

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT-BISHO)**

CASE NO:
110/2011

Date Heard: 30 August 2011
Date Delivered: 15 December 2011

In the matter between:

NONDUMISO ROSEBELLA SIYILA

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL,
FOR EDUCATION, EC**

1ST RESPONDENT

**THE SUPERINTENDENT-GENERAL DEPARTMENT
OF EDUCATION, EC**

2ND RESPONDENT

J U D G M E N T

DAMBUZA, J:

[1] In this matter the applicant sought a declarator that:

- i) the conduct of the respondent of withholding her salary for the months starting from October 2010 until the date of the hearing the application be declared unlawful and wrongful.

- ii) The respondents be directed, forthwith, to pay to the applicant, the outstanding salary.
- iii) The respondents be interdicted and restrained from further withholding applicant's salary without following due process of law ,
- iv) the applicant's late filing of the application be condoned.

[2] At the hearing of the application it was brought to my attention that the Department of Education had paid the applicant's salary for the months November 2010, December 2010 and February to July 2011; the outstanding months, at the time of the hearing, were October 2010, January 2011 and the bonus payable to the applicant at the end of October 2010. Those moneys would be paid to the applicant in the then near future. What remained for my determination was the declarator, the interdict, the application for condonation and costs.

[3] It was common cause at the hearing of the application that the applicant started employment with the Department of Education Eastern Cape as a teacher on 22 April 1985. She was stationed at **Goqwana Junior Secondary School** in Tsolo. In January 2004 the applicant applied for a vacant teaching post at Ebenezer Majombozi High School in East London. She then relocated from **Goqwana School** to **Majombozi School** where she assumed duties in February 2004.

[4] In 2006 the applicant secured employment at Sakhikamva High School in Beacon Bay East London where she was still employed at the time of the hearing of the application.

[5] The cause of the application is what the applicant perceived as withholding of her salary by the functionaries the Department of Education Eastern Cape, with effect from October 2010, without justification. The respondents deny that the applicant's salary was withheld. They state that all that happened is that the mode of payment of her salary was altered in the Department's records from one of payment by electronic transfer into the applicant's bank account to manual payment, in terms of which the applicant had to collect her salary cheque from the District Office of the Department of Education in Qumbu; that being the Regional Office of the Department of Education within whose jurisdiction **Goqwana School** falls. It appears from the answering affidavit filed on behalf of the respondents that the records kept by the Department of Education reflect that the applicant is still employed at **Goqwana School**. The respondents deny that the applicant was duly transferred or appointed to the **Majombozi School**. They contest the procedure used by the applicant in transferring from **Goqwana School** in 2004 to Ebenezer School.

[6] the applicant takes issue, as a point in *limine* with the deponent to the answering affidavit. She contends that **Tabiso Miranda Pityana** who deposed to the answering affidavit “ *lacks the Locus Standi*” to depose to the affidavit on behalf of the

respondents, as both respondents are still employees of the Department of Education whilst **Pityana** is an employee in the Premier's Office. According to the answering affidavit **Pityana** is a Legal Administration Officer stationed in the Shared Legal Services office of the Government in the Eastern Cape. In that capacity, so contends **Pityana**, she has been authorized by the respondents to deal with this matter. In my view the applicant is not in a position to validly dispute **Pityana's** authority to depose to the answering affidavit. Apart from the allegations that **Pityana** is employed in the Premier's office there is no other evidence, in the applicant's affidavit that credibly challenges **Pityana's** authority. The general approach by the courts in determining a deponent's authority is that only minimum formal evidence is required¹. This is particularly so where a bare denial of a persons authority to depose to an affidavit is raised or where surrounding circumstances confirm the existence of authority. A court should not be unduly technical and each case should be considered on its own merits.² I am satisfied from the papers that **Pityana**, by virtue of her employed in the office of Shared Legal Services which provides legal support to Government Departments in the Eastern Cape, had the authority to depose to the answering affidavit.

[7] Regarding the merits, indeed as the respondents maintain, the correspondence on which the applicant relies for her contention that she was effectively transferred by the Department of Education to East London only states that the office of the circuit manager in Qumbu, had no objection to her transfer to the East London school that she had applied to and that the School Governing Council of **Goqwana School** also had no

¹ Erasmus; **Superior Court Practice** at B1-38 A together with the authorities cited therein.

² *Ibid*

objection to the transfer. There is no letter from the Department of Education expressly appointing or transferring the applicant to **Majombozi School**.

[8] However, the matter does not end there. Although the respondents contend that the principal of **Majombozi School** had no authority to register the applicant as an educator at his school, it is not in dispute that the applicant did assume duties at **Majombozi School** in 2004 and that she served the Department of Education until the launch of this application.

[9] There respondents' case is that at some stage the functionaries of the Department of Education realized, when the applicant repeatedly failed to append her signature on the payroll for **Goqwana School**, that she was as longer at **Goqwana School**. It was then concluded by functionaries in the Department of Education that the applicant had gone "Absent Without Leave" (**AWOL**). This conclusion led to the change effected by the relevant officials of the Department to the mode of payment of the applicant's salary as I have already explained. Consequently as from November 2010 the applicant's salary was no longer electronically transferred to her bank account. The applicant was expected to collect her salary from the Qumbu District Office of the Department.

[10] It is significant that the issue before me is not the propriety or otherwise of the applicant's transfer from Goqwana to **Majombozi School**. It is the legality of the non payment or the change in the mode of payment of the applicant's salary from October

2010. Nowhere in the papers do the respondents state that the applicant was advised of an impending change to the mode of payment of her salary or that the mode of payment had, in fact, been changed. The respondents state that attempts at locating the applicant's whereabouts were unsuccessful. They do not, however, state what those attempts were. Nor is it stated when it is that the respondents first became aware that applicant had gone "**AWOL**", as they say. The copies of payroll annexed to the answering papers to show that the applicant failed to append her signature relate to payments for August and December 2010 long after the mode of payment was changed. The evidence is that the applicant assumed duties at Majombozi School in February 2004. No evidence is tendered as to why it took the respondents 6 years to take action against the applicant if they believed that she had absconded from employment.

[11] Assuming that the Department of Education, through its functionaries, was of the impression that the applicant had absconded from employment, the proper procedure was for disciplinary proceedings or a proper inquiry to be held, prior to any decision being taken as to how to deal with her as a person who had absconded from work. In my view the respondents have not shown that they so much as tried to locate the applicant's whereabouts.

[12] I have difficulty in understanding how the respondent could have considered the applicant to have absconded from work, given that the same Regional Office of the

Department of Education in Qumbu, which now considered the applicant to have absconded from work, had written a letter on 21 January 2004 in which it recorded that it had no objection to the transfer to **Majombozi School**. Even if the letter of objection does not constitute authority for the actual transfer of the applicant to **Majombozi School**, it does give an indication of where the applicant could be. It is not the respondents' case that the Department never received the letter of no objection written by the Chairperson of the School Governing Body of **Goqwana School**. The Department is also in possession of the applicant's application for transfer to **Majombozi School** dated 29 January 2004 and the letter from the principal of **Majombozi School** to the Qumbu District manager advising that the applicants application for a transfer to the school had been "accepted" by **Majombozi school**. In my view all these documents would have given an indication to the functionaries the Department of Education as to the whereabouts of the applicant. She could be summonsed to a disciplinary inquiry to determine whether she was liable to punishment for transferring herself to **Majombozi School** without the required authority or be warned of the steps that the Department intended to take as a result of her failure to sign the **Goqwana School** payroll.

[13] The respondents case is that mode of payment of the applicant's salary was changed " *to coax her into attending at the Qumbu district office, in order to determine her whereabouts and to obtain the reasons why she was no longer rendering educator services at the school at which she was officially employed*". It is further stated on behalf of the respondents that " *The remedy employed by the Department, namely, to alter the*

mode of payment, is the remedy which most easily tends to force educators to attend at the district office where the problem is located, to make inquiries. In this fashion educators whose whereabouts are unknown are in variably flushed out from wherever they are and thereby make their whereabouts known.”

[14] It would appear, that the functionaries of Department of Education have no appreciation of the nature of their authority. It is trite that administrative power, through which public officials function, is not self-generating. It is conferred by law. Public authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some authority for that act. I know of no lawful authority which entitles functionaries of the Department of Education or any other public officials to arbitrarily stop payment of an employee's salary. In my view issuing her salary cheque without ensuring that she actually receives her salary is effectively non-payment of the salary. I was not referred to any such authority during argument. Perhaps it was the realization that no such authority exist that motivated the Department to pay the applicant's outstanding salary in the end. In my view, it was reasonable for the applicant to conclude, having not received her salary without any explanation, that the Department of Education was withholding her salary. I am satisfied that the alteration in the mode of payment of the applicant's salary, without affording the applicant opportunity to make representations and without notifying her thereof, was in this case was unlawful and wrongful.

[15] Although no specific submissions were made in the papers regarding the interdict sought by the applicant I am satisfied that a proper case has been made for that relief in the papers before me. The applicant has established a clear right to payment of her salary. The failure to pay or the changing of the mode of payment constitutes an injury to her right to payment of a salary. I can think of no alternative suitable legal remedy and I am satisfied that the applicant's conduct, of approaching the court was reasonable in the circumstances.

Consequently, the following order shall issue;

- i) The decision of the functionaries of the Department of Education to withhold or change the manner of payment of the applicant's salary with effect from October 2010 is hereby declared to have been wrongful and unlawful;
- ii) The respondents are interdicted and restrained from withholding the applicant's salary without following due process of the law;
- iii) The first and second respondents are directed to pay the cost of this application, such costs to be paid jointly and severally by the; the one paying, the other to be absolved.

N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr. S.M Luzipo instructed by Mlonzi & Company Inc.

East London

For the Respondents: Mr. O.H Crisp instructed by the State Attorneys East

London