

SOUTH AFRICA / JUDGMENT

School Governing Body of Pula-Madibogo Primary School and Another v Head of Department of Education, Limpopo and Others (8941/2023) [2023] ZALMPPHC 98 (19 October 2023)

[2023] ZALMPPHC 98

COURT

Limpopo High Court, Polokwane

BEFORE

Bresler

CASE / FILE NUMBER

8941/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 8941/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

19/10/2023

In

the matter between:

THE
SCHOOL
GOVERNING
BODY
OF
First
Applicant
PULA-MADIBOGO
PRIMARY SCHOOL
SAVIOUR
ASSOCIATION OF SCHOOL
Second
Applicant
GOVERNING
BODIES
And
HEAD
OF DEPARTMENT OF
EDUCATION,
First
Respondent
LIMPOPO
MEMBER
OF THE EXECUTIVE COUNCIL
Second
Respondent
FOR
EDUCATION, LIMPOPO
MAGDELINE
MMABOTSHA RAKAKGOLO
Third
Respondent
DISTRICT
DIRECTOR: LIMPOPO DEPARTMENT
Fourth
Respondent
OF
EDUCATION, CAPRICORN SOUTH
SHARON
BOITUMELO LEKGETHA
Fifth
Respondent

JUDGMENT**BRESLER AJ****Introduction**

- [1] The Applicants apply for an urgent review and setting aside of the Fourth Respondent's decision in respect of Post 35 at Pula-Madibogo Primary School.
- [2] The Applicants furthermore apply for an order that the decision of the First Respondent, to decline the First Applicant's recommendations in respect of Post 35 at Pula-Madibogo Primary School, be reviewed and set aside and for the First Respondent to reconsider the First Applicant's recommendations within 5 (five) days from date of order.
- [3] The First Applicant is the School Governing Body of the Pula-Madibogo Primary School, the governing body responsible for the management of Pula-Madibogo Primary School and elected in terms of the provisions of the South African Schools Act. Their locus standi in this matter is clear and undisputed.
- [4] The Second Applicant is the Saviour Association of School Governing Bodies, an association of school governing bodies within the Republic of South Africa.
- [5] The First Respondent is the Head of the Department of Education, Limpopo Province in his official capacity as such.
- [6] The Second Respondent is the Member of the Executive Council for the Department of Education, cited herein in her official capacity.
- [7] The Fourth Respondent is the District Director: Limpopo Department of Education, Capricorn South, cited by virtue of being the purported Administrator that took the alleged impugned decision.
- [8] The Third Respondent is the proposed candidate for Post 35. The Fifth Respondent is the educator previously employed at Pula-Madibogo Primary School until being declared to be in excess and presumably placed at Westenburg Secondary School.
- [9] The review was launched on an extremely urgent basis. The impugned decision was taken on the 28th of August 2023. The review was issued and served on the State Attorney, Polokwane on the 29th of September 2023. The review was originally enrolled on the 10th of October 2023 allowing a period of only three and a half days for the filing of Answering affidavits, the Replying affidavit and for the matter to be enrolled before 12:00 on the 5th of October 2023 in accordance with the practice directives of this division.
- [10] Notwithstanding these restricting timeframes, the First, Second and Fourth Respondent has duly complied by delivering their Answering affidavit on the 5th of October 2023.

[11] On the 10th of October 2023 Kganyago J rolled the matter over to the 17th of October 2023 after indicating that he was involved in the previous urgent application referred to herein after. Neither urgency nor the merits was thus determined on the 10th of October 2023.

[12] This court is consequently tasked to determine:

12.1 Urgency; and

12.2 The merits of the review.

[13] The facts relevant to the adjudication of the matter, and common cause between the parties, are the following:

13.1 In terms of the 2023 Final Staff Establishments approved by the First Respondent, the School has 37 (thirty-seven) posts available. This must be understood against the milieu that the capacity of the school warrants the appointment of 37 (thirty-seven) educators which includes 1 (one) principal, 2 (two) deputy principals, 5 (five) heads of departments and 29 (twenty-nine) post level 1 educators.

13.2 At this stage, post 35, being the position of Head of Department: Foundation Phase is vacant.

13.3 On or about the 14th of April 2023, the Fifth Respondent was presented with a letter from the First Respondent declaring her to be in excess and transferring her to Westenburg High School.

[1] It is apposite to note that counsel for the Respondents conceded during the hearing that the Fifth Respondent is in fact qualified to teach intermediate phase and not foundation phase. The relevance of this distinction will appear from what is stated later in this judgment.

13.4 On the 17th of April 2023, the First Applicant advertised a substitute post whereafter candidates were shortlisted for interviews. On the 16th of May 2023 and after conducting interviews, the Third Respondent was found to be a suitable and preferred candidate and her particulars were accordingly communicated to the First Respondent.

13.5 On the 7th of September 2023 the Applicants approached this court with an urgent review (the first review) on the basis that the First Respondent

failed to take a decision.

13.6 During the course of these proceedings, the Respondents produced a letter, dated the 28th of August 2023, confirming the Third Respondent's decision to decline the First Applicant's recommendations. The said letter pertinently stated that the recommendations are declined as the School has an additional educator on the 2023 fixed

establishment.

13.7 It is common cause that the additional educator refers to the Fifth Respondent.

13.8 Because a decision was indeed taken, the Honourable Kganyago J ruled that the first review became moot, and it was thus struck from the urgent roll on the 26th of September 2023.

13.9 On the 29th of September 2023, the Applicants launched the current review.

[14] As this Court alluded to during the hearing of the matter, basic education lies at the heart of this matter. In a compelling judgment dealing with this constitutional right, Khampepe J said the following[2]:

'There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were never dreamt of before. I am not exaggerating when I say that education changed lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too.

[15] In summarizing the crisp common cause facts, it is evident that the Pula- Madiboga requires 37 (thirty-seven) educators in order to effectively educate the number of students currently enrolled in the school. They only have 36 (thirty-six) educators at this stage. The Fifth Respondent was declared in excess and having regard to her qualifications, she is not a suitable candidate for Post 35.

Analysis

of applicable law

Urgency

[16] This court found that the matter was sufficiently urgent to warrant the hearing thereof on an expedited basis on the urgent roll. For the sake of comprehensiveness, reasons for the ruling are set out herein after.

[17] The Applicants submitted that, by its very nature and the imminent possibility of an infringement of students' right to basic education, this matter should be dealt with on an urgent basis.

[18] Counsel for the Applicant specifically submitted that the school has no educator that fills post 35 and this has the disastrous consequence that minor children are not afforded their fundamental right to education.

[19] Contrary hereto, the Respondents submitted that the Applicants have known that there is no educator appointed to Post 35 since as early as April 2023. They elected to delay the matter to their own detriment.

[20] This Court referred the Respondents' Counsel's attention to the decision of *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*[3] wherein the following was stated at [7] and further:

'[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. As applicant must make out his case in that regard.

[8] In my view, the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay might have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regards thereto.

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact that the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing of the matter in due course the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of the Applicant he cannot afford substantial redress in an application in due course the application

does not qualify to be enrolled and heard as an urgent application.'

[21] The Court take cognisance of the fact that in this division, opposed matters are currently enrolled in October and / or November

2024. It must therefore be asked if the Applicants will be afforded substantial redress if the review is only heard in approximately November 2024. In my view, that would result in an injustice - not necessarily to the Applicant but to the minor children potentially being deprived of adequate basic education.

[22] I therefore indicated during the hearing that in my view, substantial redress will not be afforded to the Applicants should the matter be enrolled on the ordinary opposed roll.

[23] As to the alleged delay in launching these proceedings, I am in respectful disagreement of the Applicant's analysis of the factual position. Prior to the impugned decision, the implied status quo was that the Respondents are in the process of considering the preferred candidate for appointment. The impugned decision changed the status quo to the effect that no educator will be appointed in post 35.

- [24] The impugned decision should therefore be the point of departure to determine if the review proceedings were timeously instituted. The question is after all if substantial redress will be afforded if the review is heard on the opposed roll and not if alternative legal avenues could have, or should have, been explored.
- [25] Having considered the time frame of the current proceedings, it is clear that the Applicants did not unreasonably delay in launching the review proceedings.
- [26] The Respondents furthermore argued that the Applicants have an alternative remedy available to them. According to the Respondents, the Applicant's School Principal can reallocate classes to the available educators and, since the Fifth Respondent is still employed at the school, she can also be utilised to attend to some of the classes.
- [27] The argument of the Respondents fails to appreciate that the First Respondent, on their own version, determined that the Fifth Respondent was declared to be in excess. In this court's understanding, it was already found that the Fifth Respondent does not have the appropriate skill set and / or qualifications to be useful at the said school. Moreover, she was officially transferred to Westenburg High School.
- [28] For purposes of determining if there is an alternative remedy available, no consideration can therefore be given to the fact that the Fifth Respondent is allegedly still employed at the School.
- [29] In this court's view, education requires continuity. The Fifth Respondent's alleged employment had the proverbial sword hanging over it in as far as she was to be transferred to Westenburg. When requested during the hearing. Respondent's counsel could not direct this court to a written decision taken by the Respondent's to revoke the decision pertaining to the Fifth Respondent's transfer to Westenburg. It is trite law that an administrative action remains valid until set aside by a court of law.
- [30] The availability of an alternative remedy, is in any event not justification for refusing to hear a matter on an urgent basis. Uniform Rule 6(12)(a) gives the court a discretion to dispense with the forms and service provided for in the rules and to hear the matter at such time and place and in such manner and in accordance with such procedure as it deems fit.
- [31] In terms of Uniform Rule 12(1)(b) the Applicant must explicitly set forth the circumstances which renders the matter urgent and reasons why the applicant could not be afforded substantial redress in due course. It is evident that it need not be shown that no alternative remedies exist prior to approaching a court on an urgent basis.
- [32] I have already alluded to herein before that this matter relates to basic education. It is critical that the appointment of an educator to Post 35 be addressed as soon as possible. This cannot wait to be determined in November 2024 or thereafter. As counsel for the Applicants alluded to in his Heads of Argument: the absence of an educator for Foundation Phase constitutes a continued violation of the right to education.

[33] On this basis, this court ruled that the Applicants have made out a case for the matter to proceed on an urgent basis.

The review

[34] The review lies against the decision of the Fourth Respondent taken on the 28th of August 2023 in terms whereof the Fourth Respondent, and therefore by implication the First Respondent, declined to consider the First Applicant's recommendation to appoint the Third Respondent in Post

35. This decision is premised on the fact that the school has an additional educator on the 2023 fixed establishment.

[35] I have already indicated *infra* that the alleged additional educator is the Fifth Respondent. She was declared to be in excess and await transfer to Westenburg. No corroborating evidence was presented to show that this decision was cancelled or invalidated for any reason. Counsel for the Respondents in fact conceded during the hearing that the absence of corroborating evidence suggests that the decision to transfer her to Westenburg is still applicable.

[36] It therefore follows that the First Respondent not only refused to consider the appointment of the preferred candidate but in fact resolved not to appoint any person in Post 35. This will result in the school having only 36 (thirty-six) educators as opposed to the 37 (thirty-seven) educators as per the assessment of the First Respondent.

[37] Both counsels directed the Court's attention to the provisions of Section 6(3)(a) of the Employment of Educators Act, Act 76 of 1998 that states the following:

(a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial Department of Basic Education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of the Department, who are in excess and suitable for the post concerned.

[38] The Respondents argued in essence that the Fifth Respondent should be utilised since she is still employed at the school. The Respondents stated that there are numerous educators at the school that are underutilised, and the Principal of the school can reallocate subjects to educators and / or reassign them to new posts in order to accommodate the Fifth Respondent.

[39] This was however not canvassed in the written decision conveyed to the Applicants on the 28th of August 2023.

- [40] It also stands to be noted that this argument contradicts the factual position. The Fifth Respondent has already been declared to be in excess and transferred to Westenburg High School. Section 6(3)(a) limits the power of the First Respondent to propose candidates that are in excess and suitable for the post concerned. It does not allow the Applicant to direct a school, by implication, to reallocate or reassign existing educators to accommodate another candidate who has already been found to be in excess and thus not fulfilling the needs of the school.
- [41] In my view, this renders the decision fatally flawed. The First and / or Third Respondent was not empowered to make a decision that would result in the restructuring of the educators at school.
- [42] It is unreasonable to expect from these educators to take on further responsibilities over and above for their current post description. More specifically, basic education would have been disrupted as the educations would have to prepare anew for their newly assigned responsibilities and duties.
- [43] Section 6(2)(d) of the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA') provides that an administrative action may be set aside if it is found that the action was materially influenced by an error of law.
- [44] Section 6(2)(e) provides for judicial review of an administrative action, where the action was taken for a reason not authorised by the empowering provision. Section 6(2)(f) furthermore provides for judicial intervention if the administrative action was not authorised by the empowering provision.
- [45] In my view, a case has been made out as contemplated in Section 6(2)(d), (e) and (f) of PAJA.
- [46] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency*, and
Others[4] the following was stated:
- '[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.'
- [47] In as far as grounds for review has been established, the decision must therefore be declared unlawful and set aside.
- [48] In light of this conclusion, it is not necessary to determine the remaining grounds for review.

[49] The Respondents submitted that a period of 15 (fifteen) days would be a reasonable period to enable them to reconsider the First Applicant's recommendations. The Applicants acceded to this submission.

[50] In the words of Khamepe J[5]:

'I hope that no other pens have to be taken away before the role players in our education system fully realise the critical importance of the right to education, especially in a nascent democracy like ours, which recognises the transformative nature of education and entrenches it as socioeconomic right in our constitution'.

Costs:

[51] The Applicants raised the Baywatch principle in the event that the review is unsuccessful. It is not necessary to consider the principle in casu as the Applicants are substantially successful in their review.

[52] This court sees no reason why the costs should not follow the outcome of the proceedings. In as far as the costs of 10 October 2023 was not specifically dealt with in argument, it will be deemed to be costs in the cause.

Order

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

53.1 The non-compliance with the forms of service provided for in the Uniform Rules of Court is condoned and the Court dispenses with same, and the application is heard on an urgent basis.

53.2 The non-compliance with the timeframes stipulated in Rule 53 of the Uniform Rules of Court is condoned.

53.3 The Fourth Respondent's decision dated the 28th of August 2023 in respect of Post 35 at Pula-Madibogo Primary School is declared unlawful and invalid and is reviewed and set aside.

53.4 The First Respondent's decision to decline the First Applicant's recommendation in respect of Post No 35 at Pule-Madibogo Primary School is declared unlawful and invalid and is reviewed and set aside.

53.5 The First, Second and Fourth Respondents are directed to reconsider the recommendations submitted by the First Applicant within a period of 15 (fifteen) days from date of service of this order on the attorneys for the Respondents and to take the decision de novo.

53.6 The First, Second and Fourth Respondent, jointly and severally is ordered to pay the costs of the First and Second Applicant which costs includes the costs of employing two counsels.

M BRESLER

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES Heard on 17 October 2023

Judgment

delivered on 19 October 2023 For the Applicants Adv S.S TEBEILA Adv T.A MAKOLA Instructed by RJ Phakoago Attorneys C/O KC Moshutla Email Phakoagoattorneys@gmail.com moshutlakc.sasgb@gmail.com tebeiless@gmail.com For the Respondents Adv T.A Masete Email TMasete@justice.gov.za Instructed by The State Attorney

- [1] As per Annexure 'MP 7' to the Founding affidavit
- [2] In Moko v Acting Principal, Malusi Secondary School and Others 2021
- (3) SA 323 (CC) at [1]
- [3] 2011 JDR 1832 (GSJ)
- [4] 2014
- (1) SA 604 (CC)
- [5] In Moko v Acting Principal, Malusi Secondary School and Others supra at [47]

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