



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 3271/18

In the matter between:

W.S MONGWAKETSE

Applicant

and

**HEAD OF DEPARTMENT: DEPARTMENT OF
EDUCATION AND SPORT DEVELOPMENT,
NORTH WEST PROVINCE**

First Respondent

M.V DITHEJANE N. O

Second Respondent

Heard: 30 October 2018

Delivered: 13 November 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The applicant, an educator in the employ of the Department of Education and Sport Development (North West Province) (The Department), approached this Court on an urgent basis seeking certain interdictory and declaratory relief in two parts in the following terms;

In Part “A” of the Notice of Motion, he seeks an order:

“ ...

2. That, pending the final decision of Court in respect of Part B of the application, the First and Second Respondents:

- 2.1. Be and are interdicted and prohibited from implementing, alternatively enforcing the decision to transfer the Applicant from Setumo Primary School in Stella, North West to Seichokelo Primary School, in Ganyesa, North West;
- 2.2. Be and are interdicted and prohibited from transferring the Applicant from Setumo Primary School to any other public school;
- 2.3. Be and are interdicted and prohibited from appointing any other person to post of principal of Setumo Primary School
- 2.4. Be and are directed to allow the Applicant to perform all of the duties and responsibilities attached to the post of the principal of Setumo Primary School.

3...

4...

5..."

[2] In part "B", he seeks an order:

"...

1. Declaring the transfer of the Applicant by the Respondents, from the Setumo Primary School to the Seichokelo Primary School to be unlawful, further or alternatively to constitute an unfair labour practice as contemplated in Section 23 of the Constitution of the Republic of South Africa, 1996.
2. Directing the Respondents to reinstate the Applicant in the post of principal at Setumo Primary School with immediate effect.
3. ..."

[3] The matter initially came before Prinsloo J on 23 October 2018. The parties had agreed to the postponement of the hearing of Part A and the granting of

prayers 2.1 to 2.4 in Part A pending its final determination. The first respondent is the Head of Department (Superintendent General) in the Department. The Second respondent is employed as District Director by the Department.

- [4] The applicant commenced his employment with the Department in 1994 as an educator at Ogodiseng Middle School and had progressed to School Principal at Seichokelo Primary School in 2007. The school is situated some 73km from Vryburg where he resides.
- [5] As a consequence of travelling the distance daily for a period of ten years and the associated costs, he had in January 2018, successfully applied for a transfer to the post of school principal of Setumo Primary School (situated in the Stella area, North West), which is about 45km from Vryburg.
- [6] The second respondent in accordance with her delegated authority had approved the transfer, and the applicant had commenced his duties as principal of Setumo Primary School on 24 May 2018, having been introduced to the new school by the Department's Circuit Manager and the School Governing Body (SGB) in May 2018.
- [7] In mid-July 2018 the applicant was informed that the Department had advertised the position of principal at Setumo Primary School where he was transferred to. Despite the applicant's protestations and lodging of a grievance, the post was indeed advertised. In response to his grievance, the second respondent advised the applicant that the grievance was not upheld. He was further advised that his approved transfer as confirmed in a letter dated 9 February 2018 was temporary.
- [8] Following a meeting held between the applicant, his attorney of record and the second respondent held on 17 October 2018, correspondence was sent to the applicant informing him that his transfer had been tentative and that it has since been rescinded. He was also instructed to return to Seichokelo Primary School.

- [9] The respondents initially opposed the application on the grounds that the Court lacked jurisdiction on the basis that the issue in dispute is one that should have been referred to the relevant bargaining council for conciliation. At the hearing of this matter however, that preliminary point was abandoned.
- [10] The respondents further argued that the application did not deserve the urgent attention of this Court as the urgency claimed was self-created. The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 8 of the Rules of this Court¹, which require an applicant seeking urgent relief to adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due course². The import of these requirement is that the procedure set out in Rule 8 is not there for taking.
- [11] It is trite that the question of whether a matter deserves the urgent attention of this Court on its urgent roll is underpinned by whether the applicant cannot obtain substantial redress in an application in due course. This question is distinguishable from that of irreparable harm that is required before interim relief can be granted. Thus, even if it might be argued that redress may be obtained in due course, that redress, based on the facts, may not necessarily be substantial enough.

¹ See *Jiba v Minister: Department of Justice and Constitutional Development and Other* (2010) 31 ILJ 112 (LC) at para 18, where it was held that;

‘Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.’

² *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6, where it was held that;

‘.... An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.’

- [12] The requirements for the granting of an interim interdict are well known. These are: a right, though *prima facie* established, which is open to some doubt; a well-grounded apprehension of irreparable harm if the *interim* relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of an *interim* relief; and that the applicant has no other satisfactory remedy³

Evaluation:

Urgency:

- [13] In this case, the applicant approached the Court with this application on 19 October 2018, and had set it down for 23 October 2018. Part of the reason that led to the matter being postponed before Prinsloo J was that the respondents had filed the answering affidavit belatedly, and the applicant sought a right of reply.
- [14] I did not understand the respondent's arguments in regards to urgency to be related to the timing of the launching of this application, and it can be accepted that the applicant acted with the necessary haste in approaching the Court. The respondents however attack the basis of urgency as proffered by the applicant.
- [15] The applicant had submitted that the application was urgent on the grounds that;
- a) he was expected forthwith to report to his old school, Seichokelo Primary School and forbidden to continue with his duties at Setumo;
 - b) Disciplinary action would follow should he not comply with the transfer instruction, which may place his employment with the Department in jeopardy;
 - c) His travelling costs would unless interim relief was granted, once again soar, as the difference in travelling from Vryburg to Ganyesa as

³ See *Setlogelo v Setlogelo* 1914 AD 221 at p. 227; *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A)

opposed to travelling to Stella was about 58 km per month, which in turn translated to additional expenditure of R2000.00 per month in respect of fuel only.

- d) He will be severely prejudiced in his career prospects if the unlawful transfer were allowed to stand, as his work performance would suffer, which in turn would disqualify him from receiving any further performance bonuses or promotions in the foreseeable future;
- e) If *interim* relief were not granted on an urgent basis the Department would attempt to unlawfully fill the post at Setumo, which would have become vacant by virtue of his unlawful transfer to Seichokelo Primary School, thus jeopardising his prospects of returning to his school at Setumo if successful in the main application.

[16] The respondents contend that the applicant had not made out a case for urgency on the basis that;

- a) The grounds upon which he relies upon for urgency are self-created, and he basically pre-empts what may happen if interim relief was not granted;
- b) The applicant had not exhausted all alternative remedies available to him prior to approaching the Court, and further that the Department had already implemented the decision to transfer the applicant to Seichokelo Primary School, as it was within its prerogative to appoint or promote an employee who it considered best or most suitable;
- c) It would be irregular under the circumstances for the applicant to expect the Court to interdict or prohibit the Department from appointing any other person to the post of Setumo Primary School without a valid reason;
- d) The position at Setumo Primary School remained vacant and there was no prejudice to the applicant as he could still apply for it;

- e) The applicant's transfer to Setumo was erroneously approved or done, and the Department ought to be allowed an opportunity to rectify that error.

[17] The starting point is that whether the matter is urgent needs to be viewed within the context giving rise to the dispute. As already indicated, the applicant had applied and was granted the transfer. When the second respondent approved the transfer, it was done in writing⁴. Significant with that correspondence is that the applicant was still appointed post level 4, with the second respondent further stating that; *"The department would like to congratulate you on your transfer and hope you will enjoy your new work environment."* That appointment was further captured on the Department's *persal* system at 'Principal P3' salary rank. Furthermore, the applicant had been formally introduced to the new school by the Acting Circuit Manager and the school's SGB. This was in May 2018.

[18] Upon learning that the post had been advertised, the applicant had lodged a formal grievance on 13 September 2018, and a response in that regard was only furnished on 3 October 2018, in which for the first time he was advised that his transfer had been temporary. A further meeting with the second respondent to resolve the matter on 17 October 2018 could not yield any results. Incidentally, the second respondent's view when the dispute first arose about the advertisement of the post (in June 2018) was that the transfer was irregular, as the appointment letter issued to him had been 'forged', making the appointment invalid.

[19] Even more disconcerting in this case is the reliance by the respondents on its Annexure 'SMS2' to the answering affidavit (which is the applicant's formal application for a transfer), for the proposition that the transfer was temporary. The recommendation by the Circuit Manager and other officials was to approve the transfer on humanitarian grounds. In the body of the document, it is not indicated anywhere that the approval was conditional or temporary, and the applicant's contention is that any further reference to the appointment as being temporary, which is not in the body of the application, appears to have

⁴ Annexure "WM1" to the Founding Affidavit

been an afterthought or inserted long after his transfer. This, as correctly pointed out by the applicant's counsel, raises serious concerns about the legitimacy of the document relied upon by the respondents, and does need further investigation.

- [20] In my view, the urgency claimed in this case can hardly be construed as self-created. The applicant had sought and was granted a transfer, and had commenced his duties at the new school. As matters stand, the Department seeks to forge ahead and advertise the post, which could have serious implications for the relief that he is seeking. In my view, there is cause to treat this matter as urgent, and there is no merit in the contention that the urgency claimed in this case was self-created. On the contrary, the respondents' approval of the transfer, the intention to advertise the position and the obvious self-help in rescinding the transfer, coupled with the respondents' own concession that it had acted erroneously in effecting the transfer, gave rise to the urgency.

Prima facie right:

- [21] In considering whether an applicant has established a *prima facie* right, it has been held that the requirements in that regard are satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action, and further that the mere fact that such evidence was contradicted will not disentitle him to the relief, and not even if the probabilities are against him⁵. The SCA in *Simon* further proceeded to state that;

"The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."⁶

⁵ *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA), at C – D at 228

⁶ At F – H at 228

- [22] The applicant's contention is that the purported rescission of the transfer and the transfer back to Seichokelo is unlawful and/or an infringement of his right to fair labour practices as guaranteed under section 23 of the Constitution, and further that the Department now sought to unilaterally and unlawfully vary the terms and conditions of his employment with the transfer to his old school.
- [23] It was further argued on his behalf that even if the transfer to Setumo Primary School was as a result of an error on the part of the Department or the first respondent, the initial decision to transfer the applicant could not merely be rescinded or reversed, and that in such cases, the Department ought to have approached the Court to rescind its decision rather than resorting to self-help⁷.
- [24] The applicant submitted that the *prima facie* right relied upon for the relief sought was grounded in his contract of employment (having accepted the transfer and further as it was never communicated to him that the transfer was temporary); the provisions of sections 2 and 14(3) of the Public Service Act⁸, the provisions of section 77 of the Basic Conditions of Employment Act⁹ (in claiming specific performance); and those of section 23 of the Constitution of the Republic¹⁰.
- [25] In response to the applicant's claim, the second respondent in her answering affidavit conceded that the applicant had indeed made an application in December 2017 for a transfer to Setumo Primary School based on his reasons that he could move nearer to his place of residence. It was however denied that the applicant was provided with a written appointment or a written appointment/transfer, and that all that was done was to temporarily transfer him as envisaged in section 8 of the Employment of Educators Act¹¹, and

⁷ In placing reliance on *Tshivhandekano v Minister of Mineral Resources and Others* [2018] 6 BLLR 628 (LC); (2018) 39 ILJ 1847 (LC), where it was held that;

"[13] The respondent had already acted upon the chairperson's recommendation and issued a final written warning, but then purported to revise its own decision. It is well established that in such cases the State as employer has the right to review its own decision in certain circumstances. That does not equate to a right to simply take the matter into its own hands and reverse a decision already taken".(Citation omitted)

⁸ Act 103 of 1994

⁹ Act 75 of 1997

¹⁰ Reliance was placed on *Semela and Others v MEC for Education, Eastern Cape, and Another* (2001) 22 ILJ 1688 (LC), (2001) 9 BLLR 1085 (LC)

¹¹ Act 76 of 1998, as amended

provided with a letter of approval in that regard. It was denied that there was a right to permanent transfer which could be grounded in the applicant's contract of employment.

- [26] However, as already indicated, the official letter in terms of which the transfer was approved did not indicate anywhere that it was 'temporary' or 'conditional'. Only in the application form was the issue of the transfer being temporary raised, and since this was a matter to which the applicant was privy to, it cannot for the purposes of this application, be concluded even on a *prima facie* basis, that he was reasonably aware of. On the contrary, the indications are that his transfer was approved by the second respondent and the SGB, which was furthermore effected on the Department's *persal* system.
- [27] The question whether the post was at a different level (PL5) is for now a separate matter in that I did not understand the respondents' case to be that the transfer meant automatic promotion on the basis that the post was at a higher level. As matters stand, the applicant was laterally transferred, and had kept his post level, salary and rank. Inasmuch as it is accepted that promotions are matters within the prerogative of the employer, there is no evidence to suggest that the applicant was promoted when assuming the post at the new school.
- [28] The respondents' further contention was that the Department ought to be afforded an opportunity to correct the error in transferring the applicant. To correct that error however, is unfortunately not as easy as the respondents portray it to be. If they seeks to correct the error given the fact as already pointed out that the transfer was effected, they cannot resort to self-help to the detriment of the applicant's guaranteed right to fair labour practices. In the premises, it follows that until such time that the transfer is properly rescinded, either through a court order or as a result of the determination of Part B of this application, the applicant's constitutional rights to fair labour practices remains protected.
- [29] In a nutshell, based on the facts averred by the applicant, together with the facts set out by the respondents that are disputed, the inherent probabilities

(without pronouncing on the rights of the parties at this stage) favour that the applicant should on those facts, obtain final relief at the trial. The facts set up in contradiction by the respondent do not cast serious doubt upon the case of the applicant, and to this end, I am satisfied that he had established a *prima facie* right to the relief that he seeks.

Irreparable harm and other considerations:

- [30] In this regard, it was submitted on behalf of the applicant that the respondents had not shown why it was urgent that the purported vacant post needed to be filled, whilst he occupied that post at his old salary and without an acting allowance. On the other hand, it was argued that the risks for the applicant were real in that there was no guarantee that the post would not be filled pending the contractual dispute between the parties. To this end, it was submitted that the respondents had not or would not suffer any harm if the status quo was maintained.
- [31] The applicant approached the court in order to interdict the Department from *inter alia*, implementing the decision to rescind his transfer and compelling him to return to his old school pending the final determination of Part B. It is apparent that if the relief he seeks is not granted, he faces disciplinary measures if he does not go back to his old school, and at the same time, the post he was transferred to would be advertised and filled. It does not assist the respondents to simply aver that the applicant is at liberty to apply for the post. This is so in that as matters stand, he rightfully occupies that post until it is officially deemed vacant once the initial transfer is properly rescinded.
- [32] Taking the above considerations into account, I am on the whole, satisfied that if the decision to rescind the transfer of the applicant stands, and the post the applicant currently occupies is advertised he will suffer irreparable harm, particularly since the conundrum he finds himself in was created by the Department. It is not suggested that the applicant is entitled as of right to the post if there was indeed a need to advertise it as it entailed a promotion. All that is being said is that since he currently occupies that position on his understanding that the transfer was legitimate, permanent and not entailing a

promotion, these are issues that cannot simply be wished away with a decision to rescind the transfer without due process.

[33] I am further satisfied that the balance of convenience favours the granting of the *interim* order, failing which the applicant will suffer prejudice. On the other hand the respondents have not demonstrated any prejudice. When the Department approved the applicant's transfer, surely it must have had contingency measures in place to appoint his replacement at his old school. In my view, if ever there is any prejudice to be suffered by the Department, it is purely of its own making.

[34] Insofar as prayers 3 and 4 of the Notice of Motion are concerned, the Court fails to appreciate their relevance at this stage of the proceedings and further in the light of the order to be granted below. This is due to the reason that Part B of that Notice is still to be determined. In regards to the issue of costs, the applicant had prayed that these be costs in Part B of the application, and it shall be so ordered.

Order:

[35] In the premises, the following order is made;

1. Pending the final determination of the application in Part B of the Applicant's Notice of Motion dated 18 October 2018, the First and Second Respondents are interdicted and prohibited from;
 - 1.1 Implementing, alternatively enforcing the decision to transfer the Applicant from Setumo Primary School in Stella, North West to Seichokelo Primary School in Ganyesa, North West.
 - 1.2 Transferring the Applicant from Setumo Primary School to any other public school.
 - 1.3 Appointing any other person to the post of principal of Setumo Primary School

- 1.4 From preventing the Applicant to perform all of the duties and responsibilities attached to the post of the principal of Setumo Primary School.
2. The parties are to approach the office of the Registrar of this Court for a set-down date in respect of Part B of the Notice of Motion.
3. The costs in respect of Part A of this application will be costs in Part B of the application.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: M.G Hitge

Instructed by: Kotze Low and Swanepoel Attorneys

For the Respondents: T. Mpshe

Instructed by: State Attorney: Mahikeng

LABOUR COURT