



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D1446/18

In the matter between:

CYRIL SIMANGALISO KHANYILE

Applicant

and

HEAD OF THE DEPARTMENT OF EDUCATION:

KWAZULU-NATAL

First Respondent

MEC FOR EDUCATION: KWAZULU-NATAL

Second Respondent

Heard: 01 August 2019

Delivered: 27 August 2019

Summary: Review of refusal to reinstate ito section 14 of the Educators Act 76 of 1998.

JUDGMENT

GUSH, J

[1] In this matter, the applicant seeks an order reviewing and setting aside the respondents refusal to reinstate him in terms of section 14 of the Employment

of Educators Act¹ (the Act). Briefly, the facts are that in January 2014, the applicant who was at the time, employed by the respondents as an educator, consulted a psychologist as a result of his depression arising from an incident at the school at which he was teaching which had led to him being found guilty of misconduct.

- [2] The applicant was initially found guilty of misconduct and his services were terminated. He launched an appeal before the appeal tribunal which was dismissed on the merits but his appeal regarding sanction of dismissal was reversed and replaced with a sanction of three months suspension without pay. The applicant avers that he was falsely accused of the misconduct which led to his dismissal and that his accusers recanted in 2016 and 2017.
- [3] In his founding affidavit, the applicant avers that after he was found guilty, he was *“transferred from one school to another as a result of either parents, governing bodies or fellow educators not being at ease having [him] teach at the schools I was allocated to”*.
- [4] It is common cause that on 25 May 2017, the applicant was seconded to the Mount Pleasant primary school. The applicant records that he *“reported to the school and met with the principal who gave [him] an orientation and handed him the textbooks he would need for his classes”*
- [5] The applicant, however, did not report for duty on 26 May 2017. It is so that the applicant had been booked off work until 5 June 2017. The applicant makes no averment in his pleadings that he had complied with the Department of Education’s requirements by submitting an application for “sick” leave. On 5 June 2017, the applicant was again booked off work, this time until 16 June 2017. Again, the Applicant does not aver that he had submitted an application for “sick” leave.
- [6] It is accordingly apparent from the pleadings that despite being in possession of the medical certificates, the applicant did not complete the required and

¹ Act 76 of 1998.

necessary leave forms or submit the medical certificates to the respondents. In other words, the applicant had simply not applied for “sick leave”.

- [7] In the applicant’s founding affidavit he avers that on 15 September 2017, prior to his deemed dismissal, he wrote to the respondents requesting that he be placed in an alternative job. This letter² makes no mention of the fact that he had previously been booked off work by his Doctor nor does it allege that he is incapable of working. At best for the applicant, he simply avers that the reasons set out in the letter makes it “*difficult to continue with teaching the schoolkids*”. Nothing in this letter suggests to the respondent that the applicant is not performing his duties or that he is incapable of performing those duties.
- [8] Unsurprisingly, given the applicant’s protracted absence from work without apparent reason, the respondents, on 19 October 2017, addressed a letter to the applicant advising him that as a result of his continued absence and failure to submit valid leave applications, he was deemed to have been discharged in terms of section 14 (1)(a) of the Act.
- [9] The letter advised the applicant that the respondents “may on good cause shown” approve his reinstatement. This application for reinstatement was to comply with section 14(2) of the Act.
- [10] The section dealing with reinstatement requires, as a precondition to considering an application for reinstatement that the applicant “report for duty”. It is common cause that the applicant did not report for duty prior to submitting his application for reinstatement and still has not reported for duty.
- [11] In addition, the respondents in the notice of the deemed termination, specifically advised the applicant that his application for reinstatement should include:

‘Substantiating reason/s which showed good cause for the reinstatement together with the necessary supporting documentation, and

² At page 77 annexure I.

Reason/s for the failure to submit the application for leave, which led to discharge from service, together with any supporting documentation’.

- [12] For unexplained reasons, the applicant did not comply with either.
- [13] In his bundle of documents, the applicant included what he referred to as his “Application for reinstatement and annexures thereto”.³
- [14] This bundle of documents contains *inter alia*:
- ‘a. An Application for reinstatement. This letter even on a liberal interpretation does not contain: “substantiating reason/s which showed good cause for the reinstatement together with the necessary supporting documentation”; nor “reasons for the failure to submit the application for leave, which led to discharge from service, together with any supporting documentation.” The last medical certificate attached to his application is dated 5 June 2017. This certificate certifies the applicant unfit for duty “until 16/6/2017”. It should be born in mind that the applicant was deemed dismissed on 19 October 2017.
 - b. A report by his psychiatrist dated 23 October 2017.⁴ This report does not declare or certify that the applicant is unfit for duty. It merely records a recommendation that the applicant be placed on administrative duties’.
- [15] Conspicuous by its absence is any completed leave form or medical certificate expressly recording that the applicant is unfit to report for duty. Given the provisions of section 14 of the Act, I am satisfied that in circumstances where the applicant is not able to report for duty, it would suffice in its place, to apply for leave on account of his illness and submit a medical certificate declaring him unfit to report for duty.
- [16] From the papers, it is clear that the applicant, by his own admission, did not as is required by the terms of employment, submit the necessary leave forms regarding his incapacity. His failure to do so remains entirely unexplained in his application for reinstatement.

³ Index to record of proceedings at pages 6-16.

⁴ Index to record of proceedings pages 11 – 14.

- [17] In his application for reinstatement, the applicant filed what can only be described as a barely legible handwritten note by Dr. P. Kassen. This note does not constitute a medical certificate and does no more than recommend that the applicant perform administrative duties.
- [18] It must be borne in mind that the respondents employed the applicant as an educator. It is apparent from the applicant's affidavit that for the period from 2014 to his dismissal in October 2017, he did not perform his duties as an educator. The last valid medical certificate that the applicant submitted to his employer expired on 16 June 2017. This certificate was also issued by Dr. Kassen who records having seen the applicant on 25 April 2017 and 22 May 2017. On the latter occasion, Dr Kassen issued the applicant with a medical certificate declaring him "*unfit for duty until 05:06:2017*".
- [19] From the applicant's own papers, this was the last time that he provided his employer with a medical certificate. As a result, the respondent did not unreasonably deem the applicant dismissed on 19 October 2017. As is recorded above, this letter spelt out in some detail what the applicant was to do should he wish to apply for reinstatement. The applicant did not comply with the provisions of section 14(2) of the Act. Specifically, the applicant did not report for duty; or provide a medical certificate; or explain why he had not applied for "sick" leave; and did not show good cause why he should be reinstated.
- [20] Unsurprisingly in the circumstances, the respondents refused his application for reinstatement.
- [21] The applicant has not shown good cause for his reinstatement. He is, on his own version, not fit for duty or to perform the tasks he was employed to perform. In addition, the applicant has simply not in any way even attempted to explain his failure to submit the applications for leave.
- [22] As already mentioned above, in this Court, the applicant seeks to review and set aside the respondents' refusal to reinstate him. The applicant however has failed to demonstrate that his application for reinstatement complied with the requirements of the Act or the letter deeming him dismissed. Taking into

account the information and documents placed before the respondents by the applicant in applying for reinstatement, it cannot be said that the decision of the respondents to refuse the applicant's reinstatement is reviewable.

[23] Given the circumstances of this matter, I am disinclined to make an order regarding costs.

[24] In the result, I make the following order:

Order

1. The applicant's application is dismissed;
2. There is no order as to costs.

D H Gush

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate T Seery

Instructed by: Nompumelelo Hadebe Inc.

For the Respondents: Advocate Goldstone

Instructed by:

The State Attorney.

LABOUR COURT