



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2039/10

In the matter between:

JOHN ROENING MONDLANE

Applicant

and

THE MEC: MPUMALANGA DEPARTMENT

OF EDUCATION

Respondent

Heard: 19 January 2012

Delivered: 19 September 2012

Summary: Lawfulness of suspension of remuneration- section 14 Employment of Educators Act.

JUDGMENT

VATALIDIS AJ

- [1] This is an application arising in terms of section 14(1)(a) of the Employment of Educators Act 75 of 1998 (“the Educators Act”).

Background

- [2] The applicant seeks an order declaring that the suspension of his remuneration in terms of section 14(1)(a) of the Educators Act is unlawful; that he be reinstated to a position commensurate with his experience, taking into account certain medical recommendations and that he be awarded back-pay proportional from the date on which his remuneration and benefits were suspended.
- [3] The state attorney, acting on behalf of the respondent, filed its answering affidavit in this matter on 30 November 2011, more than one year after the applicant filed its notice of motion and founding affidavit. The respondent's answering affidavit was not accompanied by an application for condonation.
- [4] On 13 December 2011, the applicant filed a supplementary notice of motion seeking an order striking out certain paragraphs in the respondent's answering affidavit.
- [5] The applicant in an affidavit accompanying the supplementary notice of motion raised the point *in limine* that the respondent's answering affidavit had been filed outside of the time periods contemplated in the rules of this court and had not been accompanied by an application for condonation.

- [6] The parties appeared before this court on 13 December 2011. On that date, the state attorney sought a postponement in order to afford the respondent an opportunity to file an application for condonation for the late filing of its answering affidavit. The respondent tendered the costs of that postponement. This court agreed to postpone the matter until 19 January 2012, to afford the respondent an opportunity to apply for condonation for the late filing of its answering affidavit.
- [7] On 19 January 2012, the parties again appeared before this court. The respondent had failed to file an application for condonation for the late filing of its answering affidavit. Consequently, the matter proceeded on an unopposed basis.
- [8] The applicant, a teacher for almost thirty years, is employed as a secondary school teacher.
- [9] On 17 July 2006, while teaching at the Khumbula High School, the applicant was accused by learners at that school of witchcraft and of killing two learners at the school. According to the applicant, his life was threatened and the school principle advised him to leave the premises immediately for his own safety. The incident was reported by the applicant to the South African Police Services as well as his supervisors at the respondent.
- [10] In an undated letter addressed by the applicant to the respondent and which appears on page 18 of the bundle, the applicant expresses the concern in the manner in which the respondent's regional head is dealing with the matter. The applicant indicates a willingness to serve the respondent but advised that he feared returning to the Khumbula High School.
- [11] In a further letter addressed by the applicant to the respondent's head of department dated 6 August 2007, which appears on page 19 of the bundle, the applicant requests that he be released from the school level and be placed at a departmental level. It is evident from this letter that the matter remained unresolved more than a year after the incident at the Khumbula High School.

- [12] The respondent, through the office of the circuit manager, addressed a letter dated 11 October 2006 to the applicant, a copy of which appears on page 24 of the bundle. In this letter the circuit manager acknowledges having reported the applicant's state of health to the regional office. The letter calls upon the applicant to submit leave forms together with a doctor's letter.
- [13] On 20 October 2006 the circuit manager addressed a further letter to the applicant, which appears on page 25 of the bundle. According to this letter, on 13 October 2006, two days after requesting that the applicant complete leave forms and provide a doctor's letter, the circuit manager was instructed to remove the applicant from the circuit office, failing which the circuit manager was to notify the police in order to have the applicant removed from the circuit office.
- [14] In a letter dated 23 October 2006 addressed by MC Mabunda Attorneys to the respondent, which appears on page 22 of the bundle, it appears that the respondent instructed the applicant to return to the Khumbula High School. In this letter the applicant records that it would be unfair for him to return to the school. The applicant's attorneys at the time requested that the applicant be redeployed to any departmental post instead of returning to the Khumbula High School.
- [15] The applicant also appears to have completed an application form for temporary incapacity leave. This application form has also been completed by the medical practitioner treating the applicant. In the medical practitioner's portion of the report, the medical practitioner recommends that the applicant can do anything 'except teaching at some schools'.
- [16] The applicant has furnished this Court with a number of medical reports and statements from doctors in respect of the period August 2006 to May 2010. In the report of TA Ginindza (clinical psychologist) ("Ginindza") dated 9 May 2007, the recommendation is made that the applicant is not psychologically fit to resume work. In the absence of an immediate solution to the problem, the report

recommends that the applicant be placed on light duty where his physical wellbeing would not be threatened. A further report by Ginindza dated 10 May 2007 confirms that the applicant is not 100% fit to return to a class room situation.

- [17] In a progress report compiled by the Department of Health and Social Services Rob Ferreira Hospital dated 28 May 2008, a clinical psychologist notes that not much has been done by the respondent to progress the applicant's matter. The clinical psychologist recommends that the respondent convene a formal meeting with the applicant and that one person should be assigned by the respondent to deal with the applicant's concerns.
- [18] According to the applicant, after being instructed not to report to the circuit office the applicant embarked upon several courses of action to remedy his situation including referring an unfair labour practice to the Education Labour Relations Council under case number PSES327/05-06MP and referring an unfair dismissal dispute to this Court in June 2008 under case number JS360/08.

Educators Act (the "EEA")

- [19] In his capacity as an educator at a public school, the applicant is subject to the EEA¹. Section 14 of the EEA states that–

‘(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

¹ 76 of 1998.

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 post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.'

[20] It is trite law² that this Court has jurisdiction to entertain matters involving section 14 of the EEA and 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.

[21] Having regard to the evidence placed before this Court, it would appear that following the incident at the Khumbula High School on 17 July 2006, the applicant, with the consent of the respondent, reported to the respondent's circuit

² *Mogola and Another v Head of the Department: The Department of Education NO* [2012] 6 BLLR 584 para [28] (LC).
³ 66 of 1995.

office until the period 13October2006, when the applicant was removed from the circuit office by the respondent. Having removed the applicant from the circuit office, the respondent addressed a letter to the applicant dated 20 October 2006 informing him that if he did not leave the circuit office, policemen would be informed to have him removed. Although it is not clear from the applicant's papers when the applicant's remuneration was frozen, it would appear that the applicant's remuneration was frozen around the time he was removed from the circuit office on 13 October 2006.

- [22] According to the evidence before me, several medical certificates and reports relating to the applicant's medical conditions had been placed before the respondent. According to these certificates and reports, the applicant is in essence not medically fit to return to a class room environment.

Conclusion

- [23] Although the applicant has not reported for work since 13 October 2006, after having been ordered to leave the circuit office by the circuit manager, the respondent has continued to engage with the applicant as an employee as recently as May 2010. It is apparent to this Court that notwithstanding the provisions of section14(1) of the EEA, the respondent has not dismissed the applicant in terms of section14(1) of the EEA but has frozen the applicant's remuneration, presumably as a result of the applicant having failed to return to the Khumbula High School, despite the medical evidence placed before the respondent that the applicant is not medically in a position to return to the Khumbula High School.
- [24] Had the respondent properly applied its mind to the medical certificates and reports placed before it, it ought to have realised that it would not have been appropriate to compel the applicant to return to the Khumbula High School. As such, the respondent's decision to suspend the applicant's remuneration was not appropriate in the circumstances.

[25] It is also apparent to this Court that the applicant has made several efforts to resolve the situation with the respondent and that his efforts have all been fruitless

[26] The applicant's situation is clearly untenable and this Court is alarmed at the respondent's inability to resolve the applicant's situation which arose in 2006. The respondent's failure to appear before this Court to explain its conduct is a further indictment on the respondent.

Order

[27] Accordingly, the following order is made:

- 27.1 the respondent is ordered to immediately uplift the suspension of the applicant's remuneration and benefits;
- 27.2 the respondent is ordered to pay the applicant the remuneration and the value of the benefits the applicant would have received had his remuneration not been suspended by the respondent together with interest thereon;
- 27.3 the respondent is ordered to appoint the applicant to a position within the respondent which is commensurate with his experience, taken into account the medical certificates and reports already placed before the respondent by the applicant; and
- 27.4 the respondent is to pay the costs of these proceedings.

Vatalidis AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: W P Meintjes of Billy Meintjes Attorneys

FOR THE RESPONDENT: NP Yina

INSTRUCTED BY: The State Attorney (Pretoria)