

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR2636/08**

In the matter between:

**SOLIDARITY OBO JACOBUS ADRIAAN**

**HENDRIK KOTZE**

Applicant

AND

**THE PUBLIC HEALTH AND WELFARE**

**SECTORIAL BARGAINING COUNCIL**

1<sup>ST</sup> Respondent

**COMMISSIONER CL DECKENS N.O.**

2<sup>nd</sup> Respondent

**DEPARTMENT OF HEALTH: FREE STATE**

3<sup>rd</sup> Respondent

**JUDGMENT**

**Molahlehi J**

**Introduction**

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number PSHS 453/07 dated 27<sup>th</sup> September 2008. In terms of the award the commissioner found that the first respondent did not have jurisdiction to entertain the dispute as the applicant was not dismissed for the purposes of the Labour Relations Act 66 of 1995 (LRA)

but was deemed to have be dismissed in terms s 17 (5) (a) (2) of the Public Service Act No 103 of 1994.

## **Background facts**

[2] It is common cause that the third respondent suspended the applicant from his duties on the 4<sup>th</sup> July 2007. The applicant was suspended pending an investigation into the allegations of misconduct which had been levelled against him.

[3] The applicant was during his suspension issued with the letter of dismissal on the 19<sup>th</sup> October 2007. The letter of dismissal reads as follows:

***“DISCHARGED FROM SERVICE: YOURSELF: PERSAL NUMBER:  
12545015:***

1. *Kindly take (sic) 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 the service of the Department of Health.*

2. *Above mentioned discharged is eminent in terms of s 17 (5) (a) (ii) read in conjunction with s 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 or whether the said period has expired or not.”*

3. *All benefits will be paid to you and all debts to owes (as I see) the Government will be recovered from your pension.”*

[4] Subsequent to receipt of the letter, the applicant referred an unfair dismissal dispute to the first respondent, which was ultimately after satisfying other procedural requirement referred to arbitration.

[5] At the arbitration hearing the applicant's case was that his dismissal was without a hearing and that at that stage he was still on suspension. The case of the respondent during the arbitration was that the applicant was not dismissed but that his employment was terminated by operation of the law. The respondent contended that in this respect the applicants' termination of employment occurred because he assumed employment with another employer whilst in the employ of the public service.

[6] It would appear that the applicant assumed employment with a company known as Compu Africa on the 23<sup>rd</sup> July 2007. Confirmation of his assumption of employment with Compu Africa is contained in a letter from Compu Africa dated 12 October which reads as follows:

*“Re- J. A. H. KOTZE with regard to your fax i would like to confirm the following:*

- *J. A. H. Kotze is employed by Compu Africa;*
- *J. A. H. Kotze was employed on the 23<sup>rd</sup> July 2007 and not the 3<sup>rd</sup> as previously stated;*

- *Remuneration has been paid to J. A. H. Kotze*

*I trust that you will find the above mentioned in order.*

*Kind regards.”*

[7] The applicant did not deny that he had obtained employment with Compu Africa during July 2007 but contended that he was entitled in terms of the contract of employment to do other work out side of his employment. He suggested that he had permission to do so because of the application for remunerative work outside the public service application which he had made to the respondent. Although he did not receive any response in as far as this application is concerned he had assumed that he had one. It is common cause that the application was not made for Compu Africa but for Bay City trading 374 cc. In that application form the applicant indicated his official working hours with the respondent which was from 07h30 to 16h00. The request by the applicant in the application form was to perform remunerative work from 16h01 to 17h29.

### **The arbitration award and the grounds for review**

[8] The commissioner in considering the matter came to the conclusion that the first respondent did not have the jurisdiction to entertain the matter because there was no dismissal as termination of the applicants contract occurred in terms of s 17 (5) (a) of the PSA. In this respect the commissioner found that it was common cause that the applicant had assume alternative employment with

Compu Africa on the 23<sup>rd</sup> July 2007. The commissioner further found that the commissioner's application was never approved.

- [9] The applicant contended that the commissioner committed misconduct, gross irregularity and exceeded his powers. The applicant further contended that the commissioner's award was not reasonable as per the requirements set out in *Sidumo and Others v Rustenburg Platinum Mines (2007) 12 BLLR 1097 (CC)*.

### **Evaluation**

- [10] The applicant contends in his heads of argument that the deeming provisions of s 17 (5) (b) (ii) can only come into operation once it has been established that the employee has absconded. According to the applicant the provisions of s 17 (5) (b) are intended to empower the employer to take action against employees who the employer is unable to trace. The argument of the applicant is based on the concept of absconding as applied in private sector cases. The general approach adopted in private sector cases of absconding was enunciated in the case of *SABC v CCMA & Others (2002) 8 BLLR 693 (LAC)*.

- [11] In the private sector cases of absconding and entails both absence from work without authority and evidence of the intention on the part of the employee not to return to work. To satisfy the requirements of fairness in absconding cases the employer had to show that it took steps to locate the whereabouts of the employee.

- [12] In the case of *Grootboom v The NPA (Case No: C696/08 unreported)* this court was faced with having to determine whether the employer could evoke the

provisions of s 17 (5) of the PSA in a case where the employee left to study in the United Kingdom during his suspension without permission. It was common cause in that case that the employee had left the country to study in the UK without obtaining authority to do so from his employer. In dealing with the principle governing the authority that an employer has over the employee during the suspension the court held that the precautionary suspension and the postponed disciplinary hearing did not change the status of the applicant as an employee. The employee remained accountable and was subject to the employer's authority in terms of his movements and availability during working hours whilst on suspension.

[13] The court further in that case stated that the issue in determining whether the applicant was absent without authority despite his suspension revolves around his ability to report for work if was to be called upon to do so by the employer. the court then quoted with approval what was said in *Masinga v Minister of Justice, Kwa-Zulu Government (1995) 16 ILJ 823 (A)*. In that case the prosecutor was suspended pending a disciplinary inquiry found employment with Natal University. When the university suspended him, he sought to go back to the department. In dealing with the issue of the status of a suspended employee the Court (at page 826 and the last sentence of paragraph B-G) had the following to say:

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

[14] It is clear that whereas the deemed termination under sub-section (i) of s17 of the PSA, can only be invoked after the expiry of 30 (thirty) days of absence without authorisation, there is no prescribed period under sub-section (ii) of the same section. The requirements which need to be satisfied before the employer can invoke the deeming provision is that the employee must have assumed employment elsewhere during his or her absence without authority. The facts of this matter indicate very clearly that the applicant was never granted RWOPS by the respondent and therefore by assuming employment with Compu Africa absented himself from work without the approval of the respondent.

[15] In the present instance although the employee was still on suspension, he was still accountable to the respondent even during his suspension. He therefore was required to obtain authorization to undertake employment with another third party even during his suspension. The applicant took employment with Compu Africa without authorization by the respondent. In accepting employment with Compu ware the employee absented himself from work without the authorization of the employer. Objectively speaking the applicant 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 the 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 the applicant before evoking the deemed provisions of the PSA.

[16] It needs to be emphasised that the applicant took employment with Compu Africa without authorization by the respondent. In accepting employment with Compu Africa the employee absented himself from work without authorization of the respondent and thereby subjected his contract to termination by the operation of the law.

[17] It is the above reasons that I am of the view that the commissioner cannot be faulted for arriving at the conclusion that the first respondent did not have jurisdiction to entertain the dispute of the applicant as there was no dismissal. It is also for these reasons that I found that the case of the applicant stand to fail. I however do not believe that it would be fair to allow costs to follow the results.

[18] In the premises that applicant's case is dismissed with no order as to costs

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**Molahlehi J**

Date of Hearing : 05 February 2010

Date of Judgment : 28 July 2010

**Appearances**

For the Applicant : Mr D J Groenewald from Solidarity

For the Respondent: Mr SS Jonas from the State Attorney: Bloemfontein