

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.  
(2) OF INTEREST TO OTHER JUDGES: YES/NO.  
(3) REVISED.

28/05/23

DATE

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J562/2021

In the matter between:

**SANDILE RAYMOND NGOMANE**

**Applicant**

and

**MEC FOR MPUMALANGA DEPARTMENT OF PUBLIC WORKS,  
ROADS & TRANSPORT**

**First Respondent**

**MPUMALANGA DEPARTMENT OF PUBLIC WORKS,  
ROADS AND TRANSPORT**

**Second Respondent**

Heard: 30 June 2022

Delivered: 20 May 2023

**JUDGMENT**

**LERPAN AJ**

## Introduction

- [1] This is an application brought by the Applicant in terms of section 158(1)(h) of the Labour Relations Act (LRA)<sup>1</sup> for a declaration that he did not abscond from his duties within the meaning of section 17(3)(a)(i) of the Public Service Act (PSA)<sup>2</sup>. The Applicant alternatively seeks an order that the failure of the First Respondent to respond to his written representations in terms of section 17(3)(b) of the PSA be reviewed on the grounds/principle of legality.

## Background

- [2] The Applicant was employed by the Second Respondent on 1 April 2007 as an electrical Artisan based at Piet Retief Hospital.
- [3] The Applicant reported for duty on 1 December 2018 and was informed by his superior, the Artisan Foreman, that he should return home and that he will be contacted by officials from the Second Respondent's head office. He had not worked from this date until February 2019 and during this period, he was not contacted by any official to enquire about his whereabouts and why he was absent from work.
- [4] In February 2019, the Applicant was called to report to the Artisan Foreman and upon his arrival, the Applicant was informed verbally that he had been dismissed. The Applicant was given a copy of an internal memorandum which was addressed to the Head of Department of the Second Respondent requesting the approval to terminate his services in terms of section 17(3)(a)(i) of the PSA. This approval was granted with effect from 27 September 2018.
- [5] On 11 March 2019, the Applicant, through the Public Servants Association of South Africa, made written representations to the First Respondent in terms of section 17(3)(b) of the PSA giving reasons why he should be reinstated. There was no response to this letter and a follow-up letter was sent to the First Respondent on 24 April 2019 and again on 06 September 2019. None of the representations were responded to.

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<sup>1</sup> Act 66 of 1995, as amended.

<sup>2</sup> Proclamation no 103 of 1994, as amended.

## Issues

[6] The following questions require determination:

- 6.1 Have the jurisdictional requirements of section 17(3)(a)(i) of the PSA been met.
- 6.2 If the jurisdictional requirements have been met, does the failure of the First Respondent to respond to the Applicant's written representations, made in terms of section 17(3)(b) of the PSA, amount to reviewable conduct on the grounds/principle of legality.

### Jurisdictional requirements in terms of section 17(3)(a)(i) of the PSA

[7] Section 17(3)(a)(i) of the PSA provides:

'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.'

[8] The Applicant submits that he had not absconded from work but had been instructed to return home by the Artisan Foreman, his superior. The crux of the Applicant's argument is that it was an incorrect assumption to treat the Applicant as having absented himself from his employment within the meaning of section 17(3)(a)(i) of the PSA as he had been at home, on his uncontested version, at the instruction of the Artisan Foreman.

[9] The following facts are common cause. The Applicant was employed as an electrical Artisan. In October 2018, he had been informed by the Artisan Foreman, that he must return home and await instructions from head office, but received no communication from the head office until he was called back to report to his superior in February 2019. The question that is to be asked, as formulated

in the case of *Grootboom v National Prosecuting Authority and another*<sup>3</sup> (*Grootboom*) is whether "his conduct amounts to absenting himself from his official duties without permission".

[10] In *Grootboom*, the Constitutional Court dealt with a similar matter, where an employee who had been suspended decided to take a 12-month scholarship abroad. The employee was then discharged under the predecessor to section 17(3)(a)(i) of the PSA, which was section 17(5)(a)(i), which contained similar wording. The Court in that case dealt with the question of whether the employee had absented himself, and it held, *per* Boeselo AJ, that the employee had not absented himself from his employment as he had been on suspension. It had been impossible for him to have absented himself within the meaning of that section. Thus, the Court found the essential requirements of that section had not been met.

[11] I, therefore, based on *Grootboom*, make a similar finding. The simple answer is that the Applicant was instructed not to report for work with the permission of his superior, and as such, he had not absented himself without permission. This means that, as in the case of *Grootboom*, one of the main requirements of section 17(3)(a)(i) of the PSA had not been met.

[12] There is an internal memorandum which was relied upon in evidence by the Applicant which claims that the Second Respondent did not authorise the Applicant's absence and that the Artisan Foreman had called the Applicant several times during his absence. This evidence was not entered by either the First or Second Respondents and there was no confirmatory affidavit confirming the content of such a memorandum, and it constitutes inadmissible hearsay.

[13] In light of the fact that an essential requirement of section 17(3)(a)(i) of the PSA was not met, the deemed dismissal of 27 September 2018 cannot be considered to have taken place.

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<sup>3</sup> [2014] 1 BLLR 1 (CC) at para 41.

[14] Given the above finding, I do not find it necessary to make a ruling on the failure of the First Respondent to respond to the Applicant's written representations in terms of section 17(3)(b) of the PSA.

[15] Finally, in regard to costs, there is no reason why costs should not follow the result.

[16] In the premises, the following order is made:

Order

1. It is declared that the Applicant did not absent himself from his official duties without permission as contemplated by section 17(3)(a)(i) of the Public Service Act 1994 as amended and that he continues to be in the First Respondent's employ.
2. The Respondents are jointly and severally ordered to pay the costs of this application, the one paying the other to be absolved.



F Leppan

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Madonsela Mthunzi Attorneys

For the Respondent: State Attorney Nelspruit

LABOUR COURT