



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: PR 170 / 16

In the matter between:

MISUMZI SIDWELL GCANI

Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

First Respondent

**NATIONAL COMMISSIONER: DEPARTMENT
OF CORRECTIONAL SERVICES**

Second Respondent

EASTERN CAPE DEPUTY REGIONAL

COMMISSIONER: DEPARTMENT OF

CORRECTIONAL SERVICES

Third Respondent

EASTERN CAPE REGIONAL COMMISSIONER:

DEPARTMENT OF CORRECTIONAL SERVICES

Fourth Respondent

AREA COMMISSIONER: DEPARTMENT OF

CORRECTIONAL SERVICES

Fifth Respondent

Heard: 12 September 2018

Delivered: 14 September 2018

Summary: Review of decision by employer regarding reinstatement following termination of employment by operation of law for desertion – Section 158(1)(h) of LRA considered – principles applicable to such reviews considered

Delay in review application – principles considered – Court has discretion to overlook delay – delay excessive and not properly explained – condonation refused

Appeal for reinstatement – consideration of appeal for reinstatement to employer – appeal itself substantially out of time with no explanation – as such appeal incompetent

Review application – review of appeal for reinstatement – applicant bound by findings of fact of arbitrator in earlier proceedings in absence of challenge of the award – such findings in effect negate any prospects of success on appeal – no substance exists to review appeal outcome

Review application – no prospects of success – review application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, the applicant has brought an application in terms of section 158(1)(h) of the Labour Relations Act¹ ('the LRA') to review and set aside an appeal outcome handed down by the fifth respondent, in terms of which the applicant's appeal representations for reinstatement following a deemed termination of employment for desertion, was refused. The applicant seeks consequential relief to the effect that he be reinstated with retrospective effect to date of his deemed discharge.

¹ Act 66 of 1995.

- [2] The appeal outcome sought to be challenged by the applicant was actually handed down on 9 July 2014. The applicant's review application was only brought on 7 September 2016, which is approximately 26 (twenty six) months after the outcome was handed down. This is clearly an extremely lengthy delay, which could in itself have a negative impact on the competency of the applicant's review application, which will be addressed later in this judgment. At least the applicant did seek condonation for this delay, when filing his review application.
- [3] Where it comes to the factual matrix to be considered in deciding this application, most of it is fortunately either undisputed, or common cause. I will now commence deciding this matter by first setting out this applicable factual matrix.

The relevant background

- [4] The first to fifth respondents are all the relevant functionaries of the Department of Correctional Services, and will be jointly referred to in this judgment as 'the Department'. The applicant was employed by the Department as a correctional services officer, having commenced employment in March 2007, and was stationed at the St Albans Correctional Facility.
- [5] The Department falls under the scope and jurisdiction of the General Public Services Sector Bargaining Council (GPSSBC), a duly constituted bargaining council in the public services sector. In the GPSSBC there is a specific chamber dedicated to the Department, and provision is made in such chamber for the disciplinary code and procedure applicable to employees of the Department. This disciplinary code and procedure as applicable to this case is found in Resolution 1 of 2006 (the Resolution). The Resolution is also a collective agreement concluded between the parties to this chamber of the GPSSBC.
- [6] The Resolution contains specific provisions dealing with what is called 'desertion / abscondment'. In terms of clause 9.1 of the Resolution, there exists a deemed termination of employment of employees of the Department that absent themselves from work.

[7] Clause 9.1 of the Resolution reads:²

‘An employee who absents him/herself for 30 consecutive (calendar) days without permission or without notifying the employer shall be summarily dismissed. However, before dismissing the employee, the employer must endeavour 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 5 days from his/her reappearance should he/she wishes reinstatement/re-employment to be considered’.

[8] It is undisputed that the applicant was absent from work as from 15 February 2013 going forward. According to the Department, this absence was without authorization or any notification to, or contact with, the Department.

[9] In a letter dated 3 June 2013, the Department advised the applicant that because he had been absent for longer than 30 consecutive days as from 15 February 2013, without prior permission or leave, he had been summarily dismissed with effect from 3 June 2013, in terms of clause 9.1 of the Resolution.

[10] This letter dated 3 June 2013 further recorded that the applicant had failed to submit any medical certificates or leave application forms, and various telephone calls had been attempted to contact him, all of which were unsuccessful. The applicant was further informed that he could submit written representations against this decision in terms of clause 9.1 of the Resolution. Added to this, it was common cause that the applicant’s salary was already stopped in May 2013.

² This provision is similar to section 17(3)(a) and (b) of the Public Service Act 103 of 1994 (‘the PSA’) which reads: ‘(a)(i) An employee, ... 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 the date immediately succeeding his or her last day of attendance at his or her place of duty’, and ‘(b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee 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’.

- [11] According to the applicant, he never received this letter. But notwithstanding, and at the very least on the undisputed facts, the applicant was visited by an HR official from the Department at his home on 30 June 2013, and he was presented with a copy of this letter at that time. The applicant then simply presented himself at work on 1 July 2013 without seeking to make any representations as contemplated by clause 9.1. As such, and in terms of these provisions, he could not be reinstated, and had to first submit representations to substantiate why he should be reinstated.
- [12] The applicant did not submit the representations as required by clause 9.1, in the prescribed period of 5 (five) days. Instead, he filed what he called an 'appeal letter', but this was only on 3 July 2014. Accepting for the purposes of argument that this appeal letter constituted the required representations, it was filed just on a year after the applicant presented himself for work and was required to file the representations in the first place. The applicant sought no condonation for such a material delay, even assuming it was competent to do so. The applicant made no attempt to tender services in the interim.
- [13] In terms of the representations as contained in his appeal letter, the applicant explained that he was absent from work because of depression, and had been booked off work for the period from 15 February to 11 August 2013 by his doctor, Dr E A G Mayet, as a result. The applicant also contended that the Department was aware that he was booked off work due to illness, as he had been telefaxing his medical certificates '*since 01/01/13 to fax no 041 775 1171*', quoting directly from the explanation. He also raised an issue that he had never been visited or called by the Department during his absence. For these reasons, it was the applicant's view and submissions that he had never absconded / deserted, and thus he should be reinstated.
- [14] The outcome of the applicant's appeal was delivered to him on 9 July 2014 by the Department. The appeal was declined because, according to the Department, it was excessively outside the time period of 5 (five) days allowed to do so. Further, and according to the Department, even if it did know of the applicant's whereabouts, that still did not stand in the way of the termination of employment in terms of clause 9.1 of the Resolution.

[15] The applicant then referred an unfair dismissal dispute to the GPSSBC under case number GPBC 1802/2014. This dispute ultimately came before arbitrator Kevin Kayster for arbitration on 4 June and 16 July 2015. In these proceedings, the Department raised an objection *in limine* to the effect that the applicant was not dismissed, but his employment terminated by way of operation of law in terms of the Resolution. Based upon this objection raised, the arbitrator then recorded that what he needed to decide was the following:

‘I am called upon to determine whether or not the Applicant’s service terminated by operation of law, or whether he was dismissed in terms of section 186(1) of the Labour Relations Act 66 of 1995 as amended (LRA). If found that he was indeed dismissed, I am also called upon to determine whether or not the dismissal was substantively and procedurally fair.’

[16] In so recording, the arbitrator got it right. He accepted that he had jurisdiction to entertain the matter. He then directed that oral evidence needed to be heard in order to decide whether the applicant was dismissed, and thus whether the deeming provisions for termination of employment by operation of law applied or not. The arbitrator decided this matter by way of reference to section 17(3) of the Public Service Act³ (PSA), which is comparable to clause 9.1 of the Resolution. The arbitrator, in his award, specifically recognized this comparison as well.

[17] The arbitrator then heard evidence by both parties. It is important to consider that the applicant’s case before arbitrator Kayster as to why he was dismissed, and the deeming provisions as contemplated by the Resolution did not apply, is virtually identical to the case as contained in the applicant’s appeal for reinstatement referred to above.

[18] The arbitrator handed down an arbitration award on 17 August 2015. Some of the pertinent findings of the arbitrator must be highlighted. He accepted it was common cause that the applicant did not report for duty for the period from 15 February to 3 June 2013 when the termination letter was issued. He also considered the applicant’s evidence that throughout his absence, he telefaxed medical certificates to the Department and telephoned the duty clerks about his absence. The arbitrator then rejected this evidence, finding that there was

³ No 103 of 1994.

no proof that the applicant had sent the medical certificates to the Department in this period and that the applicant could not even recall who the alleged duty clerks were that he spoke to. The arbitrator also considered that the applicant's own witness, one Ms Jela, who served as a duty clerk, could not recall ever speaking to the applicant in this period or seeing a medical certificate emanating from the applicant. The arbitrator accepted the testimony of Mr Jinikwe, who testified for the Department, and whose duty it was to receive and process medical certificates, to the effect that no medical certificates were ever received from the applicant in this period.

- [19] The arbitrator further held that the applicant was unable to substantiate the medical certificates, especially considering that these certificates were only transmitted to the Department long after the dismissal letter was provided to him. The arbitrator further held that the Department was indeed unaware of the applicant's whereabouts, despite it in fact attempting to ascertain the same.
- [20] The arbitrator then concluded that the deeming provision in clause 9.1 of the Resolution as read with section 17(3) of the PSA had indeed come into operation, based on all these factual conclusions he had made, and that the applicant was therefore not dismissed as contemplated by section 186(1) of the LRA. For this reason, the arbitrator concluded that the GPSSBC did not have jurisdiction to entertain the matter.
- [21] Significantly, this arbitration award was never challenged by the applicant, and as such, the factual findings made therein must stand. In the award, arbitrator Kayster also recorded that the applicant was still free to challenge the decision by the Department to refuse his appeal for reinstatement on review to this Court.
- [22] The review application now before me then followed more than a year later only on 7 September 2016. As said, this review application only related to the 'appeal' decision by the Department refusing to reinstate the applicant, and not the arbitration award of arbitrator Kayster.

Review principles

[23] The first issue to consider, when deciding the applicant's review application, is whether such review application is indeed competent. In deciding this, it is appropriate to first start at section 195(1) of the Constitution of the Republic of South Africa⁴ (the Constitution), which *inter alia* provides as follows:

'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained. ...
- (d) Services must be provided impartially, fairly, equitably and without bias. ...
- (g) Public administration must be accountable. ...'

In terms of section 195(2), the above principles apply to all organs of state and in the administration of every sphere of government. This would include the Department, and its dealings with its employees.

[24] The Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*⁵ considered the application of section 195 of the Constitution where it came to the employment relationship between the State as an employer and its employees, and in particular where it came to the conduct of public service functionaries towards such employees. The Court held as follows:⁶

'Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, *inter alia*, in the emphasis on accountability and transparency in s 195(1)(f) and (g) and the requirement of a high standard of professional ethics in s 195(1)(a). Read in the light of the founding value of the rule of law in s 1 (c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a

⁴ No 108 of 1996.

⁵ (2014) 35 ILJ 613 (CC).

⁶ *Id* at para 35.

decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.'

[25] In terms of section 158(1)(h) of the LRA, 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.'

This provision, as read with section 195 of the Constitution, would then appear to constitute a proper avenue open to an employee in the public service to challenge decisions made by responsible functionaries, that may have a detrimental effect on such an employee.

[26] However it has been pertinently held that section 158(1)(h) of the LRA cannot be used to in effect bypass the specifically crafted dispute resolution machinery established in terms of the LRA, where it comes to employment law disputes, even for those employees in the public sector. In *Chirwa v Transnet Ltd and Others*⁷ the Court said:

'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.'

The Court in *Chirwa* specifically held that the LRA does not differentiate between the state and its organs, as the employer, and any other employer.⁸

⁷ (2008) 29 ILJ 73 (CC) at para 41. See also *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 56.

⁸ *Id* at para 66.

- [27] Following the judgment in *Chirwa*, as confirmed in *Gcaba v Minister for Safety and Security and Others*⁹, the Labour Appeal Court specifically dealt with the applicability of section 158(1)(h) as a basis for employees in the public service seeking to challenge dismissals and other forms of unfair labour practices, directly by way of review to the Labour Court, in the judgment of *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another*¹⁰. The Court held:

‘The supposition that public servants had an extra string to their bow in the form of judicial review of administrative action, ie acts and omissions by the state vis-à-vis public servants, evaporated when the Constitutional Court in *Chirwa v Transnet Ltd & others*, held that the dismissal of a public servant was not ‘an administrative act’ as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the *Chirwa* judgment was removed in the subsequent decision in *Gcaba v Minister for Safety & Security & others*. The result is that a public servant is confined to the other remedies available to him or her.

One of the effects of *Chirwa* is that a dismissal is not to be regarded as an ‘administrative act’ by the state but merely as the act of the state in its capacity as an employer. This decision brought us to the situation where the pre-*Chirwa* substratum of s 158(1)(h) fell away ...’

- [28] Therefore, and as a general proposition, where a public service employee has been dismissed, or complains about other conduct of his or her employer that would be an unfair labour practice, a review application in terms of section 158(1)(h) by such employee challenging such conduct by the employer, is simply not competent. These disputes must be pursued and then decided in terms of the arbitration or adjudication dispute resolution mechanisms under Chapter VIII of the LRA. As emphasized in *Hendricks v Overstrand Municipality and Another*¹¹:

‘The underlying guiding rationale of the ratio decidendi in *Gcaba* and *Chirwa* is that once a set of carefully crafted rules and structures has been created for

⁹ See footnote 5 (*supra*).

¹⁰ (2012) 33 ILJ 1822 (LAC) at paras 26 – 27.

¹¹ (2015) 36 ILJ 163 (LAC) at para 27.

the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. ... ‘

[29] Therefore, on face value it would seem that the applicant’s current application to review and set aside the decision by the Department to decline his appeal for reinstatement would not be competent. However, this is not the case in this instance, as what I am now dealing with can be simply described as an exception to this general principle. Where it comes to the application of the deemed dismissal provisions relating to absconment / desertion in various statutory instruments in the public service,¹² there exists a specific exception to the general competence principle summarized above. The reason for this is that the decision to reinstate an employee in terms of these provisions is legislated public power that arises directly out of a statute, therefore this kind of decision cannot resort under the dispute resolution mechanisms established by the LRA for the purposes of challenge. This was specifically recognized in *Ramonetha v Department of Roads and Transport, Limpopo and Another*¹³ where the Court said:

‘The current matter is concerned with the exercise of a power in terms of s 17(3)(b), which neither has its source in the contract of employment, nor falls within the ambit of either the LRA’s unfair dismissal or unfair labour practice jurisdiction. As such, the decision whether to approve the reinstatement of an employee on good cause shown, while a decision taken by the state as employer, involves the exercise of a legislated public power by a public functionary.’

[30] Once it is considered competent to be used, the utilization of section 158(1)(h) of the LRA indeed contemplates a review application. This being the case, it

¹² See for example Section 17(3) of the PSA, and Section 14 of the Employment of Educators Act 76 of 1998.

¹³ (2018) 39 ILJ 384 (LAC) at para 19. See also *MEC for the Department of Health, Western Cape v Weder*; *MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 2131 (LAC) at paras 33 and 36 – 37.

must then be established on what review grounds such a review application must be brought. In *Hendricks*¹⁴, the Court held:

‘In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds ‘permissible in law’.

[31] More recently, the Court in *Merafong City Local Municipality v SA Municipal Workers Union and Another*¹⁵ similarly pronounced as follows:

‘The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds ‘permissible in law’. Permissible grounds in law would include the constitutional grounds of legality and rationality and, if they constitute ‘administrative action’, on the grounds that are stipulated in PAJA ...’

[32] In his founding affidavit, the applicant does not rely upon Promotion of Administrative Justice Act¹⁶ (PAJA). The applicant squarely places his reliance on the principle of legality. Dealing with ‘legality’ the Court in *Hendricks*¹⁷ found:

‘... Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.’

[33] The Court in *Khumalo*¹⁸ also specifically dealt with the meaning of ‘legality’, in the context of a review application under section 158(1)(h), and held:

¹⁴ Id at para 29.

¹⁵ (2016) 37 ILJ 1857 (LAC) at para 38. See also *Ramonetha* (*supra*) at para 17.

¹⁶ Promotion of Administrative Justice Act 3 of 2000.

¹⁷ Id at para 28.

¹⁸ (*supra*) at para 28.

‘... The principle of legality is applicable to all exercises of public power and not only to ‘administrative action’ as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. ...’

[34] In *MEC for the Department of Health, Western Cape v Weder*; *MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*¹⁹ the Court held that the principle of legality has developed over the past decade, to the extent that a parallel system of review for action which falls outside of the strict definition of administrative action, has developed. Having so held, the Court then proceeded to set out this development as follows:²⁰

‘... Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:

‘It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.’

The Court in *Weder*²¹ then proceeded to consider this component of rationality as part of the legality enquiry, and held:

‘In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See *Gauteng Gambling Board & another v*

¹⁹ (2014) 35 ILJ 2131 (LAC) at para 33.

²⁰ Id at para 34.

²¹ Id at para 35.

MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the *process as a whole*.'

- [35] Of further guidance when considering legality review grounds, is the following *dictum* in *Ntshangase v MEC for Finance: KwaZulu-Natal and Another*²², where it was held:

'... All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with ss 195 and 197 of the Constitution. ...'

- [36] In sum, the applicant's review application in this case is indeed competent under section 158(1)(h), and should be considered by this Court. As this application is founded on the principle of legality, it must be evaluated based on the principles as summarized above. However, before I proceed, I must first deal with the material delay that has been occasioned in this matter, as well as the implications of such delay to the applicant's review application.

The issue of the delay

- [37] Overall considered, the manner in which the applicant has dealt with this matter throughout leaves much to be desired. The delays occasioned solely as a result of his own inactions, amount to more than two years. The approach adopted by the applicant concerning this delay is in essence that it should be

²² (2009) 30 ILJ 2653 (SCA) at para 18.

brushed aside because his legality challenge trumps all else. But such an approach is unfortunately a mistaken one. Whilst it may be true that there is no specified time limit within which a review application in terms of section 158(1)(h) must be brought, this does not mean that an applicant has an open licence, so to speak, to bring such an application when he or she wants and any delay occasioned is of no consequence.

- [38] There is a reason why no specific time limit to bring a review application under section 158(1)(h) has been prescribed, which reason was explained by the Court in *Khumalo*²³ as being the necessity to open the actions and conduct of public functionaries to ongoing scrutiny and transparency. The Court further explained the rationale for this approach as follows:²⁴

‘... the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments’ unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook a delay.’

- [39] Therefore, even though there is no prescribed time limit for bringing such an application, there must still not be an undue delay in bringing the application. An undue delay, especially one that is not properly explained, can in itself be seen to infringe on the constitutional principle of legality. In this respect, the Court in *Khumalo*²⁵ held:

‘Section 237 of the Constitution provides: ‘All constitutional obligations must be performed diligently and without delay.’ Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.’

²³ (*supra*) at para 44.

²⁴ *Id* at para 45.

²⁵ *Id* at para 46.

[40] In similar vein, and in *Gqwetha v Transkei Development Corporation Ltd and Others*²⁶ the Court said the following:

‘It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. ...’

[41] When determining what may be an ‘undue delay’, it is not appropriate to impose a fixed period and then measure all delay against such a period. It is always about the particular circumstances that arose as cause for the delay, and then to assess the explanation provided so as to decide whether the delay is unreasonable. As held in *G4S Secure Solutions (SA) (Pty) Ltd v Gunqubele NO and Others*²⁷, where the Court specifically dealt with a review application under section 158(1)(h):

‘It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity. The correct approach is that outlined by Brand JA in *Associated Institutions Pension Fund & others v Van Zyl & others*, followed by this court in *Colett v Commission for Conciliation, Mediation & Arbitration & others*, namely:

‘[46] ... It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. ...’

²⁶ 2006 (2) SA 603 (SCA) at para 22.

²⁷ (2018) 39 ILJ 131 (LAC) at para 11.

The Court in *G4S* (supra) also quoted with approval the following extract of the judgment in *Colett v Commission for Conciliation, Mediation and Arbitration and Others*²⁸:

‘The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court’s discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E-F)’

The Court in *G4S* also recognized that the LRA places a premium on the expeditious resolution of labour disputes, and thus the application to review had to be brought within a reasonable time, despite there being no prescribed time limit.²⁹

[42] Therefore, firstly, the extent of the delay must be considered. The decision the applicant seeks to challenge was handed down on 9 July 2014. The review was filed on 7 September 2016. This delay of some 26 (twenty six) months is on face value grossly excessive, and unreasonable, and would be the kind of delay that can competently result in the refusal of the review application on the basis of being an unreasonable delay.³⁰

[43] However, what is reasonable or unreasonable must always be assessed having due regard to the explanation provided. As said, the applicant has set out, in the founding affidavit, an explanation which can be considered in this

²⁸ (2014) 35 *ILJ* 1948 (LAC) at para 48.

²⁹ *Id* at para 16.

³⁰ In *Makuse v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 *ILJ* 163 (LC) at para 15, the Court described an 8(eight) month delay as ‘egregious’. The following delays were all described as an ‘excessive delay’: a year (*Moila v Shai NO and Others* (2007) 28 *ILJ* 1028 (LAC) at para 27); 18 months (*Maseko v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 *ILJ* 203 (LC) at para 15); 11 months (*GIWUSA on behalf of Heyneke v Klein Karoo Kooperasie Bpk* (2005) 26 *ILJ* 1083 (LC) at para 14). In *Khumalo* (supra) at paras 50 and 68, the Court was seized with a delay of 20(twenty) months, and said it was ‘significant’.

regard. The consideration of this explanation must be done in line with the following as articulated by the Court in *Khumalo*³¹:

‘In *Gqwetha* the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of ‘all the relevant circumstances’); and if so (2) whether the court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.

In terms of the first leg of the enquiry, any explanation offered for the delay is considered.’

As to the exercise of the discretion whether or not to overlook the delay, the Court held:³²

‘... On this leg of the test, the majority in *Gqwetha* held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. In the context of public sector employment, the value of security for employees and in mitigating the arguably inherent inequality of the workplace must be kept in mind.

Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court’s remedial powers to grant a ‘just and equitable’ order in terms of s 172(1)(b) of the Constitution ...’

[44] A further important consideration in deciding to overlook the delay is the possible consequences to the constitutional imperatives in section 195 of the Constitution if the irregular conduct is not set aside. This involves a proper analysis of the decision that is sought to be challenged, and the possible merits of that challenge. In *Khumalo*³³, it was held as follows:

³¹ Id at paras 49 – 50.

³² Id at paras 52 – 53.

³³ Id at para 57.

‘An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.’

- [45] These kind of review applications also quintessentially concern nothing else but, at the heart of it, an employment dispute. As such, any explanation must always be considered against the prime principle and essential requirement of expeditious resolution of such disputes.³⁴
- [46] Turning then to the explanation itself, as provided in the founding affidavit, it is firstly clear that the applicant deliberately decided on the course of action he wanted to pursue in order to challenge his termination of employment. He chose not to challenge the appeal outcome refusing reinstatement, but to rather pursue an unfair dismissal dispute to the GPSSBC. There is of course nothing wrong with this decision, but taking this decision must have consequences. One of these consequences has to be that this deliberate decision simply cannot be used as a basis for justifying a delay occasioned as a result, when one chose not to pursue the other course of action in the first place. In short, one has to live with the consequences of what one decides to do.
- [47] The reality is that this conscious and informed decision of the applicant accounted for the delay for the period from July 2014 until the end of August 2015. This is a delay that must be attributed directly to the applicant’s own conduct and is in essence thus indefensible. In my view, and clearly appreciating this, the applicant attempts a slight of hand, but this is unfortunately based on a clear misconstruing of the arbitration award of arbitrator Kayster. The applicant contends that the arbitrator held that the GPSSBC had no jurisdiction and the matter had to be referred to the Labour Court. But a proper consideration of the award shows that this is not entirely correct and completely negates the basis on which the arbitrator actually arrived at his decision, and what he decided.

³⁴ See *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman’s Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.

[48] The undeniable fact is that the applicant contended in the proceedings pursued to the GPSSBC that he was dismissed. He approached the matter on the basis that the requirements for the application of clause 9.1 of the Resolution (or for that matter section 17(3)(a) of the PSA) were not met. In such a case, the issue of the appeal (representations) of the applicant for reinstatement in terms of these provisions, are irrelevant and of no consequence. Simply put, if the requirements of clause 9.1 were not met, there would be no need to make representations in the first place. As held *Gangaram v MEC for The Department of Health, KwaZulu-Natal and Another*³⁵:

‘... My conclusion on the set of facts presented is, therefore, that the jurisdictional requirements for the appellant to be deemed dismissed because of being absent for a period exceeding one calendar month without the permission and/or knowledge of the HOD, office or the institution have not been satisfied, and as such there was no need for her to make representations in terms of s 17(3)(b) for her reinstatement. ...’

[49] Therefore, if the applicant managed to convince the arbitrator that these requirements were not met, then the arbitrator would have to conclude that the applicant was indeed dismissed, and then proceed to consider whether such dismissal was fair. Arbitrator Kayster was very much alive to this, and made this clear in his award. It is highly likely that if arbitrator Kayster came to deal with this matter on the basis that a dismissal existed, he may have found that the dismissal had been unfair, and the applicant could thus be entitled to consequential relief, which may have included reinstatement.

[50] Arbitrator Kayster held that the GPSSBC had no jurisdiction for the simple reason that after considering all the evidence, he concluded that the requirements for the application of clause 9.1 of the Resolution (or section 17(3)(a) of the PSA) were indeed met, and as a result, the applicant was not dismissed, but his employment terminated by way of operation of law. Thus,

³⁵ (2017) 38 ILJ 2261 (LAC) at para 30. See also *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* (2014) 35 ILJ 2105 (SCA) at para 13.

and with the applicant having failed to prove dismissal as contemplated by section 186(1) of the LRA, the GPSSBC had no jurisdiction for this reason.³⁶

[51] The applicant argued that the judgment in *Weder* was authority for the proposition that what the applicant did in first pursuing a case to the GPSSBC could legitimately serve as an explanation for the delay occasioned as a result, and thus excuse it. But in my view, *Weder* is distinguishable, not only on the facts, but on the basis on which the bargaining council declined jurisdiction in the matter now before me. The judgment in *Weder* concerned two employees. Firstly, Weder himself had challenged the actual refusal of the submissions for reinstatement he had made in terms of section 17(3)(b) of the PSA, to the bargaining council and the council held that it had no jurisdiction to consider this, following which Weder virtually immediately pursued the matter to the Labour Court.³⁷ In the case of the other employee, one Mangena, she did pursue an unfair dismissal dispute to the bargaining council, which the arbitrator declined to even entertain because it was held the bargaining council had no jurisdiction to even consider the case, after which Mangena then abandoned the unfair dismissal case and chose to pursue a case to the Labour Court to challenge the refusal of her submissions for reinstatement.³⁸ The Court in *Weder* then accepted the aforesaid to be a proper explanation for the delay in the employees approaching the proper forum (Labour Court), which was a delay of 6 (six) and 8 (eight) months' respectively.³⁹

[52] What makes the current matter entirely different to that in *Weder* is that this is not a case where the applicant mistakenly approached the GPSSBC as an incompetent forum. The GPSSBC always had jurisdiction to decide the unfair dismissal dispute, which it did, and dismissed the case for want of jurisdiction because no dismissal was proven to exist, on the basis of the facts as applied to clause 9.1 of the Resolution. The applicant *in casu* never sought to incorrectly challenge the refusal of his reinstatement appeal to the GPSSBC. Also, and in *Weder*, both employees almost immediately reacted and

³⁶ It is trite that the issue as to whether or not a dismissal exists is an issue of jurisdiction – see *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at paras 39 – 40; *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at para 24; *Mnguti v Commission for Conciliation, Mediation & Arbitration and Others* (2015) 36 ILJ 3111 (LC) at para 14.

³⁷ See *Weder (supra)* at para 15.

³⁸ See *Weder (supra)* para 16.

³⁹ *Id* at para 21.

approached the Labour Court when the rulings from the bargaining council were forthcoming. As stated above, that was certainly not the case with the applicant. Finally, the current delay is more than triple than that in *Weder*. Thus I conclude that the judgment in *Weder* does not assist the applicant, where it comes to the explanation on offer.

- [53] What arbitrator Kayster simply did as a concluding remark in his award, was to give the applicant some advice. This advice was that the applicant could take the appeal decision refusing to reinstate him on review to the Labour Court. This issue was never before the arbitrator to decide, and it is questionable whether it is appropriate for an arbitrator to dispense this kind of advice in an award. Be that as it may, it is clear that the arbitrator never declined jurisdiction on this basis, nor gave the applicant some or other permission to then refer the matter to the Labour Court.
- [54] I am quite satisfied that the only reason why the applicant decided to pursue the review application now before me, was because his original and chosen course of action did not work out the way he wanted. He chose his original route, and cannot now use this chosen course of action as an excuse for being late when it caused him to arrive at a destination he did not like, and he then had to turn around and go the other way.
- [55] I may add that the applicant was free to pursue both options at the same time, the one option being an unfair dismissal case in the GPSSBC, and the other option a challenge of the decision taken pursuant to the appeal (representations) for reinstatement not to reinstate him. The one option does not exclude the other.⁴⁰
- [56] But what in my view renders the delay clearly unreasonable is cemented by what happened after the piece of fortuitous advice dispensed by arbitrator Kayster in his award. Surely, by the end of August 2015, the applicant knew he had the option to pursue a review application to the Labour Court. But it still takes him more than a year to bring it. How does he explain this delay? In my view, and for the reasons to follow, this is completely unacceptably.

⁴⁰ See *Gangaram (supra)*; *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others (supra)*.

[57] The entire period between September 2015 and May 2016, being some 9 (nine) months, is explained in a manner that makes no sense at all. On the one hand, the applicant explains that he asked Mr Yali ('Yali'), who represented him in the arbitration, to assist him in the Labour Court case, but Yali declined to do so because he did not have the requisite skill and experience. But on the other hand, the applicant explains that Yali could not assist him because Yali was transferred to King Williams Town in August 2015 and only came back to Port Elizabeth in May 2016. I find it incomprehensible that there would be any need to wait for Yali to return to Port Elizabeth in circumstances where Yali made it clear from the outset that he could not assist the applicant. This kind of contrived explanation is aptly dealt with in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metal Box t/a MB Glass*⁴¹ as follows:

'It is abundantly clear from the self-contradictions in the explanation for the delay that the applicants and/or their attorneys had unfortunately not been candid with this court. It is obvious also on the papers, that the applicants have been as lax as their legal representatives in the prosecution of their claim.'

[58] The explanation is further contaminated by a contention by the applicant that Yali undertook to have the file transferred to POPRCU to assist the applicant, despite the fact that PORCRU initially could not assist him in the arbitration at the GPSSBC because he was not a member of that union. Again, this explanation makes no sense, and smacks of being contrived.

[59] There is no explanation of any kind as to what the applicant himself did to pursue his review application, to arrange alternative representation, or even seek any kind of assistance in this entire period of 9 (nine) months. This complete absence of an explanation in this regard would in normal circumstances be fatal to any review, and non-suit the applicant.⁴² The

⁴¹ (2005) 26 ILJ 92 (LC) at para 8.

⁴² See *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141E-H; *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at para 27; *Silplat (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1739 (LC) para 54; *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at paras 24 – 25; *Van Niekerk v Zondi NO and Another* (2001) 22 ILJ 1202 (LC) at para 27; *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others* (2015) 36 ILJ 232 (LC) at para 29; *3G Mobile (Pty) Limited v Raphela NO and Others* [2014] JOL 32479 (LC) at para 32.

conduct of the applicant is comparable to the following *dictum* from the judgment in *Moraka v National Bargaining Council for the Chemical Industry and Others*⁴³, where the Court said:

'A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

- [60] The next part of the explanation provided by the applicant relates to him finally being referred to Legal Aid by Yali in May 2016. But it takes him some 2(two) months, until 14 July 2016, to even set up a consultation at Legal Aid. Why this took so long is entirely unexplained, and considering the delay that had already been occasioned up to that point, is completely unacceptable.
- [61] Insofar as the further explanation once the applicant had applied for legal aid on 14 July 2016 is concerned, I will accept that this part of the explanation, at least, is a proper one. It is understandable that an institution such as Legal Aid, which does attract a large volume of matters deserving of legal assistance, would take some time to process the application for legal aid for approval, and then once approved, set up a consultation with an attorney. The period of a month taken in this regard, in terms of the explanation, is in my view reasonable. Also, and once Legal Aid had been tasked, it took about three weeks to file the review application. Whilst this is commendable, it is unfortunately far too little, and far too late, and does nothing to save the complete lack of an explanation preceding it.
- [62] What one is therefore left with is a proper and reasonable explanation for a period of less than 3 (three) months, as opposed to a period of just more than 9 (nine) months being completely unexplained. Added to this, the explanation offered for the period of 13 (thirteen) months whilst the matter was pending in the GPSSBC cannot serve as a legitimate and proper explanation.

⁴³ (2011) 32 ILJ 667 (LC) at para 20.

- [63] I thus conclude that in terms of the first leg of the enquiry as articulated in *Khumalo*, the delay in this case is unreasonable. This necessitates a consideration of the second leg of the enquiry, namely whether this Court's discretion should be exercised to overlook the delay and nevertheless entertain the application. This entails an assessment of the potential of prejudice to the affected parties, as well as a consideration as to the possible consequences of setting aside the impugned decision.
- [64] I accept that the applicant will suffer prejudice. After all, he lost his employment. However this prejudice must be considered in the context of a number of important factual considerations. The first is that the applicant's salary was stopped in May 2013, but still he did not report for work. It must also be considered that even after being informed at the end of June 2013 that he was deemed to have been dismissed, and then reporting for work on 1 July 2013 and being turned away, it takes him more than a year until July 2014 to submit representations requesting reinstatement, which he was supposed to submit directly upon reporting for work. And lastly, he considers his options when his appeal is declined and decides to pursue an unfair dismissal case, which he loses. This begs the question – is the prejudice to the applicant not of his own making? In my view, certainly so.
- [65] Next, the applicant, in his notice of motion, seeks the primary relief that he be reinstated backdated to 3 June 2013, which is in essence full retrospective effect. Whilst I accept, as said in *Khumalo*, that I can nonetheless make an order that I consider just and equitable if I find in favour of the applicant, I have difficulty with the concept of restoring an employment relationship after a period of more than 5 (five) years has passed, where the employer is not in any way at fault for this state of affairs. No doubt, this scenario would be highly prejudicial to the Department, and flies directly in the face of the imperative of the expeditious resolution of employment disputes.
- [66] Overall considered, in my view this is not a case where this Court should exercise its discretion in favour of overlooking the delay and entertaining this matter. I remain unconvinced that the applicant has made out a proper case for this discretion to be nevertheless exercised in his favour, despite the excessive delay that exists and the unreasonable explanation for it. The

imperative of the expeditious resolution of employment disputes, considering the more than five year period since termination of employment, also weighs heavily against exercising such a discretion in favour of the applicant.

- [67] In sum, the excessive nature of the delay and the complete lack of a proper and/or acceptable explanation for it, renders the delay *in casu* unreasonable.⁴⁴ There is also no legitimate or justifiable basis made out upon which a discretion should be exercised to nonetheless entertain the application. That being said, I am however mindful of the *dictum* in *Khumalo*, quoted above, that an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision, with due consideration of the legal challenge made against it and the merits of that challenge. This consideration I will turn to next.

The legal challenge

- [68] The first point the applicant sought to make is that it was the fifth respondent who decided to refuse the reinstatement appeal, but the fifth respondent was not authorised to do so, thus rendering the decision null and void. The fifth respondent is the area commissioner, and according to the applicant, the decision could only have been made by the deputy regional commissioner, who had the requisite authority. The applicant's argument in this regard is founded on the provisions of clause 8 of the Resolution, which deals with appeals. In terms of clause 8.2, an employee is entitled to submit an appeal within 5 (five) days of the outcome of a hearing, and this appeal is then forwarded to the appeals authority for determination. In terms of clause 8.5, the appeals authority shall be the deputy regional commissioner, who may be assisted by other functionaries.

- [69] The applicant's case in this regard has a fundamental flaw. This flaw is simply that clause 8 of the Resolution does not apply in this case. Clause 8 is specifically applicable to an appeal against a finding in the case of disciplinary proceedings under clause 7 of the Resolution, or any sanction that may be imposed under that same clause. This is evident from clause 8.1, and in fact

⁴⁴ Compare *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at paras 45 – 47.

the context of clause 8 as a whole. For example, and in terms of clause 8.7, the appeals authority can confirm the finding of guilty and/or sanction, change it, or remit the matter for a disciplinary hearing *de novo*. In this case there were no disciplinary proceedings under clause 7. There were no charges, and no disciplinary hearing and finding.

- [70] The deeming provisions under clause 9.1 of the Resolution were created as a specific exception to the application of the normal processes under clauses 7 and 8 of the Resolution. If the requirements of clause 9.1 are met, there is a deemed dismissal by way of operation of law (*ex lege*), and not a dismissal as a result of a decision by a chairperson of a disciplinary hearing under clause 7, which may be subject to appeal under clause 8. In fact, clause 9.1 contains its own process to 'challenge', for the want of a better description, the application of the deemed dismissal provision, in the form of representations for reinstatement under that clause itself. This is not an appeal against a finding, in that, as discussed above, it can only be applied to procure reinstatement following a deemed dismissal and is the exercise of separate legislated public power.
- [71] The fact that the applicant labelled his representations as an appeal does not change things. It cannot be an appeal, as clause 9.1 of the Resolution only allows for representations seeking to motivate reinstatement, despite the *ex lege* dismissal. The Department simply dealt with what the applicant called an appeal, on the basis that was representations as contemplated by clause 9.1 of the Resolution, which was in my view a proper approach.
- [72] Added to the above, this deemed dismissal is in reality no dismissal at all. It is an *ex lege* termination of employment, provided that the prescribed requirements for the application of such provisions are met, which in turn entails that a factual enquiry be made to determine if this is the case.⁴⁵ Considering that the provisions of clause 9.1 of the Resolution is comparable to section 17(3)(a) of the PSA, these requirements are, as stated in *Gangaram*⁴⁶:

⁴⁵ See *Department of Health v Public Health and Social Development Sectoral Bargaining Council and Others* (2014) 35 ILJ 2166 (LC) at para 30; *Gangaram (supra)* at para 28; *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC) at paras 37 – 38; *Ramonetha (supra)* at para 23; *Weder (supra)* at para 36.

⁴⁶ (*supra*) at para 28.

'In order for an employee to be deemed dismissed in terms of s 17(3)(a) of the PSA he/she must have absented himself/herself from official duties without permission of the employer or the HOD for a period exceeding one calendar month. Since the deemed dismissal takes effect by operation of law and not by any act on the part of the employer, the jurisdictional requirements prescribed by the legislature in s 17(3)(a) of the PSA must be met before an employee can be said to be deemed dismissed.'

[73] In *MEC: Department of Education, Gauteng v Msweli and Others*⁴⁷ the Court articulated the facts that need to be shown by an employer in the public service to exist, for successful reliance on section 17(5)⁴⁸ of the PSA, as follows:

'The court in *PAWUSA & another v Department of Education, Free State Province & others* dealt with the facts that need to be shown by an employer before the application on s 17(5) of the PSA can be relied on. It was held as follows at paras 15-16:

'[15] The provisions of s 17(5)(a)(i) clearly contemplate the existence of certain facts before an officer shall be deemed to have been discharged from the public service. These facts are:

- the officer,
- 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.

[16] It is clearly the existence of each of the facts hereinabove outlined that triggers the deeming provision of the subsection. No action of the employer will accordingly trigger the deeming provision to come into operation, which occurs ex lege.'

[74] It must be pointed out that in terms of clause 9.1 of the Resolution, there is the added requirement that the employer must endeavour to establish the whereabouts of the employee, in addition to the above requirements.

⁴⁷ (2013) 34 ILJ 650 (LC) at para 34.

⁴⁸ Now Section 17(3) of the PSA.

[75] The requisite factual enquiry to determine whether these requirements have been met was conducted before arbitrator Kayster in the arbitration proceedings at the GPSSBC. As set out above, the arbitrator, after considering all the facts, decided that the requirements had been met. In short, the arbitrator accepted that the applicant was absent from his official duties for more than 30 days without notifying the Department. In so finding, the arbitrator specifically rejected the evidence provided by the applicant to the effect that he throughout submitted medical certificates to the Department and that the Department was fully aware of his whereabouts. The arbitrator actually held that the only proper evidence of transmission of these medical certificates to the Department was a proof of transmission dated 10 July 2014, which was long after the fact. The arbitrator held that the Department was indeed unaware of the applicant's whereabouts and went so far as to visit his last known address to find him, without success, which met the requirement of endeavouring to establish the applicant's whereabouts. The arbitrator was even sceptical of the veracity of the medical certificates. The arbitrator in the end concluded that the applicant's employment terminated *ex lege*.

[76] In the absence of a review challenge of this award by the applicant, all these factual findings of arbitrator Kayster stand.⁴⁹ In *National Education Health and Allied Workers Union on behalf of Kgekwane v Department of Development Planning and Local Government, Gauteng*⁵⁰ the Court held:

'The GPSSBC had made a final ruling on the matter. It found that it did not have the requisite jurisdiction to deal with the dispute, because the appellant was dismissed by operation of law in terms of s 17(5)(a) of the PSA. The question of jurisdiction of the GPSSBC in this case was integrally linked to the question of whether the appellant was dismissed in terms of s 186 of the LRA or dismissed in terms of s 17(5)(a) of the PSA. The enquiry into jurisdiction by the GPSSBC was, thus, a factual one that had to be determined on an objective assessment of the evidence before the arbitrator.

⁴⁹ Compare *Public Servants Association on behalf of Smit v Mphaphuli NO and Others* (2014) 35 ILJ 2260 (LC) where such a determination was in fact subjected to a review application, along with the review application in terms of Section 158(1)(h) relating to the refusal to reinstate.

⁵⁰ (2015) 36 ILJ 1247 (LAC) at paras 28 – 29.

The finding of the GPSSBC that it lacked jurisdiction to deal with the matter, because the appellant was dismissed by operation of law in terms of s 17(5)(a) of the PSA, is a finding with final effect until set aside on review by the Labour Court. ...'

- [77] Considering that the factual basis of the applicant's reinstatement appeal is virtually the same as the factual basis on which the applicant sought to contend before the arbitrator that the requirements of clause 9.1 were not met, the award of arbitrator Keyster must be accepted to have decided these facts, as the award remains unchallenged. The substance of the applicant's legal challenge must therefore be considered based on the factual findings of arbitrator Keyster.
- [78] However, and assuming for the purposes of argument that I may be wrong in this respect, I will nonetheless deal with the applicant's contention in the founding affidavit in the review application that the medical certificates were sent to the Department earlier. There is proof of transmission attached to the founding affidavit, reflecting that medical certificates were telefaxed on 6 July 2013 to a number that purports to be that of the Department. The simple answer to this is that even on this version, it was simply already too late. It happened after the termination letter had already been provided to the applicant, he had attempted to report for work, and he was sent away in terms of the provisions of clause 9.1 of the Resolution. He could then no longer just submit medical certificates. He had to make representations, but this only followed a year later.
- [79] In the course of argument, the applicant suggested that the judgment in *Weder* was authority for the proposition that just by submitting medical certificates, the applicant had justified his absence, and as such, the Department was required to reinstate him. I cannot agree with this proposition. *Weder* is no authority for the proposition that all an employee has to do, when confronted with a letter terminating employment based on the provisions of clause 9.1 of the Resolution, is to simply submit medical certificates. In *Weder*, the employees in fact submitted representations in line with section 17(3) of the

PSA,⁵¹ but *in casu* the applicant did not. Also, and in *Weder*, the employer gave no reasons for refusing the reinstatement submissions,⁵² but *in casu* it was specifically recorded in the outcome letter that the refusal of the reinstatement appeal was principally because of the excessive delay resulting from the non-compliance with clause 9.1 of the Resolution. In *Weder*, the Court in fact accepted that a case for refusing the reinstatement submissions could be made out in affidavits filed in the course of the review application, but held that in that matter, the employer had failed to even establish such a case on this basis.⁵³ But this is simply not applicable to the matter now before me, especially considering the factual findings of arbitrator Keyster before me, which stand. Again, the judgment in *Weder* cannot come to the aid of the applicant.

[80] All of the above then has a significant detrimental impact on the applicant's case on the merits, so to speak. Firstly, the lack of authority point must fail, because once there is a deemed dismissal, it is not an act by the Department terminating the employment of the applicant, and as such, clauses 7 and 8 of the Resolution cannot apply. Clause 9.1 of the Resolution does not prescribe who had authority to decide to reinstate the applicant, and simply refers to 'delegated authority'. The applicant has made out no other case that the area commissioner is not such a 'delegated authority', and if there was some other basis to contradict this authority the applicant needed to prove it.

[81] Secondly, and when the substance of the applicant's appeal (remembering it is not really an appeal but actually representations) is considered as it was placed before the fifth respondent, it is clear that the appeal grounds are the same as the explanation and evidence advanced by the applicant in prosecuting his case before arbitrator Kayster, to prove that he was dismissed. Of particular importance are the appeal grounds that the applicant had at all times submitted medical certificates to the Department by telefax, the Department was aware he was ill, and the Department never tried to contact him or visit him. With the arbitrator having rejected all this evidence and contentions, it must follow that the applicant's appeal grounds would equally

⁵¹ See paras 3, 9 and 11 of the judgment.

⁵² *Weder (supra)* at para 38.

⁵³ *Id* at para 40.

have no substance. It is impermissible to raise all of this again for consideration afresh, in the face of the unchallenged award which, as said, stands. It is untenable for the same issues to be raised over and over again, *albeit* in different contexts. In *Nestlé (SA) (Pty) Ltd v Mars Inc*⁵⁴ the Court said:

'...Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

[82] The point I wish to make in this regard is in my view aptly illustrated by the judgment in *Bouwer v City of Johannesburg and Another*⁵⁵. In that case, an applicant initially sought an order declaring his position redundant by virtue of the abolition of his post, which would have entitled him to be retrenched and to receive his full severance benefits. This application came before Landman J (as he then was), and the learned Judge ruled that without certain expert evidence on the evaluation of the respective posts, he could not decide the matter, and he consequently dismissed the application. Undeterred, that applicant then referred another dispute to the Labour Court claiming that as a result of restructuring, the post that he previously filled had been abolished, and he sought declaratory relief including an order that he is entitled to terminate his employment and receive severance benefits. Francis J (as he then was) heard the matter, and held as follows:⁵⁶

'It is clear from the judgment and order made by Landman J that he had made a definitive and final order. It is probably appropriate to conclude this judgment by referring to *Wolfaardt v Colonial Government* (1899) 16 SC 250 at 252 where it is stated that:

'The plaintiff cannot, by now changing the form of action, make substantially the same claim as he made in the former action. The test as to what he claimed must be sought in the pleadings, and not in the evidence tendered by

⁵⁴ 2001 (4) SA 542 (SCA) at para 16. See also *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 42.

⁵⁵ (2006) 27 ILJ 2590 (LC).

⁵⁶ *Id* at paras 12 – 13.

him in support of his declaration. It is his own fault if he failed to substantiate his case by sufficient evidence.'

Landman J had found inter alia that the applicant had failed to lead expert evidence on the two different posts and therefore his case was shipwrecked. The applicant had failed to substantiate his case by sufficient evidence in the previous case. In launching the present application the applicant has attempted to salvage his wrecked ship which he clearly cannot do. ...'

[83] The judgment of Francis J in *Bouwer* was dealt with on appeal in the Labour Appeal Court in the judgment of *Bouwer v City of Johannesburg and Another*⁵⁷. Zondo JP (as he then was), writing for the majority, dismissed the appeal and upheld the judgment of Francis J. Zondo JP held that:⁵⁸

'...The matter before Landman J was not an action but an application in motion proceedings. In motion proceedings the affidavits filed by the parties do not only serve as pleadings but they also contain the evidence that the parties place before the court to enable the court to decide the matter. The court decides the matter by either granting or dismissing the applicant's application. ...'

The learned Judge further said:⁵⁹

'... it must be borne in mind that a decision on the merits of the dispute between the parties was to be based on the evidence before the court. If the court concluded that the appellant had failed to place sufficient evidence before it to justify the granting of the order that he sought, and, therefore, dismissed the appellant's application, that was a decision on the merits of the dispute. That is what Landman J did in the case between the appellant and the first respondent.'

Finally, the learned Judge concluded:⁶⁰

'If I were to extract a principle from my approach to this matter, it would be this: if in motion proceedings the parties have placed before the court such evidence as they have chosen to place before it and the matter has been argued and, thereafter, the court issues an order that the application is

⁵⁷ [2009] JOL 23913 (LAC).

⁵⁸ Id at para 23.

⁵⁹ Id at para 26.

⁶⁰ Id at para 41.

dismissed and the basis of that decision is that the applicant failed to prove its case, the judgment or order of the court is a judgment or order on the merits of the case and it is final ...'

- [84] The applicant's contention in his representations that the Department should have followed incapacity proceedings as contemplated by the LRA is disposed of by the following *dictum* from the judgment in *Msweli*:⁶¹

'... the application of s 17(5) of the PSA excludes the operation of the normal procedural requirements to effect the termination of employment of an employee where the employee has absconded as envisaged by the PSA. The provisions of schedule 8 of the LRA in fact do not apply ...'

- [85] One final aspect remains for consideration, where it comes to the prospects of success of the applicant's representations. The time limit for doing so was 5 (five) days. It took the applicant more than a year to submit same. The applicant made no attempt in his representations to explain the delay or seek condonation. He approached the matter on the basis that reinstatement was there for the asking, when he ultimately chose to do so. The fifth respondent was entirely within his rights in stating, in the letter refusing to reinstate the applicant, that the delay was well outside the allowed period and was excessive. It is patently unacceptable to wait a year to file representations for reinstatement, and then not even try to explain the delay. For this reason alone, the refusal to reinstate the applicant was justified.

- [86] Accordingly, the legality challenge of the applicant is in any event doomed to fail, because it simply has no substance. The decision of the fifth respondent sought to be impugned was rationally related to the purpose for which the power was given, was clearly justified, and accounted for all the material facts. It follows that even considering the merits of the applicant's review challenge, I remain unconvinced that it is justified that I exercise my discretion in favour of overlooking the unreasonable delay in this case.

Conclusion

⁶¹ (*supra*) at para 43.

[87] For all the reasons as elaborated on above, I conclude that the delay occasioned in this instance is excessive, and unreasonable. Added to this, there exists no justified cause or reason for me to exercise my discretion in favour of overlooking this material delay and nonetheless entertaining the applicant's application. The condonation application by the applicant must therefore fail, and falls to be dismissed. That in turn also disposes of the review application.

[88] This then only leaves the issue of costs. In terms of the provisions of section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. The respondents did oppose the matter but that does not mean costs must follow the result. I am mindful of the following dictum in *Zungu v Premier of the Province of KwaZulu-Natal and Others*⁶² where the Court said:

‘... The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. ...

The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

‘The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.’

In striking a fair balance in this instance, it is my view that no costs order should be made. The deemed dismissal provisions in the public service is a

⁶² (2018) 39 ILJ 523 (CC) at paras 23 – 24.

rather draconian provision, and I do not intend to further prejudice the applicant with a costs order. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs.

Order

[89] In the premises, I make the following order:

1. The applicant's condonation application is dismissed;
2. The applicant's review application is consequently dismissed;
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms E van Staden of Legal Aid SA

For the Respondents:

Adv L Ntsepe and Adv M Mpahlwa

Instructed by:

The State Attorney