

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 57/2015

In the matter between:

MAUDIE JOSEPHINE SCHENTKE

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

First Respondent

THE HEAD, DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

Second Respondent

THE MINISTER OF BASIC EDUCATION

Third Respondent

THE DIRECTOR-GENERAL,

DEPARTMENT OF BASIC EDUCATION

Fourth Respondent

JUDGMENT

STRETCH J:

[1] The applicant is a qualified educator. Prior to the launching of this application, she worked as a grade R teacher at Strelitzia Primary School (“the school”) in Port Elizabeth.

[2] She was not paid a salary in August and September 2014.

[3] Her membership of GEMS (a medical aid facility) was cancelled with effect 31 May 2014.

[4] This is an application in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") calling upon the respondents to furnish the applicant with certain information relevant to her employment and the termination of her GEMS membership.

[5] In terms of her notice of motion, she seeks the following documents:

- a. Those upon which the Eastern Cape Department of Education ("the Department") relied for its decision to repudiate an employment agreement concluded with her from 1 April 2014 to 31 March 2015;
- b. Those which the Department had forwarded to GEMS, resulting in the termination of her medical aid benefits;
- c. Those which the Department had relied upon to justify its authorised representative (Mr Diamond) having sought to procure her resignation as a grade R practitioner;
- d. Those which the Department had relied on to support its contention that the applicant is not an employee of the school;
- e. Those which the Department had relied on to support its contention that the employment agreement which the applicant was relying on between her and the Department was invalid or unenforceable.

[6] It is indeed the Department's case that it is not the applicant's employer. This is its main ground for opposing the application. It has also raised two points *in limine*:

- a. That the applicant has not exhausted her internal remedies in that she has failed to pay the appeal fee prescribed at section 75(3)(a) of PAIA;
- b. That the applicant, having referred her dismissal dispute with the respondents to the Department's bargaining council (the GPSSBC), ought to have utilised the procedures of the bargaining council to obtain the information which she now seeks.

[7] The applicant avers that she is employed by the Department in terms of a standard employment contract between her and the Strelitzia school governing board (“the SGB”) which contract was devised by the Department, and in terms of which the Department partially contributes towards her income.

[8] An example of her monthly salary advice from the Department and her income tax certificate reflect the following:

- a. She was appointed on a specific date with the job title of ‘ECD practitioner – public school’ and has a designated staff number.
- b. Her salary notch is R38 400 per annum, with a gross monthly income of R3 200, and a net salary of R3 158.
- c. Part of her salary deductions are for membership of the GPSSBC.
- d. Her IRP5 particulars reflect a deduction under PAYE (pay as you earn), for income tax purposes, as well as a contribution to the employer’s medical aid (GEMS), and an unemployment fund (UIF) reference number from the Department, as well as various other departmental source codes.

[9] *Ex facie* the document, an example of one of her renewed employment contracts reflects the following:

- a. That she, in her capacity as an employee of the SGB, concluded a contract with the SGB as the employer, and that the parties to the contract are the applicant and the SGB.
- b. That the Department financially supports the SGB to provide grade R classes by subsidising the SGB’s remuneration of the applicant, with the provision of what is referred to as a stipend, which would be reviewed in terms of budgetary constraints.

[10] On 30 September 2014 GEMS wrote a letter to the applicant advising that the applicant’s ‘employment’ with the Department had been terminated with effect 31 May 2014.

[11] According to the Department's legal representative, the Department had initially paid the stipends which I have referred to into school bank accounts to be transferred to the individual practitioners. However, the money was not always paid over, which resulted in the Department registering the payments on its staff salaries system (PERSAL) to be paid directly to the practitioners. An unintended consequence of this step was that the PERSAL system generated a salary advice and automatically deducted a monthly contribution to the GPSSBC.

[12] As for the applicant's membership of GEMS which is recorded and deducted as per her salary advice, it is the Department's contention that the applicant had joined the scheme of her own accord.

[13] The purpose of PAIA according to its preamble is to give effect to an applicant's constitutional right of access to any information held by the State and any information held by another person which information is required for the exercise or protection of any of the applicant's rights.

[14] The applicant has stated that the documents she requires 'are material and reasonably necessary' to enable her to take advice, consider her position and decide what steps to take in the form of further representations or possible legal action. She avers that the furnishing of the documents 'may also serve to avoid further legal action.'

[15] She further states that she and other affected colleagues 'have referred disputes to the relevant Bargaining Council as unfair dismissals' and that these disputes await resolution. 'In the meantime' she says, 'we have sought to invoke the provisions of the Information Act (PAIA) to obtain the important documentation allegedly relied upon by the Department for its decision to repudiate our employment agreements and to set same at naught.'

[16] The applicant referred her dispute to the GPSSBC for conciliation on 15 October 2014. The relief which she seeks is retrospective reinstatement with the Department.

[17] In her founding papers in the matter before me deposed to on 23 January 2015, she states the following:

‘It will take some time however for this dispute to be resolved and in the meantime I desperately seek access to all relevant documents upon which the Department ostensibly relied in making the decisions it did in terminating our employment.’

[18] I do not think that dissatisfaction about delays in finalisation of matters in other forums is an adequate ground to approach this court for this type of relief, unless of course, all other internal remedies relating to discovery (informal or otherwise) have been properly exhausted. Neither does it seem to me that the GPSSBC has been inordinately dilatory in addressing these grievances. In the matter of *C. Delport and The Department of Education* (case no. GPBC2394-2014 involving the applicant’s colleague at the school who had also been subjected to the same treatment as the applicant), a ruling was made as far back as 4 March 2015, declaring that the GPSSBC had jurisdiction to deal with the dismissal dispute, and directing the council to set the matter down for arbitration at its earliest convenience.

[19] However, that is not the end of the matter. Section 7 of PAIA reads as follows:

7 Act not applying to records requested for criminal or civil proceedings after commencement of proceedings

- (1) This Act does not apply to a record of a public body or a private body if –
 - (a) that record is requested for the purpose of criminal or civil proceedings;
 - (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
 - (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

[20] Section 7 clearly envisages the type of situation where, for example, a civil or criminal trial is underway and the parties are constrained to comply with the rules pertaining to discovery, requests for further particulars, applications to compel and the like. Not only would it be an abuse of the processes of court, but it would also result in uncertainty and confusion if parties were allowed to wander off mid-trial to

launch PAIA applications instead of making use of the statutory and common law remedies designed to regulate and expedite trials.

[21] I do not deem it necessary for purposes of this application to make a finding as to whether any anticipated proceedings in the Department's bargaining forum may be defined as civil proceedings. It suffices to say that it is clear from the applicant's papers that on 15 October 2014 she completed a standard GPSSBC form indicating that she wished to declare a dispute with the Department (whose contact person is Mr Diamond) and confirming that the form had been served on the Department. There is no evidence before me to suggest that the proceedings envisaged have in fact commenced.

[22] The deponent to the respondents' affidavit has admitted the fact of the referral, and has made a bald allegation that proceedings have commenced in the bargaining council because of this. It seems to me however, that this statement is not correct. If proceedings have indeed commenced in that forum, it would mean that it is not in dispute that there is an employer – employee relationship between the applicant and the Department, and that the GBSSBC is accordingly vested with jurisdiction (as happened in the *Delport* matter).

[23] The main contention before me (although I deem it somewhat irrelevant to this PAIA application) is that there is no employer – employee relationship between the parties.

[24] In the light of this, I am of the view that proceedings before the GPSSBC have not commenced. Even if I am incorrect in arriving at this conclusion, I am not persuaded that proceedings which are not linked to a court (such as this one or the Labour Court), and have as their main function the bargaining of conciliation, can be defined as legal proceedings within the clear meaning of the expression.

[25] As for the issue of the non-payment of an appeal fee, this point falls to be dismissed as an afterthought riding on the back of a red herring. I have little doubt that had the respondents raised the issue of this negligible fee earlier, the applicant would have paid it instead of resorting to time-consuming and expensive litigation.

Instead, and in response to the applicant's notice of internal appeal dated 26 November 2014, the Department penned the following letter on 7 December 2014:

'We acknowledge your correspondence dated 26/11/2014.

Kindly furnish us with copies of the request for information. We will attend to the matter as soon as we receive these copies.'

[26] Notwithstanding her compliance with this request three days later, the applicant was not favoured with a similar reaction, which ultimately resulted in the launching of this application.

[27] It is in any event so that in the exercise of my discretion and by virtue of the provisions of section 82 of PAIA, I am empowered to grant any order that is just and equitable in the circumstances, and I intend doing so.

Order:

- 1. The respondents are directed to furnish the applicant with the following information:**
 - (a) All information which has any bearing on the discontinuance of the payment of money and the allocation of benefits as reflected in the applicant's document headed "Employee income tax certificate information: year of assessment 2014".**
 - (b) All information forwarded by the Department of Education to the applicant's medical fund (GEMS) which has any bearing on the termination of the applicant's medical benefits.**
 - (c) All information which has any bearing on the Department of Education's authorised representative (Mr Diamond) seeking to procure the applicant's resignation as a grade R practitioner.**
 - (d) All information which supports the Department of Education's contention that the applicant is an employee of Strelitzia Primary School.**
 - (e) All information on which the Department of Education relies for its contention that there is no valid and enforceable employment agreement between it and the applicant.**

2. The respondents are directed to furnish the applicant with the aforesaid information within 20 days of the date of this order.
3. The respondents are directed to pay the applicant's costs jointly and severally, the one / more than one paying the other/others to be absolved.

I.T. STRETCH
JUDGE OF THE HIGH COURT

19 February 2016

Counsel for the applicant:

Mr P.G. Beningfield

Instructed by Hutton & Cook

King William's Town (ref. MR G.C. WEBB/LC)

Counsel for the respondents:

Mr I. Dala

Instructed by the State Attorney

King William's Town (ref. 68/15-P10-MRS YAKO)