



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2040/16

In the matter between:

KGOAHLA LS

Applicant

and

MEC; EDUCATION AND SPORTS

DEVELOPMENT NORTH WEST

First Respondent

DEPARTMENT OF EDUCATION AND

SPORT DEVELOPMENT: NORTH WEST

Second Respondent

Heard: In Chambers

Date of judgment: 6 December 2017

JUDGMENT

VAN NIEKERK J

- [1] On 1 August 2017, this matter was enrolled for hearing on the unopposed motion roll. The applicant seeks an order in terms of s 158 (1) (h), reviewing and setting aside his transfer from one school to another. The application was filed late. The applicant's attorneys had withdrawn before the hearing, and he was represented by a union official. The official sought an opportunity to explain further the delay in filing the application, and the applicant was accordingly granted an opportunity to file a supplementary affidavit. That affidavit has been filed, and this is the court's ruling in the application for condonation.
- [2] It is not disputed that on 17 April 2015, the applicant (who was then the principal of the MM Sebitloane Special School) received notice of a transfer to the Walter Lestsi High School. He disputed the lawfulness of the transfer. On 1 March 2016, the applicant was placed at the Baisitse Primary School, after the retirement of that school's principal. On 2 March 2016 the applicant disputed the lawfulness of that transfer. The dispute culminated in the filing of this application, in which the applicant seeks to have the transfer reversed and to return to the post of principal of the MM Sebitloane Special School, without loss of benefits.
- [3] The application was filed on 20 October 2016, some 6 months and three weeks after receipt of the letter of transfer. The applicant concedes that the application was filed late, but it is not clear on how late it was filed, probably because the LRA does not prescribe any particular period within which an application in terms of s 158 (1) (h) must be filed. The explanation in the condonation application is predicated on an assumption that the application to have been filed within three months. The explanation for the delay, especially that incorporated into the supplementary affidavit, concerns the handling of the matter by the applicant's previous attorneys

and attempts by the applicant's union to obtain the file from the attorneys. The application was ultimately filed in October 2016 by the attorneys, with the assistance of the union. There is no explanation however the fact that founding affidavit to the application was signed and commissioned on 30 August 2016 more than six weeks before the application was filed. In most circumstances, it is clear that both the applicant's attorneys were aware that the application was already late, but there is no explanation from them as to this period the delay.

- [4] However, even if I were to accept that the filing of the application was pursued with due diligence after the union's involvement, I'm not satisfied that the applicant has any prospects of success in the main application. The founding affidavit, as I have indicated, suggest that the application is brought in terms of s 158 (1) (h). That section permits an applicant to review any decision taken with any act performed by the state in its capacity as employer, on such grounds as permissible. It is incumbent on an applicant to articulate precisely the grounds on which the review is sought. Specifically, the applicant would at least indicate whether he or she relies on the Promotion of Administrative Justice Act, what is come to be called a 'legality review' or a review at common law. The closest that the applicant comes to articulating any proper ground for review is the assertion that in effecting the applicant transfer, the respondents acted in breach of s 14 of the Public Service Act. While it is correct that s 14 regulates transfers within the public service, s2 of the Act provides that where educators are not excluded from the provisions of the act, those provisions apply only in so far as they are not contrary to the laws governing the employment. In effect, the applicants terms and conditions of employment or regulated by the Employment of Educators Act, 76 of 98. Section 8 of that Act regulates the transfer of educators and affords the

director-general of the head of Department rights to transfer educators to other posts. These rights are subject to recommendations by the governing body of the school concerned. It would appear therefore, on the face of it, that there is a separate regulatory regime that applies to the transfer of educators and that it is not sufficient simply to allege that the respondents acted in breach of s 14 of the Public Service Act.

- [5] In short, given that the founding affidavit fails to disclose a properly formulated ground for review, the applicant's prospects of success in the review application are minimal if they exist at all.
- [6] In the light of an incomplete explanation for the delay that is not insubstantial, and the absence of any significant prospects of success, in my view, the application for condonation stands to be dismissed.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk

Judge