THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J34/2017

In the matter between:

M E NYAMANE **Applicant**

and

THE MEC: FREE STATE DEPARTMENT OF HEALTH **Respondent**

Heard: **23 August 2018**

Delivered: **31 August 2018**

Summary: An application to review and set aside a decision not to approve re-instatement of the applicant who was deemed discharged by the operation of law. The requirements of *good cause shown* considered. The Labour Appeal Court's decision in M*EC for the Department of Health Western Cape v Weder*[1] considered in line with what was said in *De Villiers v Head of Department: Education Western Cape Province*[2] and applied. Held: (1) The review application is granted and the matter remitted to the first respondent. Held: (2) There is no order as to costs.

[1] Case CA4/2013 delivered on 13 May 2014 (LAC).
[2] [2010] 31 ILJ 1377 (LC).

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a review application, seeking to review a decision by the respondent refusing to approve the re-instatement of the applicant. Although it seemed that the question whether refusal to reinstate amounts to an administrative action or not is not settled[3], the Labour Appeal Court (LAC), later seems to have 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] It is by now settled that section 158(1)(h) of the Labour Relations Act[5] (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[6] (PAJA). It is also settled that the principle applicable in section 158 (1) (h) is that of legality.[7]

[3] The LAC per Davis JA left the question open: [32] if correct, the approach adopted in De Villiers, supra would apply equally to the present disputes. But it may not be necessary to determine this specific question in order to resolve these disputes.
[4] [2018] 1 BLLR 16 (LAC).
[5] 66 of 1995, as amended.
[6] 3 of 2000.
[7] *Weder* at [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.

Background facts

[3] Proper analysis of the facts of this case is crucial for the determination of whether the decision of the respondent is reviewable or not. The applicant has been in the employ of the Free State Department of Health since 2005. He was employed as an Emergency Care Worker. Since 2013, he was a registered student at the Central University of Technology (CUT), studying a NDIP Emergency Medical Care course. On or about 17 January 2013, the applicant was involved in a motor vehicle accident and sustained a fracture on his right leg. Pursuant thereto, he was booked off duty from 17 January 2013 up to and including 25 March 2013. There is a dispute as to whether he submitted the relevant medical certificates or not. However, given the basis of the challenge in this matter, I need not resolve this dispute.

[4] On 2 April 2013, the applicant reported for duty. Upon arrival, he was informed that his employment had terminated. The applicant disputes that he had received any letters advising him of the unauthorized absence. Again, it is unnecessary to resolve this dispute of fact. Reason being that, there is no dispute that the provisions of section 17 (3)(a)(i) of the Public Services Act[8] (PSA) had kicked in. The applicant was advised to invoke the provisions of section 17(3)(b). Indeed, on 31 March 2014, the applicant submitted representations to the respondent. It is important at this stage to flash out the representations, the applicant contends as follows:

> **"REPRESENTATION**
>
> 6 I hereby make representation for reinstatement in the public service to my former post, because my absence was occasioned by the fact that I was involved in an accident.

[8] Act 103 of 1994.

7 Upon being involved in an accident I was hospitalized – **see medical certificates.**

8 My supervisor (Mr Mohono) was made aware of my medical condition and hospitalization thereof in that original medical certificates were served to him accordingly.

CONCLUSION

9 It is my submission that *good cause* has been shown for my absence and your approval for my reinstatement is justifiable.

10 Therefore, with the powers vested in you by section 17 (5) (b) of the Public Services Act, 1994 you are hereby requested to approve my reinstatement accordingly.

[5] Quoted above is the full extent of the representations placed before the respondent in order to exercise his statutory power. It is apparent that on or about 2 October 2015, one Advocate Moshodi, Senior Employment Relations Officer, compiled an investigation report which was supported by the Deputy Director General: Cooperate Services, Mr Mtakati and was recommended by Dr Motau, Head: Health. The investigation report was then approved by the respondent on 19 October 2015. The salient parts of the report reads thus:

"4. **MOTIVATION**

4.1 The Health Human Resources Circular No 49 of 2010 indicates that in all cases where an official is absent without permission for a period longer than a calendar month, he or she is dismissed by operation of law.

4.2 It is important to note that he has a contractual obligation towards the Free State Department of Health and it is an official's responsibility to report where they are.

4.3 It is therefore one's submission[9] that the Department would not be unfair to terminate Mr. Nyamane's employment contract due to abscondment.

4.4 Mr. Nyamane lied when he claims to be hospitalized as a result of the accident, when in fact he was attending classes at the Central University of Technology.

5 **RECOMMENDATION**

5.1 That the MEC: Health confirms the discharge of Mr. M. E Nyamane consistent with the provisions of section 17 (3) (a) (i) of the Public Service Act.

5.2 Should approval be granted[10], the attached letter bearing the MEC's signature will be dispatched to the Applicant (**Annexure F**)."

[6] On 6 November 2015, the respondent made the impugned decision. The relevant portions of the letter containing the decision reads thus:

"2. You are informed that after due consideration of the merits of your written representation against your discharge from the Public Service, I have decided to dismiss your request and confirm the discharge from Public Service[11]."

[7] It does seem that due to the delay in taking a decision as required by the law, the applicant launched a *mandamus* application in this court. The application is still pending under case number J2006/2015. It is apparent that the applicant only became aware of the impugned decision on 2 July 2016.

[9] Clearly, this is the submission of Advocate Moshodi. Differently put, it is his opinion and certainly not that of the repository of power.

[10] Indeed, approval was granted on 19 October 2015. I must point out that what the MEC was approving was the confirmation that the applicant's dismissal is consistent with the provisions of section 17 (3) (a) (i). As it shall be demonstrated later in this judgment that is not the purpose and the power contemplated in section 17 (5) (b).

[11] The empowering provisions requires the respondent to approve the reinstatement and not to confirm a discharge. Perhaps confirming a dismissal is tantamount to refusing to approve the reinstatement.

[8] As advised in the letter containing the decision, the applicant referred a dispute to the bargaining council. On 1 December 2016, the bargaining council correctly issued a ruling declining jurisdiction. On or about 16 January 2017, the applicant launched the present application. The application stands opposed.

Grounds of Review

[9] The applicant contends that the decision of the respondent is irrational and arbitrary.

Evaluation

[10] For the longest of time matters of this nature were dubbed "decision refusing to reinstate". I have a difficulty with this labelling. The source of my discomfort emanates from my reading of the relevant provisions of the law in question, in this instance section 17 (3) of the PSA. In order to demonstrate that, I shall quote the provisions of the relevant section. It reads as follows:

> "17. **Discharge of officers –**
> (1) …
> (2) …
> (3) …
> (4) …
> (5) (a) (i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of the department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with immediate effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.
>
> (ii)…

(b) If such an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer 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."

[11] As to why this section is still in the statute books, I am unable to understand. Particularly in the face of the LRA. There seem to be no objective policy considerations why public servants should be treated different from other employees. Ordinarily what this section seeks to deal with is abscondment and or desertion, which could be dealt with in terms of the LRA. The section deems the employee to be discharged. In other words, by not reporting for duty for the period mentioned, a public servant discharges himself or herself from the public service. It is by now settled law that this discharge does not amount to a dismissal in terms of the Labour Relations Act[12] (LRA). What is curious though for me is that the legislature somewhat leaves room for the said public servant to report for duty. Clearly, a dismissed employee would ordinarily not report for duty, reason being that the employment relationship had ended. In other words, there is no longer an employer – employee relationship. This statutory possibility to report for duty, to my mind, suggests that an employee simply reinstates himself or herself in a sense. It seems sensible to say that a public servant who discharges himself or herself can also reinstate himself or herself. The position I am propagating seem to have received approval in *Ramonetha supra*. The court held thus:

"[23] By its nature, an employment contract is an agreement in which an employee works for an employer in exchange for remuneration. In

[12] 66 of 1995, as amended.

> accepting the applicant'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)…The appellant could no longer be deemed to have been dismissed after he has been reinstated."

[12] Although, the LAC refers to implicit reinstatement by the department, what is clear from the facts of that case, is that Ramonetha was absent without permission for a period of four months. Because dismissals in this situation happens by operation of law, a decision is not required, therefore Ramonetha was deemed dismissed by operation of law four months ago. Ramonetha simply reported for duty on 17 June 2011, without any direction and or decision to be reinstated by the MEC. The MEC took a decision only on 3 September 2012. The LAC came to the conclusion that reinstatement was implicit because of payment of remuneration. Much as I accept that to be the correct legal position, I venture to say that reporting for duty is tantamount to tender of services, even if an employee is not remunerated *per se*, an employer is obliged to pay remuneration, once there is evidence of tender of services. Therefore, in my view, reinstatement happens once an employee reports for duty and is allowed to do so by the provisions of the section, thus, self-reinstatement occurs. If I am right, an employee once self-reinstated can no longer be deemed as being discharged.

[13] However, what the legislature sought to do, in my mind, is not to allow such an officer to have the final word as in reinstating himself or herself. The first thing that an officer is to do is to report for duty. If the legislature required a decision to reinstate before reporting for duty as it is ordinarily the case, the legislature would have stated that before reporting for duty, an employee must seek reinstatement from the executing authority first. In terms of the LRA, reinstatement is a remedy to be afforded to the dismissed employees by either an arbitrator or the Labour Court. The dictionary meaning of the word reinstatement is to restore to a previous condition or position.

[14] Reinstatement employed in the above section, in my view, is not a remedy as contemplated in the LRA. That being the case, it must then be afforded its grammatical meaning. To my mind, reporting for duty may not be different from reinstatement in the context of this section. Therefore, in my judgment, an officer who reports for duty reinstates himself or herself. However, in the context of the above section, the executing authority is required by law to approve the self-reinstatement as it were. In other words, the executing authority is vested with a discretion to approve the reporting to duty, after the historical deemed discharge. Therefore, in my view, if the self-reinstatement, as I call it, is not approved, it cannot be said that the executing authority refused to reinstate.

[15] The grammatical meaning of the word approve is to consent, to officially or formally, confirm or sanction. On the other hand, refuse means to indicate unwillingness to do. Therefore, in my view, the statutory duty of the executing authority is to approve the reporting for duty or the reinstatement in its grammatical meaning. I must emphasize that the executing authority does not have powers similar to those of an arbitrator and the court to order reinstatement as a remedy.

[16] The jurisdictional requirements for the approval to report for duty or reinstatement is the showing of *good cause*. Just to conclude my point, these type of applications should appropriately be labelled failure to approve the reporting for duty or reinstatement. Such labelling in my view accords with the wording of the section.

[17] The difficult part in this section arises when, as it was the case in this particular matter, the repository of power fails to exercise the discretion to approve. A number of questions arises. Should the official stop reporting for duty if the approval is not forthcoming? Should the official continue reporting until told otherwise? The telling otherwise, being (stop reporting for duty), is it

a dismissal within the meaning of section 186 of the LRA? I am not sure if I have answers to all these questions at this stage.

[18] It is apparent to me that what would kick the executing authority into action is the reporting for duty. In other words, once the executing authority gains knowledge that an officer deemed discharged has reported for duty, applying my theory, self-reinstated himself or herself, he or she is required to exercise discretion whether to approve such or not. However, it is apparent that what would guide him or she in the approval exercise is the showing of *good cause*. It does seem to me that on a proper reading of the section an official is not obliged to ignite the showing of the *good cause*. However, for good measure, it seems correct for the official to somewhat legalize his or her reporting for duty. It also seems to me that if he or she continues to report for duty without the approval, his or her reporting for duty is unlawful[13]. I do not wish to decide this issue; I am just mentioning it in passing. It may be decided some other time if not already decided.

What constitutes good cause?

[19] To my mind, in order to determine the legality or otherwise of the decision to not approve the reinstatement, a court of review must be satisfied that there was no *good cause* shown therefore, in not approving, the executing authority was acting within the confines of the law. The legal meaning of the phrase – *good cause* - is adequate or substantial grounds or reasons to take a certain action or to fail to take an action prescribed by law. Courts have been warned not to attempt a precise meaning of this phrase. In *Pieter Westerman Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills Cape*[14], Jones AJA had the following to say:

[13] However, it seems that according to the LAC in *Ramonetha*, if an official report for duty and receives remunerated thereafter, such is enough to gain reinstatement contemplated in this section. I hold a different view though. But if my interpretation of the LAC judgment is correct, then I am bound by it.

[14] Case number 127/2002 delivered on 31 March 2003 (SCA)

> "[11] …The authorities emphasize that it is unwise to give a precise meaning of the term *good cause*. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait:*[15]
>
> "When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) 1954 (2) SA 345 (A) at 352-3*). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.""

[20] In a situation where a court assesses *good cause* it is generally expected for a party to show good cause by (a) giving a reasonable explanation of his default; (b) showing that he or she is *bona fide* in his or her quest; (c) he or she has a *bona fide* claim or defence and some prospects of success. I am of a view that when an executing authority assesses *good cause* he or she must properly consider all the relevant circumstances. Should it be shown that he or she failed to consider all the relevant circumstances, then he or she would have failed to meet the statutory obligation and thus his or her decision thereafter would be incapacitated by the constitutional principle of legality or rationality.

What are the relevant circumstances?

[21] My brother Van Niekerk J in *De Villiers v Head of Department: Education, Western Cape*, found persuasion in the reasoning of Davis J and Allie J in the matter of *De Villiers v Minister of Education Western Cape Province and another* and concluded thus:

> "[30] …It is in this context that the requirement of "good cause" referred to in s 14 (2) must be read. This would ordinarily mean that unless the

[15] 1979 (2) SA 298 (C)

> employer, having regard to the full conspectus of relevant facts and circumstances, is satisfied that continued employment relationship has been rendered intolerable by the employee's conduct, the employer should as a general rule approve the reinstatement of the employee."

[22] My brother's reading of the high court judgment he relied on is that it is not required that an employee, who bears the *onus* to show *good cause*, to show that the refusal to reinstate would amount to an unfair dismissal. It does seem to me that Davis J and Allie J also found persuasion in other High Court judgments, which suggested that a deemed discharge should be treated the same way as dismissal for misconduct, thus Schedule 8 of the LRA must be applied.

[23] The approach by my brother was received with approval by the LAC in *Weder* (supra). The LAC said:

> "[42] In my view, applying the test of legality, insufficient evidence was provided by the appellant as to why the decision to reject the representations made was sufficiently rationally related to the purpose for which the power was given to appellant. In particular, and critical to these disputes, insufficient evidence was provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees."

[24] As a court below, I am bound by the *Weder* decision, and it is apparent to me that the *Ramonetha* decision approved it. I however need to deliver a comment on this. In my understanding of the law so far, discharge by operation of the law is not a dismissal within the contemplation of the LRA. In fact the Constitutional Court[16] had the following to say:

> "[16] Some 11 years after *Louw*, whilst dealing with a similar situation, the Supreme Court of Appeal in *Phenethi* endorsed *Louw*:

[16] Grootboom v NPA and another CCT 08/13 [2013] ZACC 37 delivered on 21 October 2013

> "In my view, the *Louw* judgment is definitive of the first issue in the present matter, whether the appellant's discharge constitutes an administrative act…There was no suggestion that *Louw* was wrongly decided. There being no "decision" or "administrative act" capable of review and setting aside, the second part of the first prayer in *casu*, viz that the decision be declared an unfair labour practice falls away"

I cannot fault the Labour Court and Labour Appeal Court for relying on the principle established in the two cases cited above."

[25] That being the case, I fail to understand why the provisions of Schedule 8 of the LRA must feature in a section 17 (3) (a) (i) discharge. Davis J and Allie J sought refuge from item 3 (4) of the Schedule 8 of the LRA simply because schedule 2 of the Employment of Educators Act (Educator's Act)[17] was, in their view, applicable since the discharge must be treated the same way as in section 18 (2)[18] of the Educator's Act. Similarly, my brother, Van Niekerk J sought fortification from the selfsame schedule 2 of the Educator's Act.

[26] The schedule makes specific reference that the Code of Good Practice is part of Schedule 2[19]. It seems to me that the reason why refuge was sought in section 18(2) was that in the similarly worded section 14(2) of the Educator's Act, reference is made to discharge from the service on account of misconduct.

<u>What then is the meaning of the phrase discharged on account of misconduct</u>

[27] It seems to me that the phrase on account of means 'because of'. Therefore, it seems safe to conclude that an employee who does not report for duty for the period mentioned in the section commits a misconduct. It is logical to say so because abscondment is considered to be some form of misconduct in

[17] Act 76 of 1988
[18] Section 18 deals with misconduct.
[19] Item 3 of Schedule 2

many employment instances. Desertion is also considered as some form of misconduct. However, where logic is defied in my mind is where such a misconduct does not lead to a dismissal as defined in section 186 of the LRA.

[28] Such a defiance of logic is observed when the selfsame section allows an employee who has committed misconduct to report for duty. It is not the requirements of the section that the discharged officer must first obtain permission to report for duty. As discussed above, there may be situations where discharged employees report for duty and continue as if nothing has happened even in instances where the jurisdictional requirements of the discharge are present. Think of a situation where a public servant work at remote areas with no other public servants. Such a servant may be absent for a period contemplated in the section, without permission and return after stated period. Effectively such a public servant had committed a misconduct but because he or she can simply report for duty, the relevant executing authority may not know that at a particular stage the servant was discharged by operation of law. With all those possibilities, I am not sure if there is any good reason in law in equating the deemed discharge with a dismissal for misconduct, to a point that as part of *good cause* intolerability of continued employment ought to be considered.

[29] As I pointed out above, the executing authority would not be ordering reinstatement as a remedy within the contemplation of the LRA. I understand *Ramonetha* to say that the LRA's unfair dismissal regime finds no application in the deemed discharge. If my understanding is correct, then anything that has to do with the LRA, Schedule 8 included, should stay far away from the deemed discharges.

<u>Should the requirements applicable to a dismissal in terms of the LRA apply to the discharged servants?</u>

[30] As pointed out above, Davis J and Allie J resorted to item 3 (4) of Schedule 8 of the LRA. The item provides thus:

> (4) Generally, it is not appropriate to dismiss an employee for the first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable…

[31] The import of item 3(4) is somewhat repeated in item 7(b)(iv), which provides that any person who is determining whether a dismissal is unfair should consider – whether or not dismissal was an appropriate sanction for the contravention of the rule or standard. Strictly speaking, since the discharge is not a dismissal within the contemplation of the LRA, it must follow that the executing authority is not the *any person* contemplated in item 7(b)(iv).

[32] I am in agreement with my brother Van Niekerk J when he concluded that the non-approval to reinstate does not morph, as it were, the discharge into a dismissal within the contemplation of section 186 of the LRA. Just as a side issue, in terms of section 186 (2)(c), it is an unfair labour practice to refuse to reinstate a former employee in terms of any agreement. Is it better perhaps to amend the section to include the words, *in terms of any law* – which may cover the deemed discharge situation as I sought to interpret it to mean self-reinstatement? Perhaps not. Nonetheless, with that conclusion by my brother, it must be accepted that at no stage does the deemed discharge morph into a dismissal within the contemplation of the LRA to allow any person dealing with it to take into account any law that regulates dismissal within the contemplation of the LRA. Therefore, I take a view, in passing though, that the requirements applicable to a dismissal in terms of the LRA are not applicable to the discharge in terms of section 17 (3) (a) (i) of the PSA.

The principle of rationality

[33] The statutory power approbated to the executing authority in the relevant section is to approve reinstatement of the discharged officer. The section further spells out how he or she may execute that power. He or she may do so only on *good cause* shown. The question that immediately crops up is

whether once the executing authority decides that *no good cause* is shown would that be enough to satisfy the principle of legality and or rationality?

[34] It is unfortunate that the Constitutional Court in *Grootboom* seem to have left open the question whether the decision to approve or not approve amounts to an administrative action or not? However, it seems that *Ramonetha* answered that question now. A finding on this issue by the Constitutional Court in particular would have finally settled the question. But as I say, for me as a court below, the LAC has finally answered the question. That seem to leave into account only the legality and or rationality principle much to the chagrin of the reasonableness principle as developed in *Bato Star*.

[35] In *DA v President of the RSA*[20], Yacoob ADCJ, as he then was, stated the following about rationality:

> "[27] The Minister and Mr Simelane accept that the 'executive' is constrained by the principle that [it] may exercise no power and perform no function that conferred… by law and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power could be arbitrary and at odds with the Constitution. I agree. "

[36] It has been confirmed that rationality and reasonableness are conceptually different. In *Albutt v Center for the Study of Violence and Reconciliation and others*[21], the following was said:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, <u>where the decision is challenged on the grounds of rationality, courts are obliged to</u>

[20] 2013 (1) SA 248 (CC).
[21] 2010 (3) SA 293 (CC).

> examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

[37] Textually, it seems to me that the only power exercisable is that of approving the reinstatement, however on contextual reading, regard being had to the phrase "*good cause shown*", it suggests that the other implied power is that of not approving. Not approving is another means available to an executive authority to select. Therefore, applying the *Albutt* approach, the means to be examined is that of not approving in this instance. What a court seeks to establish in the examination of the means is the rational relation between the means and the objective sought to be achieved by not approving. The constitutional court clarified the issue further in *Minister of Defence and Military Veterans v Motau*[22] and 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…"

[38] Section 23 (1) of the Constitution provides that everyone has the right to fair labour practices. The national legislation passed to give effect to this right is the Labour Relations Act. The PSA is not legislation passed to give effect to section 23 (1).[23] The purpose of the PSA can be gleaned from the preamble of the Act itself, which reads thus:

> "To provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office,

[22] 2014 (8) BCLR 930 (CC)

[23] Therefore, in my view, I am uncertain whether this statement by the LAC in *Weder* would forever remain like that: It said: [37] Correctly in my view, Van Niekerk J held that a contrary finding would represent a breach of an employee's right to fair labour practices…In particular, given an employee's right to fair labour practices, the decision must be tested for rationality as outlined.

> discipline, retirement and discharge of members of the public service and matters connected therewith."

[39] It would not be inimical to the exercise of the powers in the section to seek to achieve discipline within the public sector. Ensuring discipline within the public sector is one of the purposes of the PSA. Where the power is exercised in order to ensure discipline within the public service would that be irrational? It seems logical to suggest that public servants who absent themselves without permission are ill disciplined. It must be for that reason that the legislature somewhat suggested that being deemed dismissed would be on account of misconduct. Could it be said that not approving reinstatement of an ill-disciplined public servant is irrational simply because the decision maker did not take into account the requirements of another legislation, which is not the source of its power? In my view not. The constitutional court told us a long time ago that no one would seek a relief directly from the constitution, where there is national legislation dealing with that right. As I pointed out above the legislation seeking to give expression to the right to fair labour practices is the LRA. As *Ramonetha*, correctly in my view, held that the LRA finds no application in this types of dismissals, then a right to fair labour practices must not feature at all. In *Motau*, the constitutional court said:

> [71] A rational link therefore exists between the need to address the failures of Armscor and the termination of services of General Motau and Ms Mokoena: with them at the helm, the Corporation was not operating in an efficient manner and was not properly fulfilling its statutorily prescribed mandate. Section 8 (c) was properly used by the Minister, in the exercise of her executive oversight, to abate the problems that had set in at Armscor. Given this, I believe that the Minister's decision was rational.

[40] It is interesting to note that section 8 (c) of the Armaments Corporation of South Africa, Limited Act[24] (Armscor Act) provides that (a) member of the

[24] 51 of 2003.

Board must vacate office if his or her services are terminated by the Minister *on good cause shown*. As a final point, it bears mentioning that in terms of section 195 (1) of the Constitution, public administration must be governed by a principle of high standard of professional ethics which must be promoted and maintained. It does seem to me that if the non-approval seeks to achieve discipline within the public service, same would be rational even in instances where there is no evidence of vindication of the right to fair labour practices.

Is the decision not to approve reviewable on the *Weder* approach?

[41] The full extent of the respondent's decision is recorded in the letter dated 06 November 2015. I take a view that the investigation report, although approved by the respondent does not contain the views of the respondent but those of Advocate Moshodi. There is no evidence before me to suggest that the respondent delegated his powers to Advocate Moshodi. It was Advocate Moshodi who submitted that the Department would not be unfair to terminate the applicant's employment contract due to abscondment.

[42] The letter of the respondent is bereft of the reasons why continued employment would be intolerable. The affidavit in opposition is deposed to by a Senior Employment Relations Officer. The respondent did not file a confirmatory affidavit. It is unclear to the court why the person whose decision is impugned does not give testimony in defence of the decision. Conspicuously absent in the evidence of the Senior Employment Relations Officer are the reasons why continued employment would be intolerable. According to the LAC, this is critical for the purposes of determining rationality. On this basis alone, the decision is reviewable on the principle of legality.

The issue of the relief

[43] The applicant asked the court to substitute the decision with one that the applicant is re-instated with retrospective effect from 2 April 2013. The basis upon which, I review the decision of the respondent is more like suggesting that he failed to apply his mind. Had he applied his mind, he would have considered a relevant factor which is whether continued employment is or is not tolerable. Having failed to do so, he did not exercise his powers as required by the law. Therefore, it is as good as not having exercised a statutory power. It is not the task of this court to approve reinstatements. This not being a reinstatement as a remedy within the contemplation of the LRA, this court, in my view, is not empowered to approve the reinstatement of the applicant. I believe that this court's powers in section 158 (1) (h) is to review the decision of the state as an employer on such grounds as are permissible in law.

[44] In the *De Villiers* matter, my brother, Van Niekerk J, took a view that the exception to the general rule was applicable – the end results would, in any event, be a foregone conclusion in the matter before him. I doubt whether such would be the case in the matter before me. There is an allegation, which, it seems was not properly investigated, that may stand in the way of the reinstatement of the applicant. That is that he lied when he suggested that he was incapable to perform duties, in truth, so the suggestion went, he was attending lectures at CUT. In a reinstatement, in the context of the LRA, the LAC in *Maepe v CCMA and another*[25] found that the fact that Maepe lied at arbitration is a factor which would deny him reinstatement as a relief.

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

Order

[25] [2008] 8 BLLR 723 (LAC)

1. The decision of the respondent not to approve the reinstatement of the applicant as required in section 17 (3) (b) of the PSA is hereby reviewed and set aside;
2. The matter is remitted to the respondent for the proper exercise of the power contemplated in section 17 (3) (b) of the PSA.
3. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate L A Roux.
Instructed by: Kruger Venter Inc, Welkom

For the Respondent: Advocate T L Manye
Instructed by: State Attorney – Bloemfontein