DEEMED DISMISSALS AND SUSPENSIONS IN THE PUBLIC SECTOR

Grootboom v National Prosecuting Authority (2014) *ILJ* 121 (CC)*

1 Introduction

Two forms of suspension are known in South African law, namely, punitive and precautionary suspensions. Punitive suspensions are given as a form of a disciplinary sanction (*Koka v Director-General: Provincial Administration North West Government* [1997] 7 *BLLR* 874 (LC)), while precautionary suspensions are effected pending an investigation (*Bargarette v Performing Arts Centre of the Free State* (2008) 29 *ILJ* 2907 (LC)). In the latter case, the suspension allows the employer time and space to conduct an investigation and to prevent the employee from tampering with the enquiry. Whether the suspension culminates in the employee's dismissal or reinstatement, the LRA demands that the employee be treated fairly as an unfair suspension may constitute an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act (the LRA).

In case of a dismissal the LRA requires that a dismissal must be both substantively and procedurally fair. With regard to the procedural fairness requirement, the Code of Good Practice (Chapter 8 of the LRA) suggests that the employer hold an enquiry to determine whether there is a ground or grounds for dismissal. The enquiry does not have to be formal but the employer must inform the employee about the allegations and give such employee an opportunity to state a case in response (Item 4). However, the Code mentions that in exceptional circumstances the employer can dispense with pre-dismissal procedures, if that employer is reasonably unable to follow these guidelines (Item 4). The Public Service Act 103 of 1994 (PSA) is an example of legislation that allows employers to dispense with the procedural guidelines of the Code, citing the employee's unauthorized absence as an exceptional circumstance. Section 17(3)(a)(i) of the PSA states that a public-service employee who absents himself or herself from official duties without permission from of his or her head of department shall be deemed to have been discharged from the public service on account of misconduct. Section 17(3)(b) affords an opportunity to employees so discharged to make representations to their employers, showing good cause why they should be reinstated. Section 14(1)(a) of the Employment of

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Educators Act 76 of 1998 (EEA) contains provisions similar to those of section17(3) of the PSA, however, these apply only to educators.

One can probably take the right to make representations mentioned above as an equivalent of the right to procedural fairness in the LRA, and also as a measure of complying with the guidelines stipulated in the Code. However, the right to make representations is distinct from the procedure under the LRA because it does not take effect unless invoked by the employee. Since the enactment of the PSA and the EEA, the position of suspended employees has been uncertain. The Constitutional Court in *Grootboom v National Prosecuting Authority* ((2014) *ILJ* 121 (CC)) dealt with deemed dismissals in the PSA and the EEA and the extent to which the provisions of these Acts can apply to suspended employees in the public sector. These issues are explored in this case note.

2 The facts

The applicant, Derrick Grootboom, was employed by the National Prosecuting Authority (NPA) as a Public Prosecutor with effect from April 2001. He was transferred on various occasions to different regions of the NPA. When he commenced his duties in 2001, Mr Grootboom was stationed at Springbok, a town in the Northern Cape. In 2003 he was moved to Port Elizabeth and three years later (*ie*, in 2006), he was transferred to Upington but placed at Springbok with effect from February 2006. Whilst based at Springbok, the applicant's main task was to travel to various magisterial districts in and around Upington. This task entitled him to subsistence and travelling allowances. Because of discontent with the payment of his allowances Mr Grootboom lodged a grievance with the NPA. According to him, the employer did not respond to the grievance but suspended the applicant on 22 June 2003 for insubordination. A disciplinary hearing for this insubordination was scheduled for 21 September 2005. As a result of this disciplinary hearing, Mr Grootboom was found guilty and dismissed for misconduct on 28 March 2006.

Dissatisfied with his dismissal, the applicant referred the matter to the Public Service Coordinating Bargaining Council (PSCBC) for conciliation and arbitration.The arbitration hearing was set down for 1 and 2 June 2006. On 1 June 2006 the findings of the disciplinary hearing were set aside and the parties agreed that the applicant's disciplinary hearing would proceed in the form of a pre-dismissal arbitration. While on precautionary suspension the applicant was shortlisted by the Nelson Mandela Scholarship Fund to study in the UK for 12 months. It must also be mentioned that on 18 January 2006 the applicant wrote an email to the NPA enquiring whether it would be eager to grant him sabbatical leave to enable him to take advantage of the scholarship and further his studies, which were to commence in August 2006. The NPA, through one of its officers (Ms Ngobeni), responded by informing him that his leave would be unpaid and he had to sign the necessary leave forms. In July 2006 the applicant's attorneys wrote two letters to the NPA requesting the following: (i) that sabbatical leave be granted to the applicant; (ii) that the NPA make arrangements with the PSCBC to have the pre-dismissal arbitration finalized; and (iii) that the NPA

forward its policies and procedures pertaining to sabbatical leave to the attorneys. The pre-dismissal arbitration was set down for the 16th and 17th August 2006, but the applicant complained that since he had not been afforded 14 days' notice of the hearing, he had insufficient time to prepare. At his request the hearing was postponed *sine die* until he returned from his studies in the UK.

Subsequent to the postponement the applicant approached one Mr Engelbrecht in the offices of the NPA to sign the leave forms. Mr Engelbrecht refused to sign the forms because the applicant insisted on paid study leave. After his disagreement with Engelbrecht on whether the study leave should be paid, the applicant left the offices without having completed and signed the requisite leave forms. On 18 August 2006 the applicant left the country to pursue his studies at the University of Southampton. The NPA continued paying his salary. On 31 October 2006 the NPA unilaterally and without notice, ceased to pay the applicant's remuneration. The applicant wrote an email to the NPA stating his dissatisfaction and requesting that his salary be reinstated. This is the email that provoked the seven-year legal scuffle between Mr Grootboom and his employer. Instead of reinstating his salary, the NPA wrote an email to the applicant informing him that, in terms of section 17(3)(a)(i) of the PSA, as he had not been given permission to go on study leave outside South Africa, he was by operation of law deemed to have been discharged from public service with effect from 15 September 2006. Further, the email informed the applicant of his right, in terms of section 17(3)(b) of the PSA, to make representations to the Minister of Justice and Constitutional Development (the Minister) regarding his reinstatement. The applicant stayed and continued with his studies in the UK until 30 July 2007, when he returned to the Republic.

Upon his return the applicant commenced with the pursuit of his reinstatement. Acting in terms of section 17(3) (b) of the PSA, he made representations on 5 September 2007, attempting to show good cause for having been to the UK for 12 months and also to request that he be reinstated. On 22 February 2008 the applicant received a letter from the NPA advising him that the Minister, having "applied her mind to the representations" had decided to uphold the dismissal by operation of law. The applicant approached the Labour Court to institute proceedings in terms of section 158(1)(h) of the LRA to have his deemed discharge reviewed and set aside in terms of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Labour Court held that the applicant was discharged by operation of law. This meant that the NPA did not commit any conduct that could be subject to review by the court under PAJA. Therefore the applicant's discharge (by operation of law) did not constitute an administrative action. The Labour Court held further that the applicant went abroad without the NPA's permission and this absence warranted his dismissal in terms of section 17(3)(a)(i) of the PSA. The applicant approached the Labour Appeal Court to have the decision of the Labour Court overturned. Following the reasoning of the Labour Court, the Labour Appeal Court dismissed the appeal with costs. It is against this background that the matter had to be heard by the Constitutional Court.

3 The case before the Labour Court

In the Labour Court, the applicant invoked the grounds in section 6(2) of PAJA to review the decision by the NPA (and confirmation thereof by the Minister of Justice) to dismiss him. In the alternative, he wanted to challenge the decision of the Minister to uphold the decision of the NPA in terms of section 6(2) of PAJA. He claimed that these decisions were based on bias, ulterior motive, failure to take into account relevant considerations, bad faith and arbitrariness. In dismissing the application, Molahlehi J held that a suspended employee remains under the authority of the employer during suspension. Therefore this employee is bound to inform the employer about his whereabouts and about anything that may dissuade him from resuming his duties should he be asked to do so. Against the applicant's contention the court held that the NPA was not aware of the applicant's whereabouts and the letter that Ms Ngobeni wrote to him (in response to his request for a sabbatical leave) purported no more than to inform the applicant that his study leave would be unpaid and that he needed to complete the requisite forms to be eligible for it (par 17). The Court also took into account the refusal of Mr Engelbrecht to sign the leave forms. Provoked by the applicant's insistence on paid leave, Engelbrecht's refusal to sign meant that the leave forms were not completed as required and the sabbatical leave never came into being.

Interpreting section 17(3)(a)(i) of the PSA, the Court made reference to the case of *Phenithi v Minister of Education* ((2006) 27 *ILJ* 477 (SCA)). The court in *Phenithi* (*supra*) dealt with section 14(a) of the EEA which, as stated above, contains provisions similar to those of section 17(5) of the PSA. In answering whether the deemed discharge in the EEA amounts to an unfair labour practice, the court concluded as follows:

> "As to the ground that section 14(1)(a), read with section 14(2), violates the appellant's fundamental right to fair labour practices in terms of section23(1) of the Constitution, it is not clear what 'act' of the employer is alleged to be allowed by the section 'without considering the substantive and procedural aspects of the case'. It would be out of place to interpret the word 'act' to mean 'to decide to terminate or discharge', to which the answer again is that the employer takes no decision to terminate an educator's services under section 14(1)(a) of the Act. The discharge is by operation of law. In my view, the provisions create an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. In such a case there can be no unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'. Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome" (par 19).

With reference to the above authority Molahlehi J concluded that the NPA, by invoking the provisions of section 17(3)(a)(i) of the PSA, did not commit any "act" that can be contested before any of the dispute-resolution bodies including a court of law. This discharge was by operation of law and the Labour Court therefore lacked jurisdiction to review it.

In addressing the Minister's refusal to reinstate the applicant the Court had a challenge in determining whether an employee in the position of the applicant had a remedy in challenging this refusal to reinstate him. The

Court made reference to two approaches that the Labour Court usually follows in answering this question. The first approach was adopted by the Court in *Public Servants Association of SA obo Van der Walt v Minister of Public Enterprises* ((2010) 31 *ILJ* 420 (LC)). This approach proposes that a public servant whose representations failed to yield reinstatement must declare a dispute and refer it to the relevant bargaining council. The matter can eventually be reviewed if the bargaining council fails to resolve it by conciliation. This approach means in essence that once the employer refuses to reinstate the employee in terms of section 17(3)(b), the deemed dismissal in section 17(3)(a) changes into an ordinary dismissal, which can be challenged at the CCMA. The other approach was laid down by the Court in *De Villiers v Head of Department: Education, Western Cape Province* ((2010) 31 *ILJ* 1377 (LC)). This approach holds that the refusal to reinstate the employee constitutes administrative action that can be reviewed by the Labour Court. This proposition was made after considering the views held by the courts in *Chirwa v Transnet Ltd* (2008 (4) SA 367 (CC)) and *Gcaba v Minister for Safety & Security* ((2009) 12 *BLLR* 680 (CC)), which denounced the use of administrative-law remedies and institutions to resolve labour disputes. The Court held that this proposed approach is an exception to the principles laid down in *Chirwa* (*supra*) and *Gcaba* (*supra*). As an alternative the Court in *De Villiers* (*supra*) suggested that a refusal to reinstate can be reviewed by the Court for legality under section 158(1)(h) of the LRA, if the review procedure stated above is incorrect.

After scrutinizing the two approaches Molahlehi J held that the approach adopted in *De Villiers* supra was correct since it is in accordance with the interpretations in *Chirwa* (*supra*) and *Gcaba* (*supra*). Accordingly the judgments in *Chirwa* (*supra*) *and Gcaba* (*supra*) condemned the application of administrative law in dismissals emanating from the employment contract. However, if a termination of employment contract emanates from a particular statute, that termination will fall within the four corners of administrative action as defined in PAJA (par 46). Therefore since Mr Grootboom's termination of employment was informed by statute (the PSA) the refusal to reinstate him amounted to an administrative action. As a result the refusal can be reviewed by the Labour Court in terms of section 158(1)(h) and it can also be reviewed on the ground of legality (par 47).

Lastly, the Court decided that the applicant had a duty to inform his employer about his whereabouts during suspension. This duty also encompassed the duty to seek permission for absence that may make it impossible for the applicant to avail himself, should he be required to do so. The discharge and the refusal to reinstate the applicant were held to be in order (par 59).

4 The case before the Labour Appeal Court

In the Labour Appeal Court, Mr Grootboom raised two arguments. First, he argued that he had had permission from his employer to be away and, secondly, that he was on precautionary suspension and as such was neither required to report for duty nor needed permission from his employer to study overseas. In fact, one of the conditions of his suspension was that he refrain

from accessing his workplace. Based on these grounds Grootboom averred that the provisions of section 17(3)(a)(i) and section 17(3)(b) of the PSA were not applicable to his situation. In answering Grootboom's first contention, the Court referred to the letter that Grootboom received from his employer in response to his request for "provisional granting of scholarship". In order for him to be considered for the scholarship, he was required to present "a provisional" or "in principle" permission by his employer that he would be allowed to attend the course. It would not have served any purpose for Grootboom to be awarded the scholarship without any indication that he would be able to attend. He wrote a letter to make his employer aware of this fact and request a "provisional granting of scholarship". The Court of Appeal stated that the letter that Grootboom received in response (from Ms Ngobeni) stated categorically that his study leave would be granted without pay in order to enable the employer to secure a temporary replacement for him (par 34).

It was further mentioned that, when approaching Engelbrecht, Grootboom ought to have understood that he was going to complete the forms for unpaid leave as stated by his employer. He, therefore, could not elect to change the conditions of his leave and demand that it be granted with pay. According to the Court Engelbrecht was therefore not wrong to refuse to sign the leave forms because Grootboom's demand (that his leave be on pay) was contrary to the employer's stipulation. The contention that Engelbrecht prevented Grootboom from complying with the requirement of submitting leave forms was held to be without merit (par 35). Further reasons that the Appeal Court relied on to deny that the employee had permission to be on study leave related to the letters from Grootboom's attorneys requesting first that he be granted sabbatical leave and subsequently that the employer furnish the attorneys with relevant policies and procedures relating to that sabbatical leave. According to the Court, it would make no sense for the employee to request sabbatical leave if indeed he had been granted permission to go on study leave unconditionally and it would further not be sensible of him to request the relevant policies and procedures if he had already been granted permission to go and study overseas (par 36).

The principle laid down in the *Phenithi* judgment, referred to by the Labour Court, was reiterated here. The decision in *Phenithi* was in fact informed by the then Appellate Division's judgment in *Minister van Onderwys en Kultuur v Louw* (1995 (4) SA 385 (A)), which dealt with section 72 of the then Education Affairs Act (Act 70 of 1988 of the House of Assembly). The *Louw* decision, above, held that the coming into operation of the deeming provision is not reliant on any discretionary decision that may be a subject of administrative review. Further reliance was put on the decision of *Masinga v Minister of Justice, Kwazulu Government* ((1995) 16 *ILJ* 823 (A)). In this case, the appellant was a public prosecutor who was charged with misconduct and was placed under suspension pending the enquiry. While the enquiry was proceeding, the appellant obtained employment at the University of Natal's Community Law Centre as a Rural Paralegal Coordinator. Upon learning of this, the employer notified him that he was deemed to have been discharged on account of misconduct in accordance with section 19(29) of the Public Service Act (Act 18 of 1985 (Kwazulu)) with

immediate effect. This provision stated that if an officer who had been suspended from duty resigns or assumes other employment before finalization of the disciplinary action against him, that officer will be deemed to have been discharged on account of misconduct. The case in *Masinga* is the basis for the test applied by the Labour Appeal Court in *Grootboom*. The Court in *Masinga* (*supra*) held, that in assessing the wrongfulness of the dismissal of a suspended employee, it had to be determined first, whether the employee's engagement with the university was irreconcilable with his employment and, secondly, whether he was able to resume his duties with his employers should his suspension be lifted (par 828D−I). On the basis of the latter statement in *Masinga supra*, it was held that Mr Grootboom would not have been in a position to resume his duties with the NPA if his suspension were to be lifted.

In addressing the question whether section 17(3)(a) of the PSA applied to suspended employees, the Court in *Grootboom* (*supra*) held that such employees are subject to the authority of their employers. A suspended employee in this case was required to obtain the permission of his employer in order to go and study overseas. Moreover, it was held that the employee was not in a position to resume his duties if his suspension were to be lifted and that was made clear by the fact that, when he was informed that his contract of employment was terminated, he did not return to this country immediately. It also took the employee seven months to launch the challenge of the termination of his employment by making representations in terms of section 17(3)(b) of the PSA (par 37). Lastly, the Court made two interesting conclusions. Firstly, the Court held that for the application of section 17(3), it is immaterial whether the employer was aware of the whereabouts of the employee or not. This conclusion was made in rejection of the principle in *HOSPERSA v MEC for Health* ((2003) 12 *BLLR* 1242 (LC)), on which Mr Grootboom relied. Secondly the Court held that for section 17(3) to take effect, it is immaterial to consider whether there were less drastic measures which an employer can resort to (par 38). The decision of the Labour Court was upheld.

5 The case before the Constitutional Court

It is worth mentioning that Mr Grootboom conducted his own representation at the Constitutional Court. Also, the NPA was late in filing its written submissions and answering affidavits and written submissions, forcing the Court to exert a bit of effort in determining whether the late filing of submissions should be condoned. In the issues concerning the discharge of Grootboom, Bosielo AJ did not find anything wrong with the Labour Court's and the Labour Appeal Court's reliance on the *Louw* (*supra*) and *Phenithi* (*supra*) cases. The Constitutional Court therefore confirmed that the discharge did not constitute an administrative act capable of review (par 16). However, it was only in deciding whether the jurisdictional requirements of section 17(3) of the PSA were met that the Constitutional Court differed with the lower courts. The Court held accordingly that the employee, by undertaking studies in the UK, could not be said to have absented himself from his official duties. He had already been placed on suspension and

forbidden to perform any official duties with clear orders not to come to his place of employment or have any contact with his fellow employees. It was therefore impossible for an employee in such a position to absent himself from work. It is the suspension that renders him absent and section 17(3) of the PSA can never be used to further persecute him (par 40).

In answering whether Grootboom's going to the UK diminished his suspension, the Court started by borrowing from *Gladstone v Thornton's Garage* (1929 TPD 116), which defined suspension as follows:

> "When an employee is 'suspended' it appears to me that apart from any express instructions he must hold himself to perform his duties if called upon; though for the time being he is debarred from doing his work … First of all, if suspension is to be interpreted in the manner which I have indicated, it is an open question whether the man who is so suspended may or may not be called upon to render further services" (par 119).

Then the Court went on to reject the manner in which the Labour Appeal Court answered the latter question in *Gladstone* (*supra*). The view that Mr Grootboom would have found it impractical to return to the country to resume his duties if he were called upon to do so, was found to be speculative and without basis. There had to be evidence that he was in fact recalled and failed to do so (par 45). The employee's reliance on *HOSPERSA* was also supported when the Constitutional Court took into consideration the fact that the NPA knew where the employee was (par 45). So the decision to invoke section 17(3) of the PSA was deliberate on the part of the employer and the findings of both the Labour Court and the Labour Appeal Court, in upholding the employer's decision, were held to be wrong.

6 Analysis

The importance of fairness in labour discipline cannot be overemphasized. Disciplinary processes cannot be used as entrapments to catch employees out. In accordance with the principles laid down in the *HOSPERSA* decision, it would be unfair for the employer who knows the whereabouts of the employee to discharge that particular employee for his or her absence. When employees are appointed, not only their contact details but also those of their next of kin, are recorded by the employer. The PSA does not saddle the employer with a duty to trace the whereabouts of an employee who does not report for duty. However, there is a very small likelihood that the employer can be in the dark about the location of its employee. In the present case, the situation was even more obvious because Mr Grootboom had informed the NPA about his scholarship and the parties constantly communicated through e-mail messages. Given the above, it therefore means that deemed dismissals will be justified only under extreme situations. Moreover, the Labour Court and the Labour Appeal Court seemed to endow employers with unlimited authority over suspended employees. The Constitutional Court has, however, correctly stated that the employer cannot, through suspension, create the employee's absence and later punish the employee for it.

Another issue that the Constitutional Court did not sufficiently address is the position that should hold if the suspension of the employee is lifted. However, the Court relied on the fact that there was in fact no evidence that Grootboom was called to resume his duties and failed to do so (par 45). As short as it is, the remark in this case can consequently be taken to mean that an employee whose suspension is lifted must heed the call and take up his duties. And as a result failure to respond to this lifting of suspension can then result in the discharge of the employee.

Though distinct from *Grootboom* (*supra*), the facts in *Masinga* (*supra*) raised an important aspect which the Constitutional Court did not address with clarity. The legal position of suspended employees who acquire other employment is not very certain. If such an employee resigns from the suspending employer, there will be a normal termination of the employment relationship. However, what happens if the employee, like in Masinga (*supra*), finds other employment during suspension and does not resign or inform the suspending employer of such new position? It is submitted that the suspending employer will have two possible remedies. First, the employer can proceed on the basis of breach of contract. The employer terminates the contract and claims damages from such an employee. Such damages would include salaries already paid to the employee, if any. The second option would be proceeding on the basis of the PSA or EEA, and deem the employee to be dismissed by operation of law. The use of common-law machinery to resolve labour disputes is discouraged (see *Chirwa v Transnet Ltd supra*; *Gcaba v Minister of Safety and Security supra; SA Maritime Safety Authority v Mckenzie* (2010) 31 *ILJ* 529). Labour disputes must be resolved in ways that are quick, cost-effective and efficient (see ch I of the LRA).

7 Conclusion

This case has vindicated and given some measure of protection to suspended public servants. Public Service legislation cannot be used to ambush employees without affording them a right to be heard. It is also hoped that the Constitutional Court will soon find an opportunity to address a few outstanding issues raised above, more especially regarding the remedies available to employers when suspended employees find other employment without tendering their resignations. In that way the position in *Masinga* will be put to the test .The *Grootboom* case has also brought the issue of conditions of suspension under scrutiny. An employer, who explicitly bars a suspended employee from coming to the workplace and communicating with fellow employees, cannot later accuse such an employee of absenting him or herself from work. The absence in this situation is at the instance of the employer and cannot be used to prejudice the employee. In this light the employer must carefully consider the conditions imposed at suspension before attempting to invoke section 17(3) of the PSA.

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