REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 2934/11

In the matter between:

PSA obo LESSING **Applicant**

And

SAFETY AND SECURITY SERVICES BARGAINING COUNCIL **First Respondent**

SOUTH AFRICAN POLICE SERVICES **Second Respondent**

E. MAREE **Third Respondent**

Date heard: 15 October 2013

Date of judgment: 08 January 2014

Summary: Application to review the ruling that the bargaining council lacked jurisdiction. Ruling that the bargaining council lacked jurisdiction because termination of the employment contract was by operation of the law. The decision to evoke the deeming provision of the regulations valid until set aside.

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995, in terms of which the applicants seek an order reviewing the ruling of the third respondent (the panellist) in terms of which it was found that the first respondent (the bargaining council) did not have jurisdiction to entertain the alleged unfair dismissal dispute.

[2] The second respondent has applied for condonation for the late filing of the answering affidavit. The four months delay in filing the answering affidavit is attributed to other work which the person responsible for this matter was involved in. The delay in filing the answering affidavit is not insignificant and the reasons proffered for it are not strong. However, the extent of the delay and the weakness in the explanation is compensated for by the prospects of success. It is for this reason, that I belief, it would be an injustice to refuse condonation for the late filing of the second respondent's answering affidavit.

Background facts

[3] The individual applicant (referred hereinafter as "the employee" for ease of reference) was charged with misconduct by the second respondent and a disciplinary hearing was scheduled for 30 November 2010, 01 December 2010 and 6 December 2010. The matter was on the first day of the hearing postponed to 6 December 2010 because of the unavailability of the witnesses of the second respondent.

[4] The employee and his union representative opposed the application and insisted that the matter should proceed particularly because the employee was already on suspension without pay. During the course of the debate about the postponement the employee and his union representative walked out of the hearing and thus failing to remain in attendance.

[5] The chairperson of the disciplinary hearing, relying on the provisions regulation 18 (3) (a) of the South African Police Services Disciplinary Regulations (the Regulations) postponed the disciplinary hearing to 09 December 2010. At the stage the chairperson of the hearing postponed the matter the employee and his representative had already left the hearing. The employee contended that he was as a result not aware of the date to which the matter had been postponed to and accordingly did not attend the hearing on 9 December 2010.

[6] The third respondent again in relying on the provisions of regulation 18 (5) (a) (i) of the Regulations suspended the applicant without full remuneration and postponed the hearing indefinitely.

[7] The consequence of the suspension which was for two months was that in terms of regulation 18(5) of the Regulations the employee was expected to liaise with the second respondent regarding the reconvening of the hearing. The regulation further provides that failure to process the reconvening of the disciplinary hearing by the employee would be deemed to be discharged from the service.

[8] According to the employee the notice of suspension was served on his representative on 23 December 2010. Thereafter the employee attended the second respondent's premises on 09 February 2011 and was informed that

his services had been terminated and he was accordingly discharged. It was for this reason that the employee referred an unfair dismissal dispute to the first respondent.

[9] The matter then served before the third respondent in arbitration on 13 September 2012. At the arbitration hearing the second respondent raised a preliminary point concerning the jurisdiction of the first respondent. The third respondent agreed with the second respondent and ruled that the first respondent lacked jurisdiction to arbitrate on the matter and accordingly directed that the matter be referred to the Labour Court for adjudication.

Grounds for review

[10] The applicant contends amongst other things that the third respondent erred in:

10.1 the ruling that the applicant had been discharged in terms of the Regulations is reviewable in that the regulations were misinterpreted by the third respondent) arbitrator;

10.2 the third respondent ignored the following guidelines stipulated by the regulations for lawful discharge

- the chairperson should have, on 6 December postponed the hearing to a date of not less than 7 (seven) days, and
- in the event that the applicant still failed to attend the hearing, after the expiry of 7 days, the chairperson should have issued a notice of suspension for two months within which the applicant should have reconvened the hearing failing which he would have been discharged.

10.3 The postponement of the hearing from 6 December to 9 December 2010 was not properly convened as per the regulations. The 2 month period could not have commenced on 9 December 2010.

10.4 The applicant contends also that the 2 months period within which he (the employee) should have contacted the first respondent would have expired on or about 23/24 February 2011, considering the fact that the notice period was received on 23 December 2010. In that case the applicant was still within the 2 months time period stipulated in the regulation and could not have been discharged by the third respondent.

[11] In addition to the above the applicants challenged the ruling of the panellist on the basis that it is unreasonable. It was also argued on behalf of the employee that the panellist should not have accepted on face value the second respondent's argument that the dismissal was by the operation of the law but should have interrogated the matter to see if the conditions precedent were satisfied in that regard. It was further argued that the panellist should have taken into account that the employee presented himself at the workplace before the expiry of the two months.

The ruling

[12] The panellist found that the employee was suspended in terms of regulation 18(15) (a) (i) of the Regulations consequent to his failure to remain in attendance during the disciplinary hearing. The panellist further found that the employee failed to provide satisfactory reasons for his absence.

[13] Furthermore, the panellist found that the first respondent did not have jurisdiction to entertain the dispute because the employment contract of the employee was terminated by the operation of the law.

Evaluation

[14] The general rule in cases involving jurisdiction is that institutions such as the CCMA and Bargaining Councils do not have the power to determine their own jurisdiction.[1]

[15] The test to apply in determining a review of a jurisdictional ruling of the bargaining council or the CCMA is not that of a reasonable decision maker which was enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] but rather whether the Commissioner or the panellist as the case may be was right or wrong in arriving at whatever decision he or she did regarding the issue of jurisdiction.[3] This means in the present instance what needs to be determined is whether the Commissioner was wrong or right in concluding the Bargaining Council did not have jurisdiction to entertain the applicants' dispute.

[16] The issue to consider in determining whether the bargaining council has jurisdiction revolves around the basis for the termination of his employment contract. If the reason for the termination of the employment contract is that envisaged in section 186 (1) of the LRA then it can be said that the bargaining council has jurisdiction to entertain the dispute. If the termination was by operation of the law then the panellist was correct in concluding that the bargaining council does not have jurisdiction to entertain the dispute.

[1] *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC) at para 29.
[2] (2007) 28 ILJ 2405 (CC).
[3] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*(2008) 29 ILJ 2218 (LAC) at paras 39 – 40

[17] The facts before this court reveal very clearly that the termination of the employment contract of the employee was as result of the operation of the law. In this respect the employee in his supplementary affidavit states the following:

> "13. On 9 February 2011, I attended at the Second Respondent's premises at the police station where I was based, on arrival I was informed that that my services have been terminated due to being discharges from the service of the second respondent."

The employee further states in the same affidavit that:

> "15 Therefore, the Second Respondent's decision to discharge is unlawful in that the Second Respondent failed to follow its own Regulations dealing with discharge of employees."

[18] The chairperson of the disciplinary hearing in evoking the statutory termination of the contract of employment of the employee relied on regulation 18(3)(a) of the Regulations which reads as follows:

> "Upon failure as contemplated in subregulation (2), the chairperson must **postpone the hearing for not less than seven (7) calendar days** and the notice of the postponement, issued by the chairperson, must be served on the employee..."

And regulation 18(5)(a) of the Regulations reads as follows:

> "In the event that the employee fails to appear at the disciplinary hearing on any date to which the disciplinary hearing has been postponed, or a date to which it was postponed in terms of subregulation (3),
>
> i the employee shall, from the date of such failure to appear or remain in attendance, be deemed to be suspended without (full) remuneration; and

ii the chairperson must postpone the disciplinary hearing indefinitely, and the disciplinary hearing shall only reconvene at the instance of the employees concerned, after liaising with the employer representative, as contemplated in subregulation (1)(b): Provided that in the event that the employee fails to take steps to reconvene the hearing within two (2) months of such date, the chairperson must record such failure on the record of the disciplinary hearing and the employee shall forthwith be deemed to be discharged from the Service in terms of regulation 15(1)(f)."

[19] It is now well established that statutorily deemed termination of an employee's employment contract does not constitute a dismissal as envisaged in section 186(1) of the Labour Relations Act of 1995 (the LRA). In *MEC, Public Works, Northern Province v CCMA & Others*[4], the Court held that an employee whose employment was terminated by operation of the law was not dismissed.[5]

[20] An employee whose employment has been terminated by operation of the law is deprived of the remedies of the unfair dismissal as provided for in the LRA. This does not however mean that such an employee cannot challenge the termination of the employment under other causes of action. The exercise of power by the second respondent can be challenged under the provisions of section 158(1)(h) of the LRA,[6] which empowers the Court to review any conduct of the state in its capacity as an employer. This means that the decision of the chairperson of the disciplinary hearing in the present matter to evoke the provisions of regulation 18 of the Regulations can be challenged on

[4] (2003) 10 BLLR 1027 (LC).
[5] *Nkopo v Public Health and Welfare Bargaining Council & Others* (2002) 23 ILJ 520 (LC).
[6] *Section 1*58 (1) (h) *of the LRA reads as follows: "The Labour Court may-*
review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."

review in terms of section 158(1)(h) LRA. It is trite that it is only the Court that has the review powers and not the bargaining council.

[21] It was indicated earlier in this judgment that the decision of the chairperson of the disciplinary hearing to evoke the provisions of regulation 18 has not been challenged by the applicants or reviewed and set aside. In this respect the basic principle of our law is that an administrative decision made, be it valid or otherwise remains in force until it is set aside on review. In dealing with the same issue and following the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town,*[7] this Court in *Taung Municipality v Mofokeng*[8], had the following to say:

> "12. It has been pointed out in *Oudekraal supra* that whilst an unlawful act is void in law it is however in fact valid and derives its validity and the force of law from its factual basis. Thus the enquiry generally is not whether the decision has its basis in law but rather whether such a decision exists in fact. The next enquiry once it has been established that the decision is unlawful but exists in fact would be to determine whether it has been set aside on review. In general this question arises in the determination of whether or not the decision is enforceable or whenever there is an attempt at coercing such unlawful administrative act."

[22] It follows that the decision of the chairperson of the disciplinary hearing in the present matter remains in force be it lawful or otherwise until it is set aside on review. Accordingly the panellist was correct when he said that the bargaining council did not have jurisdiction to entertain the dispute. And I assume that

[7] [2004] 3 All SA1(SCA).
[8] (2011) 12 BLLR 1243(LC).

what he meant when he said that the applicants could refer their dispute to the Labour Court is that they could lodge a review application.

Conclusion

[23] In my view the objective facts placed before this Court do not support the contention that the bargaining council has jurisdiction as it is clear that termination of the employment contract was by operation of the law. The applicants' application therefore stands to fail.

[24] As concerning costs, I am of the view that there are merits in the complaint of the first respondent that they were unnecessarily dragged to the Court, the overriding consideration is that the costs should not be allowed to follow the result because of the relationship between the parties.

Order

[25] In the premises the following order is made:

25.1 The late filing of the second respondent's answering affidavit is condoned.

25.2 The first respondent does not have jurisdiction to entertain the dispute of the applicants.

25.3 The applicants' application is dismissed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: T Ntshebe of Thabang Ntshebe Attorneys

For the Respondent: Advocate Nhlapo

Instructed by State Attorney