THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 44/19

SOLIDARITY OBO BARKHUIZEN	**Applicant**
and	
LAERSKOOL SCHWEIZER-RENEKE	**First Respondent**
GOVERNING BODY OF LAERSKOOL SCHWEIZER-RENEKE	**Second Respondent**
NORTH WEST PROVINCIAL DEPARTMENT OF EDUCATION	**Third Respondent**
MEC: NORTH WEST DEPARTMENT OF EDUCATION	**Fourth Respondent**

Heard: **24 January 2019**

Delivered: **24 January 2019**

Edited: **15 February 2019**

JUDGMENT

PRINSLOO, J

Introduction

[1] Ms Barkhuizen (the applicant) approached this Court on an urgent basis for an order to declare her suspension unlawful and for it to be set aside.

[2] The Court papers were served on the respondents, and on 23 January 2019 the first respondent (the school) and the second respondent (the school governing body) filed a notice to abide by the decision of this Court.

[3] On 18 January 2019, the third respondent (the Department) and the fourth respondent (the MEC) filed a notice of intention to oppose. Instead of filing an opposing affidavit, the Department and the MEC also filed a notice to abide by the decision of this Court on 23 January 2019.

[4] The MEC filed an explanatory affidavit, wherein he sought to clarify specific issues relating to him, so that in future they are not misconstrued as admissions. The MEC explained that the Department was placed under administration in terms of section 101(b) of the Constitution[1], and that, as such, the executive powers of his office had been transferred to the Minister. The MEC states that no inference could be drawn that his office unduly influenced the principal or the school governing body to suspend the applicant.

[5] The MEC's explanatory affidavit so filed was not signed and the applicant took issue with that. I was provided with a letter from the MEC's attorneys Mosire Tsiane Attorneys, dated 24 January 2019, and in the letter the following was stated:

> "We are not opposing to your application to struck off our unsigned

[1] Act 108 of 1996.

> explanatory affidavit. Kindly be advised that there will be no appearance from our side today."

[6] It is evident from the letter from Mosire Tsiane Attorneys that there was no intention from the MEC's side to place a signed affidavit before this Court, and I can attach no weight to what is stated in the unsigned explanatory affidavit filed by the MEC.

[7] Before this Court is only the uncontested version of the applicant, as none of the respondents filed opposing papers to challenge, dispute or rebut the averments made by her.

[8] On the applicant's version, the facts leading up to this application have been the subject of public outrage and extensive media scrutiny and coverage and it is for this reason that I deem it necessary to set out the undisputed facts as they are before me.

The uncontested facts

[9] The applicant is employed as a Grade R educator at the school since the beginning of 2017 by virtue of an employment agreement concluded with the school governing body. The applicant is not employed by the Department, and the Employment of Educators Act[2] (the Educators Act) is not applicable to her and her employment relationship with the school and the school governing body.

[10] The school term for 2019 officially commenced on Wednesday, 9 January 2019. At the commencement of the school year, the Grade R pupils are divided into two class rooms of approximately 22 pupils each, according to their special and educational needs. Prior to the commencement of the term and on 7 and 8 January 2019, the applicant and her colleague, Ms Olivier, the other Grade R class educator, invited the parents of the learners to meet them as teachers and to familiarise themselves with the classrooms.

[2] Act 76 of 1998.

[11] The parents and the learners were granted an opportunity to acquaint themselves with the teachers and the classrooms prior to the formal commencement of the school activities. On the said dates, the applicant explained to the parents her approach to the seating arrangements in the classroom, particularly with reference to the individual learner's needs and requirements. She also explained seating arrangements and her approach in relation to communication difficulties arising from language barriers.

[12] The school is an Afrikaans medium school and to assist learners who have difficulty to communicate in Afrikaans or English it makes use of interpreters to interpret and translate for the learners. The services of the interpreter that assisted in the applicant's classroom were terminated in December 2018. There was no interpreter available at the commencement of the school term and the applicant made her own private arrangements to facilitate the interpretation and translation in her classroom until permanent arrangements could be made in that regard.

[13] The applicant explained that on 9 January 2019, as the first day of school, there were heightened levels of anxiety and emotion experienced by the Grade R pupils, and it required special effort on the part of the teaching staff to ensure that learners and their parents are comforted. In keeping with the first school day, the applicant through the course of the morning received various enquiries from parents via her cellular phone about their children.

[14] In November 2018, the applicant created a WhatsApp group for all the 2019 Grade R parents. She decided that it would be more practical to address the messages she received from the parents via the said WhatsApp group, rather than to reply to each parent individually.

[15] On the morning of 9 January 2019 a parent approached the applicant and asked her to supervise both Grade R classes, which classes are next to each other. The applicant reiterated that she had received a number of messages

from parents enquiring about their children and in an effort to alleviate the parents' anxiety, she decided to take photographs on her cellular phone of the two Grade R classes and to distribute them via the said WhatsApp group. The applicant's intention was to show the parents that the learners were content. The applicant explained that she took four photographs in total, of which two depicted Ms Olivier's class and two depicted her own classroom.

[16] Shortly after the applicant sent the said photographs to the parents via the WhatsApp group, she received a phone call from a parent of one of the learners, Mr Modise, expressing his irritation with what he referred to as a separation of his child and other black learners from the white learners. Mr Modise was in fact referring to a picture taken of Ms Olivier's classroom.

[17] The applicant explained to Mr Modise that no separation is done according to race, that the learners are moved around often during the course of the first day to accommodate the learners' individual needs and to accommodate the different daily activities. The applicant further explained to Mr Modise that the photograph was taken in the other Grade R classroom and that she had no hand in the seating arrangements of that class. Her explanation to Mr Modise came to naught, and the applicant advised him to call the principal, as she was busy with the orientation of the learners.

[18] The applicant attached the photographs she took on 9 January 2019 to her application, and it is evident that on three of the photographs, there is no separation of the learners on the basis of race, and that they are seated together and participating in activities. The photograph that sparked the events was not of learners of the applicant's classroom.

[19] The principal subsequently informed the applicant that a parent had laid a complaint against her for sending photographs of a segregated classroom. He requested the applicant, the chairperson of the school governing body and Ms Olivier to meet after school on 9 January to discuss the complaint and to prepare a response. At the aforesaid meeting the applicant and Ms Olivier

explained the events leading up to the taking of the photographs, and the principal and the chairperson of the school governing body assured them that they fully support them and they would liaise with the relevant parties to ensure that the complaints are properly ventilated and addressed. The applicant and Ms Olivier were assured that everything was in order and that they were expected back at work the next day.

[20] On 10 January 2019, some political parties incited its members to gather and protest at the school premises and the protest became so violent that the learners and the educators were eventually evacuated.

[21] At around 10:56 on 10 January 2019, the applicant had received a phone call from the school principal, informing her that after a consultation with the MEC, they had decided to suspend her with immediate effect and with full benefits. At 11:01, the MEC publically announced that he had decided that the applicant be suspended, and according to the applicant, this announcement is widely available on different media platforms.

[22] In his explanatory affidavit, the MEC stated that he has no power to suspend the applicant and that any time reference was made to her suspension, he was only confirming what was conveyed to him by the school governing body through the school principal, as an *ex officio* member thereof.

[23] I have already alluded to the fact that I can attach no weight to what the MEC stated in his unsigned affidavit, however, I cannot ignore the fact that the MEC admitted that he does not and never had the power to suspend the applicant. What the MEC however does not explain is why, notwithstanding the fact that he had no power to suspend the applicant, he showed no hesitation in taking centre stage in her suspension and why he played such a prominent and public role at the time. The MEC also does not explain why it was necessary for him to convey the school governing body's decision and why he had to convey it in a hasty and public manner as he did.

[24] On 10 January 2019, the applicant received her suspension letter, informing her that she was suspended pending an investigation.

The relief sought

[25] The applicant seeks an order to declare her suspension unlawful and to set it aside and to permit her to return to work.

[26] In Court, Mr Goosen for the applicant referred me to the fact that the applicant and the first and second respondents entered into a 'consented order' in terms of which the applicant was entitled to special leave with full benefits pending the final determination of the internal investigation regarding the subject matter of this application. I made it clear to Mr Goosen that I am not prepared to entertain such a 'consented order' as agreed between the parties, and I say so for the following reasons:

[27] The applicant's case is that her suspension is unlawful because she is not an employee of the Department, and therefore the MEC had no *locus standi* or powers to suspend her, and his decision to suspend her, which was publically announced, was *ultra vires*. It is unnecessary to deal with the specific provisions of the Educators Act in support of this argument, because the MEC admitted that he does not have the powers to suspend the employee.

[28] I accept that the MEC does not have the powers to suspend the applicant, and insofar as he made a decision to suspend her, he clearly exceeded his powers.

[29] The applicant's case further is that she was not granted any hearing prior to her suspension and she was not afforded an opportunity to make representations and to be heard, prior to her suspension.

[30] In *HOSPERSA and Another v MEC for Health, Gauteng Provincial Government* [3] it was held that:

> "It is a fundamental principle that an employee should and must be afforded the *audi alteram partem* before a decision is taken which adversely affects the rights of an employee. It is likewise a fundamental principle in our law that an employee cannot be dismissed without affording the employee the *audi alteram partem* and it is only in highly exceptional circumstances that this court will accept a departure from the principle. Where an employee is suspended, the same principle applies."

[31] The *audi alteram partem* principle is not only one of the cornerstones of natural justice, but it is a principle that applies to employment relationships and has been endorsed by the courts of this country. *In casu,* there was a flagrant disregard, disrespect and disdain for the fundamental principle that had to be adhered to.

[32] In my view, if any of the respondents took one step back and listened to the other side, as they ought to have done, this matter would not have ended up in this Court. The respondents all ignored the said fundamental principle and in doing so, they had no consideration of the context within which the photographs were taken, the fact that there were more photographs, depicting something different, and that the photographs should be considered holistically. They had no regard to the fact that it was the first day of school and there was no consideration of the explanation the applicant could have tendered. The actions of the respondents and the hasty manner in which they suspended the applicant, caused the applicant trauma, public humiliation and being branded as a 'racist'. In fact, on the applicant's version, she was branded as a racist that required immediate suspension without due process in full view of the public. This had caused indeterminable damage to her professional integrity and her personal life.

[3] (2008) 29 ILJ 2769 (LC) at para 24.

[33] The narrative preferred, as opposed to a consideration of the facts and the context within which the events took place, was supported and fuelled by the conclusions reached without due consideration of the facts and decisions taken over-hastily and without any due process. In my view, the applicant is not the only party that suffered a material detriment and the prejudice suffered *in casu* is not limited to the applicant as an individual.

[34] Furthermore, the applicant's case is that she had not been informed of the reasons why she was suspended, and no mention had been made as to the nature of the allegations against her, which would justify her suspension.

[35] In *Mogothle v Premier of the North West Province and Another*[4], it was held that:

> "To summarise, there is no clear reason articulated by the respondents as to why the applicant's suspension was necessary in order to protect the integrity of the proposed enquiry, nor have the respondents established any basis on which it might be suggested that the applicant's continued presence at work would endanger the safety or the wellbeing of any person. Further, the respondents failed to afford the applicant any substantial right to a fair hearing prior to his suspension. For these reasons, I am satisfied that the applicant has established to the relief he seeks."

[36] *In casu,* the applicant was not told about the reasons for her suspension, and despite being afforded an opportunity to present a case before this Court, the respondents chose not to place any facts before me. I accept therefore that there is no valid reason as to why the applicant's suspension was necessary or justified. In fact, it is evident that it was premised on a wrong factual matrix.

[37] I am satisfied that the applicant has made out a case and that she is entitled to the relief that she seeks.

[4] [2009] 4 BLLR 331 (LC) at para 44.

[38] The applicant sought a costs order only in the event of opposition, and as there is no opposition, she is not entitled to costs. This is unfortunate, and had the applicant sought an order for costs, I would not have hesitated to grant such an order.

[39] It has to be emphasized that no MEC, no government employee and no school governing body is above the law and they are obliged, in the execution of their duties, to adhere to the law and to ensure that the law is respected and complied with at all times, no matter the circumstances. They are not at liberty to do otherwise. In *MEC for Health , Eastern Cape and Another v Kirkland Investments (Pty) Ltd*[5] the Constitutional Court pronounced on the duty of the State to respect the law when it stated:

> 'There is a higher duty on the state to respect he law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.

[40] I can only express the hope that the parties involved in this unfortunate incident will learn from this, and that individuals who occupy decision making positions will take decisions only after due consideration of all the facts and due observation of the *audi alteram partem* rule. Pulling the trigger based on unsubstantiated rumours, complaints, media reports or the like is dangerous and can have devastating consequences. The trigger should only be pulled when the facts are clear and the target certain.

[41] Racism cannot and should not be tolerated, and it has to be attacked and destroyed wherever it is found. In the same breath, however, racism should not be found and named where it does not exist.

[42] In the premises therefore, I make the following order:

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[5] 2014 (3) SA 481 (CC) at para [82].

Order:

1. The applicant's suspension is unlawful and set aside.

2. The applicant is directed to return to work as an educator at the first respondent with immediate effect, and she is to report for duty on 25 January 2019.

3. The first and second respondents are ordered to permit the applicant to return to work and to resume her normal duties with effect from 25 January 2019.

4. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C. Coosen

Instructed by: Serfontein, Viljoen Swart Attorneys