



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: JR2987/2010

In the matter between:

MOGOLA MJ

First Applicant

MOGOLA SD

Second Applicant

and

HEAD OF THE DEPARTMENT:

THE DEPARTMENT OF EDUCATION N.O

Respondent

Heard: 16 August 2011

Delivered: 17 November 2011

Summary: Review – decision section 14(2) of the Employment of Educators Act of 1998. Employment of two educators deemed to have been terminated in terms of section 14(1) of the Employment of Educators Act.

JUDGMENT

MOLAHLEHI J

Introduction

1] This is an application in terms of which the applicants seek to review and have

set aside the decision of the respondent in terms of which their employment was terminated. In terminating the employment of the applicants, the respondent invoked the provisions of section 14(1) of the Employment of Educators Act (the EEA).¹ Section 14(1) of the EEA deems an educator who is absent from service for a period exceeding 14 (fourteen) days without authorisation to be discharged from duty.² The application of this subsection is not in issue in this matter. The issue concerns the application of subsection (2) of section 14 of the EEA, which reads as follows:

‘(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.’

2] The applicants further seek condonation for the late filing of their review application.

1 Act 76 of 1998

2 Section 14 (1) of the EEA reads as follows:

“ 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.

Background facts

- 3] The applicants who are husband and wife were prior to their dismissal employed by the Department of Education: Limpopo as educators. The first applicant was prior to his dismissal employed as the deputy manager of Matswidikanye primary school which fell under the Ramokgopa district. The second applicant was prior to her dismissal employed as an educator at the same school.
- 4] At the time of his dismissal the first applicant was acting as the manager of the school, the manager, having taken early retirement. The relationship between the first applicant and some of the teachers at the school, deteriorated soon after taking office as the acting manager. It would appear that some teachers were not happy with the appointment of the first applicant as acting manager and sought to challenge it by writing a letter to the circuit manager.
- 5] The circuit manager from Ramokgopa district intervened in the conflict and attempt resolving it. However, not so long thereafter, the school was transferred to another district, Rakgwadi district. The circuit manager for Rakgwadi district was Mr Phakula.
- 6] On 26 January 2005 Mr Phakula informed the first applicant that he had been approached by a group of people who called themselves community task team which consisted of the school governing body members and members of the community. He informed the first applicant that this group was intent on evicting him as the acting manager of the school. The group apparently informed the circuit manager that they had their own preferred person serve as acting manager.
- 7] On 17 February 2005 the community task team arrived at the school, demanded that the children be released to go home and thereafter convened a meeting at another primary school nearby. Initially the first applicant sought to resist the call but the task team members went around the classrooms telling the learners to go home. The first applicant reported the incident to the circuit manager. The applicant reported for work the following day on 19 February 2005 to find that the school gates were still locked.

- 8] Thereafter the circuit manager convened a meeting with the school governing body, attended also by the first applicant. At that meeting, the first applicant was accused of signing cheques without authorisation, misusing school funds by buying himself a car and appointing his wife as his deputy.
- 9] On 23 February 2005, on his way to report at the district office, the first applicant received a call from the second applicant, informing him that she was also evicted from the school. This incident occurred a few days after the first applicant had addressed a letter to the district office, informing it that he had received a call from someone in the district office informing them that they ought to have returned to their school as early as January 2006.
- 10] During March 2006, the first applicant became aware that the position of the school manager was advertised and the arrangements for the interviews were already underway. He then instructed attorneys to address a letter to the district office raising his concern about the process. The first raised the objection because he believed that there was an understanding with his union that the position of manager would not be advertised pending the finalisation of the conflict.
- 11] On 19 January 2007 the first applicant received a letter from the respondent informing them to report at school on 22 January 2007. The first applicant responded and indicated that he would not be returning to school until his eviction problem was resolved.
- 12] Another letter was addressed to the first applicant, informing her to report to a different school on 22 January 2007. The said school is apparently a walking distance from the one where the applicants had been evicted.
- 13] Towards the middle of the year 2007, the circuit manager convened a meeting which was attended by the applicants and the union representatives, and at the said meeting, the circuit manager pleaded with the school governing body to allow the first applicant to return to the school. It was then agreed that the first applicant would not return to school and that the second applicant will not be transferred to another school. It was also agreed that the two would continue reporting at the circuit office.

14] The first applicant says that his union (PEU), had agreed with the circuit manager that:

14.1 Both the applicants would not be transferred to any school;

14.2 The team should be formed to educate the community about the conditions of employment of educators;

14.3 The consultation process, would be put in place to speed up the process of resolving the problem and to have applicants back at work.

15] In the meantime, Mr Phakula, the circuit inspector with whom the above understanding was reached resigned and was replaced by Ms Sechaba. Soon after the appointment of the new circuit manager, the second applicant was informed that she had been transferred to Munich Primary School which is in the same village as the one from which the second applicant had been evicted from.

16] The first applicant says every 23rd of the month he would sneak in at the school to collect his salary advice and would in this regard speak to the school manager. There were however certain months when the applicants would not receive their salaries. On enquiry from the circuit office they were told it was an administrative error. The problem did not arise for the months May, June and July 2009.

17] The second applicant did not receive her salary in August 2009 and when she enquired from the circuit office she was referred to the human resources manager who informed her that the reason for the non payment of both her salary and that of the first respondent was because they have been absent without valid reasons. In this respect the applicants received a letter dated 5 October 2009 which reads as follows:

‘SUBJECT: DISCHARGE FROM SERVICE ON ACCOUNT OF ABSCONMENT:
YOURSELF

1. The above matter bears reference.

2. You have been absent without valid reasons or permission from the employer for a period exceeding fourteen (14) consecutive days. You are deemed to have to have discharge yourself from the Public Service in terms of Section 14 (1) (a) of the Employment of Educators Act 76 of 1998 (as amended)
3. The termination is with effect from 21st February 2005.
4. If there is any liability arising same will be recovered from your pension benefits.
5. You have the right to show good cause in terms of section 14 (2) of the Employment of Educators Act 76 of 1998 (as amended).'

18] At the time of receiving the letter the applicants were already aware of their dismissal and had in that regard approached their legal insurance for assistance. It would appear that they initially wanted to launch an urgent application but were advised that they had no prospects of succeeding with such cause of action. They then lodged an unfair dismissal dispute with the Education Labour Relation Council (the ELRC).

19] The applicants also made representations to MEC's office, seeking to show good cause for their absence from their workplace. Their representations were unsuccessful and accordingly received letters advising them that their discharges were confirmed. In other words their termination could not be reversed.

20] The applicants referred a dispute to the Education Labour Relations Council (the ELRC). The respondent raised a point in *limine* concerning jurisdiction when the matter came before the ELRC. The ELRC upheld the point and ruled that it did not have jurisdiction as the termination was in terms of the operation of the law. The ruling is dated 6 July 2010.

21] In the present matter the respondent has in defence raised the following grounds:

'5.1 The Applicant has not alleged enough facts to make out a case.

5.2 In launching the application the Applicants have unreasonably delayed and for this reason alone application should be dismissed.

5.3 The Applicants have been discharged from the public service in terms of section 14(1)(a) of the Employment of Educators Act as amended, were given an opportunity to make a representation and on the basis of their representation the Department decided that the Applicants did not show good cause and therefore decided against reinstating.'

Principles governing application for condonation.

22] It is trite in our law that in considering an application for condonation the Court has discretion to exercise. In exercising that discretion the court has to do so upon consideration of a number of well established factors. The factors which the court has to take into account in considering whether or not to grant condonation are: the degree of lateness, the explanation for the delay, the prospects of success, and prejudice.

23] Other basic principle to apply in considering whether to grant or refuse condonation are:

i.the factors mentioned above are not exhaustive and are not to be weighed in isolation of each other.

ii.condonation must be refused where the applicant fails to show prospects of success in the main application.

iii.Condonation must be refused where the applicant fails to provide a reasonable and satisfactory explanation for the delay.

iv.The applicant must bring an

application for condonation as soon as he or she becomes aware of the need to apply for condonation.

24] It is clear from the facts of this case that from the beginning the applicants sought to actively challenge the decision which they believed was an unfair dismissal which needed to be resolved through the Labour Relations Act of 1995. They never abandoned their claim. They were ill-advised by both their union and their attorney. They referred their dispute to the ELRC and as soon as the ruling was made that the ELRC did not have jurisdiction they referred the matter to the court. There may have been some delay between the issuing of the jurisdictional ruling and the referral to the court but such delay is in my view insignificant when weighed against all other factors relating to the consideration of condonation. In any case such delays have been compensated by the strong prospects of success which the applicants have on the merit.

25] Accordingly the condonation for the late filing of the review application is granted.

The application of section 14 (1) and (2) of the EEA

26] It is common cause that in terminating the employment relationship with the applicants the respondent invoked the provisions of Section 14 (1) of the EEA. The employment relationship was thus terminated by the operation of the law.

27] The respondent afforded the applicants the opportunity to make representations in terms of section 14 (2) of the EEA. The respondent rejected the submission made by the applicants and thus upheld the termination of the employment of the applicants which as indicated earlier came into effect by operation of the law. In other words the applicants were deemed to have been discharged for being absent from work without permission of the respondent.

28] It is now trite that termination of employment in terms of section 14(1) of the EEA does not amount to a dismissal as envisaged under section 186 read with

section 191 of the Labour Relations Act (the LRA).³ The issue raised by the respondent in the present case concerns the jurisdiction of this Court to entertain the claim of the applicants under section 14(2) of the EEA.

29] The issue of jurisdiction in relation to the provisions of section 14(2) of the EEA received attention in the Cape Provincial Division in the matter of *De Villiers v Minister of Education and another*.⁴ In that matter the applicant whose employment was terminated in terms of section 14(1) of the EEA applied to be reinstated in terms of section 14(2) of the EEA. The application was declined by the employer and accordingly the applicant launched an application in terms of section 6 of the Promotion of Administrative Justice Act of 2000 (PAJA), for review of that decision. In refusing to entertain the matter Davis J with Allie J concurring, held that the Labour Court had exclusive jurisdiction to determine the matter. The matter was then subsequently brought before the Labour Court under the same citation of *De Villiers V Minister of Education and another*.⁵ In that case, the Labour Court concluded, per Van Nieker J, that in the first instance the Court had jurisdiction to review the decision of the employer in refusing to reinstate an employee in terms of section 14(2) of the EEA as the decision of the employer under that subsection constituted an administrative action. The Court found that the decision not to reinstate the applicant was an administrative action because the discretion not to reinstate the employee arose directly from the exercise of the discretion given to the employer by the statute, namely the EEA.

30] In *Grootboom v NPA and Another*,⁶ this Court aligned itself and quoted with approval what was said in *De Villiers*, when the Court held that:

‘ . . . “refusal by the employer to reinstate the employee in terms of **section 14(2)** of the EEA constituted an administrative action”, and therefore the court was entitled to exercise its review jurisdiction in this regard. In arriving at this conclusion the court acknowledged what the Constitutional Court said in both *Chirwa, supra*, and *Gcaba, supra*, regarding the application of the principles of administrative action in cases involving the State employees.’

³ 66 of 1995.

⁴ [2009] 1 All SA 362 (C).

⁵ [2010] JOL 24964.

⁶ [2010] 9 BLLR 949 (LC)

31] The Court in the *Grootboom* matter further said:

[36] It would however seem that the court in *De Villiers* regarded the provisions of [section 14\(2\)](#) of the EEA as being an exception to the general approach enunciated in *Chirwa, supra*, and *Gcaba, supra*.⁷

32] In this respect it could never have been the intention of the legislature that those employees whose services were terminated under section 14(1) of the EEA should not have a remedy in case they were to report for work after the expiry of the 14 (fourteen) days of absence. In granting the discretion under section 14(2) the legislature recognised that there would be cases where there is legitimate and reasonable explanation for absence from duty and those where there would be none. It is for this reason that the Court is duty bound to intervene where the discretion has not been properly exercised. As Van Niekerk J puts it in *De Villiers*:

‘If this Court were to adopt a ‘hands-off’ approach to its oversight functions over the exercise of a discretion such as that established by [s 14](#) of the EEA, the respondent’s power would effectively be unchecked, and the applicant would be left without a remedy.’

33] In the event the above approach is incorrect, the alternative basis upon which the jurisdiction of the Court in matters involving the provisions of section 14(2) of the EEA can be found is in the provisions of section 158 (1) (h) of the LRA read with the provisions of section 1 of the Constitution.⁷ In this respect the jurisdiction can be founded under the principles of legality.⁸ In supporting the proposition that the jurisdiction of the Court in matter of this nature can be found in the principle of legality, the Court in *De Villiers* (at paragraph [23] held that:

[23] In all of its conduct and at all levels, the state must observe the rule of law and ensure that its actions are clothed with legality. In *Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA* [\[2000\] ZACC 1; 2000 \(2\) SA 674](#) (CC), it was held that the conduct of the President in deciding to bring a law into operation did not constitute administrative action. However, that was not

⁷ In terms of section 1(c) of the Constitution South Africa is founded on the principle of ‘ Supremacy of the constitution and the rule of law.’

⁸ See *DE Villiers* para [37] and the authorities referred thereto.

the end of the enquiry. The conduct of a public official must not be *mala fide* or exercised from ulterior or improper motives. If the official does not apply his mind or exercise his discretion at all, or if he has disregarded the express provisions of a statute, the Court would intervene on review.'

34] The issue that then arises from the conclusion that this Court does have jurisdiction to entertain this matter is whether the respondent in rejecting the applicants submission and upholding the dismissal acted in a manner that is fair, reasonable and justifiable regard being had to the circumstances and the facts of this case. In my view the answer is simply that the respondent failed to apply his mind to the submission made by the applicants and therefore the decision rejecting the submission made by the applicants stands to be reviewed and set aside for being unfair and unreasonable. The decision is unreasonable because it is not one which a reasonable functionary in the position of the respondent could have reached.

35] In the first instance the respondent ought to have been aware of the circumstances and the context that led to the eviction of the applicants from the school. Those facts and the circumstances are fully set out in the applicants' submission which was made after their dismissals.

36] The important facts which when considered cumulatively encapsulate the need for justice to be done to the applicants and which the respondents ignored in exercising his statutory discretion in terms of section 14(2) of the EEA are:

- (a) The applicants were evicted from the school by the parents of the learners. The parents also took the school keys from the first applicant.
- (b) After the eviction attempts were made to resolve the conflict.
- (c) Arrangements were by the respondents that the applicants were to report for work at the circuit office.
- (d) The circuit office failed to put in place proper reporting mechanism for the applicant. The applicants had to write to the new circuit manager pleading with her that there was a need for a proper register for

attendance.

- (e) The agreed process of educating the community about the rights of the applicants as educators seems to have failed because there is no evidence that the parents did agree that the applicants could come back to school. It seems to me that there could be no other understanding that educating the community about the training the community about the rights of the applicants meant informing the community about the right to a fair procedure before termination of their employment including the existence of a fair and valid reason. In the circumstances of this case the right to a fair reason arose as soon as the respondents called upon the applicants to make submission as to why the termination of their employment by operation of the law should be reversed.
- (f) It was not disputed that the transfer of the second applicant to the other school in the same village was discussed with the union and the understanding reached it would seem was that she would not be transferred pending the resolution of the conflict with the community. The possibility of an attack on her by the community that seemed very angry at her could not be ruled out.
- (h) The first applicant regularly sneaked into the school to collect their salary advices. He states in the submissions that he sneaked in because he was scared of being chased or threatened with violence.

37] The need for justice to be done to the applicants must be understood in the context where the respondent in the answering affidavit says:

'Due to the intransigence of the Mailula Community, on 10 August 2005 the District Senior Manager wrote a letter to Phakula as well as SGB informing them of the then Head of Department's decision to dissolve the SGB of the Primary.'

38] It would seem that the dissolution of the School Governing Body did not resolved the conflict as in the words of the deponent to the answering affidavit, Mr Boshielo, the applicants continued to report at the circuit office. It is

apparent that the conflict was not limited to the tension between the applicants and the School Governing Body but also the broader community. The broader community was unhappy with the first respondent because amongst others the parents of the primary school were expected to buy books whereas the same did not apply to the neighbouring high schools. It was for this reason and those listed at paragraph 6 of the answering affidavit that the parents were in the words of Mr Boshielo, '*threatening to take matters into their own hands.*' It is also important to note that the first applicant was never charged with misconduct regarding the allegations which the parents levelled against him and therefore they remained unsubstantiated and could therefore not have formed a basis for consideration under section 14(2) the EEA.

39] It is important to note that the notices of termination dated 5 October 2009, say that the dismissal of the applicants are backdated to the 21 February 2005. This is two days after the applicant were locked out of the school gates. It is also few days after the school keys were taken from the first applicant.

40] On the day the keys were taken from him the applicant had to call the police to intervene. The situation at the school on 22 February 2005 is described by Mr Baloyi, the police officer who intervened as follows:

"On my arrival at the school with other police members, I found a lot of community members in the school yard and were shouting that Mr Mokgola must get out from the school yard. The situation was very bad that it took us 3 to 4 hours to move Mokgola out of the school yard as the gates were locked after I parked the police vehicle in the schoolyard.

After a long time I managed to drive away Mr Mokgola in the police vehicle and his wife was driven from the school premises with her husband's car by the police officer. The two were escorted to their homes and no one was harmed or injured."

41] In addition to the above facts it should be noted that this is not a case in which it can be said that the respondent did not know the whereabouts of the applicants. This fact on its own called for the respondent to use section 14 of the EEA sparingly because its consequences can be devastating to even employees who are absent from work for good and valid reasons. The absence

of the applicants in this instance was understandably due to the unlawful means used by the community to evict them. The respondent failed to protect the applicants' right to work by acceding to the unlawful conduct of the community.

- 42] There is no evidence that the respondent ever took steps to call members of the community to order or for that matter seek the intervention of the state machinery to enforce the rule of law. I therefore do not agree with Mr Moosam, for the respondent that the applicants' claim should amongst others fail because they have failed to show in their papers that they feared for their lives. The facts speak for themselves. The respondent has over a considerable period failed to call the community to order and to ensure the safety of the applicants from the time they were evicted to the time the school keys were illegally taken from the first applicant. There is no evidence that the respondent has placed the community on terms with regard to their unlawful interference with the right to work of the applicants. This suggests that the respondent who had at his disposal the state machinery to enforce the law seems to have also been scared of the community.
- 43] I accept that the applicants may be criticized for refusing to report back to the schools they were respectively advised to report to. However in my view a reasonable and fair minded decision maker in the position of the respondent would in considering the submission made by the applicants in terms of section 14 (2) have taken into account the facts and circumstances of this matter and could in applying his or her mind appreciated that fairness dictated that termination of the employment of the applicants ought to be reversed. Other steps and measures could have been taken thereafter if the applicants persisted with their position.
- 44] In fact had the respondent applied his mind properly to the facts he ought to have realised that the conditions precedent to evoking the provisions of section 14(1) of the EEA were not present and therefore the provisions of that subsection were improperly evoked. From the about the 22 February 2005, the applicants did not report for duty at the school with the arrangement (permission) of the respondent. The applicants could not be said to be absent

from work without permission when arrangement were made after their eviction for them to report at the circuit office. At best it seems to me that the applicants may have failed to obey an instruction, whether that would have been reasonable and or lawful is not a matter for determination by this Court at this stage.

Conclusion

45] In conclusion I find that the Labour Court does have jurisdiction to intervene where in the application of the provisions section 14(2) of the EEA the functionary fails to properly and fairly apply his or her discretion in determining whether or not the deemed discharge of an educator under sub-section (1) of section 14 should be reversed. As concerning the merits of the matter I find that the applicants have made out a case warranting the intervention by the Court.

46] And finally as concerning costs, I see no reason in law and fairness why costs should not follow the results.

Order

47] In the premises the following order is made:

47.1 The decision of the respondent made in terms of section 14(2) of the Employment of Educators Act of 1998 is reviewed and set aside.

47.2 The applicants are reinstated with immediate effect in their employment on the same terms and conditions as those which governed their employment immediately prior to their deemed discharge in terms of section 14(1) of the Employment of Educators Act of 1998, save for the exclusion of the acting school manager position which the first applicant occupied prior to the discharge.

47.3 The respondent is to pay the costs of the proceedings.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. N. Rali-Ralikhuvhana instructed by LLR Attorneys

For the respondent: Adv. Moosam instructed by State Attorney