

SOUTH AFRICA / JUDGMENT

**Jordan v Education Labour Relations
Council and Others (PR372/18) [2021]
ZALCPE 5; [2021] 8 BLLR 820 (LC);
(2021) 42 ILJ 2227 (LC) (16 April 2021)
[2021] ZALCPE 5**

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PR372/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

CASE

NO: PR372/18

In

the matter between:

SINDISWA

SYLVIA

JORDAN Applicant

and

EDUCATION

LABOUR RELATIONS COUNCIL First

Respondent

JONATHAN

RUSS

N.O Second

Respondent

DEPARTMENT

OF EDUCATION, EASTERN CAPE Third

Respondent

Heard: 11

November 2020

Delivered: This

judgment was handed down electronically by circulation to the
Applicant and the Respondents' Legal Representatives

by email,
publication to the Labour Court website and release to SAFLII. The
date and time for handing - down is deemed to be 14h00
on 16 April
2021.

JUDGMENT

LALLIE J

- [1] The applicant launched this application seeking an order reviewing and setting aside or correcting the second respondents' refusal to reinstate her in her position as a teacher as envisaged in section 14(2) of the Employment of Educators Act[1] (the EEA). She also sought reinstatement with what she refereed to a 'back pay' from November 2015 or compensation. The applicant delayed in bringing this application and sought condonation for the delay. The respondents opposed both the main and condonation applications. Although the respondent's initially took issue with the applicant's failure to cite the Member of the Executive Council for Education they withdrew their challenge.
- [2] The applicant was employed by the third respondent as a teacher at Mpeko Secondary School (the school) in 1982. She became the head of the disciplinary committee whose main function was to deal with complaints of misconduct against scholars and teachers. In January 2015 the committee investigated allegations of sexual abuse which were levelled by a grade 11 learner against the then acting principal. On 28 August 2015 a note threatening the lives of all three members of the disciplinary committee including the applicant was found at the school. The applicant submitted that owing to the violence which prevailed at the school which included the murder of a learner and a candidate who had applied to be the principal of the school, the members of the disciplinary committee took the threats seriously. They stopped teaching and from 31 August 2015 they reported for duty at the district office. On 7 October 2015 they received letters instructing them to report for duty at the school on 12 October 2015. They did not carry out the instruction as their fears had not been addressed. After 20 November 2015 the third respondent stopped paying their salaries. In July 2016 the applicant was informed by her attorney that he had received communication through court papers that employment of Mr Funani, the other member of the disciplinary committee and the applicant had been terminated in a letter dated 30 November 2015 in terms of section 14(1)(a) of the EEA.
- [3] After taking a number of steps which will be dealt with later in this judgment, in an attempt to be reinstated the applicant filed the application at hand on 3 August 2018. Because of the passage of time from the date of being informed of the termination of her services and the filing of this application the applicant filed a condonation application.

Condonation

- [4] For the review application to be properly before court the applicant's delay in filing it must be condoned. For condonation to be granted the applicant must show good cause to have the delay excused. In showing good cause the application must provide sufficient information which will place the court in a position to decide whether the delay should be condoned.
- [5] The respondents denied that the applicant made out a case justifying the success of her condonation application. They argued that the applicant failed to provide a reasonable explanation of her 18 month long delay. They further submitted that in view of the failure to provide a reasonable explanation for the excessive delay there was no need to take into account the applicant's prospects of success.
- [6] When the interest of justice require condonation be granted it may not be refused. The test is expressed as follows[2]:

'[22] However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.'

- [7] The applicant gave a full explanation for the entire delay in bringing this application. The reason was that she relied on her erstwhile attorneys who failed to conduct her case diligently. They followed different incorrect procedures which saw the applicant's case being referred to a bargaining council, the Labour and High Court unnecessarily. While as a general rule an applicant may not use the mistakes of her erstwhile attorneys as a defence, each case is decided on its merits. The relevant factors which need to be taken into account in determining whether the lack of diligence constitutes a valid defence include considering whether the manner in which the applicant's case was handled reached a point at which she may not rely on the lack of diligence.
- [8] The applicant did not sit on her rights. From the day she decided not to report for duty because she feared for her life she took active steps to demonstrate to her employer that she wanted to retain her employment. She continued doing so even after she got to know of the termination of her employment, by taking steps to regain her employment. When she realized that her erstwhile attorneys were not assisting she found herself a different firm of attorneys. I therefore find the applicant's explanation of her excessive delay reasonable.
- [9] I have considered the authorities the respondents sought to rely on in arguing that the applicant's prospects of success should not be considered in view of her unreasonable explanation for her excessive delay. As the explanation has been found reasonable there are no grounds for disregarding the applicant's prospects of success. The applicant made

averments which if provide would lead to the success of her review application. Those averments include the alleged unreasonableness of the decision under review. The applicant proved that she will suffer more prejudice than the respondents should this application be refused as she will be unable to challenge the decision terminating her employment after giving the third respondent 25 years of unblemished service.

- [10] When all the relevant factors are taken into account including the first respondent's delay in issuing the decision under review, I conclude that the applicant has shown good cause to have her delay in filing this application condoned. Her application must, in the circumstances, succeed.

Merits

- [11] The applicant seeks an order reviewing and setting aside the second respondent's decision dated 14 March 2017 refusing her reinstatement and confirming her dismissal in terms of section 14 (1)(a) of the EEA on the grounds that he was not convinced that she had shown cause for her absence. Section 14 (2) of the EEA provides as follows:

'... at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine

- [12] The applicant submitted that after receiving death threats she and the other 2 members of the disciplinary committee, started reporting at the district office instead of the school from 31 August 2015. They sought intervention from the district office on the same date. In response to a letter from the district office informing them that their matter was receiving attention they, inter alia, through their attorneys, addressed a letter dated 5 October 2015 requesting to continue reporting at the district office pending the completion of the investigation of their matter. They received letters on 7 October 2015 advising them to report for duty at the school on 12 October 2015. The third respondent stopped paying the applicant's salary after 20 November 2015. In December 2015 the applicant and another member of the disciplinary committee sought, from the High Court, an order interdicting the third respondent from withholding their salaries. They were told by their attorneys in July 2016 that he had received, with the court papers letters of the termination of their services in terms of section 14(1) of the EEA. The High Court dismissed the application on the grounds that the applicant and the other member of the disciplinary committee should have first exhausted internal remedies. The respondents submitted that not all the facts the applicant sought to rely on were true.

- [13] On 6 October 2016 the applicant made representations to the second respondent seeking her reinstatement. In a letter dated 14 March 2017 the second respondent refused to reinstate the applicant and confirmed the termination of her services in terms of section 14(1)(a) of the EEA. The reason for the refusal was that he was not convinced that the applicant had shown cause for her unauthorised absence.
- [14] The applicant's grounds for review are that the second respondent failed to take into account relevant information which she had placed before him. A further ground was that the second respondent had acted inconsistently by reinstating Mr Hokwana, one of the members of the disciplinary committee who had also absented himself from work. He also failed to consider her 35 years of service and her clean disciplinary record.
- [15] I agree with the interpretation of the provisions of section 14 (2) of the EEA in *De Velliers v Head of Department: Education, Western Cape Province*[3] one of the authorities the applicant sought to rely. The following dictum of that judgment is apposite:
- '[28] In *MEC for Education & Culture v Mabika & others* (2005) 26 ILJ 2368 (LC) 2373C, it was held that:
- 'In applying its mind to the representations made by the employee in terms of s 14(2), the employer must naturally act fairly, reasonably and justifiably.'
- [29] In considering a s 14(2) application, in *De Villiers v Minister of Education, Western Cape Province & another*, *Davis and Allie JJ* held that the employer should be guided by the ordinary principles applicable to arriving at a decision as to whether an employee should be dismissed for misconduct. Ultimately, the employer should be satisfied that, on account of the employee's absence from work, the employment relationship has irretrievably broken down. As set out in item 3(4) of the code, it is generally not appropriate to dismiss an employee, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'.
- [16] In *Grootboom* (supra)[4] in interpreting provisions of section 17(5) of the Public Service Act[5] which are similar to those of section 14 of the EEA the Constitutional Court held that the reach of the legislation is extensive. It further expressed the view that 'It has the adverse effect of terminating employment for misconduct without notice or hearing' Justice therefore requires that the far-reaching powers vested in the second respondent by section 14 of the EEA are exercised properly.
- [17] Nothing turns on the dispute of fact in the detail of the events which led to the applicant's absence from duty. It is common cause that after the applicant was involved in dealing with a complaint of an alleged sexual abuse of a learner by the acting principal she received a note threatening her life. She consequently stopped reporting for duty at the school from 28 August 2015. In a letter dated 30 November 2015, the Acting Superintendent General of the third respondent acting in terms of section 14(1)(a) of the EEA terminated the applicant's services with effect from 31 August 2015. On 6 October 2016 the applicant made

representations as envisaged in section 14(2) of the EEA. In a letter dated 14 March 2017 the second respondent expressed his refusal to reinstate the applicant in the following words:

'I refer to your request for reinstatement dated 06 October 2016.

Kindly be advised that after careful consideration of the representations and other relevant factors, I hereby confirm your dismissal in terms of section 14(1)

(a) of the Employment of Educators Act 1998.

The afore-mentioned decision is based on the fact that I am not convinced that you have shown cause for your unauthorised absence and cannot therefore consent to your reinstatement.'

[18] In her representations for reinstatement the applicant gave a detailed account of the reasons for her absence from duty. She further provided reasons for holding the view that she should be reinstated. She submitted that the basis for the second respondent's refusal to reinstate her is not clear from his letter of 14 March 2017. She added that the second respondent failed to provide reasons for his decision. In the answering affidavit the second respondent submitted that it is clear from the letter dated 30 November 2015 that the applicant was discharged from service for absconding in terms of section 14 (1)(a) of the EEA. He further submitted that no further reasons were required as the reasons for her discharge from service were very clear. He repeated the submission that the applicant had failed to show good cause why the third respondent should not have

dismissed her.

[19] The respondents' answer supports the applicant's version that the second respondent failed to consider her submissions. Section 14(2) of the EEA provides that if an educator who has been discharged in terms of section 14(1) at any time reports for duty, the employer may on good cause shown and notwithstanding anything to the contrary contained in the EEA, approve the reinstatement of the educator. The applicant reported for duty after her absence. In the letter refusing to reinstate the applicant the second respondent relied on the reasons given in the letter discharging her from service which constitutes what section 14(2) of the EEA refers to as anything to the contrary contained in the EEA. The second respondent was required, notwithstanding the reasons for the termination of the applicant's services, to have considered whether in her submissions, she had shown good cause for the approval of her reinstatement. The second respondent's letter refusing the applicant's reinstatement also reflects his misunderstanding of what he was required to do in exercising the powers vested in him in section 14(2). He stated that he could not consent to her reinstatement as he was not convinced that the applicant had shown good cause for her unauthorised absence. That is not what he was required to do in section 14(2) of the EEA. He was required to determine whether the applicant had shown good cause to have her reinstatement approved.

- [20] By his own admission, the second respondent gave no reasons for his refusal to reinstate the applicant as he was of the view that he was not obliged to. His view was erroneous. The second respondent was required to demonstrate that he had applied his mind to the applicant's representations. His decision should have demonstrated that he acted fairly and legally within the confines of the enabling legislation. His failure persisted even in this application. The applicant has successfully established that the second respondent failed to consider her representations and to exercise his discretion in terms of section 14(2) of the EEA properly. His decision is therefore unreasonable and stands to be reviewed and set aside.
- [21] The applicant sought an order reinstating her in her former position or compensation. The general rule is that courts should avoid usurping the functions of functionaries and substitute their own decisions for those of functionaries. I deem it appropriate to afford the office of the first respondent an opportunity to exercise the powers vested in it section 14 (2) of the EEA properly.
- [22] The applicant sought a costs order against the respondents. Both the law and fairness supports the granting of the order because the applicant should not be out of pocket as a result of the failure to the second respondent to exercise his statutory powers properly.
- [23] In the premises, the following order is made:

Order:

1. The application for the late filing of the review application is granted.
2. The second respondent's decision in his letter dated 14 March 2017 refusing to reinstate the applicant is reviewed and set aside.
3. This matter is remitted to the first respondent for the submissions made by the applicant in the letter dated 6 October 2016 to be considered de novo.
4. The first respondent is directed to convey his decision in terms of section 14(2) of the Employment of Educators Act 76 of 1998 to the applicant within 30 days of this judgment.
5. The respondents are ordered to pay the applicant's costs jointly and severally one paying the other to be absolved.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr

Vilakazi of Nomaswazi Maseko Inc.

For the Third Respondent: Advocate Pitt

Instructed by: The

State Attorney

[1] 76 of 1998

[2] Grootboom v National Prosecuting Authority and Another [2014] 1 BL LR 1 (CC) at para 22.

[3]

(2010) 31 ILJ 1377 (LC)

[4] Para 38.

[5] Act of 1994.

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Prepared on 11 October 2026 · Esheria