CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/03

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| THE HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, LIMPOPO PROVINCE | Applicant |
| versus | |
| SETTLERS AGRICULTURAL HIGH SCHOOL | First Respondent |
| THE GOVERNING BODY OF THE SETTLERS AGRICULTURAL HIGH SCHOOL | Second Respondent |
| M D MASHAMAITE | Third Respondent |
| GERHARDUS PETRUS VILJOEN | Fourth Respondent |

Decided on : 2 October 2003

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JUDGMENT

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THE COURT:

[1] This is an application for special leave to appeal to this Court against a decision of the Supreme Court of Appeal (the "SCA"). Because this is a case in which the SCA refused an application for leave to appeal to it by the present applicant, the correct procedure is for the applicant to have applied for leave to appeal directly to

this Court against the judgment of the Pretoria High Court.[1] We shall assume, however, that the applicant has used the correct procedure in this case.

[2] The applicant is the Head of Department of the Department of Education, Limpopo Province. The first respondent is a public school ("the school") as defined in the South Africa Schools Act[2] as amended. The second respondent is the first respondent's governing body ("the school's governing body"). The third respondent is Ms Mashamaite, an educator presently employed at Rehlasa Secondary School, Chuenespoort, Limpopo Province, and unsuccessful applicant for the position of principal of the school. The fourth respondent is Mr Viljoen an educator and the principal of the school. It is his appointment to this position that is in issue. The school, the school's governing body and Mr Viljoen oppose the application on a number of grounds, including the delay in bringing the application and the prejudice that would be caused if leave to appeal was granted.

*Facts*

[3] The background to the application is as follows: contrary to the recommendation made by the governing body of the school, the applicant, in his capacity as the Head of Department of Education in the Limpopo Province, appointed Ms Mashamaite, a black female, instead of Mr Viljoen, a white male, as principal of the school. On 25 June 2002, the school and the school's governing body launched an

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[1] *Swartbooi and Others v Brink and Another (1)* 2003 (5) BCLR 497 (CC) paras 2 - 4.

[2] Act 84 of 1996.

urgent application in the Pretoria High Court for an order against the applicant. The application was to set aside the appointment made by the applicant and for a declarator that Mr Viljoen was entitled to be appointed as the principal of the school with effect from 1 July 2002 as recommended by the school's governing body.

[4] On 27 June 2002, Bertelsmann J granted an order setting aside the applicant's decision to appoint Ms Mashamaite as principal and declared that Mr Viljoen was entitled to be appointed to that position. The applicant was ordered to take all administrative steps necessary to give effect to Mr Viljoen's appointment with effect from 1 July 2002. He was also ordered to pay costs of the application proceedings.

[5] An application to the Pretoria High Court for leave to appeal against that decision was dismissed. A further application to the SCA was dismissed on 19 November 2002. The applicant now approaches this Court for leave to appeal.

[6] The applicant argues that the interpretation which the High Court accorded to the sections of the Employment of Educators Act[3] ("the Act") is in conflict with the provisions of the Constitution[4] and the Act. In the alternative, the applicant contends that the relevant sections of the Act are in conflict with the provisions of the Constitution and therefore invalid and of no force and effect.

[3] Act 76 of 1998.

[4] The Constitution of the Republic of South Africa Act 108 of 1996.

[7] Nine months have passed since the SCA dismissed the application for leave to appeal from the High Court. The applicant seeks condonation for this delay. The applicant states that after the judgment of the SCA he did not have any further communication with his legal representatives since he was under the impression that the decision of the SCA constituted a final determination in the matter, and he thought his only recourse was through the legislative process. He had requested that the Office of the State Attorney obtain a copy of the reasons for the refusal of the SCA in granting him leave to appeal but did not receive any reasons, as is customary in the SCA.

[8] In the meantime, proposals to seek an amendment to the legislation were considered and discussions to that end conducted. On 12 June 2002 he attended a committee meeting of the Heads of Departments of Education in Cape Town when he learnt of a judgment handed down in the Northern Cape High Court in which the Court interpreted the relevant section of the Act in a way that varied substantially from that given by Bertelsmann J in the Pretoria High Court.[5]

[9] The applicant avers that he immediately communicated with the office of the State Attorney in order to arrange a consultation with counsel to investigate the prospect of success on an application to this Court. On 26 June 2003 the consultation was held. On 2 July 2003 counsel furnished her opinion and a further consultation was held. With the High Court recess in July 2003 and the non-availability of

[5] *Kimberley Girls' High School and Another v The Head of Department of Education, Northern Cape Province and Others* as yet unreported judgment of the Northern Cape Division, handed down on 30 May 2003.

counsel, the further preparation and research into the law resulted in the application being finalised only in August 2003.

[10] Without giving detail, the applicant claims that the Department of Education suffered grave prejudice as a result of the impact of the judgment in his case. He states further that there are reasonable prospects of success that this Court will reverse, alternatively set aside or materially alter the decision of the High Court.

*Condonation*

[11] The main consideration whether to grant condonation of the very late filing of the application is whether it is in the interests of justice to do so. Yacoob J, in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,[6] held that:

> "I now consider the application for condonation. It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[7] [Footnote omitted].

[6] 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).

[7] Ibid at para 3.

[12] There can be no doubt that it would be in the interests of justice for differences in the interpretation of the relevant provisions to be resolved. The issues are socially and legally complex. They touch on the intricate interrelationship between the rights of the governing bodies to make decisions on suitable candidates for employment at schools, and the need for transformation to overcome racial and gender imbalances in education. On the other hand, the applicant has taken nine months to bring this application. In the interim, the appointment at issue has been made and the fourth respondent has taken up his position as principal. This delay has induced a reasonable belief in the minds of the respondents that the High Court order, against which the applicant now seeks leave to appeal, and their respective positions flowing from such order, had become unassailable. In our view, it would not be in the interests of justice after such an inordinate delay to reopen the particular dispute, place the fourth respondent in jeopardy of losing his position and subject the school to the uncertainty and dislocation which would be the inevitable consequence of such proceedings. The applicant may explore other ways of getting clarification on the question of interpretation.[8]

[13] It follows that the application for condonation must be refused. We emphasize that such refusal is in no way related to the prospects of success on the question of the

[8] See for example section 23 of the Supreme Court Act 59 of 1959, which states:

> "Whenever a decision in civil proceedings on a question of law is given by a provincial or local division which is in conflict with a decision in civil proceedings on a question of law given by any other such division, the Minister may, after consultation with the South African Law Commission, submit such conflicting decisions to the appellate division and cause the matter to be argued before that division, in order that it may determine the said question of law for the future guidance of all courts."

proper interpretation of the Act. It flows simply from a determination that after so much water has flowed under the bridge, it is not in the interests of justice for this Court to entertain the appeal.

[14] There is one further matter that requires attention. It relates to the issue of costs awarded in the High Court. The respondents mentioned in their affidavit that despite frequent requests, three costs orders of the High Court have not been responded to by the applicant. If the applicant has indeed ignored the order for costs made against him in the earlier proceedings, that would indicate an unacceptable lack of respect for court orders. If a structure of government is unhappy with a decision of a court it has its legal remedies; refusal to pay orders for costs is not amongst them. The Constitution provides that an order of court "binds all persons to whom and organs of state to which it applies".[9] It also requires organs of state to protect the dignity and effectiveness of courts.[10] If governments do not obey the court, they cannot expect citizens to do so. Nothing could be more demeaning of the dignity and effectiveness of courts than to have government structures ignore their orders. The applicant has not had an opportunity of replying to the averments made in this regard. There is no need to delay the matter by calling for a reply before handing down this judgment. The matter cannot, however, pass without the issue being investigated at the highest level within the Province. It is important that steps be taken to establish whether or not the orders for costs have been paid, and if not, to ensure that the court orders are

[9] Section 165 (5).

[10] Section 165 (4).

complied with without further delay. The Registrar of this Court is requested to forward this judgment to the Member of the Executive Council of the Limpopo Province responsible for education, with a request that a report be made to this Court on this issue by 16 October 2003. The Registrar is also requested to forward a copy of this judgment to the Premier of the Limpopo Province.

*Order*

[15] The application for condonation and for leave to appeal is refused with costs.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Yacoob J.