REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case number: P294/2011

In the matter between:

DEPARTMENT OF HEALTH	**Applicant**
and	
PHSDSBC	**First Respondent**
PIERRE NAUDE *N.O*	**Second Respondent**
NEHAWU	**Third Respondent**
THABO MADYIBI	**Fourth Respondent**

Heard : 24 October 2013

Delivered: 13 December 2013

Summary: Review application. Section 17 of the Public Service Act discharge. Bargaining Council has jurisdiction to adjudicate the dismissal dispute if the requirements of section 17 had not been met.

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicant is seeking the review and setting aside of an arbitration award wherein it was found that the Fourth Respondent (Madyibi) was indeed dismissed and that his dismissal was found to be unfair. The application is opposed.

[2] The Second Respondent (arbitrator) issued an arbitration award on 9 December 2010, after the unfair dismissal dispute proceeded on 19 July 2010 and was postponed to 15 November 2010 to allow the parties to consult with witnesses to rebut or corroborate Madyibi's case that he remained at the transport office at King Sandile Dalindyebo LSA until 20 February 2008.

[3] In the arbitration award of 9 December 2010 the arbitrator found that Madyibi was dismissed and the Applicant was to indicate within 14 days whether or not it wished to deal with the issue of procedural and substantive fairness. In the event that the Applicant did not wish to proceed or upon expiry of the 14 day period, the matter would have been determined on the evidence led.

[4] The arbitrator issued a further arbitration award, to be read with his findings on the operation of section 17 of the Public Service Act 1994 (PSA), as per the arbitration award of December 2010.

[5] The arbitrator stated that the Applicant was afforded an opportunity to prove that Madyibi's dismissal was procedurally and substantively fair and the Applicant did not use the opportunity wherefore the dispute was finalised on the evidence before the arbitrator.

[6] The arbitrator retrospectively re-instated Madyibi and it appears that the arbitration award was faxed from the First Respondent on 31 May 2011.

[7] The review application was to be filed within six weeks from 31 May 2011, which means that it was to be filed by 12 July 2011. The review application appears to be filed on 30 June 2011 and is therefore filed within the prescribed six week period.

[8] The Applicant however sought condonation for the late filing of the review application, based on the fact that it was shown a letter from NEHAWU on 15 April 2011, demanding Madyibi's re-instatement and by that time the six week period had lapsed. The application for condonation is opposed.

[9] I am of the view that there is no need to apply for and to grant condonation as the application for review was filed within six weeks from the date the final arbitration award was faxed and wherein Madyibi was re-instated.

[10] Even if I am wrong and condonation is indeed required, the granting or not of condonation is within the discretion of this Court. I am of the view that the degree of lateness is not so excessive and the explanation therefore not so weak that the Applicant should be prejudiced to an extent that its application for review is not considered at all. In so far as it may be necessary, condonation is granted for the late filing of the review application.

Background facts

[11] The brief history of this matter is as follows: the Applicant employed Madyibi as an administration clerk at the Mbekweni Health Centre and during September 2005 Madyibi was delegated to work at the King Sandile Dalindyebo LSA (KSD) to assist *inter alia* with driving responsibilities.

[12] Around May 2007 the Applicant decided that Madyibi should return to the Mbekweni Health Centre. Madyibi refused to return to Mbekweni Health Centre and he was informed that his absence would be treated as leave without pay. The Applicant subsequently instituted disciplinary proceedings in respect of gross insubordination for failing to comply with the instruction to report at Mbekweni Health Centre. In August 2007 Madyibi was found guilty and he was issued with a final written warning, coupled with a further instruction to report at Mbekweni Health Centre, which he appealed in September 2007. Madyibi never received any outcome on this appeal he filed.

[13] Due to the continued and extended absence of Madyibi at the Mbekweni Health Centre, the Applicant invoked the provisions of section 17 of the PSA in February 2008 and terminated the employment of Madyibi.

[14] Madyibi was informed that his services had been terminated by operation of law and he was granted an opportunity to make submissions to the Member of the Executive Council (MEC) if he sought re-instatement. Madyibi made submissions to the MEC, which was rejected by the MEC on 29 September 2009.

[15] An unfair dismissal dispute was subsequently referred to the First Respondent. From the transcript it is evident that the Applicant never raised a point *in limine* on jurisdiction and that the existence of dismissal was in dispute. The arbitrator indicated that the existence of the dismissal had to be determined first and all parties were in agreement that the matter should proceed on that basis.

[16] The Second Respondent (the arbitrator) determined that Madyibi was indeed dismissed and he ordered his retrospective re-instatement. It is this finding that the Applicant now seeks to review.

The arbitration award:

[17] The arbitrator had to decide was whether or not there was a dismissal as envisaged by the provisions of the Labour Relations Act 66 of 1995 (the Act).

[18] The Applicant's case is that Madyibi absented himself for a period exceeding on calendar month and his contract of employment was terminated in terms of the provisions of section 17(5)(a)(i) of the PSA. It was thus terminated by operation of law and there existed no dismissal.

[19] Madyibi on the other hand denied that he was absent and contended that he tendered his services at KSD. He also led evidence and called witnesses to corroborate that he reported for duty at KSD during 2007 until February 2008.

[20] The issue therefore was whether the jurisdictional pre-conditions for the operation of section 17(5)(a)(i) of the PSA existed and consequently whether the Applicant could rely on it.

[21] Madyibi's testimony was that he reported for duty at KSD for the period May 2007 until February 2008, when his services were terminated, and that the Applicant paid his full salary for the said period. The Applicant disputed this but called no witnesses to rebut this version.

[22] The arbitrator found that Madyibi proved that he was dismissed and he afforded the Applicant an opportunity to deal with issues related to procedural and substantive fairness, but it failed to do so.

[23] In determining the dispute, the arbitrator found that before the provisions of section 17(5)(a)(i) of the PSA could be relied upon, an employee must be absent for a period exceeding one calendar month and this was a question of fact that could be determined easily. The employer further has to show that the employee was absent without permission and once it is shown, section 17(5)(a)(i) of the PSA operates without any act on the part of the employer.

[24] The jurisdictional pre-requisite for the operation of section 17(5)(a)(i) of the PSA is met when an employee was absent without permission for a period exceeding one calendar month, whereupon the employee is notified that his / her services were terminated by law.

[25] The arbitrator considered the evidence and found that in August 2007 Madyibi was found guilty of insubordination and issued with a final written warning, coupled with a further instruction to report at Mbekweni Health Centre. Madyibi appealed in September 2007 and his appeal stayed the consequences flowing from the chairperson's findings, which means that until such a time that the appeal was finanlised, the chairperson's instruction had no force and effect and was not to be complied with. It follows that it cannot be said that Madyibi was absent without permission for a period exceeding one calendar month when he failed to report at Mbekweni Health Centre, but reported at KSD.

[26] The arbitrator found that the Applicant was never in a position to rely on the provisions of section 17 of the PSA and the termination of Madyibi's services amounted to a dismissal as envisaged by section 186(1)(a) of the Act.

<u>The provisions of section 17 of the PSA</u>

[27] The relevant portions of the now repealed section 17(5) of the PSA 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 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 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 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.'

[28] The intention of the section was that if an employee is absent from duty without permission from the employer for more than one calendar month the employee shall be deemed to be dismissed from duty.

[29] This Court has in several of its judgments set out what the requirements are in deciding whether the provisions of s 17(5)*(a)* (i) of the PSA have been met. These are:

29.1 the employee must be an officer;

29.2 the employee must have absented himself or herself from official duties;

29.3 the absence must be without permission from the head of department or delegated official;

29.4 the period of absence must exceed one calendar month

[30] It is trite law that the question as to whether the requirements of s 17(5)*(a)* (i) of the PSA have been met or not, is a factual enquiry and is justiciable by a court of law and/or the bargaining council. If the requirements have been met, the bargaining council will lack jurisdiction to hear the dispute on the basis of section 17(5)*(a)* (i) of the PSA. If the requirements have not been met, the discharge will not be *ex lege* and the fairness of the dismissal should be considered.

Grounds of review

[31] The Applicant raised a number of grounds of review in its founding and supplementary affidavits.

[32] The first and in my view the main ground for review is that the arbitrator misconducted himself by committing errors of law. In its heads of argument the Applicant submitted that the main question this Court has to determine is whether the arbitrator had jurisdiction to arbitrate the dispute before him in light of the fact that Madyibi's termination of service was by operation of law in terms of section 17(5)(a)(i) of the PSA.

[33] The Applicant's case is that there is a distinction between a dismissal and a section 17 of the PSA ('section 17') termination. The arbitrator correctly identified the dispute as a section 17 termination and the enquiry should have been whether Madyibi absconded and not whether he was dismissed. The arbitrator required that the Applicant proved the fairness of the dismissal in circumstances where there was no dismissal.

[34] The Applicant submitted that a discharge in terms of the provisions of section 17(5)(a)(i) of the PSA constitutes a termination of employment by operation of law and therefore no dismissal exists that could be challenged on the basis of unfairness. The only challenge is to take the MEC's decision not to re-instate on review.

[35] The arbitrator disregarded the distinction between a dismissal and a section 17 termination when he regarded the termination as a dismissal. He committed an error of law when he found that Madyibi was dismissed.

[36] Madyibi's case on the other hand is that the provisions of section 17 of the PSA did not apply in the circumstances for a number of reasons. Firstly section 17 only applied to officers and he was not an 'officer' but an employee and secondly at all material times the Applicant was aware of his whereabouts and remained in contact with him and it cannot be said that he was absent from work.

[37] Madyibi was strictly speaking not absent form work, but was reporting and tendered his services at KSD, contra the instructions from his employer.

[38] In determining the dispute, the arbitrator found that before the provisions of section 17(5)(a)(i) of the PSA could be relied upon, an employee must be absent for a period exceeding one calendar month and this was a question of fact that could be determined easily. The employer further has to show that the employee was absent without permission and once it is shown, section

17(5)(a)(i) of the PSA operates without any act on the part of the employer.

[39] The arbitrator held that whether or not there was a dismissal, was step one in the issues he had to determine. If there were a dismissal, step two would be to determine the fairness of the dismissal.

[40] The Applicant's case is that once section 17 of the PSA was raised as reason for termination, that should have been accepted and that should have been the end of the enquiry as the bargaining council had no jurisdiction to determine an *ex lege* termination where no dismissal occurred. The only recourse was a review application to court.

[41] In *Member of the Executive Council for Health v Khoetha and others* [1]the employee, a senior security officer, had refused over a period of time to report for duty at a hospital but reported for duty instead at a district office where he had originally been appointed. Eventually, he was dismissed by operation of law in terms of s 17(5)*(a)* (i) of the PSA for failing to report for work at the hospital. The bargaining council arbitrator had confirmed that four requirements had to be satisfied before the provisions of the section could apply: the person had to be an officer or employee; the employee had to absent himself from official duties; the absence had to be without the permission of the head of department, and the absence had to exceed a calendar month. Once all four requirements were present, it would then be deemed that the employee was discharged from the public service because of misconduct. The Employer sought to review and set aside an arbitrator's award on the basis that the bargaining council did not have jurisdiction as the dismissal of its employee had occurred *ex lege* in terms of section 17(5)*(a)* (i) of the PSA.

[42] In determining the review application in the Khoeta matter this Court held that:

> "It is trite law that any factual enquiry about whether the requirements of s 17(5)*(a)* (i) of the PSA have been met, is justiciable by a court of law and/or the bargaining council. Once it is found that the requirements have been met, the bargaining council will lack jurisdiction to hear the dispute on the basis of s 17(5)*(a)* (i) of the PSA. If the requirements have not been met, the said provisions will not have come into operation and the discharge will be invalid and the dismissal will be substantively and procedurally unfair.

[1] 2011 32 ILJ 647 (LC).

> It is trite law that the test to be applied when reviewing a jurisdictional ruling is whether objectively speaking the facts that would give the bargaining council or CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the bargaining council would not have jurisdiction despite its finding to the contrary."

[43] In *HOSPERSA and another v MEC for Health*[2] the Court held that there are two mechanisms available where employees absent themselves from work without permission. The first is to charge them for misconduct and the second mechanism is in terms of section 17(5)*(a)* of the PSA. Employees who absent themselves without permission for more than one calendar month shall be deemed to have been discharged and the provisions are automatically invoked by operation of law and it automatically deprives employees of their employment. The Court held that:

> "All in all, s 17(5) is a Draconian procedure. It must be used sparingly and only when the code cannot be invoked when the employer has no other alternative. That would be so, for example, when the respondents are unaware of F the whereabouts of the employees and cannot contact them. Or, if the employees make it quite clear that they have no intention of returning to work. The code is a less restrictive means of achieving the same objective of enquiring into and remedying an employee's absence from work. It enables employees to invoke the rights to fair labour G practice and administrative justice. All the jurisdictional prerequisites for proceeding in terms of s 17(5)*(a)* (i) must be present before it is invoked."

[44] In the matter of *Grootboom v National Prosecuting Authority and another*[3] the Labour Appeal Court has held that:

> "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 *HOSPERSA & another v MEC for Health* 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, [this contention] is without merit. There is nothing in s 17(5) that prescribes that the deeming provision will not come into operation if the head of the department is aware of his whereabouts.

[2] 2003 24 ILJ 2320 (LC).
[3] 2013 34 ILJ 280 (LAC).

> 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 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."

[45] In *Grootboom v National Prosecuting Authority and another*[4] the Constitutional Court recently held that the jurisdictional requirements of section 17(5) of the PSA have not been met where an employee was not absent without permission of his employer and where the employer knew at all relevant times where he was and was communicating with the employee. The employer made a conscious decision not to recall the employee but rather to discharge him and it was found that the Labour Court and the Labour Appeal Court was wrong and the employee's appeal succeeded.

[46] *In casu* it is clear from the objective facts placed before the arbitrator that Madyibi was not absent from his official duties. He was performing duties but not where he was instructed to do so and as such present at work but at a different workstation. The requirements of section 17 of the PSA had not been met. The position would have been different if Madyibi was not reporting for duty at all.

[47] The arbitrator found that the requirements of section 17(5)*(a)* (i) of the PSA were not met in that Madyibi was not absent without permission for a period exceeding one calendar month. Madyibi was performing duties where he was not instructed to do so and for that the Applicant instituted disciplinary proceedings and issued a warning. Once it is found that the requirements have been met, the bargaining council will lack jurisdiction to hear the dispute

[4] Constitutional Case number CCT08/13 [2013] ZACC 37, handed down on 21 October 2013

on the basis of s 17(5)*(a)* (i) of the PSA. If the requirements have not been met, the said provisions will not have come into operation and the discharge will be invalid and the dismissal will be substantively and procedurally unfair.

[48] The arbitrator had to engage in a factual enquiry to determine whether the requirements of section 17 of the PSA had been met, and if so, the bargaining council would have no jurisdiction to arbitrate the dispute. The arbitrator found that the requirements of section 17 of the PSA have not been met and therefore he had jurisdiction to arbitrate the dispute. I am satisfied that the arbitrator correctly found that the bargaining council had jurisdiction to adjudicate the dispute and he has not committed any reviewable irregularity. This ground for review is without merit.

[49] The second main ground for review is that the arbitrator committed a gross irregularity in that he made a finding based on unreliable evidence and on the basis of one version.

[50] In the arbitration award of 9 December 2010 the arbitrator found that Madyibi was dismissed and the Applicant was to indicate within 14 days whether or not it wished to deal with the issue of procedural and substantive fairness. In the event that the Applicant did not wish to proceed or upon expiry of the 14 day period, the matter would have been determined on the evidence led.

[51] The arbitrator subsequently issued a further arbitration award, to be read with his findings on the operation of section 17 of the PSA, as per the arbitration award of December 2010. The arbitrator stated that the Applicant was afforded an opportunity to prove that Madyibi's dismissal was procedurally and substantively fair and the Applicant did not comply, wherefore the dispute was finalised with the evidence before him.

[52] This ground for review is without merit. The Applicant is the creator of its own misfortune when it failed to adduce evidence, despite being afforded an opportunity to do so.

[53] The arbitrator cannot be said to have committed a gross irregularity when he made findings based on the evidence placed before him.

The test on review

[54] The test to be applied when reviewing a jurisdictional ruling is whether objectively speaking the facts that would give the bargaining council jurisdiction to entertain the dispute existed. If such facts did not exist, the

bargaining council would not have jurisdiction despite its finding to the contrary.

[55] The arbitrator did not strictly speaking issue a jurisdictional ruling. He issued an arbitration award wherein he found that Madyibi was dismissed and because there was a dismissal, he had jurisdiction to adjudicate the dispute and to determine the fairness of the dismissal.

[56] Even if the arbitration award has an element of a jurisdictional ruling, the facts placed before the arbitrator showed that Madyibi was not absent without permission for a calendar month and it ousted the operation of section 17 of the PSA and vested jurisdiction.

[57] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*:[5] whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[58] In *Herholdt v Nedbank Ltd*[6] the Supreme Court of Appeal recently confirmed that:

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[59] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed and this Court can only decide whether the

[5] 2007 28 ILJ 2405 (CC).
[6] 2013 34 ILJ 2795 (SCA).

arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[60] Having considered the evidence adduced at the arbitration proceedings and the probabilities as they presented themselves to the arbitrator, the findings made by the arbitrator and the grounds for review raised by the Applicants, I cannot accept that the arbitrator's decision fell outside of the band of decisions to which a reasonable decision maker could come and it is not open to review.

[61] The representatives for both parties argued that costs should follow the result. I can see no reason to disagree.

Order

[62] In the premises I make the following order:

62.1 The application for review is dismissed with costs.

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Prinsloo AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant : Advocate M Simoyi

Instructed by : Java Mama Attorneys

For the Third Respondent: Adv Seleka