

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO

C467/01

14-2-2002

In the matter between:

NELSON MBUYISELO NKOPO

Applicant

and

PUBLIC HEALTH & WELFARE BARGAINING First and Further

COUNCIL & OTHERS

Respondents

J U D G M E N T

LANDMAN J:

1. Mr N M Nkopo seeks to review and set aside an award of an

arbitrator which was made following an arbitration (case number PSHS172) held under the auspices of the Public Health & Welfare Bargaining Council.

2. The review application was postponed on the previous occasion as the applicant had not complied with the Rules of this Court. The record of the proceedings of the arbitration are, however, incomplete. The indexed papers omitted a crucial affidavit but Mr Horne, who appeared on behalf of the Department of Health, alerted me to this and the affidavit of the arbitrator was traced.
3. Several issues were put to Mr Nkopo, an attorney with the same surname as his client who appeared on behalf of the applicant. But neither he nor Mr Horne were able to deal with them satisfactorily. The principal query was whether the applicant had been dismissed by the Department of Health and whether that dismissal was a dismissal for the purposes of the Labour Relations Act 66 of 1995. I might add that Attorney Nkopo did not have a full set of papers with him during argument. In the light of the view which I take of this matter there would be little purpose in a further postponement and the matter was allowed to proceed.

4. The facts, stated starkly, are the following. The applicant was the chief hospital administrator of the Umzimkulu Hospital operated by the Department of Health. During February 1996 he implemented an unpopular measure having the effect of discontinuing the employment of persons engaged in terms of a special employment creation programme. During February he was forewarned that these persons had made threats against his life and that it would be dangerous for him to attend his place of work. He did not go to the hospital that day but reported to the nearest police station. He also informed the Regional Director of the situation. The Regional Director advised him to stay at home for a few days. Many further developments ensued. Communications passed between the applicant and the Department and at one stage his union and his attorney were involved.
5. The situation was not resolved. The applicant did not attend at the hospital because he believed that his life was in danger. Eventually the Department of Health invoked section 17(5)(a) of the Public Service Act of 1994 (Proclamation No. 103 of 1994). Sub-section (5)

reads as follows:

"(5)(a)(i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, 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 discharged 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.

(5)(a)(ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.

(5)(b) If an officer who is deemed to have been so discharged, reports for duty any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause show and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer 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."

6. The applicant was discharged from the Public Service on 18 November 1999. The applicant, when he learnt of his discharge, did not resort to section 17(5)(b) of the Public Service Act in order to obtain his reinstatement in the Service. Instead he complained about his "dismissal" and took steps which led to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). However, the CCMA did not have jurisdiction to arbitrate the dispute. Eventually the dispute was processed through conciliation and referred to arbitration before the Public Health & Welfare Bargaining Council.
7. There are no documents relating to the referral of the dispute to this body and to arbitration. However the arbitrator notes in his award that:

"The issue to be decided is whether the employer party fairly dismissed Mr Nkopo in terms of substantive and procedural fairness."

The arbitrator found that the applicant's absence from work exceeded a period of one calendar month. He also found that the applicant was no longer in danger and therefore, by implication, he

had no excuse for not reporting for work. The arbitrator found:

"Mr Nkopo's dismissal on 18 November 1999 is both substantive and procedurally fair."

It is clear to me that neither the applicant nor his representative, a union official, the Department of Health nor the arbitrator appreciated that the applicant had not been dismissed in the sense of that concept as used in the Labour Relations Act 66 of 1995. The Appellate Division has held in **Minister van Onderwys en Kultuur en Andere v Louw** 1995 (4) SA 383 (A) that the effect of section 72(1) of the Education Affairs Act (House of Assembly) 70 of 1988, which is similar to section 17 of the Public Service Act, is to the effect that the notification of the discharge in terms of that section occurs by operation of law. The headnote accurately reflects the decision. It reads as follows:

"The deeming provision of s 72(1) of the Education Affairs Act (House of Assembly) 70 of 1988 (which provides that a 'person employed in a permanent capacity at a departmental institution and who - (a) is absent from his service for a period more than 30 consecutive days without the consent of the Head of Education...shall, unless the Minister directs otherwise, be deemed

to have been discharged on account of misconduct...') comes into operation if the employee:

- (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 the allegation is disputed, the factual dispute is justiciable by a court. There is then no question of a review of an administrative decision. The coming into operation of the deeming provision is not dependent upon any decision there is no room for reliance on the audi alteram partem rule which in its classic formulation is applicable when an administrative- and a discretionary- discretion may detrimentally affect the rights, privileges or liberty of a person. Where, as in casu, the employee is informed in a letter of discharge that he has been discharged in terms of s 72(1), it is not a consequence of a discretionary decision, but merely a notification of a result which occurred by operation of law."

(See also Du Toit et al/ Labour Relations Law 3rd ed. page 338).

8. In the light of the Louw case, there was no decision and no dismissal which could be found to be unfair. The discharge of the applicant took place by operation of law. It was not a dismissal as contemplated in the Labour Relations Act. The arbitrator could, therefore, not validly award any relief, even if he was mindful to do so, in the absence of any express agreement to this effect. The award, therefore, must be set aside as it was premised on erroneous assumption that the dispute related to an unfair dismissal. As neither party appreciated this point no costs should be awarded.
9. In the premises the award is reviewed and set aside. There will be no order as to costs.

Signed and dated at BRAAMFONTEIN this 1st day of March 2002.

AA Landman

Judge of the Labour Court of South Africa