

SOUTH AFRICA / JUDGMENT

Nogoduka v Minister of the Department of Higher Education & Training and Others (2981/2016) [2017] ZAECGHC 74; [2017] 6 BLLR 634 (ECG) (16 February 2017)

[2017] ZAECGHC 74

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering

CASE / FILE NUMBER

2981/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

no: 2981/2016

Date

heard: 16 February 2017

Date

delivered:

In
the matter between
LAZOLA
NOGODUKA Applicant
vs
THE
MINISTER OF THE DEPARTMENT
OF
HIGHER EDUCATION &
TRAINING First
Respondent
THE
DIRECTOR-GENERAL
DEPARTMENT

OF HIGHER EDUCATION
AND
TRAINING Second
Respondent
IKHALA
TVET
COLLEGE Third
Respondent

JUDGMENT

PICKERING J:

- [1] This is an application launched on 24 June 2016 in which applicant seeks, inter alia, the following relief:

“1. Directing that Respondents take such administrative or other steps as may be necessary to correct the employment records relating to the Applicant, so as to reflect the Applicant’s resignation as an employee on 22 June 2013.

2. Reviewing and setting aside the disciplinary proceedings held on or about 1 July 2015 and 3 July 2015 as against the Applicant.
3. Directing that the Respondents take such administrative or other steps necessary to procure and facilitate in collaboration with the Government Employees Pension Fund, the payment of the Applicant’s pension monies, following upon the Applicant’s resignation as an employee of the Ikhala College on 22 June 2015.
5. Directing that the Respondents pay the Applicant’s costs jointly and severally the one paying the other to be absolved.
- [2] The first respondent is the Minister, Department of Higher Education and Training. Second respondent is the Director General,

Department of Higher Education and Training; Third respondent is the Ikhala Tvet College. A Tvet College is a Technical Vocational

Education and Training institute, designated as such in terms of the Further Education and Training Colleges Act 16 of 2006.

- [3] It is common cause that applicant was employed by the respondents on 26 June 2009 as a lecturer. According to applicant his employment situation became increasingly intolerable by reason of what he termed was “the self-serving political agendas pursued by the Senior Echelons of third respondent.” He states that because he was “ill-inclined to become involved in the political machinations of senior officials in the employ of third respondents, he became marginalised and unhappy.”

- [4] In consequence thereof he resigned from his employment with immediate effect on 22 June 2015. His letter of resignation, addressed to the principal of third respondent reads as follows:

“I am thrilled to inform you that I am resigning. I have been waiting for what seems like forever to inform that I am resigning. I believe I have worked in this institution long enough to understand its cultural, its people and its identity. And I can honestly say that the environment now is as toxic and destructive as I have ever seen it.

I am tendering my resignation effectively immediately.”

- [5] What applicant neglects to state in his founding affidavit is that on 6 February 2015 he had been served with a “Notice of Contemplated Precautionary Suspension: Yourself.” (Annexure B). This notice reads as follows:

“The college is at present considering putting you into a paid precautionary suspension due to serious allegations which are levelled against you. The reasons of this consideration is to allow process of thorough investigation to verify these allegations and it is our view that your presence at the College during this period might compromise this process. You are hereby given opportunity in terms of the Rules of Administrative Justice to make representations why the above actions should not be taken against you.”

- [6] Applicant did apparently make representations although the nature thereof does not appear from the papers.
- [7] On 2 March 2015 the third respondent, after considering applicant’s representations, placed him on full precautionary suspension. On 14 April 2015 third respondent served a charge sheet (Annexure C) on applicant calling upon him to attend a disciplinary hearing on 22 April 2015. This notice to attend a disciplinary hearing concluded with a warning to applicant that should he fail to attend the hearing without a valid reason “the chairperson may continue with the hearing in your absence.” Various allegations of misconduct were levelled against applicant in the said notice, including allegations of gross dishonesty and insubordination.
- [8] On 20 April 2015, however, applicant submitted a medical certificate in which sick leave was recommended from 20 – 24 April 2015. The hearing was in consequence thereof postponed to 25 June 2015.
- [9] As set out above, however, on 22 June 2015 applicant resigned with immediate effect. Third respondent alleges that he did so in order to escape due process despite the fact that his contract of employment provided for a period of one month’s notice.
- [10] According to applicant, however, there was no substance whatsoever to these charges. He states that it was these fabricated charges which finally persuaded him to resign from his toxic work environment. He denies that he resigned in order to avoid the disciplinary proceedings.

[11] Third respondent avers that on the day of the postponed hearing, namely 25 June 2015, applicant was not present. He was,

however, contacted telephonically by its prosecutor and requested to attend. He was warned that should he not do so the hearing

would continue in his absence. Applicant denies that he was so contacted but it is not necessary to deal with this conflict because he admits that he refused to attend the hearing.

[12] It is common cause that the hearing then proceeded in his absence, it being recorded by the Presiding Officer that applicant had failed to attend without any valid reason. Certain evidence was led, whereafter, on 1 July 2015, applicant was found guilty as charged. On 9 July 2015 the presiding officer handed down the sanction down of dismissal.

[13] Applicant avers that the presiding officer committed a gross irregularity by proceeding with the hearing inasmuch as applicant was at the time thereof no longer an employee of third respondent. He avers that in so doing third respondent purported to act as his employer (which it was not) in respect of him as his employee in its employ (which he was not). He avers that this conduct is illustrative of the conspiracy to oust him from his employment and that the entire process was nothing else but a vindictive vendetta against him.

[14] Applicant avers further that it is clear from all the circumstances that third respondent had accepted his resignation. In this regard third respondent states that “correctly construed, the disciplinary hearing was really an enquiry aimed at determining whether, in the course of his employment, applicant made himself guilty of dishonest conduct, such as to warrant him being dismissed... Respondents were lawfully entitled to dismiss applicant and his contract of employment and/or the Public Service Act in this regard created rights and obligations which survived the applicant’s resignation.”

[15] Applicant avers further that he discovered over the passage of time that his attempts to obtain alternative employment had been thwarted by third respondent’s action in conducting the disciplinary proceedings which, according to him, had had the purpose of bringing his good name into disrepute and creating “an artificially prejudicial record” against his name. Prospective employers making enquiries from third respondent were advised that he had been dismissed for misconduct and dishonesty. He therefore instructed his attorneys to address a letter to second respondent demanding, in effect, the relief sought in this application, expunging the adverse disciplinary record so as to reflect that he had resigned as an employee on 22 June 2015.

[16] Applicant further avers that respondents have taken no steps to facilitate the payment of his pension monies by submitting the relevant and necessary forms to the Government Employees Pension Fund, including a so-called Form Z102 which provides for the employer alone to complete the form, and also to inform the pension fund of the date of termination of his employment and his salary. To this third respondent responds that there has been a non-joinder of the Pension Fund as an interested party. It avers that the pension fund is an

independent legal entity which approves or rejects the payment of pension fund monies to members independently and that the respondents have no influence over the Fund in this regard.

- [17] Much argument was addressed to me concerning the issue as to whether or not this Court has jurisdiction to hear and deal with the application. It is not necessary to deal with all the submissions addressed because, in my view, section 77(3) of the Basic Conditions of Employment Act 27 of 1997 is decisive of the matter. S 77(3) reads as follows:

“(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.” See too section 157 of the Labour Relations Act.

- [18] The issue raised by applicant clearly concerns his contract of employment and this Court therefore has the requisite jurisdiction to deal with the matter

- [19] It will be convenient to deal firstly with the issue relating to applicant’s Pension Fund. This question is, in my view, easily disposed of. It is clear in my view that the Pension Fund is not an interested party at this stage. All that the relevant prayers of the Notice of Motion seek to achieve is that respondents be directed to take the necessary administrative and other steps to procure applicant’s pension monies. Respondents contend that before they can do so, however, applicant is required to complete certain forms for onward transmission by respondent to the Fund. They state that applicant was called

upon in this regard by email (Annexure E) on 1 September 2016 to fill in the necessary forms which, so he was advised, were available at third respondent’s offices. In response hereto applicant denies receipt of Annexure E and reiterates that in form Z102 provision is made for third respondent alone to complete the form and to inform the Fund accordingly. It is, so he states, the lodging of this form with the Fund which “precipitates payment of the pension monies.”

- [20] In these circumstances where it appears to be common cause that a form or forms must be completed and submitted to the Fund the latter has no interest whatsoever in this application.

- [21] As is apparent from what is set out above there is a dispute as to whether the respondents are required to complete Form Z102 alone without any input from the applicant. These being motion proceedings I must decide the matter on the facts put forward by respondents. They insist that applicant is required to complete certain documentation and that they have advised applicant to attend at the offices of third respondent to do so but that he failed so to attend. Such being the case the relief sought by applicant in paragraph 3 of the Notice of Motion is misconceived and cannot be granted. I would just add that it is disquieting that the parties and their legal representatives were unable to resolve this issue of applicant’s pension fund monies and the forms to be completed without the necessity of this court application.

[22] I turn then to the relief sought in prayers 1 and 2 of the Notice of Motion. It is clear, as submitted by Mr. Thys for the respondent, that the respondent's authority to conduct the disciplinary hearing arises from applicant's contract of employment read together with the Public Service Act of 1994. In this regard applicant's employment contract provided for a notice period of one month. Section 16B(6) of the Public Service Act is accordingly relevant. It provides:

"If notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice applicable to the employee."

[23] In my view this provision was clearly introduced into the Act to cater for precisely the situation which has arisen here, where an employee "resigns" in order to avoid an adverse disciplinary finding and thereby to leave his employment with an ostensibly clean record.

[24] In these circumstances, where the disciplinary proceedings were instituted against applicant before his purported resignation on 22 June 2015 the respondents were precluded in terms of section 16B(6) from accepting applicant's resignation.

[25] Applicant was therefore obliged to serve out his one month notice period. He was accordingly still an employee during the course of the disciplinary hearing and remained so at the time the guilty verdict was pronounced on 1 July 2015 as well as on 16 July 2015 when the sanction of dismissal was handed down. He therefore chose not to attend the disciplinary enquiry at his peril.

[26] In the light of the above there is no merit in the application. The following order will issue:

"The application is dismissed with costs."

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. J. Bester

Instructed by: Netteltons Attorneys, Ms. Pienaar

Appearing on behalf of First Respondents: Adv. M. Thys

Instructed by: Whitesides Attorneys, Mr. Barrow

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Prepared on 13 October 2026 · Esheria