

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

Not reportable

Case No: D546.11

In the matter between:

NICHOLOUS BONOKWAKHE DLAMINI

Applicant

and

MEMBER OF EXECUTIVE COUNCIL FOR  
EDUCATION, PROVINCE OF KWAZULU-NATAL

First Respondent

THE MANAGER, EXAMINATIONS AND ASSESSMENTS  
DIRECTORATE, DEPARTMENT OF EDUCATION,  
PROVINCE OF KWAZULU-NATAL

Second Respondent

Date of Hearing: 29 June 2011

Date of Judgment: 30 June 2011

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JUDGMENT

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PATHER A.J

*Introduction*

[1] This matter is brought as an urgent application in terms of which the applicant seeks an order to be appointed as a chief marker for the Introduction to Criminology matriculation examination during the 2011 marking session.

*Brief background facts*

[2] The applicant, who is currently awaiting the outcome of disciplinary proceedings brought against him in his capacity as educator, was advised on 26 May 2011 of the termination of his services as a chief marker for the Introduction to Criminology, the reason being his suspension as educator.

[3] As a chief marker, the applicant was paid between R20 000,00 and R45 000, 00 per marking session, depending on the number of examination scripts and subjects for which he would be responsible.

[4] While on suspension as an educator, the applicant receives his full salary.

[5] Despite subsequent representations to the second respondent, on 3 June 2011, the applicant was informed that the termination of his services as a chief marker would stand.

[6] The marking session for the June 2011 examination will commence on 1 July 2011.

*Evaluation*

[7] Mr Nhlangulela for the applicant argued among other aspects, that as the next marking session is due to commence on 1 July 2011, the application for urgent relief was necessary. In opposing the application, Ms Seedat on behalf of the respondents, argued that the application failed to comply with the rules of the Labour Court, more particularly rule 8 (2) (a) and (b). There was no explanation for the non-

compliance with the rules as provided in rule 8 (2) (b) despite the applicant being aware as at 3 June 2011, that his services as chief marker had been terminated.

[8] Referring to among others, the case of *Jonker v Wireless Payment Services CC*<sup>1</sup> where Molahlehi J remarked as follows:

“It is trite that before an urgent application can be granted, the applicant must satisfy the following requirements; a clear right (or a prima facie right in the case of interim relief); a well-grounded apprehension of irreparable harm if the relief is not granted on an urgent basis, that the balance of convenience favours the granting of the relief on an urgent basis; and that the applicant has no other alternative relief.”

Ms Seedat argued that:

- The applicant had failed to establish a clear right; he seeks a final interdict. The applicant is on a data base and a process is and was being followed;
- It could only be inferred that the applicant’s submission regarding his apprehension of irreparable harm relates to financial hardship, as paragraph 27 of the founding affidavit does not give any basis for such an apprehension, whereas paragraph 12 of the founding affidavit refers to the salary he earned as a chief marker. In this regard, she argued that it is trite that financial hardship is not regarded as a ground for urgency; that in any event, the income earned from being a chief

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<sup>1</sup> (2010) 31 ILJ 381 (LC) at para 12. ,

marker was an added benefit over and above his monthly salary earned as an educator; and

- The applicant indeed has an alternate remedy in that he submits in paragraph 25 of the founding affidavit that the respondents' conduct amounts to an unfair labour practice; the Education Labour Relations Council is therefore the forum to which this dispute must be referred.

[9] In response, Mr Nhlangulela argued that the applicant was not responsible for the delay; that he had to address a letter on 27 May 2011 to the second respondent seeking a response to his representations; that as at that date, there had been no official communication, and that the applicant had followed all internal procedures.

[10] In my view, the applicant has failed to satisfy the requirements for urgent relief. On his own version, he was aware of the finality of the respondents' decision on 3 June 2011, but only signed the papers some three weeks later. I agree with Ms Seedat's submission: given the intervening period, there is no explanation for the non-compliance with rule 8 (2) (a) & (b), let alone a satisfactory one. Apart from his statement contained in paragraph 28 of the founding affidavit, the applicant has failed to explain why the application was not brought on proper notice and in compliance with the rules. In any event, the termination of the applicant's services as chief marker is linked to the continuing disciplinary proceedings; it is common cause that this process is being finalised. The applicant accordingly has the right to refer the dispute relating to an alleged unfair labour practice to the Education Labour Relations Council. In the circumstances that:

- 10.1 the applicant has not complied with rule 8 (2) (a) and (b);

10.2 there being no basis for an apprehension of irreparable harm; and

10.3 disputes relating to unfair labour practices must be referred to the Education Labour Relations Council,

I am not satisfied that the applicant has established a clear right to urgent relief. However, in view of the continuing relationship between the parties, and the fact that further processes are envisaged, it would not be in the interests of justice to award costs against the applicant.

[11] In the premises, the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

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Patheer, A.J.

#### Appearances

For the Applicant	:	Mr.M.A.Nhlangulela
Instructed by	:	Buthelezi Attorneys
For the Respondent	:	Ms F Seedat
Instructed by	:	State Attorney