Phenithi v Minister of Education and Others (18/2005) [2005] ZASCA 130 (14 December 2005)

Last Updated: 1 March 2006

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

Case number: 18/05

In the matter between:

M G PHENITHI Appellant

and

MINISTER OF EDUCATION 1st Respondent

MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION IN THE PROVINCIAL
GOVERNMENT OF THE FREE STATE 2nd Respondent
THE HEAD OF DEPARTMENT OF
EDUCATION IN THE PROVINCIAL
GOVERNMENT OF THE FREE STATE 3rd Respondent

CORAM: **MPATI DP, CAMERON, NAVSA, VAN HEERDEN and**
MLAMBO JJA
HEARD: **8 NOVEMBER 2005**
DELIVERED: **14 DECEMBER 2005**
Summary : Employment Law – educators – discharge of – deemed discharge on account of absence from work without permission for more than 14 consecutive days in terms of s 14(1)(a) of Employment of Educators Act 76 of 1998 – coming into operation of deeming provision not dependent upon any decision and so not constituting administrative action – hearing not totally excluded and accordingly provision not unconstitutional

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JUDGMENT

MPATI DP:

[1] As at 19 May 2000 the appellant had been an educator for 15 years. She was notified by letter dated 31 July 2000 (the discharge letter) from the third respondent, the Head: Education, Free State Province, that 'in terms of section 14(1)(a) of the Employment of Educators Act 76 of 1998 you are deemed to have been discharged from service on account of misconduct from 19 May 2000, for being absent from work for a period exceeding fourteen (14) consecutive days without the consent of the employer'. At the time of her discharge the appellant was teaching at Nkgodise Primary School, a public school in Dewetsdorp (the school).

[2] Section 14(1)(a) of the Employment of Educators Act (the Act) provides:
'An educator appointed in a permanent capacity who –

(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
(b) . . .
(c) . . .
(d) . . .

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where –

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or

(ii) . . . .'[1]

[3] The appellant referred the matter to the Education Labour Relations Council (the Council) – she was advised in the discharge letter that she had a right to do so if she was not satisfied – where conciliation was attempted. When conciliation failed, the matter was set down for arbitration on 11 February 2002. The arbitrator found that the Council had no jurisdiction over the matter since s 14(1)(a) of the Act was peremptory. He expressed the view that the section 'seems to be unconstitutional in that the employer is not required . . . to apply the *audi alteram partem* rule before the dismissal'. He accordingly recommended that the appellant 'take the matter to High Court' or to 'approach the Constitutional Court directly in order to set aside the provisions of s14(1)(a)' of the Act. The appellant launched an application for direct access to the Constitutional Court, but the application was turned down. She then instituted motion proceedings in the Orange Free State Division of the High Court, seeking the following order:

'1. That the decision of the Respondents to dismiss the [appellant] be set aside and declared (an) unfair Labour Practice and unconstitutional.
2. That the provisions of section 14(1)(a) read with 14(1)(d) and 14(2) of [the Act] (are) unconstitutional and invalid.

3 . . .
4. Further and/or alternative relief.'

The court *a quo* (Ebrahim J) dismissed the application with costs, but granted the appellant leave to appeal to this court.

[4] The issues in this appeal are (1) whether the discharge of the appellant from duty constitutes administrative action and, if so, whether it was fair and (2) the constitutionality of s 14(1)(a) of the Act. The appellant avers in her founding affidavit that on 16 February 2000 she was admitted to hospital due to illness 'until about April 2000'. She submitted medical certificates and leave forms to the principal of the school, Mr Sekhele Amos Ramakau. She had not fully recovered when she was discharged from hospital, but because she had been informed by her colleagues that the principal intended to 'dismiss' her, she reported for duty. On or about 19 May 2000 she again fell ill and consulted a medical doctor on 22 May 2000. The doctor referred her to hospital and booked her off work until 5 June 2000. On 6 June 2000 her son died. She informed the principal of this before she took time off so as to arrange for her son's burial. She states further that the principal was not happy with her proposed absence since, according to him, she had exhausted her sick and family leave. He nonetheless gave her permission 'to attend to the burial'. Shortly after her son's burial she again fell ill and was booked off by a medical doctor from 19 to 21 June 2000. This last incapacity 'coincided with school holidays' but when she reported for duty at the school when it re-opened she was informed by the third respondent, through the principal, that her 'services had been terminated' due to absence from work for more than 14 consecutive days. She subsequently received a notice – the discharge letter – through the post.

[5] Mr Ramakau, who is now a School Management Developer employed by the second respondent, deposed to an affidavit on behalf of the respondents. Whilst not disputing that she had been ill, he denies that the appellant submitted medical certificates and leave forms for the period 16 February 2000 to April 2000. He denies, however, that the appellant was at the school between April 2000 and 19 May 2000. It is not necessary, in my view, to make a finding in this regard because the period in respect of which s 14(1)(a) of the Act came into operation is from 19 May 2000 onwards. I say this because given the manner in which the respondents relied on that subsection, 19 May 2000 would have been 'the day following immediately after the last day on which the educator was present at work' (s 14(1)(a)(i)). Mr Ramakau also denies that it was the appellant's son who had died and alleges that it was in fact the son of the appellant's sister. He denies further that the appellant had made any arrangements with him to attend to the burial.

[6] It is not in dispute that on 20 June 2000 Mr Ramakau delivered a letter to the appellant in terms of which she was charged with misconduct 'in that on 16 February to 25 April 2000 and on 1 June 2000 till now' she had been negligent or indolent in carrying out her duties by not attending 'to your class Grade 3B'. She was also invited, in terms of s 19(2) of the Act, to admit or deny the allegations against her. The appellant did not respond. Another letter dated 21 July 2000 was addressed to her in the following terms:
'It has come to the attention of the Department that you have not reported for duty at Nkgodise Primary School since 19 May 2000 up to date.
If you do not report to school on or before Wednesday 26/07/2000, your services will be terminated on the basis of abscondment (absenting yourself from duty without the permission

from the employer.)
Yours sincerely
Principal : Nkgodise Primary School.'
On 27 July 2000 Mr Ramakau wrote to the School Management Developer, Bloemfontein East District, advising that the appellant had failed to report for duty at the school 'on or before Wednesday, 26 July 2000' as per the instructions in his letter of 21 July 2000. The next correspondence (on 31 July 2000) was the letter of discharge.

Does the appellant's discharge constitute administrative action?
[7] Although in his heads of argument Mr Khang, for the appellant, submitted that it was unclear from the respondents' papers whether the appellant was 'dismissed' by operation of law or 'on the basis of abscondment', he conceded in argument before us that the termination of the appellant's employment was by operation of law. This concession was wisely made.

[8] It bears noting, however, that the first prayer sought by the appellant in the notice of motion was the setting aside of 'the decision of the respondents to dismiss' her and that such decision be declared an unfair labour practice. In his heads of argument and before us Mr Khang argued that the termination of the appellant's employment was both substantively and procedurally unfair. The complaint is captured in one single statement in the founding papers as follows:
'4.9 I was not given an opportunity to state my case and the termination was apparently by operation of law without any hearing.'

[9] In *Minister van Onderwys en Kultuur v Louw*[2] this court had occasion to deal with the provisions of s 72 of the Education Affairs Act (House of Assembly), 70 of 1988, which were almost identical to those of s 14 of the Act. Section 72(1) of Act 70 of 1988 provided that a person 'employed in a permanent capacity at a departmental institution and who – (a) is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education . . . shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct . . .'. The respondent in *Louw's* case was a general assistant and in permanent employment at a boarding house of a certain high school in Upington. He failed to report for duty over the period 29 July to 31 August 1992. On 11 September the principal wrote him a letter informing him, in essence, that according to the school governing council he had been discharged (from duty) ('dat u ontslaan is') and that his last day of service was 28 July 1992. Following unsuccessful negotiations between his representatives and the education authorities the respondent instituted application proceedings in the Northern Cape Division seeking, inter alia, an order setting aside the 'decision' to terminate his services with effect from 28 July 1992. In this court Van Heerden JA, reversing the decision of the Northern Cape Division, said (at 388 G-H):
'The deeming provision [of s 72(1)] comes into operation if a person in the position of the respondent (i) without the consent of the "Head of Education" (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the *audi* rule which, in its classic formulation, is applicable when an administrative – and

discretionary – decision may detrimentally affect the rights, privileges or liberty of a person.' (My translation.)
The court held further that where, as in that case (and also the present matter) the employee is informed in a letter of discharge that he/she has been discharged in terms of s 72(1) - in this case s 14(1)(a) - it is not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law (at 388 I).

[10] In my view, the *Louw* judgment is definitive of the first issue in the present matter, viz whether the appellant's discharge constitutes an administrative act. (See also *Frans v Groot Brakrivierse Munisipaliteit en Andere* 1998 (2) 770 (C) 777I-779E.) There was no suggestion that *Louw* was wrongly decided. There being no 'decision' or 'administrative act' capable of review and setting aside, the second part of the first prayer in *casu*, viz that the 'decision be declared an unfair labour practice', falls away.

[11] The operation of the provisions of s 14 (1)(a) of the Act may only be lifted or revoked by the employer directing otherwise.[3] It is not the appellant's case on the papers, nor was it argued before us, that the employer took a 'decision' not to 'direct otherwise'. Her case has always been that the 'decision to discharge' her must be reviewed and set aside. An educator may also be reinstated in terms of s 14(2), which reads:
'If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.'
It is at this stage that provision is clearly made for a hearing. Although the appellant reported for duty when schools re-opened after the June/July 2000 holidays, the provisions of s 14(2) were not invoked. It is not necessary to

consider now the question as to who should have initiated such a hearing.

[12] It was argued, on behalf of the appellant, that it is not clear from the papers that the period in excess of 14 consecutive days relied upon by the respondents was not interrupted. Indeed, if that period had been interrupted, the provisions of s 14(1)(a) would not have come into operation and the letter of discharge would be invalid. The submission on behalf of the appellant was that there are indications on the papers that point to the principal's version of events being unreliable. For example, the letter of 20 June 2000, in terms of which the appellant was charged with misconduct for not attending to her class over the period '16 February to 25 April 2000 and on 1 June 2000 to date', makes no mention of the period commencing 19 to 31 May 2000, which falls within the period consequent upon which s 14(1)(a) came into operation. Mr Khang accordingly contended that whatever dispute of fact there may be on the papers can be resolved, not by reference to the well-established rule laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints*,[4] but by this court preferring the appellant's version to that of the respondents, having regard to the improbabilities and lack of clarity in the respondents' version.

[13] The dispute of fact concerns the averment by the appellant that, when her son died on 6 June

2000, she informed the principal of this fact before she took time off to make arrangements for the funeral, and that the principal gave her permission to do so. The principal (Mr Ramakau) denies that the appellant made any such arrangements with him. No replying affidavit was filed – nor did the appellant ever seek to have Mr Ramakau or the respondents' other deponents cross-examined. The appellant having elected to institute proceedings by way of notice of motion, the issue must be decided on the respondents' version[5]. There is no reason to depart from this well-established rule since the respondents' version is not so far-fetched as to be rejected merely on the papers. It must be accepted, therefore, that the appellant never obtained permission from Mr Ramakau to be absent from work from 7 June 2000 to arrange for her son's burial (assuming, for present purposes, that it was her son who had died).

[14] The appellant also alleges that she had sick certificates for the periods 22 May 2000 to 5 June 2000 (during which she was hospitalised) and 19 to 21 June 2000, when she was booked off by a medical doctor. She fails, however, to state that she handed, or sent, the sick certificates to the principal. Mr Ramakau admits that he received a copy of the first-mentioned sick certificate, but does not say when he received it. But he could not have received it before the discharge letter was written, because the copy he received, which is annexed to the founding papers, is dated 18 September 2000. It was issued well after the event. As to the second sick certificate, Mr Ramakau's uncontested version is that he saw it for the first time during consultation 'with the department's attorneys' on 5 December 2003. It follows that these two sick certificates, which may have constituted evidence of the existence of a valid reason[6] for the appellant's absence from work, do not in any way serve to interrupt the statutory period required for the operation of s 14(1)(a) of the Act. The employer had no knowledge of the reasons for the appellant's absence from work.

[15] The appellant avers that her illness over the period 19 to 21 June 2000 'coincided' with the schools' June holidays. Whether that period coincided with the holidays or not is of no moment. The statutory period (required for the operation of s 14(1)(a)) is objectively ascertainable. The period 19 May 2000 to 18 June 2000 is well in excess of 14 consecutive days even if weekends and the public holiday (16 June – Youth Day) are disregarded and only working days considered. Clearly, therefore, the appellant was absent from work for a period exceeding 14 consecutive days without the permission of the employer and the provisions of s 14(1)(a) of the Act thus came into operation.

Constitutionality of s 14(1) of the Act

[16] Under this head the appellant sought an order that the provisions of s 14(1)(a), read with subsecs 14(1)(d) and (2) of the Act be declared unconstitutional and invalid. Subsection 14(1)(d) provides that an educator who, while disciplinary steps taken against him/her have not yet been disposed of, 'resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct . . . with effect from the day on which the educator resigns or assumes employment in another position, as the case may be'. I fail to see how this subsection has any relevance to the present matter. The appellant did not resign from service or assume employment in another position. No further reference will thus be made to this subsection.

[17] The grounds for the claim of unconstitutionality and consequent invalidity of s 14(1)(a) are couched in the following terms in the founding papers:

'6. I have been advised and humbly submit that the provision of Section 14(1)(a) read with . . . subsection (2) of the Act are unconstitutional and invalid on the following grounds:
6.1 the provision violates the fundamental right to fair Labour Practice in terms of section 23(1) of the Constitution because it allows the [employer] to act without considering the substantive and procedural aspects of the case before termination.
6.2 In particular, the provision violates the fundamental right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution in that it does not only fail to compel the [employer] to hear the other party but fails to compel the [employer] to give reasons for (his) decision as well.'

('Employer' is defined in the Act, for purposes of an educator in the service of a provincial department of education, as the "Head of Department".)
The difficulty facing the appellant regarding the last part of 6.2 (failure of the section to compel the employer to give reasons for his/her decision) is the same as that discussed above (paras 9 and 10). No 'decision' is taken by the employer, which would require him/her to give reasons for it. He/she merely conveys to the educator, in the discharge letter, the result which, according to

his/her interpretation of the law (s 14(1)(a) of the Act), flows from the operation

of the provisions of the section. It is not a decision taken after, eg, the

exercise of a discretion.[7]

[18] With regard to the 'reasons' for the employer's alleged 'decision', in the present matter the letter of discharge in any event contains the reasons for the termination of the appellant's employment. The letter clearly states that in terms of s 14(1)(a) of the Act the appellant was deemed to have been discharged from service for being absent from work for a period in excess of 14 consecutive days without the consent of the employer. In my view, the employer would, as a matter of course, as was the case in the present matter, give reasons for the termination of an educator's employment when conveying to such educator the consequences of the deeming provisions of the section. This ground accordingly has no substance.

[19] As to the ground that s 14(1)(a), read with s 14(2), violates the appellant's fundamental right to fair labour practices in terms of s 23(1) of the Constitution, it is not clear what 'act' of the employer is alleged to be allowed by the section 'without considering the substantive and procedural aspects of the case'. It would not be out of place to interpret the word 'act' to mean 'to decide to terminate or discharge', to which the answer again is that the employer takes no decision to terminate an educator's services under s 4(1)(a) of the Act. The discharge is by operation of law. In my view, the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. In such a case there can be no unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'. Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome.

[20] But the more fundamental complaint, as can be distilled from the otherwise ineptly formulated grounds mentioned above (para 17), is that s 14(1)(a) of the Act deprives an educator of his/her right to administrative action that is procedurally fair (s 33(1) of the Constitution, read, at the relevant time, with item 23(2)(b) of Schedule 6) in that it permits the termination of an educator's services, albeit by operation of law, without such educator having had an opportunity to be heard. That the termination of an educator's services under s 14(1)(a) of the Act materially and adversely affects such educator's rights (see s 3(1) of the Promotion of Administrative Justice Act 3 of 2000) cannot be questioned. The section, however, does not require any decision to be made for its provisions to come into operation and for that reason no hearing is contemplated prior to its coming into operation. And it is difficult to fathom how the employer could suspend the operation of the provisions of the section so as to afford an educator an opportunity to be heard.

[21] But the fact that s 14(1)(a) does not compel the employer to give an educator a hearing before its provisions came into operation does not necessarily make it unconstitutional. The section does not totally exclude a hearing. While it is true that it does not place an obligation on the employer to invite an educator to a hearing, the educator is not precluded from placing before the employer material or facts that may move the latter to 'direct otherwise', ie to direct that the operation of the provisions of s 14(1)(a) be lifted or that the section shall not take effect. As was said in *Louw*[8] , the phrase 'unless the employer directs otherwise' is not entirely clear. Whether the employer may 'direct otherwise' only before the expiry of the period contemplated by the section is not clear from the wording of the section. A definitive finding on this aspect is, however, not necessary as no approach was made in this case for the third respondent to 'direct otherwise'. Section 14(2) also affords an educator an opportunity to be heard and to be reinstated, provided he/she is able to show good cause as to why the employer should reinstate. The fact that s 14(2) provides for a hearing only after an educator has been deemed to be discharged in terms of s 14(1)(a) does not mean that the latter subsection is in conflict with the Constitution (cf *Buffalo City Municipality v Gauss and Another*[9]).

[22] Mr Khang referred us to s 210 of the Labour Relations Act 66 of 1995 (the LRA) which provides that:

'(1) If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail.'

Mr Khang consequently submitted that the provisions of s 14(1)(a) of the Act are in conflict with those of s 188 of the LRA, which decrees that 'a dismissal . . . is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee's conduct or capacity . . . and that the dismissal was effected in accordance with a fair procedure'. He argued that, in terms of s 210 of the LRA, the provisions of s 188 must accordingly prevail.

[23] I am not persuaded that the provisions of s 14(1)(a) of the Act are in conflict with s 188 of the LRA. As to the requirement that the reason for the dismissal must be a fair reason there is no suggestion, as correctly pointed out by Mr Soni for the respondents, that unexplained and

unexcused absence from work for more than 14 consecutive days is not a fair reason for the termination of an educator's employment. It is true that the consequences of the operation of s 14(1)(a) of the Act are that, in most cases (assuming that the employer may 'direct otherwise' only before the expiry of the statutory period), an educator's employment is terminated without him/her having had an opportunity to state his/her case. But as I have mentioned above (paragraph 21) a hearing is not totally excluded, whatever form it may take. Moreover, s 14(2) clearly provides for a hearing, albeit only after an educator's employment had been terminated in terms of s 14(1)(a).

[24] To the extent that it may be argued that the deeming provisions of s 14(1)(a) limit an educator's right to procedurally fair labour practice, Ms Lorraine Rossouw, who deposed to an affidavit on behalf of the respondents, sets out the reasons why the provisions of s 14(1)(a) are necessary in the education department. According to her, the consequences of an educator's absence without leave are, to mention a few, that: the learners are left without a teacher; the department cannot appoint a substitute or a temporary educator immediately; major disruptions are caused as a reshuffling of both educators and learners is required; the department has to remunerate such educator while he/she is not fulfilling his/her obligations and the principal of the school concerned has a grave dilemma regarding what to do during the educator's absence. The provisions of the section thus ensure certainty as the principal can set things in motion for the appointment of a substitute.

[25] The reasons given by Ms Rossouw are confirmed by Mr Eben Boshoff, Director of Legal and Legislative Services, responsible for the drafting of education legislation, who adds that having a teacher in the classroom is an important aspect of giving substance to a child's right to education. Education, he continues, has the unique responsibility of balancing the rights of children with the competing rights of others, such as educators. Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. The intention behind s 14 of the Act, he says, is to limit the potential harm that learners could suffer because of the absence of an educator without leave, while still allowing for a period of 14 days before the right of the educator is affected by operation of law. As has been mentioned above, no replying affidavit was filed and these factors, in justification for the limitation of an educator's right to procedurally fair labour practice, stand uncontradicted. There is therefore no reason to hold that the limitation, if it be one, is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36(1) of the Constitution).

[26] I conclude therefore that the provisions of s 14(1)(a), read with s 14(2), of the Act do not offend against the Constitution. The appeal must therefore fail.

[27] As a last port of call Mr Khang contended that the provisions of s 14(1)(a) oust the jurisdiction of the high court. He based his submission on the arbitrator's finding that the Council had no jurisdiction in the matter since the section was peremptory. This contention has no substance. If, as was held in *Louw's* case,[10] the educator concerned were to allege that he/she had the necessary consent to be absent from work and that allegation is disputed, the factual dispute is justiciable by a court of law. Similarly, if the employer were to be requested to 'direct otherwise' (in terms of the section) and refuses to do so, his/her decision (to refuse) is

reviewable. The same would apply in the case of a refusal to reinstate under s 14(2).

[28] Mr Khang submitted, in the alternative, that in the event of the appeal failing, we should order that the matter be remitted to the department for further consideration by it. That would certainly be an incompetent order as the appeal before us is against the order of the court *a quo* in terms of which the appellant's application was dismissed with costs. But it would not be inappropriate, in my view, to make a few comments regarding the contents of the letter of discharge. The appellant was advised that if she was not satisfied with the termination of her services she had 'the right to refer the matter to the Education Labour Relations Council in terms of section 191(1)(a) of the Labour Relations Act . . . within 30 days from the receipt of this letter'. She was then given the Council's address. No criticism can be levelled against the advice per se, because at least conciliation was attempted, but failed. However, one would have expected, first and foremost - precisely because s 14(1)(a) does not clearly envisage a hearing, although it does not exclude it - that the writer, who was the Head of the Provincial Education Department of the Free State (the employer), would bring the appellant's attention to the provisions of s 14(2) of the Act. Sending the appellant to the Council while failing to make any reference to s 14(2) was, in my view, a serious omission on the part of the employer, and so much was conceded by counsel for the respondent. He argued, however, correctly so in my view, that such omission does not affect the termination of the appellant's services, but may have costs implications.

[29] Counsel for the respondent referred us to Ms Rossouw's affidavit, where it is alleged (and this is not disputed) that after the arbitrator's award and before the Constitutional Court had handed down its judgment, the appellant was given an opportunity to make representations with regard to her reinstatement and that she failed or refused to avail herself of that opportunity. In my view, this cannot be held against the appellant. At that time the parties were already deep in litigation, the appellant having already approached the Constitutional Court for relief and waiting for judgment. The upshot of all this, in my view, is that it may still be open to the appellant to attempt reinstatement by showing good cause why she should be reinstated in terms of s 14(2). It is uncontested that, when the schools re-opened after she had been ill, she reported for duty, a prerequisite for the employer to consider reinstatement on good cause shown.

[30] As to costs on appeal, I consider that this matter may well not have ended up in this court had the appellant's attention been drawn to the provisions of s 14(2) either when she reported for duty when schools re-opened or in the letter of discharge. It would be proper, in the circumstances, to make no costs order.

[31] The appeal is dismissed.

L MPATI DP
CONCUR:
CAMERON JA
NAVSA JA
VAN HEERDEN JA
MLAMBO JA

[1] See s 17(1)(m) (now 17(1)(j)) which, in the context of disciplinary procedures, provides that '[a]n educator shall be guilty of misconduct if the educator . . . without leave or valid reason, is absent from office or duty'.
[2] 1995 (4) 383 (A)
[3] *Louw*, supra, at 389E
[4] 1984 (3) 647 (A) 634 H-I
[5] *Plascon-Evans Paints*, supra, at 634 H-I
[6] See s 17(1)(m) referred to in footnote 1
[7] *Louw*, supra at 388 I
[8] Supra, at 388F
[9] 2005 (4) 498 (SCA)
[10] Supra, at 388 G-H