

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
HELD IN JOHANNESBURG**

Case no: JA 68/05

**IN THE MATTER BETWEEN:**

**The Head of the Department of Education**

**(Free State Province)**

**Appellant**

And

**South African Democratic**

**Teachers' Union**

**First respondent**

**Sithole, S M**

**Second respondent**

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**Judgment**

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**TLALETSI AJA**

**Introduction**

[1.1] This appeal is against the whole of the judgment of the Labour Court given by **Kruger AJ** in a review application concerning a dispute between Head of the Department of Education: Free State Province, the appellant herein, and the respondents about the fairness of an alleged dismissal of the second respondent ("the educator") who was at all relevant times a member of the South African Democratic Teachers Union ("the first respondent").

[1.2] There is an issue that must be disposed of before the merits of the appeal are considered. I discovered that the party that was cited as the appellant in this case was the Member of the Executive Council for Education: Free State Province ("the MEC"). It is common cause that the MEC had not been a party in these proceedings. The dispute has always been between the respondents and the Head of the Department. There had also not been any application for intervention brought by the MEC. This issue was taken up with Counsel for the appellant. He was not aware of this problem and could as a result not provide us with any explanation. The appellant was granted leave to bring an application to regularise the situation.

[1.3] We have since received a substantive application to substitute the MEC with the Head of the Department. In the affidavit supporting the application the appellant attributes the confusion to the office of the State Attorney in that they typed MEC in the position of the Head of the Department. The application for substitution is not opposed. In my view a proper case for substitution has been made and is accordingly granted.

### **FACTUAL BACKGROUND**

[2] The dispute was arbitrated by an arbitrator of the Education Labour Relations Bargaining Council ("the ERLC") which was cited as the first respondent in the Labour Court. In the

award, which was the subject of the review application, the arbitrator found that the educator had been dismissed and that his dismissal was substantively fair. He made no order as to costs.

[3] In the review application the Labour Court held that the award was reviewable and set it aside and ordered that the matter be remitted to the ELRC for arbitration by a different arbitrator. It is against this judgment that the present appeal was noted.

[4] The educator was employed by the appellant in a permanent capacity from 01 January 1998 and was based at Phiritona High School, Hebron, where a certain Mr Mazibuko was headmaster. On 28 January 2002 the educator was attacked, assaulted and sustained injuries. On 30 January 2002 he consulted Dr H R Gani, who diagnosed that he had sustained a fracture on the tenth right rib. He booked him off duty until 05 February 2002. He was to resume duties on 06 February 2002.

[5] On 05 February 2002 the educator consulted Dr J S Mostert for the same injury and the latter booked him off duty until 08 February 2002. He was, therefore, to return to work on 09 February 2002. On 11 February 2002 the educator consulted Dr Van der Merwe with respect to an injury to his right hand. Dr Van der Merwe booked him off sick until Thursday 14 February 2002. However, a copy of the medical report issued by Dr Van der Merwe reflected that he was booked off sick for

one week being from 11<sup>th</sup> to the 18<sup>th</sup> February for the injuries to his right hand. The date of the report, which was handed in as exhibit 'C' in the subsequent arbitration, reflects the date of issue as "11/02/03". Dr Van der Merwe was not called to testify although it was the respondent's initial intention to call him. He was subpoenaed and failed to attend. The appellant tendered no evidence to challenge this piece of evidence. Nothing turns on this aspect in view of the issue to be decided below in this judgment. The above meant that the educator was absent from work for the period 28 January to 18 February 2002. This meant that he was absent from work for more than 14 consecutive days. It is common cause that he had not obtained permission for his absence from work.

- [6] It is not clear from the educator's own version when he returned to work. It was mentioned by his legal representative during his evidence in chief that he reported for duty on 18 February 2002. The educator, however, did not directly confirm this version. During cross examination when he was asked exactly when he had reported for duty again, he only mentioned that sometime during the 'process' of his sick leave he had gone to the school to notify the headmaster that he was on sick leave and was told by the headmaster that he was not going to recognise that leave. He testified that on this occasion, he was also informed that he was no longer required because he had deserted and that the headmaster also refused to accept the medical certificates relating to his absence. He did not, however, mention, despite being asked on more than three occasions by the appellant's

representative and as well as the arbitrator, when he reported for duty. On this aspect, the headmaster testified that the educator only reported for duty on the morning of 09 April 2002 when he complained about the injury on the right hand. He said that he requested the educator to supply him with medical reports and the latter undertook to do so. He said that the educator failed to submit the medical report on the 10<sup>th</sup>, the 11<sup>th</sup> and the 12<sup>th</sup> despite his undertaking to do so nor did he do so later.

[7] On 12 February 2002 the headmaster addressed a letter to the Deputy Director: Department of Education. The body of the letter reads:

**"ABSCONDMENT OF MR. SITHOLE S.M (11228148)"**

*Kindly note that the above-mentioned educator Mr Sithole has not been reporting for duty since this date 28<sup>th</sup> January 2002 to 11<sup>th</sup> February 2002, without permission. Note that his absence has tremendously affected teaching and learning, that is more than 200 learners had n't received tuition for the period he'd been absent. Also note that the said educator was charged with unauthorized absence previously. Therefore as the head of the institution, I strongly move that he should be charged with abscondment, with immediate effect. Hoping you find this in order."*

It is common cause that this letter was written and forwarded during the educator's absence from school. The headmaster testified that the reason why he wrote this letter to the head of the department was that there was no medical report submitted and as such the educator was not on official leave. He testified further, under cross-examination, that he would

have been prepared to ignore his letter had the educator submitted the medical reports. Under cross-examination the headmaster was asked why in the letter he wrote that the educator was absent only on the days reflected. He replied that the dates covered the fourteen days period which was sufficient for a discharge according to the training he received.

[8] On 20 February 2002 the appellant addressed a letter to the educator. The letter read thus:

**“Termination of Service**

*In terms of section 14(1) (a) of the Employment of Educator’s Act 1998 (No 76 of 1998) you are deemed to have been discharged from service on account of misconduct with effect from the 28<sup>th</sup> of January 2002 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 19(1) (a) of the Labour Relations Act 1995(No.66 of 1995), within 30 days from the receipt of this letter. The address is as follows:*

*ELRC*

*Private Bag X 12*

*CENTURION*

*0046*

*Yours sincerely”*

It is common cause that the educator did not receive this letter immediately. According to the educator, which was not

disputed, this letter was only delivered at his home on 12 April 2002. The appellant did not dispute this.

### **Arbitration Proceedings**

- [9] In the arbitration proceedings the main contention on behalf of the educator was that he should be reinstated because during the period of absence he had been on sick leave. It was contended on behalf of the appellant that the effective period of non-attendance was forty one working days, and that the fact that the educator had consulted three different medical doctors was indicative of an ulterior motive on his part and that he should have returned to work immediately after the initial six days period because he was not doing manual work at school. It was finally contended that the 'dismissal' of the educator was fair.
- [10] In the award the arbitrator reasoned that an educator who was absent from work without the consent of his/her employer was deemed to have been discharged from service in terms of section 14(1) (a) of the **Employment of Educators Act 76 of 1998 ("EEA")** at the expiry of 14 consecutive days. He held that for the deeming provision not to come into effect there must be consent from the employer. The arbitrator held further that the subsection imposes an obligation on educators to obtain the consent of the employer before they absent themselves. He finally held that the educator's 'dismissal' was under the circumstances of this case substantively fair.

### **Proceedings in the Labour Court**

[11] In response to the educator's application to have the Labour Court review and set aside the arbitrator's award, the appellant raised a point *in limine* to the effect that the court lacked jurisdiction to determine the dispute because there had been no dismissal in this case as the services of the educator had been terminated by operation of law in terms of section 14(1) (a) of the EEA. The Labour Court found that on the facts before it there was in fact a decision to dismiss and that the arbitrator did not address the fairness of the dismissal on the facts. In support of its conclusion that there had been a dismissal, the court *a quo* said that there had been a delay in terminating the services of the educator, that the headmaster wanted to speak to the educator first before handing the letter from the head of the department to him and, that the letter itself advised the educator to approach the ELRC if not satisfied. The Labour Court, thereafter, issued an order reviewing and setting aside the award and remitting the matter to the ELRC for arbitration by a different arbitrator.

### **The Appeal**

[12] The appellant sought leave to appeal to this court against the judgement of the Labour Court but leave was refused. This Court granted leave to appeal after the appellant had petitioned the Judge President of this Court. The appeal is

opposed. In my view, it is important to determine whether a dismissal occurred in this case. This is a point which was raised by the appellant in the founding affidavit to the review application. The appellant's contention which was not accepted by the Labour Court was to the effect that the court lacked jurisdiction as there was no dismissal. If it is found that there was indeed no dismissal, the disputes relating to the date of dismissal as well as issues related thereto should fall away.

[13] Section 14 provides thus:

**"certain educators deemed to be discharged**

*(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) while the educator is absent from work without permission of the employer, assumes employment in another position;*

*(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or*

*(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) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or*

*(ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.” (My emphasis)*

[14] The arbitrator reasoned, inter alia, that for the deeming provision not come into effect there must be consent by the employer and that it is not enough for an educator to allege, after the expiry of fourteen days that he or she had some valid reason for being absent. The arbitrator concluded that since the educator was physically capable of informing his immediate superior of the reasons for his absence from work, and failed to do so, his ‘dismissal’ was therefore substantively fair.

[15] In my view, the argument that the Labour Court lacked jurisdiction to determine the dispute is not correct. I say this because what the Labour Court had to consider is a review of the award of the arbitrator. It had jurisdiction to do so. It is only the arbitrator that would not have had jurisdiction to determine the dispute if there was indeed no dismissal.

[16] It is clear from the wording of the above provisions that once an educator who is appointed in a permanent capacity is absent from work without the permission of the employer for a period exceeding fourteen consecutive days, s/he “shall, unless the employer directs otherwise, be deemed to have

been discharged from service". The discharge takes place by operation of law. The coming into operation of the deeming provision is not dependent upon any decision. This issue has been considered in decisions such as: ***Ntabeni v MEC for Education, Eastern Cape (2002) (3) SA 103 (TKH); Nkopo v Public Health and Welfare Bargaining Council and Another (2002) 23 ILJ 520 (LC); MEC for Public Works Northern Province v CCMA and others [2003] 10 BLLR 1027 LC; Maidi v MEC Department of Education and Others (2003) 24 ILJ 1552 (LC)*** (These cases have been referred to by the Labour Court in its judgment). The Supreme Court of Appeal was also called upon to consider the provisions of section 14 (1) (a) in ***Phenithi v Minister of Education & Others (2006) 27 ILJ 477 (SCA)***. The Court, in reaffirming the position as stated in ***Minister van Onderwys & Kultuur v Louw 1995 (4) SA 383 (A)*** held inter alia, that the discharge of the educator is not a consequence of a discretionary decision and did not constitute an administrative action. The court further held that the provisions of section 14 (1) (a) were not in conflict with Section 188 of the ***Labour Relations Act 66 of 1995*** and that they are not unconstitutional. (at 486G-I and 487H)

[17] In this case all the jurisdictional requirements for the provisions of section 14 (1) (a) of the EEA to apply were in existence. These were that the educator was absent from duty for a consecutive period exceeding fourteen days without the permission of the employer, and that the employer had not directed otherwise. It was thereafter open to the educator to

approach the employer and request reinstatement in terms of section 14(2) of the EEA provided its requirements are satisfied. This section provides that:

*"(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 determine"*

[18] I now proceed to consider the reasons advanced by the Labour Court to support its conclusion that there was a dismissal. The first reason is that there had been a delay in issuing a letter dated 20 February 2002 to the employee. In my view, this reason is misplaced because for the provisions of section 14 (1) (a) to operate or for the educator to be deemed to have been discharged, it was not necessary for him to be given any letter. That letter was not legally required in order for the provisions of section 14 (1) (a) to become operational. The second reason advanced was that the headmaster testified that he waited so that he could first talk to the educator before he could give him the letter dated 20 February 2002. I am of the opinion that this reason is also misplaced because it is not necessary for the employer to speak to the educator before section 14 (1) (a) could become operational.

[19] The third reason advanced by the Labour Court is that the letter advised the educator to approach the ELRC if aggrieved. I am of the opinion that this reason is not valid. I say this

because by the time that letter was written and later delivered to the educator, the provisions section 14 (1) (a) had long been triggered into operation. Even if the letter had said to the educator he was being dismissed, such dismissal would have been ineffectual in law because by operation of law he would already have been deemed to be discharged from service and an employer cannot dismiss somebody who in terms of section 14 (1) (a) is deemed to have been dismissed already. I note, for what it is worth, that the letter concerned made it clear to the educator that he was deemed to have been discharged: "*...you are deemed to have been discharged from service...*" The finding of the *court a quo* that there was a decision taken to terminate the services of the educator is therefore incorrect. The letter from the appellant did not, in my view, contain any decision to dismiss but was merely the notification of a result which occurred *ex lege*.

[20] It was open to the appellant to have, in the *court a quo*, consented to the order reviewing the award of the arbitrator while at the same time opposing an order that the matter be referred to the bargaining council for arbitration *de novo*, on the basis that the bargaining council lacked the necessary jurisdiction to entertain the dispute. This view was canvassed with the appellant's counsel during the hearing of the appeal and he conceded that this would have been the correct approach. It shall therefore be appropriate to make an order along these lines in this appeal.

[21] What remains is the issue of costs. In my judgement it would accord with the requirements of the law and fairness not to make any order as to costs in this matter.

[22] **In the result I make the following order:**

- 1. The appeal is upheld.**
- 2. No order is made with regard to costs on appeal.**
- 3. The order of the *court a quo* is set aside and replaced with the following one:**
  - (a) The application is granted.**
  - (b) No order is made as to costs.**
  - (c) The award issued by the commissioner in this matter is hereby reviewed and set aside and replaced with the following one:**

**"The applicant's claim for unfair dismissal is dismissed for lack of jurisdiction."**

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**Tlaletsi AJA**

I agree.

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**Zondo JP**

I agree.

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**Waglay JA**

Appearances:

For the appellant: Adv Soni SC

Instructed by: State Attorneys

For the respondent: Adv Van der Riet SC

Instructed by: Cheadle Thompson & Haysom Inc

Date of judgment: 27 September 2007