



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR 56/21

In the matter between:

LAVERN SYSAAR

Applicant

And

MINISTER OF EDUCATION

First Respondent

HEAD OF DEPARTMENT

Second Respondent

DISTRICT DIRECTOR OF EDUCATION

Third Respondent

FERNWOOD PARK SCHOOL GOVERNING BODY

Fourth Respondent

M. JURIES

Fifth Respondent

Heard: 8 September 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First and Third Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h00 on 5 April 2023.

JUDGMENT

LALLIE, J

[1] The applicant filed this application seeking an order reviewing and setting aside the decision the third respondent took on 11 June 2018 on behalf of the second respondent transferring the fifth respondent to the fourth respondent. The applicant also seeks to have the recommendation of the fourth respondent declaring her a preferred candidate for the post of Deputy Principal at Fernwood Park Primary School to be made an order of court. The application is opposed by the first and third respondent. A substantial period lapsed between the date on which the impugned decision was taken and the filing of this application. In order to ensure that the application is properly before court the applicant filed an application for condonation of its late filing. The first and third respondents' opposition is not vehement. The main reason for the delay is that the applicant followed an incorrect procedure in seeking the current relief. The applicant made her intentions of challenging the impugned decision shortly after it had been taken. She submitted that she has good prospects of success. Amongst the factors that weighed in the applicant's favour is the need to determine her allegation of the illegality of the impugned decision. I am, in the circumstances satisfied that the applicant has shown good cause to have the late filing of the review application condoned.

[2] The first and third respondent who will be referred to as the respondents in this judgment delayed in filing their answering affidavit. The applicant, purporting to act in terms of clause 11.4.2 of the Practice Manual of the Labour Court (the

Practice Manual) objected to the late filing. The effect of the objection is that when it is raised the respondents are compelled to file an application for condonation of the late filing of the answering affidavit. The applicant was required to have raised the objection within 10 days of receipt of the answering affidavit. The answering affidavit was served on the applicant's attorneys on 13 June 2022 and they delivered the notice of objection on 6 July 2022. In the circumstances I accept the respondent's averments that the notice of objection was delivered late. The respondents were therefore under no obligation to file a condonation application and their answering affidavit is properly before court.

[3] This dispute can be traced from 2018. On 30 March 2018 the Department of Education advertised the vacant position of Deputy Principal of Fernwood Park Primary School. The closing date for receipt of applications was 30 April 2018. The applicant was employed at the same school as a temporary teacher on a three months' fixed term contract which expired on 31 March 2018. She applied for the position. Her application was unsuccessful. Upon making enquiries about her application the applicant was informed that the fifth respondent had been appointed to it.

[4] The decision the applicant seeks this court to review and set aside is contained in the following letter addressed to the fifth respondent by the third respondent on 11 June 2018.

"TRANSFER DUE TO OPERATIONAL REQUIREMENTS: YOURSELF

To date you have not been successfully transferred to a substantive vacant post as your school and/or any other school. As allowed by section 8(5) of the Employment of Educators Act, which allows for the temporary transfer of an additional educator without the recommendation of the school governing body, you will be transferred to Fernwood Park Primary School for the period of 17 July 2018 till 31 December 2018. Please ensure that you report for duty at Fernwood Park Primary School on 17 July 2018. Your permanent transfer in accordance with Collective Agreement 4 of 2016 will be processed as prescribed.

Your valuable contribution at the said institution for the said period is appreciated”.

- [5] The applicant submitted that the decision communicated in the letter of 11 June 2018 stands to be dismissed and set aside because it is premised on an error of law. The principal of Fernwood Park Primary School addressed a letter to the third respondent informing him that the fourth respondent had already completed the shortlisting and interview process for the vacant Deputy Principal post. He added that the fourth respondent had submitted the recommendation documents to the Department of Education, Nelson Mandela Bay District on 15 June 2018. He further rejected the fifth respondent's placement on the basis that the fourth respondent had submitted the recommendation documents for the applicant who was the best suited candidate. The fourth respondent's recommendation was sent to the fourth respondent on 2 August 2018.
- [6] The applicant submitted that the third respondent committed a gross irregularity in assuming the power of the second respondent. She further submitted that the decision is in breach of section 6(3)(a) of the Employment of Educators Act 76 of 1998 (EEA) in that it was taken without the recommendation of the fourth respondent. She further submitted that in terms of the same legislation the power to appoint educators vests on the second and not the third respondent.
- [7] The respondents denied having acted in breach of section 6 of the EEA. They submitted that the fifth respondent was temporarily placed in the impugned position in terms of collective agreement 4 of 2016 dated 23 August 2016 hereinafter referred to as the collective agreement, read with the EEA which regulates employees in excess in various schools. They submitted that in 2017 the fifth respondent who was at the time a Deputy Principal at Happydale Special School was in excess of the educator post establishment. It was the respondents' case therefore that it was in terms of section 8(5) of the EEA and section B 6.5.6 of the Collective Agreement that the fifth respondent's temporary placement was properly made. The respondents submitted that the

authority to place the fifth respondent was delegated by the second respondent to the third in circular 23 of 2017.

[8] The applicant did not file a replying affidavit in the review application. The averments made by the respondents in the answering affidavit were, as a result, left unchallenged. The attempt to cure the effects of the omission by incorporating the averments that should have been made in the replying affidavit in the applicant's heads of argument cannot succeed because it is not permissible. The respondents' version has to be preferred. I must therefore accept that the applicant did not establish valid grounds to have the impugned decision reviewed and set aside. She further did not provide cogent reasons for the fourth respondent's decision to be made an order of court. Her application cannot succeed.

[9] The respondents provided no reason in fairness for a costs order to be granted against the applicant.

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

Order:

1. The late filing of the application for review is condoned.
2. The application for review is dismissed.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

Adv. Blundin

Instructed by

Simpiwe Jacobs & Associates Inc.

For the First and Third Respondent:

Adv. Ah Shene

Instructed by

State Attorney, Gqeberha

LABOUR COURT