

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**(HELD IN PORT ELIZABETH)**

**Case No: P529/09**

*Reportable and of interest to other Judges*

**In the matter between**

**THE DEPARTMENT OF CORRECTIONAL  
SERVICES**

**APPLICANT**

**and**

**GENERAL PUBLIC SERVICE SECTORIAL**

**FIRST RESPONDENT**

**BARGAINING COUNCIL**

**JONATHAN GRUSS N.O**

**SECOND RESPONDENT**

**WILLEN ANDRIES VOSLOO**

**THIRD RESPONDENT**

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**JUDGMENT**

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**SHAI AJ**

## **INTRODUCTION**

- [1] This is an application in terms of which the applicant seeks to review and set aside the arbitration award issued by the Second Respondent, (“the arbitrator”) on the 24 August 2009 under case number PSGA 1269-07/08 under the auspices of the First Respondent. In this application the Applicant seeks to have the finding of the arbitrator that the dismissal of the Third Respondent (“the employee”) was both procedurally and substantively unfair, set aside and substituted with a finding that the dismissal was for a fair reason.

## **THE FACTS**

- [2] The employee commenced his employment with the Applicant on 01 December 1989 as a correctional officer.
- [3] The Applicant contended that for a considerable period, that is from 01 December 2006 until his dismissal, the employee was absent from work without permission or without advising either his supervisors or his employer of his whereabouts. Applicant contended during such period the employee was rendering services at Netcare 911 while he was still employed by the applicant.

- [4] On or about 31 August 2007, a letter was sent to the employee advising him to report for duty on or before 03 September 2007, failing which he will be regarded as absconded.
- [5] On the said 03 September 2007, the employee went to the office of the Applicant dressed in civilian clothing. The Applicant contended that the employee was advised that in terms of the above letter he was required to report for duty failing which he will be regarded as having been absconded.
- [6] The Applicant contends that the employee ignored this and left the office. The Applicant contends further that the only information furnished by the employee was that he had applied for temporary incapacity leave but was informed that such application was not received by the Applicant and that he should furnish proof thereof.
- [7] On 04 September 2007, the employee was issued with the dismissal letter. The letter informed him that he was absent from work for a consecutive period of 30 days without permission from his employer and was consequently dismissed in accordance with clause 9.1 of Resolution No 1. of 2006. The relevant provisions of the resolution are dealt with in paragraph 35 below.

- [8] The employee lodged an appeal against his dismissal and such an appeal was dismissed on 30 January 2008. Thereafter the employee referred a dispute to the GPSSBC challenging the fairness of his dismissal. The matter was scheduled for arbitration and such arbitration was presided over by the Second Respondent and finalised on 05 August 2009, which award is the subject of this review application.
- [9] In this award the arbitrator found that the employee was procedurally and substantively unfairly dismissed and ordered reinstatement of the employee. In addition the arbitrator ordered back pay in the sum of R241 135.00 representing the loss of income from the date of dismissal to the date of the award.
- [10] The employee on the other hand contended that he was absent from work due to ill health and has submitted ill health application forms which the Applicant did not process.
- [11] He further contended that at all times the Applicant knew where he was, as officials came to his house where discussions were held with him and that also Mr Nweba came to his house and thirdly, a letter was delivered to him at his house (on 31 August 2007).

- [12] Further that he did not render services to the Netcare from 01 December 2006 to 03 September 2007. He however, admits that he performed voluntary service for Netcare 911 from 2004 with the knowledge and approval of the Applicant and supervisors. At no stage was the issue of Netcare 911 raised with him during such discussions – discussions centered on absence from work and ill health.
- [13] On 03 September 2007 when he met Mr Nweba he was in civilian clothing and this infuriated Mr Nweba. The latter further refused to accept his explanation that his house burned down and that his uniform burned with it.
- [14] The employee contends that on that day Mr Nweba produced a blank leave form and required him to sign it thereby construing the absence from work as being leave without pay, notwithstanding the fact that he told him he had submitted sick certificates and temporary ill health application throughout.
- [15] Mr Nweba asked him to produce proof of submissions of the forms and he advised him he did not have them with him, at that stage. He was then handed a disciplinary hearing notice which he refused to sign.

[16] He contends that the meeting with Mr Nweba was confrontational and escalated further when he told him that he had a doctor's appointment and need to attend to.

[17] He contends that the letter he received did not inform him to resume duties but to report to discuss the matter with him in order to clarify and possibly resolve the matter.

[18] The Applicant was dissatisfied with the award of the commissioner and lodged the review application on 29 October 2009 which is three weeks late and seeks condonation therefore.

#### **CONDONATION APPLICATION**

[19] The Applicant received the arbitrator's award on 28 August 2009. The Applicant filed his review application on 29 October 2009 which makes the application late by approximately three weeks.

[20] As the reason for the delay the Applicant contends that the Applicant is a state organ and need to follow certain internal procedures before embarking on litigation. In this instance the award was sent to Legal Service at Regional Office in East London and the said office had to prepare memorandum and advice whether the award must be

implemented or reviewed. The said memorandum was prepared on 01 September 2009.

[21] The said memorandum and the award were sent to Regional Head: Corporate Services on 07 September 2009. Thereafter the memorandum and the award were sent to the Deputy Regional Commissioner. After making comments the said documents were sent to the Regional Commissioner for her consideration and mandate, which was done on the 10 September 2009. From there the State Attorney had to be engaged which was done on the 28 October 2009 hence the late filing of the application for review.

[22] The Applicant is of the view that he has good prospects of success given the issues he raised against the award. The Applicant is also of the view that justice will be better served if condonation is granted as the Respondent will suffer no prejudice.

[23] The factors that need to be taken into account in determining whether a good cause has been shown for condonation of late filing of the review were stated in the case of *Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A) at 532* and it involves weighing together the following factors; which are interrelated: degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on

and said that although these factors are interrelated and are not individually decisive if there are no prospects of success there would be no point in granting condonation.

- [24] In the case of *Kritzinger v CCMA & Others* (J2254/05) [2007] ZALC 85 (9 November 2007), published also at [2008] JoI 21093 (LC) Molahlehi J said the following in relation to the test as enunciated in *Melane v Santam Insurance Co LTD* 1962(4) SA (A) at 532:

*“These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate for inadequate explanation and the long delays.”*

- [25] In the present set of facts the delay is approximately three weeks which I regard as not excessive. This in conjunction with explanation of the delay and prospects of success sufficiently and satisfactorily explained in the review application leads me to the conclusion that a good cause for condonation has been shown and accordingly condonation for late filing of the application of review is granted.

## **GROUND OF REVIEW**



[26] The Applicant attacks the award of the arbitrator as follows:

[26.1] The evidence before the arbitrator proved that the employee absented himself for a period in excess 30 days without permission or leave from his employer. His dismissal was in accordance with clause 9.1 of the Resolution 1 of 2006 and therefore not in terms of the Labour Relations Act.

[26.2] During the cause of the arbitration hearing, the employee admitted working for Netcare 911. However, the arbitrator made a finding that there was inconclusive evidence in this regard. It is applicant's submission that this finding is not supported by evidence properly placed before him and is unreasonable.

[26.3] The arbitrator made a finding that the employee refused to sign a blank leave form authorizing the Applicant to deduct unpaid leave which applicant had led neither such evidence nor its witnesses cross examined on it.

[26.4] The arbitrator failed to apply his mind to the fact that the evidence proved that the employee did not render any service to the applicant for the duration of his absence from work but

nevertheless, he (“the arbitrator”) awarded the employee an amount of R 241 135.00 as back pay.

## THE LEGAL POSITION

[27] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo & Another v Rustenburg Platinum Mines LTD & Others 2008(2) SA CC* being: “is the decision reached by the commissioner one that a reasonable decision maker could not reach?”

[28] In *Sidumo*, Ncgobo J, as he then was, was of the view that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard of a reasonable decision maker, a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review, and at paragraph 186 he said the following:

*“The general powers of review of the Labour Court under Section 158(1)(g) are therefore subject to the provisions of Section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioner’s may be reviewed by the*

*Labour Court under Section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under Section 145(2) must found his or her cause of action on one or more of these grounds of review”*

[29] Regarding gross irregularity as a ground of review Ncgobo J said the following:

*“[263] The basic principle was laid down in the often- quoted passage from Ellis v Morgan [Ellis v Morgan, Ellis v Dessan 1909 TS 576] where the court said:*

*“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined”*

[30] The Court went further to say that:

*“In Goldfields [Goldfield investments LTD and Another v City Council of Johannesburg and Another 1938 TPD 551], Schreinder J distinguished between patent irregularity that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and ‘latent irregularities’, that is, irregularities that take place inside the mind*

*of the judicial officer, which are only ascertainable from the reasons given on the decision maker. In the case of latent irregularities one looks at the reasons not to determine whether the results is correct but to determine whether a gross irregularity occurred during the proceedings. In both cases, it is not necessary to show intentional arbitrariness of conduct or any conscious denial of justice.....”*

[31] The Court went further to indicate that in both *Ellis and Goldfields* cases it is clear that the crucial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues.

[32] In *Southern Sun Hotel Internationals (PTY) LTD v Commission for Conciliation, Mediation and Arbitration & Others* [2010] 31 ILJ 452(LC), the Court acknowledged the test for review of Commissioner’s award as enunciated in the Sidumo decision (reasonable decision maker test) but said:

*“Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner’s process related to conduct is found wanting. Of course, reasonableness is not irrelevant to this inquiry – the reasonableness requirement is relevant to both process and outcome”*

[33] My understanding is therefore that if the Commissioner commits acts as stipulated in Section 145(2) of the Act the decision arising from proceedings so conducted would not be reasonable, thus would not pass the constitutional standard of the reasonable decision maker.

[34] The first attack on the arbitrator's award is that the employee was not dismissed but terminated *ex lege* in terms of the Resolution 1 of 2006 nevertheless the commissioner found that the employee was unfairly dismissed as per Labour Relations Act 66 of 1995.

[35] The clause 9.1 of Resolution 1 of 2006 provides as follows:

*"9.1 An employee who absents him/herself for thirty consecutive (calendar) days without permission or without notifying the employer shall be summarily dismissed. However, before dismissing the employee the employer must endeavor to establish the whereabouts of the employee. Upon the employee's reappearance after desertion, he/she may not be reinstated. The employee must make written representations to the delegated authority within five (5) days from his/her reappearance, should he/she wish reinstatement/re-employment."*

[36] It is common cause between parties that the above Resolution governs the employer-employee relationship between the Applicant and the Third Respondent. What the parties do not agree on is whether the said

resolution creates termination of employment *ex lege* or not and whether the circumstances of the Third Respondent triggered the operation of termination *ex lege*.

- [37] The applicant in its submission relies on the case of *Phenithi v Minister of Education and Others* (2006) 27 ILJ 477 SCA wherein the court dealt with a discharge from service in terms of Section 14(1) (a) of the Employment of Educators Act 76 of 1998. The said section provides as follows:

*“14 Certain educators deemed to be discharged:*

*(1) An educator appointed in a permanent capacity who-*

*(a) is absent from work for a period exceeding fourteen consecutive days without permission of the employer ..... shall, unless the employer directs otherwise, be deemed to have been discharged from the service on account of misconduct .....with effect from the day following immediately after the last day on which the educator was present at work.”*

- [38] Section 14(2) of the same Act provides further that if such educator at any time, reports for duty, the employer, may, on good cause shown and notwithstanding anything to the contrary contained in that Act, approve the

re-instatement of the educator in the educator's former post or any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.

- [39] The court cited the case of *Minister van Onderwys en Kultuur v Louw* 1995(4) 383 (A) with approval and said the following:

*"In this court Van Heerden JA, reversing the decision of the Northern Cape Division, said (at 388 G-H):*

*"The deeming provision [at 72(1)] comes into operation if a person in the position of the respondent*

- (i) without the consent of the "Head of Education"*
  - (ii) is absent from his service for more than 30 consecutive days.*
- Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justifiable by a court of law? There is then no question of a review of administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon a decision. There is thus no room for reliance on the audit rule, which, in this classic formulation, is applicable when an administrative – and discretionary – decision may determinately affect the rights, privileges or liberty of a person.' (My translation) "*

- [40] The court went further to say that there being no decision or administrative act capable of review and setting aside, the prayer that the 'decision – be declared an unfair labour practice' falls away.
- [41] See in this regard previous and subsequent cases - *Mabika and Others (D547/2003) [2005] ZALC 89 (28 September 2005)*, *Free State Provincial Government (Dept of Agriculture) v Makae (in his capacity as commissioner of the CCMA Free State Province & Presiding Others 2006 15 LC 1.11.9 reported also at [2006] 7 BLLR 659 LC; JOL 17505(LC)*, *PSA obo Van der Walt v Minister of Public Enterprise and Another (2009) 18 LC 6.6.1, reported in [2005] 2 BLLR 172 (LC)*, *Maidi v MEC for Department of Education (2003) 12 LC 7.1.14 etc.*
- [42] Such is the effect of the deeming provisions. Now I must determine if the Resolution 1 of 2006 has the same effect or not. A proper examination of the resolution leads one to conclude that the intention was to create a termination *ex lege* despite the use of the words summary dismissal. It must also be remembered that section 14 of the Educator's Act also use the words 'deemed dismissed' and despite this it is trite that there is no dismissal within the meaning of the Labour Relation Act 66 of 1995 but termination following the operation of the law. I can read no other meaning into it other than that it is intended to create an *ex lege* termination. According to *Phenithi*, once the stipulated period lapses, desertion is



inferred. However, the measure should not lightly be resorted to, it is an extraordinary measure reserved for extraordinary and clearest cases.

[43] In this regard Steenkamp J in the case of *Director General: Office of the Premier of the Western Cape & Others v South African Medical Association & Others*, Case No C420/2007, said the following"

"[22] In *Phenithi v Minister of Education & others*<sup>1</sup> the Supreme Court of Appeal explained the purpose of a deeming provision in the *Employment of Educators Act*<sup>2</sup> similar to that in s 17(5)(a) of the *Public Service Act* as follows:

*"In my view, the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. In such a case, there can be no unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'. Only the very clearest cases are covered. Where this is in fact not the case, the Act provides ample means to rectify or reverse the outcome."*

[23] *The case before me is not one of those "clearest cases". It is by no means clear that the employee had deserted. Even if the deeming provision in s 17(5) of the Public Service Act had been applicable, it would not have applied to the facts of this case.*

[24] As Pillay J noted in *HOSPERSA & another v MEC for Health*<sup>3</sup>:

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<sup>1</sup> 2008 (1) SA 420 (SCA) para [19]

<sup>2</sup> Act 76 of 1998

<sup>3</sup> (2003) 24 ILJ 2320 (LC) para [37]

*"All in all, section 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 respondent is unaware of the whereabouts of 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 section 17(5)(a)(i) must be present before it is invoked."*

[44] However, I must indicate that the factors that trigger the *ex lege* termination are slightly different to those we find in section 14 of Employment of Educator's Act. In the case of section 14 of Employment of Educators Act the factors that trigger termination *ex lege* are absence from work for a period exceeding fourteen consecutive days and without permission of the employer. In the case of Resolution 1 of 2006 the factors that trigger termination *ex lege* are absence from work for 30 consecutive days without permission or *without notifying the employer*.

[45] The third respondent contends that he served the applicant with his medical certificates and ill-health application form (for temporary incapacity) and has shown proof of service thereof, although the Applicant

contends that he did not receive them. The question that must be answered is whether same constitutes permission within the context of Resolution 1 of 2006. I do not think so. See in this regard *Free State Province & Presiding Officer) & Others (2006) 15 LC 1.11.9, JOL 17505 (LC)*, where it was held that mere notification of the employer of medical condition did not amount to being granted permission to be absent.

[46] Was the Applicant notified of the absence? It was indicated in the above paragraph that the Third Respondent contended that he notified the applicant of ill health by faxing the medical certificates and application for temporary incapacity forms. This he faxed to the Head Office of the Applicant. However, he further contended that he initially handed them to his local work station but when he was informed that they did not receive them he then faxed to Head Office hence forth.

[47] Further that it appears that the Applicant through its employees, Muller, Wood and Skade made numerous visits to the Third Respondent's house e.g 10 May 2007, 30 July 2007 and 31 August 2007. During these visits the Third Respondent told them that such forms have been faxed to St Albans at Fax No (041)775 1171. Mr Nweba also in his testimony confirms that during such visits the employee's absence and ill health should have been discussed. Further that, Mr Nweba in his testimony indicated that in their system the employee was recorded as on temporary

incapacity leave although he tried to explain how it could have happened. This is the fact that alerted him to check for the said forms. It is however, clear that someone in the employ of the applicant who is privy to the facts recorded it as such. If not notified why would there be such a record.

It is strange that whereas Mr Nweba in his testimony doubted the authenticity of the proof of service submitted by the employee, and whereas he undertook to deliver the register in which the receipts of faxed are recorded, when he was required to submit the register he reported that the register is nowhere to be found. One would have expected that once the employee alleges that he has faxed such documents he will inspect such register and save guard it to disprove the allegation. He did not do so.

- [48] Does the above constitute notice in the context of resolution 1 of 2006? I think so. The fact that the Third Respondent has had discussion with Applicant through its officers and the faxed documents to the Applicant points to a proper notice. In the circumstance the necessary requirement of “without notifying the employer” is absent and hence Resolution 1 of 2006 did not apply to the circumstances of the employee. The arbitrator therefore had the jurisdiction to determine the matter.

#### **IS THE AWARD NEVERTHELESS IMPEACHABLE?**

[49] The second attack against the award of the commissioner is that the employee during the arbitration admitted working for Netcare 911 nevertheless, the arbitrator found that there is inconclusive evidence in relation thereto and that such finding is not supported by evidence. There is no merit in this attack. The employee admitted that after his dismissal he became employed by Netcare 911. Surely after the dismissal the employee was entitled to seek work anywhere else. Further that the employee admitted that he did voluntary work with Netcare 911 with the permission of the Applicant and his supervisor. The purpose was for him to accumulate hours of his AA qualification (Paramedic qualification). Initially his local office refused him permission but Provincial Authorities intervened and he was permitted. According to his evidence he did not do any further hours during the period of his absence as there was no need as he had collected the necessary hours. This evidence was not contradicted in any way. Applicant led only evidence to the effect that an investigation was done and it was found that the employee had worked for Netecare 911. Such report was not presented as evidence nor did the person who conducted the investigation give evidence. What the Applicant did was to give uncorroborated hearsay evidence.

[50] The arbitrator was within his rights to come to the conclusion that such evidence is inconclusive and hence no irregularity occurred that need interference by this court.

- [51] The third attack on the commissioner's award is that the compensation the arbitrator awarded is not just and equitable in that the arbitrator did not take into account that the employee received salary during his absence and that he alternatively exceeded his powers in that section 194(1) of the Labour Relations Act 66 of 1995 limits compensation to no more than 12 months' remuneration.
- [52] The arbitrator after finding that the dismissal of the employee was procedurally and substantively unfair ordered his reinstatement from 3 September 2007 with immediate effect on the terms and conditions, not less favorable than those which governed his employment immediately prior to the dismissal.....
- [53] Further that, the arbitrator ordered that the Respondent pay to the employee back pay in the amount of R214 135.00( $10\,706.75 \times 20$  months) as loss of income(remuneration) for the period 03 September 2007 to the date of the award. The date of the award is 24 August 2009. By this time the employee was out of work for 24 (twenty four) months.
- [54] Section 193 of the Labour Relations Act 66 of 1995 provides as follows:

*“(1) If the Labour court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may –*

- (a) Order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
- (b) order the employer to re-employ the employee either in the work in which the employee was employed before the dismissal or other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
- (c) order the employer to pay compensation to the employee.”*

[55] Section 194 of the Labour Relations Act 66 of 1995 provides as follows:

*“(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee’s conduct or capacity or the employer’s operational requirements or the employer did not follow a fair procedure, or both, must be just an equitable in all circumstances, but may not be more than the equivalent of 12 months’ remuneration.”*

[56] In our given case the arbitrator ordered reinstatement of the employee. The purpose of the reinstatement is to place the employee in the position he would have been had the dismissal not occurred. The arbitrator further ordered back pay in favour of the employee, which is consistent with placing the employee in the position he would have been had the

dismissal not occurred. The 'back pay' is not compensation within the meaning of Section 193(1)(c) or 194(1) hence is not confined to 12 (twelve) months – See in this regard – *Republican Press Pty Ltd v CEPPWAWU and Others* (218/06) [2007] ZASCA 121., where the court said the following at para 19:

*“I do not think that the back pay to which an employee ordinarily becomes entitled when an order of reinstatement is made is to be equated with compensation (thus allowing for limitation contained in S 194 to be applied in relation to back pay). As pointed out by Davis AJA in Kroukam, (and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under the contract necessarily becomes due to the worker on that ground alone. Perhaps a court (or arbitrator) that make such an order may also order that part of the remuneration shall not be recoverable (I make no finding on the point) but I agree with Davis AJA that the remuneration becomes due under the terms of the contract itself and does not constitute compensation as envisaged by S 194”*

[57] The arbitrator therefore has not committed any irregularity in this regard.

[58] The fourth attack on the award is that the arbitrator made the finding that the employee refused to sign a blank leave form authorising the Applicant



to deduct unpaid leave while Applicant had led no such evidence nor its witness cross-examined on it. There is no merit on this attack.

[59] During the arbitration hearing the employee testified as follows at page 140, para 10 of the records:

*“....He told Mr Viviers to go and fetch a leave form that I just have to sign, so I told him it is a blank form, I cannot just sign a blank form, what they going to put there? So he told me it was for my absence. So I did not want to sign, so he said well they will sign on behalf of me, I cannot remember what he said....”*

[60] Cross examination proceeded as follows:

“MR VOSLOO: According to me I was on sick leave. According to Mr Nweba at that time I was absent, he referred to it as (indistinct)

COMMISSIONER: Desertion/Absconment

MR VOSLOO: I can absconding

COMMISSIONER: And what did he want you to sign?

MR VOSLOO: The blank leave forms.

COMMISSIONER: For what purpose

MR VOSLOO: Absenteeism that I was absconding

COMMISSIONER: And what would be the implication thereof?

MR VOSLOO: Leave without pay”

[61] Applicant cross examined the employee on the issue. If the Applicant was worried about this evidence he should have objected or applied for recalling of its witness to deal with it. Applicant cannot fault the arbitrator for accepting evidence of the employee in that respect. Besides that this evidence does not sit at the centre of the conclusion of the commissioner. It is therefore my conclusion that no irregularity occurred in this regard that requires this Court to intervene.

[62] In the end the question that I must answer is whether the arbitrator reached a conclusion that a reasonable decision maker could not reach? I do not think so. In the circumstances the order is as follows:

1. The application for review and setting aside of the award issued under case No PSGA 1269-07/08 is dismissed with costs.

**SHAI AJ**

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**DATE OF HEARING: 09-02-2011**

**DATE OF JUDGMENT: 10-05-2011**

**FOR THE APPLICANT: Advocate Gqamana**

**INSTRUCTED BY: State Attorney**

**FOR THE RESPONDENT: Advocate NCF Schultz**

**INSTRUCTED BY: Brown Braude & Vlok Inc**