the

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA104/2016

In the matter between:

M J RAMONETHA **Appellant**

and

DEPARTMENT OF ROADS AND TRANSPORT

LIMPOPO **First Respondent**

PITSO MOLOTO, MEC: DEPARTMENT OF ROADS

AND TRANSPORT N.O. **Second Respondent**

Heard: **7 September 2017**

Delivered: **01 November 2017**

Summary: The appellant was absent from work without permission for a period in excess of 30 days. On his return, he was permitted to continue employment for more than seven months, during which period he was paid for his services. Eight months later a misconduct hearing was convened at which it was found that s17(3)(a)(i) of the Public Service Act 103 of 1994 applied and that the appellant had no right to a hearing. Eleven months later the appellant was notified by the Department that he had been deemed to have been dismissed in terms of s17(3)(a)(i) as a consequence of his unauthorised absence from work. The MEC rejected the appellant's representations that good cause existed to

justify his reinstatement in terms of s17(3)(b) and the appellant sought the review of that decision in terms of s158(1)(h) of the LRA. The Labour Court dismissed the review application on the basis that the respondents had not acted *ultra vires* the provisions of the PSA and there was no good cause shown as to why the appellant should be reinstated. On appeal: reviewed in terms of s158(1)(h) on the grounds of legality. Decision of MEC found to be unlawful, arbitrary and irrational since appellant had been reinstated for seven months after his deemed dismissal. Judgment of the Labour Court set aside and substituted with order that the appellant is reinstated retrospectively into his employment with Department. Appeal succeeds with costs.

Coram: Coppin JA, Sutherland JA and Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This is an appeal, with the leave of the Labour Court (Baloyi AJ), against the dismissal of an application in terms of s158(1)(h) of the Labour Relations Act 66 of 1995 (the LRA). The appellant, Mr M J Ramonetha, a former employee of the first respondent, the Department of Roads and Transport, Limpopo (the Department), sought the review and setting aside of the refusal of the second respondent, the Member of the Executive Council for Roads and Transport in Limpopo (the MEC) to reinstate him into his employment with the Department. This followed notice having been given to the appellant on 21 May 2012 of his deemed dismissal due to his having been absent from work without authorisation for a period in excess of one calendar month.

[2] The appellant was employed by the Department on 7 April 1993 as a traffic officer. On 10 February 2011, he left work to consult a doctor and remained absent without authorisation until his return, more than four months later, on 17 June 2011. During the period of his absence, his station commander made

repeated attempts to establish the appellant's whereabouts until, on 7 April 2011, he was informed by a family member that the appellant was ill. Although he requested a medical certificate from the appellant, no certificate was produced. The appellant returned to work on 17 June 2011 and three days later, on 20 June 2011, he furnished the Department with a letter from a traditional healer but with no medical certificate. The appellant's station commander requested that an investigation be conducted by the Department into the matter. For more than seven months from the date of his return to work the appellant continued working for the Department and was paid for his services. This remained so until seven months later, on 16 February 2012, the appellant was notified to attend a "*misconduct hearing*" on the basis that he had committed a *"contravention of Resolution 1 of 2003 in that he absconded from work for 84 days*…".

[3] On 29 March 2012, the chairperson of the misconduct hearing found that, since the appellant had been absent for more than one calendar month, he had in terms of s17(3)(a)(I) of the Public Service Act 103 of 1994 (the PSA) been deemed to have been dismissed from his employment with the Department by operation of law. Section 17(3)(a)(i) provides that:

> *'(i) An employee, other than a member of the services or an educator or a member of the 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 dismissed 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'.*

[4] The chairperson found that the appellant had no right to a hearing, with there being no jurisdiction to determine the matter at such a hearing. The appellant was informed that he was entitled to make representations to the executing authority, being the MEC, "*as to why your services should not remain terminated*". Section 17(3)(b) reads as follows:

> *'(b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph*

> *(a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee 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.'*

[5] Thereafter, on 21 May 2012, more than 11 months after his return to work on 17 June 2011, the appellant received a letter from the Head of the Department in which it was stated that due to the extent of his unauthorised absence from work:

> '*You have therefore terminated your contract with the* [Department]… *This means that the termination of your contract is by operation of law as this termination is triggered by your conduct and not based on the employer's decision*'.

[6] The appellant thereafter made representations to the MEC, as the executing authority, in terms of s17(3)(b). On 3 September 2012, he was informed that the MEC had rejected his representations, that his services had been "*terminated by operation of law and that there is no dismissal as contemplated by section 186 of the LRA"*.

[7] Aggrieved with the termination of his employment, the appellant referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council (GPSSBC) for determination. On 29 October 2012, the GPSSBC ruled that it lacked jurisdiction to determine the matter given that the appellant had not been dismissed from his employment as contemplated in s186 of the LRA.

[8] The appellant thereafter sought the review by the Labour Court, in terms of s158(1)(h) of the LRA, of the MEC's refusal to reinstate him. He did so on the basis that he did not abscond from work and that it had been "*incorrectly determined*" by the respondents that he had; that the respondents had irrationally inferred that he had no intention to return to work; that s17(3)(a)(i) was implemented without factual basis and *ultra vires,* with the MEC failing to distinguish between s17(3)(a)(i) and s17(3)(b); that the MEC had committed a

gross irregularity in not applying his mind to appellant's representations and reaching an unreasonable decision; and that the Department had waived its right to rely on s17(3)(a)(i) by allowing the appellant to commence work after his absenteeism, remunerating him for the services rendered.

[9] In opposing the review application, the respondents contended that when the appellant returned to work, although he was not informed of this, his services had been terminated by operation of law; and that neither the investigation undertaken by the Department, nor the misconduct enquiry, restored the employment relationship "*even though* [the appellant] *continued to receive his salary*". Consequently, it was stated that the MEC had after a "*proper consideration*" rejected the appellant's representations and refused to reinstate him.

[10] The Labour Court, accepting that it had jurisdiction under s158(1)(h) to determine the review application, found that the appellant's employment had been terminated by operation of law. The respondents had therefore not acted *ultra vires* the provisions of the PSA and, with no good cause shown to warrant reversing the termination of employment, the review application was dismissed with costs.

[11] On appeal, the appellant contended that while the Labour Court was permitted to review the decision on any ground permissible in law, the decision of the MEC was neither rational nor reasonable and that the review should therefore have succeeded. The respondents opposed the appeal on the basis that the decision of the MEC was neither arbitrary nor irrational. Continued employment was rendered intolerable by the appellant's extended unauthorised absence from the workplace. Consequently, it was submitted for the respondents that the appeal falls to be dismissed with costs.

Evaluation

[12] The Labour Court, in terms of s158(1)(h) of the LRA, may "*review any decision taken or any act performed by the state in the capacity as employer on such grounds that are permissible in law*". This is a generic provision establishing the

jurisdiction of the Court,[1] with what constitutes the "*grounds permissible in law*" having over time been a matter of some debate.

[13] In *Gcaba v Minister for Safety and Security and Others,*[2] *(Gcaba)* the Constitutional Court found that the failure to promote an employee is "*a quintessential labour-related issue*" and not administrative action. This was so in that the unfair labour practice jurisdiction of the LRA gives effect to the constitutionally recognised right to fair labour practices, almost as clearly as it does to unfair dismissal, which was the subject of the dispute in *Chirwa v Transnet Ltd and Others,*[3] (*Chirwa*) in which matter the Court made it clear that where "*an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA*".[4] The reasoning in *Gcaba* was that:

> *'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.*'[5] [Footnotes omitted]

[14] In *De Villiers v Education, Western Cape Province,*[6] the Labour Court found that the discretion not to reinstate an employee's contract of employment after a deemed dismissal in terms of s14 of the Employment of Educators Act 76 of 1998, a provision similar to s17 of the PSA, involved the exercise of a statutory

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[1] *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC) at para 28; *Merafong City Local Municipality v South African Municipality Workers Union and Another* [2016] 8 BLLR 758 (LAC) at paras 35-39.
[2] 2010 (1) SA 238 (CC) at para 66.
[3] [2008] 2 BLLR 97 (CC).
[4] Ngcobo J at para 124.
[5] At para 64.
[6] (2010) 31 ILJ 1377 (LC) at para 21.

power, which, since it did not have its source in the employment contract, constituted administrative action. This was found to be so recognising that -

> *'…as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following SARFU[7]) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute …, whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject-matter of the power). I venture to suggest that the existence of any alternative remedies may also be a relevant consideration - this was a matter that clearly weighed with the court in both Chirwa and Gcaba, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation.'*[8]

[15] The Court concluded that if oversight in the form of a review in terms of s158(1)(h) were not to be exercised over the statutory power exercised, that power would be left unchecked.[9]

[16] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal,*[10] the MEC sought the setting aside of the promotion of two employees on the basis that the promotions were not lawful, reasonable or fair and that they were invalid. The Constitutional Court found that the true nature of the application was a review of the legality of the promotions under the Public Service Act (Proclamation 109 of 1993) and not a review of administrative action under PAJA. The Court stated that any reliance on s33 of the

[7] *President of the Republic of South Africa and Others v South African Football Union and Others* 2000 (1) SA 1 (CC).
[8] At para 19.
[9] At paras 20 and 24.
[10] 2014 (3) BCLR 333 (CC).

Constitution of the Republic of South Africa, 1996 (Constitution) or PAJA to establish the grounds of review "*would be misplaced in the light of this Court's jurisprudence and the particular facts of this matter*"[11] when "*the true nature of the application is one for judicial review under the principle of legality, sought in terms of section 158(1)(h)*".[12]

[17] While in *MEC for Department of Health v Weder,* [13] a review under s158(1)(h) of a decision taken in terms of s17(3)(b), this Court proceeded on the basis of a concession made by counsel for the appellant that the review was one based on the residual principle of legality,[14] in *Hendricks v Overstrand Municipality,*[15] *Hendricks*) it was found that a review in terms of s158(1)(h) of a decision not to dismiss a senior municipal police official on corruption charges, concerned the review of administrative action within the meaning of PAJA. In *Hendricks*, the Court approached the matter on the basis that a decision taken by the state in its capacity as employer could be reviewed on any grounds permissible in law, if no other remedy is available. The grounds permissible in law were identified as (i) those listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) on the basis of the constitutional principle of legality. [16] Thereafter, in *Merafong City Local Municipality v South African Municipality Workers Union and Another,*[17] this Court took the view that the grounds permissible in law for a review in terms of s158(1)(h) included legality and rationality; and, if the acts constitute administrative action, on those grounds stipulated in PAJA.

[18] More recently in *Minister of Labour and Another v Public Services Association of South Africa and Others,* [18] a review of the Minister's reversal of the designation of an official appointed as Registrar of Labour Relations in terms of s108(1) of the LRA, this Court, recognising a fine line between administrative

[11] At para 27.
[12] At para 28.
[13] [2014] 7 BLLR 687 (LAC) at paras 33-35.
[14] At para 33.
[15] [2014] 12 BLLR 1170 (LAC) at paras 21 and 32.
[16] At para 29.
[17] [2016] 8 BLLR 758 (LAC).
[18] [2017] (2017) 38 ILJ 1075 (LAC).

action under section 33 of the Constitution and public and employment relationship issues in the public sector,[19] found that the decision of the Minister constituted administrative action within the meaning of s33 of the Constitution.[20] It found this to be so having regard to the source and nature of the action, whether the action involves, or is closely related to, the formulation of policy, or to the initiation and/or implementation of legislation.[21]

[19] The current matter is concerned with the exercise of a power in terms of s17(3)(b), which neither has its source in the contract of employment, nor falls within the ambit of either the LRA's unfair dismissal or unfair labour practice jurisdiction. As such, the decision whether to approve the reinstatement of an employee on good cause shown, while a decision taken by the state as employer, involves the exercise of a legislated public power by a public functionary.

[20] The appellant sought that the MEC's decision be set aside on a number of grounds which included unlawfulness, irrationality and with a faint reference made to unreasonableness. Whilst he would have benefitted from a clearer pleading of the grounds on which he sought the review, in essence the application was approached on the basis that the MEC's decision was reviewable on grounds of legality.

[21] It is now trite that inherent in our constitutional order is the principle of legality in terms of which by virtue of the rule of law public functionaries, in their exercise of public power, are required to act within the powers granted to them by law[22] and arrive at decisions which are lawful, not arbitrary and are rationally related to the purpose for which the power was given.[23] There can be little doubt that that the MEC's decision is capable of review under s158(1)(h) on the grounds of legality. Since it was not contended that the MEC's decision constituted

[19] At para 49.
[20] At para 57.
[21] At para 52.
[22] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC) at para 58.
[23] *Pharmaceutical Manufacturers, Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

administrative action, whether a review on such basis would be apposite does not require determination in this matter.

[22] Turning to the facts of this case, since s17(3)(a)(i) provides that an employee *'…shall be deemed to have been dismissed 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',* after having been absent from work for a period exceeding one calendar month, the appellant was deemed, given his unauthorised absence in excess of this period, to have been dismissed from his employment by operation of law *'with effect from the date immediately succeeding his … last day of attendance at his … place of duty'.* Yet, on his return to work on 17 June 2011, the appellant was not informed by the Department of his deemed dismissal. Instead, he was permitted to return to his work and continued to render services for the Department as his employer for a period in excess of seven months, during which time it was undisputed that he was "*issued with duties and instructions*" and was remunerated by the Department for his services.

[23] By its nature, an employment contract is an agreement in which an employee works for an employer in exchange for remuneration.[24] 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. This is so given that his deemed dismissal took effect by operation of law in terms of s17(3)(a)(i) on "*the date immediately succeeding the employee's last day of attendance at his or her place of duty*" and not on any later date determined by the employer. The appellant could no longer be deemed to have been dismissed after he had been reinstated.

[24] If reinstatement did not follow his deemed dismissal, it is difficult to understand on what basis the Department then accepted the appellant's tender of his services and compensated him for those services rendered. Furthermore, the fact that an investigation may have been contemplated to determine the reason

[24] *Board of Executors Ltd v McCafferty* (1997) ILJ 949 (LAC); [1997] 7 BLLR 835 (LAC).

for the appellant's absence from work, or that such investigation in due course was undertaken, does not alter the fact that the law prescribed the date on which the appellant's deemed dismissal took effect. Nor does it alter the fact that the appellant had been reinstated into his employment subsequent to such deemed dismissal having been effected.

[25] The Department was, following the appellant's reinstatement, not entitled thereafter to rely on his deemed dismissal, when no further period of unauthorised absence from work had arisen after the appellant's return to work. Given such reinstatement, it was not open to the Department under s17(3)(a)(i), to indicate, as it did in its letter of 21 May 2012, 11 months after the appellant's return to work, that his contract of employment had been terminated by operation of law.

[26] It follows that in relying on the appellant's deemed dismissal after he had been reinstated, the MEC acted unlawfully, irrationally and outside of 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, which by operation of law had taken effect on "*the date immediately succeeding the employee's last day of attendance at his or her place of duty*" and when the employment relationship between the parties had thereafter been restored. The failure of the MEC on 3 September 2012 to find this to be so in considering the appellant's representations in terms of s17(3)(b), was therefore unlawful, arbitrary and irrational and the Labour Court erred in failing on review to find so.

[27] Although counsel for the respondents sought to place reliance on *Du Toit v Minister of Safety and Security and Another,*[25] in which it was held that a police officer's deemed discharge following a prison sentence cannot be undone by extinction of the conviction through the granting of amnesty, the facts of that matter are distinguishable in that in that matter no decision to reinstate had been taken following the deemed dismissal.

[28] It follows for these reasons that the decision of the MEC fell to be set aside on review on the application of the principle of legality. Having found this to be so,

[25]2009 (1) SA 176 (SCA).

it is not necessary to determine the merits of a review of the MEC's decision as administrative action.

[29] Since reinstatement is the primary remedy provided in terms of s193 of the LRA, there is no reason as to why the appellant, who had a long and previously unblemished record of service and who seeks reinstatement, should not be retrospectively reinstated into the same or similar position of employment with the Department.

[30] Having regard to considerations of law and fairness there is no reason as to why costs should not follow the result.

Order

[31] For these reasons, the following order is made:

1. The appeal succeeds with costs.

2. The order of the Labour Court is set aside and replaced as follows:

'*1. The application in terms of s158(1)(h) of the Labour Relations Act 66 of 1995 to review the decision on 3 September 2012 of the second respondent, the Member of the Executive Council for Roads and Transport, Limpopo Province, succeeds with costs.*

2. The decision of the second respondent on 3 September 2012 not to reinstate the appellant, Mr M J Ramonetha, is set aside.

3. The first respondent, the Department of Roads and Transport, Limpopo Province, is to reinstate the appellant, with retrospective effect and by no later than 30 November 2017, into the same or similar position, with the period of the appellant's unauthorised absence from work from 10 February 2011 to 17 June 2011 to be treated as unpaid leave.

4. Back pay is to be paid to the appellant by the first respondent by no later than 30 November 2017, with interest accruing on such amount thereafter at the prescribed rate of 10,5%.'

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Savage AJA

Coppin JA and Sutherland JA agree.

APPEARANCES:

FOR THE APPELLANT:	Mr C Goosen
	Instructed by Thapelo Kharametsane Attorneys
FOR THE RESPONDENTS:	Mr M B Matlejoane
	Instructed by the State Attorney