

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO: D42/05

In the matter between:

KWAZULU-NATAL PROVINCIAL TREASURY

Applicant

and

**THE GENERAL PUBLIC SERVICE BARGAINING
COUNCIL**

First Respondent

JANE KALLIDEEN N.O.

Second Respondent

ENYINNA NKEMI-ABONTA

Third Respondent

J U D G M E N T

G.O. VAN NIEKERK AJ

- [1] Doctor Nkemi-Abonta (“Dr Abonta”) is a member of Parliament who was elected as a candidate of the Democratic Alliance to a seat in the National Assembly in the general election which took place on 14 April 2004. He was until 15 March 2004 employed in a senior position with the Applicant. His services were terminated because of his candidacy for election to the National

Assembly.

- [2] After Dr Abonta's election and after he became a member of the National Assembly, he declared a dispute regarding his dismissal. This dispute was arbitrated in the General Public Sector Bargaining Council and the arbitrator ruled as follows:-

- “• *The dismissal was unfair;*
- *Applicant is reinstated from 15 March 2004 with full benefits less the period when he received remuneration elsewhere;*
- *Remuneration to be for the period 15 March to ... (sic);*
- *Applicant is given one month to tender his resignation from Parliament and/or the department;*
- *Applicant to commence duty on 1 February 2005 or resign from the department as he so wishes;*
- *No order as to costs.”*

- [2] The Applicant seeks to review the award on the grounds that as a member of the National Assembly, Dr Abonta may not in terms of section 47 of the Constitution, 1996 be employed in the service of the state. Applicant contends that the arbitrator's award is repugnant to the provisions of section 47 and that it

was accordingly not competent for an order for reinstatement to be made.

- [3] Firstly I must deal with the facts giving rise to the dispute. When the Applicant became aware of Dr Abonta's candidacy he was placed on special leave with remuneration until he received a certificate confirming that he had been placed on the final list of candidates for election in terms of section 31(3) of the Electoral Act, 1998. He was also told that as soon as he was informed that such a certificate would be issued to him, he would be expected to resign from his employment. This requirement was in accordance with Chapter 1, Part VII G2.4 of the Public Service Regulations published on 5 January 2001.
- [4] On 14 January 2004 the Director-General of the Applicant had published a circular clarifying employees' rights and obligations in regard to candidacy for election to the National Assembly. Paragraph 2.2(a) of this circular states that an employee who becomes a candidate for election must resign no later than the date on which he or she is issued a certificate in terms of section 31(3) of the Electoral Act. On 12 March 2004 the Minister for Public Service and Administration, published a circular concerning the participation of public service employees as candidates for election to the National Assembly. In paragraph 2 of that circular it is clearly stated that an employee who seeks election must resign from the public service with effect from the date that a certificate in terms of section 31(3) of the Electoral Act is issued. Paragraph 4.1 of the circular provides for compulsory reinstatement in the event that an employee who has resigned is not elected to the National Assembly or such a

person is elected but does not accept such election.

- [5] On 18 March 2004 Dr Abonta's head of department wrote to him and pointed out to him that the circular of 14 January 2004 requires an employee to resign from the public service before such an employee becomes a candidate for election. For reasons not quite clear to me the letter went on to state that with effect from 15 March 2004, Dr Abonta was confirmed to be a candidate standing for election and further erroneously stated that his candidature disqualified him from continuing in the employ of the public service. He was informed that his services with the department were terminated with effect from 15 March 2004. On 5 April 2004 the Chief Electoral Officer for the IEC issued a certificate in favour of Dr Abonta in terms of section 31(3) of the Electoral Act. Doctor Nkemi-Abonta was elected in the national election that took place on 14 April 2004 and he remains a member of Parliament. It is Dr Abonta's case that termination of his employment was premature and that it deprived him of the election of either remaining in the service of the public service or accepting election to the National Assembly.

- [6] The relevant provisions of section 47 of the Constitution, 1996 read as follows:-

“47. Membership (1) *Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except –*

(a) *anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service ...*

(b) ...

(c) ...

(d) ...

(e) ...

(2) *A person who is not eligible to be a member of the National Assembly in terms of sub-section (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.*

(3) *A person loses membership of the National Assembly if that person –*

(a) *ceases to be eligible; or*

(b) *...*

(c) *...”*

[7] Section 47 does not, therefore, prohibit a person in the service of the State from being a candidate for the National Assembly but such a person is not eligible to become a member of the Assembly if he or she remains in the service of the State. Such a person must, therefore, exercise an election. Either that person accepts election to the National Assembly in which case he or she may not remain in the service of the State or that person remains in service in which case he or she is not eligible to be a member of the Assembly.

[8] Although it is true that Doctor Nkemi-Abonta's services were terminated before he could make the election to remain in the service of the State, he did, however, accept election to the National Assembly.

[9] I am in agreement with Mr Pillemer, who represented the Applicant, that Doctor Nkemi-Abonta's membership of the National Assembly precludes him from employment by the State and that it was not, therefore, competent for the

Second Respondent, the Arbitrator, to reinstate Doctor Nkemi-Abonta. That is not, however, the end of the matter.

[10] The termination of Doctor Nkemi-Abonta's services was clearly premature. He was entitled in terms of Section 47(2) of the Constitution to be a candidate for the National Assembly and he had not yet been elected as a member of Parliament. He had also not yet been issued with a certificate in terms of section 31(3) of the Electoral Act when he was dismissed. It was only upon the issuing of such a certificate on 5 April 2004 when the obligation to resign arose. Doctor Nkemi-Abonta's services were, however, terminable upon the event of his election to the National Assembly. That occurred soon after the election on 14 April 2004. It was only on that date that it can be said that Doctor Nkemi-Abonta was no longer a candidate in terms of Section 47(2) but a member of Parliament.

[11] Mr Pillemer also referred me to Section 17(5)(ii) of the Public Service Act, 1994 which provides that if an officer employed by the State assumes other employment, he or she shall be deemed to have been discharged from the service of the State. I do not consider these provisions to be of any assistance because Doctor Nkemi-Abonta was not discharged for assuming other employment but by reason of the fact that he was a candidate standing for election. This much is clear from the letter of termination dated 18 March 2004.

[12] I am satisfied that the application should succeed insofar as reinstatement is

concerned but I consider that the Arbitrator was correct in the finding that the dismissal was unfair. It was certainly premature and should not have occurred until Nkemi-Abonta's election to the National Assembly. In paragraph 6 of the referral of the dispute to the Bargaining Council, the relief that is sought is reinstatement and "*immediate payment of all monies due to me*". The Arbitrator clearly intended awarding Doctor Nkemi-Abonta remuneration from 15 March 2004 but did not specify for what period such remuneration was payable. There is no reason why that part of the award should be set aside save to identify the period for which remuneration is payable. Because the election occurred on 14 April 2004, I consider that the period applicable is 15 March to 15 April 2004.

[13] Although the Applicant is substantially successful in its application for review and although Mr Pillemer argued that I should award the Applicant its costs, I do not consider it is appropriate to make such an order in view of the fact that the termination of Doctor Nkemi-Abonta's employment was unfair.

[14] I accordingly make no order as to costs.

G O VAN NIEKERK AJ

Appearances: For the Applicant - Mr M Pillemer
 Instructed By - Venn Nemeth & Hart Attorneys

 For the Third Respondent - Mr Peggie Moodley
 Instructed By - Peggie Moodley & Company

Date of Judgment: 27 October 2005