Despatch High School v Head, Education Department, Eastern Cape Province & others [2008] JOL 22170 (Ck)

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Case No:	242 / 01
Judgment Date(s):	25 / 09 / 2002
Hearing Date(s):	20 / 08 / 2002
Marked as:	Unmarked
Country:	South Africa
Jurisdiction:	High Court
Division:	Bisho
Judge:	Ebrahim J
Bench:	Y Ebrahim, D van Zyl JJ
Parties:	Despatch High School (At); Head of the Education Department, Eastern Cape Province (1R), Member of the Executive Council Responsible for Education, Eastern Cape (2R), Casper Hendrik Coetzee (3R), E Gorgonzola (4R)
Appearance:	Adv SC Rorke, Michael Randall Inc (At); Adv MG Swanepoel, State Attorney (R)
Categories:	Application – Civil – Substantive – Private
Function:	Confirms Legal Principle

Key Words

Administrative law – Education – Disciplinary action – Review

Mini Summary

The applicant, a public school, sought the review of the first respondent's decision to institute disciplinary proceedings against the third respondent in terms of the provisions of section 18 of the Educators Employment Act 76 of 1998, by charging him with misconduct.

Held that the decision in question amounted to administrative action. The court explained that the first respondent is vested with a discretion as to whether or not an educator should be charged with misconduct as well as the nature of the charges to be preferred against the educator. The question was whether in the circumstances of this matter, the applicant had shown that there were grounds upon which the decision may be reviewed and whether such grounds justified that it be set aside.

The ground of review relied on by the applicant was that the first respondent erred in applying the provisions of sections 18(1)(c) and (d) of the Act instead of section 17(1)(a) thereof in regard to the charge to be preferred against the third respondent. The court held that the first respondent's decision could not be held to be erroneous.

The application was dismissed.

EBRAHIM J

Introduction

[1] These are review proceedings in which the applicant, a public school, seeks the following relief:

> "(1)
>
> That the decision taken by the First Respondent to institute disciplinary proceedings against the Third Respondent in terms of the provisions of Section 18 of the Educators Employment Act 76 of 1998, by charging him with misconduct be reviewed and set aside.

(2) That the proceedings before, and the findings of, the Fourth Respondent at the disciplinary hearing of the Third Respondent on

28th JUNE, 2001, arising from the decision by the First Respondent referred to in paragraph 1 above, be reviewed and set aside.

(3) That the First Respondent be ordered to comply with the provisions of Section 17(2) of the aforesaid Act by instituting disciplinary proceedings against the Third Respondent in terms whereof he is charged with serious misconduct in terms of Section 17(1)(a) of the same Act.

(4) That the First and Second Respondent pay the costs of his application jointly and severally, the one paying the other to be absolved.

(5) That the Third and Fourth Respondents pay the costs of this application only in the event of their opposing same, in which event they be ordered to pay such costs jointly and severally with the First and Second Respondents.

(6) That the above Honourable Court grant the Applicant such further or alternative relief as it deems fit."

[2] The application is opposed by the first and second respondents only.

The factual background

[3] During September 1999 the third respondent, who is the principal of the applicant, reported to the applicant's governing body that a cellular telephone, the property of the applicant, had been stolen. The third respondent claimed that this occurred while he was attending a sports function in Cradock. Later the third respondent confirmed this in an affidavit which had to be submitted for an insurance claim.

[4] Sometime thereafter (exactly when this occurred has not been disclosed) a secretary, during the course of scrutinising the applicant's telephone account, discovered that the third respondent had made telephone calls from his office at the school to the telephone number of the missing cellular telephone. In June 2001, however, members of the governing body confronted the third respondent with this information and sought an explanation from him. At first the third respondent persisted with his previous explanation but thereafter said that six months after he had lost the cellular telephone he found it in a shoe in his cupboard. When he was told that this version was implausible the third respondent admitted that he had stolen the cellular telephone and given it to his daughter, residing in Jeffrey's Bay, and that he had telephoned her.

[5] In view of these developments the governing body decided that, even though the third respondent was guilty of theft and of making a false declaration under oath, they would not pursue criminal charges against him. Instead the matter would be reported to the first respondent so that disciplinary proceedings could be initiated against the third respondent.

[6] After an initial meeting with the first respondent's development officer the governing body submitted a written report to a Mr Elliot Kani, the first respondent's district manager in Uitenhage. Various meetings were held but when the governing body perceived that there appeared to be a

reluctance on the part of Mr Kani to deal with the problem they communicated with the first respondent, who was then the acting Superintendent-General of the

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Education Department.

[7] Despite numerous telephonic discussions disciplinary proceedings were not instituted against the third respondent. Consequently the governing body took the decision to report the matter to the police so that criminal charges could be investigated. The first respondent's office in Uitenhage was informed of this and requested that the third respondent be suspended pending the outcome of the criminal investigation. Almost six weeks later the first respondent was placed on special leave and instructed to vacate his office at the school.

[8] Following upon the governing body's complaint to the police the third respondent was criminally prosecuted and stood trial. On 28 March 2001 the third respondent pleaded guilty to a charge of theft of the cellular telephone and was duly convicted thereof and sentenced to a fine of R2 000, alternatively to a term of imprisonment of six months. The details of the conviction and sentence were furnished by the police to the governing body which in turn conveyed this to the Uitenhage office of the first respondent.

[9] Thereafter, following numerous enquiries, the chairman of the school governing body, Mr JF Stoltz, eventually ascertained from a Mrs Nyati on 28 June 2001 that a disciplinary hearing was being held on the same day. He was also informed, to his dismay, that the members of the governing body would not be permitted to participate or attend as the matter was one between

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employer and employee.

[10] On 23 July 2001, the day before the commencement of the school term, a letter was telefaxed to the governing body from the district manager to inform it of the outcome of the disciplinary hearing. The letter indicated that the third respondent had been found guilty of contravening subsections 18(1)(c) and 18(1)(d) of the Employment of Educators Act 76 of 1998 ("the EEA"). In addition, the third respondent had received a final written warning as a sanction and had been instructed to report to the school by not later than 24 July 2001.

[11] From my reading of the papers it does not appear as if the first and second respondents have disputed the sequence of the aforesaid events. Certain factual issues, however, are in dispute.

Defences in limine advanced by the first and second respondents

[12] In addition to opposing the merits of the application the first and second respondents have advanced two further defences. Since these are, in effect, defences *in limine* it is necessary that I consider these before I deal with the merits of the application.

Does the applicant have the necessary locus standi in judicio?

[13] While the first and second respondents admit that the applicant is a juristic person they dispute that the applicant has the necessary *locus standi* to bring this application against the first and second respondents. Mr *Swanepoel*, who

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appears for the first and second respondents, has highlighted the applicant's failure to disclose the section(s) of the SA Schools Act 84 of 1996 ("the Schools Act") which empower it to bring this application. He has also submitted that the governing body is not empowered to litigate as it deems fit since it may only exercise such powers as are entrusted to it in terms of the Schools Act.

[14] The submissions of Mr *Rorke*, who appears for the applicant, are to the contrary. He contended that in terms of the provisions of the Schools Act the applicant has the necessary *locus standi*. Moreover, the *locus standi* of a school to institute these proceedings, through its governing body, has been recognised by the courts. Apart from this, at common law the applicant has a direct and substantial interest.

[15] Section 16(1) of the Schools Act stipulates that "the governance of every public school is vested in its governing body". Section 20(1)(a) specifies that the governing body must "promote the best interests of the school". Further, section 16(2) prescribes that the governing body "stands in a position of trust towards the school". It is evident from these provisions that if a governing body is to fulfil its statutory duties properly it should be entitled to institute proceedings (either in its own name or that of the school itself), more especially where the interests of the governing body or the school are directly affected. I am of the view, therefore, that the applicant's *locus standi* to bring this application has been established. In this regard see, *Grove Primary School v Minister of Education & others* 1997 (4) SA 982 (C) and

Bennie Groenewald Primêre Skool & andere v Premier van die Noord-Kaap & 'n ander [1998] 3 All SA 426 (NC) [also reported at [1998] JOL 2733 (NC)–Ed]. See, further, *Iqhayiya Technical College v MEC for Education*, *Eastern Cape Province* 1998 (4) SA 502 (Ck) at 510J and 511A where this Court recognised that a college (established in terms of the Technical Colleges Act 104 of 1981) and its governing council had the necessary *locus standi* to institute proceedings. I consider those comments to be equally apposite in respect of a school and its governing body. In the circumstances the attack on the *locus standi* of the applicant cannot be upheld.

Does the first respondent's decision to institute disciplinary proceedings, *and the proceedings itself*, *constitute administrative action*?

[16] A further defence that the first and second respondents have advanced is that the first respondent's decision to institute the disciplinary proceedings, including the disciplinary hearing itself, do not constitute administrative actions and, accordingly cannot be reviewed. In support of this Mr *Swanepoel* referred to the definition of administrative action contained in the Promotion of Administrative Justice Act 3 of 2000 ("the Administrative Justice Act") (which only came into effect on 30 November 2000). This definition excludes, *inter alia*, "a decision to institute or continue a prosecution" (section 1(b)(ff)). While Mr *Swanepoel* conceded that a decision to institute disciplinary proceedings cannot be equated with a decision to institute a prosecution (since the former is clearly not "a prosecution"), he nevertheless contended that the principle appeared to be comparable.

[17] In support of his submissions Mr *Rorke* referred to the case of *Transnet Ltd v Goodman Brothers* (*Pty*) *Ltd* 2001 (1) SA 853 (SCA) [also reported at [2000] JOL 7680 (SCA)–Ed] at 8658–G (paragraph [34]), where Olivier JA focussed on the most recent decisions which dealt with the concept of "administrative action". He submitted further that the Administrative Justice Act recognised that, in addition to an organ of state, administrative action could also be taken by a natural or juristic person when "exercising a public power or performing a public function in terms of an empowering provision". He contended, therefore, that since the institution of the disciplinary proceedings involved the implementation of legislation it was administrative action. This, he said, applied equally to the disciplinary proceedings itself.

[18] I do not find any merit in Mr *Swanepoel*'s submission that the decision to institute disciplinary proceedings does not constitute administrative action. Although he has recognised, and rightly so I may say, that such a decision cannot be equated with a decision "to institute a prosecution" the contention that the two types of proceedings involve a principle of a comparable nature is clearly untenable. The disciplinary proceedings in the EEA are distinctly different from a criminal prosecution, both in form and content. Firstly, they arise from and form part of a contract of employment between the parties. Secondly, the proceedings are to be conducted in accordance with a disciplinary code and

the procedures defined therein. Thirdly, discipline is to be seen as a corrective and not a punitive measure. In addition, the consequences that flow from the respective proceedings are also decidedly different. Moreover, the purpose to be achieved by a sanction imposed in

consequence of disciplinary proceedings can manifestly not be said to have the same purpose as punishment imposed in a criminal matter nor is it influenced by the same considerations.

[19] Finally, in determining whether or not the first respondent's decision is conduct which qualifies as administrative action, regard must be had to the remarks of the Constitutional Court in *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) at 67B (paragraph [141]) (also reported as 1999 (10) BCLR 1059 (CC)):

> "What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not . . . The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant action belongs, but on the nature of the power he or she is exercising."

[20] There is no doubt that, in taking the decision to institute disciplinary proceedings against the third respondent, the first respondent was "performing a public function in terms of an empowering provision" and consequently carrying out an administrative act. It follows, furthermore, that the decision is not beyond the purview of review proceedings. Whether grounds exist which would justify that it be reviewed and set aside is, of course, another matter entirely. Accordingly, I find that there is no merit in this defence and it follows that it must fail. I turn now to the merits of the matter.

Was the second respondent's decision erroneous or not?

[21] The crux of the applicant's case is that the first respondent's decision to charge the third respondent with misconduct in terms of the provisions of

section 18(1)(c) and (d) of the EEA was erroneous. The applicant has contended that on a proper reading of the provisions of subsections 17(1)(a) and 17(2) of the EEA the first respondent was obliged to charge the third respondent with serious misconduct and not misconduct in terms of section 18(1), which was a lesser charge. It was submitted, therefore, that since the first respondent's decision was erroneous that both the decision and the resultant disciplinary proceedings should be set aside.

[22] In their answering affidavit the first and second respondents assert that the right to determine the nature of the charges in disciplinary proceedings, and the relevant section of the EEA under which the third respondent should be charged, rested solely with the first respondent as the former's employer. Moreover, the applicant did not have the right to insist that the third respondent be subjected to fresh disciplinary proceedings on the same set of facts. Not only had the third respondent been duly convicted of the offence of theft as a result of criminal proceedings, but he had also been subjected to disciplinary proceedings and a sanction had been imposed in consequence thereof. No matter how dissatisfied the applicant might be with the verdict or the sanction imposed this did not entitle the applicant, as a matter of law, to have the disciplinary proceedings, and the findings of the tribunal as well as the sanction imposed, set aside.

[23] The provisions of section 17 of the EEA are the following:

> "[17] Serious Misconduct
>
> (1) An educator must be dismissed if he or she is found guilty of –

(a)
theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;

(b)
committing an act of sexual assault on a learner, student or other employee;

(c)
having a sexual relationship with a learner of the school where he or she is employed;

(d)
seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;

(e)
illegal possession of an intoxicating, illegal or stupefying substance; or

(f)
causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e)

(2)
If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for Schedule 2."

[24] The interpretation which the applicant seeks to place on the provisions of sections 17(1)(a) and 17(2) of the EEA may, at first blush, appear to have merit. Mr *Rorke* submitted that the offence of theft is specified in section 17(1)(a) and, since the third respondent had been convicted of theft at a criminal trial, the first respondent was enjoined by the provisions of section 17(2) to charge the third respondent with serious misconduct and to institute disciplinary proceedings accordingly.

[25] Even though the phrasing is somewhat inelegant the comma after the words "theft" and "bribery" is to be interpreted in the same manner as "or" after the word "fraud". The purpose of each comma is not to separate "theft" or "bribery" (nor is "fraud" by implication to be separated) from the phrase "in regard to examinations or promotional reports". The comma indicates that each is qualified by that phrase in the same manner that the phrase qualifies "an act of corruption". In other words, the acts of theft, bribery or fraud relate to

examinations or promotional reports and not anything else. This interpretation is reinforced by the fact that in instances where an educator has committed a common law or statutory offence or an act of dishonesty, subsections 18(1)(dd) and 18(1)(ee) of the EEA provide for a charge of misconduct to be brought against the educator. Theft, fraud, bribery and corruption are obviously transgressions which fall within the purview of common law or statutory offences. Clearly the Department of Education regards "theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports" as transgressions of a more serious nature than a common law or statutory offence or an act of dishonesty.

[26] I am accordingly of the view that the decision of the first respondent to charge the third respondent with misconduct under the provisions of subsections 18(c) and (d) of the EEA, and not with serious misconduct under the provisions of section 17 thereof, cannot be held to be erroneous.

How should section 17(2) of the Educators Employment Act 76 of 1998 be interpreted?

[27] Mr *Rorke* submitted further that section 17(2) of the EEA had to read as being peremptory in those instances where there was an allegation of serious misconduct and the first respondent (as the employer) had no choice but to institute disciplinary proceedings. Accordingly, so he argued, since

theft was specifically referred to in section 17(1)(a) of the EEA the appropriate charge should have been one of serious misconduct and not misconduct.

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[28] The interpretation which Mr *Rorke* seeks to place on section 17(2) of the EEA is misconceived. The purpose of the provisions in section 17(2) is not to prescribe that disciplinary proceedings have to be instituted where there is an allegation of serious misconduct but directs that such proceedings must take place "in accordance with the disciplinary code and procedures provided for Schedule 2" of the EEA. It needs to be noted that section 18(2) of the EEA sets out a similar provision in relation to misconduct. I, accordingly, find that there is no merit in the applicant's submissions regarding the interpretation to be placed on section 17(2) of the EEA.

[29] It cannot be disputed that the first respondent is vested with a discretion whether or not an educator should be charged with misconduct or serious misconduct as well as the nature of the charges to be preferred against the educator. However, the question which has still to be answered is whether in the circumstances of this matter, the applicant has shown that there are grounds upon which the decision may be reviewed and whether such grounds justify that it be set aside.

Has the applicant established that the second respondent's decision should be reviewed and set aside?

[30] The grounds upon which a court may, in the exercise of its common-law review jurisdiction, interfere with the first respondent's decision are circumscribed (see *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (AD) at 152A–D and *Hira & another v Booysen & another* 1992 (4) SA 69 (AD) at 93A–J).

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[31] The position, since the advent of the Constitution of the Republic of South Africa (1996) has been stated succinctly by Chaskalson P (as he then was) in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) [also reported at 2000 (3) BCLR 241 (CC)–Ed] at 692E–G as follows:

> "The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

[32] The promulgation of the Administrative Justice Act has resulted in the grounds upon which administrative action may be reviewed being defined statutorily. Both Mr *Rorke* and Mr *Swanepoel* have referred to various provisions of the Administrative Justice Act. They have, in support of their respective arguments, accepted the relevance of the said Act in determining the issues raised by this application in regard to the grounds upon which the decision of the first respondent may be reviewed and set aside. I am mindful of the fact that the applicant's cause of action arose prior to the promulgation of the Administrative Justice Act. Nevertheless, it is clear, as stated in the *Pharmaceutical Manufacturers* case (*supra*) that it is incorrect to draw a distinction between the common-law principles of review and review under the Constitution.

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[33] The ground upon which the applicant relies as the basis for the decision of the first respondent to be reviewed is that he erred in applying the provisions of subsections 18(1)(c) and (d) of the EEA instead of section 17(1)(a) thereof in regard to the charge to be preferred against the third

respondent. In view of the conclusion that I have reached, as set out above, namely that the first respondent's decision cannot be held to be erroneous, the application must fail.

Costs

[34] In regard to costs I am not persuaded that this is an appropriate case where it should be ordered that the costs should follow the result. The manner in which the first respondent dealt with the concerns of the applicant regarding the continued presence of the third respondent at the school, after the applicant had reported the theft of the cellular telephone, was far from satisfactory. The need for the applicant to have resorted to litigation may very well have been averted if the officials who acted on behalf of the first respondent, had displayed greater sensitivity to the understandable concern of the governing body at the dishonest conduct of the third respondent. One can certainly not fault the governing body for losing confidence in the third respondent as principal and the head of the school when, instead of conducting himself in an exemplary manner, he had stolen the school's property and thereafter compounded his misdeed by lying about its disappearance. It is by ho means surprising that this caused a furore.

[35] It is apparent, furthermore, from the answering affidavit that the aforesaid

officials, and to some extent the first respondent himself, contributed in various degrees to the adversarial relationship which developed between the parties. In view of these circumstances I consider it just and equitable that the respective parties should bear their own costs.

Order

[36] In the result I make the following order:

1. The application is dismissed.

2. Each party is to pay its own costs.

(Van Zyl J concurred in the judgment of Ebrahim J).