REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 71/10

In the matter between:

SOLIDARITY	**First Appellant**
JACOBUS ADRIAAN HENDRIK KOTZE	**Second Appellant**
and	
THE REPUBLIC HEALTH AND WELLFARE SECTORAL BARGAINING COUNCIL	**First Respondent**
COMMISSIONER C L DICKENS N.O	**Second Respondent**
DEPARTMENT OF HEALTH: FREE STATE	**Third Respondent**

Heard: **16 May 2012**

Delivered: **22 January 2013**

Summary: Jurisdiction of the Bargaining Council in terms of s 17 (5) (a) (i) of the PSA – employee taking remunerative employment while on suspension- assuming other employment amounts to being absent from duty and employee is deemed to have resigned – employee deemed to be discharged. The Bargaining Council therefore, lacked jurisdiction to entertain the dispute as employee's service terminated by operation of law. Appeal dismissed.

Coram: Wagly AJP, Tlaletsi JA and Murphy AJA (MurphyAJA dissenting)

JUDGMENT

TLALETSI JA

Introduction

[1] This appeal turns on the interpretation and application of s 17(5)(a)(i) of the Public Service Act[1] ("the PSA"). The second appellant ("the employee") was employed by the third respondent, the Department of Health: Free State Province in the position of Senior Administrative Officer. He complained that he was unfairly dismissed by his employer and together with his trade union, the first appellant, referred a dispute of unfair dismissal to the first respondent, the Public Health and Welfare Sectoral Bargaining Council ("the Bargaining Council"). The dispute was unsuccessfully conciliated and was referred to the second respondent, a commissioner appointed under the auspices of the Bargaining Council, for arbitration.

[2] At the arbitration, the third respondent raised a point *in limine* that the Bargaining council lacked jurisdiction to entertain the dispute since, in their view, the employee had not been dismissed but was discharged by operation of law. The point *in limine* was upheld by the commissioner. Aggrieved by this decision, the appellants instituted review proceedings in terms of s 158(1)(g) of the Labour Relations Act[2] seeking orders, *inter alia*, setting aside the award of the second respondent and that the matter be referred back to the first respondent for hearing *de novo* before a commissioner other than the second respondent. The Labour Court, *per* Molahlehi J, heard the matter on 5 February 2010 and handed down its judgment on 28 July 2010 in terms whereof the application for review was dismissed with no order as to costs. On 2 November 2010, the appellants were granted leave to appeal to this Court by the Labour Court.

[1] Act 103 of 1994.
[2] Act 66 of 1995.

Factual Background

[3] The employee was based at Phekolong/Ketoana District Hospital Complex in Reitz, Free State Province. It is common cause that he was placed on precautionary suspension with effect from 4 July 2007 pending the finalization of an investigation of several allegations of misconduct (fraud). Whilst on suspension, the employee secured and assumed employment in Pretoria with Compu Afrika with effect from 23 July 2007 and continued to work until December 2007. The employee had not obtained permission from the third respondent to take up remunerative work outside the Public Service. He, however, testified that he had submitted his application to be allowed to perform remunerative work outside the Public Service on a previous occasion and was convinced that having submitted the application forms he had the approval of the third respondent. It is for this reason that he freely told his cousin who is the owner of Compu Afrika to write a letter to the third respondent confirming that he was indeed employed by him when enquiries were made to establish whether he was employed by Compu Afrika. The employee however, conceded that he had not obtained permission but only assumed that he had approval to assume remunerative work outside the Public Service. The reason he advanced for not applying for permission was simply that he had no access to the workplace.

[4] On 19 October 2007, the employee received a letter from the third respondent informing him that:

'*Discharge from service: Yourself: Persal number: 12545015*

1. Kindly take that you are deemed to be discharged from the Public Service with effect from 3 July 2007 when you accepted alternative employment whilst you were still in service of the Department of Health. (sic)

2. Above-mentioned discharge is eminent in terms of Section 17(5)(a)(ii) read in conjunction with Section 30(b) of the Public Service Act, 1994, which stipulates the following: "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."

3. All benefits will be paid to you and all debt you owes the Government will be recovered from your pension.(sic)

Kind Regards'

[5] As pointed out already the commissioner made an award to the effect that the Bargaining Council does not have the jurisdiction to entertain the dispute as deemed discharge does not constitute a dismissal for purpose of the Labour Relations Act.

Proceedings in the Labour Court

[6] The appellants challenged the award of the commissioner on the basis that he committed misconduct, gross irregularity and exceeded his powers. They contended further that the decision reached by the commissioner was not one that a reasonable decision-maker could have reached. They relied on the decision of the *Constitutional Court in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[3]

[7] The nub of the reasoning of the Labour Court in dismissing the review application is found in the following passage from its judgment:

'In the present instance the applicant was suspended on the 4th July 2007, he then assumed employment with another employer on 23 July 2007 without authorization from the respondent. Obtaining work with another employer amounted to absenting himself without authority. Although the applicant was on suspension, he was still accountable to the respondent even during the period of suspension. He therefore required authorization to absent himself to attend employment with the third party. He also required authorization to undertake employment with another employer even during his suspension. In taking employment with Compu Africa the applicant absented himself from his work without authorization of his employer. Objectively speaking the applicant

[3] [2007] 12 BLLR 1097 (CC).

could not make himself available if the suspension was to be uplifted and was to be immediately instructed to report for work. Unlike in the case of absconding in the private sector cases the respondent did not dismiss the applicant but the dismissal occurred by the operation of law. The requirement of a fair reason before termination does not apply. In other words the employer does not have to show what steps it took to locate the whereabouts of applicant before evoking the deeming provisions of the PSA.'

The Appeal

[8] In the Notice of Appeal the appellants raised the following as their grounds of appeal: The court:

8.1 applied wrong legal principles, alternatively misconstrued legal principles applicable to s 17 (5)(a) deemed dismissal in terms of the Public Service Act;

8.2 erred by not considering the fact that the employee could not be dismissed in terms of s 17(5)(a)(ii) read in conjunction with s 30(b) of the Public Service Act.

8.3 erred by not considering the fact that the employee did not absent himself but was placed on suspension and thus the provisions of s 17(5)(a)(i) could not apply which accordingly meant that the provisions of s 17(5)(a)(ii) could not be invoked;

8.4 erred by not considering the argument that if the third respondent wished to dismiss the employee in terms of s 30(b) of the PSA they should have instituted formal disciplinary action against the employee in terms of their Disciplinary Code, which they did not do. The court therefore erred by not considering the *Audi-alteram partem* principle;

8.5 erred by concluding that the employee's alleged unauthorised acceptance of alternative work amounted to absenting himself. The employee was never charged nor dismissed for his absence but for

performing unauthorised work. The Disciplinary Code made provision for the employee to be charged for his misconduct even though he was on suspension.

8.6 ought to have found that the employee was at all times available to render service to the third respondent in the event that the third respondent uplifted his suspension, as well as that it was never the intention of the employee to terminate his employment with the respondent.

8.7 erred by not following the decision in *HOSPERSA and Another v MEC for Health*[4] where it was held that s 17 (5) is a draconic procedure which should be used sparingly and only when the Code cannot be invoked or when the employer has no other alternative.

[9] The issue that was raised before the commissioner as a point *in limine* was whether the Bargaining Council had jurisdiction to entertain the matter. The question that had to be asked in determining whether the Bargaining Council had jurisdiction is whether the employee had been dismissed. If there was no dismissal, the Bargaining Council would not have jurisdiction. The issue of jurisdiction does not depend on a finding of the commissioner but on whether, objectively speaking, the facts that would in law clothe the Bargaining Council with jurisdiction indeed existed. If such facts were not present it would then mean that the Bargaining Council did not have jurisdiction, notwithstanding any finding by the commissioner to the contrary: *(SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPA and Another.*[5]

[10] Section 17 (5)(a) and (b) which is the subject matter of this appeal provides that:

> '(5)(a)(i) An officer, other than a member of the services or an educator or a member of the Agency or Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office

[4] [2003] 12 BLLR 1243 (LC).
[5] [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC).

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.

(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.

(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.' [Emphasis added].

[11] What s 17(5)(a)(i) entails is that if an employee of the department (who is not a member of the services or an educator or a member of the Agency or the Service) absents himself or herself from official duties for a period exceeding one month without having obtained permission from his or her head of the department, he or she shall be deemed to have been discharged from the Public Service on account of misconduct with effect from the first day on which he or she began the absence. This means that the deeming provision applies on the first day after the expiry of the one calendar month and the dismissal is deemed to have taken place retrospectively on the first day of his or her absence from duty.

[12] Subsection (ii) must be read in conjunction with subsection (i). It provides that if the employee who is absent without permission assumes other employment, the period of one calendar month becomes irrelevant and the employee is deemed to have been discharged forth with. Put differently, for the employee to be deemed to have been discharged in terms of s 17 (5)(a)(ii), he/she must be absent without permission and assume other employment even if the period of one calendar month has not expired.

[13] For a deemed discharge provided for in s 17(5)(a)(ii) to take effect, no act or decision on the part of the employer is required. The discharge takes effect by operation of law as soon as the jurisdictional requirements are met. The jurisdictional requirements for the deemed discharge to take place is: it must be an employee who is not excluded; who is absent without permission; assumes other employment without the permission of the employer. All what the head of the institution then does is to convey to the employee what has taken effect by operation of law. The head of the institution does not have the power to stop or suspend what takes effect by operation of law. It is therefore not within the head of the institution to decide or make an election on what cause to follow and ignore what has taken effect by operation of law and follow a procedure that he is in his opinion less draconian.

[14] I have already expressed my views on the *HORSPESA* decision in a recent judgment of this Court in *Derrick Grootboom v National Director Prosecution and Another*.[6]

> 'The finding of the court *a quo* that the appellant's services were terminated by operation of law and that there is no decision to review is, in my view, correct. To the extent that the appellant contends, relying on *HORSPERSA and Another v MEC for Health*[7] that the first respondent knew where he was and that where there are other less drastic measures that the first respondent could have invoked, and hence the respondent was not supposed to use s 17(5) (a) to terminate his services is without merit. There is nothing in s 17 (5) that prescribe that the deeming provision would not come into operation if the Head of the Department is aware of his whereabouts. There is also nothing in s 17(5) that makes it a requirement that the deeming provision does not apply where there are other less drastic provisions or measures which an employer may use. Such requirements, if any, would not have made sense in that there is no action or decision required by the employer for the deeming provision to become operative. The provision applies, by operation of law, once the circumstances set out in s 17(5)(a)(i) exist, namely, an officer who absents himself/herself from official duties without permission of his/her head of the institution for a period exceeding one calendar month. There is no

[6] Case no: CA 7/11 unreported, handed down on 21 September 2012 at para 38.
[7] [2003] 12 BLLR 1242 (LC).

> requirement in the section that an employee should be heard before the deeming provision applies. Neither is any action required to be taken by the relevant head of the institution for the deeming provision to apply. All that the head of the institution is required to do is to inform the employee what has taken effect by operation of law.'

The views expressed in the above passage remain relevant and valid in this case as well.

[15] An employee who has been so discharged by s 17 (5) (a) is not without a remedy. He or she may approach the relevant executing authority with a request that he be reinstated. If the executing authority is satisfied that the discharged employee has shown good cause, it is obliged to approve the reinstatement of that employee to his/her former or any other post or position notwithstanding anything to the contrary contained in any law. The reinstatement would have the effect that his or her period of absence shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the relevant authority may determine.

[16] In this case there is no doubt that the employee did not have the permission of the head of the department when he assumed other employment. The question that must be considered is whether the fact that he was on precautionary suspension pending an investigation and a disciplinary enquiry for misconduct could be deemed to have been discharged when he assumed new employment. Furthermore, whether when on suspension he could be said to have been absent without permission.

[17] A situation anomalous to the one at hand arose in *Masinga v Minister of Justice Kwazulu Government.*[8] In that case an employee who was on suspension pending an investigation of misconduct allegations assumed other employment. He was informed that he was deemed discharged in terms of the applicable legislation. The then AD held, *inter alia*, that assuming other employment must be comparable to resignation or incompatible with continued employment with the department and:

[8] (1995) 16 ILJ 823 (A) at 828D-H.

> 'There is authority that in a case of wrongful dismissal the onus is on the employee to prove the agreement and his subsequent dismissal; and that the onus thereafter is on the employer to justify it…I am prepared to assume, in favour of the respondent, that the onus was on the appellant who moved for the order to prove the conditions entitling him to it (cf *Kwete v Lion Stores* (Pty) Ltd 1974 (3) SA 477 (SR) at 482 B-D). Those conditions were that he was employed by the department and that the department wrongly discharged him. The agreement as such is common cause and so is the purported discharge. What is in issue is the wrongfulness thereof. And that depends, in the first instance, on whether his engagement with the University was irreconcilable with his employment with the department while under suspension and, in the final instance, on whether he was able to resume his duties with the department forthwith if his suspension were to be uplifted.'

In my view the above test is applicable in the facts and circumstances of this case in determining whether the second appellant absents himself from his official duties without the permission of his head of the institution and assumed other employment.

[18] In my view, the employee's conduct fell within the circumstances envisaged in s 17(5)(a)(i) and (ii) of the PSA. He is an officer who assumed other employment without the permission of the executing authority. The employee even though on suspension, remained an employee of the department and was subject to its authority in terms of the contract of employment. The department was also contractually obliged to pay his remuneration during the suspension period. Accepting or assuming other employment amounts to being absent from duty because the employee is now rendering his services to another employer which conduct is irreconcilable with his employment with the department while under suspension. He left the Free State where he was stationed and moved to Pretoria to put his labour at the disposal of the new employer. In the circumstances, I am of the view that he was deemed to be discharged and there was no decision to dismiss him. The Bargaining Council therefore, lacked jurisdiction to entertain his dispute since he was not dismissed.

[19] In my view, when an employee, who is prohibited by his/her contract of employment from taking any remunerative employment, takes up other remunerative employment he/she must be deemed to have resigned. The fact that such an employee may be serving a period of suspension on full pay at the time he/she takes up such other remunerative employment and even if the employment may only be for the period of his suspension does not change the fact that he/she will be deemed to have resigned. Section 17(5) read with s 30(b) means exactly that. Instead of resignation it uses the word discharged.

[20] When an employee is placed on suspension on full pay he/she does not have the freedom to seek other employment while on suspension because he/she remains an employee who is bound to the terms and conditions of his/her employment contract, save that he/she is excused from rendering certain services. Therefore, an employee who is on suspension must be deemed to be rendering his/her services and can not be regarded as being absent with permission for purposes of s 17(5) of the PSA.

[21] Finally, I must state, in fairness to the Union official who appeared on behalf of the appellants, that he found himself in a difficult position of being unable to submit that the commissioner's finding, which was subsequently upheld by the Labour Court was incorrect. His view was that the appellants ought not to have approached the Bargaining Council for relief since there was no dismissal but to approach the court for necessary relief. This concession was in my view properly made.

[22] In light of the above, the appeal should fail. It is in accordance with the requirements of the law and fairness that there be no order as to costs.

[23] In the result, the following order is made:

'1) The appeal is dismissed.

2) Each party is to pay its costs'.

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Tlaletsi JA

I Agree

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Waglay AJP

Dissenting Judgment

MURPHY AJA

[24] I have had the opportunity to read and consider the judgment of my colleague Tlaletsi JA in this appeal and find that I am unable to agree with his conclusion that the bargaining council lacked jurisdiction in terms of s 191 of the LRA to conciliate and arbitrate the unfair dismissal dispute referred to it by the appellants on the ground that there had been no dismissal. In my opinion, the third respondent did indeed dismiss the second appellant and in view of that the bargaining council was obliged to conciliate the dispute and if necessary to determine by arbitration whether the dismissal was fair or not.

[25] I agree with my learned colleague's summation of the facts, and thus need not repeat them, though I do in some respects place a different inflection on particular factual issues relevant to the conclusion I have reached.

[26] I emphasise at the outset that the fairness and legality of the second appellant's dismissal are not in contention in this appeal. The sole question is whether the bargaining council had jurisdiction to conciliate and arbitrate the dispute. The answer to that question depends on whether there was a dismissal as defined in the LRA. The fairness or legality of the dismissal is not relevant to the preliminary point in issue.

[27] The point of departure in deciding whether the bargaining council had jurisdiction to determine the referral is s 191(1) of the LRA, the relevant portion of which reads:

> 'If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to – (a) a council, if the parties to the dispute fall within the registered scope of that council...'

[28] Section 191(1) must be read in conjunction with s 186(1)(a) of the LRA, which defines a "dismissal" *inter alia* to mean:

> *'an employer has terminated a contract of employment with or without notice' (my emphasis)*

[29] The question, therefore, is: did the third respondent terminate the contract of the second appellant? Although Tlaletsi JA makes no specific reference to section 191(1) and section 186(1)(a) of the LRA, he unequivocally concludes that the third respondent did not dismiss the second appellant. In his view, the contract was not terminated by the employer because it ended automatically by operation of law in terms of section 17(5)(a) of the PSA, which provides for the automatic discharge of officers of the public service in certain circumstances. I disagree with my colleague's interpretation and application of this provision, and in particular with his finding that the conditions precedent for its operation were in fact fulfilled on the facts in this case. The provision provides:

> '(i) An officer, other than a member of the services or an educator or a member of the Agency or 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.

(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.'

[30] The conditions precedent for the application of section 17(5)(a)(i) of the PSA require *inter alia* that the officer absent himself from his official duties without the permission of the relevant functionary for a period exceeding a calendar month. It is common cause that, at least initially, the second appellant, an officer, was absent from his official duties because he was on precautionary suspension with full pay. He accordingly did not absent himself at that stage; he was suspended by his employer. Furthermore, he was not absent without permission of his head of department, office or institution. He was instructed to be absent.

[31] Tlaletsi JA does not make any explicit finding that the second appellant absented himself when he was suspended, nor does he find that the suspension of the second appellant meant he was absent without permission; rather his finding is to the effect that the second appellant absented himself by virtue of his having assumed other employment while on suspension. His finding accords with the stance adopted by the third respondent in its letter of discharge dated 19 October 2007 in which it declared that the second appellant was deemed to be discharged "when you accepted alternative employment whilst you were still in service of the Department of Health". In my opinion, such a finding wrongly conflates the different conditions precedent enacted in s 17(5)(a) of the PSA and fails to appreciate their distinct nature. That conflation, in turn, is predicated upon an incorrect interpretation of s 17(5)(a) of the PSA and a misapplication of the *ratio decidendi* of *Masinga v Minister of Justice, Kwazulu Government*,[9] upon which my learned colleague places important reliance.

[32] Section 17(5) of the PSA is a draconian provision and its terms should be restrictively construed. In *Dadoo Ltd and others v Krugersdorp Municipal Council,*[10] Innes CJ stated:

[9] (1995) 16 *ILJ* 823 (A).
[10] 1920 AD 552.

> 'It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole.'

The intention of s 17(5) of the PSA is primarily to present the employer with a means of dealing with desertion by an employee. It allows for the employment relationship to come to an end without compliance with the substantive and procedural requirements of a fair dismissal when the employee has removed himself from service by absenting himself for more than a month. Without the possibility of a deemed discharge the employer might be unfairly saddled with obligations arising from the continuation of the relationship despite the employee having deserted or absconded. Therefore, the provision allows for those obligations to cease when the employee evinces through his absence a *prima facie* intention to repudiate his obligations. A restrictive interpretation of s 17(5)(a)(i) of the PSA requires the following conditions precedent to be strictly fulfilled: the employee must fall into the category of officer as defined; the employee must absent himself from his official duties; the absence must be without the requisite permission; and the absence must be for a period exceeding one calendar month.

[33] As I have already explained, I maintain that the second appellant did not absent himself from his official duties. In the beginning he was instructed to stay away on suspension and consequently was absent (at the instance of the employer) from his official duties with permission. The word "absent", as used in s 17(5)(a)(i) of the PSA, being in the form of a verb, means to withhold or withdraw from. The second appellant did not withhold his services or withdraw from performing or discharging his duties. He was instructed to desist from performance. Tlaletsi JA accepts that such was the situation when the second appellant was first suspended. He, however, as stated before, takes the view that the second appellant absented himself from his official duties during the course of his suspension when he began rendering services to another employer and that his contractual obligations to that employer rendered it impossible to fulfil his obligations to the third respondent. That finding is unsustainable, in my respectful view, for two reasons. Firstly, once the second

appellant's obligation to render his official duties had been suspended contractually by the employer, he no longer had any official duties to perform. Official duties are those tasks, functions, services and obligations which an officer is required to perform or discharge by virtue of his office. The purpose of the suspension was to put the performance of those duties on hold temporarily. For the duration of his suspension, the second appellant had no official duties. Logically, therefore, he could not absent himself from them. Secondly, it is trite that at common law the employee's principal obligation is to make his or her services available to the employer. The employee's entitlement to remuneration and the employer's obligation to pay arises from the availability of the employee's services and not the actual rendering of services.[11] There is no evidence indicating that the services of the second appellant were unavailable to the third respondent as a consequence of his accepting other remunerative work in a family company for about six months during his period of suspension, or that such made it impossible to perform his obligations. He was never instructed to tender his services, nor did he refuse or fail otherwise to do so. It was simply presumed by the third respondent that because the second appellant had assumed remunerative work with another employer his services would not be available. There is no evidentiary basis justifying that supposition.

[34] The finding of Tlalesti JA seems to be predicated upon a reading of s 17(5)(a)(ii) of the PSA to the effect that the assumption of outside employment by a suspended employee in itself automatically leads to a deemed discharge. Section 17(5)(a)(ii) does not say that. It provides that 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". Interpreted strictly, this provision merely provides for an earlier discharge of an absent employee prior to the expiry of one calendar month in specified circumstances. The second appellant has submitted correctly that s 17(5)(a)(ii) does not apply to him because an earlier deemed discharge arises in terms of this provision only where an employee absents himself from work without permission (being "*such an officer*'), and also (in addition to being

[11] *Johannesburg Municipality v O' Sullivan* 1923 AD 201.

such an officer) has assumed other employment. In other words, the effect of s 17(5)(a)(ii) is to allow for an earlier deemed discharge before the expiry of the one calendar month in those instances where an officer, who has absented himself without permission, takes another job. In which case, the deemed discharge by operation of law occurs before the expiry of the "*said period*", such period being the one calendar month referred to in s 17(5)(a)(i). As the second appellant was not "such an officer" who had absented himself without permission, the earlier discharge provision does not apply to him. Section 17(5)(a)(ii) is not intended to provide for a deemed discharge by operation of law whenever an employee assumes other employment, it is restrictively associated with the terms of s 17(5)(a)(i) and the fulfilment of the conditions precedent in that provision.

[35] It might be argued, at a stretch, that the term "such an officer" in s17(5)(a)(ii) was intended to refer to the opening words of s 17(5)(a)(i), namely "an officer, other than a member of the services as an educator or a member of the Agency or the Service" and not to an officer who has absented himself without permission. If that interpretation were to be accepted as correct, then if any such officer assumed other employment, the assumption of employment alone would be enough for there to be an automatic discharge by operation of law. However, that interpretation is confounded by the stipulation in s 17(5)(a)(ii) for the discharge to occur immediately "irrespective of whether the said period has expired or not". The said period is obviously "the period exceeding one calendar month" referred to in s 17(5)(a)(i); which can only mean that the term "such an officer" in s 17(5)(a)(ii) alludes to an officer who has absented himself from his official duties without permission.

[36] I am also unable to agree with Tlaletsi JA that *Masinga v Minister of Justice Kwazulu Government*[12] is authority for the proposition that the mere assumption of other employment by an employee on suspension results in a deemed discharge. The deeming provision applicable in *Masinga*, s 19(29) of the Public Service Act (Kwazulu),[13] differed in a significant respect from s 17(5)(a) of the PSA. Unlike s 17(5)(a) of the PSA, it specifically and expressly

[12] *Masinga v Minister of Justice, Kwazulu Government.*
[13] Act 18 of 1985 (Kwazulu).

stipulated that the assumption of other employment while on suspension would result in a deemed discharge. Section 17(5)(a) of the PSA does not do as much. Section 19(29) of the Public Service Act (Kwazulu) reads:

> 'An officer who has been suspended from duty in terms of sub-section (4) or against whom a charge has been preferred under this section and who resigns from the Public Service or assumes other employment before such charge has been dealt with to finality ... shall be deemed to have been discharged on account of misconduct...'

[37] Tlaletsi JA holds also that an employee who is prohibited by his contract of employment from taking other remunerative work must be deemed to have resigned should he do so. Again, I respectfully disagree. A breach of contract of that order may result in a fair dismissal, but in my judgment it goes too far to regard such conduct axiomatically as a constructive resignation. The assumption of other employment in certain circumstances surely will constitute a breach of contract, or perhaps even a resignation, at common law. However, there is no absolute prohibition in our law on an employee holding two jobs. Failing a contrary provision in the contract, an employee may hold two jobs provided they are not incompatible or irreconcilable.[14] Furthermore, any finding that the contract had been terminated on the assumption of a second job would require evidence that the breach was a material repudiation accepted by the employer, or that resignation was the intention. As I have intimated, the evidence does not establish that the two jobs in this case were incompatible (in the sense that his second employment was irreconcilable with his first); that the second appellant would have been unable to resume his duties if the suspension had been uplifted; or that the conduct of the employee evinced an intention not to continue with the employment relationship.

[38] In this instance there is indeed a contrary provision in the contract of employment prohibiting the employee from assuming other remunerative work without permission of the employer. Section 30(b) of the PSA, to which the third respondent referred in its letter of 19 October 2007 informing the second

[14] *Masinga v Minister of Justice, Kwazulu Government*.

appellant of its view that he had been discharged by operation of law, provides:

> 'No officer or employee shall perform or engage himself or herself to perform remunerative work outside his or her employment in the Public Service, without permission...'

It is common cause that although the second appellant may have sought it, he did not have permission to take up remunerative work outside his employment, and hence that he was in breach of this term. It does not follow that he was as a consequence deemed to be discharged. It is moreover not self-evident that such a breach would be material or go to the root of the contract, permitting the employer without more to cancel. And, as explained, in terms of s 17(5)(a) a deemed discharge does not occur simply because of the assumption of other employment while on suspension; other applicable conditions precedent of the deeming provision were not fulfilled in this case.

[39] Yet, as I have just said, the second appellant did breach s 30(b) of the PSA and thereby possibly repudiated his contract. Depending on the circumstances, and in particular the seriousness and significance of the breach, his conduct may have constituted a material repudiation and thereby provided substantive grounds for a fair dismissal. But with regard to the preliminary point at issue in this appeal, (the question of whether or not there was a dismissal so as to confer jurisdiction on the bargaining council), the mere fact of the breach does little to help the third respondent. Our law of repudiation is clear. A wrongful repudiation of a contract does not automatically terminate a contract. It is for the injured party to decide whether he will treat the contract as at an end (cancellation) and seek redress by way of damages; or whether he will regard the contract as still subsisting and call for performance in accordance with the contractual terms. In other words, the injured party (in this case the employer) must accept the repudiation, before termination occurs in law.

[40] An argument no doubt could be made that employment law should be looked at differently and that a repudiatory breach by an employee should be

sufficient to terminate an employment contract without there being any need for the employer to accept the repudiation. In other words, it may be contended, along the lines of the reasoning of Tlaletsi JA, that repudiation in the form of accepting other employment without permission should *ipso facto* be regarded as a "constructive resignation". Even then though, as I see it, there would have to be additional evidence of an intention not to continue the relationship, or alternatively constructive intent inferred from incompatibility or the irreconcilable nature of the two jobs. As I have already found, there is no evidence of either incompatibility or an intention by the second appellant not to continue with the relationship in this case. Be that as it may, prevailing authority requires acceptance of the repudiation in order to terminate the contract. In principle, therefore, at least in terms of our common law, it is the acceptance of the repudiation that terminates the contract. That being the case, if an employer accepts a perceived repudiation of the contract by the employee, it is not the employee, nor the operation of law, but the employer that has terminated the contract; and hence its conduct will be a dismissal as defined in s 186(1)(a) of the LRA.

[41] To re-cap briefly: if we accept then the two key legal propositions from the preceding lines of argument, first that s 17(5)(a) of the PSA finds no application here, and second that an employer must accept a repudiation before a contract of employment can terminate, it follows that the second appellant's contract of employment did not automatically terminate by operation of law, but terminated when the third respondent accepted what it perceived to be a repudiation by the second appellant. Although the third respondent was ill-advised about the scope of s 17(5)(a), there can be no doubt that it viewed the second appellant's assumption of other remunerative work as a repudiatory breach. The letter of 19 October 2007 informing the second appellant of his discharge proclaimed his acceptance of outside remunerative work (and not his absence without permission for more than a month) to be the basis for his deemed discharge, and stated expressly that the conduct was in breach of s 30(b) of the PSA. The third respondent's stance was a clear signal that it regarded the conduct of the second appellant as a repudiation which it had accepted. But for the second appellant's

assumption of other remunerative work, and the third respondent's perception and interpretation of his conduct, the second appellant would have remained on suspension and in employment. Effectively, by terminating the payment of remuneration to the second appellant, albeit on the incorrect categorisation of his conduct as a deemed discharge, the third respondent refused the implicit tender of his available services and terminated the contract. Had the third respondent not accepted the apparent repudiation, it would no doubt have allowed the second appellant an opportunity to make out good cause for reinstatement in terms of s 17(5)(b) of the PSA. If it had wanted the relationship to continue it would have followed that procedure instead of seizing the chance to terminate it on the mistaken basis of a deemed discharge. Its miscalculation was to assume that the contract had terminated by operation of law, when in fact and in law it had not, and further that such entitled it to dispense with the requirements for a fair dismissal ordained by the LRA.

[42] In the result, I find that the third respondent did dismiss the second appellant and that both the bargaining council and the Labour Court were wrong in their findings that the bargaining council lacked jurisdiction. For those reasons, I would say the appeal should succeed and I would propose the following orders:

i) The appeal is upheld.

ii) The ruling of the first respondent is set aside and is substituted with the following:

'The respondent's preliminary point is dismissed and it is declared that the bargaining council has jurisdiction to determine the unfair dismissal dispute referred to it by the applicant.'

iii) The third respondent is ordered to pay the costs of the appeal.

APPEARANCES:

FOR THE APPELLANTS:	Mr D J Groenewald of Solidarity
FOR THE THIRD RESPONDENT:	SS Jonase Attorneys