REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2012/25786

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

24/8/2012
DATE

SIGNATURE

In the matter between:

IMMACULATA SECONDARY SCHOOL Applicant

and

K P BVUMA First Respondent

BORNWELL MABHINY Second Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This is an application brought on urgent basis. The urgency of the matter was rightly conceded during argument.

[2] The applicant seeks an order interdicting the respondents from breaching their contracts of employment concluded with the applicant in tendering their resignations as employees of the applicant. On the morning of 16 July 2012, I granted an order in terms of prayers 2, 3 and 4 of the notice of motion and indicated that the reasons for my decision would follow. These are the reasons.

THE COMMON CAUSE FACTS

[3] The following facts are common cause or not seriously challenged: The applicant is a public high school, operating under the Catholic Archdiocese, Johannesburg. The applicant accommodates Grade 8 to Grade 12 boys and girls, and operates from Zone 2, Diepkloof, Soweto. The applicant currently has about 625 enrolled students. Both respondents are currently employed by the applicant as educators in terms of written contracts of employment.

3.1 In respect of Mr K P Bvuma ("*the first respondent*"), he was appointed as a full-time educator on the basis of a written contract from 1 July 2007, as reflected in his letter of appointment Annexure "MMD2", to the founding papers. On the same date the first respondent also entered into an indefinite contract of employment with the applicant. He is a mathematics educator.

3.2 Mr Bornwell Mabhiny ("*the second respondent*") he too, entered into a written contract of employment as educator with the applicant on 1 July 2010. However, in his case, as a non-South African citizen, his contract was for a term of four years, terminating on 27 July 2014. He is a physical science educator for Grades 10 and 12.

3.3 Clause 3.2 under the Terms and Conditions of Employment, and in respect of the first respondent, provides as follows:

> "*All employees appointed indefinitely may resign or have their services terminated by the employer upon written notice of one term.*"

Clause 3.4 goes on to provide that:

> "*The periods of notice defined in the conditions may be shortened by mutual consent between the employer and the employee concerned.*"

In the case of the second respondent, clause 3.3 of the contract provides as follows:

> "*An educator employed on a term appointment may resign in terms of the Basic Conditions of Employment Act 75 of 1997, as amended.*"

It is common cause that the second respondent was required to give the applicant one month's notice of his intention to terminate his contract of employment. It is also common cause

that the second respondent, by virtue of his status as a foreign national, is not entitled to certain benefits, such as pension or provident fund.

3.4 It is further common cause that on or about 10 July 2012 the first respondent handed to the applicant a letter dated 29 June 2012 in which he tendered his resignation as employee of the applicant. In the letter, Annexure "MMD3", to the founding papers, the first respondent stated as follows:

> "*The above matter bears reference. I hereby wish to tender my resignation as an educator from the abovementioned institution with effect from the above date* [29/6/2010]. *I got a promotional post (HOD) as advertised in GDE vacancy circular – promotion/therapist post – April 2010.*" (my insertion of date)

3.5 The second respondent, on his turn, handed the applicant his letter of resignation dated 9 July 2012 on the same date. He gave as a reason for his resignation the fact that the applicant failed to address his grievances relating to his deprivation of a provident fund and unemployment insurance benefits. In the letter the second respondent concluded that:

> "*I apologise for submitting my resignation notice so late. The reason was that I felt at any time the school authorities may come up with something inasfar as my grievances were concerned. I wish the school and the learners a continued success throughout many years to come.*"

3.6 It is further not in dispute that at the time of the receipt of the letters of resignation, the applicant school was on winter vacation, until Monday 16 July 2012.

3.7 In his answering affidavit filed a few hours before the hearing on Sunday 15 July 2012, the first respondent stated that:

> *"I have already signed a contract with the Department of Education in terms of which I will serve it in the role of a Head of Department (HOD), which is a promotional post with more responsibilities than those I had at the applicant ... The school I will be moving to has over 500 learners and currently has no HOD for mathematics ..."*

On his turn, the second respondent intends to assume an educator's post at Fidelitas Secondary School, also in Diepkloof, Soweto. In his new post, he will be responsible for teaching Grades 10, 11 and 12 in physical science.

3.8 Finally, regarding common cause facts, it was conceded during argument that the respondents' letters of resignation as described above, in fact gave the applicant insufficient notice and not in accordance with the contracts of employment.

[4] Upon receipt of the letters of resignation, the applicant engaged the respondents in an endeavour to have them both serve their notice periods. This attempt, however, was unsuccessful. The main concern of the applicant is that the short notice given by the respondents to resign their posts will

negatively about 400 learners who will be left without educators when the schools re-open on 16 July 2012. Further, that the rights of the learners to receive education uninterrupted are paramount. The applicant will require at least one month to secure suitable replacement educators after procedures such as advertisements of the vacant posts, screening, short-listing, interviews, final recommendations, appointments, handing over by the respondents to the new incumbents and the *curriculae*. The applicant wants the respondents to be available to the learners at the start of the new school term. For these reasons, the applicant's Board of Governors took a special resolution for the institution of the instant proceedings.

DEFENCES RAISED BY THE RESPONDENTS

[5] On the other hand, the respondents, through their counsel, attorney B L Mzamo, have raised at least three defences. One of such defences was that the applicant's counsel, Adv K Msomi, was conflicted since he was a member of the applicant's Board of Governors. The allegation was not supported by any evidence. Adv Msomi denied the allegation. He assured the Court that he is a member of the Johannesburg Bar Council and was only introduced to the applicant's Board of Governors in regard to the present matter. In short, the allegation was, in my view, disingenuous and spurious. I reject it as a desperate attempt by the respondents to evade their contractual obligations towards the applicant.

[6] The main contention advanced on behalf of the respondents, worthy of consideration, was as follows: That an order compelling the respondents to serve their respective notice periods in terms of their contracts, will be tantamount to an unfair and harsh order of specific performance in contract. Further, that it would be similar to enforcing an unjust and inequitable restraint of trade as a result, so the argument proceeded, the respondents stand to lose their new employment as well as the current occupations at the applicant.

[7] The restraint of trade argument is unfortunate and plainly misplaced. Very little ought to be said about this contention. Enforcing a restraint of trade has different objectives. The respondents are well educated persons. They entered into their respective contracts of employment some time ago (2007 and 2010, respectively). They knew full well, or ought to have known the implications of their contractual obligations with the applicant. In respect of the second respondent, he knew from inception that he was not entitled to pension benefits. He received his gross salary in full. In any event, the applicant's case is not that the respondents will be employed by a competitor in education. The applicant simply seeks compliance by the respondents of their respective contractual obligations. The fact that the respondents have already entered into new contracts with prospective employers, is of their own making. Proverbially, they have made their own bed and must lie in it. They have admitted that their notices to terminate the contracts were inadequate. In fact, properly viewed, the letters of resignation were not only retrospective in effect, but also given during school recess, and thereby affording the applicant a few days only to find suitable replacements. The contention that

there are numerous other and available, unemployed, and qualified educators, is cold comfort for the applicant. In regard to the alleged grievances of the second respondent, he knowingly signed a contract of employment with the applicant, some thirty months ago, which provides, *inter alia*, that:

> "*All South African employees or foreign employees with permanent residence in South Africa will be governed by the conditions of the Unemployment Insurance Act 63 of 2001, as amended, and the Unemployment Insurance Contribution Act 4 of 2002, as amended.*"

He has not obtained permanent residence in the Republic of South Africa. He cannot now complain.

SPECIFIC PERFORMANCE AND SOME LEGAL PRINCIPAL

[8] I turn to consider the submission that by ordering the respondents to serve their notice periods in accordance with their contracts, would constitute unfair specific performance. It is in fact so that by requiring the respondents to serve their respective notice periods, the applicant is in fact seeking to hold the respondents to their contracts, albeit for a limited period only. In the case of the first respondent it will be a period of a school term, i.e. 90 days. In the case of the second respondent, it will be a period of 30 days.

[9] Regrettably, none of the parties referred me to any case law or authorities, save for the respondents' counsel who quoted from Christie's *Law of Contract* 5 ed at 522-528 and made general reference to secs 13 and 22 of

the Constitution which, respectively, deal with the right not to be subjected to slavery, servitude or forced labour, and the right to freedom of trade, occupation and profession. In this regard, I understood the rather vague submission to be that in compelling the respondents to serve their notices of termination of their contracts, would be tantamount to turning them into slaves, and that they have the right to practice their professions as educators, freely. This contention cannot be valid since the respondents will be paid their full salaries if they serve their notice periods.

[10] It is indeed trite law that the Court has a discretion to grant or refuse an order of specific performance. The discretion must be exercised judicially, and on the basis of each case to be adjudicated on its own circumstances. In *Pretoria East Builders CC and Another v Basson* 2004 (6) SA 21 (SCA) at para [10], reference was made to *Shakinovsky v Lawson and Smulowitz* 1904 TS 326 at 330, where the following was said:

> *"Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the Court either to grant such an order or not. It will certainly not decree specific performance where the subject-matter has been disposed of to a bona fide purchaser, or where it is impossible for specific performance to be effected; in such cases it will allow an alternative of damages."*

The Court in *Unitrans Freight (Pty) Ltd* came to the conclusion that an order for specific performance was futile. However, the facts in the last mentioned case were distinguishable from the facts in the present matter which concerns specific performance of the respondents as educators, based on their employment contracts.

[11] The facts in *Nationwide Airlines (Pty) Ltd v Roediger and Another* 2008 (1) SA 293 (W) where possibly closest to the facts in the instant matter. In that case, the applicant airline had entered into an employment agreement with the first respondent, a pilot, in terms of which he was required to give three month's notice of termination of his employment. After the first respondent gave one month's notice of termination of his employment, the applicant brought an application in the High Court in which it sought to enforce the notice provisions of the agreement. In spite of the first respondent's opposition, the Court, Horn J, granted specific performance. At paras [19] to [21] of the judgment, the Court said:

> "*[19] From this it is apparent that it is a misconception to say without qualification that specific performance of an employment agreement will never be permitted. There are numerous situations where specific performance may be ordered where various factors may play a determining role in coming to such a decision.*
>
> *[20] Such factors may, for example, be:*
>
> 1. *The particular relationship between the employer and the employee.*
> 2. *The nature of the employment contract.*
> 3. *The nature of the service or work which is to be performed in terms of the contract.*
> 4. *The prejudice or hardship to be suffered by the innocent party should specific performance not be ordered, compared to the prejudice that will be suffered by the employee, should it be granted.*
>
> *[21] The general rule should still be that where a party wrongfully breaches a contract it should entitle the innocent party to enforce the contract, and that should no less be so even in employment contracts. After all as the authorities have laid down, each case must be decided on its own facts.*
>
> *[22] A case directly in point is Santos Professional Football Club (Pty) Ltd v Igesund and Another 2003 (5) SA 73 (C) (full bench).*"

The matter of *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (*supra*) concerned a professional football coach who had entered into a coaching agreement with a soccer club called Santos. The Court, after comprehensively and carefully reviewing the history of orders of specific performance, foreign law, and numerous case law, upheld the appeal of *Santos* ordering the coach, who had given short notice of termination of his coaching contract, to continue serving as head coach of *Santos* until the end of his contract. Commenting on the case, the learned authors in Christie's *The Law of Contract*, 6 ed, at p 551 say:

> "*The Court was equally clearly correct in drawing a distinction between a wrongfully dismissed servant and an employee who contracted with his employer on equal terms and unlawfully resiled from the contract in order to earn more money from a rival, in the result, a football coach was ordered to comply with his contract.*"

The passages quoted by counsel for the respondents from Christie's *Law of Contract*, 5 ed, p 528, in essence, confirm the legal principles as set out above.

[12] In applying the above legal principles to the facts of the instant matter, it is clear that the respondents' contentions that they will suffer undue hardship if held to their contracts, is untenable, for a number of reasons. Both respondents can hardly be said to illiterate. They contracted freely and voluntarily with the applicant. They performed their services as educators under their contracts for some time before their purported resignations. There is no evidence at all that the relationship between them and the applicant has broken down irretrievably to such an extent that serving their notices of

termination of employment would be impossible. The prejudice likely to be suffered by the learners due to the absence of the respondents, is greater than that likely to be suffered by the respondents if they are not ordered to serve their notice periods. In fact, the Court enquired, and was informed by the deponent to the founding affidavit that the respondents stand to lose certain financial benefits should they not keep to their contracts. In the case of the first respondent for example, he is exposed to forfeiting a portion of his pension benefits, whilst in the case of the second respondent, he may forfeit a month's salary at least. Furthermore, it is plain that both the respondents purported to resign in order to take up better paying employment. As stated earlier in the judgment, the respondents elected to breach their contracts and brought their own present predicament upon themselves.

[13] There is ample authority for the legal principle that it is in the public interest that contracting parties adhere to their contracts. In the *Santos Professional Football Club* matter (*supra*) at 86E-G, the Court said:

> *"It must be remembered that we are dealing with a contract which first respondent entered into freely and voluntarily and in terms of which he agreed to an order for specific performance being made. In Brisley v Drotsky 2002 (4) SA 1 (SA) at 35 para [94], it is so that Cameron JA said:*
>
> > *'On the contrary, the Constitution's values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.'*
>
> *This is not, with respect, a statement in favour of refusing the application ... The passage cited above means that Courts should be*

> *slow and cautious in not enforcing contracts. They should, in a specific performance situation, only refuse performance where a recognised hardship to the defaulting party is proved."*

In determining the disputed issue in the instant matter, I also take into account the interests of the learners who are about to be abandoned by the respondents in a clearly unfair and premature manner. This is also not in the best interests of the learners, which aspect I deal with in the next paragraph.

THE BEST INTERESTS OF THE LEARNERS

[14] It is trite law that this Court, as upper guardian of all minor children, will always consider their best interests. In addition, sec 28(2) of the Constitution provides that a child's interests are of paramount importance in every matter concerning the child. Section 29 of the Constitution entrenches the right to basic education. For its relevance, the preamble to the Employment of Educators Act No 76 of 1998 ("*the Act*"), provides:

> "*To provide for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith.*"

In *Phenithi v Minister of Education and Others* [2006] 9 BLLR 821 (SCA), the appellant, who had been absent from work for an extended period, was discharged from service in terms of sec 14(1)(a) of the Act. Her appeal to the High Court was dismissed with costs. On appeal, the appellant contended that the decision to dismiss her constituted administrative action and that the decision violated her right to just administrative action. She also contested the

constitutionality of sec 14 of the Act. In dismissing the appeal, the Court, at paras [24], [25] and [26] said:

> *"[24] To the extent that it may be argued that the deeming provisions of section 14(1)(a) limit an educator's right to procedurally fair labour practice, Ms Lorraine Rossouw, who deposed to an affidavit on behalf of the respondents, sets out the reasons why the provisions of section 14(1)(a) are necessary in the Education Department. According to her, the consequences of an educator's absence without leave are, to mention a few, that: the learners are left without a teacher; the Department cannot appoint a substitute or a temporary educator immediately; major disruptions are caused as a reshuffling of both educators and learners is required; the Department has to remunerate such educator while he/she is not fulfilling his/her obligations and the principal of the school concerned has a grave dilemma regarding what to do during the educator's absence. The provisions of the section thus ensure certainty as the principal can set things in motion for the appointment of a substitute.*
>
> *[25] The reasons given by Ms Rossouw are confirmed by Mr Eben Boshoff, Director of Legal and Legislative Services, responsible for the drafting of education legislation, who adds that having a teacher in the classroom is an important aspect of giving substance to a child's right to education. Education, he continues, has the unique responsibility of balancing the rights of children with the competing rights of others, such as educators.*
>
> *Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. The intention behind section 14 of the Act, he says, is to limit the potential harm that learners could suffer because of the absence of an educator without leave, while still allowing for a period of 14 days before the right of the educator is affected by operation of law. As has been mentioned above, no replying affidavit was filed and these factors, in justification for the limitation of an educator's right to procedurally fair labour practice, stand uncontradicted. There is therefore no reason to hold that the limitation, if it be one, is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (section 36(1) of the Constitution).*
>
> *[26] I conclude therefore that the provisions of section 14(1)(a), read with section 14(2), of the Act do not offend against the Constitution. The appeal must therefore fail."*

See also *Procurement Adjudication and the Rights of Children: Freedom Stationery (Pty) Ltd v MEC For Education, Eastern Cape* 2011 JOL 26927 E. In *Federation of Governing Bodies of SA Schools and Others v MEC For The Department of Basic Education, Eastern Cape and Others* [2011] 6 BLLR 616 (ECB) at para [9] the Court said:

> *"Section 29 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides that everyone has a right to basic education. This guaranteed right is a right to education which avails all learners against the State. It is not a right which avails learners as against an individual school. The State, accordingly, has a corresponding constitutional obligation to provide such education. Education takes place by means of educators and, accordingly, the State has a constitutional obligation to provide educators so as to facilitate education."*

I am of the view that these principles apply with equal force to the relationship between the applicant and the respondents in the present matter.

[15] The respondents' purported pre-mature resignations, which are contrary to their contracts of employment, will undoubtedly deny the learners at the applicant the right to education. The respondents' argument that by moving to their respective new schools, they are equally promoting the best interests of the learners at such new schools, is not convincing at all and is misplaced. Their intended abandoning of the learners at the applicant's school in the second half of the academic year will be highly prejudicial and inconsiderate to the learners. It will undoubtedly also exacerbate the current problems in the education system.

CONCLUSION

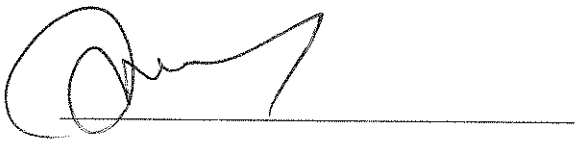
[16] For all the aforegoing reasons, I conclude that the applicant has succeeded in making out a case, on a balance of probabilities, for the relief sought in the notice of motion. See *C A Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (D). There is plainly no valid and recognised hardship if the respondents are kept to their contracts. The submission that by ordering the respondents to serve the notice of termination of their contracts, will be equivalent to enforced labour or slavery, is equally without merit. They are professionals by occupation. Their contractual obligations are specifically to teach the learners at the applicant. This occupation falls within their expertise. The application must therefore succeed.

COSTS

[17] I deal with the issue of costs. There is no reason why the costs should not follow the result. In fact a punitive costs order would be justified since the respondents delayed the court proceedings without just cause on Saturday 14 July 2012. They did not comply with a Court order directing them to file answering papers by 18h00 the previous day. They conceded the urgency of the matter only during closing argument.

ORDER

[18] In the result, an order is granted in terms of prayers 2, 3 and 4 of the notice of motion dated 13 July 2012.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	K MSOMI
INSTRUCTED BY	SELEKA ATTORNEYS
COUNSEL FOR THE RESPONDENTS	ATTORNEY B L MZAMO
DATE OF HEARING	14 JULY 2012
DATE OF ORDER	16 JULY 2012
DATE OF JUDGMENT	24 AUGUST 2012

SUMMARY

Schools – the right of learners to basic education as enshrined in section 29 of the Constitution of the Republic of South Africa, 1996 – educators tendering their resignations to applicant school pre-maturely with short notice during school vacation – in order to take up better paying educators posts – the best interests of learners paramount in terms of section 28(2) of Constitution – when to order specific performance for respondent educators to serve their notice of termination periods under teaching contracts – section 14(1)(a) of the Employment of Educators Act No 76 of 1998.