REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA

IN JOHANNESBURG

JUDGMENT

Case No: JS 196/2010

In the matter between:

NOMSA CECILIA MOTAUNG	**Applicant**
and	
DEPARTMENT OF EDUCATION	**First Respondent**
D HINDLE	**Second Respondent**
MOLAPO QHOBELA	**Third Respondent**
CHIKA SEHOOLE	**Fourth Respondent**

Heard: **28 - 30 November 2011**

Delivered: **15 October 2012**

Summary: (Unfair discrimination based on obeying dictates of conscience in relation to the performance of duties concerning instructions which might have entailed flouting a regulatory framework)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Ms N Motaung, who has held the position of Director: Private Higher Education in the employment of the respondent, the Department of Education since 1999. She claims that since 2006, she was subjected to unfair discrimination for her refusal to succumb to pressure from Dr M Qhobela to pay selective or alternatively no attention to the regulatory framework governing the private higher education institutions. She believed that she was being asked not to comply with legal obligations imposed on her, and thereby would have been guilty of misconduct in terms of the Public Service Act, Proc 103 of 1994 ('the PSA'), read with Annexure A of chapter 7 of the Senior Management Service Handbook ('the SMS Handbook'). This would have amounted to misconduct. Unlike most of the disputes about the performance of an employee's duties which come before this court, this case has the unusual distinction that it concerns an employee who claims to have been prejudiced on account of her diligence and conscientiousness.

[2] The main prejudicial treatment she claims to have suffered for obeying the dictates of her conscience about what she could or could not lawfully do was the following:

2.1 The assignment of her functions to her supervisor, Qhobela, and thereafter to his successor, Prof C Sehoole, the fourth respondent during the period 2006 to 2010, which she claims was an unlawful divestiture of her functions in terms of section 32 (1) of the public service act, 1994 read with paragraph C. 1 and C. 2. of part one of chapter 4 of the public service regulations, 2001.

2.2 Her performance for the 2008/2009 financial year was assessed as unsatisfactory, owing to the fact that her supervisor at the time, Sehoole, could not give a rating of her performance as a result of her being divested of her responsibilities resulting from the reassignment.

2.3 The applicant was further denied a notch increase on the basis of the unsatisfactory performance assessment.

2.4 The department never finalised a performance agreement with her for the 2009/2010 financial year, which prevented her from fulfilling her legal obligations in terms of paragraph A of part III of chapter 4 of the regulations and paragraph 8.1 of chapter 4 of the SMS Handbook, apart from being a breach of the employers obligation to conclude such an agreement.

[3] Motaung also claimed to have suffered other forms of prejudice relating to:

3.1 unexplained variations in her PAYE tax rate;

3.2 unexplained deductions for medical aid between January and May 2008;

3.3 the failure of the Department to appoint someone to the position of secretary for the directorate;

3.4 the failure of the director general at the time, Mr D Hindle, to respond to her complaints about a competency assessment test in September 2008;

3.5 the Director-General's failure to respond to her complaints about psychological harassment she was suffering at the hands of Qhobela in October 2008;

3.6 Qhobela's exclusion of her from discussions and meetings on the review of Regulations for the Registration of Private Higher Education Institutions, and

3.7 Sehoole's unilateral variation of a previously agreed upon short list of candidates to be interviewed for the post of administration officer for the Directorate: Private Higher Education.

[4] Prior to the matter being set down for trial, the parties had followed a tortuous route getting there. I do not intend to set out in detail the various processes and applications preceding the hearing of the matter, but will only mention those that have a direct bearing on the

trial. A substantial part of the saga of events leading up to trial is set out in a useful memorandum prepared for the Judge President by respondent's Counsel, Mr Pio in June 2011.

[5] The first matter relates to the absence of a pre-trial minute signed by both parties. On 2 March 2011, the parties appeared before Basson J to conclude a pre-trial minute. It is clear from the following order issued by her that Basson J understood the parties to have agreed on a pre-trial minute on that date, which both parties would then sign. When the first respondent asked the applicant for a signed copy of the minutes which had been concluded before the judge, the applicant disputed the minute. This prompted Bassson J to make the following order on 4 March 2011:

"IT IS ORDERED THAT:

1. *The applicant has failed to sign the pre-trial minutes as agreed upon between the parties on 02 March 2011. The respondent has signed the pre-trial minutes as agreed upon between the parties.*
2. *The applicant is barred from proceeding with the matter until such time she has explained in writing why she has failed to sign the pre-trial minutes as agreed upon between the parties on 02 March 2011.*
3. *The registrar is directed to place the explanation before a judge in chambers for a decision or directive."*

[6] Before the applicant filed an explanation as directed, she first applied to have her version of the pre-trial minute declared the correct version of what had been agreed before Basson J. To complicate matters further, the applicant also filed an amended statement of claim, to which the first respondent took exception. The exception was argued before myself before the trial proceedings got underway. Perhaps because of the further complications caused by the filing of the amended statement of case, the explanation provided by the applicant for not signing the pre-trial minute was never placed before a judge in chambers for a decision or directive. In consequence, no

decision was ever taken on what should constitute the pre-trial minute which the parties agreed to on to March 2011. However, to some extent that regrettable omission has been overtaken by the application to amend the state of case and SAPO's exception thereto.

[7] Before hearing evidence, two preliminary points had to be dealt with. Firstly, the applicant sought to consolidate another matter, which had been initiated by way of an urgent application under case no: J2466/10, with the trial in this case. Secondly, the first respondent, the Department of Education raised an *in limine* objection on the basis that the applicant's amended statement of claim did not disclose a cause of action. Both applications were dismissed and *ex tempore* rulings were made at the time. For the sake of completeness, they are repeated below. The applicant subsequently appealed against the court's dismissal of the consolidation application.

The application to consolidate case J2466/10 with this matter

[8] On 9 December 2010 the applicant launched an urgent application for further relief. Firstly, she sought a declaration that the reassignment of her functions was an act of unfair discrimination in terms of section 6 (1) of the Employment Equity Act, 55 of 1998 (' the EEA') and that the department's failure to finalise a performance agreement with her for the 2010/2011 financial year was unlawful. Further, she wanted a declaration that certain statements, which were uttered by senior figures in the Department purporting to explain the failure to conclude the agreement, to be unlawful and defamatory. In addition she asked for an order compelling the department to advise her in writing of the reasons why the performance agreement had not been concluded and compelling it to restore to her all her functions and responsibilities. The applicant also requested the court to order the department to furnish her with a written report of the measures it would take to ensure that she would not be prejudiced in the performance assessment be conducted for

that financial year or in the application of pay progression to her. Lastly, she wanted the respondent to be ordered to arrange an inspection of her office and equipment by energy experts to determine if she was being subject to excessive radiation which might have caused her to display symptoms of illness since the beginning of September 2010.

[9] When the matter came before court on the urgent role on 14 December 2011 it was struck off the roll for lack of urgency. Since the merits of the application were not determined, the applicant decided to apply to consolidate that application with these trial proceedings. My ruling on that application is set out below.

> *"The applicant has applied to consolidate an amended application brought under case number J2466/10, together with case number JS196/10. This application arose out of an alleged continued discrimination of the applicant since the establishment of the Department of Higher Education.*
>
> *The respondent did not respond to the amended application, but opposes the consolidation of this matter with the trial proceedings. Since this application was originally dismissed for lack of urgency, the applicant did not refer a dispute to the CCMA about the alleged unfair discrimination by the Department of Higher Education. She also did not set the application down on the ordinary motion roll for determination as an application.*
>
> *I appreciate that the applicant may have been ill-advised in the way she has proceeded with this matter. However, the court's jurisdiction to entertain this dispute with the Department of Higher Education as a matter for trial, is non-existent.*
>
> *In order to determine a dispute of unfair discrimination under the Employment Equity Act 55 of 1998, a dispute must first be referred to conciliation and then referred to this court in*

the form of a statement of claim. Without been referred to conciliation, this court has no jurisdiction to entertain the dispute in terms of section 10 of the Employment Equity Act as a matter for trial.

Accordingly, I have no power to consolidate this matter with the trial proceedings in JS196/10 and the application for consolidation is dismissed. No order is made as to costs."

First respondent's exception to the applicant's amended statement of case

[10] My *ex tempore* decision on the first respondent's exception to the applicant's amended statement of case read as follows:

"a. The applicant in this matter has referred to a claim of unfair discrimination in terms of the employment Equity act 55 of 1998 to this court. The respondent has taken exception to the claim on the basis that it does not disclose a cause of action in one or more respects.

b. The parties had concluded a pre-trial minute[1] and in terms of the pre-trial minute the respondent reserves its right to proceed with an exception to the applicant's claim. The basis of the exception is threefold. Firstly the respondent argues that in order to succeed with the claim of discrimination under the EEA the applicant must allege and prove she's been subjected to differential treatment which it claims she has not done in her statement of claim. Secondly, it argued that the applicant's claim about the basis on which she was unfairly treated is her belief about the proper interpretation of the regulations governing her work. The respondent argues that the applicant's belief about the

[1] At that stage of the proceedings I was under the impression that a pre-trial minute had been finalised, thought in fact, as the outline of matter earlier in the judgment shows this was not the case. It does not alter the legitimacy of the first respondent's challenge since it had excepted to the amended statement of case and the applicant did not further seek to amend her statement of claim, so the exception still had to be determined before trial could commence.

correct application of those regulations is a matter of opinion and is not the type of belief which is protected by the prohibition against unfair discrimination in section 6 (1) of the EEA. Thirdly, the respondent objects to the applicant's claim on the basis that she also refers to it as an unfair labour practice in her statement of claim.

c.The applicant claims that she was denied certain entitlements to performance evaluations and notch increases which would have followed from those evaluations and the conclusion of a performance agreement. The reason she claims she was subject to this treatment she explains as follows in her amended statement of claim:

"... I am now of the firm impression that the events described under 13.1 and 13.2 above are not isolated incidents but elements of a broader campaign of harassment and/or unfair discrimination dating back to at least 2006. As stated under paragraph 14.2, I am of the view that the campaign was unleashed after I questioned an approach propagated by Dr Qhobela, which sought to place pressure on the directorate to pay selective, or no attention, to the regulatory framework for the private provision of higher education. I resisted this approach because I believed that, as a civil servant, I was under a legal obligation to comply with the provisions of the Public Service Act: Annexure A of chapter 7 of the SMS handbook deems an SMS member guilty of misconduct if he or she fails to comply with, or contravenes an act, regulation or legal obligation. I thus view the unlawful reassignment of my functions as Director: Private Higher Education, the rating of my work performance as unsatisfactory in 2008/2009 financial year, the consequent denial of a notch increase in the non-finalisation of my performance agreement for 2009/2010 as unlawful actions affected for no reason other than to subject me to harassment and/or unfair discrimination for my belief and/or the dictates of my conscience that, as a public servant, I am required to comply with the provisions of the public service act. The court should do is find the

said actions as an intentional contravention of section 6 (3) read with six (1) of the Employment Equity Act."

d. In short, the applicant is claiming that because she followed the dictates of her conscience or her belief that she was required to comply with the provisions of the Public Service Act and that she was treated in a variety of prejudicial ways by the respondent, which amounts to unfair discrimination on the grounds of conscience or belief in terms of the EEA.

e.The primary question is whether the interpretation of 'conscience' and, or alternatively, 'belief' in the EEA includes the type of belief or conscientious objection which the applicant claims she was motivated by to refuse to apply the regulatory framework less rigorously as demanded by her employer. The applicant's belief in this case is a belief that the statutory framework governing the performance of the employee's duties must be complied with. On the question of conscience the applicant is saying that her conscience will not permit her to perform her responsibilities in a way that deviates from the requirements of the statutory framework which would amount to an act of misconduct.

f. Both in the EEA and in section 9 (3) of the Constitution of the Republic of South Africa, act 108 of 1996 (' the Constitution') conscience and belief follow closely on the heels of religion in the list of prohibited grounds of discrimination . In the commentary by the authors of Constitutional Law of South Africa, the following is stated in relation to discrimination on the basis of religion, conscience and belief: "protection against discrimination on the basis of religion includes protection of individual and group identification with particular religion as well as practices and beliefs in terms of that religion. Belief and conscience may extend to moral or other value systems part of, or separate from, faith-based systems of religion. Discrimination on the basis of conscience might result where a person is required by law to do something that contradicts their values or ethics."

g. There is regrettably no case authority I was able to find which has dealt with the interpretation of the concepts of conscience or belief in a legal context. Black's Legal Dictionary defines conscience in the following terms: "1.A moral sense of right or wrong especially a moral sense apply to one's own judgement and actions. 2. In law, and the moral rule that requires justice and honest dealings between persons."

h. The shorter Oxford English dictionary identifies one meaning of conscience as: "a moral sense of right or wrong; a sense of responsibility felt for private or public actions, motives, et cetera; the faculty of principle that leads to the approval of right thought or action and condemnation of wrong." It also describes belief: in the following terms: "1. Trust, confidence; faith... 2. Mental acceptance of a statement, fact, doctrine, thing, etc., as true or existing... 3. The thing believed; a proposition or set of propositions held to be true; a religion; an opinion or persuasion."

i. I have some difficulty in identifying a belief in the importance of strict adherence to regulations as being the kind of belief that was intended to be protected by the prohibitions against unfair discrimination. If one is to distinguish between the conscience and belief, it seems that the latter involves some attachment and commitment to the truth of some fundamental proposition or set of propositions, that also entail certain moral precepts, whereas conscience does not seem to necessarily entail adoption of a belief in certain truths, but does entail a deeply held conviction about what is morally right or wrong.

j. I am satisfied that it is possible for the applicant to claim that she was unfairly discriminated against on account of acting according to the dictates of her conscience.

k. The respondent claims that the applicant has failed to demonstrate differential treatment. The respondent is claiming that the applicant has failed to show that she has been treated differently to other employees. I agree that in claims such as *claims for unfair discrimination between men and women in the payment of remuneration, it would be necessary for the applicant to make out a case that mean in the same job grades were paid more than women. In such cases the need to establish the existence of comparators to show the differentiation in treatment is obviously essential to the claim. However where a woman claims to have been subject to sexual harassment, it is not necessary for her to demonstrate that men are not subject to the same harassment in order to succeed with a claim of unfair discrimination. I believe the same principle applies in this instance accordingly, it is not necessary for the applicant to have made out a case that other employees who refused to comply with the regulations because of the dictates of their conscience were not prejudiced in order to make out a claim of unfair discrimination on the basis of conscience.*

l. In the circumstances, the respondent's exception is dismissed. No order is made as to costs."

The regulatory framework governing Private Higher Education Institutions

[1] Before turning to the evidence, it is useful at this point to outline some of features of the regulatory framework governing private higher education institutions.

[2] The overarching legislation governing the functions performed by the applicant directorate is the Higher Education Act, 101 of 1997 (' the HEA'). Amongst other things, chapter 7 of the HEA provides for the registration of private higher education institutions. Section 51 of the HEA prevents any unregistered private body offering higher education. Sections 52 to 64 deal with the registration process and appeals against decisions of the registrar of private higher education institutions. The Director-General is designated as the Registrar in terms of section 50 (1) of the same act. The basic requirements for registration stipulated by the HEA are set out in section 53 of the act, which permits the registrar to register an institution if the registrar has reason to believe that:

2.1 it is financially capable of meeting its obligations to students;

2.2 it will maintain acceptable standards in all the programs it offers;

2.3 it will comply with the strictures of the higher education quality committee, and

2.4 with any other reasonable requirements prescribed by the Minister.

[3] Section 54(1)(c) of the HEA permits the Registrar to register the institution if the requirements of s 53 have been fulfilled.

[4] In terms of section 64 of the HEA an appeal against any decision of the registrar can be made to the Minister. The registration requirements of the Act are supplemented by regulations published by the Minister under Regulation No. R1564 of *Government Gazette No. 24143* dated 13 December 2002. These regulations substantially expand the requirements that must be met by a private institution seeking registration. Amongst other things the regulations also limit the time periods within which fresh applications may be made. For example, regulation 7 provides that:

> *"7. Subsequent application for registration*
>
> *(1) An applicant that has withdrawn an application in terms of regulation 6(1) may submit a subsequent application to the registrar not less than 12 months after the date of withdrawal.*
>
> *(2) An applicant whose-*
>
> *(a) application has been denied other than in terms of regulation 16(6); or*
>
> *(b) provisional registration has lapsed; or*
>
> *(c) registration has been cancelled*
>
> *may submit a subsequent application not less than 36 months after the date of denial, lapsing or cancellation respectively.*

(3) A person whose application has been denied in terms of regulation 16(6) may submit a subsequent application not less than 60 months after the notification of such denial of registration has been issued by the registrar.

(4) Despite (2) a person who has been found guilty of an offence in terms of section 66 of the Act may submit a subsequent application not less than 60 months after paying the fine or serving the term of imprisonment as the case may be.

(5) Regulation 3 applies to the submission of a subsequent application."

[5] Also of relevance to this matter is Regulation 6(1) which provides that:

"An application made in terms of regulations 3, 4 or 5 may be withdrawn by notice in writing to the registrar, but no notice of withdrawal is valid if it is submitted after the registrar has notified the applicant in writing of the result of the application."

[6] Lastly, Regulation16(1)(a) states that:

"16. Determination of an application

(1) The registrar <u>must consider and determine an application for registration</u>-

(a) <u>in accordance with section 54 of the Act and these regulations</u>;

(b) at least six months before the applicant intends to commence operations.

(2) In determining the application of a foreign applicant, the registrar must independently verify the information contemplated in regulation 14(a).

(3) In determining an application, the <u>registrar must consider</u>-

(a) all the information and declarations provided by the applicant and any other relevant information;

(b) the advice of the HEQC on the applicant's application for accreditation;

(c) whether, if registered, the applicant in all its higher education programmes will maintain acceptable standards that are not inferior to standards at a comparable public higher education institution;

(d) whether, if registered, the applicant in all its higher education programmes will comply with the requirements of the HEQC in terms of section 53(1)(b)(ii) of the Act;

<u>(e) whether the applicant has met all other relevant requirements of the Act</u>;

(f) a determination by the Minister relating to the scope and range of operations of institutions in terms of section 3(3) of the Act;

(g) the distinction between a foreign juristic person and a local juristic person in terms of section 54(1)(b) of the Act;

(h) the proposed programmes and qualifications and the respective sites where they are to be offered;

(i) section 54(3) and (4) of the Act concerning provisional registration;

(j) section 60 of the Act concerning conditions attached to registration or provisional registration;

(k) regulation 21 concerning the registration name;

(l) <u>the rights of the general public, the students and the applicant</u>; and

<u>(m) the interests of the higher education system as a whole</u>.

(n) any other requirement prescribed by the Minister in terms of section 53(1)(c) of the Act....”

The evidence

[7] Only the applicant and her current supervisor, Chief Director M Mabizela, gave evidence. Mabizela was initially appointed in an acting capacity from 1 December 2010 and his appointment was made permanent from 1 June 2011. He therefore had no direct knowledge of what transpired between Motaung and her previous supervisors, Qhobela and Sehoole. The salient portions of their testimony are set out below.

[8] Motaung confirmed that Qhobela, the deputy Director-General for higher education, had been her supervisor until 2008, when he was replaced by Sehoole.

[9] In 2002/2003 and 2003/2004 financial years the applicant's performance appraisal rating was 72.9% and 81% respectively, for which she received a notch increase and a cash merit bonus. Those performance assessments were conducted by a former supervisor Director-General T D Mseluku. The next performance appraisal for the 2004/2005 financial year was conducted by Mr D Hindle, who was the acting Director-General. Consequently Motaung also received a notch increase on that occasion.

[10] The first hint of a problem occurred following the performance appraisal for the 2005/2006 financial year. Although her performance was assessed at the rate of 73% she was advised that she did not qualify for a notch increase. It was only when she challenged this decision at ministerial level that it was reversed. Despite her misgivings about that anomaly, in the 2006/2007 financial year she was advised that her "performance has been rated as very good and you have received a 103% performance rating." She also received a notch increase with effect from 01 April 2007 as a result of that evaluation conducted by Hindle. This was repeated in the performance assessment for 2007/2008 in which she received 100% rating and was awarded a notch increase, also by Hindle.

[11] On 2 April 2009, Sehoole gave the applicant and undated letter from the Director-General, Hindle, advising her that her work performance for the 2008/2009 financial year had been rated unsatisfactory and as a result she did not qualify for a notch increase.

[12] The applicant referred to a letter written by Qhobela on 11 December 2006 in which he raised his concerns about the approach she was taking to the work in her directorate. At this juncture, it should be mentioned that the applicant accepted that the function of her directorate was to provide administrative support to the Director-General of the in the performance of his functions as the Registrar of Private Higher Education Institutions. The letter referred to numerous discussions on the issue then state:

"I am sure you will recall that on numerous occasions, I have informed you that the purpose of the work of the directorate to support the Director-General in regulating the provision of private higher education institutions. This task in part involves using positively the enabling legislation and not merely to find fault with each application that is submitted, and therefore find reason not to register the applicant. You are aware that I have returned a significant number of evaluations from your office as a consequence. I have on numerous occasions also indicated that the distance between us and thus with the Director-General, regarding your approach towards the work of the directorate is untenable and could lead to loss of confidence and judgement.

It is against this background that felt it necessary to write to you formally about your attitude towards the evaluation of a number of submissions. As discussed, I noted your report dated 12 October regarding applications for registration for TSIBA Education, FEDISA and the Institute for Advanced Studies. On numerous occasions I have reminded you that you do not make decisions about the registration of institutions. Why he acknowledged this fact, you continue to refuse to evaluate the applications of the above institutions. Please note this letter is an instruction to you to *ensure that the evaluations of the above three institutions reach the Director-General for 15 December 2006, as the department will close on that date."*

[13] The applicant wrote a formal reply to this letter on 14 December 2006. In her reply she expressed surprise that previous meetings had been described as ones concerning her attitude, rather than concerning substantive issues. She disputed the claim that she refused to evaluate the applications of the institutions in question and referred to what she had stated in a previous report dated 12 October 2006 namely:

"1) Registrar of Private Higher Education Institutions declined the initial application for registration as a private higher education institution submitted by Tsiba Education on 27 September 2005. Tsiba Education did not follow due process and submit an appeal. It instead submitted a second application on 22 June 2006, which the Directorate Private Higher Education returned to the institution on 17 July 2006, in accordance with the Regulations. In terms of regulation (2), Tsiba Education can only reapply for registration in 2008. On 16 August 2006, the institution submitted the application under discussion.

This further application for registration submitted by Tsiba Education has as yet not been handled due to lack of clarity on what provisions of the Higher Education Act and the Regulations would apply to its handling. Under consideration must also be how any kind of departure from implementing legislation as it stands should be interpreted against the background of the Public Service Act of 1994 and the Public Services Regulations which lists [a] "failure to comply with, or contravene an act, regulation or legal obligation" by a public servant as an act of misconduct.

2) The Registrar of Private Higher Education Institutions declined the initial application submitted by the Institute of Advanced Studies on 11 October 2005. The institution submitted an appeal which the Directorate duly processed. The institution *then withdrew the appeal and has indicated it wishes to submit an application. The same considerations as applies to the further application submitted by Tsiba Education would apply to a further application by the Institute.*

3) Subsequent to the decline of the appeal lodged by FEDISA CC on 28 March 2006, the HEQC sent the institution and accreditation report granting the institution accreditation for the programs it wished to offer.

Two issues arise, however. The first is the same issue that has been outlined above with respect to the further applications by Tsiba Education and the Institute for Advanced Studies. The second is that, in my own recollection as a member of the Accreditation Committee, the Committee has not approved the accreditation for the program (s) that the institution had applied for. I raised the latter matter with Mr Theo Bhengu of the CHE. He said that he was going to look into the matter.

The feedback obtained by the director from Mr Theo Bhengu is that the HEQC concedes that the Accreditation Committee did not grant the institution accreditation. The minute writer however failed to capture this decision in the committee's minutes; the minute states that the institution was granted accreditation. However, the strategy agreed on in discussion with Ms Mala Singh and Professor Africa was that the accreditation should not be withdrawn, as the institution was already informed in the minutes were adopted."

[14] The applicant agreed that it was the registrar's responsibility to take decisions on applications by private education institutions but she expressed her concern about the issues raised by the applications of the institutions mentioned above. Motaung did not see it as finding fault with the applications in order not to register the applicants, but believed that in order to achieve the transformative intentions of the EEA, the provisions of the Act had to be adhered to. In her letter she recorded that Qhobela had refused to discuss the relevance of

Regulation 7 to the fresh applications for registration made by the institutions referred to.

[15] Despite her misgivings, the applicant accepted that Qhobela, as her line manager, had the prerogative to issue a written directive to her directorate to disregard regulation 7 and, in the case of Tsiba Education, also section 64 of the Act, so that they could proceed to evaluate the application despite those provisions. She said she asked him to do this in order to avoid any confusion in the future about whether or not she had refused to take an instruction. However, Motaung's superiors were not prepared to clarify matters in this way. Under cross-examination, it was put to her that she was not asked to mislead the Director-General by proceeding with the evaluation, but Motaung was adamant that processing the application would have required her to act in a manner inconsistent with the regulatory framework. Mabizela confirmed the department's view that Motaung was entitled to make her comments in the recommendations to the registrar, but should have processed the application and forward it to his predecessor.

[16] In relation to the Tsiba Education application, Mr Pio presented the applicant with two letters from Tsiba Education. The first dated 3 November 2005 indicated that Tsiba Education had applied for registration as a private higher education institution in error in the belief that because it was offering the degree programme of CIDA City Campus it had to register, whereas what was actually required was for CIDA City Campus to amend its own registration so that it could have an additional site for delivery of its degree programme. Accordingly, it requested the department to expunge the previous application made in error. The second letter dated 3 August 2006 was a fresh application for registration of Tsiba Education as a private higher education institution. It records that the Director-General had agreed to sanction the submission of the application before 36 months have elapsed since the last application so that Tsiba could start operating from January 2007.

[17] Mr Pio put to the applicant that the policy of the Department was to apply a 'liberal approach' to the registration of such institutions, as suggested in the letter addressed to her by Qhobela in December 2006. Motaung said she was not aware of such a policy and could only deal with the applications in terms of the framework. It was further suggested to her that even though Tsiba Education's second application, which was made in 2006,was less than three years since the original erroneous application, it ought to have been granted registration in the spirit of encouraging registration of such institutions if proper consideration was given to the erroneous nature of the first application. Motaung said that it could be difficult to do that and added that Qhobela returned almost every submission she sent to him. When it was her turn to cross-examine Mabizela, the latter agreed that the legislation and regulations made no provision for dealing with applications made in error. She further put to him that nothing had prevented Tsiba Education from appealing the decision on the basis of the same error, which he conceded they could have done. She further suggested that it would create an intolerable situation in administering such applications because it was necessary for the people in her department to know how to evaluate an application. If they had to do so using the exercise of their discretion it could make things very difficult and inconsistency would develop. Mabizela persisted, saying that the duty of Motaung's directorate was simply to advise the Director-General as to why the application should be refused or granted.

[18] From the Department's perspective it saw the conflict between Motaung and her superior as simply a difference of opinion about how the Act and regulations should be implemented, and that the applicant should have accepted that this was the case and allowed her superior's opinion as to the proper way to implement the provisions to prevail.

[19] Under cross-examination, Motaung elaborated on the role performed by her directorate in evaluating applications for registration of private higher education institutions. Her directorate would process an

application and evaluated it for its accuracy, whether it met the requirements for registration, and whether the information in the application was correct. Once the pre-requisites were met then the recommendation would be made to grant registration. If the pre-requisites were not met, the directorate would write to the institution to say what needed to be completed. The Registrar would not be involved at this stage. Once the institution had been given an opportunity to correct anything in the first stage then the application would be evaluated, and a recommendation made to the Director-General with all the relevant information attached so that he could make a decision as the registrar whether or not to proceed with the registration.

[20] The recommendation and evaluation took place in terms of the regulatory framework, which had been discussed and agreed on in the Department and which Qhobela had in fact drafted. Motaung said she never refused to process an application. The problem with the three applications in question from the institutions mentioned was that they should never have been tabled as subsequent applications in terms of regulation 7. Under cross-examination, it was put to her that Qhobela was entitled to tell her to continue to evaluate and submit the applications, to which she agreed, save only that because of the problems with the applications she asked that the instruction be in writing. Motaung pointed out that it would be pointless to evaluate an application that would not be approved in terms of the regulations. While Motaung accepted that the registrar had to take the decision, she could not see the purpose of performing an evaluation of an institution that should not to be registered in terms of the act or the regulations. Thus, in the case of Tsiba Education, it could not reapply for registration until 2008 in terms of Regulation 7. The correct procedure in terms of the HEA was that it should have appealed against the decision.

[21] Motaung then testified about the disadvantages that she believed she suffered as a result of her obstinacy on the question of regulatory compliance. She then gave evidence of letters she had written to the

Chief Director: Personnel Administration and Development, Mr A Schoeman, complaining about the variations in PAYE levied on her salary in April, August and December 2007. She was dissatisfied with the explanation given for the source of the increased tax deduction. Likewise in the same letter she complained that an amount of R1700 per month was deducted from her basic salary as a medical aid contribution from January to May 2008, when her contribution ought to have been R 988 per month. However, she could not be sure that it was never rectified, or why Schoeman would have been involved in a campaign to prejudice her. What made her suspicious was that these apparent anomalies had happened in the first place for no clear reason during periods when there were no other adjustments to her salary. She agreed that Schoeman had subsequently written a letter responding to her queries.

[22] Motaung also testified about the vacant senior secretary's post in the Directorate which he had mentioned in her grievance, though the grievance was not part of the bundle. Although she drafted the advertisement and forwarded it to her superior the post was never advertised. Since there was no valid reason why that should be the case, Motaung believed that it was part of the campaign to make her work difficult.

[23] In August 2008 the applicant was subjected to a competency based assessment conducted by Deloitte and Touche. She testified that such assessments are important evaluations because they are required by the Department of Public Service and Administration and are available for scrutiny by anyone else in government, for example someone considering a job application by the member concerned. A bad report could therefore hinder someone's career progression in the public service. Schoeman was unable to advise her how to challenge the assessment. She then lodged detailed objections to the report, which, judging from a letter seemed in the main to characterise her as merely 'competent'. The letter was directed to Hindle, who never responded directly to on the issue.

[24] When Motaung did not get a response she wrote to Hindle again on 31 October 2008 setting out the difficulties she was having in accepting instructions from Qhobela and his then deputy Sehoole which required her to disregard the legislation relating to the evaluation of applications for registration and the monitoring of registered private higher education institutions. In that letter she also complains how Qhobela had barred her from carrying out the responsibilities such as attending Higher Education Qualification Committee accreditation meetings and meetings to discuss amendments to the regulations. Staff in her section no longer took instructions from her, but only took instructions from Qhobela and Sehoole.

[25] If the applicant had hoped for a constructive response from the Director-General that was not to be: Hindle's response was terse and dismissive. Without responding to any of her detailed concerns or expressing any view on whether or not it was appropriate for Qhobela and Sehoole to run the directorate, he noted:

> *"It is for me a matter of regret that your time at the Department appears to have been characterised by ongoing disagreements with your supervisors, and their track record and delivery, resulting in your being moved through a number of offices."*

[26] Hindle was clearly not prepared to intervene, despite the serious implications of some of her complaints, and simply advised Motaung to follow formal dispute procedures if she wished to take the matter further, but he cautioned her that such a process would expose her "departmental history of conflict and non-performance".

[27] On 23 April 2008, Motaung launched a detailed formal grievance summarising the prejudicial treatment she was suffering and the supposed motivation behind it. Shortly before that, at the end of March 2008, she submitted a comprehensive 50 page document entitled Draft Evaluation Report on the Implementation of the

Regulatory Framework Governing the Private Provision of Higher Education from 1997 to Date, to Qhobela, Hindle and the Minister of education, Dr GNM Pandor. The report had been prepared at the request of the Minister. In the space provided for the signatures of Qhobela and Hindle neither of them commented on the report other than Qhobela who merely said that it was “a detailed and frank personal report by Mrs Motaung”. The handwritten comments from the Minister's office are not entirely legible but it is clear at least that her office identified the report as containing several matters requiring attention and some of the case studies mentioned suggested consideration of policy interpretation by the Department was needed.

[28] While the report was critical of the registration of a number of institutions, it is relatively dispassionate and places the difficulties created by such registrations squarely on the table. It suffices to cite just two examples from the report.

[29] The CTI Education Group (Pty) Ltd was registered under the name Computer Training Institute (CTI) in 2004. However in July 2007 a company by the name of Computer Training Institute (Pty) Ltd lodged an application to change its name to CTI Education Group (Pty) Ltd. No proof of such change of the letter companies registered name was provided by the registrar of companies. The applicant pointed out that the computer training Institute (Pty) Ltd was reported as being in the final liquidation according to the CIPRO database. She then rightly raises the following questions. Which is the Computer Training Institute (Pty) Ltd that was registered by the Department of Education in 2004? Is it the company registered in 1998 and currently shown on the CIPRO database which was under liquidation, or the company supposedly registered in 2000 but which appeared to be non-existent on the Cipro database. Motaung continued "The papers submitted by the institutions suggest That CTI Education Group (Pty) Ltd is a change of name from the seemingly non-existent

Computer Training Institute (Pty) Ltd. If This [is] the Case, the standing of CTI Education Group (Pty) Ltd as a legally constituted company is brought into question."

[30] Motaung went on to question why these issues were not raised in the evaluation of the application for amendment and pointed out that the possibility existed that the department had registered a private higher education institution which had 'no constitution'. In this reqard, it is noteworthy that the registrar is bound by Regulation 19(1)(d) to de-register an institution that is liquidated, and also under Regulation 19(1)(a)(ii), if an institution ceases to meet eligibility criteria such as being an entity registered under the Companies Act.

[31] A second more general example cited in Motaung's report concerned the failure of Qhobela to refuse applications, despite recommendations to do so, when company registration papers did not feature the seal of the registrar of companies, which was a pre-requisite for a valid certificate of incorporation. In the light of the regulations, Qhobela's approach did not merely reflect a difference of opinion, but went directly to the question of whether or not the peremptory eligibility requirement of incorporation had actually been met.

[32] When questioned why she had referred the matter to the Minister, Motaung said that she saw that as a collegial way of trying to resolve the conflict with her supervisor. Mr Pio suggested to her that she was a difficult person and that she fought with everyone. He alluded to the paragraph mentioned above in Hindle's response to Motaung's grievance. Motaung pointed out that the statements made by Hindle were completely at odds with her previous performance assessments and that she had challenged the assertions made in that letter. She agreed that both Sehoole and Qhobela had since resigned from the Department. She was asked whether she saw her new superior, Mabizela, or as part of the campaign against her. She answered that she only saw him in this light to the extent that her performance

agreement had still not been finalised despite there being an obligation on the Department to do so. Motaung defended the fact that she had not been at work since April 2009 as something beyond her control because when she went to the office there was nothing for her to do following the reassignment of her functions. She had submitted a draft performance agreement which would have defined her functions for the year, but she could not assume those tasks without the employer concluding the performance agreement.

[33] Importantly, the employer did not dispute that it had removed her functions from her, but Mr Pio suggested that she should instead have been disciplined. Motaung vehemently disputed this contention because she said she had never refused to do her work, but she could not see how she could perform functions falling outside a performance agreement relating to her directoral functions. Motaung argued in reply that the reason Qhobela did not take any steps against her was because she knew he was correct.

[34] In justifying her failure to accept the department's earlier offer of a restoration of her duties in March 2011, Motaung said that the offer did not acknowledge the unfair treatment she had been subjected to. She also said that she regarded all her letters of complaint about the reassignment of her functions and the referral of disputes to the bargaining Council as attempts to mitigate the fact that she was not working, but the Department had not been prepared to settle at that stage. She disputed that matters were resolved now that she was working under a new manager, because she still did not have a performance agreement and he wanted to assign functions which did not fall under her responsibilities in her directorate. His instructions were not in line with the department's offer to restore her to her previous role. It was obvious from her cross-examination of Mabizela that her underlying concern was that if she acceded to working on tasks unrelated to the core responsibilities that this would amount to capitulating to the reassignment of her functions. She felt she was entitled to approach the court given the unwillingness of the Department in addressing her complaints.

[35] It was suggested to her more than once that, in terms of the SMS Handbook, her superior was entitled to assign her other duties. Mabizela also believed that there was such a provision in the handbook but also could not identify it. He complained that in 2011 although he tried to conclude a performance agreement with Motaung so that he could assess her she would not do so. In fact Motaung identified the elusive provision when she was questioning Mabizela. It is not in the SMS Handbook but is s 32(1) of the PSA, and reads:

> *"32. Assignment of other functions to officers and employees.—An executing authority or the head of a department, branch, offic e or institution may direct any officer or employee under his or her control temporarily to perform duties other than those ordinarily assigned to such an officer or employee or appropriate to the grade, designation or classification of his or her post, and he or she shall comply with such a direction."*

[36] Motaung admitted that she had originally referred to complaints as an unfair labour practice to the bargaining Council and had been wrongly advised by Bargaining Council staff to characterise her complaint as a unilateral variation of terms of employment in terms of section 64 of the act, which the council declined to arbitrate. Mr Pio referred the applicant to Chapter 6, paragraph 8.4 of the SMS Handbook, which states:

> *"Senior managers may also complain to the Public Protector Provincial Public Protector, the Public Service Commission or the Auditor General where they believe that a department has acted wrongly in its decision-making or actions."*

[37] Motaung claimed not to have been aware of that provision and that in any event it did not address her claim of unfair discrimination. She also pointed out that the department itself did not even address her internal grievance, and these mechanisms involved third parties.

[38] In support of a claim of what she ought to have received had she been properly assessed in the 2008/2009 and the 2009/2010 financial years she produced a letter issued by the Director-General on 24 March 2011 which showed that between April and the end of December 2009 she would have earned R 7,461-00 and more, from January to the end of March 2010 she would have earned R 2,636-25 more and between April and the end of December 2010, she would have earned a further R 16,158-75. The letter also contained calculations for part of 2011.

[39] It must be mentioned that the Department reiterated its offer of reinstating the applicant to her previous functions with immediate effect and to compensate for any financial loss she may have suffered. However, even though the applicant conceded that this proposal was not insignificant, she felt it did not take account of the emotional distress she had suffered of working in a hostile environment since 2006 and would not have addressed her concern that she had been discriminated against for her actions. She felt that the Department would be accommodating her on its own terms if she simply accepted the offer to return to work.

Evaluation

[40] The essence of this case concerns whether or not the applicant was prevented from performing her normal work because she had refused to be party to flouting the regulatory framework governing the registration of private higher education institutions, which she felt would have been morally wrong as a civil servant and would have entailed her committing misconduct in terms of he PSA.

[41] The Department maintains that because it was the Director General in his capacity as the Registrar, who took the decision on registrations, she was not required to do anything untoward by evaluating what might appear to be a defective application and

submitting it to him through her supervisor, the Deputy Director General.

[42] Firstly, it must be said that in respect of the three objections she raised that gave rise to the sharp disagreement with Qhobela about what she was required to do, it seems that in terms of the regulations it would have been irregular to grant the relevant institutions the registration that they sought in the circumstances. Thus in the case of Tsiba Education, it is not really a matter of dispute that it was allowed to make a fresh application for registration sooner than permitted by the regulations, without having appealed against the original decision. Granted, an appeal against a decision declining registration might have been difficult to pursue since the relief sought by Tsiba Education in 2005 would not have been to overturn the refusal to grant registration, but to have the application expunged, which is actually a different kind of application rather than an appeal. On the other hand, Regulation 6(1) does not permit the withdrawal of an application once a decision had been taken. What the Tsiba Education case pointed to is a difficulty in the regulations, which provided no appropriate avenue for obtaining the relief it sought, except the somewhat artificial one of an appeal. These difficulties suggest to me that the applicant's concerns about the lawfulness of considering a fresh registration application from Tsiba without it having appealed the original decision were not ill-founded and she might well have formed the *bona fide* belief that if she evaluated the applications notwithstanding non-compliance with regulations it would entail her tacit complicity in advancing an application that could not be granted.

[43] In the case of the Institute for Advanced Studies, there was no evidence led to suggest that the reason for its premature second application could be justified on similar grounds to that of Tsiba Education. In the case of FEDISA, there was also no evidence led to show that it's non-compliance with time frames for applications was justified.

[44] It is clear from the provisions of s 54 of the HEA that the registration decision rests with the Registrar and in making the decision there are a myriad of factors he or she is required to consider. However, it is also clear from regulation 16(1)(a) read with s 54(1)(c) of the HEA, that registration may not occur if the requirements for registration are not met which includes compliance with reasonable requirements prescribed by the Minister under s 53(1)(c). In turn, such requirements must include reasonable requirements for registration set out in the regulations. It was never suggested in this matter that any of the prescripts in the regulations affecting registration were unreasonable, even though some of the applications have revealed there may be some flaws in them. Thus, even if there might be an argument made that consideration of other provisions of s 54 of the HEA might bestow some discretion on the Registrar to register a PHEI despite non-compliance with some formalities in the registration application pre-requisites, there was a good basis for Motaung believing the requirements in the regulations were prescriptive. The argument advanced by the Department was simply that because Motaung did not have to take the decision on registration, she should not have refused to process applications that did not comply with the regulations, without a written instruction to do so despite those problems.

[45] Consequently, it was not unreasonable of the applicant to ask for an assurance in writing that she could process the application notwithstanding her possible involvement in non-compliance with the regulations. This situation could have been avoided if her superior had simply told her to record her reservations in the evaluation itself. There is also no dispute that Motaung was effectively relieved of the functions of her Directorate following this disagreement, and one cannot escape the most natural inference that it was because she would not simply go along with processing applications that did not qualify to be evaluated. This did prejudice her both in relation to her standing as a Director and in relation to assessment in terms of her designated responsibility. It seems that by offering to restore the

notch increases she most probably would have got had she continued to perform her duties, the department recognised that she had been prejudiced to this extent.

[46] In respect of the 2008/2009 financial year, because Motaung had been stripped of her functions, no meaningful assessment of her performance could be conducted and Sehoole concurred that this was the case. Yet her performance was rated as unsatisfactory and as a result she did not receive a notch increase as in previous years. The inescapable inference is that had she not had her duties re-assigned she would in all probability have obtained a performance in line with her previous ones and would have received the notch increase.

[47] I am not persuaded that the applicant's concerns about variations in her PAYE, provident and medical contributions were attributable to some intention to prejudice her. The applicant did not explain why Schoeman's reply to her complaints did not satisfy her that they were the consequence of legitimate factors. There was also no reason to suppose that Schoeman was party to attempts to prejudice her.

[48] In summary, I am satisfied that the applicant was discriminated against on account of her acting in accordance with her conscience that if she processed the problematic applications she would be complicit in flouting the regulations governing the registration of PHEIs and possibly guilty of misconduct in terms of the PSA read with the relevant provisions of the SMS Handbook.

<u>Relief</u>

[49] I accept that in terms of working conditions and remuneration, the Department effectively undertook to restore those, which would have included the backpay of notch increases foregone in the absence of existing performance agreements against which her performance in her post would have been assessed. Certainly that prejudice relating to notch increases might have continued until the end of the 2010/2011 financial year. However, her new superior, Mabizela did

not appear to be acting outside the ambit of section 32(1) of the PSA when he tried to assign her other duties and was prepared to motivate her performance assessment in relation to an agreement being concluded in respect of those duties. Nothing prevented the applicant from entering into such an arrangement subject to reserving her rights to pursue her claim. Certainly it was Mabizela's understanding that such a provisional arrangement was not intended to compromise her pending claim.

[50] The respondent suggested that the applicant's decision to persist with her claim in view of the settlement offer made in March 2011 was essentially vexatious and resulted in the department incurred further unnecessary legal costs. There is certainly merit in this claim, but I am not persuaded that the applicant was unreasonable in pursuing the claim in order to obtain an order that she had been unfairly discriminated against becaus here actions were not unjustified. Failing that order, the very same situation might arise in the future where once again Motaung would be asked to process an application for the Registrar's decision, in circumstances where there are good grounds for believing it did not qualify to be considered, without her superior at least giving her an opportunity to place her misgivings on record in the evaluation she prepares or supervises. In short, without some confirmation that her actions were not unjustified, the scenario which led to court could easily be repeated. For this reason, I believe the applicant was not vexatious in insisting on the matter proceeding to court, despite the settlement offer.

[51] In the circumstances, the applicant has substantially justified most of the relief set out in her statement of case.

[52] On the question of costs, since there was an ongoing employment relationship when this matter was heard, I do not think it would be appropriate to order costs to either party.

Order

[53] In view of the above, the following order is made:

[54] It is declared that:

54.1 The first respondent's re-assignment of the applicant's duties and functions in her post of Director: Private Higher Education commencing at the end of 2006, amounted to unfair discrimination on account of her acting in accordance with the dictates of her conscience in the bona fide and reasonable belief that, if she proceeded to evaluate registration applications that did not meet the pre-requisites for registration of PHEIs under the provisions of the Higher Education Act 101 of 1998 or the Regulations issued under that Act, she would be complicit in flouting those statutory instruments and would possibly be guilty of misconduct in terms of Public Service Act, Regulations, Chapter 4.I.D and 4.VIII.D read with Chapter 7, Annexure A par 1 of the SMS Handbook.

54.2 The first respondent's work performance assessment outcome in 2008/2009 and the failure to grant her a notch increase for that financial year was an act of unfair discrimination for the reason stated in paragraph 54.1, and is deemed invalid.

54.3 The first respondent's failure to finalise the applicant's performance assessment agreement and failure to conduct a performance assessment for the 2008/2009 financial year was an act of unfair discrimination for the reason stated in paragraph 54.1.

[55] It is ordered that the Department of Higher Education and Training, as the successor to the Department of Education must:

55.1 restore to the applicant her normal functions and duties as Director: Private Higher Education in so far as the applicant is still in the employment of the first mentioned department, by 15 November 2012;

55.2 pay the applicant the following salary notch increases with retrospective effect, by no later than 15 November 2012:

55.2.1 a salary notch increase to R 673,164-00 per annum with effect from 1 April 2009, and

55.2.2 a salary notch increase to R 724,553 per annum with effect from 1 April 2010,

55.3 and further advise staff of the Directorate: Private Higher Education and Training in writing of the restoration of the applicant's functions and duties no later than when it complies with paragraph 55.1.

55.4 No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: **In person**

RESPONDENT: **P C Pio, instructed by the State Attorney**