet the purpose of section 195 of the Constitution. Section 195 (1)
- (a) and (f) requires a public administration that maintains and promotes a high standard of professional ethics as well as one that is accountable. An employee or official must perform his or her official duties in order to ensure a high standard of professional ethics and accountability. If he or she does not, such an employee is effectively absent from official duty[3]. In support of the submission that a commissioner retains jurisdiction reliance was placed on two[4] of this Court's judgments. One by Francis J and the other by Prinsloo J when she was still acting justice of this Court. In *MEC for Health v MD Khoetha and Others*[5], Francis J reached the following conclusion.

“[17] Once it is found that the requirements have been met, the bargaining council will lack jurisdiction to hear the dispute on the basis of s 17 (5) (a) (i) of the PSA. If the requirements have not been met, the said provisions will not have come into operation and the discharge will be invalid and the dismissal will be substantively and procedurally unfair.

- [6] I am unable to agree that there will be a dismissal which will be substantively and procedurally unfair. In *Department of Health v PHSDSBC and Others*[6], Prinsloo AJ (as she then was) reached the following conclusion:

“[30] ...If the requirements have not been met, the discharge will not be ex lege and the fairness of the dismissal should be considered.”

- [7] Regrettably I am unable to agree with a conclusion that the fairness of the dismissal should be considered. Hereunder follows my reasons why I disagree with the conclusions reached by Francis J and Prinsloo AJ.
- [8] As a point of departure, even in an instance where the executive authority refuses to approve a reinstatement, such a refusal does not morph into a dismissal within the meaning of the LRA. In this particular matter, James attempted to have the discharge reversed and that attempt failed. Such does not imply that James was dismissed thereby. In section 186 (1) (a) the Labour Relations Act[7] (LRA) defines a dismissal to mean that an employer has terminated a contract of employment with or without notice. Owing to the

definition of a dismissal, of significance is that dismissal means termination of a contract of employment and that termination must be effected by the employer. The reason why it was consistently held that section 17 of the PSA terminations are not a dismissal within the meaning of the LRA is that those terminations occur by operation of law, whilst the dismissal in terms of the LRA is effected by an employer. The other reason is that in the former, no decision is required, whereas in the latter, a decision is required. The Labour Appeal Court (LAC) in SAPO Ltd v Mampuele[8] aptly stated the law as follows:

“[12] ...I am in agreement with the court a quo that ‘dismissal’ means any act by an employer which results, directly or indirectly in the termination of an employment contract.”

- [9] To my mind, in an instance where the jurisdictional requirements of section 17 are not met, what becomes is the fact that the law cannot operate. Put it differently, a termination does not occur in law. Where an employer calls into aid the provisions of the section in the circumstances where the jurisdictional requirements are not met, such an employer shall be acting unlawfully and on application of the principle of legality, a Court with the necessary jurisdiction may declare that an employee has not been terminated. In such an instance, there is no room for fairness or unfairness of a dismissal let alone an existence of a dismissal within the meaning of the LRA. The Constitutional Court in Grootbom v NPA and another[9] concluded that where one of the essential requirements of section 17
- (5) (a) (i) of the PSA has not been met, the section cannot be invoked. Importantly, the Court made the following order:

“[48] ...5 it is declared that the applicant did not absent himself from his official duties without permission as contemplated in section 17 (5) (a) (i) of the Public Services Act 103 of 1994 and he continues to be in the first respondent’s employ...”

- [10] Similarly, the Constitutional Court in Maswanganyi v Minister Veterans and others[10] relying on Grootbom concluded that Mr Maswanganyi did not need to apply for reinstatement as the provisions of section 59 (1) (d) of the Defence Act[11] did not find application. This was after confirming the view expressed in Steenkamp v Edcon Ltd[12] that an employee whose dismissal is invalid does not need an order of reinstatement. An appropriate order is to order an employer to allow the employee into the workplace for

purposes of performing his or her duties.

- [11] Regard being had to the above explicit legal position, it cannot be correct to state that an employee who has been invalidly terminated has as an added string to the bow, a claim for unfair dismissal within the contemplation of the LRA. Section 185 of the LRA explicitly provides that every employee has the right not to be unfairly dismissed. Section 213 perspicuously defines dismissal to mean dismissal as defined in section 186. As indicated earlier, a termination by operation of law does not fit the definition of a dismissal[13]. It must axiomatically follow that the right espoused in section 185 does not avail to an employee whose termination occurred by operation of law. More pointedly, section 188 of the LRA provides that a dismissal is for a fair reason if it is based on (a) conduct; (b) capacity and (c) operational requirements. A termination by operation of law cannot be justified by the employer using any of the three recognized reasons. That being the case how is it possible to determine the fairness of that termination? In my view, there is no possibility. Mr Magoshi, appearing for James submitted that what then is the remedy of an employee whom the employer formed a wrong believe that he or she was absent for the period? The answer is simple, as pointed out in this judgment, where the jurisdictional requirements are absent, there is no termination by operation of the law. Such an employee may seek a declarator or an interdict. It is no answer that absent the jurisdictional requirements, a dismissal as a fact rises and appears like a sun at the crack of dawn.
- [12] Section 191 of the LRA deals with disputes about unfair dismissals. Clearly, owing to the definition of a dismissal, section 191 does not cater for any other form of termination other than the one that fits the definition of termination in section 186 of the LRA. The section mandates that such disputes are to be resolved by first referring them for conciliation and if conciliation fails to resolve them, they be referred for adjudication or arbitration, depending on the nature of the dispute.
- [13] In my view, it is a fallacy to suggest that a commissioner is empowered to enquire into whether the jurisdictional requirements of a section bringing about termination by operation of law are present[14]. It is one thing for a commissioner to establish whether a dismissal as defined in section 186 has factually happened and it is another thing to establish that the law has operated or not. The better approach - in an instance where a commissioner is faced with such a question – whether the law has operated – is to decline jurisdiction. A commissioner is not empowered to issue a declaratory relief in an instance where there is no jurisdiction. Section 138 (9 (c)) of the LRA empowers a commissioner to make an appropriate award that may take a form of a declaratory order. Such does not imply that a commissioner is empowered to make a declaratory order outside an arbitration award. Unlike the Labour Court, the Commission for Conciliation, Mediation and Arbitration (CCMA) or the bargaining council is not clothed with powers to review any exercise of statutory powers. In effect, where an employer calls into aid the statutory provisions, such an employer is exercising public power, which exercise is susceptible to judicial review on application of the principle of legality. Mr Magoshi submitted that an

employee faced with a discharge has an election to make. Either to approach a Court of review or refer a dispute alleging unfair dismissal. I disagree. Where there is no dismissal within the meaning of the LRA, the CCMA and bargaining council lacks jurisdiction. I agree with the submission of Mr Jongwana, appearing for the department that James had accepted that he was discharged hence his approach to the MEC to exercise statutory powers to reverse the discharge. It is curious to note that in the letter addressed to the head of department, James says nothing about the provisions of the section having not kicked in. The MEC's statutory powers are reserved to be exercised

only for discharged employees. The argument belatedly used at the CCMA that James was not absent for 30 days is more an afterthought.

- [14] Section 192 of the LRA specifically provides that in any proceedings concerning any dismissal, as defined in section 186 of the LRA, I add, the employee must establish the existence of the dismissal, as defined, this Court adds. Should an employee fail to establish that a dismissal as defined exists, the CCMA or bargaining council is not sceptor to deal with the termination that may have allegedly occurred. Where section 192 refers to any dismissal, it does not mean any other termination, but any termination that amounts to a dismissal as defined in section 186. The LRA knows only two forms of dismissals; namely (a) unfair dismissal – ordinary dismissal[15] and (b) automatically unfair dismissal[16]. Any other form of termination – invalid termination - is foreign to the LRA[17].
- [15] For all the above reasons this Court concludes that Francis J and Prinsloo AJ were, with respect, wrong in reaching a conclusion that a commissioner has jurisdictional powers to entertain a termination dispute in an instance where the commissioner has established that the jurisdictional prerequisites of section 17 of the PSA have not been met. On the contrary, where the jurisdictional requirements are not met, the law has not taken course and available to an employee is a demand to return and if not allowed, approach a Court with competent jurisdiction to issue an interdict or a declarator. Thus, this Court is not bound by those decisions on application of the stare decisis principle. Accordingly, this Court parts ways with the above stated reasoning. Regard being had to the reasoning employed in those two judgments, the question is who would have effected the termination? In section 186 the termination must be effected by the employer.
- [16] Termination by operation of law does not require a decision by the employer[18]. That being the case, there is no room for dismissal as defined in the LRA to exist. Once the law operates, a letter informing an employee that the law is in operation is not an act of dismissal. If an employer disguises the true reason by feigning the operation of the law, once that feign dissipates, what remains is not a dismissal unless it can be demonstrated that there was an overt act by the employer to directly or indirectly terminating an employment contract. In my view an employee faced with the disguise must take advantage of the statutory powers possessed by an executive authority instead of laying a claim for unfair dismissal. in the main, what employees often dispute, in cases of this nature, is the absence. This case relates to section 17 before being amended. Thus the relevant subsection is

subsection (5). In terms of subsection 17 (5)

- (b) an officer deemed discharged can first report for duty whereafter the relevant functionary may on good cause shown approve the reinstatement.

[17] The above legal position implies that where an employer in disguise informs an officer that the

provisions of the law had kicked in, then such an officer should report for duty and ask the relevant functionary to approve his or her reinstatement. It is thus unnecessary for an officer to claim unfair dismissal, unless he or she can show an overt act of

dismissal.

[18] The second respondent was correct when he concluded that James was not dismissed in terms of the LRA but was discharged by operation of law. Accordingly, the bargaining council lacked jurisdiction to hear the dispute. Dismissing the application/referral was the correct approach.

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

Order

1. The application is dismissed
2. There is no costs order.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Magoshi of Majang Inc Attorneys, Johannesburg.

For the 3rd Respondent: Mr N Jongwana

Instructed by:

State Attorney Johannesburg.

[1] No. 103 of 1994.

[2] SARPA and Others v SA Rugby (Pty) Ltd and Others [2008] 29 ILJ 2218 (LAC) and Johnson Uniform Solutions (Pty) Ltd v Lynette Brown and Others [2014] JOL 32513 (LAC)

[3] See Senne v Minister of Health and Another (JR 2275/11)

[2016] ZALCJHB 207 (4 June 2016).

[4] MEC for Health v Khoeta and Others (2011) 32 ILJ 647 (LC) and Department of Health v PHSDSBC and Others (2014) 35 ILJ 2166 (LC).

[5]

(2011) 32 ILJ 647 (LC).

[6]

[2014] 35 ILJ 2166 (LC)

[7] No. 66 of 1995, as amended.

[8]

[2010] 10 BLLR 1052 (LAC)

[9]

[2014] 35 ILJ 121 (CC).

[10]

[2020] 41 ILJ 1287 (CC).

[11] Act 42 of 2002.

[12] 2016 (3) BCLR 311 (CC).

[13] See Grootbom.

[14] That becomes a duty of a Court of review. See in this regard MEC for Health Eastern Cape and Another v Kirkland Investments (Pty) Ltd

[2014] ZACC 26 (25 March 2014) where it was held that the absence of a jurisdictional fact does not make the action a nullity, it simply means that the action is reviewable on the grounds of lawfulness.

[15] Section 188 of the LRA.

[16] Section 187 of the LRA.

[17] See Singhala v Ernst and Young Incorporated and another

[2019] 40 ILJ 1083 (LC).

[18] Phenithi v Minister of Education and Others [2006] 9 BLLR 821 (SCA).

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Prepared on 13 October 2026 · Esheria