**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JR2580/12

In the matter between:

**SOUTH AFRICAN MEDICAL ASSOCIATION** **First Applicant**

**DR ELIE MUTUNZI** **Second Applicant**

and

**MEMBER OF THE EXECUTIVE COUNCIL**
**FOR HEALTH IN NORTH WEST** **Respondent**

**Heard**: **14 May 2020 (Due to Covid19 Lockdown and the directives of the Judge President, this matter was heard *via* video conferencing and the parties agreed thereto)**

**Delivered**: **22 May 2020 (This judgment was handed down electronically by emailing a copy to the parties and the date of 22 May 2020, shall be deemed to be the date of delivery of this judgment)**

**Summary: An application to review and set aside a decision to invoke the provisions of section 17 (3) (a) (i) of the Public Services Act (PSA) alternatively a decision not to approve re-instatement of the applicant who was deemed discharged by operation of law. Where one of the jurisdictional requirements is**

LABOUR COURT

**lacking the invocation of the provisions of the section is unlawful and is bound to be reviewed and set aside on the principle of legality. Where the decision is set aside on the basis that same is unlawful, the Court is empowered to order the *status quo ante*. Held: (1) The decision to invoke the provisions of section 17 (3) (a) (i) is reviewed and set aside. (2) The second applicant is reinstated to his position with immediate effect. (3) The respondent to pay the applicants' costs.**

---

**JUDGMENT**

---

**MOSHOANA, J**

Introduction

[1] This is a review application brought in terms of section 158 (1) (h) of the Labour Relations Act[1] (LRA). In terms of that section this Court is empowered to review any decision taken or any act performed by the State in its capacity as an employer. Involved in this matter are two acts and or decisions. The first of which is when the respondent called into aid, the statutory provisions to effect the termination of the second applicant's employment. The second of which is when the respondent failed to approve the reinstatement of the second applicant. In this judgment, if a conclusion is arrived at that statutory provisions were not evocable, then the consideration of the second act or decision would be academic. Put differently, it shall be the end of the matter for the respondent. Matters involving this section of the Public Service Act[2] (PSA) remain difficult horses to ride. However given the approach I take at the end, it was unnecessary for me to ride this difficult horse for long. In my view, with regard to the decision whether to approve reinstatement or not, its fate ends once a conclusion is reached that one of the jurisdictional facts is absent. Although it

[1] No. 66 of 1995, as amended
[2] No. 103 of 1994.

LABOUR COURT

seemed for some time that the question whether the refusal to reinstate amounts to an administrative action or not is not settled[3]. The Labour Appeal Court (LAC), later seems to have somewhat settled the issue in *Ramonetha v Department of Roads and Transport Limpopo and another*[4], when the Court said:

> "[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 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 the decision is taken by the state as an employer, it involves the exercise of public power by a public functionary."

[2] Similarly calling into aid a statutory provision is an act that involves exercise or purported exercise of public power. It is by now settled that when the provisions of the section kicked in, there is no need for a decision by a functionary. However where a functionary calls into aid a statutory provision, which act in itself is an exercise of public power, such an act is susceptible to judicial scrutiny under the rubric of legality principle. It is by now settled that section 158(1) (h) of the LRA is available to review the decisions of the state in its capacity as an employer. I shall proceed to consider this matter under the provisions of the LRA as opposed to Promotion of Administrative Justice Act[5] (PAJA). It is also settled that the principle applicable in section 158 (1) (h) reviews is that of legality.[6]

Background facts

LABOUR COURT

[3] The Labour Appeal Court in the matter of *MEC for the Department of Health, Western Cape v Weder, In Re: MEC for the Department of Health, Western Cape v Democratic Nursing Organisation of South Africa obo Mangena* (2014) 35 ILJ 2131 (LAC) per Davis JA left the question open: *"[32] If correct, the approach adopted in De Villiers, supra would apply equally to these present disputes. But it may not be necessary to determine this specific question in order to resolve these appeals."*
[4] [2018] 1 BLLR 16 (LAC).
[5] 3 of 2000.
[6] *Weder* (id fn 3) at para 33: *"Irrespective of the classification of the decisions of the appellant as administrative action, appellant's actions are open to review in terms of s 158…on the ground of legality, a principle that has been developed significantly by the courts over the past decade."*

[3] The bulk of the relevant facts of this matter are common cause. The quibble is around the interpretation and meaning of those facts. The second applicant, Doctor Mutunzi (Mutunzi) was employed as a Medical Doctor by the Department of Health, which is under the leadership of the respondent (MEC for Health). Mutunzi was absent from work effective 28 December 2011 and he returned to work on 10 April 2012.

[4] Two days after his return, Mutunzi received a letter from the Clinical Manager of Mafikeng Provincial Hospital (MPH), Doctor Mabote (Mabote) which stated the following to Mthunzi:

> "You are advised not to work until further notice."

[5] According to Mutunzi, the above amounted to a suspension from work. According to the respondent, Mutunzi was simply sent back home and the letter was a "*follow up*". Mutunzi wrote a detailed protestation letter and perspicuously made the point that he was placed on an unfair and unlawful suspension. He received the letter with astonishment and considered it as *coup de theatre* following a meeting that was held on 10 April 2012, when his return was largely accepted. His protestation letter was not dignified with any response.

[6] That notwithstanding, on 17 April 2012, the Acting Chief Executive officer of MPH, addressed a further letter to Mutunzi, which in parts reads as follows:

> **"Re: Your deemed dismissal in terms of section 17 (3) (a) (i) of the Public Service Act, Act 103 of 1994 as amended**
>
> "Please be advised that you have been deemed as having been dismissed from the continued employment of the public services with effect from 1 February 2012 and that deemed dismissal is occasioned by your unauthorized absence in excess of one calendar month…

LABOUR COURT

> In the event of you not being pleased with the above, you may, in terms of subsection (3) (b) of the same provision make written representation for the consideration of the Honourable MEC for possible reinstatement and until such date you shall, with respect, remain deemed as having been dismissed."

[7] On 7 May 2012, the first applicant addressed written representations to Dr M Masike, the MEC. On 14 July 2012, the MEC said the following with reference to the representations:

> "1. The above matter refers.
>
> 2. It has come to our attention that while the Department was still in a process of considering your representations, you decided to lodge a dispute with the Public Health and Social Development Sectorial Bargaining Council.
>
> 3. Your decision to lodge a dispute at this stage, has undermined any further efforts of ensuring that your representations are dealt with internally.
>
> 4. The Department will not substantively deal with your representations. It is, however, worth noting, that the Department has attended to your dispute at the forum that you have chosen…we will await the outcome of take guidance thereof."

[8] On 20 August 2012, in response to the above correspondence, the first applicant implored the MEC to consider the representations nonetheless. On 7 September 2012, an Employment Relations Official, Bokaba, provided a response which in parts reads thus:

> "5. Notwithstanding the above and even where Dr Mutunzi could have not abandoned the internal processes, his deemed dismissal would still not stand on the grounds that his representations did not *show good* cause for reinstatement as contemplated by the section under reference."

[9] Consequently, on 9 November 2012, the applicants launched the present application. The application is duly opposed by the MEC.

LABOUR COURT

Grounds for review

[10] The pleading of the grounds was done in a haphazard manner. But on the reading of the founding affidavit as a whole, the following emerges:

10.1 The purpose of the application is to review and set aside the respondent's decision not to reinstate the Applicant in terms of section 17 (3) (b) of the Act and the initial discharge in terms of section 17 (3) (a)

10.2 The bulk of the other grounds are directed to the failure to approve the reinstatement following the decision of this Court in *De Villiers v Head of Department Education, Western Cape*[7].

[11] What the Court is able to decipher from the papers, is that the attack is on the initial decision to invoke the discharge, which was communicated to Mutunzi on 17 April 2012 and the decision not to reinstate him, which decision was communicated to him on 7 September 2012. The applicants' notice of motion specifically attacks the decision of September 2012.[8] In addition, the applicants seek a further and alternative relief.[9] In *Geza v Minister of Home Affairs and Another*[10], the following was said:

> "Whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*, Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever a court 'can vividly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not

[7] *De Villiers v Head of Department Education, Western Cape* (2010) 31 ILJ 1377 (LC).
[8] See paragraph 1 of the Notice of Motion.
[9] See paragraph 4 of the Notice of Motion.
[10] [2010] ZAECGHC 15 (22 February 2010) at para 12.

LABOUR COURT

enlarge in any way "the terms of the express claim" as pointed out by Tindall JA'…[11]

[12] In the founding papers, the deponent amongst others states the following:

> "10. Dr Mutunzi took his annual leave from 28 December 2011 and left the country to visit his family abroad. Dr Mutunzi was scheduled to return to work on the 30 January 2012."

[13] According to the respondent, Mutunzi was dismissed with effect from 1 February 2012 for having been on an unauthorized absence in excess of one calendar month. The primary relief sought by Mutunzi is to review and set aside his termination as an employee effected in line with the section employed by the Department.

Evaluation

[14] Before I deal with the merits of this application, it is appropriate to deliver this comment with regard to the manner in which the parties before me pleaded in this matter. It is common cause that this matter has a long history. Around 2012, the applicants launched this application. In support of the application, an affidavit of Ntokozo Bongumusa Sibeko was used. Based on that evidence, the applicants obtained a default order. Following that, a rescission application was launched by the respondent. The application was opposed and Mutunzi deposed to an opposing affidavit. After the rescission litigation was concluded, on or about June 2018, attorney Theresa Achada, deposed to a supplementary affidavit. In the said supplementary affidavit, she testified thus:

> "With regards to supplementing its founding affidavits…to the section 158 (1) (h) review application…to avoid prolixity, the Applicants incorporate paragraphs 2 to 2.15, 19-31, 38 and 47 (all paragraphs

[11] See also: *Elefu v Lovedale Public Further Education and others* [2016] ZAECBHC 10 (11 October 2016) and *National Stadium South Africa (Pty) Ltd and others v First Rand Bank Ltd* 2011 (2) SA 157 (SCA).

LABOUR COURT

> inclusive) (together with the relevant annexures)…and humbly request that the aforementioned paragraphs be read as if specifically incorporated to the section 158 (1) (h) review application…the answering affidavit together with its annexures is attached as Annexure "TA1".

[15] In my view the above approach is inappropriate, for the following reasons. In the first instance, reviews in this Court are or should be regulated by rule 7A. In terms of rule 7A (8) (a), an affidavit to supplement is only required after the registrar has made the record of the proceedings to be reviewed and the reasons thereof available. There is no indication on the papers before me that the supplementary affidavit was prompted by a delivery of a record of the proceedings. To that end, the delivery of the supplementary affidavit was an irregular step. Nonetheless, there was no objection from the respondent.

[16] Surprisingly, the answering affidavit delivered in this matter does not deliver an answer to the allegations as repeated in the supplementary affidavit. However, given the view I take at the end, this is not fatal to the respondent. In the second instance, ordinarily, where a rescission is granted, what naturally follows is the leave of a responding party to file its answer, since the applicant's case has been "made", hence the granting of a default order. There is therefore no room to file further affidavits unless with the leave of a Court. There is no indication on the papers before me that leave of Court was obtained in order to file the supplementary affidavit.

[17] In the third instance, I find it inappropriate for a party to present evidence tendered in another Court as an annexure accompanied by a proverbial request that that evidence should be incorporated in the evidence before a Court seized with a matter. The practical effect of the said proverbial request is that the replying affidavit as filed in another Court must be taken into account as it does constitute an answer to the allegations. Such a procedure is not welcomed. It must be remembered that affidavits in motion proceedings serve two purposes. One as a pleading and two as evidence. The Court in *Swissborough Diamond*

LABOUR COURT

*Mines (Pty) Ltd v Government of the Republic of South Africa and Others*[12] stated the following:

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof."

[18] My difficulty in this case is that portions were identified in the supplementary affidavit with no indication of what case is to be made out with regard to those portions. My further misgivings are that I am not here just dealing with a documentation but with evidence tendered in another Court. Accordingly, what the applicant presents is an incomplete evidence tendered in another Court. It is more like a party presenting a transcript of evidence-in-chief tendered in another Court and excludes the evidence tendered in cross-examination. That is more like tendering an incomplete record. It is inappropriate in my view. Accordingly, I conclude that the evidence tendered in the rescission application is irrelevant before me and shall not be taken into account.

[19] I now turn to the merits of the application. As pointed out above two acts or decisions are implicated in this matter. I shall deal with the first decision communicated on 17 April 2012. In my view the court's decision on it is dispositive of the whole matter.

[20] By way of introduction, South Africa is founded on values of supremacy of the Constitution of the Republic of South Africa[13] (the Constitution) and the rule of law.[14] The principle of legality simply implies that any decision or act must be in

LABOUR COURT

---

[12] 1999 (2) SA 278 (T)

[13] No. 108 of 1996.

[14] Section 1 (c) of the Constitution.

line with the law. In *Minister of Defence and Military Veterans v Motau*[15] the following was said:

> "[69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard it must be rationally related to the purpose for which the power was given…"

[21] As the Constitutional Court in *State Information Technology Agency SOC ltd v Gijima Holding (Pty) Ltd*[16] puts it, once there is compliance with the legal prescripts that is the end of the matter in a legality review. Crucial in this matter is the question whether the jurisdictional requisites of section 17 (3) (a) (i) were present to enable its invocation. Both parties before me are in agreement that the requisites of the section are:

21.1 There must be an employee;

20.2 That employee must have absented himself from his official duty;

21.3 His absence has to be without permission of the head of the department; and

21.4 The absence should be in excess of a calendar month.

[22] In terms of the section once the requisites are met the dismissal takes effect on the date immediately succeeding the last day of attendance at his place of duty. Thus, the dismissal of Mutunzi should have taken effect from 29 December 2011, since his last day of attendance was 28 December 2011. Curiously, the letter addressed to Mutunzi refers to 1 February 2012, thus suggesting that his last date of attendance was 31 January 2012. Mr Nhlapo SC appearing for the respondent conceded that the first period (29 December 2011 – 31 January 2012) cannot be relied on as a period of absence without permission. This is concession well and nobly made.

LABOUR COURT

---

[15] 2014 (8) BCLR 930 (CC).
[16] 2018 (2) BCLR 240 (CC).

[23] In an instance where one of the requirements is lacking, the section cannot be invoked[17]. The question I now turn to is was the absence of Mutunzi without permission.

*Was the absence of Mutunzi without permission?*

[24] Before I consider the factual allegations around this question, it is important to consider the language employed by the legislature in the section under consideration. The phrase "*without permission"* is employed. Care must always be exercised when considering this phrase. In terms of section 20 (2) of the Basic Conditions of Employment Act (BCEA)[18], an employer is obligated to grant an employee annual leave. Perspicuously, if an employee takes annual leave, such an employee does not necessarily require the permission of an employer. Section 20 (10) of the BCEA provides that annual leave must be taken either in terms of an agreement or in terms of the provisions of the section. Section 20 (6) provides that an employer is obligated to permit an employee at the employee's written request to take leave during a period of unpaid leave. To my mind, once annual leave or any other form of leave for that matter, is involved there can be no mention of absence without permission.

[25] Section 17, in my view, is there to cater for instances of abscondment or desertion. Such an abscondment may be converted into vocational leave if the executing authority is satisfied that it was not an abscondment in the first place. The phrase that *"his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave*" simply buttresses the point that leave cannot be seen as absence without permission.

[26] The word permission must be given its literal dictionary meaning. Permission means an *act of permitting, especially giving formal consent; authorization*. Therefore, if an employee, who is not on leave, is absent for a period in excess

---

[17] See: *Grootboom v NPA and another* 2014 (2) SA 68 (CC) and *Gangaram v MEC for Department of Health Kwa-Zulu Natal and another* [2017] BLLR 1082 (LAC).
[18] Act 75 of 1997.

LABOUR COURT

of one calendar month, such an employee must exhibit a formal authorization from the Head of the Department. One myth that must be dispelled with adequate immediacy is that the permission need not be in writing. Oral permission is sufficient for the purposes of the section. Like oral agreements, it is difficult but not impossible to prove an oral arrangement.

[27] Turning to the facts of this case, the first strange feature is that the provisions of the section were invoked on the return of Mutunzi. This Court fails to understand the reason of gagging Mutunzi to continue with his work on 12 April 2012. I am inclined to agree with Mutunzi that he was placed on suspension, something the Department is not entitled to do without following the applicable prescripts on suspension. In any event, if it is accepted that Mutunzi ceased to be an employee on 1 February 2012, then the Department was not empowered to suspend him. That notwithstanding, the respondent's case on Mutunzi' s allegation of annual leave was as follows:

> "50 Ad paragraph 10
>
> I admit that, according to what is recorded in the leave form, second respondent (applicant) took leave from 28 December 2011 which was due to end on 31 January 2012. Leave was not approved."

[28] From the above evidence, it is clear that the issue is that the leave was not approved. To that end section 20 (6) of the BCEA does provide that at the written request of an employee, an employer is obligated to grant leave. On 15 December 2011, Mutunzi made a written application for leave of absence.[19] The remarks of Dr Mabote, in not recommending – notably, permission was not an issue – he recorded thus: "*This leave was not discussed with the clinical manager for approval before the officer left*." The leave form does indicate that what Mutunzi was seeking to take was annual leave. *Ex facie* the form appears the following above the signature of Mutunzi: "*Furthermore, I fully understand that if I do not have sufficient leave credits from my previous or current leave*

[19] Annexure NWH1.

LABOUR COURT

*cycle to cover for my application, my capped leave as at 30 June 2000 will be automatically utilized.*"

[29] When it comes to annual leave the question is does an employee have days accumulated for that cycle or not. By law an approval of the supervisor is not required. 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. I therefore conclude that that section does provide that the approval was not required. Thus, the conclusion to arrive at is that Mutunzi was on annual leave and his absence is not one contemplated in the section under discussion. In any event during oral argument the applicant's counsel nobly conceded that no reliance can be placed on this period to meet the requirements of the section.

[30] Turning to the period from 30 January 2012 up to and including 10 April 2012 (the second period). The first issue to be disposed of is that according to the respondent, the deeming provisions kicked in on 1 February 2012. Accordingly, from 1 February 2012, Mutunzi was no longer an employee of the department. If this is accepted to be factually correct, then during this period Mutunzi was an employee for effectively two days. Of course the contention of the respondent is not legally correct. As pointed out above, if the period covered by the annual leave is for a moment considered to be a period of absence without permission within the contemplation of the section concerned, then the last day at work was 28 December 2012 and by end of January 2012 – the calendar month – the deeming provisions kicked in, but with effect from 29 December 2011. Therefore, the deemed dismissal date has to be 29 December 2011.

[31] Assuming for now that this period is to be taken into account for the purposes of the section concerned, I take into account that on 30 January 2012 – a day before the end of the annual leave, Mutunzi firstly applied orally and confirmed it in writing, for an unpaid leave of absence. The respondent's case on that period is as follows:

LABOUR COURT

“Ad paragraph 11

51.1 I admit that there was a conversation between the second applicant and Dr Mabote as recorded in a letter dated 30 January 2012. What Mabote told him when refusing to extent the leave is now a matter of record.

51.2 What the second respondent (applicant) left out of the letter can only be seen as an attempt to conceal or withhold vital information. According to Mabote, he made it clear to him that he could not extend leave that was never authorised.

51.3 …It is highly improbable that transmission by email would have failed to reach Mabote.

Ad paragraph 12

The contents therein contained and what is recorded from the letter of 30 January are admitted. “

(My own emphasis)

[32] Few comments are appropriate on this evidence. Firstly, the deponent admits the contents of the letter. The letter makes no reference to a refusal to extend the leave as having been mentioned in the telephonic conversation which preceded the letter. The contents of the telephonic conversation are captured in the letter. The conversation itself is not disputed. The deponent is hugely ambivalent as to whether Dr Mabote did or did not receive the letter of 30 January 2012. On the assumption that this Court gives Dr Mabote the benefit of the doubt that he did not receive the letter, his admission of the telephonic conversation and the contents of the letter is fatal to any denial of knowledge of the letter. Therefore, my conclusions are that Mutunzi did request for the extension of the annual leave and as pointed out above, the respondent was by law obliged to grant him that.

[33] In the final analysis, it is perspicuous that not all the jurisdictional requirements of the section were not met. This simply implies that the effect of the section – deemed dismissal – cannot be invoked. On application of the principle of

LABOUR COURT

legality, the decision or action taken on 12 April 2012 to the effect that the provisions of the section had kicked in is invalid, ineffectual and has no force of law. Since Mutunzi was not deemed dismissed, it was not necessary for him to seek reinstatement by showing *good cause*[20].

*The issue of the remedy*

[34] An illegality is remedied by simply declaring it as such and for the *status quo ante* to prevail. The *status quo* before 12 April 2012 was that Mutunzi was an employee of the hospital. On 12 April 2012 he was unlawfully stopped from performing his duties. Given my conclusions above, the appropriate remedy would be to declare that Mutunzi was not deemed dismissed and order the respondent to reinstate him without loss of any benefits effective 12 April 2012.

[35] One aspect that requires clarification is that as it was done in *De Villiers*, this Court, by reinstating Mutunzi, is not stepping into the shoes of the MEC, as empowered to approve reinstatement within the contemplation of section 17 (3) (b) of the PSA. In another judgment, I have taken a view, which is divergent from *De Villiers*, to the effect that the power in section 17 (3) (b) is reserved statutorily for the MEC, it being different, in my view, from the reinstatement power approbated to the Courts and the dispute resolution bodies[21]. I still hold this view to date. In *Kenyatta University & 2 others v Elena D. Korir*[22], the Kenyan Court of Appeal in a judicial review stated the following:

> 25 With due respect, the first issue as framed related to the merit of the appellants' decision. In considering whether the appellant was qualified for the award of PhD <u>the court was undertaking the statutory role of the University which in accordance with section 14 (2) (d) of the Kenyatta University Act, the University was empowered.</u>

LABOUR COURT

---

[20] See paragraph 30 of *Gangaram supra*. *"…the jurisdictional requirements …have not been satisfied, and as such there was no need for her to make representations in terms of s 17 (3) (b) for her reinstatement."*

[21] See: *Nyamane v MEC: Free State Department of Health* [2019] 12 BLLR 1371 (LC) para 43-44.

[22] [2016] eKLR http://www.kenyalaw.org page 9.

> 28 As rightly submitted by the appellant, judicial review is only concerned with the process followed and not an evaluation of the judgment, or the exercise of discretion by the decision maker…In *Republic v Kenya National Examination Council ex parte Geoffrey Njongore & 9 others…*is spot on:
>
> > …The High Court cannot, however, through *mandamus* compel the licensing court to either grant or refuse to grant license. The power to grant or refuse a license is vested in the licensing court.
>
> (My own emphasis)

[36] I respectfully agree and associate myself with the above sentiments. The above position augurs very well with what the Supreme Court of Appeal said in *Minister of Defence v Mamasedi*[23]*.* Plasket AJA writing for the majority specifically stated the following:

> [24] The first reason is that re-instatement does not follow from the setting aside of the decision not to re-instate Mamasedi. He was discharged by operation of law…and, in the absence of a decision by the Chief of SANDF to reinstate him, he remains dismissed from SANDF.
>
> [25] The reason is that, if Wentzel AJ purported to substitute her decision for that of the Chief of SANDF, she misdirected herself in doing so. Administrative decision-making powers are vested by legislation in administrators and not judges. When an administrative decision is set aside on review, generally speaking, it must be taken again by the administrator concerned.
>
> [25] It is only in limited circumstances when such usurpation of administrative power is permitted…
>
> [27] …She simply was not in a position, let alone as good a position as the Chief of SANDF, to take the decision to re-instate Mamasedi. Without the factual dispute having been resolved one way or the other,

[23] (622/2017) [2017] ZASCA 157 (24 November 2017)

LABOUR COURT

> it could not be said that the decision was a foregone conclusion. There is, furthermore, no indication that the Chief of SANDF is biased or otherwise precluded from taking the decision again when the facts are properly determined.
>
> (My own emphasis)

[37] However that issue does not arise in *casu*. In fairness to both parties, I granted them a further opportunity to file supplementary submissions on the issue of the remedy. They were to do so by 21 May 2020. The applicant's counsel submitted that *Nyamane* is, on the weight of other authorities of this Court correct. The respondent's counsel is also not at variance with the *Nyamane* principles.

Costs

[38] When it comes to costs, this Court possesses a wide discretion. I take a view that the approach taken by the respondent in this litigation was the most cavalier one. After suspending Mutunzi, and realizing that there is no legal basis to do so, it simply called into aid, the most drastic provision of the PSA, whilst fully knowing that when Mutunzi left he had applied for leave – the fact that Dr Mabote did not approve it is of no moment and does not detract from the fact that the respondent had an idea of the whereabouts of Mutunzi. There seem to be a developing and growing trend within the public service to wizardly call into aid the provisions of the section without due consideration of the question whether the jurisdictional requirements are present.

[39] This trend is of course a worrying one because the issue – of lack of jurisdictional requirements – gets pointed out by the courts years later. Quintessentially, the public purse is hemorrhaged as a consequence. I implore the legal advisers of the departments to carefully dispense with valuable and less enigmatic legal advice in order to protect the public purse. Ordinarily, I have no qualms if the executive authorities, who are not technocrats but politicians to have it wrong at the stage of *good cause* showing, but I have humungous reservations if technocrats also have it wrong. It is apparent to me that in this

LABOUR COURT

matter, the Acting Chief Executive Officer of the hospital may have been fed with a wrong legal advice.

[40] It would be unfair and unlawful[24] to deprive Mutunzi of his litigation costs. Accordingly, having been substantially successful, the applicants are entitled to their litigation costs. However, for the purposes of taxation of such costs, any costs amassed in the rescission application, including the supplementary affidavit and its annexures, would not form part of the costs so awarded.

[41] In the results, I make the following order:

<u>Order</u>

1. It is declared that Mutunzi is not deemed dismissed.
2. The respondent is to reinstate Mutunzi with immediate effect retrospective 12 April 2012 with benefits on the same terms and conditions that previously applied to him as if he had not been dismissed.
3. The respondent is to pay the costs of this application.

________________________

GN Moshoana

Judge of the Labour Court of South Africa

LABOUR COURT

[24] Recently the Constitutional Court in *AMCU and Others v Ngululu Bulk Carriers (Pty) Ltd and Others* [2020] ZACC 8 (6 May 2020) confirmed that the rule of costs following the results is still intact in the Labour Court.

Appearances:

| | |
|---|---|
| For the Applicant: | Advocate Van As. |
| Instructed by: | Solomonholmes Attorneys |
| For the Respondent: | Advocate S N Nhlapo SC. |
| Instructed by: | State Attorney – Johannesburg. |

LABOUR COURT