

SOUTH AFRICA / JUDGMENT

Zongo v MEC of Education, Eastern Cape Province and Another (1894/2004) [2011] ZAECHMHC 26 (29 December 2011) [2011] ZAECHMHC 26

COURT
Eastern Cape High Court, Mthatha

BEFORE
Dawood

CASE / FILE NUMBER
1894/2004

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT: MTHATHA)
CASE NO: 1894/2004

In the matter between: SOLOMON ZONGO
.....PLAINTIFF
AND
THE HONOURABLE MEC FOR
THE DEPARTMENT OF HOME
EDUCATION AND ANOTHER
(Eastern Cape Province)
.....DEFENDANTS

JUDGMENT

DAWOOD J

The Plaintiff herein instituted action against the First and Second Defendant wherein he sought relief for contractual damages arising out of breach of contract, alternatively for enforcement of contract and a declaration of rights.

An order was granted in terms of Rule 33(4) separating the issues of liability and quantum with the matter only proceeding on the issue of liability.

After extensive argument the application for a separate determination of the legal points was refused on the basis that the

determination

of some of these issues would need oral evidence which would overlap with the evidence to be led in the main trial and accordingly it would not be convenient to separate the legal points from the merits of the matter.

The defendant denied:-

That the Plaintiff was appointed as Principal in that :-

The letter, Annexure SZ1, is not a letter of appointment but just a letter conveying an intention to appoint the Plaintiff subject to approval of the Education Department;

That no approval for his appointment had been obtained by the Department of Education by reason of the impropriety in the recommendations of the School Governing Body, recommending the appointment of the Plaintiff and accordingly the suspensive condition had not been fulfilled;

That the signatory to the said letter was not authorized in law to appoint the Plaintiff;

That the Plaintiff's appointment was based on improper recommendation by the School Governing Body and accordingly a withdrawal letter was written after learning of the impropriety of the Plaintiff's recommendation by the School's Governing

Body;

That the withdrawal constituted a breach of contract.

The Defendant pleaded in addition, that the Plaintiff waived his rights to institute action because he accepted an invitation to participate in the subsequent interview. The Plaintiff thereby abandoned, and/or waived the right to claim entitlement to

appointment to the post on the basis of the previous interviews and recommendations and on the basis of his appointment in terms of the letter of appointment.

The Defendant pleaded in respect of breach of contract with regard to failure to comply with the audi alterum partem rule, that the Plaintiff:-

Had not complied with section 7 of PAJA relating to time periods for institution of proceedings and relating to external and internal remedies and of failing to comply with PAM, (Personnel Administration Measures), Act issued in terms of the Employment of Educators Act 1998.

The Defendant contended further that they offered the Plaintiff a hearing and furnished him with reasons for the withdrawal of his appointment.

The Defendant submitted that the issues for determination were the following:-

Whether or not the suspensive condition was fulfilled.

Whether or not the letter written was a letter of appointment since the person who signed it had no authority to sign;

Whether or not the Plaintiff had waived his right to rely on the letter or intention to appoint;

Does the Plaintiff's reliance on the audi alterum partem rule create a new cause of action and has it prescribed due to the fact that there was undue delay;

Was the decision one in terms of PAJA or common law;

If it was in terms of Common Law is the Plaintiff still hit by PAJA;

Did the Defendant bear the onus of informing the Plaintiff of any of his rights of recourse;

Whether the Plaintiff exhausted internal remedies;

Was the Plaintiff entitled to a hearing; and

Was he given such a hearing and did the Plaintiff, by accepting the conditions to submit to fresh interviews waive such a right.

Evidence led

The Plaintiff, Mr Solomon Zongo, testified as follows:-

He was employed as a teacher in 1993 by the Department of Education;

He applied for a post of Principal of Mzamo Junior Secondary School in 2002;

He received an appointment letter after he had been interviewed on the 12th of August 2002;

He was informed in person by the circuit manager Mr Dweba on the 24th September 2002 of his appointment and he thereafter got the appointment letter at another office.

The appointment letter reads as follows:-

“...

RE: APPOINTMENT: YOURSELF

I have pleasure to inform you that the Department has approved your appointment as a / an educator in accordance with the particulars reflected hereunder:-

School: Mzamo JSS District: Libode Salary Scale: 116310/157677 Salary Notch: 116310 Date of Appointment: 12/09/2002 Date of appointment will be with effect from the date you assume duties provided it is after the approval by the Department.

The conditions of service and other fringe benefits such as pension, housing, medical aid scheme, leave credits and service awards as contained in Act No. 78 of 1998 of Employment of Educators Act read with existing regulations also applies.” (my highlighting)

He thereafter went to Mzamo Junior Secondary School to assume duties as principal on the 25th of September 2011 when he was met by the Circuit Manager who introduced him to the Student Governing Body and to the School Staff.

There were no changes in his salary upon him assuming his appointment at Mzamo Junior Secondary School.

He did not receive the new salary for a Principal despite holding the position of Principal from the 25th of September until the 13th of November when he received a call from the circuit manager who informed him that his appointment was challenged by two other applicants and he was advised to return to his previous school until the matter was resolved.

He indicated that he did attempt to resist but was persuaded by his boss and told that if he did not comply with the instructions he was likely to lose his post and he accordingly did as he was told and went back to his previous school.

He was embarrassed when he returned to his previous School because the School and the School Governing Body was not informed and refused to accept him without something in writing

He then went back to the Circuit Manager who sent him to a Ms Fubu who served him with the withdrawal letter on the instruction of the District Director, Dr Nuku. The letter, dated 12 November 2002 reads as follows:-

“Dear Sir

Re: WITHDRAWAL OF APPOINTMENT AS PRINCIPAL OF MZAMO JUNIOR SECONDARY SCHOOL NGQELENI.

It is with regret I inform you that your appointment as principal of Mzamo Junior Secondary School has been withdrawn.

This decision was taken after the agreement made at the conciliation meeting held on 31st October 2002. It has been discovered that procedures for appointment of a principal at Mzamo were not followed properly hence the matter was taken up as a dispute with Education Labour Relations Council.

The department highly regrets the inconvenience that will be made by this decision.

Yours faithfully

District Manager”

He went back to the Circuit Manager to request clarity on the contents of the letter.

Mr Dweba convinced him that this was just a formality as a document that he should submit to the school to enable the Department to hold a second round of interviews to resolve the problem.

Mr Dweba assured him that despite the contents of the letter the post was his and that he had to comply with the instructions if he is willing to get the post and he accordingly complied because he was desperately in need of the post and he could not argue with his employer.

He was told that if he did comply it would make things easier for them as a Department to re-instate him as Prinical.

He was not informed of the conciliation hearing that preceded him receiving the letter of withdrawal nor was he consulted. Nothing was done before he got the withdrawal letter except the telephonic information the previous day from the Circuit Manager.

He gave the letter to the Student Governing Body and waited for the next round of interviews as he had been persuaded by the Circuit Manager to attend those interviews if he really wanted the post.

The second interviews were conducted on the 29th of January 2004 and he attended these interviews at the Department Building and not at Mzamo JSS where the first interviews were held.

He was told by Mr Dweba that he should comply with the instructions if he was desperately in need of the post and if he did not attend he would lose the post, this was the reason he attended the second interviews.

The Student Governing Body at Mzamo JSS was not represented at the second round of interviews and there were now nine contestants whereas in the first interviews there had been only five.

He was not told about the outcome of the second round of interviews until he discovered that on the 24th March, a new principal had been appointed.

The Circuit Manager did not answer him when he questioned him about this and this prompted him to go to the Labour Relations Office where he consulted with Mr Ngedi and was given the Education Labour Relations Council forms to fill in and he faxed it to the department and was told that they had seen it.

He waited until July 2004 for a response and when he called, he was told that they knew nothing about the forms.

It was at that stage that he went to his attorney in August 2004.

According to him he was told to attend the second set of interviews and did not know nor did he intend to waive any rights by so doing and he was not given any information that his subsequent attendance would have an adverse effect upon his rights.

Under cross-examination, it was put to him that he was employed in terms of Employment of Educators Act, in terms of the letter of appointment.

It was put to him that the letter was signed by Mr Mkentane and he indicated that he did not know but could not dispute it. He testified that he knew that Dr Nuku was the District Director of Libode in 2002.

His evidence was that he had not known who, in the Department of Education had the power to appoint an Educator.

It was put to him that in terms of Section 6(1) of the Employment of Educators Act the only person who has the power to appoint a person to a Provincial Department of Education is the Head of the Department and his response was initially that he did not know who has got the power and he thereafter conceded that this rested in the hands of the Head of Department to appoint a Principal.

The Head of Department of the Department of Education is the Superintendent General and he conceded that the Superintendent General is the only person who can appoint unless he has delegated that power.

It was put to him that Mr Mkentane was not the Superintendent General and he did not have the power to appoint much less sign a letter conveying any appointment on behalf of the Department.

He disputed that Mr Mkentane could not sign because he could not be delegated to sign.

It was put to him that Mr Mkentane was never delegated the power to appoint or sign a letter of appointment on behalf of the Department of Education.

He disputed this saying that a number of Principals were appointed at the same time as him and Mr Mkentane signed the appointment letters. He however failed to give the names of such individuals and none of them were called to testify in order to confirm this allegation.

It was put to him that evidence would be led to the effect that Mr Mkentane when signing this letter acted outside the scope of any powers he may have had. His response was that he disputed this. He testified that Mr Mkentane was the Chief Education Specialist and disputed that the Chief Education Specialist did not have any powers to appoint a Principal and he based his dispute on the fact that the withdrawal letter which was issued by Dr Nuku would not have been issued if he had not been issued with a letter

of appointment and the withdrawal letter made no mention of the appointment letter being ineffective because the signatory did not have the power.

It was put to him that Mr Mkentane did not have the power that is why the letter contained the condition that approval had to be forthcoming from the Department and this was confirmed by the fact that he did not receive the salary of the Principal. He disputed this.

He confirmed under cross-examination that he attended the second interviews and that he fully participated in the second set of interviews.

He initially stated that he was asked whether he would accept the outcome of the second interviews and thereafter denied this and testified that he was never asked.

It was put to him that he ranked the lowest amongst all the candidates in the first interview. His response was that he ranked third and there were five candidates.

He conceded that two candidates scored higher than him and that the School Governing Body could recommend someone that was not ranked number one but he accepted that usually the appointment would go to the person with the highest scores and that if they

chose a candidates ranked number three they would have to motivate for the decision.

The Plaintiff conceded that when you go for interviews there are no guarantees, but he had an assurance from Mr Dweba that if he went for the second interview he would get the post, but only if he went to the second round.

He denied that this would be improper conduct because it was the Department that had the problem and he had been appointed.

He then went on to say that he was told that if he wants to get the post then he must go for the second interview.

He did not consider it to be improper conduct if the outcome was pre-determined because it was already the position he was occupying and he was desperate.

He disputed that he willingly waived his right to the previous appointment by undergoing fresh interviews and exposing himself to a situation where he would compete with other candidates.

He indicated that he was unaware of what was contained in the PAM, (Personnel Administration Measures), document and he was not aware that he could lodge a grievance.

It was put to him that Mr Mkentane was not authorized to sign the letter of appointment in law or in fact and he stated that he did not agree.

It was also put to him that the letter was subject to a suspensive card, that the Department had to approve his appointment and that the Department did not give such an approval. His response was that he did not agree and that this was the letter confirming

the agreement with the Department.

It was put to him that the letter was not binding on the Department and he responded that the letter was a binding contract.

He disputed that he willingly subjected himself to fresh interviews and thereby abandoned and waived his rights to rely on the appointment.

Under re-examination he indicated that he was employed prior to the coming into effect of the PAM, (Personnel Administration Measures), document and he was not made aware of nor was he told about the grievance procedure.

According to him Mr Mkentane was given the authority to convey appointments by the person who had the right to employ.

The withdrawal letter was not signed by him but the person who signed the withdrawal letter was aware of the appointment.

This concluded the Plaintiff's testimony.

The next witness called by the Plaintiff was Jamanjile Ncele:-

He was the chairman of the School Governing Body from 2001 until 2004.

According to him he knew the Plaintiff well as he had grown up in the village next to his and that the Plaintiff had submitted his application for the post of Headmaster.

Three persons were recommended and the Plaintiff was the third person recommended.

The Student Governing Body rejected the first and second person, the first person was not popular and regarded as weak and the second person was unknown to them and was coming from afar therefore they rejected him whereas the Plaintiff grew up in front of them and they respected him and he respected them.

According to him they made a verbal recommendation and not a written one.

According to him the Plaintiff arrived alone when they announced that he had been appointed.

Their recommendation was not cancelled and nothing was said to him.

He confirmed that he was present when interviews were conducted in April 2003 but he was not part of the interviewing panel and that the Department had withdrawn the Student Governing Body's power to interview.

This concluded the Plaintiff's case.

The Defendant thereafter commenced its case.

The Defendants' called Mr Mkentane who is the acting District Director of Libode employed by the Department of Education as the first witness.

Mr Mkentane testified that:-

In 2002 he was the Chief Education Specialist and signed a letter appointing the Plaintiff as Principal.

In 2002 the District Director was Dr Nuku who had the power to appoint, delegated to him by the Superintendent General in writing.

According to him, if it is not in writing it has no force or effect.

He confirmed that he signed the letter because he was acting on behalf of Dr Nuku who was not in the District at the time.

Dr Nuku had telephonically requested him to act as District Director and he was given the same powers as Dr Nuku and could perform the functions of Dr Nuku at the time.

According to him these powers should have been conveyed in writing and accordingly had no effect.

Paragraph 6 of the letter of appointment co-notated the fact that he would appoint, thereafter the Province or the Department must confirm the appointment and in the Plaintiff's case the Department did not confirm the appointment.

The Student Governing Body had given a written motivation for recommending the Plaintiff despite him being number three.

He wrote the letter based on the Student Governing Body's recommendation and made the decision as the Acting District Director to appoint him as the Principal, without being aware that he did not have the authority to appoint.

That concluded his testimony.

Dr Nuku thereafter testified as follows:-

In 2002 he was the District Director of Libode.

He was on leave at the relevant time when the letter of appointment was written and he telephonically requested Mr Mkentane to act in his place.

He had the delegated powers from the Head of Department but was unable to delegate what was delegated to him.

He further was required to in writing appoint someone to act in his place setting out exactly what that person's duties would be.

He was aware of the appointment letter when he returned to work as a report had been made that it was necessary to withdraw the letter due to the flaws in the appointment and the issuing of the letters.

The matter was referred to the Head Office and the powers of the Student Governing Body were withdrawn and a panel was appointed to start the process afresh.

Under cross-examination he confirmed that the power to make appointments was delegated to him personally as the person in his capacity as the District Director and not to the office of the District Director.

He was named in the letter authorizing his delegation and the Superintendent General delegated this to him specifically and not to the office of the District Director.

This power could not be further delegated.

He was aware that he had to appoint someone to fulfill his functions in writing but due to ill health, he was in hospital at the time, he was unable to do so.

He became aware of the appointment in September but wanted the conciliation process to be finalized prior to making a decision with regard to the appointment as the whole process was flawed.

He confirmed that he did not specifically state in his letter that the signatory to the letter was not authorized as he did not deem it appropriate to inform the appointee but merely stated that the whole process was flawed.

He indicated that he does not have the power to appoint as part of his job description and that these powers were delegated to him and he did not have the authority to further delegate the powers to the appointment and dismissal of teachers.

According to him, Mr Dweba was requested to communicate to the Plaintiff that the process was flawed and that Mr Mkentane did not have any powers to appoint.

He was unable to dispute that the Plaintiff was not told about the lack of authority to sign the letter of appointment.

He confirmed that he had not gone to court to rectify the appointment as he did not deem it necessary.

Under re-examination he confirmed that he could not even have implicitly delegated powers that had been delegated to him since it was personally delegated to him.

He indicated that if the Plaintiff had approached him he would have informed him of these irregularities.

That concluded the Defendant's case.

EVALUATION

The Plaintiff despite his reluctance to readily make concessions or answer questions under cross examination was a reasonably good witness and did not deviate from his evidence in chief. It was evident from his testimony:-

That he considered the letter of appointment to have given rise to a binding agreement;

That he was persuaded to attend the second interviews in order to retain the position; and

That the withdrawal letter did not specifically make mention of the lack of authority as the basis for withdrawing his appointment.

He was however unable to satisfactorily explain why there was a suspensive condition of obtaining approval inserted into the letter if his appointment was confirmed.

He was also unable to explain why he did not receive the salary of a principal if he had been appointed by the Department and the letter was merely a confirmation of his appointment.

The Defendants' witnesses were both found to be honest and forthright and it was evident from both their testimonies that Mr Mkentane did not have the authority to appoint and neither was this power delegated to him nor could it be delegated to him.

Even the functions that he performed were not reduced to writing. Accordingly even if it was possible to sub-delegate, which does not appear to be the position here, this ought to have been done in writing and could not be either explicitly or implicitly done verbally, having regard to the provisions of the Act authorizing or sanctioning delegation.

It was also evident from Dr Nuku's testimony that Mr Dweba was merely requested to convey the decision to withdraw the Plaintiff's appointment to the Plaintiff.

It is evident from this that the Plaintiff was not consulted or heard prior to the decision being taken to withdraw his appointment.

Dr Nuku was further not aware of whether or not the lack of authority of Mr Mkentane was mentioned to the Plaintiff by Mr Dweba as grounds for the withdrawal.

Legal Position

Section 6(1) of the Employment of Educators Act 76 of 1998 (hereinafter referred to as the Act) reads as follows:-

"Subject to the provisions of this section, the appointment of any persons or the promotion or transfer of any educator:-

In the service of the Department of Basic Education shall be made by the Director General; or In the service of a Provincial Department of Education shall be made by the Head of Department."

It is trite law that the legislative and executive in every sphere may exercise no power and perform no function beyond that conferred upon them by law.

In this case Mr Mkentane on his version had no power nor did he have the authority to appoint and accordingly he could not appoint any individual.

It is also trite that a contract that is ultra vires the enabling legislation is void ab initio and is not enforceable.

In terms of Section 7A (6)-7A (8) of the Public Service Act Proclamation 103 of 1994:-

"The Head of Department may delegate any power conferred upon him / her in terms of any legislation. Any delegation by a head of department within the province and the district:-

shall be in writing" (my highlighting)

In this case it is evident that this authority was delegated personally to Dr Nuku, in writing. There was no delegation made by the Head of Department to Mr Mkentane in writing as required by the Act or even verbally.

Mr Mkentane accordingly had no authority or delegated powers to appoint and any act taken by him was ultra vires the Act and of no force and effect.

In the case of “delectus personae” where the delegee appears to have been chosen for his or her special abilities or qualifications, it is more likely that the sub delegation will not be allowed.

In Minister of Trade and Industry vs Nieuwoudt 1985(2) SA 1 CPD at page 10 D – E:-

“In our law, where powers are conferred upon a subordinate authority, the maxim delegatus delegare non potest prevents a delegation of such powers unless it is authorised either expressly or by necessary implication (Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) SA 628 (A) at 639 C – D)...”

At 11 and 12, the learned Judge stated circumstances under which a delegation could be made at 12 H – 13 G it was stated:-

“(5) Delegatus non potest delegare is

"The general principle that certainly in matters involving judicial powers, trust, the exercise of discretion, or where the

qualities of the delegate are material, a delegate must act himself and may not, unless expressly authorized, delegate his functions to another. The principle does not extend to merely executive functions. It applies also to administrative law." (Oxford Companion to Law, David M Walker, Regius Professor of Law, University of Glasgow, at 344).

- (6) Delegation of authority by an officer of a private commercial undertaking to his representative may be in order; but delegation of power by a public official is bad unless he has the right to delegate (Jacobson and Woolf v Municipal Council of Johannesburg 1906 TH 99 at 101). Indeed, even in the private sphere a delegation is in general, it seems, not permissible; J thus an agent may not delegate his functions to a sub-agent except with the consent of his principal or where the employment of a sub-agent is necessary for the A carrying out of the mandate or is customary in the ordinary course of business (Belonje v African Electric Co (Pty) Ltd 1949
- (1) SA 592 (E) at 599, citing Wille's Principles). It may be observed that the mere fact that it may be convenient to appoint a sub-agent is not enough: it must be necessary or customary (ibid same page). This, for B what it is worth, militates against the argument of Mr Viljoen that the inspectors would find it convenient to have experienced counsel to conduct interrogations for them.
- (7) In the Companies Act ss 258 - 260 there is plainly no express authority given to the inspectors to delegate their C powers of interrogation to anyone.

Does the Act contain an implication that the inspectors may do so?

Baxter Administrative Law at 435, dealing with "Unlawful abdication of power", says:

"When may power be delegated?

Where there is no express authority to delegate the delegatus D maxim has prima facie weight and the delegator must show that he enjoys an authority to delegate that is necessarily implied by the empowering legislation. Such implication might depend on a number of interrelated factors, of which the following seem to be the most significant:-

- (i) the degree of devolution of the power;
- (ii) the importance of the original delegee;
- (iii) the complexity and breadth of discretion;
- (iv) the impact of the power; and
- (v) practical necessities."

In regard to factor (i) Baxter - correctly, I think - states that the permissibility of the delegation depends F partially upon how much power is handed over (see at 436).

"Where there is a complete handover of power and responsibility, the Courts are unlikely to approve. Conversely, where the delegation is very limited and the delegator retains full control over the final decision, the delegation is likely to be intra vires. In S v Louterwater Landgoed (Edms) Bpk 1972

- (2) SA 809 (C) where a Minister promulgated fire-control regulations on the basis of advice furnished to him by various G committees, it was held that there had been no ultra vires delegation since, although the advice had been influential, the Minister had at all times exercised his own discretion."

The real issue in this case is whether or not the Defendants' witness, Mr Mkentane, acted ultra vires when he signed the letter.

The Plaintiff was justifiably unable to gainsay the evidence of both Dr Nuku and Mr Mkentane, that Mr Mkentane did not have the power or the authority to appoint as this power was delegated to Dr Nuku personally as the District Manager and there is no evidence that he could or did delegate this power. The Act does not make provision for Dr Nuku to delegate this power.

The testimony of both these witnesses clearly indicates that Mr Mkentane did not have the power to appoint.

I accept that it was not a power that could be expressly or implicitly delegated by Dr Nuku and most certainly not verbally, since Dr Nuku did not have the power or the authority to delegate.

Accordingly the letter of appointment signed by Mr Mkentane was void ab initio and no valid and binding agreement came into existence.

The letter of appointment in the circumstances can be regarded as pro non scripto.

The Plaintiff accordingly cannot rely upon the letter as creating a valid and binding agreement between the parties in the circumstances.

The Plaintiff accordingly has failed to discharge the onus resting upon him to establish that the Defendant had breached an agreement since no agreement came into existence between the two parties as a result of the lack of authority of Mr Mkentane.

No rights or obligations accordingly flowed from the letter and the determination of this issue is decisive of the matter.

The decision on the other points will not change the outcome and accordingly I do not propose dealing with any of the other issues raised by the parties.

It is evident that the lack of authority was not specifically mentioned in the letter of withdrawal. Perhaps if this was done the Plaintiff may not have instituted legal proceedings against the Defendants. Accordingly in the exercise of my discretion, no cost order will be made against the Plaintiff despite the Defendants' been the successful parties.

ORDER

I accordingly make the following order:-

- 1.) The Action is dismissed
- 2.) No order as to costs.

(JUDGE OF THE HIGH COURT)

DATE HEARD: 14 SEPTEMBER 2011

(DATE JUDGEMENT RESERVED)

DATE DELIVERED: 29 DECEMBER 2011

FOR THE PLAINTIFF: MR TSHIKI

TSHIKI & SONS INC

18 SPRIGG STR

MTHATHA

REF: M. TSHIKI

FOR THE DEFENDANT: ADV DA SILVA

MESSRS VELILE -

TINTO & NGUMILE

FLAT 4,

NETTLETON COURT

STANFORD TERRACE

REF: VT/ND/SA/859.05

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Prepared on 12 October 2026 · Esheria