



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case no: D189/15

In the matter between:

NDUDUZO FORTUNE MHLONGO

Applicant

and

**MINISTER OF EDUCATION, KWA-
ZULU NATAL**

First Respondent

**HEAD OF DEPARTMENT OF
EDUCATION, KZN.**

Second Respondent

NKOSINATHI CHONCO

Third Respondent

PHUMELELA NKOSI

Fourth Respondent

RAYSELAN NAIDOO

Fifth Respondent

DAVE AITKEN

Sixth Respondent

PINETOWN BOYS HIGH SCHOOL

Seventh Respondent

Heard: 19 October 2017

Delivered: 25 October 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] In his Notice of Motion, the applicant seeks an order that;
- a) 'The KwaZulu-Natal Department of Education's failure to take a decision concerning the complaints of victimization, fraud and abuse of power perpetrated by the fifth and sixth respondents against the applicant respectively, as previously reported to the KwaZulu Natal Department of Education, be reviewed and such complaints be considered by this Department in terms of Chapter 5, section 17 (2) and section 18 (2) of the Employment of Educators Act, 76 of 1998
 - b)
 - c) That the late filing of this application and any non-compliance with the Rules be condoned in terms of the Rules of this Court, PAJA, and section 158 (1) (8) of the Labour Relations Act'
- [2] The applicant is an Educator at the seventh respondent (Pinetown Boys High School). The respondents include the MEC for Education, the Head of Provincial Department of Education, the Pinetown District Director of Education, the Superintendent of Education, the Principal and Deputy Principal of the School, and the School itself.
- [3] The applicant's application is 105 pages long and it was difficult to make sense of his case as he had raised complaints dating back as far as 2012, which ranged from the school's choir no longer singing isiZulu songs during school functions; the failure of the school to invite SADTU to be involved in shortlisting processes of candidates for positions; differences in income paid to educators; failure to pay incentives and bonuses; failure to hold meetings with staff; the non-representative nature of the School Management Team; the disproportionate allocation of teaching subjects to educators, the failure of the school to embrace democratic values, and to practice open , participative and accountable governance; the continued oppression of Africans at the school, the failure on the part of the school. He further complained of victimisation on account of his association with SADTU.
- [4] Within this minefield, the Court identified key central topics in the application which formed the basis of the review, and which the applicant had conceded that indeed they were the source of his complaint. These were that;

- a) The Department failed to take action after he had reported fraudulent activities on the part of the fifth respondent and abuse of power;
- b) The Department failed to take any decision in regards to claims that he had been subjected to victimisation in the workplace, particularly as a result of the allegations of fraud he had made to the school's Governing Body
- c) Two IRP5 forms were issued to the applicant in the same year by the school, which implies that accounting records were not kept. The auditors of the school had a business relationship with the School, hence the former failed to properly investigate his allegations of fraud
- d) The fifth respondent unreasonably instructed the sixth respondent to have the school's computer programme shut down before he (applicant) could finish capturing the marks for the term
- e) Continuous victimisation since 2012 by the fifth respondent, who had also abused his powers

[5] The respondents in the light of the applicant's multiple claims and allegations raised the question whether the Court had the requisite jurisdiction to determine the review application. The Court having expressed the same concerns with the applicant after going through the various issues he had raised in his application, he nevertheless insisted that he wanted reasons as to why the court could not assume jurisdiction in this matter, his contention being that the provisions of section 157 of the LRA enjoined the Court to determine the matter.

[6] The reliance by the applicant on the provisions of section 157 of the LRA is a matter that was not pleaded in his papers, and it simply came from the bar. In seeking a review, the applicant relied on various provisions of the Constitution of the Republic, specifically sections 38 (a), 9, 33, 172 (1) (a) and section 8 (2) of Promotion of Administrative Justice Act 2000 (PAJA). He further seeks that the alleged failure to take a decision by the Department be reviewed, and

that the complaints be considered by the Department in terms of sections 17 (2) and 18 (2) of the Educators Act.

The Preliminary Points:

- [7] The Respondent pointed out that the alleged failure to take a decision regarding the applicant's complaint arose in May 2013, or alternatively in March 2014. The complaints date back to 2012/2013/2014, and the review application was only launched in February 2015. Section 7 (1) of PJA set down time frames within which institution of proceedings for a judicial review may be launched. Thus, in the absence of an application for condonation, the Court lacked jurisdiction to determine the application.
- [8] There is merit in the respondents' contentions that the Court lacks jurisdiction to determine the matter to the extent that the applicant relies on the provisions of PAJA, more particularly its section 7 (1). However other than the failure to comply with the prescripts in launching proceedings in terms of the PAJA, it is trite that generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. Thus, when a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action¹.
- [9] Amongst the issues raised by the applicant in seeking a review is that he was subjected to victimisation and abuse of power for raising issues surrounding fraud or being associated with SADTU. The provisions of section 187 (2) of LRA are available to the applicant, and there is no basis for him to bypass all other statutory dispute resolution mechanisms contained in sections 135 and 191 of the LRA and directly approach the court.
- [10] The respondents further pointed out that to the extent that the applicant still relied on the provisions of PAJA, its section 7 (2) (a) required of him to have first exhausted his internal remedies in terms of the applicable statutory

¹ *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC) at para 64

enactments available to him, including remedies available in terms of the Educators Act. In this case, the applicant had not done so.

[11] During argument, I had pointed out to the applicant that even if there was merit in the complaints that he had raised, certain aspects of those complaints, required the attention of the relevant authorities including *inter alia*, the South African Receiver of Revenue, the National Prosecuting Authority or even the South African Police Service. In essence therefore, and further based on the preliminary points raised, it follows that this Court does not have jurisdiction to deal with review application as launched by the applicant.

[12] The respondents sought a cost order in the event that the applicant was unsuccessful. It is my view that the applicant's application raises issues of concern which if proven, may have repercussions for the respondents. This application however was ill-considered as some of the issues raised are not for this Court to determine, and the applicant could not have been seen as a means for the applicant to achieve his ends whether noble or otherwise. In this regard, and having had account of considerations of law and fairness, I do not deem it warranted to make an order of costs.

Order:

- i.* The preliminary points raised by the respondents are upheld.
- ii.* The Court lacks the requisite jurisdiction to determine the review application.
- iii.* There is no order as to costs.

Tlhotlhemaje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

In Person

On behalf of the Respondent:

Adv. D Pillay

Instructed by:

State Attorney

Labour Court