

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO.: PA6/06

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

Appellant

and

NATASHA GQEBE

Respondent

J U D G M E N T

Khampepe ADJP:

INTRODUCTION

[1] This an appeal against the judgment and order of the Labour Court in terms of which that court set aside the arbitration award issued by the arbitrator in the Education Labour Relations Council.

[2] The Respondent had applied to the Labour Court for an order that the arbitration award be made an order of court in terms of section 158(1) (c) of the Labour Relations Act and also prayed for further and or alternative relief.

[3] Section 158(1)(c) of the LRA confers upon the Labour Court the power to make an arbitration award an order of court. The pivotal issue raised in the appeal relates to whether it was competent for the Labour Court to set aside the arbitration award in circumstances where it was not sought or canvassed by the parties and the arbitrator and the Council as interested parties were not joined as parties to the proceedings before the Labour Court.

FACTUAL BACKGROUND

[4] The respondent to whom I shall refer by her surname, "Gqebe", is a high school teacher at Khutliso Secondary School. She teaches Grade 12 learners. She is employed as such by the appellant. The appellant is the political head and executive head of the department responsible for the acts and omissions of all functionaries employed by the department.

[5] During the year 2000, Gqebe was bitten by a dog and was pursuant thereto unable to perform her teaching functions for almost two academic years. As a result of her prolonged absence, Grade 12 learners were without a teacher for almost the entire academic year in 2002. Ineluctably, her prolonged absence caused substantial prejudice not only to the learners but to the department itself. Not unexpected and quite commendable, the school's governing board lodged a complaint with the authorities against Gqebe's prolonged absent. Following those

complaints, several delegations led by the principal made numerous attempts to ascertain the whereabouts of Gqebe without success.

[6] Section 14 of the Employment of Educators Act 76 of 1998 provides that:

“14. 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.*
- (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 re-instatement 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.*

[7] Following her injury Gqebe submitted leave forms and medical certificates to the school covering the period of her absence from 2000 until 30 October 2002.

[8] During 1-15 November 2002, Gqebe furtively changed the procedure for the submission of her leave forms and medical certificate ostensibly because she was aggrieved by the fact the school principal had caused a letter to be written

and delivered to her in which she was informed that unless reasons were furnished for her absence, her services would be terminated in terms of Section 14 (1) (a) of the Employment Educators Act.

[9] During January 2003 Gqebe was subsequently dismissed in terms of section 14(1) of the relevant Act. The basis of her dismissal was that she had failed to submit leave forms for the period covering November 2002 until the date of her dismissal in January 2003.

[10] She was not satisfied with her dismissal and referred the dispute for arbitration at the Labour Bargaining Council. The arbitrator found her dismissal to have been substantively unfair but procedurally fair. In this regard the arbitrator held that:

“The applicant has been the architect of her own misfortune in this dispute. Up to a point she followed the correct procedure in submitting her sick leave application and the necessary supporting documentation. Thereafter she only submitted leave applications after protracted efforts by Mcuba-he should be commended for the patience he exhibited. On the last occasion the applicant only submitted her forms after receiving the letter of intended termination from the department. The applicant’s actions caused major inconvenience to the ability learners to receive proper preparations for examinations. Further, substitute teachers have also been severely inconvenienced.

The applicant has not demonstrated that she is fit to resume her duties at Khutliso Daniels Secondary School. In response to a question from the arbitration the applicant stated that she is currently still under treatment. She will have to submit documentary evidence to substantiate any claim of fitness to resume duty.”

[11] In the result the arbitrator made an award in terms of which:

11.1 The dismissal of Ms Gqebe was found to be substantially unfair.

11.2 The department was ordered to reinstate her with non-retrospective effect from 1st January 2004.

11.3 The reinstatement was subject to Ms Gqebe submitting medical proof that she is fit to resume her teaching duties. In the event of Ms Gqebe not being fit for duty her services were to be terminated for reasons of medical incapacity.

11.4 Ms Gqebe was to report for duty at Khutliso Daniels Secondary School on 19th January 2004.

Proceedings at the Labour Court

[12] Gqebe launched an application in the Labour Court for an order that the award should be made an order of court in terms of section 158(1) (c) of the Labour Relations Act and for further or alternative relief.

[13] The application was not served on the arbitrator or the Bargaining Council nor were these entities made parties to the proceedings. It is quite evident on the mere reading of the application that the basis, upon which the order was sought, was that the Department had allegedly refused to pay her salary in compliance with the award. The appellant was therefore alleged to have failed to comply with

the terms of the award, and in making it an order of court the respondent would be able to enforce the terms thereof. That application was opposed by the appellant.

Nature of the application

[14] It is common cause that the only order sought by the respondent at the Labour Court was that the award should be made an order of court. In her founding papers Gqebe categorically stated that she was unable to comply with the terms of the order in that she was unable to resume her teaching duties on medical grounds: in support of her alleged medical incapacity, she relied upon the medical report compiled by Dr Ngam which cryptically stated that:

“I Dr Z Ngam feel that she is not fit to go back to work.”

[15] The Labour Court found that as Gqebe was not fit to resume her duties, she had not complied with the terms of the award by the arbitrator. Her application to make the award an order of court was accordingly refused. The findings of the court are in my view cogent and the concomitant order made in this regard cannot be faulted.

[16] Having refused the application before it, the Labour Court proceeded to further find that the arbitrator had exceeded her powers when he gave direction

relating to the process to be followed in the event of the respondent not being able to resume her duties on account of medical incapacity. In this regard it found that:

“The commissioner sought, through the award to create an exit mechanism for the applicant in the event she would not be medically fit. In my mind the commissioner had for a moment lost sight of the fact the applicant as she stood in front of him was no longer an educator and therefore no exit mechanism needed to be created for her. To say in the event of applicant being fit for duty, her services should be terminated for reasons of medical incapacity, was clearly beyond the powers given to the commissioner.”

[17] Following this finding, the Labour Court set aside the award and remitted the matter to the arbitrator for reconsideration. As authority for its powers to grant the aforementioned relief, the court *a quo* placed reliance firstly, on the prayer for alternative relief cited in Gqebe’s notice of motion, secondly, the case of *Mzulwini v Fidelity Cleaning* 2000 (21) ILJ 1382, thirdly, on section 158(i)(a)(iii) of the Act.

[18] Arising from these findings, the pivotal issues for determination in this appeal is whether it was competent for the Labour Court to set aside the award where an application was made in terms of section 158(1)(c). Mr Kroon who appeared on behalf of the appellant submitted that it was impermissible for the Labour Court to do so because there was no prayer for the setting aside of the order and no basis was laid in the applicant’s papers for an order setting aside the award. He further contended that the Labour Court was enjoined to afford the interested parties (namely the arbitrator and the Bargaining Council) an

opportunity to be heard prior to making an order since they were not joined as parties to the proceedings as they should have been.

[19] As correctly argued by Mr Kroon, the reinstatement order was conditional upon Gqebe submitting medical proof that she was fit to resume her duties.

[20] What loomed large at the Labour Court was the interpretation to be accorded to the words “*subject to*” as alluded to in the award. The appellant’s argument at the Labour Court in this regard, was that since Gqebe was not fit to resume her duties, she had not complied with the terms of the award.

[21] The appellant’s argument appears to have prevailed before the Labour Court. That it did is evident from the terms of the order it gave in this regard.

- “1. *The reinstatement of the Applicant was conditional.*
2. *She is the agent upon whom the activation of the condition depends.*
3. *She had to submit a medical certificate as proof of her fitness to ‘resume her duties’.*
4. *She had to report for duty.”*

[22] In my view the findings of the court *a quo* in this regard cannot be faulted. This is so because Qqebe was on her version, still medically unfit to resume her duties and was therefore unable to produce the requisite medical proof of her fitness to resume duties in terms of the award.

[23] Having refused the application, the Labour Court, inexplicably, proceeded to set aside the award.

[24] As stated herein above, Mr Kroon has submitted, quite correctly so in my view, that the setting aside of the award was neither sought nor on Gqebe's own version, arose for consideration at all.

[25] In *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965, referred with approval in *Groenewald NO and Another v Swanepoel* 2002 (6) SA 724 (ECD), the court took a dim view on the practice which is often adopted by judicial officers of relying for their decisions, on matters not canvassed in papers or in argument for their decisions. In *Kauesa* at 973I-974A the court said:

"It would be wrong for judicial officers to rely for their decision on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel."

[26] In granting this relief, the Labour Court relied on Gqebe's prayer in his Notice of Motion for "*such further and/or alternative relief as this court may seem meet*" I hereunder deal in *seriatim* with the submissions made on behalf of the appellant.

Setting aside not sought by Gqebe / Alternative Relief

[27] The principles relating to the granting of alternative or further relief are cogently and authoritatively enunciated in *Queensland Insurance Co Ltd v Banque Commerciale Africaine Co Ltd* (1946 AD 272 at 286) as follows:

“It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English practice. In the Roman Dutch practice, according Van Leeuwen (R.D.L 5.15.8), this prayer (the so-called clause salutare asking for such other relief as the court may deem best for the plaintiff) is of such effect that every right, to which the plaintiff may in anyway be entitled upon the allegations in his claim, is thereby considered to be included in a prayer. See also Voet 2.13.13) and Van der Linden, Jud Pract(2.3.7, Vol 1, p 147). The effect of the prayer for such further or other relief as the nature of of the case might require in the English practice seems to be the same. See Cargil v Bower (10 ch.D.502, at p.508) in which FRY, LJ ..pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternatief relief, anything that is inconsistent with those two things”

See also *Tsosane v Minister of Prisons and Others* 1982 (2) SA 55 (C) at 63, where the court stated:

“Relief may be granted under this prayer where what is sought is not consistent with the substantive relief claimed and where further the basis for such relief has

been laid in the supporting papers and dealt with in the answer of the respondent.”

[28] In *Mgoqi v City of Cape Town and Another* 2006 (4) SA 355 (C), the principles are broadly stated in similar terms. In *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112C-E it was held that:

“Finally, there remains the question of Municipality’s right to an order in the limited form as sought by Mr Barnard on its behalf by way of the prayer for ‘further and/or alternative relief’. Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf Trustees of the Orange River Land and Asbestos Co v King and Others 6 HCG 260 at 296-297. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of ‘further and/or alternative relief.’”

[29] What is crystal clear from the cited authorities is that alternative relief will not be granted where:

29.1 No basis has been laid for such a relief in the supporting papers.

29.2 The order granted is inconsistent with the substantive relief claimed.

[30] It is indubitable that Gqebe’s substantive relief was for the award to be made an order of court. She therefore in her papers only set out in detail the basis for her relief in that regard. In doing so, she inevitably accepted in her papers that the terms of the award were valid. There is no shred of evidence on

the founding papers of Qgebe which seeks to lay a basis for any other relief or the kind that the Labour Court granted. Moreover there was no suggestion what so ever in her papers that the arbitrator had exceeded his powers or acted improperly when making the award.

[31] Furthermore, no allegation was made in the papers that the order was reviewable or bad in law, nor was there any factual basis laid either directly or obliquely in this regard. The Labour Court simply went on a frolic of its own when setting aside the award and by so doing, misdirected itself.

[32] The case of *Mzulwini* relied upon by the Labour Court as authority for the setting aside of the award is inimical to the decision taken by the Labour Court. In that matter, Wallus J only held that if the arbitrator fails to formulate an order properly this could lead to material inconvenience to a party in whose favour the award was made and any application to enforce that award accordingly fell to be dismissed. I am persuaded by Mr Kroon's submission that in this case the Labour Court should have followed the same approach adopted by Wallus J by merely dismissing the application of Ggebe.

Failure to join interested parties to the proceedings

[33] It is settled law that where a person or entity has a direct and substantial interest in the outcome of the proceedings such a person and/or entity should be

joined in the proceedings (*Public Service Association v Department v of Justice* 2004 (2) BLLR 118 (LAC). In review applications, it is necessary to cite the arbitrator and/or CCMA or the relevant Bargaining Council. (Cf *Dlala v Commissioner for CCMA and another* [1999] 7 BLLR 670 (LC) at para [19]; *Johnson v CCMA & Others* [2005] 8 BLLR 796 (LC) at para [6]; *Duda v MEC for Gauteng Department of Education & Others* (2001) 22 ILJ 1637 (LC) at para [23]; *De Beers Consolidated Mines Ltd v CCMA & Others* [2009] 9 BLLR 995 (LAC) at para [15]; see also *Cloete v Evander Gold Mines Ltd* [2001] 4 BLLR 433 (LC) at para [36].

[34] *In casu* the Labour Court should have afforded both the arbitrator and the relevant Bargaining Council an opportunity to make representations on the issue relating to whether the award fell to be set aside or not.

[35] Given that the Labour Court found that the reinstatement of Gqebe was conditional, on that finding alone it ought to have dismissed the application.

[36] In the premises I make the following order:

1. The appeal is upheld.
2. The order of the Labour Court setting aside the award is hereby set aside and is substituted with the following:

“The application is dismissed. There is no order as to costs.”

3. Considerations of law and equity do not permit that the order of costs should be granted. There is therefore no order as to costs.

S S V KHAMPEPE ADJP

I agree:

S PATEL JA

I agree:

P TLATETSI AJA

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STATE ATTORNEY

COUNSEL FOR RESPONDENT

No appearance

INSTRUCTED BY

RANDELL-OSWALD INC

DATE OF JUDGMENT

8 May 2009