IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

JR 2316/04

In the matter between:

PAWUSA	**FIRST APPLICANT**
M.J MDALI	**SECOND APPLICANT**

And

DEPARTMENT OF EDUCATION [FREE STATE PROVINCE]	**FIRST RESPONDENT**
MEC DEPARTMENT OF EDUCATION	**SECOND RESPONDENT**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC)	**THIRD RESPONDENT**
J.B. MTEMBU N.O.	**FOURTH RESPONDENT**

JUDGMENT

Cele AJ

INTRODUCTION

[1] The second applicant (applicant) seeks to have the arbitration award dated 19 January 2004, issued by the fourth respondent as an Arbitrator of the third respondent reviewed, set aside and substituted in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995 ("the Act"). The first respondent in its capacity as the erstwhile employer of the applicant opposed the

application.

Background facts

[2] The applicant commenced his services with the first respondent on 1 March 1994 as a General Assistance Worker. He was transferred to the Transport Division and later to the Human resources Department dealing with “housing state guarantee”.

[3] On 19 July 2000 to 11 August 2000 the driver of the second respondent went on leave. The applicant was used by the first respondent to replace this driver on leave. During that period, the applicant would not report to his supervisor, where he had to sign an attendance register. After 11 August 2000, the applicant’s signature in the attendance register appeared on: 4/9/2000; 5/9/2000; 11/9/2000 and 9/10/2000. his supervisor however noted in the attendance register that, the applicant was reporting at the office of the second respondent for the period 21-25 August 2000. For the period 17-20 October 2000 the attendance register showed that the applicant was on sick leave. On or about 9 October 2000, the applicant handed in a letter of resignation to the first respondent. By its conduct the first respondent did not accept his resignation. On or about 1 December 2000, the first respondent issued a letter calling upon the applicant to report for duty on or before 11 December

2000.

[4] The evidence in the pleadings and in the arbitration proceedings is lacking in particularity in respect of some of the events which unfolded in this matter. There is a period when the applicant was charged with an act of misconduct on the allegations that he damaged government property, being a motor vehicle. In an internal disciplinary hearing, he was found to have committed the act of misconduct complained of and was dismissed per letter dated 16 November 2000, with effect from 1 January 2001. He lodged an internal appeal which, it seems was successful as that charge was withdrawn through a letter of the second respondent dated 14 December 2000. However, the second respondent simultaneously indicated that it was busy with the implementation of abscondment for the applicant. A letter dated 29 December 2000 informed the applicant that he was deemed to have been discharged in terms of section 17 (5) (a) (i) of the Public Service Laws Amendment Act, 1998 from service on account of misconduct with effect from 10 October 2000 for being absent from work for a period exceeding 30 consecutive days without consent of the head of department.

[5] The applicant felt aggrieved by the termination of his employment and he was assisted by the first respondent (the

union) in referring an unfair dismissal dispute for conciliation. A jurisdictional ruling dated 4 July 2002 was issued by Advocate Antony Osler, as the appointed arbitrator for conciliation, to the effect that a discharge in terms of section 17 (5) (a) (i) of the Public Service Act was not a dismissal and therefore that the council had no jurisdiction over the dispute as then referred.

[6] A letter dated 23 July 2002 was issued by the union on behalf of the applicant with representations to the second respondent. It advised him that the applicant was alleged to have absconded from duties at a time when he was on duty at the second respondent's offices. A negative response dated 26 September 2002 was received by the union from the first respondent. Part of the response reads:

> "...The allegation made that he worked in the office of the MEC Education could not be substantiated because there is only one letter that indicates that Mr Mdali worked at the office of the MEC-Education, and that period was from 19 July-11 August 2000. A report on the matter of Mr Mdali was forwarded to the office of the MEC Education and he has indicated that according to the report from GPSSBC it was never indicated that he should be involved in the matter.
>
> The Department therefore stands by the decision to terminate the services of Mr Mdali due to abscondment and the matter is therefore regarded as finalised"

[7] In the pleading bundle there is a certificate of outcome dated 21 July 2003 with an endorsement that the dispute between the parties, referred to conciliation on 21 July 2003, concerning an

alleged unfair labour practice, remained unresolved on 21 July 2003. How a dispute could remain unresolved on the very day it was referred to the council, leaves much to be desired. The union proceeded to refer the dispute to arbitration and the fourth respondent was appointed to arbitrate it. He found that the applicant wilfully absented himself without consent for a period exceeding 30 consecutive days and was correctly dismissed by the respondent.

Grounds for Review

[8] While the applicant failed to succinctly outline the review grounds on which he sought to have the award reviewed, the substance of his submissions undoubtedly showed that he relied on an allegation that the fourth respondent committed a misconduct and / or a gross irregularity in the execution of his duties. He said that the fourth respondent failed to apply his mind to the relevant issues and thus came to a wrong conclusion, further, that he misconstrued documentary evidence and ignored or misapplied relevant legal principles to an extent that was unreasonable and inappropriate.

[9] In response, the fourth respondent said that the submissions made by the applicant in support of the review application were mere conclusions of law. It was contended that the applicant set out no basis for the said conclusions, without which basis or

factual allegations there were no grounds for review. In his supplementary affidavit, the applicant did set out factual allegations as a support base for the conclusions of law and the fourth respondent contradicted those submissions. He said that the fourth respondent was entitled to take into account the documentary evidence, namely the attendance register.

[10] Due to the fact that the application for review was filed very late, the applicant had to file a condonation application.

[11] Even before I proceed to deal with the two applications before me, namely, the review and the condonation applications. I have to attend to the points which the fourth respondent raised *in limine*. These points, if successful, have the potential of disposing off this matter.

Points raised *in limine*

[12] Submissions by the first respondent are basically that:

- The ruling issued by Advocate Osler, to the effect that the applicant was deemed to be discharged in terms of section 175 (5) (a) (i) of the Public Service Act, 1994 and was therefore not dismissed as envisaged by section 186 of the Act, was final and binding;
- Accordingly, the issue between the parties had

been determined and it was *res-judicata*;

- As the matter was again referred to arbitration and an award was issued because of the ruling of Advocate Osler, the matter ought not to have been proceeded with by a further arbitration hearing. The fourth respondent had no power or jurisdiction to deal with the dispute;
- The effect is that the decision of the fourth respondent falls to be reviewed and set aside, leaving the ruling of Advocate Osler.

[13] The submissions by the applicant, on the other hand are that:

- Where a commissioner / arbitrator has issued a certificate in terms of section 191 (5) stating that such a dispute remains unresolved, the CCMA and therefore also, the council has jurisdiction to arbitrate the dispute.
- The first respondent admitted in its answering affidavit that the applicant has again referred a dispute to the third respondent.
- The third respondent had jurisdiction to arbitrate this matter up until the certificate of outcome was reviewed and set aside.
- No point *in limine* pertaining to the jurisdiction of the third respondent was ever raised during the arbitration hearing of this matter before the fourth

respondent.

- If the second respondent argued that the certificate of outcome contains a nullity vitiated by an irregularity that goes to the root of the facts that it seeks to confirm and was fraudulently issued and therefore be regarded as a nullity – then it would be argued that the fourth respondent's award must then be set aside as having no legal effect.
- As the certificate of outcome has not been set aside and no application for its setting aside has been made, the challenge to the jurisdiction to arbitrate the matter was doomed to failure while the certificate remained intact.

ANALYSIS

[14] The point *in limine* is premised on section 175 (5) (a) (i) of the Public Service Act, 1994, which reads:

> "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."

[15] The provisions of section 175 (5) (a) (i) clearly contemplate the existence of certain facts before an officer shall be deemed to have been discharged from the public service. These facts are:

- The officer,
- 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.

[16] It is clearly the existence of each of the facts herein above outlined that triggers the deeming provision of the subsection. No action of the employer will accordingly trigger the deeming provision to come into operation, which occurs *ex-lege* – see the unreported decision in *The Head of the Department of Education (Free State Province) and South African Democratic Teachers' Union JA 68/05 dated 27/09/2007 (LAC)*, and *MEC Public Works, Northern Province v CCMA & Others [2003] 10 BLLR 1027 (LC)*.

[17] In the absence of a decision by the employer to dismiss, as the discharge takes place by operation of the law, neither the CCMA nor Council would have jurisdiction to entertain the dispute which might have arisen. The disgruntled employee is

however not left without a remedy. It is always open to the employee to persuade the employer to reinstate him or her in terms of section 17 (5) (b), which reads:

> "If an officer who is deemed to have been 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 re-instatement of that officer in the public service in his or her former or any other post or position, and in such 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."

[18] Section 17 (5) (b) is clearly intended by the legislature to satisfy the *audi alteram partem* rule which hitherto would not have come into operation. The employee is thereby accorded an opportunity to explain whether he or she indeed absented 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. The employer is then to consider whether or not to approve the re-instatement of that employee.

[19] The situation where the employer decides not to reinstate the

employee, as in the present case, needs to be briefly examined. In the case of *Public Servants Association of SA & Another v Premier of Gauteng & Others (1999) 20 ILJ 2106 (LC)*, at paragraph 31 Revelas J considered albeit obiter, the question of conciliation and arbitration of a dispute where the employee is not reinstated by the employer. She said the following:

> "In my view, it is still open to the second applicant to attempt to persue her rights in terms of s 17 (1) (b) (should be 17 (5) (b)) of the proclamation. If she is unsuccessful she may refer the dispute about her dismissal to have the matter conciliated and arbitrated by the CCMA..."

[20] I share the same centiments as were expressed by Freund AJ in the *MEC Public Works, Northern Province Case* (Supra), in respect of the view expressed by Revelas J. In paragraph [9] of his judgment Freund AJ had the following to say:

> "..., To the extent that this court may have implied in an *obiter dictum* in the *Public Servants Association Case* (Supra) at paragraph [31] that a refusal to reinstate in terms of section 17 (5) (b) (i) (should be 17 (5) (b)) is a dismissal whose fairness can be determined by the CCMA, I respectfully disagree. In my view a decision not to reinstate an employee whose employment has been terminated by operation of the is not a "dismissal" in terms of any of the subsections of section 186 of the LRA. In particular, section 186

> (a), which provides that where "an employer has terminated a contract of employment with or without notice" there is a "dismissal" does not in my view apply. If the employer exercises his discretion in terms of section 17 (5) (b) (i) (sic) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer."

[21] Because the employee in the case of *Public Servants Association* had not triggered the provisions of section 17 (5) (b), the court held thus in paragraph [28]:

> "In my view, there is therefore no decision, as envisaged by s 158 (1) (h) of the LRA, to be reviewed and consequently the application must fall to be set aside on this basis."

[22] In the case before me, the union submitted written representations to the second respondent on behalf of the applicant. It was on the basis of such representations that the second respondent stood by the provisions of section 17 (5) (a) (i). The employer refused to reinstate. I shall assume, without deciding, that the submission of written representations was a proper means of showing good cause. All that was then left for the applicant to do, in my view, was to take the decision of the employer, not to reinstate him, on review, in terms of section 158 (1) (h) of the Act, if he felt that the decision could be reviewed on any grounds that are permissible in law. He ought

not to have referred the matter to the third respondent, which had no jurisdiction to adjudicate the matter, in the first place.

[23] The points raised *in limine* by the first respondent, represented by Mr Gough, to whom, I am indebted, are accordingly sustained.

[24] Lest uncertainty and therefore unfairness prevail, I do need to consider the matter further. The applicant sought to review and set aside the award of the fourth respondent on grounds other than that of lack of jurisdiction of the third respondent. The jurisdictional ground of review came from the applicant only as an alternative response to the points raised *in limine* by the first respondent.

[25] The review test as was laid down in *Carephone (Pty) Ltd v Marcus NO & Others [1998] 11 BLLR 1093*; *(1999) 19 ILJ 1425 (LAC)* has been changed by the decision of the Constitutional Court in *Sidumo & Another v Rusterburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC)*. It was held that the grounds of review as set out in section 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution of the Republic of South Africa, 1996 to be lawful, reasonable and procedurally fair. Accordingly an arbitration award must be

reasonable. If not, it can be reviewed and set aside.

[26] The Labour Appeal Court had an occassion to clarify the difference between the approach enunciated in *Carephone* (Supra) and that in *Sidumo* (Supra) with regard to the grounds of review set out in section 145 of the Act, in the case of *Fidelity Cash Management Service v CCMA & Others [2008] 3 BLLR 197 (LAC)*. In paragraph [102] of the judgment the following appears:

> "...In many cases, the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely, to support his or her decision or finding but which can render the decision reasonable or unreasonable, can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

[27] The fourth respondent did not deal with the question whether or not he had jurisdiction to determine the dispute before him. It

was evidence made properly available before him that the applicant's employment services had terminated for misconduct in terms of section 17 (5) (a) (i). He dealt with this aspect under the "background to the issue", in his award. He could have relied on the absent jurisdiction to dismiss the claim before him. In my view, his award is not the one that a reasonable decision maker could have arrived at for lack of jurisdiction to adjudicate the matter and it should therefore not be allowed to stand.

[28] The prospects of success of the review application are so good and strong as to outweigh the not so plausible reasons tendered for an excessive period of delay. I am satisfied that granting the applicant an indulgence of condoning the late filing of the review application will not cause prejudice to any party.

[29] Accordingly the following order will issue;

1) The points raised by the first respondent *in limine* are sustained.
2) Condonation for the filing of the review application is granted.
3) The arbitration award dated 19 January 2004, issued by the fourth respondent in this matter, is reviewed and set aside. For lack of jurisdiction the matter is not remitted to the third respondent.
4) The decision taken by the second respondent, not to

reinstate the applicant still stands.

5) The applicant is to pay costs of this application to the first respondent which has substantially been successful.

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CELE AJ

Date of Hearing: 29 February 2008

Date of Judgment:

Appearance:

For the Applicant: C. Breytenbach
Instructed by: H. Le Roux

For the Respondent: I Gough

Instructed by: State Attorney