Sneller Verbatim/

IN THE LABOUR COURT OF SOUTH AFRICA

Not reportable

CASE NO: J5675/00

DATE OF HEARING 2002-06-10

In the matter between:

Applicant

and

M E C FOR DEPARTMENT OF EDUCATION Respondent

J U D G M E N T

PILLAY, J:

[1] This matter has been referred for oral evidence on a limited issue. I am required to determine whether or not the applicant deserted his post in 1994. The facts were as follows:

[2] The applicant was employed by the third respondent as an educator. On 27 January 1994 he applied for study leave for the period 1 February 1994 to 31 December 1994 by writing a letter to the rector, the fourth respondent. By a letter of the same date the fourth respondent informed the applicant that his study leave could not be granted as application therefor should have been made the previous year to enable the college to make alternative arrangements. Secondly, the applicant was the only art lecturer at the college. The applicant persisted with a further letter on 28 January 1994, stating that in 1990 special arrangements were made for him within a short time. He referred the fourth respondent to a person who might be employed as his substitute.

[3] By a letter dated 31 January 1994 the fourth respondent reiterated that application for study leave should be made timeously. Furthermore he pointed out that he had wanted to discuss the matter with the applicant that day, but was unable to do so on discovering that the applicant was not at work. The application for study leave was refused and the applicant advised to resign if he wish to proceed with his studies so that he could be replaced.

[4] The applicant then called on Mr Kganakga who was then employed as a director of treasury institutions at the head office of the third respondent. The applicant testified that Mr Kganakga allowed him to continue with his studies and undertook to follow up the matter with the fourth respondent. The applicant requested Mr Kganakga to confirm this discussion in writing which the latter did by an undated letter (document A8) which the applicant alleges he only received in May 1994. The letter was posted to his home and he was not there to receive it until May 1994.

[5] Mr Kganakga denies that he ever gave the applicant permission to proceed with his studies without the latter making an application for leave. He also had no authority to grant leave as that was the prerogative of the Director-General.

[6] The fourth respondent and Mr Kganakga denied that they met each other at the college to discuss the applicant's case. Although Mr Kganakga records in his letter dated 3 September 1994, (document A6+7) that he visited the college and that the fourth respondent had said that nobody knew where the applicant was, he had no independent recollection of these facts or events.

[7] The applicant's reliance on A8 as proof that his study leave had been authorised is quite misplaced. In that letter Mr Kganakga advised the applicant as follows:

"It has been noted that your application in connection with the above matter was done at short notice. You are once more reminded that application for study leave should be done at least three months in advance to allow the rector to make the necessary arrangements. The department, however, has studied your situation and advises you as follows:

(1) You are allowed to carry on with your studies, so please complete the necessary leave forms, going through the correct channels, etcetera.

(2) Write a letter to the rector of your college and explain your position very clearly.

(3) It is in your own interest to maintain good working relationship with your rector."

[8] The advice to the applicant in that letter is quite unequivocal. It is consistent with Mr Kganakga's evidence about the content of his discussion with the applicant. The applicant could not have been under any reasonable misapprehension about what he was required to do to regularise his study leave. The applicant deliberately misinterprets A8 as the plain meaning of the text does not suit his cause.

[9] The applicant had applied successfully for leave in 1990. He was

aware of the procedures, in particular, that a prescribed leave form had to be completed. Mr Kganakga also confirmed this under cross-examination. The applicant's case was not that he did not know that he had to complete leave forms. He testified that he did submit the leave forms with his first letter of application dated 27 January 1994. This is disputed by the third and fourth respondents.

[10] An admission was made by the respondents and recorded in the following terms in the pretrial minute:

"22. Does the respondent contend that the second respondent was wrong in his arbitration award by saying that in June 1994, the applicant submitted the forms again to the rector? Answer - no."

Mr Mokhari for the applicant explained the admission in his opening address. Mr Tokota did not object to Mr Mokharis explanation at the time. The applicant in closing argument, relied on the admission.

[11] Mr Tokota in his opening address submitted thus:

"That it was common cause that the applicant did submit forms to the rector before 1994."

He explained that it was always the applicant's case as pleaded and presented at the trial that the applicant had made no application for leave prior to the operation of the deeming provisions in section 11(2)

(a) of the Lebowa Education Act, 1974 Act No. 6 of 1974 taking effect. In making the admission above the respondents' representatives had overlooked the word "again", their focus being on the June date. His failure to correct Mr Mokhari during the opening address was also an oversight, so he submitted.

[12] The respondent's representatives are censured for their inattention to their client's case. However, this was a *bona fide* error and omission on their part. I say so, because the respondents' entire case always rested on the failure to make the application for leave before the deeming provisions came into operation. The subtlety of the question which was admitted was obviously lost on the respondents' representatives and Mr Kganakga. Evidence led in cross-examination about the application was extensive and undertaken without objection from Mr Mokhari. There would have been no need for such evidence and cross-examination if he had in fact admitted that the applicant had made an application for leave in January 1994.

[13] The respondents' version that the applicant submitted no leave forms in January 1994 strikes me as being more probable. The fourth respondent and Mr Kganakga had testified clearly and consistently. Their evidence is corroborated by the documentation. They also do not

have a personal interest in whether the application for leave had been granted or not. There is no evidence that any of the respondents' representatives were motivated by an ulterior or malicious purpose. As such, they are, relative to the applicant, independent witnesses. Hence I find them to be more credible than the applicant.

[14] The applicant bears the onus of proving that he applied for leave as alleged in January 1994. No copy of such an application is available. I find that the applicant has failed to discharge the onus.

[15] Even if such application had been made, the applicant's leave had not been authorised. An application for leave was a process which required firstly, a recommendation by the fourth respondent to the Director-General who has the authority to approve or disapprove the leave. At paragraph 5 of document A6-7, a letter dated 3 September 1994 from Mr Kganakga to the Director-General, the latter approved the recommendation of Mr Kganakga which was in the following terms.

"Recommendation:

5.1 Maidi should be allowed to continue with his studies.

5.2 The rector should be allowed to fill the post with a seconded person.

5.3 Maidi should be advised to write a letter to the rector to explain his position."

Mr Kganakga testified that his intention in making the recommendation was to prevent the applicant from being visited with any punitive action consequent upon his pursuing his studies. This is reinforced by paragraph 4 on A6 where Mr Kganakga writes:

"Before any punitive steps came to be taken the following should be put right -

4.1 Break of communication between the rector and Maidi should be put right.

4.2 The confusion should be cleared."

The recommendation that was approved was not the applicant's leave; it was approval for him to continue his studies. Furthermore, the subject matter of the letter is "desertion of post Maidi, PC reference 271147."

[15] As this recommendation was approved by, amongst others, the Director-General, it confirms that when this letter was written, that is on 3 September 1994, the applicant's desertion was acknowledged as a fact by the Director-General. The applicant's reliance on the Director-General's approval of the recommendation in this letter (A6-7), as approval of his leave is therefore misplaced.

[16] The applicant alleges that the fourth respondent had no authority to refuse his application for leave, that being the prerogative of the

Director-General. Whether the fourth respondent had authority to refuse leave or not, is a secondary issue. The preliminary question is whether there was a valid application in the first place. I have found that there was no such application. The applicant also relied on A8 being the undated letter which she received in May 1994 as the event that triggered the application for leave which was made on 23 June 1994. There is no evidence that the applicant on receiving such a letter protested about having to complete the leave forms again, as one would reasonably expect him to do if he had previously completed such forms. This too fortifies my conclusion that the applicant did not make an application for leave prior to termination of his services.

[17] It was further submitted that the fourth respondent defied the Director-General's directive to approve the leave by refusing to attend at the offices of the Director General to sign the applicant's leave form.

[18] The fourth respondent testified that he received a request from one Miss Maja who was firstly, not known to him. Secondly, he found the request to be unprocedural, as that was not the way in which leave applications were signed by the fourth respondent. As a result he refused to comply with Miss Maja's request. As it transpires the

respondents denied that the fourth respondent was required to sign the leave forms as described. Furthermore, his letter to the Director-General in which he pointed out that it was inappropriate for Miss Maja to have given the applicant leave forms and then summon him to sign them, is dated 14 June 1994 (document C25-26). At that stage the applicant had not even made the application for leave which was only done on 23 June 1994.

[19] It was also submitted that the fourth respondent terminated the applicant's services by a letter dated 2 February 1994 (document C32-33) i.e before the 14 days referred to in section 11(2)(a) of the Lebowa Education Act had expired. That letter is not a letter terminating his services. It was addressed to the Director-General. If it was addressed to the applicant personally, the submission may have had merit.

[20] The applicant relies on an agreement for financial assistance as proof that his services were not terminated (document A30-32). Paragraph 5 of the agreement states:

"I accept that the receipt of formal financial assistance does not entitle me to a post in the service of the department."

It is self evident from this text that the applicant was aware that he was not entitled to a post in the department. On completion of his studies therefore, the applicant could not claim such a right.

[21] The respondent's case was that the applicant's services were terminated by operation of law. Section 11(2)(a) of the Lebowa Education Act, it was submitted, automatically came into operation as there was no authorisation for the applicant's absence which exceeded 14 days.

[22] The applicant submits that the section does not apply as the respondents granted permission for his absence alternatively condoned it after he went on leave. Section 11(2)(a) of the Lebowa Education Act provides:

> "Any teacher who without the permission of the secretary is absent from duty for a period exceeding 14 days shall be deemed to have been discharged on a count of misconduct with effect from the day immediately succeeding the last day on which he was on duty."

The authorities are consistent about deeming provisions similar to section 11(2)(a) of the Lebowa Education Act in other statutes. (*Yanta and Others vs Minister of Education and Culture KwaZulu v/s Natal and Another*, 1992 (3) SA 54 (n), *Minister van Onderwys en Kultuur en*

Andere vs Louw, 1995 (4) SA 383 (a) and *Nkopo vs Public Health and Welfare Bargaining Council and Others*, 2002, 23 ILJ 520 LC). Mr Mokhari's reliance on the decision in *South African Broadcasting co-operation vs CCMA and Others*, 2001, 22 ILJ 487 LAC is inappropriate as that case did not deal with a similar statutory deeming provision.

[23] Based on my analysis above I find that the applicant's absence from employment was not approved by the Director-General. It was common cause that he was absent for more than 14 days. Consequently, the applicant's services were terminated by operation of law in terms of section 11(2)(a) of the Lebowa Education Act. In view of this finding, it is not necessary to deal with the remaining issues referred for oral evidence.

[24] Before I proceed to make the order, may I enquire from the parties what the position is with the rest of the application in view of my conclusion? It seems to me to follow that the application for the review must also be dismissed, and on the basis of the submissions I heard yesterday, the costs must follow the result. Is that the position?

MR MOLOKOME: ...(Inaudible).

MS SHONBE: ...(Inaudible).

PILLAY, J: Yes, is that so? For the record, you are Molokome for the applicant and Shonbe instructed by the state attorney for the respondent.

It follows then from this finding that the application for review should also be dismissed. I grant an order in the following terms:

The application for review is dismissed, the applicant to pay the costs.

PILLAY D, J

30 May 2003.

ES
NT : ADV MOKHARI
: MANKOE&MAGABANE ATTORNEYS PIETERSBURG

DENT: ADV B R TOKOTA
: STATE ATTORNEY
PRETORIA