

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3831/2003

In the matter between:

M.G. PHENITHI

Applicant

and

THE MINISTER OF EDUCATION

First Respondent

MEMBER OF THE EXECUTIVE
COUNCIL FOR EDUCATION IN THE
PROVINCIAL GOVERNMENT OF THE
FREE STATE

Second Respondent

THE HEAD OF DEPARTMENT OF
EDUCATION IN THE PROVINCIAL
GOVERNMENT OF THE FREE STATE

Third Respondent

CORAM: **EBRAHIM, J**

HEARD ON: **6 MAY 2004**

DELIVERED ON: **5 AUGUST 2004**

[1] This judgment deals with the constitutional review of a deeming provision in the Employment of Educators' Act (Act no 76 of 1998). The applicant seeks to review a decision taken by the respondents to dismiss her from its employ. The principal contention underpinning the applicant's case is that the legislative provisions in the Act in terms of which the dismissal was effected

is constitutionally invalid in that it offends her right to fair labour practice and lawful and fair administrative action. In the Notice of Motion the applicant claims the following relief:

1.1 That the decision of the respondents to dismiss the applicant be set aside and declared an unfair labour practice and unconstitutional;

1.2 That the provisions of Section 14(1)(a) read with 14(1)(d) and 14(2) of the Employment of Educator's Act, Act no 76 of 1998 be declared unconstitutional and invalid;

1.3 That the respondents be ordered to pay the costs of this application only on opposition jointly and severally, the one paying the other to be absolved;

1.4 Further and/or alternative relief.

[2] The background to this application is the following:

2.1 The applicant was employed by first respondent as an educator and as of the date of her dismissal on 31 July 2000 she had been in the first respondent's employ for a period of 15 years;

2.2 She alleges that she was admitted to hospital on 16 February 2000 on account of illness the nature of which is not apparent from the papers. She was discharged in April 2000. She submitted medical certificates and leave forms to the school principal for the entire period of her absence. Between 19 May 2000 and 5 June 2000 the applicant again absented herself from duty due to illness. Once again allegations are made in the founding papers that medical certificates were provided to the authorities. On 6 June 2000 the applicant alleges her son died, she obtained permission from the school principal for leave to attend the funeral, which was granted. Shortly after the burial the applicant alleges she fell ill again and was again booked off duty by her doctor until 21 June

2000. The school holidays followed and she returned to school only once school re-opened. At that point she was informed by the principal that her services had been terminated due to her absence from work for a period of more than 14 consecutive days in terms of Section 14(1)(a) of the Employment of Educator's Act;

2.3 On 20 June 2000 a letter was addressed to the applicant by the school principal Mr Ramakau. This letter forms Annexure "AP1" to the papers, the contents of which read as follows:

"RE: ALLEGED MISCONDUCT

You, Mpho Phenethi: Employed by the Department of Education therefore an educator as defined in section 1(v) of the employment of educator act, 1998, act no. 76 of 1998, hereafter referred to as the act, are hereby in terms of section 19(1) of the act, charged with the following misconduct: In that you are guilty of misconduct in terms of section 17(1) of the act in that on 16 February to 25 April 2000 and on 01 June 2000 till now at Nkgodise Primary School, you were negligent or indolent in carrying out of duties when you did not attend to your class Grade 3B.

You are hereby requested in terms of section 19(2) of the act; to send or deliver a written admission or denial of the above-mentioned charges, with which you are charged; within seven (7) days after receiving this charge sheet. Such admission or denial and or representation is to be made to: The Principal address as above.

Your attention is drawn to the provisions of section 19(5) and 21(1) of the act."

2.4 Thereafter on 21 July 2000 Ramakau addressed a further letter to the applicant. The applicant acknowledged receipt of this letter on the same day i.e. 21 July 2000. This letter appears at Annexure "AP2" of the papers:

"ALLEGED ABSCONDMENT

It has come to the attention of the Department that you have not reported for duty at Nkgodise Primary School since 19 May 2000 up to date.

If you do not report to school on or before Wednesday 26/07/2000, your services will be terminated on the basis of abscondment (absenting yourself from duty without the permission from the employer.)

Yours sincerely."

The applicant refused to acknowledge receipt of

Annexure "AP2" and this resulted in a letter dated

27 July 2000 (Annexure “AP3”) being written by the school principal to the school management developer to that effect.

A third letter was finally sent to the applicant, Annexure “AP6” dated 31 July 2000 which was a letter terminating her services in terms of section 14(1)(a) of the Employment of Educators’ Act. That letter reads as follows:

“TERMINATION OF SERVICE

In terms of section 14(1)(a) of the Employment of Educators Act, 1998 (No. 76 of 1998) you are deemed to have been discharged from service on account of misconduct from 19 May 2000, for being absent from work for a period exceeding fourteen (14) consecutive days without the consent of the employer.

Please be advised that if you are not satisfied, you have the right to refer the matter to the Education Labour Relations Council in terms of section 191(1)(a) of the Labour Relations Act, 1995 (No 66 of 1995), within 30 days from the receipt of this letter. The address of the Labour Relations Council is as follows:

ELRC
Private Bag X126
CENTURION
0046

Yours sincerely”

The first two letters were addressed to the applicant at her address at 17118 Bloemanda, Bloemfontein whereas Annexure “AP6” the letter of termination was

handed to her when she arrived at the school.

2.4 The respondents dispute that the applicant furnished any medical certificates for the periods of her absence nor did she furnish any leave forms according to them. According to the applicant she was summarily dismissed on 31 July 2000 despite the fact that she had furnished medical certificates to the principal which reflected that she had been ill for the period of the absence. On receipt of the letter dated 31 July 2000 she did refer the matter to the Education Labour Relations Council for Conciliation which failed. She then referred the matter for arbitration to the CCMA. The arbitrator ruled that the dismissal had occurred *ex lege*, that is by operation of law and accordingly he had no jurisdiction to have the dismissal set aside.

2.5 The applicant then applied to the Constitutional Court for direct access which was refused. As a result she approaches this Court for final relief.

2.6 There are disputes of fact on the papers in regard to two matters. Firstly, in regard to the reasons for her absence from school and secondly, in regard to whether or not she was given an opportunity to make representations. She alleges that she was not given an opportunity to make representations prior to being dismissed. The respondent alleges that the applicant was given an opportunity to make representations and that this happened at a stage when the matter was already in the Constitutional Court but before judgment was given by that Court. The applicant refused to avail herself of the opportunity, even after she was notified that the Constitutional Court had refused to entertain her application. Despite being invited to make representations at that stage, she directly launched the present application.

[3] I deal first with the constitutional issues raised by the applicant. section 14(1)(a) read with section 14(1)(d) and section 14(2) of the Employment of Educators' Act reads as follows:

“14(1) An educator appointed in a permanent capacity who –
 (a) is absent from work for a period exceeding 14

consecutive days without permission of the employer;

(b)

(c)

(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position,

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where –

(i)

(ii)

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine."

[4] The applicant contends that the fact that she was given no hearing prior to her dismissal offends the *audi alteram* principle. The provisions of section 14(1) and 14(2) give the employer a

discretion in each case whether or not to hold a hearing. Under section 14(1) the words “unless the employer directs otherwise” and under section 14(2) the words “on good cause shown” underpins this discretion. The fact that the employer chooses not to avail himself of the discretion in favour of the employee cannot be used to impute the statute with constitutional invalidity. The statute itself makes provision for the rights of the employee to be respected by way of the exercise of a discretion. The question then becomes whether or not the employer exercised that discretion in a manner that is unconstitutional. Whether the exercise of the discretion is obligatory or not, in my view does not alter the position that the statute does not blatantly ignore the right of the employee to be heard. Where the exercise of a discretion has implications to the rights of the employee, it is in any event difficult to regard the exercise of that discretion as optional. For present purposes whatever the nature of the discretion to be exercised is not necessary to decide. Suffice to say that the discretion does not flagrantly disregard the rights of the employee to fair labour practice and to justifiable administrative action.

4.2 On behalf of the applicant Mr Khang has argued that the very fact that the employer is vested with a discretion in terms of the statute promotes discrimination and arbitrariness as it is entirely

dependent on the whim of the employer as to which employee is given a hearing and which is not, and that therein lies the demon. In order for the statute to promote the rights to fair labour practice and just administrative action, he argues that it needs to be couched in peremptory terms such as to allow an employee faced with the possibility of dismissal, to be given a hearing in each and every case. He argues that there ought to be no question of a choice being exercised by the employer.

4.3 While the statute may promote selectivity, in my view it cannot for that reason alone be struck down as being unconstitutional as ignoring the rights to fair labour practice and administrative justice. It may be that in the circumstances of the particular case the exercise of the discretion on the part of the employer not to grant a hearing amounts to an unfair labour practice or unjust administrative action, but that would only be an incorrect exercise of the discretion afforded the employer in terms of the statute. It does not in my view taint the constitutional validity of the statute itself. In this regard also it must be remembered that in the present case competing considerations, namely that of the learner and that of the educator, must of necessity play an important role in the employer's mind when exercising the discretion.

[5] I turn now to consider whether the choice exercised by the employer in the present case infringed the applicant's rights to fair administrative action and fair labour practice.

5.1 It was argued by the respondents' counsel that it is for the employee to make such representations as he/she wishes to make and not for the employer to invite representations. He argued that the applicant had been advised that she could make representations to the Education Labour Relations Council in terms of the Labour Relations Act 66 of 1995, but that she had declined to do so. It is not clear why the applicant was not invited to make representations immediately before she was dismissed, that is before the letter dated 31 July 2000 was handed to her, especially in light of the fact that her address was known to the respondents. The respondents have argued that by very reason of her lack of response to earlier correspondence and her refusal to acknowledge receipt of the letter of misconduct dated 21 July 2000 (that is Annexure "AP2" to the papers) there was no point in assuming that any further invitation by the respondents would not be met with the same blatant

disregard. Under these circumstances, it was argued, the respondents could not be criticised for assuming that the applicant was not interested in resuming duties and that she had deserted her post. The respondents also deny receiving any medical certificates and according to them were completely in the dark as to the applicant's condition.

5.2 Whether the respondent exercised the discretion vested in him in terms of section 14(1)(a) of the Act incorrectly must be decided on the basis of the facts of this particular case as found to be proved. This requires an analysis of the To establish the probability of the case. In doing so, even if I assume in favour of the applicant that she submitted all medical certificates and leave forms which she was required to submit, it does not alter the fact that she was informed that her absence was being viewed as misconduct (Annexure "AP1"). It was common cause that she had received Annexure "AP1" the letter dated 20 June 2000, but had ignored it. She made no attempt to contact the authorities nor did she make any attempts to write any representations informing them of the circumstances of her particular case and why she was not able to attend her post. It was also not disputed that a month later the respondents had addressed another letter warning the applicant that she had not reported for duties since 19 May 2000, that she was at risk of having her services terminated and placing her on terms to report within 5 days of that letter (Annexure "AP2"). The applicant refused to acknowledge receipt of this letter but accepted a copy thereof as appears clearly from the letter annexed as Annexure "AP3" to the papers written by the school principal.

5.3 I reject as entirely improbable the applicant's evidence that she furnished medical certificates to the authorities concerned for the entire period of her absence. There is no mention whatsoever in the founding papers as to why certificates are attached for the period 22 May 2000 to 5 June 2000 and for 19 June 2000 to 21 June 2000 only and why no mention whatsoever is made as to why certificates for the remainder of the period of her absence are not attached. In fact, the impression is created that the applicant is deliberately vague and evasive on this score. Had she in fact been medically treated for the remaining periods of her absence, it would have been a simple matter of annexing those certificates as well. The applicant was well aware that her absence was being viewed by the respondents in a very serious light as implicit in the contents of Annexure "AP2" was the suggestion that if she could not report for duty on 26 July 2000 she ought to inform the respondents of her reasons to avoid dismissal. She chose to ignore this warning and not to make any overtures to the respondents in regard to her reasons for her absence. Had she genuinely not been in a position to attend her duties

due to illness, then the opportunity was there for her to have contacted the respondents either by way of a letter, by telephone or through the medium of a relative or a friend. To my mind the applicant's conduct smacks of a blatant disregard of her responsibilities. Such responsibilities involving as they did, the education of young children must be taken extremely seriously and her absence caused a major disruption in the life of the young learners in her charge. I find that it was in the circumstances quite natural for the respondents to form the belief and the opinion that she had deserted her post and that in the circumstances no further invitation was necessary to the applicant to make representations prior to being dismissed. Moreover, in these circumstances I can find no reason why the 1st respondent should repeat the invitation to make representations, make any further attempt to establish the whereabouts of the applicant or exercise his discretion in terms of section 14(1)(a) in favour of the applicant.

- [6] Substantively, there can be no doubt that desertion is a ground for dismissal. One has to be careful however not to confuse mere absence with desertion, the one does not equal the other. Mere absence is not conclusive evidence of desertion which is absence plus an intention not to return to duty. In the present circumstances I find established on the probabilities, that the applicant deliberately absented herself from duty with the intention not to return and for reasons best known to herself changed her mind thereafter. I am of the view that the applicant deserted her post and I find therefore that her dismissal was substantively fair.
- [7] In considering the issue of procedural fairness I deal with the *audi-* principle as a facet of dismissal in the context of desertion.

Procedurally the question is whether in these circumstances the respondent was required to convene a hearing before deciding to allow the deeming provision to operate. The obligation on an employer to hold a hearing before dismissing an employee for abscondment or desertion has been extensively traversed under the Labour Relations Act 66 of 1995. (Schedule 8 and paragraph 4 of the Code of Good Practice.)

See also **South African Broadcasting Corporation v CCMA & Others** 2001(4) BLLR 449 (LC) at p 454 J.

The correct approach seems to be that where adequate warning is given of the consequences of extended absence without an explanation, the employer is relieved of the obligation to hold a hearing. The real issue is whether adequate warning has been given in that all reasonable efforts have been made to contact the employee. The conclusion I come to in the present case on the present set of circumstances is that proper and adequate warning was in fact given by the first respondent to the applicant and that being so the applicant's dismissal was procedurally fair.

[8] In the result I find that the first respondent exercised the discretion vested in him in terms of section 14(1) of the Employment of Educators' Act No. 76 of 1998 correctly, properly and fairly and I accordingly make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application.

S. EBRAHIM, J

On behalf of Applicant:

Mr M. Khang
instructed by
Mapitse & Khang Attorneys
BLOEMFONTEIN

On behalf of Respondents:

Mr IP Gough
State Attorney
BLOEMFONTEIN

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