IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1511/05

In the matter between:

THE DEPARTMENT OF TRANSPORT	
NORTH WEST PROVINCE	APPLICANT
AND	
GG SEBOTHA N.O.	1ST RESPONDENT
THE GENERAL PUBLIC SERVICE	
SECTORAL BARGAINING COUNCIL	2ND RESPONDENT
PUBLIC SERVANTS ASSOCIATION	3RD RESPONDENT
H K GWABENI	4TH RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction1

[1] This is an application in terms of which the Applicant seeks an order reviewing and setting aside the arbitration award issued by the First Respondent (the arbitrator) under case number PSGA 507-04/05 dated 10th May 2005. I terms of her award the arbitrator found the dismissal of the Fourth Respondent (the employee) to have been unfair and ordered his reinstatement.

Background facts

[2] The employee was charged with misconduct related to absenteeism for a period of about 143 (hundred and forty three) days. The only witness which the Applicant called in support of its case was Mr Moletsane.

[3] The case of the Applicant is that on return after the protracted period of absence from work the employee failed to provide an explanation for his absence. During the period of absence the Applicant attempted contacting the employee to find out about his whereabouts. The attempt at contacting the employee included visiting his mother and leaving messages presumably that he report for work.

[4] The case of the Applicant is further that the employee had been placed on an Employee Assistance Programme (EAP) but absented himself from it also. He did not furnish an explanation for his failure to attend the programme the Applicant submitted.

[5] It would appear that the case of the employee at the arbitration hearing was that the dismissal was too harsh. It seems also common cause that the employee led no evidence during the arbitration hearing.

The grounds for review

[6] The Applicant complains that the award is full of errors which indicate that arbitrator failed to apply her mind to the issues placed before her. In this respect the Applicant gave two examples of the errors. The one relates to the statement

by the arbitrator on page 1 of her award that the *"Applicant testified"* whereas at page 4 she states that *"Applicant did not testify and closed his case"*

[7] The Applicant further contended that the arbitrator committed a misconduct, gross irregularity and exceeded her powers in the following respect:

(a) She failed to apply her mind to the relevant law applicable to the dispute between the parties.

(b) There is no rational connection between the award she made and the evidence presented to her.

Evaluation of the application

[8] In the heads of argument the Applicant relies on the provisions of section 17(5) of the Public Service Act of 1994 (the PSA), in its challenge to the arbitrator's decision. It is contended in this regard that the arbitrator failed to apply her mind to the provision of this section because had she done so she ought to have concluded that the employee was deemed to be dismissed by the *"operation of law."* Section 17(5) of the PSA reads as follows:

> *"(a) ...*
>
> *(i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month,*

shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

(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."

[9] In support of its case the Applicant relies in the decision in *Hospersa & Another v MEC for Health (2003) 12 BLLR 1242(LC),* where in dealing with the interpretation of section 17(5) of the PSA the Court held at para [36]-[37] that:

"[36] Because the employees are discharged, they are deprived of all the rights and protections afforded by the unfair dismissal laws. As a discharge is deemed to be on account of misconduct, the employees

are condemned before they have been given a hearing. There may be reasons other than misconduct for their absence. After the employees have been deemed to be so discharged, and provided they, firstly, report for duty and, secondly, they show good cause, their reinstatement into their former or other positions may be approved subject to conditions (s 17(5) (b)) When exercising their right to a hearing in terms of s 17(5) (b) the employees bear the onus of showing good cause. Section 17(5) (a) not merely restricts, but excludes the employees' right to a fair hearing before being found guilty and dismissed. It deprives the employees of challenging the termination of their services through conciliation and arbitration. It automatically deprives employees of their employment.

[37] *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 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 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."

[10] The Applicant further relied on the case of *Phetheni v Minister of Education and Others (2006) 9 BLLR 821(SCA),* where the Supreme Court of Appeal dealt with a similar section under the Employment Educator's Act 76 of 1998.

[11] In the *Horspesa's case* the Court held that the requisites for invoking the provisions of section 17(5) of the PSA were:

i. The person concerned must be an officer or an employee

ii. The employee must have absented himself or herself from the employee's official duties

iii. The absence must have been without authority

iv. The absence must be for more than a calendar month; and

v. The circumstances must be such that the disciplinary code and procedure of the Public Service do not have application.

[12] The *Horspesa case* was subsequently followed in the case of *Seema v GPSSBC & others (2005) 26 ILJ 2035 (LC),* and the same conclusion reached in the *Free State Provincial Government v Makae & others (2006) 27 ILJ 1845 (LC).* It needs to be emphasized that the reading of these cases indicate very clearly that when faced with a case involving absence from work by an employee in excess of thirty days, the employer has an election of either evoking the provisions of section 17(5)(1)(a) or directing otherwise. The employer may instead of evoking

the provisions of section 17(5) (1) (a) of the PSA evoke the provisions of the Labour Relations Act 66 of 1995 (the LRA). Where on employer evokes the provisions of section 17(5), the employment relationship is terminated by the operation of law and can therefore not be said to be termination in terms of section 186 of the LRA. Thus in this instance the bargaining council or the CCMA's jurisdiction will be ousted by the deeming provisions in section 17(5) (1)(a) of PSA. If the employer elects to institute disciplinary proceedings and ultimately dismisses an employee who absented himself or herself without authority for a period in excess of thirty days then in that instance the provisions of section 186 of the LRA would apply and the CCMA or the bargaining council would accordingly have jurisdiction. In this respect Pillay J in *Horspesa* had this to say:

> *"[34] There are two mechanisms available to the respondent (employer) if the employee absent themselves from work without permission. The first is charge them for misconduct for having breached the code. Schedule A of the code includes as an offence: Absence or repeatedly absenting him/herself from work without reason or permission. <u>The employees remain employed whilst the charges are investigated and tried</u> (my underlining). If the disciplinary enquiry determines that they should be dismissed, respondents would bear the onus of proving the fairness of the dismissal. Absence from duty without permission is also not usually regarded as a serious offence warranting dismissal. To invoke this procedure, the*

whereabouts of the employees must be known to the employer in order to serve a charge-sheet and secure their attendance at the disciplinary enquiry.

[35] The second mechanism is in terms of s 17(5) (a). Employees who absent themselves without permission for more than one calendar month shall be deemed to have been discharged on account of misconduct. The words "shall be deemed" implies that the provisions are automatically invoked by operation of law."

[13] In *Phetheni's case* the Court held that the operation of the provisions of section 14 (1) (a) of the Employment of Educators Act 76 of 1998, may only be lifted or revoked by the employer directing otherwise.

[14] It is clear that in the present instance the Applicant did not evoke the provisions of section 17(5)(1)(a) of the PSA but rather directed that the employee be disciplined for misconduct in terms of clause 6 and 7 of the Disciplinary Code and Procedure as contained in the Public Service Coordinating Bargaining Council (the PSCBC), resolution number 2 of 1999 as amended by resolution 1 of 2003. It therefore means that the termination of the employment falls within the provisions of section 186 of the LRA and accordingly the bargaining council had jurisdiction to entertain the dispute concerning the alleged unfair dismissal of the employee. It also appears that the issue of section 17(5)(1)(a) was never raised by the Applicant during the arbitration hearing which means the arbitrator cannot be criticized for having not considered whether or not the provisions of

that section was applicable. In addition the facts of the case before the arbitrator did not call on her to raise the deeming provision *mero muto.*

[15] In my opinion the termination of the employee's employment was not due to the deeming provisions of the PSA but rather termination as envisaged by the provisions of the LRA and therefore the determination of whether the arbitration award in this matter is reviewable falls to be determined in terms of the LRA.

[16] I now turn to deal with the issue of whether or not the award of the arbitrator is reviewable. In considering whether or not to review and set aside the arbitration award of the arbitrator the question that arises is whether or not the conclusion reached by the arbitrator falls outside the range of reasonableness so as to attract interference with the award by the Court. The test to determine whether or not a conclusion reached by an arbitrator is reasonable or otherwise is that of a reasonable decision-maker. The question to be answered in considering the reasonableness or otherwise of an award is whether the conclusion of the arbitrator is one which a reasonable-decision maker could not reach. See *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC).*

[17] In order to apply the above test the Court needs to have before it the record of the arbitration proceedings. As a general rule the complete record of everything that transpired during the arbitration proceedings needs to be placed before the Court. There is however instances where the Court may be able to determine whether or not the award is reviewable based on specific and relevant portions of the record only or for that matter on the arbitration award alone. This would

be so in particular if the irregularity complained of is patent from the reading of the award. See *Shoprite Checkers Ltd v CCMA (2002) 7 BLLR 677 at par 11.*

[18] The responsibility to ensure that a proper and complete record is placed before the Court rests with the Applicant. Failure to place before the Court a complete record by the Applicant could result in the dismissal of the review application on that ground alone.

[19] In *Boale v National Prosecuting & Others [2003] 10 BLLR 988 (LC) para 5:*

> *"It is trite that there is duty on an Applicant to provide a review Court with a full transcript of the proceedings he wishes to have reviewed. The Applicant has failed to provide this Court with the full transcript of the proceedings that he wished to have reviewed. Where an Applicant fails to provide a full transcript of the proceedings the review application must be dismissed. The only exception would be where the tape cassettes are missing or where the parties are unable to reconstruct the record."*

[20] The same approach was adopted in *Fidelity Cash Management Services (Pty) Ltd v Muvhango SA (2005) JOL 14293 (LC),* where it was held that:

> *"The court should be placed in a position to assess the different versions as they were placed before a commissioner through a full transcription of the record or a satisfactory reconstruction thereof."*

[21] The approach to be adopted when dealing with an incomplete record was set out in the case of *Life Care Special Health Services (Pty) Ltd t/a Ekuhlengeni Care*

Centre v CCMA & Others [2003] 5 BLLR 416 (LAC) 1116, where the Labour Appeal Court held:

> *"[14] This is not to say that much purpose was served by placing the un transcribed notes before the Court a quo. It is properly to be expected that Court, as in this Court that hand written documents will be accompanied by typed written transcription or copies. The commissioner's hand writing affords ample reason for the settled practise."*

The court held further that:

> *"[17] The reconstruction of the record (or part thereof) is usually undertaken in the following way, the tribunal (in this case the commissioner) and the representatives in this case is ready for the employee and Mr Mvelengwa for the employer to come together, bring in their extent notes and such other documentation as may be relevant. He then endeavoured to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purposes of appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness."*

[22] At the beginning of this application the Court invited Mr Vally for the Applicant, to show cause why in the light of the absence of the transcription of the record of the arbitration proceedings the matter should not be postponed to afford the Applicant the opportunity to produce or reconstruct the record. He indicated that he did not see the reason for the postponement because the matter has been fully ventilated. He contended that the Court could determine the matter based on the arbitrator's hand written notes which are also not transcribed. He further contended that the hand written notes were legible enough to make sense to the Court.

[23] These notes are however incomplete and provides a partial recording of the testimony of the only witness of the Applicant, Mr Moletsane. The testimony of Mr Moletsane is crucial in the determination of whether or not to review the award of the arbitrator. The evidence of Mr Moletsane is key to the reasoning of the arbitrator in particular because this evidence was rejected and Mr Moletsane was found to be an unreliable witness. The Applicant based its attack of the award on the criticism of the evidence of the testimony of Mr Moletsane by the arbitrator. In the absence of a proper record this Court is unable to determine whether or not there is a basis for this criticism. In other words in the absence of the transcript of what was said during the arbitration hearing this Court is unable to determine whether or not *"Mr Moletsane's evidence is full of contradictions and proved to be an unreliable witness"* as was determined by the arbitrator.

Conclusion

[24] In my view the Applicant's review application stand to be dismissed for failure to provide the Court with a complete record. I see no reason why the costs should not follow the results both in terms of law and fairness.

[25] In the premises the review application is dismissed with costs.

Molahlehi J

Date of Hearing : 20th November 2008

Date of Judgment : 13th May 2009

Appearances

For the Applicant : Adv B Valley

Instructed by : State Attorney (Mmabatho)

For the Respondent: Adv F J Van Der Merwe

Instructed by : Bouwers (Roodepoort) Incorporated