



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number: JS2283/2019

ELIZABETH BEZUIDENHOUT

First Plaintiff

M GROENEWALD obo LATE ESTATE OF C BEDDY

Second Plaintiff

and

MINISTER OF BASIC EDUCATION

First Defendant

**MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, GAUTENG PROVINCE**

Second Defendant

**HEAD OF DEPARTMENT OF EDUCATION
GAUTENG PROVINCE**

Third Defendant

MR. T. GROENEWALD N.O

Fourth Defendant

**SCHOOL GOVERNING BODY
LANTERN SCHOOL**

Fifth Defendant

Heard: In chambers

Delivered: 17 February 2025

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 17 February 2025.)

JUDGMENT

FORD AJ

Introduction

1. This is an application for leave to appeal against the whole of my judgment and order, dated 19 November 2024.

2. In the judgment I dismissed the plaintiffs claim, without making an order as to costs.

3. The plaintiffs challenge that decision on grounds that I have misdirected myself on the facts and the law. For reasons that will become apparent herein, I disagree.

Grounds of appeal

4. The plaintiffs contend that in assessing the merits of the case, I failed to have regard to the following common facts, which were otherwise unchallenged by the defendant:

4.1. The plaintiffs are qualified as Educational Psychologists and that they are registered as such with the HPCSA;

4.2. That a requirement for their appointment was that they be qualified as Educational Psychologist;

4.3. That at the time of their appointment they were informed that they would be appointed as Educational Psychologist;

4.4. That since their appointment and employment with the Gauteng Department of Education, they performed the duties and

functions of an Educational Psychologists and were evaluated and assessed as such;

4.5. That there exists, in the post establishment of the Department of Education, no post of a Therapist to be employed as Psychologist and that there is a clear distinction between the duties and salary scales of a Therapist (being either a Physiotherapist, Speech Therapist, Occupational Therapist), Counsellors and Psychologist;

4.6. That other individuals employed by the Gauteng Department of Education, also employed at the Lantern School, were appointed in the post of Educational Psychologist and performed the same duties and responsibilities of the plaintiffs;

4.7. That the audit conducted by the Gauteng Department of Education in 2018 confirmed that the defendants were aware of the fact that the plaintiffs' profession was that of Educational Psychologists, and that their registration status with the HPCSA was that of "active psychologist";

4.8. That the Occupation Specific Dispensation for education therapist, counsellors and psychologist (the OSD) required from the Department of Education Gauteng to appoint and remunerate the individuals as per their specific field of expertise and that the Department of Education Gauteng could not utilise the plaintiffs, being registered Educational Psychologists . in the capacity as a "Therapists";

4.9. That even on the version of the Department of Education Gauteng, presented by Mr Macaucua, that the defendants cannot employ a person as Therapist and then utilise them as Psychologist;

5. The plaintiffs contend that if I had properly evaluated and considered the aforementioned facts, I would have arrived at a different conclusion and that there exist more than reasonable prospects that the Labour Appeal Court will come to a different conclusion, having considered the facts of the matter.

6. The plaintiffs reference paragraph 22 of my judgment, where I reached the following conclusion;

The agreement between the Department and the plaintiffs came pursuant to the advertisement of certain vacant posts for therapists in the Vacancy Circular. Not educational psychologists. The plaintiffs applied for those posts, fully aware of the fact that the posts, as advertised was for a therapist position. The fact that the advert required the incumbent to be registered as an educational psychologist with the HPCSA, as an additional requirement, did not evolve the position into that of an educational psychologist. The position was advertised as a therapist, the plaintiffs applied for those positions, the plaintiffs were appointed, and accepted those appointments.

7. In arriving at the aforementioned conclusion, so it is submitted, I allegedly ignored the fact that;

7.1. Prior to the plaintiffs having applied for the positions, they were employed on a temporary basis and performed the functions of Educational Psychologist and not that of Therapists;

7.2. That the first plaintiff was absorbed into the post establishment at a time when the Gauteng Department of Education knew that she was performing the work of Educational Psychologist and that she was not qualified as a Therapist;

7.3. That in terms of the OSD a Therapist is not an Educational Psychologist and that there could have been no reason for advertising a position of Therapist with the "*requirement*" that the incumbent be registered as an educational psychologist other than the fact that the intention of the Gauteng Department Education was to employ such individual as an Educational Psychologist;

7.4. That besides the adverts itself the plaintiffs presented clear and unchallenged evidence that the principal informed the Gauteng Department of Education, with reference to the advert, that the second plaintiff wished to apply for the position of Educational Psychologist.

8. The plaintiffs contend that the conclusion I arrived at, was irreconcilable with the proven facts and that they have reasonable prospects that the Labour Appeal Court, when considering the facts, would come to a different conclusion.

9. The plaintiffs references my finding at paragraph 23, where I noted that the *'what the plaintiffs are pursuing, is in effect a claim to be appointed as educational psychologists' and that claim, however legitimate it appears to be, does not constitute rectification'*. They submit that the finding is irreconcilable with the authorities relied upon, having regard to the fact that it was common cause between the parties and expressly admitted by the defendants that, at the time the plaintiffs were appointed it was a requirement that they be Educational Psychologists. In the aforementioned circumstances, so it is argued, and having regard to the authorities relevant to the issue of rectification, it is submitted that I ought to have found, that it was the common intention of the parties that the plaintiffs were to be appointed as Educational Psychologists and that their contracts of employment did not correctly reflect the intention of the parties.

10. It is submitted further that, had I correctly considered and evaluated the evidence presented, I would have concluded that;

10.1. It was at all times the intention of the parties that the plaintiffs perform the duties and functions of an Educational Psychologist;

10.2. The evidence expressly and unequivocally confirmed that the defendants required from the plaintiffs, to perform the functions of Educational Psychologist and not that of Therapist;

10.3. In terms of the OSD the plaintiffs could not be employed as Therapists;

10.4. And that based on the aforementioned it ought to have been evident that the plaintiffs' contracts of employment could not have been a true reflection of the intention of the parties which mistake was evidently due to an error on the part of the defendants.

Analysis

11. The plaintiffs advance the same arguments and issues raised at the trial before me.

12. In order to claim rectification of an agreement, there must be a common mistake, which does not reflect the true intention of the contracting parties. And as previously stated, the mistake being a *sine qua non* for rectification¹.

13. I have considered all the issues which the plaintiffs allege, I neglected to do. What the evidence confirmed was the following:

13.1. The agreement between the Department and the plaintiffs came pursuant to the advertisement of certain vacant posts for therapists in the Department's vacancy circular;

13.2. The vacancy circular sets out the post establishments;

13.3. The circular did not make provision for educational psychologists;

13.4. The plaintiffs applied for those posts, fully aware of the fact that the posts, as advertised was for a Therapist position;

13.5. The fact that the advert required the incumbent to be registered as an educational psychologist with the HPCSA, as an additional requirement, did not evolve (as stated in the judgment) the position into that of an educational psychologist. The position was advertised as a therapist, the plaintiffs applied for those positions, the plaintiffs were appointed, and accepted those appointments.

¹ *RZT Zelphy 4243 (Pty) Ltd v Olam South Africa Pty Ltd* (5462/2015) [2020] ZAFSHC 95 (15 May 2020) para 19

14. What became abundantly clear both at the trial and in this application for leave to appeal, is what the plaintiffs are pursuing, is a claim to be appointed as educational psychologists, principally because they performed as such and officials at the school and some at the Department knew this. That claim, however legitimate it appears to be, does not constitute rectification.

15. The long and short of this matter is this. The plaintiffs failed to convince me that there was a common intention between them and Macuacua at the time of the conclusion of their contracts, that they were to have been appointed as educational psychologists.

16. As previously stated, the posts the plaintiffs were appointed to were vacant at the time, and listed as such in the Department's post establishment.

17. In terms of s 17(1)(a) of the Superior Courts Act 10, of 2013, leave to appeal "may only be given" when:- the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

18. The court in *MEC Health, Eastern Cape v Mkhitha*², touching on the test to be applied when considering an application for leave to appeal, stated the following:

Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable or realistic chance on appeal. A mere

² 2016 JDR 2214 (SCA) para 16-17

possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal." (Emphasis added).

19. In *Smith v S*³ the Supreme Court of Appeal, also had occasion to consider what "*reasonable prospects of success*" in section 17(1)(a)(i) meant, it said:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal".

20. In *Fair Trade Tobacco Association v President of the Republic of South Africa and Others*⁴ a full bench held that:

"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might find differently on both the facts and the law. It is against this background that we consider the most pivotal grounds of appeal."

21. In *Democratic Alliance v President of the Republic of South Africa and Others*⁵ the court held:

³ 2012 (1) SACR 567 (SCA) at para 7

⁴ 2020 JDR 1435 (GP) at [6]

⁵ (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) at par [5]

"Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."

22. I have carefully considered the application for leave to appeal, and the grounds advanced therein, and conclude that the plaintiffs have no prospect of success on appeal, and in the absence of a realistic chance of success on appeal, it would serve no purpose to grant leave to appeal.

23. In the premises, I make the following order

Order

1. Leave to appeal is refused.
2. I make no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the plaintiffs:

Instructed by:

Adv. D.J. Groenewald

Serfontein, Viljoen & Swart