

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case no: J3797/98

In the matter between:

First applicant

Second applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF EDUCATION, ARTS,
CULTURE & SPORT**

First respondent

THE MINISTER OF EDUCATION

Second respondent

Third respondent

THE GOVERNING BODY:

Fourth respondent

THE PREMIER

Fifth respondent

JUDGMENT

LANDMAN J:

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1. Adriaan Botha and Elizabetha Venter are employed at the Settlers Agricultural High School (the High School) as administrative manager and matron respectively. When they were employed the School Governing Body (SGB) which was established pursuant to the Education Affairs Act (House of Assembly) 70 of 1988 entered into contracts of employment with them. The contracts of employment are not attached to the papers. Unsigned drafts are, however, attached. It appears that the applicants are employed by the High School, which was a juristic person and the Transvaal Education Department. This was found to be the case by De Villiers AJ in this matter in an undated judgment circa 23 July 1999. This issue is therefore *res judicata* as regards the identity of their employer. I will revert to the question of the parties to the contracts of employment later.
2. It is common cause that the contracts of employment provide that in addition to the remuneration paid by the TED the SGB (in law the High School) would top-up that salary by doubling the salary of Mr Botha and adding R1000 pm to the salary of Ms Venter. The respondents refer to these payments as monthly allowances. The additional remuneration was paid regularly to the applicants.
3. The Schools Act 84 of 1996 repealed the Education Affairs Act (House of Assembly) of 1988. The High School remained a juristic person. The old SGB was succeeded by a SGB established in terms of s 15 of the Schools Act of 1996. The Department of Education, Arts, Culture and Sport, Northern Province Government

(the Department) succeeded the Transvaal Education Department as regards the High School. The new SGB, or more correctly the High School, continued to top up the salaries.

4. The Department formed a view that the payment of the additional remuneration was impermissible. In a letter dated 25 March 1998 the Circuit Manager, Mr JM Mametja, raised the permissibility of the SGB/High School paying the extra remuneration. He made the point that: "...In line with the new Act, South African Schools Act, constituting the School Governing Bodies the powers and functions of the previous Governing Body of the ex-Model C schools cease to exist. By implication, contracts entered into by these bodies are therefore nullified."

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5. On 25 November 1998 the principal of the High School, acting on behalf of the SGB (which had been instructed by the Department that the payment of top-up salaries must cease), informed the applicants that their additional salaries would cease with effect from the end of November 1998. The payments were stopped. But certain arrangements have been put in place pending the outcome of this application for a declaratory order.
6. The applicants aver that the decision to terminate the top-up salaries is unlawful, irregular, illegal and unconstitutional and ultra vires. Alternatively if the Schools Act of 1996 is applicable and permits the termination of these salaries it is averred that the Act is unconstitutional and invalid.
7. The Department and the SGB justify the cessation of the payments on the grounds that:
 - (a) The school funds of the High School were being used to pay the additional salaries. This is in conflict with s 37(6) of the Schools Act of 1996 and the payment of these salaries had to be terminated and were legally terminated.

(b) Section 20(n) of the Public Service Act (Proclamation 103 of 1994) (the PSA) forbids an officer from receiving other emoluments without permission of a relevant executing authority. The applicants do not have permission and may not receive the additional salary.

8. This is not a contractual claim. The applicants do not seek payment of the additional salaries. They seek merely a declarator regarding the lawfulness etc of the *decision* of the SGB on behalf of the High School and the Department to stop paying the additional salaries. They do not seek to review the decision. Notwithstanding this, at the heart of this matter lies the contracts of employment. It is therefore, in my opinion, necessary to examine the contracts and their validity before dealing with the SGB and the Department's stance.
9. Were the contracts incapable of performance when they were concluded? This point has not been taken. The respondents have been content to base their case on the invalidity of the contract

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allegedly attributable to effect of the enactment of the Schools Act of 1996.

11. The powers of a High School to agree on terms and conditions of employment with educators was considered in **Association of Professional Teachers & another v Minister of Education & others** (1995) 16 ILJ 1048 (LC) at 1067 H - 1068A where it was held:

“Although the law provides that the appointment, promoting and discharge of employees, such as teachers, vest in the governing body, strictly speaking, in the juristic person via its

governing body, the state controls the exercise of these powers very tightly. The governing body may only select teachers from a list supplied by the state, promotions are subject to the approval of the state and likewise, no teacher may be discharged without prior approval of the state. The state is empowered to intervene and appoint a teacher if the governing body does not do so. Although the governing body formally appoints a teacher on the subsidized staff or establishment of the school, the governing body is specifically, and this was common cause between the parties, disempowered from negotiating terms and conditions of employment with such a teacher. Even in regard to teachers and other employees whose salaries are not subsidized by the state, there is a limitation on the terms and conditions which may be negotiated with such a person.”

12.I have no doubt that this passage is also applicable to non-educators. If a school could not employ a non-subsidised employee at greater rates than those of the Department of Education then it follows that it could not employ subsidised employees at a greater salary. See s 97 and 100 of the Education Affairs Act (House of Assembly) of 1988. This is what the High School purported to do as regard the applicants whose post were subsidised by the TED. This step would have been permissible had the Head of Department, as defined in the Act, sanctioned it. It is not alleged on the papers that there was express consent to the High School topping up the applicants’ salaries. It is not our law that the TED or its successor is

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estopped from insisting on compliance with the law.

14.However it may be that the TED, being part of the composite employer, impliedly approved the payments. There are no facts which permit this inference to be drawn.

15.If I am wrong and the contracts were valid as regard the additional remuneration, it is necessary to consider the effect of the Schools Act of 1996 on the contracts.

16.Mr JM Mametja's view that the contracts of employment are invalid is entirely without foundation. A School Governing Body is something approximating a board of directors. It does not have an independent existence. It contracts, within its powers, on behalf of its principal the school. The Schools Act of 1996 contains no provision which expressly or implicitly nullify any contract entered into between the High School and its staff. See s 54(4) of the Schools Act. Where a contract is invalidated the Schools Act says so explicitly. See s 52(4).

17.Under the new dispensation a public school (like the High School) may no longer employ educators and non-educators. The most that a public school may do is to make recommendations to the Head of Department. See s 20(1)((i) and (j) of the Schools Act of 1996.

18.It may be that a valid contract with a staff member becomes wholly or partially incapable of performance because of the operation of a provision of the Schools Act. This aspect must be investigated. It involves the question: May the school funds of the High School be used to pay the additional salaries? Is it in conflict with s 37(6) of the Schools Act to pay these salaries so that a valid decision could be taken to terminate the payments?

19.It is common cause that school funds are used to top-up the applicants' salaries. It is clear from s 37(2) that the High School itself should have no funds other than its school fund. Consequently the additional remuneration, if it is to be paid, must be paid out of this fund. Section 37(6) of the Schools Act reads:

“The school fund, all proceeds thereof and any other assets of the public school must be used only for-

- (a) educational purposes, at or in connection with such school;
- (b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;
- (c) the performance of the functions of the governing body; or
- (d) another educational purpose agreed between the governing body and the Head of Department.

20. Section 36(7) of the Schools Act of 1996 sets out the overall purpose for which school funds may be employed. The actual authorisation for the payment for services to fulfil those goals must be sought elsewhere. In this case s 21 is one such section.

21. Section 21 reads:

- (1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:....
 - (d) to pay for services to the school....
- (2) The Head of Department may refuse an application contemplated in sub-section (1) only if the governing body concerned does not have the capacity to perform such function effectively.
- (3) The Head of Department may approve such application

unconditionally or subject to conditions.

- (4) The decision of the Head of Department on such application must be conveyed in writing to the governing body concerned, giving reasons.

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- (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal to the Member of the Executive Council.
- (6) The Member of the Executive Council may, by notice in the Provincial Gazette, determine that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if -
 - (a) he or she is satisfied that the governing bodies concerned have the capacity to perform such functions effectively; and
 - (b) there is a reasonable and equitable basis for doing so.”

22. It seems to me that 21 would permit a School to remunerate an employee of the school for additional work done for the school. This would be consistent with the PSA if the services are in addition to the duties framed in the contract of employment. It may, nevertheless, fall foul of the statutory obligations regarding the right to do other work. But, it would not fall foul of the prohibition on receiving additional remuneration for performing the principal duties.

23. It is common cause that the applicants are officials and that the PSA is applicable to them. The PSA forbids an officer from receiving additional remuneration. See s 20(n) which reads:

“An officer, other than a member of the services or an educator or a member of the Agency or the Service, shall be guilty of misconduct and may be dealt with in accordance with section

21, if he or she-

.....

(n) accepts, without permission of a relevant executing authority (granted on the recommendation of the Commission in the case of an officer in the A division), or demands in respect of the carrying out or failure to carry out his or her duties any commission, fee or other reward (not being the emoluments payable to him or her in respect of his or her duties), or fails to report to his or her department or, if he or

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she is a head of department, to such authority, the offer of such a commission, fee or reward.”

24. Section 20 of the PSA must be read with s 30 of the same Act which deal with remuneration for other work. It is permissible to be paid for a variety of other work provided that “it is otherwise provided for in his or her conditions of employment”. The conditions of employment must, I believe, refer to the conditions of employment agreed upon or fixed by the state as employer. In this instance there are no facts which show that the applicants conditions of employment with the Department, as opposed to the High School, provide for additional remuneration.

25. In my opinion, on the facts as they appear on the papers, the decision to terminate the additional remuneration is one which was dictated by the law. The only consideration was the state of the law. Questions of fairness do not enter the picture. No discretion is exercisable. Advance warning of the intention to terminate the payments was given. The applicants were invited to address representations to the authorities.

26. However it remains to decide whether the Schools Act of 1996 which forbids the payments of additional salaries out of school funds is unconstitutional and invalid. Various submissions were

made regarding the merits of paying the additional remuneration and some comparisons were drawn with the position of Educators and the transitional provisions which were enacted to deal with their employment situation when the Education Affairs Act (House of Assembly) of 1988 was repealed. However, no submissions were made as to which rights in the Constitution of the Republic of South Africa of 1996 are infringed the by the Schools Act of 1996. In the result the complaint of constitutional invalidity cannot be sustained.

27.The decision to terminate the top-up salaries was not unlawful, irregular, illegal, unconstitutional or ultra vires.

28.I may add, in conclusion, that in the absence of a copy of the contracts of employment I am unable to find and, indeed not called

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upon to find, whether the part of the contracts dealing with additional remuneration have become impossible of performance. It may be that if sued the High School would plead that thy cannot use these funds. Probably the High School does not have other funds. It would appear that it ought not to have other funds but whether or not it has such funds is something which I cannot decide.

30.In the result the application is dismissed with costs including the reserved costs.

SIGNED AND DATED AT BRAAMFONTEIN THIS 22nd DAY OF APRIL 2002.

AA Landman

Judge of the Labour Court of South Africa

licants: Ms R Anderson of Anderson & Kloppers Attorneys.

pondents: Adv TP Kruger instructed by the State Attorney.

18 March 2002.

gment 23 April 2002.