REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case number: CA 7/11

In the matter between:

Derrick Grootboom **Appellant**

and

The National Prosecuting Authority **First Respondent**

The Minister of Justice and Constitutional Development **Second Respondent**

Date of hearing: 08May 2012

Date of judgment: 21 September 2012

JUDGMENT

Tlaletsi JA

Introduction

[1] This is an appeal against the judgment and order of the Labour Court in an application brought by the appellant in that court in terms of section 158 (1)(h) of the Labour Relations Act [1] ("the Act"). In this application, the appellant sought orders in the following terms:

1.1 Reviewing and setting aside the decision made by the first respondent dated 7 February 2007;

1.2 In the alternative, reviewing and setting aside the decision made by the second respondent on 25 March 2008 and that the Labour Court substitute the decision of the second respondent with that of its own;

1.3 Directing first and or second respondents to take all necessary measures to reinstate the appellant as from the date of his unlawful dismissal namely, 7 February 2007 and for such reinstatement to be effected within two weeks of the order.

[2] The application was opposed by the respondents. The Labour Court dismissed the appellant's application and made no order as to costs. Aggrieved by this decision, the appellant unsuccessfully applied for leave to appeal in the Labour Court and only obtained leave to appeal from this Court pursuant to a petition to the Judge President of this Court.

Factual Background

[3] The record consists of five volumes and contains, *inter alia*, various correspondence between the parties, some of which relates to matters not strictly necessary for the purpose of this appeal. I would therefore confine this judgment only to those matters that provide the relevant factual matrix necessary for the determination of this appeal. Most of these facts are, unless where otherwise indicated, common cause.

1 Act 66 of 1995.

[4] The appellant was employed by the first respondent as a Public Prosecutor during 2001. He was initially stationed at Springbok, later Port Elizabeth and was finally at his own request transferred to Upington from 2 February 2004. His functions entailed travelling to various magisterial districts around Upington as a "Relief Prosecutor".

[5] In the course of time the appellant had allegations of insubordination leveled against him by the first respondent. He was, with effect from 22 June 2005, placed on precautionary suspension with full remuneration, pending a disciplinary enquiry to be held against him. It was a condition of his suspension that in order to avoid possible interference with the investigations and or potential witnesses, he should not enter the premises of the employer or have contact with any staff member of the first respondent unless authorized to do so.

[6] It is common cause that a disciplinary enquiry was ultimately held and the appellant was found guilty of misconduct and was dismissed from his employment on 21 November 2005. His internal appeal against his conviction was unsuccessful.

[7] The appellant referred a dispute of unfair dismissal to the General Public Service Sectoral Bargaining Council ("GPSSBC"). An arbitration of this dispute was set down for 1 and 2 June 2006. On 1 June 2006 the parties entered into a settlement agreement in terms whereof (a) the disciplinary hearing process against the appellant and the outcome thereof was set aside; (b) the first respondent could apply for the disciplinary enquiry to be presided by GPSSBC *de novo* as a pre-dismissal arbitration; (c) the appellant withdrew his grievance against the first respondent that he had referred to the GPSSBC. The appellant continued to be placed on suspension.

[8] On 18 January 2006 the appellant forwarded an email to Ms Gyt S Ngobeni ("Ms Ngobeni") who was the Corporate Manager of the first respondent. In the email he referred to a recent telephonic communication he had with her and mentioned, *inter alia*, that he had been short-listed for the finals in

Johannesburg for the award of the scholarship by the Nelson Mandela Scholarship Fund. The scholarship was for the M.Sc. in Criminal Justice studies in the United Kingdom.

The letter stated further that:

> '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 be able to answer during the finals in Johannesburg. My request therefore (to you as Corporate Manager responsible for the Northern Cape) is to ascertain or obtain such provisional granting of study leave and to advise me of same as soon as possible before the end of January 2006;' [Emphasis added]

The email concluded thus:

> 'This request is being sent to you taking into account my present suspension and its pending finalization- I hope that this opportunity (study leave) could lead to a correction of broken relationships and a solution to 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.'

[9] First respondent replied to the appellant's aforesaid email and stated that:

> 'It's a pleasure to inform you that after deliberations with management, it concluded that study leave for a year be granted to you upon official request, however, which certain conditions that is leave be granted without pay, this is to enable the NPA to find a temporary replacement for your post.(sic)
>
> Other than that, normal forms should be processed following normal procedures.
>
> Should you have any queries regarding this matter please do not hesitate to contact me.' [Emphasis added]

[10] On 19 January 2006 the appellant responded with a terse email message stating that: 'Thank you for your consideration, help and reply. I will do'.

[11] On 3 July 2006, the appellant's attorney sent a letter to the first respondent in which settlement proposals by the appellant were communicated on a without prejudice basis. The letter which has been placed on record by the appellant stated:

> 'As you are aware, our client has been granted scholarship by the Nelson Mandela Institute to study towards LLM degree at the University of Southampton, which course 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.' [Emphasis added]

[12] On 23 July 2006, first respondent replied that the settlement proposals made on behalf of the appellant were not acceptable, that there were no counter proposals from their side and that they were awaiting a date for the pre-dismissal arbitration from the GPSSBC. The pre-dismissal arbitration referred to here was to be constituted in accordance with the previous settlement agreement concluded by the parties.

[13] On 3 July 2006 the appellant's attorneys acknowledged receipt of the letter dated 25 July 2006 and *inter alia,* recorded their dissatisfaction in the manner in which the first respondent was treating them. The letter stated that:

13.1 On 30 June 2006 the appellant signed a request for a pre-dismissal arbitration hearing at the request of the first respondent.

13.2 In the same letter, appellant was requested to submit his settlement proposals and he did so on 4 July 2006. First respondent only responded to the appellant's settlement proposals after a period of four weeks and rejected the appellant's settlement proposals without providing any counter proposal.

13.3 The appellant had been granted scholarship and he was to travel on 18 August 2006. He wanted to present his defense at the pre-dismissal arbitration.

13.4 They made enquiries at the GPSSBC and have been informed that the latter had not yet received any request for a date of set-down of the matter from first respondent. It was first respondent's responsibility to obtain a date form the GPSSBC.[2]

The letter concluded thus:

> '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 finalized prior to 18 August 2006, our client is left with no alternative other than to make an application to the NPA that he be placed on sabbatical for a period of approximately 12 months commencing on 18 August 2002. In this regard, we kindly request that the NPA forward to us its relevant policies and procedures in this regard together with the 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.' [Emphasis added]

[14] The first respondent responded by stating, among others, that it had to follow internal procedures, in terms whereof, they had to obtain an approval of the Chief Executive Officer (CEO) to apply for the date and funding to cover the costs for the appointment of the arbitrator. They were however in the process of obtaining a date for the pre-dismissal arbitration from the GPSSBC.

[15] It is common cause that on 7 August 2006 the pre-dismissal arbitration was set down for 14 and 17 August 2006 at Upington. On 10 August 2006 the appellant's attorneys sent an urgent letter to the first respondent in which they recorded that they were, *inter alia*, dissatisfied that they had been given only 7 days instead of 14 days' notice as prescribed by Resolution 1 of 2003 of the PSCBC[3] for the hearing. They stated further that they were prejudiced by the

2 Sec 188A of the Act.
3 Public Service Co-ordinating Bargaining Council established in terms of sec 36 of the Act.

short notice and suggested that the hearing be postponed *sine die* until the appellant returned from his sabbatical leave in August 2007. The hearing was thereafter rescheduled for 16 and 17 August 2006. At the hearing, an application for a postponement *sine die* was successfully moved on behalf of the appellant.

[16] On 26 August 2006 the appellant attended at the office of the Senior Prosecutor ("Mr Engelbrecht") in Upington in order to complete the requisite leave forms. Engelbrecht refused to sign the appellant's leave application forms as he held the view that leave could only be granted to the appellant without pay, while the appellant insisted that it had to be on full pay. The matter could not be resolved amicably and the appellant left Mr Engelbrecht's office without his application forms for leave having been formally submitted.

[17] It is common cause that the appellant ultimately left for the United Kingdom, whilst on suspension. He started his studies from 18 August 2006 and returned to South Africa on 30 July 2007. Two months later, on 31 October 2006, payment of his salary was discontinued. On 30 November 2006 the appellant sent an email to Ms Ngobeni requesting that his salary be reinstated.

[18] On 19 December 2006 Mr Steven Booysen, the Labour Relations Manager at the first respondent sent an email to the appellant confirming a telephone conversation that he had with him regarding his challenge to the discontinuation of his salary and his studies. The appellant replied to this email on 19 December 2006 and requested a copy of the notice that authorised the non-payment of his salary.

[19] On 1 February 2007 the first respondent's acting CEO sent a letter to the appellant 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. Therefore, in terms of section 17(5) (a) (i) of the Public Service Act 103 of 1994 *("*the PSA"), by operation of law, the appellant was deemed to have been discharged from the public service

with effect from 15 September 2006.

[20] On 5 September 2007 the appellant's attorneys submitted detailed written representations in terms of section 17(5)(b) of the PSA to the second respondent via the first respondent. On 14 December 2007 the second respondent confirmed the "abscondment" of the appellant as recommended by first respondent in a memorandum forwarded to her office in response to appellant's representations.

[21] On 22 February 2008 the appellant was informed of the unsuccessful outcome of his representations in terms of section 17(5)(b). The letter, written by the acting Chief Executive Officer of the first respondent advised the appellant that he may 'seek a remedy to the decision from the High Court of the Republic of South Africa'.

[22] On 17 March 2008 the appellant's attorneys wrote a letter to the second respondent requesting reasons for the decision to uphold appellant's deemed dismissal as a matter of urgency so that they could institute review proceedings without delay.

[23] On 18 March 2008 Mr Pather (Senior Manager: Employee Relations of the first respondent) ("Pather") replied to the letter dated 17 March 2008. The letter read as follows:

> 'The reasons for the Minister's decision to uphold the deemed dismissal of Mr Grootboom, which are well-known to your client, may be summarised as follows. Mr Grootboom was absent from the workplace, without leave or authorisation, for a period of one year. In terms of s17(5)(a)(i) of the Public Service Act, 1994, an employee who absents himself from his official duties for a period exceeding one calendar month, shall be deemed to have been discharged from the Public Service on account of miscount with effect from the date immediately exceeding his last day of attendance of duty.
>
> Mr Grootboom's representations, on your letterhead, dated 5 September 2007, were submitted to the Minister for her consideration. The afore-

> mentioned representations were found to be without substance and it was held that sabbatical leave had not been granted to Mr Grootboom, verbally or per e-mail, by G Ngobeni nor by anyone else, at any stage, and further that there is no evidence that sabbatical leave was granted to Mr Grootboom.
>
> For these reasons, the Minister upheld the dismissal of Mr Grootboom.'

[24] On 20 March 2008 appellant's attorneys wrote to the second respondent and among others, took issue with the fact that it was Pather and not the second respondent who provided them with reasons for upholding the appellant's deemed dismissal. The letter concluded that:

> 'we reiterate our client's intention to take the matter on review, however we kindly request clarity on whether we should proceed with the reasons afforded by Mr Pather in his capacity as Senior Manager Employee Relations of the NPA alternatively whether we should wait for reasons by the Minister as the review will be based on the Minister's refusal to uphold our client's representations.'

[25] On 23 March 2008 Pather replied to this letter and advised that the first respondent in its capacity as the appellant's employer was entitled to provide feedback on the second respondent's reasons and response to the application for re-instatement. He stated further that appellant's application for reinstatement was submitted to the second respondent via the first respondent and the response was sent to their office for onward transmission to the appellant. Pather confirmed that the second respondent's reasons to uphold the deemed dismissal of the appellant are the same reasons as those advanced by the first respondent as set out in their previous letter of 18 March 2008.

Judgment of the Court *a quo*

[26] In its judgment, the Labour Court recorded that the appellant's grounds for reviewing the "decision" of the first respondent were that 'first respondent was biased or took the decision for ulterior motive and also took into account

irrelevant considerations. In the alternative, the appellant 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 the Promotion of Administrative Justice[4] ("PAJA") bias, ulterior motive, failure to take into account relevant considerations, bad faith and arbitrariness or capriciously.'

[27] In essence and relevant to this appeal, the Labour Court found that:

27.1 The appellant was away from the country for a period of a year without authorisation from his employer;

27.2 The deeming provisions 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 a court of law;

27.3 The decision of the second respondent not to reinstate the appellant and how it was communicated to him was not irregular and improper.

27.4 The appellant had failed to make out a case justifying interference with the decision of the respondents.

The appeal

[28] The appellant's arguments in this Court may be summarised as follows:[5]

28.1 The provisions of sec 17(5)(a)(i) and 17 (5)(b) of the PSA were not applicable to his situation because, firstly, he had permission from his employer to be away and secondly he was on precautionary suspension and as such not required to report for duty. First respondent was aware of this fact as it was advised by its Senior Consultant: Labour Relations in an internal memorandum addressed to

4 Act 3 of 2000.
5 See Appellant's Heads of Argument.

the Executive Manager: HRMD.

28.2 The issue of the disputed leave granted to him was a peripheral issue, the determination of which required a separate enquiry if need be in terms of the respondents Disciplinary Code.

[29] The relevant provisions of Section 17(5) (a) and (b) of the Public Service Act[6] that were applicable at the time provided as follows:

> '(5)(a)(i) An officer, other than a member of the services or an educator or a member of 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 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.'

[30] In *Minister van Onderwys en Kultuur en Andere v Louw*[7] the Appellate Division ("AD") had to consider s 72 of the then Education Affairs Act[8] which

6 Act 103 of 1994. Sec 17 has amended by sec.14 of Act no.47 of 1997 and substituted by sec. 25 of Act no.30 of 2007. The provisions are in essence the same and the numbering has change to sec.17 (3).
7 1995 (4) SA 385 (A).
8 Act 70 of 1988 of the House of Assembly.

provided that a person employed in a permanent capacity at a departmental institution, and who is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct. The AD held *inter alia*, that the deeming provision comes into operation if a person in the position of the respondent, without the consent of the Head of Education, is absent from his service for the period stipulated. Whether the requirements of the legislation to be operational have been satisfied is objectively determinable. Should the employee allege that he/she had the necessary consent and that allegation is disputed by the employer, it will create a factual dispute which is justiciable in a court of law. The AD held further that the coming into operation of the deeming provision is not dependent upon any discretionary decision that may be a subject of administrative review.

[31] Louw's decision was confirmed in *Phenithi v Minister of Education and Others*[9] when considering s 14(1)(a) of the Employment of Educators Act[10] which is worded on the same terms. The SCA held that:

> '…No "decision" is taken by the employer, which would require him/her to give reasons for it. He/she merely conveys to the educator, in the discharge letter, the result which, according to his/her interpretation of the law (Section 14(1)(a) of the Act), flows from the operation of the provisions of the section. It is not a decision taken after, for example, the exercise of a discretion.'[11]

It is important to note that Phenithi also challenged the constitutionality of the deeming provision and the SCA was not persuaded that the provisions of s

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9 [2006] 9 BLLR 821 (SCA); (2006) 27 ILJ 477 (SCA)

10 Act 76 of 1998. Sec 14(1)(a) provides that: '(1) An educator appointed in a permanent capacity who- (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
(b) …
(c) …
(d)…
Shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-
i) Paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or
ii) …'

11 Above n 9 at para 17.

14(1)(a), read with section 14(2) of the said Act, are in conflict with s 188 of the LRA and held further that they do not offend against the Constitution.[12]

[32] The decision of the AD in *Masinga v Minister of Justice, KwaZulu Government*[13] is particularly relevant to the facts in this case. Briefly, Masinga was a public prosecutor who was charged with misconduct and was suspended pending an enquiry. The enquiry dragged on and Masinga sought and obtained employment with the Community Law Centre of the University of Natal as a Rural Paralegal Coordinator in its Community Law Project. When the employer became aware of this situation, it reacted by notifying him that he was deemed discharged from service with immediate effect in terms of s 19(29) of the Public Service Act.[14] It provided that if an officer who had been suspended from duty pending misconduct charges resigns from service or assumes other employment before such misconduct charge had been dealt with to finality he/she shall be deemed to have been discharged on account of misconduct with effect from a date to be specified by the Minister.

[33] The AD held, *inter alia*, that assuming other employment must be comparable to resignation or incompatible with continued employment with the department:

> '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

12 Id at paras 20 and 23.
13 (1995) 16 ILJ 823 (A)
14 Public Service Act 18 of 1985 (Kwazulu). The relevant s 19(29) provided that: '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 in accordance with the provisions of this section, shall be deemed to have been discharged on account of misconduct with effect from a date to be specified by the Minister unless, prior to the receipt of his notification of resignation or the date of his assumption of other employment he had been notified that no charge would be preferred against him or that the charge preferred against him had been withdrawn.'

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.'[15]

In my view the above test is applicable to the facts and circumstances of this case in determining whether the appellant was absent from his official duties without the permission of his head of the institution.

[34] The first factual enquiry is whether the appellant had the permission of his employer to leave the country for the United Kingdom. The objective facts do not support the contention that the appellant had such permission when he left. It is common cause that the appellant was scheduled to attend interviews for selection as a shortlisted finalist for the awarding of the scholarship. For him to be considered or to qualify, he required "a provisional" or an "in principle" decision by his employer that he would be granted permission to attend the course. It would not have served any purpose for him to be awarded the scholarship without any indication that he would be in a position to take advantage thereof. The letter that the appellant received in response to his request for the "provisional granting of scholarship" stated categorically that he was to be granted study leave without pay in order to enable the first respondent to find a temporary replacement for him.

[35] What the appellant understood or ought to have understood, was that once his application for scholarship was successful, he had to formally complete the necessary application forms as a process of applying for study leave for a period of one year without pay. It is for this reason that the appellant approached Engelbrecht at his work station to comply with what was required of him. Quite evidently and contrary to the "provisional" permission granted to him, the appellant elected to change the conditions and demand that he be granted study leave with pay. In my view, Engelbrecht was not wrong to refuse to approve appellant's application which was not in accordance with the provisional permission. Appellant's submission that Engelbrecht prevented

15 Above n 13 at 828D-I.

him from complying with the requirement of submitting the leave forms is therefore without merit. He wanted to compel Engelbrecht to sanction leave with pay which was not granted to him.

[36] There are other reasons why the appellant's contention that he had permission to go on study leave is not only wrong but disingenuous as well. In a letter dated 3 July 2006 from his attorneys to the first respondent referred to above, it was stated in no uncertain terms that the appellant was requesting that he be granted sabbatical leave in accordance with the first respondent's standard policies and that his understanding was that this kind of leave is granted with full pay. Furthermore, in the letter dated 10 August 2006, appellant's attorneys again requested first respondent to provide them with the relevant policies and procedures regarding sabbatical leave as well as the necessary application forms so that the appellant can present his application. It would make no sense for the appellant to request sabbatical leave if indeed he had been granted permission to go on study leave unconditionally. It would further make no sense for him to request the relevant policies and procedures if he had already been granted leave with pay to go overseas.

[37] The fact that the appellant was on precautionary suspension and was not required to report for duty is, in my view, not a bar to the application of s 17(5)(a) of the PSA. He remained an employee of the respondents in terms of the contract of his employment. He remained subject to the authority of the respondents who were paying his salary. He was therefore obliged to obtain authorisation from the first respondent before leaving and he himself was aware of this aspect. I have no doubt that his engagement with a university in the United Kingdom without permission was irreconcilable with his employment contract with first respondent in that in order to so study he was required to leave the country for a full period of a year for that purpose. Furthermore, he was not in a position to resume his duties if the suspension were to be uplifted or required to attend a pre-dismissal arbitration. He was not going to abandon his studies and return to this country immediately. This is also borne out by the fact that, as soon as he was informed that the deeming provision applied in, and that his services were terminated on 1

February 2007, he did not return to this country immediately. It also took the appellant seven months to initiate the contestation of the termination of his services by making representations through his attorneys to the second respondent in terms of s 17(5)(b) of the PSA.

[38] 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*[16] 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 prescribes 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 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 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 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.

[39] The appellant's contention that the issue of the disputed leave is an irrelevant and peripheral issue which requires a separate enquiry in terms of the disciplinary code of the respondents is, therefore, in my view, without merit. His absence is one of the jurisdictional requirements for the deeming provision to apply and if, he indeed had permission to be away such a

16 (2003) 12 BLLR 1242 (LC).

requirement would be lacking and the deeming provision would be inapplicable. It is not within the head of the institution's powers to suspend that which takes place by way of operation of law and conduct a disciplinary enquiry. Furthermore, the respondents' were entitled not to follow the advice of its Senior Consultant Labour Relations if they were of the view that it was incorrect.

[40] The reasons that are advanced by the appellant to support his claim that second respondent's decision not to reinstate him was not "legal, rational and or reasonably connected to the purpose" are the same reasons that he raised to contend that s 17(5)(a)(i) did not apply to his case. I have already dealt with these reasons in my finding that s 17(5)(a)(i) was applicable to his situation. Suffice it to state that the fact that the appellant was on precautionary suspension, that the first respondent knew that he would be leaving the country on a scholarship to study overseas, and that the employer had knowledge about his whereabouts are not a bar to the operation of the deeming provision and are not sufficient to support the contention that the second respondents' refusal to reinstate him was illegal, irrational or unreasonable. It is clear that the appellant knew that he had no permission to leave the country and defied the authority of his employer by leaving the country. It would, in my view, be absurd and unreasonable to expect an employer in the position of the second respondent to ignore such conduct and reinstate an employee who has behaved in this manner. The appellant has, in my view, failed to show good cause that he should have been reinstated by the second respondent.

[41] The appellant took issue with the fact that the decision of the second respondent was communicated to him through an officer in the office of the first respondent. He contended that it is an indication that the second respondent did not apply her mind at all to his representations. This contention must be rejected. It is clear from the record that the appellant's representations were forwarded to the second respondent and, as the court *a quo* correctly held, first respondent was entitled to make submissions in opposition to the appellant's representations. The office of the second

respondent acknowledged receipt of the appellant's representations from his attorneys and advised them that the second respondent was attending to the matter and that further communication would be addressed to them soon.

[42] In addition, the appellant wrote to Mr J N Labuschagne, the Chief Legal Research officer in the office of the second respondent presenting his case and requesting assistance. The latter investigated the matter and reported to him about the process being followed by the second respondent in dealing with his representations and that he would receive a response soon. The fact that the second respondent accepted the first respondent's representations and refused to reinstate the appellant does not mean that the second respondent did not apply her mind. The appellant's contention stands to be rejected.

[42] In conclusion, I am satisfied that s 17(5)(a)(i) applied to the appellant's circumstances and that the appellant has not made out a case warranting interference with the decision of the second respondent's refusal to reinstate him. The appeal should therefore fail. It is, in my view, in accordance with the requirements of law and fairness that costs should follow the result.

[43] In the result the following order is made:

The appeal is dismissed with costs.

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Tlaletsi JA

Judge of the Labour Appeal Court

Davis JA and Hlophe AJA concur in the judgment of Tlaletsi JA.

Appearances

For the Appellant: In person

For the Respondents: Adv. R Nyman

Instructed by: The State Attorney, Cape Town