



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 2835/2017

In the matter between:

RENTIA NELIA McGALTY

Plaintiff

and

**THE MEC: DEPARTMENT OF EDUCATION
NORTHERN CAPE PROVINCE**

First Defendant

**THE HOD: DEPARTMENT OF EDUCATION
NORTHERN CAPE PROVINCE**

Second Defendant

Heard on: 13 – 15/05/2024

Argued: 05/12/2024

Delivered on: 24/01/2025

Summary: Action: Damages- breach of contract. Merits and quantum separated. Plaintiff bound by pleadings. Settlement agreement. Did defendant fail to comply with terms of settlement agreement. Is defendant responsible and liable for plaintiff's unemployment and damages flowing therefrom. Is defendant responsible for removal of plaintiff's name from roll of educators?

ORDER

In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.

JUDGMENT

MAMOSEBO ADJP

[1] The plaintiff claims damages as a result of the defendant's alleged breach of a settlement agreement concluded on 27 November 2014 as well as future damages for her inability to obtain employment as an educator. The parties agreed to separate the issues of liability (merits) and quantum as contemplated in Rule 33(4) of the Uniform Rules of Court.

[2] In her Amended Particulars of Claim the plaintiff pleaded as follows, in relevant part:

- '11. As a result of the department's breach of the agreement, the plaintiff has subsequent to the conclusion of the agreement not been able to obtain employment as an educator. Furthermore, the officials of the department removed her name from the national system as an educator.
12. Had the department complied with its obligation under the agreement, the plaintiff would have obtained employment as an educator and would have earned the remuneration of at least a level 1 educator as well as increases that become applicable to such remuneration.
13. As a result of the department's breach of the agreement the plaintiff suffered loss of income in the amount of R1 607 793.00 (One million Six Hundred and Seven Thousand Seven Hundred and Ninety-Three Rand), being the total amount of remuneration together with the applicable increases that the plaintiff would have earned as a level 1 educator over a period of three years subsequent to the conclusion of the agreement.'

[3] The plaintiff was employed as a level 1 educator by the Northern Cape Department of Education (the department) until she was dismissed based on a misconduct the details of which did not form part of this adjudication. She declared an unfair dismissal dispute and approached the Education Labour Relations Council (ELRC) in Kimberley for its resolution. On 27 November 2014 she concluded a settlement agreement with the department essentially on the following terms:

- ‘(1) That respondent (the Northern Cape department of Education) will pay Mrs RN Mkgaloty (applicant) 12 (twelve) months’ salary and an additional one-month service bonus. The payment will be effected by the 31st of December 2014.
- (2) That the dismissal of Mrs RN Mkgaloty be replaced with a resignation.
- (3) The applicant has no further claim against the Northern Cape Department of Education in terms of this dispute.
- (4) This is in full and final settlement of this dispute.’

[4] The plaintiff alleges that the code was only changed after summons was issued. She was unable to obtain employment as a result of the dismissal code on the system. According to her, a certain Mr Gavin George, the Labour Relations Official who represented the department at the ELRC, assured her that the process of changing the code from dismissal to resignation would be of immediate effect. He would prepare a memorandum in that regard to the Head of Department. She maintains that despite having followed up on the progress several times, nothing happened. No monies were paid to her as per the settlement agreement until February 2015; and that the code was only changed in January 2018 after summons was issued.

- [5] Mr Lambert Marius Power, acting principal at Homevale High School, wrote an unsigned letter on 24 February 2015, not bearing the school letterhead, and handed it to the plaintiff. The letter is addressed to '*to whom it may concern*' under the heading: '*Appointment of temporary educator 2015: Mrs RN Mcgalty (51601401)*' and reads:

'Mrs Mcgalty was recommended to be appointed in the post of Ms EL Horne who was on sick leave. However, due to the fact that there was a dismissal code against her name we could not recommend her.

Thanks.

School date stamp dated 26 February 2015.

On 26 February 2015 the plaintiff addressed a letter to the District Director of the department, attached Power's letter, and complained about a temporary position which she had applied for unsuccessfully due to the unchanged code and sought the offices' intervention.

- [6] In 2016 she applied to Pescodia High School, TVET College and the Sol Plaatje University but asserted that she was barred from being employed by the dismissal code. After 2014 she had temporary employment for 17 months. Plaintiff was adamant and has pleaded that the department was responsible for the removal of her name from the South African Council for Educators (SACE) register. She did not fare well under cross-examination. She failed to explain why she did not complete the SACE number under item 7 of the NCK 1 application form; her basis for the disagreement that the NCK 1 forms were changed annually; that the NCK 1 form that she claims to have completed in 2015 only came into existence in 2017; and that her name was removed after an expiry period of six months since a person cannot occupy a position of an educator without registration with SACE. Despite noticing the differences in the NCK1 forms in pages 48 and 51 of the papers, and that the NCK 1 Form

at page 48 was used in 2015 while the one in page 51 was used in 2017, she persisted with her stance. It was put to her that the department denies that she applied to Homevale High School in 2015 as there was no record of her application and that according to Mr Carl Wayne Miller, the then principal at Homevale High School, the only applicant was a certain Mr Baadjies. It is common cause that she was employed on a temporary basis in 2019 and 2021.

- [7] In October 2018 the department made an offer to the plaintiff for a vacant and funded level 1 educator post but she rejected the department's offer, her reason being that she had to accept the amount of R616 000 as full and final settlement.
- [8] Mr Power is currently employed by the department and based at the Teacher Development Centre as Senior Education Specialist. He testified that he was the deputy principal at Homevale High School in 2014 and acting principal in February 2015. He added that despite the recommendation by himself as the acting principal and the School Governing Body (SGB) for the plaintiff to be appointed, the department appointed Baadjies instead. Power conceded that the letter written by Miller not only had the school letterhead and date stamp but was also signed and reflects his official capacity as principal. It was put to Power that Miller was transferred in February 2016 and not in January 2015 as he (Power) had contended. Power disagreed with those dates maintaining that Miller left in January 2015.
- [9] Ms Liza-Marie Mazzoncini is an employee of the department and seconded to the South African Teachers' Union (SATU) as a fulltime shop-steward since January 2019. She has only dealt with one unrelated matter involving the removal of a code in 2021 and only met the

plaintiff on the very morning when she came to testify. She was not familiar with the facts of this case and her evidence does not assist the plaintiff's case.

- [10] The last witness to testify for the plaintiff was Ms Francis Sonja Fayvers. She was employed as a secretary at Homevale High School and the chairperson of the SGB. According to Fayvers the plaintiff was the only candidate recommended to fill a vacant post in 2015. Fayvers is not aware of the applications by the plaintiff in 2016, 2017 and 2018. Plaintiff was appointed on a temporary basis in 2019 and 2020. On 27 January 2020 the plaintiff was recommended for a vacant position as reflected in, what she termed, 'the minutes' of that meeting. She was extensively cross-examined on the fact that the names of the members present in that meeting were not reflected, no apologies noted, no indication that they quorate, their deliberations nor the time when that meeting had started and adjourned. Her response was that they had completed an attendance register which did not form part of the papers. There were no supporting documents. That concluded the plaintiff's case.
- [11] The defendant called three witnesses. Ms Anita Jansen, Deputy Director: Corporate Services, Human Resources Management (HR) and Employee Wellness. She has been working in the HR department since 2003 and grew within the ranks. She explained that there are different post levels for educators within the department. Principal is PL4, deputy principal is PL3, Head of Department is PL2, and educator is PL1.
- [12] In 2015 Homevale High School had a vacant temporary or substitute position, which means when the person who is permanently employed in that position is on sick leave, maternity leave, seconded etc. The process

followed to fill the substitute position is guided by the collective agreement which was signed at the ELRC.

- [13] With temporary positions and on an annual basis, around August/September, the department issues a staff establishment determined on the number of learners of a particular school to indicate how many educators a school would qualify for. The principal and the SGB would determine the vacancies, and the principal would provide the post profile based on the curriculum needs. They will then match the educator to those needs. They can also refer to the departmental database to search for educators matching the required profile. A recommendation would be made to the circuit manager followed by the verification process conducted by the HR department. The last level of approval is the district director. SGB's make recommendations to the Head of Department (HOD). In respect of the principal post the SGB must recommend three candidates and with temporary educators one person may be recommended. The NCK1 form must be signed off by the principal and the SGB and the circuit manager before getting its approval from the district director.
- [14] Should the recommended candidate's name be blocked by the code, HR department would register its communication with the Treasury to uplift the code. Treasury requires a signed off submission by the HOD. Jansen testified that the dismissal code is not a bar to employment with the department and that each application is considered and evaluated on its own merits. The change to remove the blocking is effected by the National Treasury following a submission, first to the provincial and then National Treasury.

- [15] The NCK1 forms have changed over time in terms of the Department of Public Administration regulator. The form attached to the papers at p 48 was issued in 2015 and the one in page 51 was used in 2017. In 2017 the form was amended to include SACE. A copy of the notification for the amended NCK1 form is attached at page 54.
- [16] The department keeps a database of qualified unemployed educators. Not every applicant can be guaranteed employment when they apply for vacant positions. Persal is a government system that is not available to other institutions like TVET or the Sol Plaatje University. Access to persal is limited to the different government department's HR units and the National Treasury is in control of the persal system. In 2015 Homevale High School had a vacancy for a substitute post whereas in 2019 and 2021 it was additional posts.
- [17] Ms Nosiphiwo Mlilwana has been employed by SACE since 2013. SACE is a regulatory body dealing with the educators' issues of ethics and discipline as well as their professional development. The responsibility to register with SACE lies with the educator. Registration with SACE must precede employment with the department. The department is required to refer cases of educator misconduct to SACE. Plaintiff's particulars did not appear on the SACE system hence the conclusion that she was not registered with SACE. Plaintiff was allocated pre-accredited membership, that is, she was registered temporarily pending submission of outstanding documents within a period of six months. Upon failure to submit the required documents at the expiry of the six months period, SACE would then remove the educator from its registration database. The department of education cannot remove an educator's name from the register of SACE. The plaintiff's disciplinary record was not availed to SACE.

[18] Mr Miller is currently employed as Deputy Chief Education Specialist: Infrastructure. He taught at Homevale High School from 1989 to February 2016 until his transfer to the district office. According to Miller, all official communication must be on the letterhead and signed off by the principal. He confirmed the existence of a vacancy in 2015 and the letter that he wrote to the district director dated 20 February 2015 recommending the appointment of Mr V Baadjies to teach history at Homevale as a substitute appointment for a permanent teacher on sick leave. Baadjies had both history and geography as teaching subjects. He had no recollection of the plaintiff's application for that post in 2015 as, according to the records confirmed by his letter, Baadjies was the only applicant. Miller's testimony concluded the oral evidence for the defendant.

[19] The following instructive remarks were made by Majiedt JA in *Minister of Agriculture and Land Affairs and Another v De Klerk and Others*¹:

'It is trite that parties are bound by their pleadings — the object thereof being to delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and to then seek to pursue another at the trial.'

[20] It is convenient to begin with the first part of the agreement which required the department to pay the plaintiff 12 months' salary and an additional one-month service bonus on 31 December 2014 because it can be briefly disposed of. In its amended plea dated 09 May 2024 the defendant states that it complied with paragraph 1 of the settlement agreement in January 2015, without specifying the exact date in January. However, it would mean that the payment was made either one month later or in less than one month. The period is not unreasonable. To make

¹ Minister of Agriculture and Land Affairs and Another v De Klerk and Others 2014 (1) SA 212 (SCA) para 39

an issue based on this aspect where the payment was effected in full as agreed does not really take the plaintiff's case any further. Of significance is that the department has at least complied with clause 1 of the settlement agreement. I do not think it is a matter that must detain us.

[21] The second pleaded aspect was that the department removed the particulars of the plaintiff from the roll of educators resultantly causing her to be unemployed and suffering damages. From the evidence adduced it is clear that the department and the South African Council for Educators (SACE) have separate and distinct mandates and operate from different systems. SACE has the sole responsibility to register educators. The reason furnished by Ms Mlilwana was that the educators bear the responsibility to be registered within a six-month period, failing which, council would remove their names from the register. The plaintiff failed to submit the required documents, and her removal was done by SACE. The evidence of Ms Mlilwana regarding this aspect was uncontroverted. She also impressed me as a credible witness. The attack on the department pertaining to the removal of the plaintiff's details from the educators' roll is unsubstantiated and stands to fail.

[22] I now turn to the main argument by the plaintiff to consider whether the failure by the department to change the code from dismissal to resignation which was done three years later and on 7 December 2017 caused the plaintiff to be unemployed and suffer damages.

[23] The settlement agreement was concluded in November 2014. Plaintiff claims to have applied for a temporary position in 2015. There are two mutually destructive versions regarding whether or not plaintiff had applied in 2015. Her version which is supported by Mr Power (the deputy principal) and Ms Fayvers (the SGB chairperson) is that she had

applied in 2015 and was recommended for the temporary position. Mr Miller, the principal, maintained that there was only one applicant, Mr Baadjies, who eventually filled the temporary position. What complicates matters in this regard is the applicable NCK1 form at that time. Ms Jansen substantiated her assertion that the form that plaintiff claims to have used was not in operation then and supported her assertion with a dissemination communication when the NCK form changed. The other conflicting version relates to who the principal was in 2015, Power or Miller? There are also conflicting submissions as to whether there was more than one candidate who had applied for the temporary position in 2015.

- [24] The law is settled when the court is confronted with two mutually irreconcilable versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*² Nienaber JA made these insightful pronouncements:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance

² *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) para 5

compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

- [25] The plaintiff had no factual knowledge regarding the NCK1 forms except to remain adamant that she completed the correct form when she applied in 2015. She testified that she received the form from school. The form she claims to have used was apparently not in use until 2017. Ms Jansen on the other hand was more credible when testifying about the NCK1 form and her explanation thereto was sensible. Mr Power did not strike me as a credible and reliable witness. His testimony that the NCK1 could be used universally between provinces has no merit. NCK is for the Northern Cape and each province has its own forms. He had no knowledge about the changed forms. It seemed to me he was testifying as if he had a score to settle with the department and used this platform to vent, which is unacceptable. This is also borne out by the purported unsigned official contradictory letter without a letterhead he wrote to whom it may concern and claiming to have been assisting the plaintiff by writing that type of letter. The allegations about political interference as claimed by the plaintiff and her witnesses was firstly, not pleaded and secondly, not supported by any objective evidence. I will therefore disregard such allegations as speculative.

[26] According to Ms Fayvers there were several applicants who had applied and the principal (Power) and the SGB recommended the plaintiff. Miller on the other hand is adamant that he was the principal in 2015, and Power was his deputy. He only left Homevale High School in 2016. The department attached his letter which bore the Homevale High School letterhead, stamp and his signature to support his evidence. He testified and struck me as a credible witness. The problem with Fayvers' evidence is that the minutes do not specify the essentials of the minutes and the panel assessing the candidates is not recorded anywhere in those minutes. Only the signature of Fayvers appears. This is not persuasive. Ms Mazzoncini only dealt with one case involving the dismissal code and experienced difficulties in having the code changed in that matter. She conceded to not having the details of the plaintiff's case and her evidence is therefore unhelpful. In as far as these conflicting issues are concerned, I have no doubt that the defendant's witnesses were credible and reliable. It follows that the defendant's version was probable and supported by objective evidence.

[27] The crux of the plaintiff's claim is that had the department changed the code from dismissal to resignation she would have been employed and would not have suffered damages. Unlike in the monetary clause where there is a timeframe of 31 December 2014 set for payment, the aspect of the changing of the code has no time frame. It reads: *That the dismissal of Mrs RN McGalty be replaced with a resignation.* Plaintiff claims that the defendant's representative assured her that it would be effected immediately. However, there is nothing in writing to substantiate that and the same representative, Mr George, was not called to testify by either party. The evidence before me is the following. That the dismissal code was changed on 7 December 2017. According to Jansen, the code does not bar a candidate from applying for employment. Save for the

disputed application in 2015 dealt with above, the applicant was afforded an employment opportunity when she applied in 2019 and 2021. She declined the department's offer for a permanent post level 1 appointment in 2018. The department has established a database of qualified but unemployed educators.

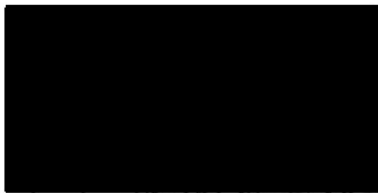
[28] Undoubtedly, the unemployment rate is high in this country. There is no guarantee that a person will be employed at any time merely because of his or her qualifications. I seem to gain the impression from the plaintiff that whenever a vacancy arises in Homevale High School, she is the school's preferred candidate, and her appointment should be automatic. That perception conflates issues with the unchanged code as the reason for her unemployment. Clearly, that cannot be the case. Jansen's uncontroverted evidence was that even if the persal system displayed a candidate's code as 'dismissal', each case would be assessed on its own merits and if the profile of the candidate addressed the need, the Head of the Department would make a submission to the Department of Treasury to change the code. It is a process. Persal is a government system with limited access within the relevant government departments. The contention by the plaintiff that she had applied to Pescodia High School, TVET College and Sol Plaatje University and was rejected because of the dismissal code has no merit.

[29] I have already found that the version by the defendant pertaining to the plaintiff's application in 2015 is more probable. That means that I accept that the plaintiff did not apply or was not persuasive in saying that she had applied during the period 2014 to 2017. She was appointed on a temporary basis in 2019 and 2021. I am not persuaded that the code being changed only in 2017 had caused the plaintiff's unemployment. It therefore follows that a case has not been made by the plaintiff for the

department to be held liable for the purported suffered damages, including future loss of income. Such claim stands to fail.

[30] In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.



MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the plaintiff
Instructed by:

Adv. A. Eillert
Engelsman Magabane Inc

For the defendants:
Instructed by:

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