

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

Case no: J 2382/10

In the matter between:

WENDY MACHIMANE

Applicant

and

SIMON R MASHANGOANE

First respondent

HELEN FRANZ SPECIAL SCHOOL

Second respondent

DEPT OF EDUCATION,

LIMPOPO PROVINCIAL GOVERNMENT

Third respondent

MEC, DEPT OF EDUCATION,

LIMPOPO PROVINCIAL GOVERNMENT

Fourth respondent

HEAD OF THE DEPARTMENT OF EDUCATION,

LIMPOPO PROVINCIAL GOVERNMENT

Fifth respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

- [1] The applicant is a teacher at the Helen Franz special school in Limpopo, the second respondent in this application. The first respondent is the principal of the school.

- [2] The applicant seeks urgent relief in the following terms:
- 2.1 Condoning applicant's non-compliance with the rules relating to service, filing and dealing with the application on an urgent basis.
 - 2.2 Interdicting and prohibiting first respondent from harassing applicant sexually or in any other manner.
 - 2.3 Declaring unlawful, and/or irregular and setting aside the written warning dated 15 October 2010, issued under the hand of the first respondent.
 - 2.4 Declaring unlawful, and/or irregular and setting aside the written warning dated 22 October 2010, issued under the hand of the first respondent.
 - 2.5 Ordering that a rule nisi be issued calling upon the respondents to show cause, on a date and time to be determined by the registrar, why the interim orders should not be made final.
 - 2.6 Costs of suit on an attorney and own client scale.

BACKGROUND

- [3] The applicant has been employed as an educator at the Helen Franz special school at Bochum in Limpopo since 2000.
- [4] In the course of 2010 a dispute developed between the applicant and the school governing body (SGB) over her accommodation. The SGB resolved that members of staff who were living in the principal's house should vacate the house in order to make way for it to be turned into a guesthouse for visiting parents. The applicant was unwilling to do so.
- [5] As a result of this altercation, the applicant brought an urgent application before Bhoola J on 16 November 2010. The application was not opposed. The court granted an order in the following terms:

"The first respondent [the principal] is interdicted from locking or causing the applicant to be locked out of her accommodation at the Helen Franz special school, to which she is entitled as an implied term of employment."

- [6] At the hearing before Bhoola J, the applicant also sought relief relating to the warnings as set out in subparagraphs 2.3 and 2.4 above. Bhoola J was not satisfied that the applicant had set out the legal framework relating to the discipline of educators. It appears that the applicant's attorney then abandoned those prayers and brought a fresh application in the terms set out above. That application was launched on 26 November 2010.

URGENCY

- [7] The applicant alleges that she has been exposed to sexual harassment by the principal over the last 10 years. The written warnings that she complained of, were issued on 15 and 22 October 2010 respectively. This application was launched more than a month later. Not surprisingly, Mr Zulu, who appears for the respondents, has raised the question why this matter should be heard on an urgent basis.
- [8] Mr Mangena, the applicant's attorney, submits that this application should be seen in the context of the earlier application that served before Bhoola J on 16 November 2010. That application was launched on 12 November 2010.
- [9] The complaint relating to sexual harassment, however, did not form part of the earlier application. A complaint in this regard was addressed to the Head of Department of the Department of Education, Limpopo, (the fifth respondent) for the first time on 5 October 2010. The applicant has waited almost two months to bring this application on an urgent basis; and she says that the conduct complained of dates back over 10 years. The relief sought in subparagraph [2.2] should be struck from the roll for lack of urgency alone. I will nevertheless give the applicant's attorney the benefit of the doubt regarding the reason why the application with regard to the warnings was only launched on 29 November 2010 and I will deal with the merits relating to both elements of the application.

THE MERITS

Sexual harassment

[10] The allegations regarding sexual harassment are vague in the extreme. Although the applicant says that the principal "is notorious for fondling and seductively touching the female staff" and that he has "on numerous occasions made advances towards applicant by suggestively touching [her]" over the last 10 years, she only raised a complaint for the first time on 5 October 2010. That complaint was raised in the context of a more specific complaint relating to her accommodation.

[11] The applicant has not cited any specific incident of sexual harassment by the principal. In his answering affidavit, the principal quite correctly points out that it is therefore difficult for him to deal meaningfully with the generalised allegations. He says that they are in any event without any foundation and points out that it is only after 10 years, when the dispute about accommodation arose, that she raised this allegation. He submits that it is improbable that an educated person such as the applicant, who is "very assertive of her rights", would have waited this long to report that she was being sexually harassed.

[12] In accordance with the rule in *Webster v Mitchell*¹ and on the probabilities I have to accept the principal's version. On the evidence before me, the applicant has not established that she is being sexually harassed. She has therefore not made out a *prima facie* case for the relief sought in subparagraph [2.2].

The warnings

[13] I now turn to the two warnings complained of. The applicant complains that no proper procedure was followed before issuing the warnings; and that they were "unlawful, and/or irregular".

¹ 1948 (1) SA 1186 (W) 1189.

- [14] The principal issued the first written warning on 15 October 2010. The handwritten document barely makes grammatical sense. The only details of the conduct for which the warning is ostensibly issued, is the following:²

“This is a written in terms of the disciplinary process. Should you engage in further misconduct, defiance, insubordination and deformation of character. The written warning may be taken into account in determining more serious sanction.”

It went on to say:

“If you object the warning, you may direct an appeal to [name] within five working days.”

- [15] The final written warning issued on 22 October 2010 was based on the following:

“The nature of the misconduct is, insubordination, defiance and deformation of character.” *[sic]*

- [16] The legal framework for the discipline of educators is set out in Schedule 2 to the Employment of Educators Act.³ I will refer to that schedule as “the code”, as Mr Mangena did.

- [17] Clause 4(1)(a) of the code provides that the functions to deal with misconduct can be delegated to the head of the institution where the educator is employed. In the case before me, that is the principal.

- [18] If the seriousness or extent of the misconduct does not warrant a formal enquiry, the employer must convene a meeting where the educator and, if she so chooses, her trade union representative or another employee who is based at the institution, are present. The employer must give reasons to the educator as to why it is necessary to initiate the disciplinary procedure and the educator or the educator’s representative must be heard on the misconduct and reasons thereof. The employer can only issue a written warning or a final written warning after hearing the educator or her representative. The educator may not appeal against a warning but may lodge an objection in writing.⁴

² Spelling and grammar as in the original.

³ Act 76 of 1998

⁴ Clause 4(6) of the Code.

[19] It is common cause that the principal did not have a meeting with the applicant or her representative before he issued the warnings on 15 and 22 October 2010. He says that the reason is that she refused to go to his office. There is no indication in the warnings themselves that he had made any effort to give her a hearing. The only conclusion I can reach is that the principal did not afford the applicant a hearing in terms of the code or in terms of the *audi alteram partem* principle.

[20] Against this background, I will deal with the requirements for an interim interdict.⁵

Prima facie right

[21] I have already concluded that the applicant has not established a prima facie right with regard to the complaint of sexual harassment. With regard to the warnings, though, I am satisfied that the applicant has established such a right. The principal did not afford her a hearing in terms of the code. Nor did he comply with the *audi alteram partem* principle generally.

[22] But that is not the end of the matter. Once the applicant has crossed this threshold, I must still exercise my discretion whether or not to grant a temporary interdict. In the exercise of this discretion, I must be satisfied that the applicant has proven an actual or well grounded apprehension of irreparable loss if no interdict is granted; and I must have regard to the balance of convenience and be satisfied that the applicant has no other satisfactory remedy.⁶

Apprehension of irreparable harm

[23] The only harm that the applicant is suffering is that there are two warnings on her personnel file. These warnings will lapse six months after they had been issued, i.e. by the end of April 2011. She is still employed and she has an alternative remedy, as will become apparent below. The harm she is suffering is not irreparable.

⁵ As set out in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) 267 A-F

⁶ Prest, *The Law and Practice of Interdicts* 57.

Alternative remedy

[24] Most importantly in the exercise of my discretion, the applicant has an adequate alternative remedy. The warnings that she complained of fall squarely within the definition of an "unfair labour practice", i.e. any unfair act that arises between an employer and an employee involving "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."⁷

[25] The primary remedy is to refer an unfair labour practice dispute to the relevant bargaining council, namely the Education Labour Relations Council (ELRC). Mr Mangena tried to persuade me that the ELRC did not have the power to grant declaratory relief. That is not correct. The arbitrator (or panellist) may make any appropriate arbitration award in terms of the Labour Relations Act, including a declaratory order.⁸

[26] The applicant has not made any effort to pursue her primary remedy in terms of the Labour Relations Act in the period from 22 October 2010 (when a final written warning was issued) until she approached this court on an urgent basis to have the matter heard today, 7 December 2010.

Balance of convenience

[27] I am not satisfied that the prejudice the applicant would suffer if the interdict is not granted, outweighs the prejudice to the respondents if it is. The applicant is at most temporarily inconvenienced until she either pursue her remedies under the LRA or the warnings lapse in April 2011.

[28] A temporary interdict remains a discretionary remedy. I am not persuaded that I should exercise my discretion in the applicant's favour, given the factors set out above.

⁷ LRA s 186(2)(b)

⁸ LRA s 138 (9) (c)

COSTS

[29] Both parties have asked for costs to follow the result. In her application, the applicant went so far as to ask for costs on a punitive scale. Needless to say, as she has been unsuccessful, she is not entitled to any costs. But neither am I inclined to grant costs to the respondents. Firstly, the principal has acted with blatant disregard to his obligations as spelt out in Schedule 2 to the Employment of Educators Act. Secondly, the parties have an ongoing relationship. The applicant is still employed by the school. The relationship, which is already a fraught one, needs to be repaired. In law and fairness, I do not think that a costs order would assist in that process.

ORDER

[30] The application is dismissed. There is no order as to costs.

STEENKAMP J

Date of hearing: 7 December 2010

Date of judgment: 9 December 2010

For the applicants: Mr MN Mangena

Mapotene Neville Mangena attorneys, Polokwane

For the respondent: Adv M Zulu

Instructed by: The State Attorney