



JURISDICTIONAL RULING

Case No: **PSHS267-20/21**

Commissioner: **Allan Kayne**

Date of ruling: **13 February 2021**

In the matter between:

PSA OBO VUYISILE PATRICK MPONDO

(Applicant/ Union)

and

DEPARTMENT OF HEALTH- NORTHERN CAPE

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servant Association of South Africa ("the PSA") referred a dispute, on behalf of Mr. Vuyisile Patrick Mpondo ("the applicant"), to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 191(1) of the Labour Relations Act 66 of 1995 ("the LRA"), regarding his dismissal related to misconduct. The arbitration took place virtually, using the Zoom platform, on 29 January 2021. In addition to the evidence led during the proceedings, parties were afforded an opportunity to submit written arguments by 05 February 2021.
2. The applicant was represented by Mr. Russle Bindeman, a union official of the PSA, while Mr. Jack Pudikabekwa appeared for the respondent.

3. The applicant submitted an electronic bundle of documents to be utilised during the proceedings.
4. The proceedings were electronically recorded, and the record filed with the Council's administration.

PRELIMINARY ISSUES

5. At the commencement of the proceedings, Mr. Pudikabekwa raised a preliminary issue claiming that the Council lacked jurisdiction to arbitrate the dispute as the applicant had never been dismissed. Instead, his services with the respondent had terminated by operation of law in terms of section 17(3)(a)(i) of the Public Service Act 103 of 1994 ("the PS Act"). He referred to a letter from the respondent's Head of Department ("HOD") to the applicant, dated 08 July 2020, which indicated that the applicant was deemed to have been dismissed, given his absence from duty without leave and/or permission from 01 August 2019 to date of the correspondence. Subsequently, the applicant had made a formal representation to the Executing Authority in terms of section 17(3)(b) of the Public Service Act, with the assistance of his union on 07 August 2020 seeking reinstatement. Therefore, he submitted that the applicant ought to be challenging the decision not to reinstate him via the Courts and not the Council.
6. Mr. Bindeman responded that the termination of the applicant's employment constituted a dismissal as there had been no response to his application for representation to the Executing Authority. For the provisions of section 17(3)(a)(i) to take effect, the employee would need to be absent without permission and such that his conduct clearly indicates that he wished to repudiate his contract of employment. In the present matter, the applicant tendered his service to the respondent, and the respondent was fully aware of where he was working at all times. As such, the applicant claimed that the respondent unfairly dismissed him for misconduct, which fell outside the purview of section 17(3)(a)(i) of the PS Act.
7. Having heard the brief submissions made by parties, I ruled that it was evident that the existence of a dismissal was in dispute, given the respondent's reliance on section 17(3)(a)(i) of the Public Service Act as opposed to the applicant's claim that he had not absented himself from work and, accordingly, that he could

not have been deemed to have been discharged from service by operation of law. Section 192(1) of the LRA prescribes that *"In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal"*. Accordingly, the applicant would be required to lead evidence to discharge the onus required in terms of section 192(1) in order to determine whether jurisdiction vested in the Council to hear the dispute.

SURVEY OF EVIDENCE AND ARGUMENT

8. The following constitutes a summarised version of the evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

Vuyisile Patrick Mpondo

9. The applicant testified under oath, setting out in great detail, his history with the respondent. While based at the Galeshewe Clinic, in 2011 as a Professional Nurse, he requested a transfer, owing to his low CD4 count and was sent to the James Exum offices, where insinuations were made that he was HIV positive, which was untrue. He requested another transfer out of the James Exum offices. Instead, during 2014, the respondent discharged him in terms of section 17(3)(a)(i) of the PS Act, despite him presenting a medical certificate confirming his incapacity and absence from work. He referred his dispute to the Labour Court and, realising their error, in 2019, the respondent agreed to reemploy him. According to the order issued under case C824/2015, he was to report for duty on 01 June 2019, or the next working day thereafter.
10. He duly did so, and Ms. Kgape (Director: HAST) advised him to liaise with the Chief Director, Ms. Mazibuko, who granted him permission to return to the District, rather than continue working at James Exum. Ms. Kgape drove him to the West End Hospital to meet with Mr Jaka and left him there. Mr. Jaka failed to arrive for the appointment, and the applicant returned three times thereafter.

Eventually, he resorted to leaving his contact details with Mr. Jaka's Assistant and sent him a text message, which remained unanswered. Not wanting to face a similar situation which resulted in his previous termination, he returned to the James Exum offices where he learned that Ms. Kgape was on family responsibility leave. Ms Emmanuel, her Assistant, notified the Chief Director of his situation, and she advised him to await Ms. Kgape's return. Upon her return, she advised him to wait until she was able to resolve the situation.

11. The applicant continued to render service at the James Exum offices and, despite not being provided with a workspace and being made to feel very unwelcome, the respondent paid him his remuneration. Ms. Katz replaced Ms. Kgape as his supervisor on 01 August 2019 and, when he explained his circumstances to her, she also advised him that she would try and resolve it, which she failed to do.
12. Although he reported for work on a daily basis at the James Exum offices between August 2019 and February 2020, the respondent failed to provide him with work and even excluded his name on the attendance register, later adding it and suggesting that he was absent on those days for which he had not signed. However, he had taken photographs of the original registers. According to the applicant, he saw Ms. Katz, and she saw him occasionally at the James Exum offices. When necessary, she would call him to come and collect correspondence from her office. Notably, he only absented himself from work when his younger brother died on 25 February 2020, and he communicated his absence to her, to which she responded, requesting a copy of the death certificate for family responsibility leave purposes, in writing, which letter he presented into evidence, dated 26 February 2020.
13. On 27 March 2020, the HOD requested the assistance of all employees in dealing with the COVID-19 pandemic, and he volunteered to assist at the N8 provincial border post to perform traveller screening. While stationed there, he was scheduled in the off duties register and signed the attendance registers daily, where he worked under Mr. Jaka, who approved the shift rosters. He recalled, on one occasion, how his colleague had, in his presence, confirmed telephonically with Ms. Katz that he was stationed at that border post. He continued rendering service there until 13 May 2020 when he returned to the

James Exum offices. On 15 June 2020, the respondent stopped paying him his salary and, when he attempted to meet with Mr Strydom and the HOD, he was advised to return home by the HOD's Assistant and Ms. Emmanuel and was advised by them that he would be called back.

14. Despite never being absent from work for more than 30 days, on 09 July 2020, he was issued with a letter of discharge in terms of section 17(3)(a)(i) of the Public Service Act, which had been drafted on 30 April 2020, but was only signed by the HOD on 08 July 2020. He presented a copy of the representation made by his union shortly thereafter to the MEC. This termination of service was, in fact, the third by the respondent during his tenure.
15. During cross-examination, the respondent presented a letter from Ms. Katz to the applicant, dated 09 December 2019, in which she instructed him to resume his official duties, given that he had absented himself between 01 August 2019 and 09 December 2019. She further called on him to furnish her office with substantial reasons explaining his absence within five days whereafter a decision would be taken whether or not to deal with the matter in terms of the disciplinary code. The applicant confirmed receipt thereof and that he had reverted to Ms. Katz in this regard, those documents unfortunately not being included in the bundle. He questioned her honesty especially why she had issued such a letter in any event especially as he reported to her, she had seen him in the building, and he had even interviewed him when she was first appointed to the post on 01 August 2019. Furthermore, he had met with her to discuss his concerns regarding the lack of workspace for him on several occasions in that period.
16. The applicant went on to say that, although he had not submitted a formal grievance, he had addressed several letters to the respondent, including its HOD, regarding his employment concerns, all of which went unanswered.
17. He testified that he was also unaware of his right to enforce the order of the Labour Court if he believed that the respondent had failed to comply with the provisions thereof and, as a result of differences between him and his then union, NEHAWU, he had terminated his membership and joined another union who was willing to assist him.

18. The applicant continued that the respondent ought to have provided him with a workspace and, thereafter, to allocate specific duties to him after his reemployment. He conceded that Ms. Katz might not have necessarily been aware that he heeded the HOD's at the end of February 2020 to mobilise, ahead of the COVID-19 lockdown, as she was not present at that meeting. However, he reiterated how he had been present when his colleague advised her that he was rendering service at the N8 provincial border post. He recalled how they had occasionally returned to the James Exum offices to collect supplies where he encountered the odd employee as most were allocated duties outside of the office during lockdown.
19. Asked if he scheduled his own duties, the applicant submitted that he had merely responded to the HOD's call to the respondent's employees to mobilise, and "do something". He questioned why the respondent expected him to ask Ms. Katz when none of his other colleagues were expected to check their deployment with their supervisors.

RESPONDENT'S EVIDENCE

20. The respondent declined to call any witnesses to present evidence, relying instead on its cross-examination of the applicant.

ANALYSIS OF EVIDENCE

21. Pertinent to the applicant's case is that the respondent re-employed him in terms of an order of the Labour Court and that he was expected to return to work on the first working day on or after 01 June 2019. He did so, and on his undisputed evidence, he engaged with the respondent about returning to the District. Despite arrangements with Mr. Jaka that he be accommodated, this was not forthcoming. After several unsuccessful attempts to meet with Mr. Jaka, he returned to the offices where he worked prior to the termination of his services in 2014. His undisputed evidence suggests that the respondent's representatives to whom he reported, failed to accommodate him there or assist with the resolving the *impasse* with the District. Ms. Ngape, who was noted to be the respondent's representative, tasked with facilitating the applicant's reemployment, failed to

ensure that he was properly reintegrated into the workplace and proceeded to move on without resolving the applicant's concerns regarding his placement. Notably, the respondent presented no evidence to rebut the applicant's claims that the respondent did not assist him or that he was left to flounder in the hallways of the James Exum offices.

22. Similarly, Ms. Ngape's replacement, in the form of Ms. Katz, according to the applicant, assured him that she would resolve his displacement but failed to do so. Instead, in correspondence addressed to him, dated 09 December 2019, she claimed that he had been absent from work from 01 August 2019 until 06 December 2019 and that, he was required to immediately report for duty as well as furnish her with reasons for his absence within five working days. The applicant claims to have done so, and Ms. Katz was never called upon to refute his claims that he was, in fact, rendering service in the James Exum offices and that she had encountered him there between 01 August 2019 and June 2020 (excluding the period where he assisted at the N8 provincial border post).
23. The applicant further claimed that the only absence during his recent tenure with the respondent was following his younger brother's death. To this effect, he produced a letter, penned by Ms. Katz, in which she offers her condolences and requests him to furnish her with an application for bereavement leave.
24. The applicant introduced several attendance registers into evidence during the month of April 2020, reflecting him being on duty, screening travellers at the N8 provincial border post. Interestingly, the signature approving payments is that of Mr. Jaka, who was initially responsible for accommodating the applicant in the District but failed to do so, according to the applicant. None of the registers presented into evidence were disputed by the respondent's representative and, accordingly, are accepted as well as the applicant's attempt, via WhatsApp to contact Ms Katz regarding his lack of salary payment on 15 June 2020.
25. The evidence presented by the applicant suggests on the balance of probabilities that he was not absent for work apart from a short bout of family responsibility leave at the end of February 2020, regarding which the respondent was aware.

26. Furthermore, it was not disputed by the respondent that the applicant made attempts to meet with other representatives of the respondent to resolve his concerns, including Mr Strydom and the HOD, to no avail.
27. Subsequently, the respondent simply delivered a letter of discharge by operation of law in terms of the PS Act to the applicant and, despite him making a formal representation to the Executing Authority to reinstate him, dated 07 August 2020, no response has been forthcoming to date, some six months later.
28. Section 17(3)(a)(i) of the PS Act provides as follows:
- “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.”*
29. The Courts have adjudicated this contentious section of the PS Act on numerous occasions. In *HOSPERSA v MEC for Health* (D218/03) [2003] ZALC 89 (18 August 2003), the Labour Court held, at paragraphs [36] and [37] that invoking section 17(5) of the then PS Act, which was later amended by the Public Service Amendment Act, 30 of 2007, was a draconian procedure to be used sparingly when the disciplinary code could not be invoked or where the employer had no other alternative. In that judgment, Pillay, J states that such an instance would occur where the employer was unaware of the employee's whereabouts, could not contact him/her or where the employee made it quite clear that he/she had no intention of returning to work. He indicates that termination by operation of law under this section excludes the employee's right to a fair hearing before being found guilty and dismissed and deprives him/her from challenging the termination of service through conciliation and arbitration.
30. Essentially, for a public service employer to rely on a deemed dismissal by operation of law in terms of section 17(3)(a)(i), the following elements should be present:

- 30.1. The employee must have been absent for a period of more than one calendar month.
- 30.2. The absence must be without permission.
- 30.3. The employee's whereabouts must be unknown, or there should be a reasonable inference that he/she has no intention of returning to work.
31. On the undisputed evidence of the applicant, apart from one week where the respondent was aware of his absence, he reported for duty on each day required of him. Without any evidence to the contrary, he was not absent from work without permission at any stage. The respondent can also not claim that it was unaware of his whereabouts. On his undisputed version, Ms. Katz observed the applicant's presence on occasions within the James Exum offices, even meeting with him. Although the applicant appears to be somewhat of a law unto himself, deciding to heed the call of the HOD to assist during the initial COVID-19 lockdown and be deployed to the N8 provincial border post, his evidence overwhelmingly suggests that the respondent was aware that he was rendering service there, and is also confirmed by the attendance registers that he completed indicating this.
32. It should also be noted that the contents of the HOD's letter were fundamentally incorrect claiming that the applicant had absented himself from the workplace from 01 August 2019 to the date of the correspondence as the evidence adduced during these proceedings proved substantially otherwise.
33. Having considered the totality of the termination of service, the respondent's reliance on section 17(3)(a)(i) of the PS Act is misplaced given that, on the evidence adduced, the applicant was not absent for more than a calendar month, and the respondent was generally aware of his whereabouts. It is highly improbable that the applicant, having previously been discharged by the respondent in terms of section 17 of the PS Act, would not seek to prevent such a recurrence. While the applicant is in no way blameless in the circumstances, the respondent similarly appears to have given him the proverbial run around and patently failed to ensure that he was properly reintegrated as part of his reemployment and does not appear to have managed the applicant adequately.

34. On this basis, the HOD as representative of the respondent employer, in his letter to the applicant on 09 July 2020, effectively did nothing more than to advise the applicant that the respondent was terminating his services, thus constituting a dismissal in terms of section 186(1)(a)¹ of the LRA.
35. Therefore, the applicant has discharged the onus required of him in terms of section 192(1) of the LRA to prove the existence of his dismissal by the respondent.

RULING

36. Accordingly, jurisdiction vests in the Council to hear this dispute.
37. The Council must reschedule the matter for arbitration at its earliest convenience.



Allan Kayne

¹ "Dismissal" means that an employer has terminated employment with or without notice.