IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO **D218/03**

DATE HEARD: 2003/08/08

DATE DELIVERED: 2003/08/18

In the matter between:

HOSPERSA First Applicant

MOULTRIE Second Applicant

and

MEC FOR HEALTH Respondents

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

ON 18 AUGUST 2003

ON BEHALF OF APPLICANTS: MR M PILLEMER SC
Instructed by Llewellyn Cain
ON BEHALF OF RESPONDENT: MR J N M POSWA SC
Instructed by State Attorney, Durban.

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JUDGMENT 18 AUGUST 2003

PILLAY D, J

[1] This application turns on the interpretation and application of

section 17(5)(a)(i) of the Public Service Act, Proclamation 103 of 1994 (“the PSA”). The section provides:

"(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 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 effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

(5)(a)(ii)

> If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.

(5)(b)

> If 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."

[2] The facts were: there was a collective agreement adopted by Resolution 8 of 1998 by the Public Service Co-ordinating Bargaining Council ("the Resolution 8 agreement"). It enabled the conclusion of further agreements for the special secondment of officials to the trade union in terms of a secondment agreement. The secondment agreement was tripartite between the trade union, employer and the official. The trade union undertook to reimburse the employer for the remuneration it continued to pay during the period of secondment of the official. The official undertook to render services to the trade union. The employer guaranteed certain protections to the official during the period of secondment. The second applicant had been seconded to the first applicant for three terms of one year from 1 July 1999.

[3] A dispute about whether the second respondent had a duty to

comply with a request for a secondment was referred for arbitration on 25 January 2001. It was decided in favour of the applicants. Although that award is challenged under review, it remains in force until it is set aside.

[4] Reinforced by the award, the first applicant requested on 30 May 2001 the secondment of the second applicant for the rest of the term of his office as president of the first applicant.

[5] Secondment might previously have been made for periods of one year. However, as discussed below, a request for a longer period is not prohibited by the Resolution 8 agreement. The second applicant nevertheless remained seconded to the first applicant from 1 July 2001.

[6] In July 2002 the secondment agreement was further extended. There is a dispute about the duration of this extension.

[7] That brought into question the status of the second applicant's secondment. The applicants contended that they had acquired vested rights which could not be affected by the termination of the Resolution 8 agreement. They maintained

that the secondment agreement endured until 2004 when the second applicant's term of office came to an end.

[8] The respondents maintained that the secondment ceased once the Resolution 8 agreement was terminated on 31 December 2002. Furthermore, the applicants did not derive any vested rights independently of the Resolution 8 agreement, so it was submitted.

[9] The second respondent informed the applicants that the second applicant was to report to work on 2 January 2003. On 2 January 2003 first applicant wrote to the second respondent, requesting that they discuss the matter. The response on behalf of the second respondent was, *inter alia*, to point out that the second applicant had not reported for duty that day and that he, the second respondent refused to engage in any discussions with the applicants.

[10] The second applicant presented himself for work on 6 January 2003 and produced a medical certificate to explain his absence for the first two working days of the year.

[11] By letter dated 16 January 2003 the applicants informed the second respondent, *inter alia*, that they regarded the demand that the second applicant return to work to be a direct violation of the terms and conditions of the collective agreement. The second applicant presented himself to work pursuant to the second respondent's demand, without prejudice to his rights and with a reservation of all rights vested in him. This was done in the hope that a conciliatory attitude would prevail and litigation would be avoided. If the matter was not resolved amicably by 20 January 2003 the first applicant gave notice that the second applicant would, with effect from 21 January 2003, continue his secondment to the first applicant for the remainder of his presidency. The second applicant stopped reporting for work with the respondents from 21 January 2003.

[12] On 12 March 2003 the second applicant was served with a letter in the following terms:

"Abscondment : Yourself

You have absented yourself from duty without authority with effect from 21 January 2003. In terms of section 17(5)(a) of the Public Service Act, 1994 you are deemed to have been discharged on account of abscondment. However, you have an opportunity to make representations as to why your dismissal cannot be confirmed. In this regard you are requested to present yourself at the inquiry which is scheduled as follows ..."

[13] On 28 March 2003 this application was launched. A *rule nisi* was obtained by consent on 1 April 2003, *inter alia*, for a declarator and to interdict the respondents from taking disciplinary steps against the second applicant by reason of him tendering his services on the basis that he had been seconded to the first applicant pending the determination of an arbitration on the issue as to whether or not the secondment was valid.

[14] The parties referred a dispute to arbitration to determine what effect the withdrawal of the Resolution 8 agreement had on the balance of the period of secondment of the second applicant, i.e. the period after 31 December 2002.

[15] Three arbitrators found against the applicants. The applicants had agreed that the second applicant would return to his duties with respondent if the arbitrators ruled against them.

[16] The second applicant tendered his services on 10 July 2003. However, the respondents insisted on proceeding in terms of section 17(5)(a)(i) of the PSA.

[17] The parties had obviously misunderstood each other's intentions when the applicants agreed to tender the second applicant's services after the arbitration. It is quite improbable that the second applicant would have agreed to submit himself to the completion of the section 17(5) procedure, for that would have meant acceptance by him that he had already been discharged. The very purpose of this application is to prevent that eventuality.

[18] The second applicant accordingly withdrew his tender and sought to confirm the *rule* in this application. Mr *Pillemer* submitted that the second applicant did not absent himself from duty within the meaning of section 17(5)(a)(i) of the PSA. Accordingly, the purported discharge of the second applicant for abscondment is invalid and should be set aside. The legal position brought about by the section, he further submitted, is triggered by the objective factual situation, resulting in the termination of the contract of employment by operation of law. It is not dismissal. (*The Public Service Association of South Africa v Premier of Gauteng* (1999) 20 ILJ 2106 (LC).) Furthermore, he contended that the purpose of the section is to cater for situations where employees abscond or absent

themselves from work without explanation. It is one of the situations described as "a crisis zone" in which a hearing can be dispensed with. (E Cameron, *The right to a hearing before dismissal, problems and puzzles* (1988) ILJ 147; *Dunywa Thembeka Patricia v the Department of Economic Affairs, Environment and Tourism, Godangwana Commissioner Robert Midgley*, case No EC 8577 dated 9 September 1999.)

[19] Mr *Poswa* for the respondent submitted that the Court has no jurisdiction to deal with administrative processes between the respondents and their employees. As section 17(5)(a) resulted in the termination of services by operation of law, there is no "decision" to review. If the respondents abused their administrative powers, he acknowledged employees would be at liberty to approach the Court provided they exhausted all other preliminary remedies. The outcome of the section 17(5) process, he said, was being pre-empted. If the second applicant remained aggrieved after a hearing in terms of section 17(5)(b) he could then have recourse to the Court.

[20] I agree with Mr *Pillemer* that section 17(5)(a) calls for a purposive interpretation to give effect to the constitutional

objective of the right to fair labour practices. In my view, the jurisdictional prerequisites for invoking the provisions of section 17(5)(a) are the following:

(1) The person concerned must be an officer or employee, as defined. The section does not apply to a member of the permanent force of the National Defence Force, the South African Police Services and the Department of Correctional Services, an educator, a member of the intelligence agency or the intelligence service.

(2) The employee must absent herself from her official duties.
(3) Such absence must be without permission.
(4) Such absence must be for more than one calendar month.
(5) The circumstances must be such that the Disciplinary Code and Procedure, Resolution 2 of 1999 and Annexure A ("The Code") thereto have no application.

[21] Each of the jurisdictional requirements will now be discussed. The second applicant is an officer in the Public Service. The first requirement is accordingly met. The second, third and fourth requirements will be discussed together. It is common cause that the applicant was not at Natalia, where he was posted by the respondents. It is also common cause that he was not performing duties for the respondents during the period in issue, i.e. January 2003 to date.

[22] Mr *Pillemer* submitted that he was nevertheless performing his official duties, i.e. his duties as a union official in furtherance of the first applicant's business. This was so, he submitted, because the secondment agreement endured beyond the cancellation of the Resolution 8 agreement. He referred to various analogous situations where rights remained unaffected by changes to the enabling instrument. For example, an amendment to a statute, retrospectively or otherwise, whilst a matter is pending did not affect the rights of parties which, in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time the action was instituted. (*Bell v Voorsitter van Rasklassifikasieraad* 1968 (2) SA 678 (A) at 683E.) Similarly, he argued, if authority under a contract falls away whilst the contract still had a period to run and a party loses legal capacity, the contract remains enforceable against that party's estate.

[23] In my view, it does not follow that on the cancellation of a principal agreement such as the Resolution 8 agreement, that other agreements arising therefrom would automatically be terminated. Much would depend, *inter alia*, on the terms and

the nature of the agreements, whether they can exist independently of each other and what the intention of the parties were when concluding and cancelling them.

[24] Clause 4(c) of the Resolution 8 agreement lists as one of the obligations of the employer the conclusion of an agreement with the official to be seconded to regulate certain matters, such as her grade, the form of her performance assessment to apply during secondment, promotion and her duties. The purpose of such an agreement is to protect the official during the period of secondment.

[25] The trade union, on the other hand, had to minimise as far as possible the amount of special secondments requested. There was no other qualification on what the request should contain, or how or when it should be made. In terms of clause 7(a) of Resolution 8, the trade union has to make a request for special secondment.

[26] In this case, the respondents dispute that there was a formal agreement to second the second applicant to the first applicant. It is common cause that there is no written contract

to that effect. An agreement, nevertheless, came about. It did not come about merely on the first applicant notifying the respondents that the second applicant was seconded. The second respondent had to consent first before the secondment agreement could take effect. The second respondent, either expressly or tacitly, granted the first applicant's request for special secondment of the second applicant from July 2002 to 2004, when his term of office would come to an end. This request was made in writing in the form of a letter.

[27] It is common cause that the applicant was seconded from July 2002 to December 2002 and rendered services to the first applicant without protest from the respondents.

[28] If the second respondent did not intend to grant the secondment at all or for the entire duration of his term of office, it ought to have refused the request or granted it for such period as it wanted to.

[29] I agree with Mr *Pillemer* that the secondment agreement was a tripartite agreement between the first applicant, second applicant and the respondents. To the extent that it conferred

protections on the second applicant, it is arguably a species of a *stipulatio alteri*. Unlike the Resolution 8 agreement, it was not a collective agreement, as defined in the Labour Relations Act 66 of 1995. Furthermore, it was an agreement for a fixed term, whereas the Resolution 8 agreement was for an indefinite term.

[30] As a tripartite agreement for a fixed term, the respondents could not unilaterally terminate it. It conferred rights and protections in favour of the first and second applicants. In turn, the first applicant was obliged to reimburse the respondents for the cost of the second applicant's remuneration during the secondment. These rights and obligations could endure despite the demise of the Resolution 8 agreement. For example, the rights and obligations of parties to a retrenchment agreement are not extinguished if the currency of the recognition agreement which enabled the retrenchment agreement is terminated. Nor is the retrenchment agreement terminated if the employer is liquidated. The agreement will be enforceable against the liquidator. The employer would still be obliged to, for example, inform the trade union if vacancies arise.

[31] Finding, as I do, that the secondment agreement endured after the Resolution 8 agreement was terminated, it follows that the first applicant had a right to the services of the second applicant. Conversely, the second applicant's obligation was to perform official duties for the first applicant. The respondents have not placed in issue that he did not perform duties for the first applicant.

[32] I accordingly conclude that the second applicant did not absent himself from his official duties for more than one calendar month. Furthermore, I find that the second respondent's purported withdrawal of its permission for such secondment to be unlawful and in breach of the secondment agreement.

[33] The fifth requirement relating to the non applicability of the Code is elevated to a jurisdictional prerequisite, otherwise section 17(5) cannot co-exist with the employee's rights to fair labour practices and administrative justice.

[34] There are two mechanisms available to the respondents if

employees absent themselves from work without permission. The first is to charge them for misconduct for having breached the Code. Schedule A of the Code includes as an offence:

> "Absence or repeatedly absenting him/herself from work without reason or permission."

The employees remain employed whilst the charges are investigated and tried. If the disciplinary inquiry determines that they should be dismissed, respondents would bear the *onus* of proving the fairness of the dismissal. Absence from duty without permission is also not usually regarded as a serious offence warranting dismissal. To invoke this procedure, the whereabouts of the employees must be known to the employer in order to serve a charge a sheet and secure their attendance at the disciplinary inquiry.

[35] The second mechanism is in terms of section 17(5)(a). Employees who absent themselves without permission for more than one calendar month shall be deemed to have been discharged on account of misconduct. The words "shall be deemed" implies that the provisions are automatically invoked by operation of law.

[36] Because the employees are discharged, they are deprived of

all the rights and protections afforded by the unfair dismissal laws. As a discharge is deemed to be on account of misconduct, the employees are condemned before they have been given a hearing. There may be reasons other than misconduct for their absence. After the employees have been deemed to be so discharged, and provided they, firstly, report for duty and, secondly, they show good cause, their reinstatement into their former or other positions may be approved subject to conditions. (Section 17(5)(b).) When exercising their right to a hearing in terms of section 17(5)(b) the employees bear the *onus* of showing good cause. Section 17(5)(a) not merely restricts, but excludes the employees' right to a fair hearing before being found guilty and dismissed. It deprives the employees of challenging the termination of their services through conciliation and arbitration. It automatically deprives employees of their employment.

[37] All in all, section 17(5) is a draconian procedure. It must be used sparingly and only when the Code cannot be invoked when the employer has no other alternative. That would be so, for example, when the respondents are unaware of the whereabouts of the employees and cannot contact them. Or, if

the employees make it quite clear that they have no intention of returning to work. The Code is a less restrictive means of achieving the same objective of enquiring into and remedying an employee's absence from work. It enables employees to invoke the rights to fair labour practice and administrative justice. All the jurisdictional prerequisites for proceeding in terms of section 17(5)(a)(i) must be present before it is invoked.

[38] The second respondent knew the reason for the second applicant's absence from his duties with the respondents. It was in contact with the applicants to process the arbitration and this application.

[39] Even if I am wrong in finding that the second applicant had an obligation to render services to the first applicant after the Resolution 8 agreement was terminated, there was, at the very least, a *bona fide* dispute about the status of the secondment agreement.

[40] There is no reason why the Code could not have been applied to the second applicant if the respondents believed in good

faith that the second applicant's absence amounted to misconduct.

[41] The second applicant's uncertainty about his position is evidenced by his tender of services on 6 January 2003 with a medical certificate to explain his absence. Furthermore, the first applicant's offices were closed at the time. The applicant's further explanation for not performing duties for the respondents was the existence of the dispute. He submitted to arbitration, which resolved that dispute.

[42] The respondents cannot reasonably infer, in those circumstances, that the second applicant committed misconduct. His absence from the respondents' workplace since 10 July 2003 has been occasioned by the respondents' insistence on applying section 17(5). He has had the protection of the Court against the application of section 17(5) since 1 April 2003.

[43] The respondents failed to comply with the fifth jurisdictional prerequisite. The second applicant cannot be deemed to have been discharged.

[44] These are the reasons for the order I granted on 8 August 2003 in terms of paragraphs (a), (b) and (d) of Notice of Motion, including the costs of two counsel.

PILLAY D, J

13 October 2003