IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

REPORTABLE

CASE NO: C696/08

In the matter between:

DERRICK GROOTBOOM	APPLICANT
AND	
THE NATIONAL PROSECUTING AUTHORITY	1ST RESPONDENT
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this matter seeks to review and set aside the decision of the first respondent dated 7th February 2007, alternatively that of the second respondent made on the 25th March 2008. The decision which the applicant seeks to review relates to the respondents evocating the provisions of section 17(5)(a) and (b)[1] respectively of the Public Service Act 103 of 1998 (the PSA) in terms of which the employment of the applicant was terminated.

[1] Section 17 (5) of the PSA has been substituted by section 25 of Act 30 of 2007 and is now sub-section 17 (3) (a) and (b). There are no, material differences between the two sections. The changes brought in by the subsection relates to the word "officer" which has changed to the word "employee."

Backgrounds facts

[2] It is common cause that the applicant was an officer employed as such by the respondents prior to his dismissal. There are several incidents that occurred prior to the respondents' evoking the provisions of section 17(5)(a)(i) of the PSA. The applicant who commenced his employment with the respondents in April 2001, as a prosecutor was transferred on a number of occasions to various other work places of the respondents. He was initially employed in 2001, in Springbok and was transferred to Port Elizabeth in June 2003. After spending some three years in Port Elizabeth the applicant was transferred to the Upington but stationed at Springbok as of February 2006.

[3] The applicant who commenced his employment with the respondents in April 2001, as a prosecutor was transferred on a number of occasions to various other work places of the respondents. He was initially employed in 2001, in Springbok was transferred to Port Elizabeth in June 2003. After spending some three years in Port Elizabeth the applicant was transferred to the Upington but stationed at Springbok as of February 2006.

[4] The duty of the applicant whilst based at Springbok was to travel to various magisterial districts in and around Upington and because of this he was entitled to subsistence and travelling allowances. Because of the

dissatisfaction with the payment of his travelling allowances the applicant lodged a grievance with the first respondent.

[5] According to the applicant, instead of responding to the grievance the first respondent suspended him on the 22nd June 2005, pending a disciplinary hearing which was to take place then on the 21st September 2005. Further to the disciplinary hearing the applicant was found guilty of misconduct and dismissed on the 28th March 2006.

[6] The applicant being unhappy with the outcome of the disciplinary hearing referred his alleged unfair dismissal dispute to the Public Service Coordinating Bargaining Council (PSCBC) for conciliation and arbitration. The arbitration hearing was set down for the 1st and 2nd June 2006.

[7] The outcome of the disciplinary hearing was set aside on the 1st June 2006, by the arbitrator of the PSCBC and the parties agreed that the applicant's disciplinary hearing would proceed on the basis of a pre-dismissal arbitration.

[8] The pre-dismissal arbitration was set down by the PSCBC for the 14th to the 17th August 2006. The matter was then according to the applicant postponed *sine die.*

[9] Subsequent to the postponement the applicant approached one of the officials of the first respondent to sign the requisite study leave forms to go and study in the United Kingdom. According to him he had already made arrangements for his further studies in the UK whilst he was on suspension.

The applicant left the country soon after the postponement of the pre-dismissal arbitration proceedings to attend his LLM studies in the UK.

[10] It is common cause that the salary of the applicant was frozen at the end of October 2006. Following the freezing of the salary there was an exchange of emails between the applicant and the officials of the first respondent responsible for the labour relations between the period November and December 2006 concerning this issue.

[11] On the 1st February 2007, the applicant received a letter informing him that he had not been granted leave of absence to further his studies outside the Republic of South Africa and that no application for leave had been received or approved by the first respondent. It was for this reason that it would appear that the provisions of section 17(5) (a) (i) of the PSA was evoked by the first respondent. The employment of the applicant was accordingly deemed to have been terminated on the 15th September 2006.

Grounds for review

[12] The applicant brought his application to review the decision of the first respondent and confirmation thereof by the second respondent in terms of the grounds set out in section 6(2) of the Promotion of Administration Act No 3 of 2000 (PAJA). The grounds for review are set out in the applicant's heads of arguments and the essence thereof is that the first respondent was biased or took the decision for ulterior motive and also took into account irrelevant considerations. In the alternative the applicant challenged the

decision of the second respondent to uphold the decision of the first respondent based on the common law grounds as codified in section 6(2) of PAJA. The grounds are also based on bias, ulterior motive, failure to take into account relevant considerations, bad faith and arbitrariness or capriciously.

Evaluation

[13] In my view it is trite that during suspension an employee still remains under the authority of his or her employer. Therefore a suspended employee has a duty to keep his or her employer posted about his or her whereabouts and about anything that may prevent him or her from assuming duties should he or she be required to do so by the employer. In other words the applicant in the present matter was obliged to obtain authorisation from the first respondent before leaving for his studies overseas. The applicant was away from the country for a period of a year without authorisation from his employer.

[14] It was suggested in argument that the applicant had received authorization for his sabbatical leave. In his contention that he was granted sabbatical leave the applicant relied on an email which had been addressed to him by Ms Ngobeni of the respondent. That email does not support the applicant's contention because all what it says is that the applicant's request was receiving attention. It has also not been disputed that Mr Engelbrecht refused to sign the applicant's leave forms because of the insistence by the applicant

that the one year sabbatical leave he needed ought to be granted on full pay. The relevant parts of the email which the applicant addressed to the first respondent dated 18th January 2006 reads as follows:

> *"4. It is upon me now to ascertain from the employer provisional granting of study leave for a one year period to me to be able to make use of the scholarship-a question I need to able to answer during the finals in Johannesburg.*
>
> *5. My request therefore (to you as corporate manager responsible for the NC) is to ascertain or obtain such provisional granting of study leave and to advise me of the same as soon as possible before the end of January 2006.*
>
> *6. …*
>
> *7. This request is been sent to you taking into account my present suspension and its pending finalisation- I hope that the opportunity (study leave) could leave to a correction of broken relationship and a solution to the existing problems with regard to the said suspension. I still want to serve the People of South Africa through an important Institution such as the NPA and would settle any dispute if this can be maintained. I hope you may be of help to me."*

[15] In response to the above the respondent stated in an email as follows:

"Dear Mr Grootboom

It is a pleasure to inform you that after deliberations with management, it concluded that a study leave for a year be granted to you upon official request, however with certain conditions that is a leave be granted without pay (my underlining) this to enable the NPA to find a temporary replacement for you for your post.

Other than that, normal forms should be processed (sick) following normal procedures.

Should you have any queries regarding this, please do not hesitate to contact me.

Hope you find this in order."

[16] It is clear from reading a short answer from the applicant to the above email that he understood fully what was stated in the above email. There is no suggestion in my view that the respondent's email could be read to be purporting to be an approval for the sabbatical leave. In his response the applicant states:

"Good day Ms Ngobeni

Thank you for your consideration, help and reply. I will do so.

Best Regards."

[17] This response indicates that the understanding by the applicant was that once the scholarship was approved he would complete the necessary leave application forms. It is also clear that the position of the respondent was that if leave was to be granted it would be granted on condition that it was without pay.

[18] The correspondence between the first respondent and the applicant's attorneys also do not support the contention of the applicant that he had been granted the sabbatical leave. In this respect the letter dated 3rd July 2006, from the applicant's attorney requesting authorization for sabbatical leave states at paragraph 5.2 as follows:

> *"5.2 As you are aware, our client has been granted a scholarship by the Nelson Mandela Institute to study towards his LLM degree at the University of South Hempton, which of cause is due to commence in mid August 2006. It is our client's request that he be granted sabbatical leave-in accordance with the NPA's standard policies in this regard-for the period mid August 2006 until October 2007. We understand from our client that this leave is fully paid in terms of the NPA's current policies."*

[19] The applicant's attorneys addressed another letter dated the 25th July 2006 and at paragraph 6 thereof stated the following:

> *"6. Our client's position is accordingly as follows: in the absence of the NPA making the necessary arrangements with the GPSSBC to*

have our client's pre-dismissal arbitration finalised prior to the 18th August 2006, our client is left with no alternative other than to make application to the NPA that he be placed in sabbatical for a period of approximately 12 months commencing 18th August 2006. (my underlining) In this regard, we kindly request that the NPA forward to us its relevant policies and procedures in this regard together with necessary application forms. This would by implication involve our client's pre-dismissal arbitration being postponed sine die pending our client's return from his sabbatical leave."

[20] It is common cause that on the 26th August 2006, the applicant attended at the office of Mr Engelbrecht and requested for the leave forms. As stated earlier Mr Engelbrecht refused to sign the leave forms because the applicant insisted that the sabbatical leave be on full pay. This is confirmed in the applicant's heads of argument at paragraph 52 where it is stated as follows:

"Engelbrecht refused to assist (referring to the applicant) with the completion of the necessary leave forms."

[21] The consequences of an employee who absent himself or herself without proper authorisation is governed by the provisions of section 17 of the PSA. There are two parts to the provisions of section 17 governing the consequences of an employee who absent himself or herself without authorisation. The first part deems an employee who is absent from work

without authorisation for a period of more than one calendar month to be dismissed due to misconduct. The second part affords an employee an opportunity to show good cause for his unauthorised absence.

[22] The relevant parts of section 17 of the PSA read:

"(5) (a) (i) An officer, other than a member of the services or an educator or a the Agency or Service who absent 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 dismissed from the public service on account of misconduct with effect from a date immediately succeeding his or her last day of attendance at his or her place of duty.

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

(b) If an officer who is deemed to have been so discharged, reports for duty at anytime 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 absent on vacation leave without pay or leave on such other conditions as the said authority may determine."

[23] The above provisions of section 17(5) of the PSA have received attention in a number of decisions of the Courts. In *Phethini v Minister of Education and Others (2006) 27 ILJ 477 (SCA),* the Court in dealing with the provisions of section 14(1) (a) of the Employment of Educators Act 2 (EEA), which has similar provisions as those of section 17(5) of the PSA[2], held that when an employee is dismissed in terms of the deeming provision the employer does not commit an act or take a decision because the discharge is by operation of the law. At paragraph 19 the Court specifically said:

"[19] As to the ground that s 14(1)(a), read with s 14(2), violates the appellant's fundamental right to fair labour practices in terms of s 23(1) of the Constitution, it is not clear what "act" of the employer is alleged to be allowed by the section "without considering the substantive and procedural aspects of the case." It would not be out of place to interpret the word "act" to mean "to decide to terminate or discharge", to which the answer again is that the employer takes no decision to terminate an educator's services under s 14(1)(a) of the Act. The discharge is by operation of law. In my view, the provisions

[2] Section 14 (1) (a) of the Employment of Educators Act 76 of 1998 reads as follows: an educator appointed in a permanent capacity who (a) absent from work for a period exceeding 14 consecutive days without permission of the employer", and section 14 (2) reads as follows: if an educator who is deemed to have been discharge under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty at otherwise as the employer may determine."

create an essential and reasonable mechanism for the employer to infer "desertion" when the statutory prerequisites are fulfilled. In such a case there can be unfairness, for the educator's absence is taken by the statute to amount to a "desertion." Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome."

[24] There is generally accepted authority that the deeming provision as envisaged in terms of section 17(5)(a)(i) of the PSA do not constitute a decision by the employer which could be challenged before any of the dispute resolution bodies including the Court of law. Thus in cases involving termination of employment of a public service officer due to unauthorised absenteeism, the Court does not have jurisdiction to review a consequent outcome of the provisions of the section 17(5)(a) of the PSA. In other words once it has been shown that the requirements of section 17(5)(a)(i) of the PSA have been satisfied, an employee cannot challenge the termination of his or her employment contract since it would have been terminated by the operation of the law. However a different position applies in as far as the provisions of section 17 (5) (b) of the PSA is concerned, as will appear in more detail hereunder.

Point in limine

[25] The respondents contented that this Court does not have jurisdiction to consider the applicant's case because in his notice of motion he formulated the relief as follows:

> 1. *Reviewing and setting aside the decision made by the First Respondent dated 7th February 2007 in terms of section 158(1)(h) of the LRA.*
>
> 2. *In the alternative to paragraph 1, reviewing and setting aside the decision made by the Second Respondent on the 25th March 2008 in terms of section 158(1)(h) of the LRA and that this Honourable Court substitute the decision of the Second Respondent with that of its own, …"*

[26] The applicant further contends at paragraph 8 of his heads of argument that:

> *"It is the Applicant's contention that the Respondents decisions constitute an unfair labour practice in terms of LRA rather than administrative action in terms of section 6 of Promotion of the Administration of Justice Act (PAJA). However, the common law grounds of review as codified in the PAJA are referred to by the Applicant. Nevertheless the application itself is brought in terms of section 158(1)(h) read with section 157(2) of the LRA."*

[27] The applicant in his heads of argument acknowledges that the decision in *Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC),* has pronounced that public servants can no longer invoke administrative reviews to challenge the validity of their dismissals. He however in the same breath argues that the decision in that case does not mean that parties could not incorporate administrative law requirements into their employment agreements. He does not however indicate in what respect the administrative law requirements have been incorporated into the contract of employment between the respondents and himself.

[28] In *Gcaba v Minister of Safety and Security (2009) ZACC 26 (CC),* the Constitutional Court after explaining the confusion that seems to have arisen because of the decisions in *Chirwa* and *Fredericks and others v MEC for Education & Training Eastern Cape and others 2002 (2) SA 693 (CC),* observed as follows:

> *"[64] Generally, employment and labour relations issues do not amount to administrative action within the meaning of PAJA. This is recognised by the constitution. Section 23 regulates the employment relationship between the employer and the employee and guarantees the right to fair labour practices. The ordinarily thrust section 33 is to deal with relationship between the state as a bureaucracy and citizens and guarantees the right to lawful, reasonable and procedural fair administrative action. Section 33 does not regulate the relationship between the state*

as an employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as an employer and it has few or no direct implication or consequent for other citizens, it does not constitute administrative action."

[29] The Court went further to state that:

"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case.

[30] In the present instance the employment of the applicant having automatically been terminated by the operation of the law, there is no decision to review. The applicant was absent from work without authorisation for a period exceeding one calendar month as provided for in section 17 (5) (a) (i) of the PSA.

The provisions of section 17(5) (b) of the PSA

[31] After being informed that the first respondent had invoked the provisions of section 17(5) (a) (i) of the PSA, the applicant addressed representations to the second respondent dated the 5th September 2007. These representations were opposed by the first respondent who addressed certain recommendations to the second respondent in that regard. It is common cause that the second respondent upheld the recommendations which were made by the first respondent. Following the decision of the second respondent the applicant requested reasons thereof. The applicant

complained that the first respondent purported to give reasons on behalf of the second respondent. The applicant being unhappy with this state of affairs then demanded that the second respondent should furnish him with her reasons for the decision.

[32] The second respondent never responded to the request for reasons by the applicant. This being the case the applicant contended that the second respondent did not apply her mind to his representations in terms of section 17(5) (b) of the PSA.

[33] The issue that has arisen as the result of the refusal to reinstate the applicant concerns in essence whether or not there is a remedy available to the applicant in challenging the decision of the respondents not to reinstate him. Although there is consensus as to what approach to adopt when dealing with the provision of section 17(5) (a) the same does not apply in as far as section 17 (5) (b) is concerned. There are two approaches that have been adopted by the Labour Court in dealing with this issue.

[34] The one approach is that which was adopted in the unpublished judgment of *Public Servants Association of South Africa obo MSL Van der Walt v Minister of Public Enterprise and another case number JR1453/06,* where in dealing with this issue the Court held that:

> *"18 The applicant is not left without a remedy. She must report for duty and make representations in terms of section 17(5) (b) of the PSA and show good cause. It is at this stage where*

she can raise the issue around why she did not report for work like she has done in terms of her letters. Should the department refuse to consider her representations or find that she has not shown good cause, she could than declare a dispute and refer it to the relevant bargaining council and after that if need be on review."

[35] The other approach is that which was adopted in *Andre Johann de Villiers v Head of Department: Education Western Cape Province* in the soon to be reported case number: C934/2008, the Court held that *refusal by the employer to reinstate the employee in terms of section 14(2) of the EEA constituted an administrative action,* and therefore the Court was entitled to exercise its review jurisdiction in this regard. In arriving at this conclusion the Court acknowledge what the Constitutional Court said in both *Chirwa* and *Gcaba* regarding the application of the principles administrative action in cases involving the State employees. In interpreting what is said in the *Gcaba's* judgment the Court in *de Villiers'* case held that:

[14] It is tempting to read the Gcaba judgment to suggest that public sector employees may pursue their employment-related grievances only through the processes established by the LRA and other labour legislation, and that in this respect at least, the door to administrative review has finally and irrevocably been closed to them. Such a reading would resonate with the majority judgments in Chirwa and their concerns with the implications of the emergence of a dual system of law, the need to prevent forum shopping in labour

disputes and the desire to treat private and public sector workers equally."

[36] It would however seem that the Court in *de Villiers* regarded the provisions of section 14 (2) of the EEA as being an exception to the general approach enunciated in *Chirwa* and *Gcaba.* In this respect the Court per Van Niekerk J had the following to say:

> *"[20] Applying these considerations to the facts of the present matter, it is common cause that the applicant's contract of employment was terminated in terms of section 14(1) of the EEA, i.e. by operation of law and independently of any action by the respondent. It is also common cause that the discretion exercised by respondent in refusing to reinstate the applicant did not flow from the applicant's contract of employment, but directly from its powers under the EEA. In short, on the facts of this case, the Court is faced with a straight-forward exercise of statutory power vested in the respondent, at a time when the applicant's contract of employment was already at an end. In so far as the relative positions of power are concerned, the respondent was clearly in a position of power, and the inequality in status of the parties could not have been more pronounced. By virtue of being an organ of state, regulated by the EEA, the respondent was in a special position not accorded to employer in the private sector. The employees of no other employer can be "discharged" ex lege, without a prior hearing. No other employer is legislatively immunised from an unfair dismissal referral in circumstances where an employee fails to report for work for a continuous period of 14 days. No other employer enjoys the right to consider reinstatement of its employees within its sole discretion. What weighs particularly heavily in the applicant's favour is that unlike the employee parties in Chirwa, Gcaba,*

Tshavhungwa and Mkumatela, the applicant has no alternative right of recourse - in the absence of a dismissal as defined by the LRA, the option of a referral of an unfair dismissal dispute to the bargaining council is not open to him. If this Court were to adopt a 'hands-off' approach to its oversight functions over the exercise of a discretion such as that established by s 14 of the EEA, the respondent's power would effectively be unchecked, and the applicant would be left without a remedy."

[21] For these reasons, I consider that the respondent's conduct in deciding in terms of s 14(2) of the EEA to refuse to reinstate the applicant constituted administrative action, and that this Court is entitled to exercise its review jurisdiction on this basis."

[37] The alternative approach which the Court *de Villiers* considered in the event the above being incorrect is that the decision of the employer, refusing to reinstate an employee deemed to have been dismissed, could be reviewed under the grounds of legality. The review could be brought in terms of section 158(1) (h) of the LRA. In this respect the Court had the following to say:

"[22] Even if I am incorrect in coming to this conclusion I have that the respondent's conduct amounted to administrative action, in my view, the respondent's action remain open to review under s 158 (1) (h) of the LRA on the ground of legality. It will be recalled that s 158 (1) (h) empowers this Court to review any conduct by the state in its capacity as employer, on any grounds that are permissible in law.

[23] Section 1(c) of the Constitution stipulates that the Republic is founded

on values which include the supremacy of the Constitution and the rule of law. In all of its conduct and at all levels, the state must observe the rule of law and ensure that its actions are clothed with legality. In Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA 2000 (2) SA 674 (CC), it was held that the conduct of the President in deciding to bring a law into operation did not constitute administrative action. However, that was not the end of the enquiry. The conduct of a public official must not be mala fide or exercised from ulterior or improper motives. If the official does not apply his mind or exercise his discretion at all, or if he has disregarded the express provisions of a statute, the Court would intervene on review (at 707G, citing Shidiack v Union Government (Minister of the Interior) 1912 AD 642 at 651).”

[38] In the light of the two approaches I am required to determine which one is correct and should be applied in dealing with the remedy available against the decision of the Sate as an employer when it refuses to reinstate an employee who has been deemed to have been dismissed by operation of the law.

[39] I deal first with the approach which was applied in *Public Servants Association of South Africa.* It seem to me that the ratio of that decision is based on the assumption that the deemed dismissal in part (a) changes into being a decision to dismiss when the employer refuses to reinstate the employee under part (b) of the subsection. This in my view is the only basis upon which the bargaining council or the CCMA could have jurisdiction to entertain the dispute.

[40] This interpretation is in my view incorrect because it is not supported by the reading of the provisions of the subsection. In my view had the legislature intended the deeming provision in part (a) of the subsection to changed under part (b) into a decision of the employer to terminate the employment relationship, which could be challenged in the bargaining council or the CCMA, it would have said so or used words to that effect. The words that would have supported that interpretation would have been to the effect that the employer should in terms of part (b) charge the employee with misconduct related to absenteeism. The other approach could have been to nullify the provisions of part (a) once the employee who had been absent without authorisation presented himself or herself or made submission showing good cause for such period of absenteeism.

[41] It is clear from the reading of the subsection that the deemed dismissal for misconduct relating to absence without authorisation remains even when the provisions of part (b) comes into operation and therefore the deeming provision does not change into the decision of the employer that can be subjected to scrutiny by the CCMA or the bargaining council in terms of section 188 (1) (a) (i) of the LRA.

[42] I now turn to deal with approach adopted in *De Villiers.* The first part of the decision is that the employer in considering the existence of "*good cause"* in terms of part (b) of the subsection exercises an administrative function which may be reviewed in terms of the administrative principles. As indicated

earlier the Court arrived at this conclusion on the basis of it being an exception to the approach which was adopted in both C*hirwa* and *Gcaba.*

[43] This approach has support in what was observed in the minority judgment of *Langa CJ* (as then was) in *Chirwa.* In that judgment after concluding that the power which was exercised by the employer did not constitute an administrative action the Learned Chief Justice had the following to say:

> *It is important to note, however, that my reasoning does not entail that dismissals of public employees will never constitute 'administrative action' under PAJA. Where, for example, the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed, the requirements of the definition of 'administrative action' may be fulfilled."*

[44] The above approach seems to have support also in *Chirwa* from what was said by *Ngcobo J (*as he then was) at paragraph [142] when he reasoned as to why the exercise of power to dismiss by Transnet, although a statutory body, was not "administrative" in nature. The Laerned Judge had the following to say:

> "*[142] the subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment*

contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment; it was exercising its contractual power. <u>It does not involve the implementation of legislation which constitutes administrative action.</u> (my underlining).”

[45] The essence of the minority decision on the facts in *Chirwa* is that the dismissal did not amount to administrative action because it was not taken in terms of any statutory authority, but rather in terms of the contract of employment. The refusal to reinstate an employee in terms of section 17(5)(b) of the PSA is in my view an exercise of power given to the employer by the statute. It is important to emphasise that in considering whether or not to reinstate the employer is not considering termination of the contract of employment as at that stage it would have already happened by virtue of the automatic operation of the law. The only power which the employer has is to consider whether or not there are good reasons for the employee’s absence without authorisation and to exercise discretion given by the statute.

[46] Thus the present case is different from those of *Chirwa and Gcaba* where the Constitutional Court was dealing with the issue of unfair dismissals of public service employees, such decisions having been taken by the employer in terms of the contract of employment. In the present instance as indicated earlier there is no decision to terminate the contract but the termination

happens as a result of the operation of the law and thereafter it is the law that empowers the employer to reinstate once the employee has shown good cause for his or her absence without authorisation. Accordingly, when Van Niekerk J in *De Villiers* says that in terms of Gcaba, "*the door to administrative review"* for public service employees "*has finally and irrevocably been closed,* he is referring to those cases involving termination of the employment relationship by the State as the employer and not where termination is by operation of the law. This is even clearer when one reads the paragraph [64] of *Gcaba* when it is indicated that as a general approach the general rule is that the employment and labour relations issues do not amount to administrative action. This, in my view cannot be read to include instances where the employment and labour relations issues are regulated by specific legislation and not contract as is the case in the present instance.

[47] I am accordingly in agreement with the decision in *De Villiers* that refusal by an employee whose employment has been deemed to have been terminated by operation of law constitute administrative action which can be challenged before the Labour Court in terms of section 158(1) (h) of the LRA. The decision could also be challenged on the basis of legality.

Evaluation of the applicant's case

[48] The question that arises in the present instance is whether the applicant has made out a case that the decision not to reinstate him should be reviewed on the basis of the above principle. In the notice of motion the applicant seeks

to have the decision of the employer reviewed in terms of section 158(1) (h) of the LRA. At paragraph 75 of his founding affidavit the applicant states that: "*I accordingly submit that the decision is reviewable in terms of Section 6(2) (f) (ii) (dd) of PAJA."*

[49] On the authorities referred to above the case of the applicant is unsustainable and therefore has failed to make a case justifying interference with the decision of the respondents in refusing to reinstate him into his previous employment which had been terminated by the operation of the law.

[50] Similarly, the applicant has also failed to substantiate the other grounds for review relating to bias, ulterior motive and bad faith. In this respect the applicant contended that the first respondent was aware that he would be leaving on a scholarship to study outside the country. I have earlier in this judgment indicated that a suspended employee has a duty to inform his or her employer about his or her whereabouts during the period of suspension and may have to seek permission if he or she is to be away in circumstances that he or she would not be able to resume duty if he or she was so directed by the employer. The fact that the employer had knowledge about his whereabouts is irrelevant as what is key is whether or not the absence was authorised. The facts in this case indicate very clearly that the applicant never received authority to be away for an excessive period of one year. The criteria for evoking the provisions of section 17(5) (a) of the PSA was in my

view satisfied and thus the first respondent was entitled to evoke the provisions of that subsection.

[51] In seeking to show good cause the applicants through a letter written by his attorneys of record and dated 5th September 2007, proffered two reasons for his absence. The first relates to the precautionary suspension which he had been placed on by the first respondent. He contends that he could not absent himself from work because he was on suspension and the suspension was not uplifted before termination of his employment. He further states that in terms of the conditions of his suspension he was not allowed to enter the premises of the respondents.

[52] The second explanation is that the provisions of subsection 17(a) of the PSA could not have come into operation because he was granted sabbatical leave. I have already dealt with the issue of whether the applicant had received authority to be away and attend his studies oversees and found that such authority did not exist.

Was the decision of the respondent rational or reasonable?

[53] The question that follows in the light of the above analysis of the explanation tendered by the applicant through his attorneys is whether the decision by the respondents not to reinstate him is reasonable in the circumstances of this case.

[54] The legality of the decision of the employer not to reinstate has to be assessed in the context of considering whether or not the employee has

shown good cause for his or her absence without authority and whether the employer in refusing to reinstate applied its mind to the submission made by the employee.

[55] The decision of the respondent in the present instance is not based on the notion of unfair dismissal but rather on the refusal to reinstate subsequent to termination of the employment relationship by the operation of the law. Thus the contention of the applicant that the decision not to reinstate him constituted an unfair labour practice has no merit. It is trite that a litigant must make out his or her case and the relief sought in its pleading and accordingly the Court must approach the matter as pleaded. The concept of unfair labour practice is found in section 186(2) of the LRA. That section has no relevance or bearing on the discretion exercised by the employer in terms of section 17(b) of the PSA. It would seem from the case pleaded by the applicant that reliance on unfair labour practice can be located in the provisions of section 186(2) (c) of the LRA which reads as follows: "*(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement."* This refers to failure to reinstate in terms of an agreement and not in terms of the legislation which is what is provided for in terms of part (b) of subsection 17(5) of the PSA.

[56] It is clear in my view that the requirement of good cause in terms of section 17(5(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what

were the reasons for being absent without authorisation. The employer in considering whether or not to reinstate the employee has to exercise a discretion given by section 17(5) (b) of the PSA. In this respect the decision by the employer has to be influenced by fairness and justice. In other words the employer does not have unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her mind to the submission made by the employee for the decision to be said to be reasonable and lawful. The key factor amongst others, which the employer has to take into account, is whether or not unauthorised absence was wilful on the part of the employer.

[57] In the present instance the decision of the respondents not to reinstate the applicant cannot be said to be improper, irregular or unlawful. The precautionary suspension and the postponed pre-dismissal hearing did not change the status of the applicant as an employee of the respondents. He remained accountable and was subject to the respondent's authority in terms of his movement and availability during working hours. The issue in determining whether the applicant was absent without authority despite his suspension revolves around his ability to report for work if was called upon to do so by the respondents. In another sense it is apparent that the applicant could not make himself available at the workplace of the respondents had he been called to do so and if his suspension was to be uplifted with immediate effect because of his studies oversees. An approach similar to this was

adopted in *Masinga v Minister of Justice, Kwa-Zulu Government (1995) 16 ILJ 823 (A).* In that case the prosecutor who was suspended pending a disciplinary inquiry found employment with Natal University. When the university suspended him, he sought to go back to the department. In dealing with the issue of the status of a suspended employee (the last sentence at paragraph B-G page 826) the Court had the following to say:

> *"Here the only issue is whether his work in the CLP (Community Law Project of the university) could prevent him from resuming employment with the department forthwith if his suspension was lifted."*

[58] I do not agree with the complaint of applicant that the manner in which the decisions not reinstate him was taken and how it was communicated was irregular or improper. The first respondent, represented by the officials of the department including the Director General made submissions in opposition to the submissions made by the applicant to the second respondent. The second respondent, being the Minister, accepted and agreed with the submissions made by the officials and on that basis refused to reinstate the applicant. The complaint that the decision was communicated by an official of the department to the applicant has no merit.

[59] In the light of the above analysis, I am of the view that the applicant has failed to make out a case justifying interference with the decision of the respondents. Whilst there may be some reservations about the conduct of the

applicant I do not belief that it would be fair to allow costs to follow the results.

[60] In the premises the following order is made:

1. The applicant's application is dismissed

2. There is no order as to costs.

Molahlehi J

Date of Hearing : 30th September 2009

Date of Judgment : 18th December 2009

Appearances

For the Applicant : Adv V Barthus

Instructed by : Cliffe Dekker Hofmeyr Inc

For the Respondent: Adv R Nyman

Instructed by : The State Attorney