Manegela v MEC, Department of Education, Eastern Cape Province (103/05; ECJ83) [2006] ZAECHC 41 (31 August 2006)

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 83

PARTIES:

Registrar CASE NO: **103/05**
Magistrate:
ΣυπρεμεΒουρτοφΑππεαλΒονστιτυτιοναλΒουρτ**SECLD OF THE HIGH COURT**

DATE HEARD: 03 August 2006
DATE DELIVERED: 31 August 2006

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -
Appearances:

for the State/Plaintiff(s)/Applicant(s)/Appellant(s): Adv Hartle

for the accused/defendant(s)/respondent(s): **Adv Pillay**

Instructing attorneys:

Plaintiff(s)/Applicant(s)/Appellant(s): **Randell-Oswald Inc**

Respondent(s)/Defendant(s): State Attorney

CASE INFORMATION -

Nature of proceedings : **JUDUCIAL REVIEW**
Topic:

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)
CASE NO: 103/05

In the matter between:

PUMLA ETHEL MANENGELA **APPLICANT**

and

THE MEMBER OF THE EXECTIVE COUNCIL, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE **RESPONDENT**

JUDGMENT

DAMBUZA J:

1. This is an application for judicial review of a decision by the Department of Education, Eastern Cape Province *(the Department),* to terminate applicant's employment as a temporary educator with effect from 30 September 2004. Applicant seeks an order that her status as a temporary educator be restored and her employment in that capacity endure until such time as the department has advertised the post in relation to which she was appointed.

2. The application is founded on the following facts:

2.1 Applicant was employed by the Department, with effect from 1 April 2003 as a temporary educator at **Soqhayisa High School** in **Port Elizabeth** *(the School)*. This was pursuant to another educator, **Mrs Mkencele**, who had occupied a permanent post at the school, being declared by the respondent as having "absconded" from her employment with the school.

2.2 According to applicant when she took up employment as a temporary educator she was made to understand that her employment would endure until such time as the post vacated by **Mrs Mkencele** was advertised by way of publication in an open bulletin. Once the post was advertised, applicant would be entitled to apply along with other educators. She therefore accepted the appointment on that basis.

2.3 At the start of the first 2004 school year term applicant returned to the school to continue with her employment duties. It turned out, however, that the department had allowed **Mrs Mkencele** to return to her post at the school. Applicant was then advised by the principal that from January to June 2004 she would occupy a redeployment post and would only receive her salary until June 2004. It appears that despite the decision to terminate applicant's employment in June 2004, she continued working at the school as an educator. When this case came before me on 3 August 2006 I was made to understand that she was still employed as such. She also continued to receive her salary. On 4 August 2004 the Department wrote to the applicant advising that due to the then pending placement of excess educators in the department, applicant's temporary appointment would end on 30 September 2004.

3. Applicant relies on a memorandum directed to the district manager (presumably of **Port Elizabeth**, the district in which the school is situated) in respect of the terms and conditions of her employment. The memorandum appears to be a document generated within the Department of Education. In this memorandum the district manager is requested to approve "*temporary filling of a vacant educator post"*. According to the memorandum "*the post became vacant due to the abscondment of Miss/Mr Mkencele, Persal No 1210*9860 *on 10/04/03"*. The request for temporary filling of the post was approved on 23 September 2003.

4. On 11 June 2004 applicant's attorneys wrote to the Department enquiring about the decision to terminate applicant's employment at the end of June 2004.

5. Applicant contends that the Department had no right in law to unilaterally and arbitrarily impose the date of 30 September 2004 as termination date of her temporary employment in view of the original agreement that applicant's employment would endure until the post in relation to which she had been temporarily appointed was advertised. It is submitted on her behalf that the respondent is obliged to ensure that the Department discharges its obligations according to the principles of the rule of law and that it does not unilaterally alter the terms of applicant's employment.

6. Although the respondent denies that the applicant was employed on a temporary basis, the events set out as the basis for applicant's cause of action are

common cause. Respondent denies that **Mkencele** was characterized by the department as having absconded. In the opposing affidavit **Samuel Twigg,** an **Assistant Director for Labour Relations** at the respondent's **Port Elizabeth office**, states that after the memorandum requesting applicant's appointment in **Mkencele's** post was prepared *"it transpired*" that **Mkencele** had not absconded but was on sick leave. There is no evidence as to when the Department became aware that **Mkencele** was on sick leave. **Twigg**, however, maintains that once the department became aware of the fact that **Mkencele** was on sick leave the need for the temporary filling of the post fell away.

7. Strangely, **Twigg,** in some parts of his affidavit admits that applicant was *"requested to assume duties as a temporary educator*." **Ms Kosi**, the principal of the school, confirms the contents of **Twigg's** affidavit.

8. The main submission on behalf of the respondent is that the applicant did not utilize proper procedures in bringing the dispute before this court. I might add that the basis for this submission does not appear in the answering papers filed on behalf of the respondent. Be that as it may, it is contended that applicant should have first lodged a grievance with the Department in terms of the grievance procedure provided for in the **Employment of Educators Act 76 of 1998.** It would seem that the argument is founded on **Section 7 (2) (a) of the Promotion of Administrative Justice Act, Act No 3 of 2000** which states that:

"Subject to paragraph c, no court or tribunal shall review an administrative action in terms of this act until any internal remedy provided for in any other law has first been exhausted."

9. **Ms Hartle** submitted on behalf of applicant that the grievance procedure referred to by **Mr Pillay**, (who appeared on behalf of the respondent) is not a remedy. My view is that **Section 7 (2) (a)** is aimed at ensuring that parties first exhaust internal or Departmental dispute resolution procedures prior to approaching courts for review of administrative decisions. The grievance procedure is one of such internal dispute resolution procedures which parties should exhaust prior to launching review proceedings. The grievance procedure referred to by **Mr Pillay** provides that grievances shall be dealt with, amongst others, by way of an oral interview between a grievant and a head of the school or college.

10. It is clear in this case that applicant's problem or grievance was discussed with the principal of the school. In this regard a *"written response"* by **Kosi** regarding this dispute is attached to applicant's founding papers. In this "*written response*" **Kosi** confirms that applicant was employed as a temporary educator in post relating to **Mkencele** as set out in the memorandum. According to **Kosi, Mkencele's** last day at school was 4 February 2003 and that she *(Mkencele)* never submitted any leave forms to her (the principal). On 23 January 2004 **Mkencele** came back to the school. It also appears from this *"written response*" that **Kosi** visited certain offices of the Department and discussed the issue with **Mrs Terblanche**. It further appears that **Kosi** was not satisfied with the manner in which **Mkencele's** issue was dealt with by the Department. As a result **Kosi** laid a complaint with **Terblanche** and **Tutu,** an **Education District**

Officer. It appears, from the **Kosi's** response that the problem caused by **Mkencele's** return to her post was somewhat resolved by another *"temporary post"* which became available in January 2004. The School Governing Body then recommended applicant for this post. It is not clear from the evidence whether the recommendation was approved by the department. However, applicant continued to be employed by the Department as a temporary educator. Applicant seems to have regarded herself as still employed in relation to **Mkencele's** post even subsequent to **Mkencele's** return.

11. The contents of **Kosi's** *"written response*" are not disputed by the respondent. I am satisfied that applicant's grievance was communicated to **Kosi** and that **Kosi** attempted to resolve it. In the circumstances the argument that applicant had to launch a grievance prior to approaching this court cannot stand.

12. I am satisfied from the papers that applicant was employed as a temporary educator with effect from 1 April 2003. I am also satisfied that her employment as such was occasioned by what the department, at that stage, perceived as **Mkencele's** abscondment. Whether such perception was well founded or not is of no moment for purposes of these proceedings. The recommendation in the memorandum was expressly that approval be granted for the temporary appointment of an educator *(the applicant)* until such time as the post would be advertised in the bulletin. When the department approved the request or recommendation it did so on the recommended terms. There is no indication that the recommended conditions were altered before or at the time of the approval of the recommendation. The applicant was therefore entitled to assume that her appointment was on such terms as recommended in the memorandum.

13. It follows therefore that when the Department re-instated **Mkencele** to her *(former)* post the terms of applicant's employment were altered. Certainly **Mkencele's** post would no longer be advertised as anticipated in the memorandum.

14. I am not persuaded, however, that an order directing that applicant be re-instated to the temporary educator's post which relates to **Mkencele's** absondment would be appropriate or practical. It seems to me that an order would cause a spiral of other problems. **Mkencele's** permanent post is now occupied by her. However, the dispute occasioned by the department's administrative action in returning **Mkencele** to her former post seems to have been resolved by appointing applicant to another temporary post. Such appointment has endured for over two years. There does not appear to be any valid basis for the Department to terminate this appointment. I can only conclude from the period for which applicant's current employment had endured, that there is a real and continuous need for her services at the school.

15. According to applicant the Department recently issued a circular advising of imminent conversion of employment tenure of temporary educators to a permanent status. A copy of the Circular, **Circular No 19 of 2006** issued on 9 March 2006 is attached to a supplementary affidavit filed by applicant. The Circular is issued by the

Superintendent General of the Department of Education in the Province of the Eastern Cape.

The relevant portions thereof read as follows:

"1. The gazetting of the Education Laws Amendment Act, No 24 of 2005, Section 6B confers powers on the Head of Department to convert the posts of temporary educators into permanent posts.

2. Kindly take notice that it is my intention to convert the posts of all serving temporary educators employed according to persal who are in vacant substantive posts as at 20 February 2006."

16. It is clear that as a result of the conduct or threats of the Department to terminate applicant's employment, applicant stands to suffer prejudice. Although the Department refers to her as a temporary educator *(for example in the letter dated 24 August 2004)* it is clear from the papers that it *(the Department)* does not fully regard her as a temporary educator. Applicant's employment tenure, as a result, remains uncertain. Her rights flowing from her employment also remain uncertain. In this regard the conduct of the Department is wrongful and unlawful.

Consequently the following order will issue:

(a) The administrative action of the Department of Education, Eastern Cape Province in terminating the applicant's status as a temporary educator with effect from 30 September 2004 is declared unlawful;

(b) The department is directed to restore applicant's status as a temporary educator; such tenure shall endure until such time as the department has advertised her post as an educator at the **Soqhayisa High School, Port Elizabeth** or the post which the applicant currently occupies as a temporary educator is converted to a permanent post.

(c) The respondent shall pay applicant's costs.

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N DAMBUZA
JUDGE OF THE HIGH COURT 24 August 2006