
SOUTH AFRICA / JUDGMENT

South African Medical Association and Another v Member of the Executive Council for Health North West (JR2580/12) [2020] ZALCJHB 223 (22 May 2020)

[2020] ZALCJHB 223

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR2580/12

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The Labour Court of South Africa, JOHANNESBURG

Judgment

Not reportable

case no: JR2580/12

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION

1st Applicant

DR ELIE MUTUNZI

2nd Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH IN NORTH WEST

Respondent

Heard: (In Chambers)

Delivered: 22 July 2020

Summary: The test for application for leave to appeal remains that of an appeal having reasonable prospects within the contemplation of section 17(1) (a) (i) of the Superior Courts Act [1]. The application failed to meet the test. Held (1) The application for leave to appeal is dismissed with costs.

Judgment-Leave to Appeal

MOSHOANA, J

Introduction

[1] This is an application to seek leave to appeal against the whole judgment and order of this court handed down on 22 May 2020. The application is duly opposed by the first and second applicants. For ease of reference, the parties are cited in this judgment as they were in the main application. However, the applicant for leave to appeal in the present application is the Member of the Executive Council: Health North West Province (MEC) and the respondents are the applicants in the main application Parties filed written submission in terms of the provisions of Rule 30. The application was considered in chambers.

Background facts

- [2] The relevant facts are as set out in the impugned judgment and are not to be repeated herein. Suffice to mention that the MEC is aggrieved by the judgment and order made by this Court. According to the main judgment, there was no deemed dismissal because one of the jurisdictional requirements of section 17 of the Public Services Act (PSA) is absent. As a result this Court ordered as a remedy, reinstatement of Mutunzi without any loss of benefits as the Labour Appeal Court in the judgment of Gangaram did it[2].
- [3] The respondents contend that this Court arrived at a conclusion that no other Court may disturb and as such the application must be refused.

Grounds for leave to appeal

- [4] The MEC contends that this Court erred in concluding that the jurisdictional requirement of absent without permission was not met. Further the MEC contends that this Court erred in its interpretation of section 20 of the Basic Conditions of Employment Act (BCEA) and its interpretation is at variance with the interpretation of the similar provisions by the earlier judgment of this Court. The MEC also contends that this Court issued a declaratory relief without it being sought by the aggrieved party. A further contention is that this Court applied the provisions of section 20 of the BCEA without warning the parties that it would do so. Lastly, it is contended that the remedy afforded to Mutunzi was inappropriate.

Evaluation

[5] The test for leave to appeal requires a measure of certainty that another court will differ with this court.[3] The bar has been raised higher than normal. This Court has carefully considered the grounds set out above together with the MEC's

lengthy submissions as well as the submissions of the applicants in the main application. It is apparent that the MEC has missed the import of the main judgment by a proverbial mile. The issue is not about review of a decision to dismiss. The dismissal in this instance happened by operation of law thus not reviewable as a legal fiction. The authorities properly cited by the MEC are perspicuous. The dismissal happens by operation of law. The issue is did all the jurisdictional facts presented themselves in order for the legal fiction to take effect. This Court in the main judgment concluded that the legal fiction did not happen.

[6] The letter of 17 April 2012 had legal consequences for Mutunzi's employment. This legal consequences was brought about by the MEC's believe that the provisions of the law had kicked in. In the Court's view, in the main judgment that believe is wrong. The question for Mutunzi was whether he should leave a decision with dire consequences for him? He decided against that and launched a review.

[7] In MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd[4], the majority judgment penned by Cameron J stated the law as follows:

[64] ...Even where the decision is defective...government should generally not be exempt from the forms of process of review...

[65] The reason spring from deep within the Constitution's scrutiny power. The Constitution regulates all public power...When government errs by issuing a defective decision, the subject affected by it ...to be afforded a proper hearing, on whether the decision should be set aside... The decision, despite being defective, may have consequences that make it undesirable or even impossible to set aside. That demands a proper process, in which all factors for and against are properly weighed.

[8] The MEC holds a view that calling into aid statutory provision does not amount to exercise of public power. It is truly difficult to understand this view. What the MEC communicated to Mutunzi on 17 April 2012 was done on the strength that the statutory fiction had kicked in. In other words the MEC used the law to bring about the undesirable consequences for Mutunzi. If this is not exercise of some statutory power then this Court does not know what to call it. It cannot be seriously argued that when the MEC informed Mutunzi on 17 April 2012 that the legal fiction has taken effect such does not amount to a decision. In Kirkland, the Court stated the following:

[92] It is true that the word "decision" in its ordinary meaning may signify a proper decision, namely one taken lawfully after a full application of the mind. Yet in administrative law an approval granted under unlawful dictation is still a decision. Like any other, it has effect until it is reviewed and set aside. That it was granted under dictation makes it vulnerable to judicial review. It does not mean that it is a non-decision.

- [9] Clearly in my view, calling into aid the provisions of a section in order to achieve a particular consequences and effect amounts to a decision susceptible to judicial review. Whether such a decision is administrative in nature is neither here nor there in order to be reviewed under PAJA or the Constitution under the rubric of legality. The distinction becomes irrelevant particularly because PAJA itself defines an administrative act as a decision by the state exercising a public power or performing a public function in terms of any legislation. It can hardly be said that when the MEC acted on 17 April 2012 by calling into aid the provisions of the section was performing private function not attached or sustained by legislation. No Court can arrive at a conclusion that no exercise of public power or function was involved. As pointed out above, the decision I am referring to is not one of saying Mutunzi you are dismissed. The decision I am referring to is one that says the jurisdictional requirements of the section are present. The Court in Kirkland clarified the law as follows:
- [98] ...Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of power...It is true we sometimes refer to lawfulness requirements as “jurisdictional facts”...
- [99] So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable; usually on the grounds of lawfulness... Our courts have consistently treated the absence of a jurisdictional fact as a reason to set the action aside, rather than as rendering the action non-existent from the outset. The absence of jurisdictional facts did not entitle Mr Boya to withdraw the approval but only to approach a court to set it aside.
- [10] It does seem apparent that the MEC takes a view that because it has been held that in a deemed dismissal there is no decision required, an affected party cannot approach a court of review to question amongst others the presence of the jurisdictional facts to enable the legal fiction to take effect. That is an untenable situation and at odds with what the Constitutional Court has said. It offends the principle of legality and the rule of law to allow such an invocation of the law even in instances where the lawfulness of such application of the law is questionable. This Court in the main judgment took a view that action of calling into aid the provisions of section 17 of the PSA even where the jurisdictional facts are absent offends section 1 (c) of the Constitution. In terms of section 169 (1) of the Constitution, the High Court of which the Labour Court is one is empowered to decide any constitutional matter.

In terms of section 167 (7) of the Constitution, a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

- [11] In launching a section 158 (1) (h), which subjects any act performed by the state in its capacity as an employer to review by the Labour Court, Mutunzi was seeking to protect and enforce the rule of law, thus involved in a constitutional matter.
- [12] The MEC incorrectly interprets to order declaring that there was no deemed dismissal to mean that this Court was exercising powers under section 158 – granting of a declaratory relief. A judgment or order is to be interpreted by having regard to the judgment as a whole.

[5] Before making the order this Court pronounced itself in paragraph 33 of the main judgment that the jurisdictional requirements of the section have not been met and the deemed dismissal did not kick in. Section 172 (1) of the Constitution provides that when deciding a constitutional matter within its powers, a court must – (a) declare that the conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Where the jurisdictional facts of section 17 of the PSA are absent an employee may not be deemed dismissed. Deeming an employee dismissed in the absence of the jurisdictional facts is a conduct that is inconsistent with section 1 (c) of the Constitution.

[13] The Constitutional Court in *Merafong City Local Municipality v Anglo Ashanti Ltd*[6], Jafta J stated the following:

[17] Consistent with its supremacy, in section 172 (1) (a) the Constitution obliges every court, in deciding a matter within its competence, to declare law or conduct inconsistent with it invalid.

[14] As pointed out above deeming Mutunzi dismissed within the statutory provision – on 17 April 2012 – is a conduct inconsistent

with the Constitution in instances where the jurisdictional requirements were not met. The obligation of this Court after reaching a conclusion that the jurisdictional requirements were not met was obligated to declare as invalid any assertion or conduct that

Mutunzi was deemed dismissed. As mentioned above the conduct of calling into aid a statutory provision when all the requirements are met is an exercise of public power. Such an exercise must comply with the Constitution[7]. In light thereof, no other Court may arrive at a conclusion that absent jurisdictional facts of the enabling section, Mutunzi was not deemed dismissed.

[15] With regard to the remedy, the MEC again takes a wrong view that the reinstatement ordered is one dependent on the fairness or otherwise

of a dismissal. It is not. At paragraph 34 of the main judgment, this Court stated that an illegality is remedied by simply declaring it as such and for the status quo ante to prevail. Zondo J in a dissenting judgment of *NUM obo Fohlisa & others v Hendor Mining Supplies*[8] stated the following persuasive position:

“ Another point that supports the proposition that paragraph (a) of Cele AJ’s is not a prospective order is this. Outside of the LRA, if a court make an order that someone be reinstated in a certain position from which he or she had been unlawfully removed, that order would mean both that that person should be put back into the position he or she occupied before his or her removal...”

[16] It cannot be gainsaid that removing an employee under the guise of a legal fiction, when the legal fiction did not take effect, amounts to an unlawful removal[9]. Therefore, the reinstatement order made by this Court is one outside the LRA and in response to the unlawful removal. Accordingly, I take a view that another Court may not provide a different remedy. What this Court did remedy wise was done by the LAC in *Gangaram*.[10]

- [17] Section 17 (1) (a) (ii) of the Superior Courts Act provides that where there is some compelling reason why the appeal must be heard including conflicting judgments on the matter under consideration, leave to appeal may be given. The MEC takes a view that there are conflicting judgments on the issue of section 20 of the BCEA. As a point of departure, section 20 of the BCEA was not a matter under consideration. This Court made reference to section 20, when seeking to give meaning on the words “without permission”. The enquiry whether permission exists is a hybrid one. It is one of facts and where necessary one of law. Interpretation is a legal task and not dependent on what the parties say. It is a task reserved for a Court of law. That being so, a complaint that the parties were not warned that section 20 of the BCEA shall be considered en route interpretation of a statutory provision is not one that makes this matter a compelling one in order to gain leave to appeal. A doctrine in statutory construction exists which states that statutes in *pari materia* must be construed together. Section 17 makes reference to vocational leave that is unpaid. An absence without permission within the contemplation of the section may morph into a vocational leave. The BCEA is one statute that deals with leave of absence in an employment context. Thus it is a statute in *pari materia*. In search for the meaning of words employed by the legislature it was not incongruent for this Court to apply the doctrine of *pari materia*.
- [18] Turning to the alleged conflict between the main judgment and the judgment of the Labour Court per Van Niekerk J in *Ludick v Rural Maintenance (Pty) Ltd*[11]. There is no conflict between the two judgments. In *Ludick* the Labour Court was involved in a claim of forfeiture of accrued annual leave. This Court in the main judgment interpreted section 20 of the BCEA to mean that no approval is required in order to take leave. In paragraph 18 of the *Ludick* judgment, my brother Van Niekerk J states that the ideal situation and not the legal position is to have the timing of the leave once accrued to be a subject of agreement between the parties. On the other hand this Court in the main judgment stated, “the practice of the supervisor recommending is more operational and accords with the issue of the timing within the contemplation of section 20 (10) (b) of the BCEA.” This is not in conflict with the “ideal” situation propagated by Van Niekerk J. Nowhere in the judgment does Van Niekerk J state that an approval of leave is a statutory requirement.
- [19] The MEC is oblivious of the fact that the genesis of this matter is the taking of annual leave. The statute that governs the taking of annual leave is the BCEA. There are two periods involved in this matter. In relation to the first period counsel for the MEC correctly conceded that the provisions of section 17 of the PSA could not cover the first period. With that well made concession, the issue is the second period.
- [20] Before the expiry of the first period not affected by section 17 of the PSA, Mutunzi requested an extension. This request is nothing but a request to be on leave. It was for that reason that this Court referred to section 20 (6) of the BCEA. On proper interpretation of section 20 annual leave is earned and is different from an ordinary absence from work. With annual leave once earned there is no need for approval. Whereas with an ordinary absence, permission is required. On the facts, there is no evidence that the annual leave so earned

was not extended. This conclusion was reached in the main judgment at paragraph 32 – therefore my conclusions are that Mutunzi did request for extension of the annual leave... the respondent was by law obliged to grant him that. In Grootboom, it was found that an employee who has been placed on suspension is not obliged to perform duties and as such the requirement of absence without permission was not present and a jurisdictional requirements is lacking. Similarly, where an employee requests an extension of annual leave and there is no evidence that such an extension was not granted, then the without permission requirement shall not have been met. Mutunzi was paid for the months of February and March 2012. Such implies that even if the provisions of the deeming provisions had taken effect from 1 February 2012, being paid implies that he was reinstated and on 12 April 2012 was suspended and his absence was with permission. In Ramonetha, the LAC stated the following:

- [23] ... In accepting the appellant's tender of performance and remunerating him for his services, the only conclusion to be drawn on the facts is that, on his return to work, the Department implicitly reinstated the appellant into his employment with it
- [25] The Department was, following the appellant's reinstatement, not entitled thereafter to rely on his deemed dismissal, when no further period of unauthorized absence from work had arisen after the appellant's return to work.
- [26] It follows that in relying on the appellant's deemed dismissal after he had been reinstated, the MEC acted unlawfully, irrationally and outside the powers granted to him by law. This is so in that it was not legally permissible for the Department on 21 May 2012 to rely on a deemed dismissal...when the employment relationship between the parties had thereafter been restored.
- [21] For all the reasons set out above, the MEC has failed to meet the heightened test for leave to appeal.

Conclusions

- [7] In summary, it is my finding that the application for leave to appeal must fail with costs.

Order

- [8] In the results, I make the following order:
1. The application for leave to appeal is dismissed.
 2. The MEC is to pay the costs of the respondents.

G. N. Moshoana

Judge of the Labour Court of South Africa

APPEARANCES (NONE)

WRITTEN

SUBMISSIONS

For the MEC: Advocate

M J Ramaepadi SC and Advocate S B Nhlapo

Instructed by: State

Attorney Johannesburg

For the Respondents: Advocate M Van As

Instructed by: Solomon

Holmes Attorneys, Johannesburg.

[1] Act 10 of 2013

[2] See citation in the main judgment.

[3] See Mont Chevaux Trust v T Goosen and 18 others Case T28/2012.

[4] [2014] ZACC 6 (25 March 2014)

[5] See Firestone SA (Pty) Ltd v Genticuro AG 1977

(4) SA 298 (A)

[6] [2016] ZACC 35 (24 October 2016)

[7] See Affordable Medicine Trust v Minister of Health 2006 (3) SA 247 (CC)

[8] [2017] 6 BLLR 539 (CC)

[9] Maswanganyi v Minister of Defence and Military Veterans and others 2020

(4) SA 1 (CC)

[10] Similarly in Maswanganyi, the order of the Constitutional Court has similar effects – it is declared that the applicant's

services...did not terminate as contemplated in section 59 (1)

(d) and that he continues to be in the employ...in the same position and capacity was on 18 July 2014.

[11] [2014] 2 BLLR 178 (LC).

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