

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED.

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

In the matter between:

Not Reportable

Case Number: JR429/12

MINISTER OF CORRECTIONAL SERVICES

Applicant

and

G.P. RAMAKADI N.O.

First Respondent

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL

Second Respondent

SIBUSISO ANDREA MANDLAZI

Third Respondent

Heard: 7 January 2020

Delivered: 12 May 2020

"By Email"

Summary: GPSSBC arbitration proceedings – Review of findings that Third Respondent was dismissed and did not resign – Test for rationality and reasonableness does not apply – issue considered de novo on whether there was a dismissal or not - no dismissal- award reviewed and set aside with no order as to costs.

JUDGMENT

RAMDAW AJ

Introduction

- [1] This is a review application wherein the Applicant seeks the review and setting aside of an arbitration award issued by the First Respondent under the auspices of the Second Respondent, wherein the First Respondent found that the dismissal of Third Respondent to be substantively unfair, and awarded four months' compensation.

Points in limine

- [2] It is submitted that the Applicant's papers for review were filed outside of the time limit and further that due to its failure to request the Court for condonation in keeping with a trite plethora of case law including *S v Mercer*,¹ *Van Wyk v Unitas Hospital*,² *Legodi and Others v SSSBC and Others*.³ The Third Respondent in any event instructed his erstwhile attorneys of record and opposed the application on the merits as he did not intend to defend his cause on mere technicalities.
- [3] It is submitted therefore that first and foremost, the Applicant's filing of this application merely serves the purpose of unfairly and unreasonably delaying compliance with the arbitration of the Commissioner's award, which was made some eight years ago.
- [4] It is submitted that the Applicant's undue delay has played into its hands by encroaching on the Third Respondent's right to access to courts in terms of Section 34 of the Constitution of the Republic of South Africa⁴, whereas he has an arbitration award in his favour dating back some eight years in any

¹ 2004 (2) SA 598 (CC) at para 4. See also: *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC) at para 11 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC).

² 2008 (2) SA 472 (CC) at para 20.

³ Unreported decision. Case number: JR685/06. Delivered on 28 March 2018.

⁴ Act 108 of 1996.

event. The Court is therefore implored to bring finality to this matter as the Third Respondent suffers severe prejudice as a result of the undue delay.

- [5] The Applicant also raised the point that the arbitration award has prescribed. This Court will not delve into this aspect in great detail save that the lodging of the review application on 27 February 2012 interrupted the running of prescription. The Applicant has also failed to comply with the Rules, Practice Manual and directives of this Court rendering the application archived, withdrawn or lapsed. The court exercises its discretion and powers in terms of the Labour Court Rules, in particular Rule 11, to condone any non-compliance, grant condonation and to finalize this matter as it is a determination de novo on the jurisdictional issues as to whether there was a dismissal or not.

Background

- [6] The Third Respondent was employed by the Applicant at the rank of Director. He avers that he was dismissed in writing on 17 August 2010 by the National Commissioner. The Applicant denies that it dismissed the Third Respondent and alleges that he resigned in writing on 26 October 2010. Further, that he completed a resignation form, dated 29 October 2010 and stated therein that he resigned.
- [7] On 7 January 2011 the Third Respondent referred a constructive dismissal dispute to the Second Respondent who conciliated same on 23 June 2011. The conciliator certified that the dispute concerning the alleged constructive dismissal could not be resolved and referred same for arbitration.
- [8] The Second Respondent arbitrated the dispute on 11 and 12 October 2011. Both parties were legally represented and held a pre-arbitration conference on the 10 October 2011. During the pre-arbitration conference the Third Respondent's attorneys effected an amendment to the referral changing the dismissal from a constructive dismissal to an actual dismissal in terms of the

aforesaid letter dated 17 August 2010 signed by the National Commissioner dismissing the Third Respondent.

- [9] The parties agreed that the First Respondent, the Arbitrator, be called upon to decide separately from all other issues in the matter the question as to whether the Third Respondent was dismissed by the Applicant.
- [10] The applicant states that both parties confined themselves to the issue of dismissal only. The Third Respondent personally testified and the Applicant called Deputy Director Pieter Kilian and Director Khoza of the Department of Correctional Services to testify. Both parties filed written heads of arguments.
- [11] The First Respondent issued an arbitration award in terms whereof he found that the dismissal of the Third Respondent was substantively unfair and awarded him payment of the sum of R232,000.00 being 4 months' salary in compensation.
- [12] The Applicant states that it was astonished and surprised that the First Respondent did not deal with the issue as to whether there was a dismissal or not in his award (being the only issue before him) and instead he made a finding of an unfair dismissal, pre-supposing that a dismissal existed.
- [13] The Applicant seeks to review and set aside this award in terms of Section 145(2)(a) of the Labour Relations Act⁵ (LRA). The Third Respondent only opposed and filed his answering affidavit on 22 November 2017.
- [14] The Third Respondent sought condonation for the late filing of his answering affidavit and a dismissal of the review application with costs. The Third Respondent denied that he resigned from the Applicant's service and states that he was unfairly dismissed as per the letter dated 17 August 2016 issued

⁵ No. 66 of 1995, as amended.

by the Applicant which letter was placed on his table by some in an envelope but agrees that the same was not officially served on him.

- [15] The Third Respondent contends that the First Respondent made the correct finding. The same was a decision of a reasonable decision maker and should be allowed to stand as he avers that:

"It is clear that the letter signed by the National Commissioner bears a direct intention of dismissal and was signed and confirmed before he tendered his resignation letter. The facts before this Honourable Court are that I was unfairly dismissed from my employment".⁶

- [16] Therefore, the Applicant has failed to make out a case for the review and therefore it should be allowed to stand.

- [17] The Third Respondent applied for condonation for the late filing of his answering affidavit. Although the explanation for the delay leaves a lot to be desired there was no objection raised by the Applicant, and therefore there is no need for condonation. The matter is ripe for determination and therefore I will proceed to do same.

Legal Principles

- [18] The First Respondent's award is attacked primarily on the jurisdiction of the Second Respondent to arbitrate this matter. The *point in limine* raised by the Applicant was whether there was a dismissal or not, which is a jurisdictional issue. The applicant contends that the First Respondent failed to address this point and issued an arbitration award which has become reviewable. However, the test for rationality and reasonableness as will be alluded to herein does not apply as set out herein. When the issue in dispute centres around the jurisdiction of the relevant Bargaining Council, this Court has to determine the jurisdiction issue *de novo*.

⁶ See: para 11 of the Answering Affidavit.

- [19] In cases such as these, where it is about whether the General Public Service Sectoral Bargaining Council (GPSSBC) had jurisdiction, the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction of its own accord, by deciding *de novo* whether the determination by the arbitrator on jurisdiction is right or wrong.⁷ In *Trio Glass t/a The Glass Group v Molapo NO and Others*⁸ the Court stated:

'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue *de novo* in order to decide whether the determination by the commissioner is right or wrong.'

- [20] In the case of a wrong decision by an arbitrator where it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justifiable grounds.⁹ It does not matter what the reasoning of the arbitrator may have been, it is up to the Court to form an objective perspective, decide whether the requisite jurisdictional facts exist. In *Universal Church of the Kingdom of God v Myeni and Others*¹⁰ the Court said:

'... the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the church, there existed facts which objectively established that Mr Myeni was indeed the employee of the church. If, from an objective perspective, such jurisdictional facts did not exist, the CMA did not possess

⁷ See: *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 ILJ 1197 (LC) at paras 5 and 6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 ILJ 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 ILJ 1272 (LC) at para 21.

⁸ (2013) 34 ILJ 2662 (LC).

⁹ See: *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC) at para 24; *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC) at para 6.

¹⁰ (2015) 36 ILJ 2832 (LAC) at para 27.

the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.'

- [21] In the end, and as held in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*.¹¹

'The CCMA is a creature of statute and is not a court of law. As a general rule it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court'

- [22] To this extent I will take into consideration all the material before me to determine whether the GPSSBC had jurisdiction to have arbitrated this dispute in the manner it did. I need to determine whether there was a dismissal or was there a resignation. If there was a dismissal then the Applicant had to show that same was for a fair reason after following a fair procedure. If there was a resignation then the Third Respondent terminated the employment relationship as such and the GPSSBC does not have jurisdiction herein.

Factual matrix

- [23] The Third Respondent faced a disciplinary enquiry presided over by Brigadier Van der Walt of the South African Police Services, a person with a rank to his own. This negotiated sanction was made in accordance with chapter 7 of the SMS Handbook at para 2.7(4) which states that "*with the agreement of the member, the Chairperson may impose the sanction of suspension without pay and demotion as an alternative to dismissal. If a member is dismissed after a year, he or she may apply for promotion without prejudice.*" This can only be done by the consent of both parties.

- [24] In terms of the aforesaid provisions the presiding officer at the disciplinary hearing, Brigadier Van der Walt, on 22 July 2010 by agreement between the

¹¹ (2008) 29 ILJ 2218 (LAC) at para 40.

parties, including the Third Respondent and his counsel and in the presence of the Third Respondent and his counsel, issued the following sanction:

19.1 A final written warning with effect from the first day that the employee resumes his duties. This final warning will be valid for a period not exceeding six months from the date of resignation of duties, and

19.2 Suspension without pay for a period of one month. The parties agree that the Employee's supervision will determine the effective date in collaboration with the employee but that the period of suspension will not commence before 15 August 2010 and not later than 15 November 2010.

[25] Neither the finding of guilt nor the sanction was taken on review by the Third Respondent and stands. The third respondent reported for duty the following day, Friday 23 July 2010 but was handed a fax stating that his position was being considered and that he would be informed when the suspension would be uplifted.¹²

[26] On Monday 26 July 2010, the third respondent was advised in writing that his suspension was uplifted with effect from 26 July 2010 and that he should report for duty.¹³ The third respondent did so and reported for duty on that day. In the same letter, he was advised that *"the suspension without pay for the period of one month shall be effected from 15 August 2010 to 15 September 2010"*.

[27] The third respondent did not respond to the letter and did not register a grievance about its contents. He, however, discussed the contents of the letter with Bouwer and informed him of his dissatisfaction with the dates.¹⁴ Despite the aforesaid letter, the third respondent, probably because of the

¹² Exhibit "B" at p. 48.

¹³ Exhibit "C" at p. 20.

¹⁴ Transcribed Record on p. 46 at lines 8 – 20.

reluctance he articulated in the amended referral, did not take his suspension on 15 August 2010 but reported for duty on 15, 16 and 17 August 2010.¹⁵

- [28] The Section: Code Enforcement at the Departmental Head Office is *inter alia* tasked to ensure that all disciplinary sanctions countrywide, are implemented and carried into effect.¹⁶ This section is headed by Director Carel Paxton. His deputy, specifically tasked to oversee the implementation of sanctions, Mr Pieter Killian then drafted a memorandum¹⁷ to the National Commissioner recommending the applicant's dismissal as a result of his reluctance to comply with the agreed suspension.¹⁸
- [29] Attached to the memorandum, was a draft letter for signature by the National Commissioner, if he approved of its contents, dismissing the Third Respondent with immediate effect.
- [30] Mr Killian took the memorandum to Mr Paxton, who then signed it. Mr Killian then took it to Messrs Malatsi and Shilubane to sign, and then, because it so happened that the Acting Regional Commissioner, Mr Bouwer, was at head office for a meeting, he (Killian) then handed the memorandum to Mr Bouwer who signed it and took it to the National Commissioner, who, according to the signatures on the documents, also approved the recommendations and signed the memo as well as the letter. The memo was then again taken care of by Mr Bouwer.¹⁹
- [31] Back at the office Mr Bouwer discussed the matter with Mr Xhosa. It was then decided not to implement the dismissal and to call in the Third Respondent because he contended at the time that he was not given a copy of the sanction or consulted about the timing of the suspension. This letter was never handed to the Third Respondent and definitely could not have landed on the Third Respondent's desk the very same day.

¹⁵ Transcribed Record on p. 46 at lines 3 and 25 to 4.

¹⁶ Transcribed Record on p. 137 at lines 1 to 25.

¹⁷ Exhibit "B" at p. 49.

¹⁸ Transcribed Record on p. 141, line 1 onwards.

¹⁹ Transcribed Record on p. 147 at line 23 onwards.

- [32] For that purpose, i.e. to deliver a copy of the sanction, Mr Killian was dispatched to the office of the Area Commissioner, the Third Respondent's immediate supervisor, who handed a copy of the sanction to the Third Respondent, who signed for it on 18 August 2010.²⁰ The handing over of the sanction took place in the office and presence of the Third Respondent's direct supervisor, the Area Commissioner. A formal letter was also handed to the Third Respondent who signed for the same. The so-called dismissal letter dated 17 August 2010 was not handed over or mentioned by any person let alone the Third Respondent.
- [33] The Third Respondent received the implementation of the sanction letter and responded the following day.²¹ In his response, no mention is made of his dismissal, or the fact that he had insight into the dismissal letter or learnt of the decision by the National Commissioner to have him dismissed with immediate effect. He suggested, contrary to the agreement reached and recorded regarding the sanction, that the suspension be timed to take place during February 2011 on humanitarian grounds because of his financial commitments as it his birthday month and he will receive a double payment. This is certainly an unexpected response and request from a person who was advised that he was dismissed with immediate effect.
- [34] The request was, however, declined in the light of the sanction and, in a letter dated 26 August 2010 Mr Bouwer determined the timing of the suspension for the month of October 2010.²²
- [35] Again, the Third Respondent pushed his luck: upon receipt of the letter the next day, and he argued that his October salary should be paid but that he

²⁰ Exhibit "C" at p. 33. See also: Transcribed Record p.148 at lines 9 to 18. This evidence was not contested in cross-examination.

²¹ Exhibit "C" at p. 34. See also: Transcribed Record on p. 55 at lines 24 and 25.

²² Ibid. See Also: Transcribed Record p. 56 at lines 20 to 25.

would take the financial knock of his salary not being paid, the next month.²³ Again, the Third Respondent's request was approved.²⁴

[36] On the 26th October 2010 five days from the end of the month of October, and five days before his suspension was due to start, on his own version and at his own request, the Third Respondent resigned. In his resignation letter, he emphatically states that the resignation should be effective from 31 October 2010.²⁵

[37] The Third Respondent's resignation was accepted after consultation with the National Commissioner, but by agreement, it was made effective from the end of November 2010 to enable the Third Respondent to take his "*suspension*" as agreed.²⁶ He reported for duty in October but not in November 2010, although he was required to sign an attendance register in November 2010, which he did.

[38] Subsequently the Third Respondent applied for his leave to pay to be paid out, which was done. He also applied for his resignation benefits, but that has not been paid out to him as at date of the arbitration.

Legal Principles

[39] A 'dismissal' is defined in section 186(1) of the LRA as follows:

" 186. Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that -

(a) An employer has terminated a contract of employment with or without notice; ...

²³ See: Transcribed Record on p. 58 at lines 16 to 25.

²⁴ Exhibit "C" at p. 41.

²⁵ Exhibit "C" at p. 42.

²⁶ Exhibit "C" at p. 46.

- (e) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

[40] The dispute originally referred to arbitration was one in terms of Section 186(1)(e), i.e. a constructive dismissal. In terms of the amended referral the Third Respondent relies on an actual dismissal in terms of Sec 186 (1)(a) which was arbitrated.

Analysis

[41] Against the background of the aforesaid common cause facts, the Third Respondent's version is that he found a copy of²⁷ the termination letter and the supporting memorandum in his office in an unmarked envelope delivered by an anonymous person. The Third Respondent was extremely vague about when he received the copy of the termination letter and memorandum. Without committing himself, he suggested that he was aware of the letter from 17 August 2010. However, there can be no doubt that he was not aware of it before he wrote his resignation letter.²⁸ Strangely, he did not mention that in any correspondence or oral engagement. His reason was that he “*did not want to open a can of worms*”.²⁹ Even on the Third Respondent's own version, the First Respondent could not reasonably conclude that the communication of a letter and memorandum was intended to be a dismissal and in fact was one. Clearly it was not so understood by any of the Departmental officials or the Third Respondent himself as he continued with his employment up and until he resigned.

[42] In making a determination I take cognisance of all the material before the arbitrator, however, especially the following. The decision taken by the National Commissioner on 17 August 2010 was not implemented and the

²⁷ Transcribed Record on p. 24 at lines 8 and 9.

²⁸ Transcribed Record on p. 81 at lines 10 to 19.

²⁹ Ibid.

signed letter of termination was never handed to the Third Respondent nor delivered to him along recognized means or procedures.

[43] His version that he found, on an unknown date, before his resignation, a copy of the letter and the memorandum on his desk, and did not mention it to anyone, not even in his resignation letter just does not make any sense and is highly improbable. This evidence which was presented before the GPSSBC as the basis for an actual dismissal is so fanciful and so far-fetched, that it should have been rejected by the First Respondent without any hesitation. Instead the First Respondent accepted same as it formed the basis of his final award.

[44] On the other hand, all the correspondence subsequent to 17 August 2010 until after his resignation more than two months later, justify only one interference, and that is that the decision by the National Commissioner to terminate the Third respondent's services, was not implemented. If the Third Respondent was in fact dismissed then why did the Third Respondent continue to work until he resigned effective 30 November 2010. It just does not make any sense and the only conclusion is that the letter dated the 17 August 2010 was leaked to the Third Respondent sometime closer to the arbitration date and used for purely mischievous purposes against the Applicant.

[45] A cursory analysis of the brief award given by the First Respondent reveals that he did not consider the question of proof of a dismissal at all. The First Respondent also did not refer to a single one of the common cause facts listed in making up his final decision that the Third Respondent was unfairly dismissed and entitled to four months compensation.

[46] This misdirection of the First Respondent is illustrated by the following remark prefacing his analysis where he states:

"The dismissal is a sequel from (sic) the disciplinary hearing that the applicant appeared in. However, I am only confined to the evidence before me that precipitated the dismissal".³⁰

It is clear that he did not make a determination whether there was in fact a dismissal or was there a resignation but merely moved from the premise that a dismissal in fact existed.

[47] It is clear that the First Respondent grossly misconceived the nature of the enquiry before him to the extent that it cannot be said that the First Respondent applied his mind to the matter before him at all. He rendered an award that is so absurd which no reasonable decision would have made in light of the evidence before him. His determination is wrong and clearly falls to be reviewed and set aside.

[48] The arguments presented to Court were based primarily on the reasonableness test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³¹. However, as shown above, this is a review based on whether there was a dismissal. Therefore the reasonableness test does not find application. Therefore, I do not deem it necessary to go through all the grounds of review submitted.

[49] The First Respondent did not list the issues he had to decide upon correctly taking into consideration the *point in limine* raised as to whether there was a dismissal or not. He states under substantive fairness

"The One million Dollar question raised in the arbitration hearing is why the Applicant did tender a resignation letter on 26th October 2010 when he was already being dismissed."

³⁰ See: Arbitration award at p. 62 of the bundle.

³¹ (2007) 28 ILJ 2405 (CC).

However, he failed to find answers to this question nor give reasons as to why he made the findings he made.

- [50] The First Respondent quotes a lot of irrelevant case law but does not give a proper reason or explanation as to why he found that there was a dismissal not a resignation and that the dismissal was not for a fair reason.
- [51] The First Respondent issued an award wherein he made both legally and factually incorrect findings and therefore same stands to be reviewed and set aside. However, given the numerous issues with regards to the status of the review application and the fact that the Court needs to deal with the jurisdiction issues *de novo* the arbitration award is of secondary importance in that the First Respondents findings are irrelevant to the final decision of this Court which needs to make its own findings.
- [52] The Third Respondent received a one month suspension and was offering resistance to have same implemented. He made numerous excuses or gave flimsy reasons as to why it should be deferred even to February 2011 when he receives a double salary payment. This request was turned down as there was a deadline date for the suspension to be put into operation being 15 November 2010. He made all these representations post 17 August 2010 which does not make sense if he was indeed dismissed.
- [53] The Applicant was giving many frivolous and vexatious excuses to delay the implementation of the suspension. However, he never challenged or contested the same in the GPSSBC which he could have done. This led the Applicant to draft a memo to the National Commissioner to approve that the Third Respondent be dismissed for failing to serve his suspension which sanction was *in lieu* of dismissal and imposed as per the agreement in terms of the SMS Handbook.
- [54] However, the problem came about because the Third Respondent was not served with the sanction properly, yet he should have been aware of the same being present at the hearing when the same was handed down and

furthermore, was part of the negotiated process in agreeing to same with his advocate and the Applicants legal team. Given this excuse he was served with the sanction on 18 August 2010 and was also given a letter which he signed for. He makes no mention of having received the controversial letter of 17 August 2010 with a full memo left in a sealed envelope on his desk, which effectively dismissed him.

- [55] He did not contest his so-called dismissal at that stage neither did he leave the workplace as he was 'supposedly' dismissed. Within the Department of Correctional Services a pre-dismissal interview is carried out if and when one is dismissed. Therefore had he been dismissed he should have attended same. He continued to report for duty despite his version of being dismissed by the Commissioner.
- [56] After his 'dismissal' he re-negotiated his suspension, made certain proposals and then goes on suspension after his requests to serve his suspension in February 2011, his birthday month, were turned down. Hardly something expected from a dismissed employee. When he realizes that his "whims and fancies" were not taking him anywhere he decided to write out a resignation letter on 26 October 2010. He did so freely, voluntarily and without any coercion. Same was given to his seniors who accepted same. He then does his exit interview and completes the statutory and administrative forms relating to his resignation on 29 October 2010. He completes the forms stating that he has resigned. His immediate supervisor who testified confirmed that he tried talking him out of the resignation which he did not want to do.
- [57] Nowhere in his resignation letter does he mention his dismissal on 17 August 2010, 3 months earlier. He gives instances of victimization and states that his resignation will be effective from 31 October 2010. He needed to give 1 months' notice and he served his suspension from 1 November 2010 to 30 November 2010. On 7 January 2011 he lodged an unfair dismissal dispute with the GPSSBC and claims "constructive dismissal". He deposes to an affidavit in support of his condonation application and made no mention of an actual dismissal on 17 August 2010.

- [58] His dispute was conciliated as a constructive dismissal bearing in mind that he resigned on 26 October 2010 in writing, effective 30 November 2010. If he now alleges an actual dismissal on 17 August 2010 his referral was hopelessly out of time and condonation was never considered nor approved.
- [59] The so-called amended referral form citing the date of dismissal being 17 August 2010 and the reason being a normal dismissal was accepted by the First Respondent after the pre-arbitration meeting of 10 October 2010. It is recorded that same is done by consent and is also highly irregular to say the least. The certificate of outcome was in effect being changed and could only be done in terms of the Constitution of the GPSSBC.
- [60] A certificate for conciliation has been issued in the earlier referral with a condonation ruling relating to a constructive dismissal. The parties on their own charged the entire referral and requested the Arbitrator, the First Respondent, per the addendum to the pre-arbitration minutes handed in which read:
- "The Applicant is given leave to amend his referral form in accordance with pages 1-10 of the Applicant's bundle exhibit B."
- [61] The parties agreed that the arbitrator be called upon to decide separately from all other issues in the matter the question as to whether the Third Respondent was dismissed by the Applicant. Therefore, the First Respondent's arbitration award falls to be reviewed and set aside because it is a wrong decision as it is clear that there was no dismissal on 17 August 2010 but that the Third Respondent resigned in writing on 26 October 2010, which resignation terminated the employment relationship.

Conclusion

- [62] This court, now that the arbitration award has been reviewed and set aside, has the powers to dispense with this matter and makes a finding that the

Second Respondent, the General Public Service Sectorial Bargaining Council lacked the jurisdiction to arbitrate the dispute referred by the Third Respondent as there was no dismissal as the Third Respondent resigned from the Applicant's service effective from the 30 November 2010

Costs

[63] In terms of section 162 of the LRA, the Court has a wide discretion when it comes to awarding costs. In the footsteps of decisions taken in this Court which confirmed that cases without merit would be "*visited with adverse consequences*".³² However, this is a matter where the arbitrator clearly failed in his duties and therefore it was a matter that needed to be brought on review.

[64] Even though ultimately I find that the Third Respondent was not dismissed but had resigned, he did have an award in his favour which he was within his rights to defend, despite his referral to the Bargaining Council being frivolous and vexatious from the onset, and therefore, in light of *Zungu v Premier of the province of Kwa-Zulu Natal*³³, in consideration of the law and fairness, I exercise my discretion to not make any order as to costs.

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

Order

1. The arbitration award issued by the First Respondent under the auspices of the Second Respondent is hereby reviewed and set aside and is substituted with the following:

"The referral is dismissed due to lack of jurisdiction."

³² See: *Mashishi v Mdladla and Others* (2018) 39 ILJ 1607 (LC); *Kabe v Nedbank Ltd* (2018) 39 ILJ 1760 (LC); *Sepheka v Du Point Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC) and in particular *Ntombela and 49 Others v United National Transport Union And Others* (2019) 40 ILJ 874 (LC).

³³ (2018) 39 ILJ 523 (CC).

2. There is no order as to costs.



A. Ramdaw
Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Advocate J.L. Basson
Instructed by: The State Attorney, Pretoria

For the First Respondent: Advocate Munotsiwa
Instructed by: Snail Attorneys @ Law Incorporated

LABOUR COURT