Despatch High School v Head of Education Department, Eastern Cape Province and others [2001] JOL 8990 (SE)

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Case No:	1941 / 01
Judgment Date(s):	29 / 08 / 2001
Hearing Date(s):	16 , 17 / 08 / 2001
Marked as:	Unmarked
Country:	South Africa
Jurisdiction:	High Court
Division:	South Eastern Cape
Judge:	Sangoni AJ
Bench:	T Sangoni AJ
Parties:	Despatch High School (At), Head of Education Department, Easten Cape Province, MEC reponsible for education in the Eastern Cape Province, Casper Hendrik Coetzee (R)
Appearance:	Mr Rorke, Michael Randell Inc (At); Mr Schoeman, State Attorney (R1, R2), In Absentia (R3)
Categories:	Application – Civil – Substantive – Private
Function:	Confirms Legal Principle

Key Words

Administrative law – Educators – Disciplinary action against – Administrative decision – Application for review – *Audi alteram partem* rule

Employment of Educators Act 76 of 1998 – Employment of Educators Act 76 of 1998, section 17 – Employment of Educators Act 76 of 1998, section 17(2)

Employment of Educators Act 76 of 1998, section 18

Mini Summary

The applicant school applied for a rule *nisi* calling upon the respondents to show cause why a final order should not be issued reviewing and setting aside first respondent's charging of the third respondent with misconduct, and requiring him to initiate appropriate disciplinary proceedings in terms of the Employment of Educators Act 76 of 1998. The third respondent had been charged unauthorised use of a cell-phone, and given a final written warning. The applicant argued that he should have been charged with theft, and that his return to the school had been met with a negative reaction by the community, staff and learners.

The respondents raised the preliminary points relating to the *locus standi* of the applicant, and to the non-joinder of the chairman of the disciplinary enquiry.

Held, that the applicant could not be granted the relief sought as it would undermine the *audi alteram partem* rule. The application was dismissed with costs.

SANGONI AJ: This is an application brought under rule 6(12) of the Uniform Rules of the Court wherein an order is sought:

> "2
>
> Directing that a Rule *Nisi* do issue, calling upon the Respondents to show cause if any, to this Honourable Court on or before 5 September 2001, why an Order should not be granted:–
>
> 2.1

Reviewing and setting aside the First Respondent's administrative action, more particularly the proceedings initiated by him in terms of

Section 18 of the Employment of Educators Act, 76 of 1998, in terms of which the Third Respondent was charged with misconduct;

2.2

Ordering the First Respondent to comply with the provisions of Section 17(2) read with the provisions of Schedule 2 of the Employment of Educators Act, 76 of 1998, more particularly, by initiating appropriate disciplinary proceedings as envisaged therein;

2.3

Directing the First Respondent to allow the Applicant to present such evidence at the disciplinary proceedings referred to in paragraph 2.2 above, as may be appropriate to protect its interests and rights and as envisaged in Section 3(3)(a) read with Section 7(9)(a) of Schedule 2 to the Employment of Educators Act, 76 of 1998;

2.4

Ordering the First Respondent to forthwith discharge his statutory duty to exercise his discretion: –

2.4.1

In terms of Section 6 of Schedule 2, read with Section 17 of the Employment of Educators Act, 76 of 1998, as to the Third Respondent's suspension or otherwise;

ALTERNATIVELY:

2.4.2

In terms of Regulation 58 of the Employment of Educators Act, 76 of 1998, as to the Third Respondent being accorded special leave, pending the hearing envisaged in paragraph 2.2 above

2.5

Directing that the First and Second Respondent pay the costs of this Application jointly and severally, the one paying the other to be absolved;

2.6

Directing that the Third Respondent pay the costs of this Application only in the event of his unsuccessful opposition thereto.

3

Ordering that the provisions of paragraph 2.4 above operate as a temporary interdict and Order, pending the return date aforementioned.

4

Granting such further and/or alternative relief as to this Honourable Court may seem meet".

Counsel for the first and second respondents raised, points *in limine.* They relate to the following: –

(i)

The case made out by applicant regarding urgency in terms of Rule 6(12) is insufficient, rendering it inappropriate to dispense with the forms and service provided for in the rules.

(ii)

The granting of the rule *nisi* operating as interim relief as contemplated in paragraph 2.4 of the notice of motion would be in violation of the provisions of section 35 of Act 62 of 1955. It is common cause that the founding papers were not served at least 72 hours before the time mentioned for the hearing of the application in the notice of motion.

(iii)

The court has no jurisdiction as first and second respondents' head office is located within the area of jurisdiction of the Ciskei Division of the High Court where, also, the cause of action allegedly arose.

The points taken are not only limited to (i), (ii) & (iii) but it is not necessary for purposes of this judgment to deal with the others. They relate to the *locus standi* of applicant, and the non-joinder of the Chairman of the disciplinary inquiry whose decision has given rise to this application for review.

For its case applicant largely relies on the founding affidavit of the Chairman of its governing body. The deponent sets out the difficulties experienced by applicant in an attempt to cause the Department of Education to take disciplinary action against third respondent. Third respondent who is in the employment of the Eastern Cape Province Department of Education (department) as a principal of applicant allegedly pleaded guilty to and was convicted in the Magistrate's Court of theft of a cell phone and sentenced to a fine of two thousand rand

(R2 000,00) or six (6) months imprisonment. That came about after third respondent had made a sworn declaration explaining to the governing body of applicant that the cell phone got lost during or about September 2000, thus claiming to be innocent in that regard, only to admit having stolen it when subsequently confronted with facts that emerged later on.

The deponent to the founding affidavit portrays a full picture regarding the steps taken by the applicant through its representatives, calling for a disciplinary action by the department against third respondent for theft. The belated responses by the department were inadequate in applicant's view. Somewhere down the line, after several exchanges of correspondence between applicant and the department, third respondent was eventually charged and granted special leave under extraordinary circumstances in terms of the regulations, pending the outcome of the disciplinary proceedings. He was charged with and found guilty of misconduct in terms of section 18(1)(c) & (d) of the Employment of Educators Act 76 of 1998 (the Act). Section 18(1)(c) reads:

> "Misconduct – Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she –
>
> (c)
>
> without permission possesses or wrongfully uses the property of the State, a school, a further education and training institution, an adult learning centre, another employee or a visitors".

Applicant submits that third respondent should have been charged with theft of the cell phone and not merely the unauthorised possession or wrongful use thereof. Theft constitutes serious misconduct, in terms of section 17 of the Act,

which attracts a mandatory punishment of dismissal, if found guilty. Respondents dispute that that is a correct interpretation of the provisions of section 17 of the Act. The submission made on their behalf

is that a punishment of dismissal is not mandatory in the case of theft of anything not related to examinations or promotional reports. I refrain from expressing a view on this at this stage.

The outcome of the inquiry was a decision by the chairman that a final written warning be served on third respondent. Even though I refer to a "decision " the parties accept this to be a mere recommendation as the decision whether or not to sanction the recommendation was later taken by the department at Bisho. In terms of the decision third respondent was required to return to school, which he did on 24 July 2001.

Applicant avers that third respondent's return to the school was met with a strong negative reaction by the school community – members of the staff, members of the governing body, learners and their parents. Their attitude was one of rejection of him, learners walking out of the assembly, educators refusing to attend school assemblies and no such assemblies were held in the school hall since third respondent's return. The return of third respondent is unacceptable to applicant which prides itself on high quality education and high ethical standards.

I now propose to deal with the points *in limine* in the light of the averments made as well as established facts of the case.

Urgency and non-compliance with section 35 of Act 62 of 1955

These are closely related.

On or about 4 August 2001 third respondent was booked off sick to return to the school on 20 August 2001. It is this return that applicant is seeking to stop.

It is clear that what applicant seeks to achieve is that at the end of the sick leave period third respondent should not return to the school in view of the untenable situation his presence creates there. According to applicant he lacks the integrity expected of a principal of applicant, he having been convicted of theft by a criminal court.

Notwithstanding that, there is no relief contained in the notice of motion that would ensure that third respondent does not return.

The closest to that is paragraph 2.4 in respect of which a temporary interdict is being sought. Its effect, if granted, would only be to order first respondent properly to exercise its discretion in terms of Act 76 of 1998 and the regulations thereto relating to whether or not third respondent should be suspended or accorded special leave, pending a hearing in

contemplated fresh disciplinary proceedings in terms of clause 2.2 of the notice of motion.

At the hearing counsel for applicant conceded that even if the interim relief were to be granted it would not secure what is sought to be achieved and, that being so, the grounds for urgency no longer exist (*Salt & another v Smith* 1991 (2) SA 186 (NHC), cf *Cekeshe and others v Premier, Eastern Cape & others* 1998 (4) SA 935 (Tk)).

It follows that without a rule *nisi* operating as an interim interdict section 35 of the General Law Amendment Act 62 of 1965 does not apply and it is thus not necessary to deal with this point any further.

Mr *Rorke* who appeared for applicant submitted however, that it was within the powers of the court to make an order, on the available evidence, as follows:

> "The Third Respondent be and is hereby suspended as the principal of the Applicant in terms of section 6 of Schedule 2, read with section 17 of the Employment of Educators Act, 76 of 1998, pending the final determination of this application".

In the first instance that would in my view undermine the *audi alteram partem* rule more particularly as against third respondent. He was served

with the founding papers on 15 August 2001. I have been advised that he indicated that he would not be attending the hearing. I do not take that to mean that by not attending he was compromising his right to be heard on the issue of whether or not he should be suspended. In my view he could not reasonably have been expected to have appreciated that the suspension which applicant now seeks could possibly be ordered on the basis of the prayer for alternative relief. That relief was in no way foreshadowed in the notice of motion.

Secondly, in essence the amended version of the prayer, if granted, would strip first respondent of his prerogative to exercise his discretion and have the effect that this Court's decision to suspend was substituted for his. It is trite that this is only permissible in exceptional circumstances. No such exceptional circumstances exist in the present case.

I do not agree with the submission by Mr *Rorke* that referring the matter to first respondent for him to exercise his discretion as envisaged in clause 2.4 of the notice of motion, would necessarily result in a decision against applicant. In all what happened preceding the institution of this action, there is no suggestion by applicant that first respondent was aware of what was going on. The failure to take adequate disciplinary steps against third respondent, as alleged on applicant's papers, may well be a source of concern.

I thus find that applicant has not established sufficient grounds entitling it to the relaxation of the rules and of the ordinary practice of the court.

That finding constitutes sufficient basis for dismissal of the application.

Jurisdiction

It is common cause that the disciplinary action referred to above took place at Despatch and the decision to subject applicant to a disciplinary inquiry and to sanction the recommendation of the chairman was taken at Bisho which is located outside the jurisdiction of this Court. It is also common cause that the 'general administrative business' of the State and therefore the first and second respondents is conducted at Bisho. (See *Twala v Legal Aid Board* 1997 (1) SA 283 (SECLD), *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD, 324 at 334, *Hattanooga v Tulfers Co v Chenille Corporation of SA* 1974 (2) SA 10 (ECD)).

In this case there are only two jurisdictional connecting factors raised, namely the issue relating to the cause of action and the location of the "general administrative business". Both these factors have been conceded, fairly in my view, on behalf of applicant. Any division of the High Court has jurisdiction where the cause of action arose with its area of

jurisdiction (*Hako v Minister of Safety and Security and another* 1996 (2) SA 891 (Tk).

The fact that the Department of Education conducts its business also within the area of jurisdiction does not in itself confer jurisdiction. It is the "general administrative business" that matters.

I therefore find that this Court has no jurisdiction to entertain the matter.

In the result the application is dismissed with costs.