



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Not reportable

Case no: D79/12

In the matter between:

**MAQHINGA ZUMA**

**Applicant**

and

**COMMISSIONER PILLAY N.O.**

**First Respondent**

**EDUCATION LABOUR RELATIONS COUNCIL**

**Second Respondent**

**DEPARTMENT OF EDUCATION: KZN**

**Third Respondent**

**Heard: 15 July 2014**

**Delivered: 19 September 2014**

**Summary: Review of arbitration award. First Respondent making an award not rationally linked to the evidence properly placed before him at arbitration. No evidence to sustain the finding. First Respondent further misconducting himself in not giving due consideration to the extremely long delay in bringing disciplinary action in circumstances where Applicant had long service, clean disciplinary record and had continued to work as a principal in the interim. Application granted with costs.**

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## JUDGMENT

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HOBDEN, A. J.

### Introduction

- [1] This is an application by the Applicant to review, set aside and correct an arbitration award by the First Respondent.
- [2] The First Respondent's award, which is dated 18 December 2011, held that the dismissal of the Applicant by the Third Respondent was substantively fair but procedurally unfair. The First Respondent awarded the Applicant compensation in the amount of R28,000.00.

### The background

- [3] The Applicant was employed by the Third Respondent as an Educator in 1981.
- [4] In 1998 the Applicant was appointed to a position of Deputy Principal and then, in 2001, he was appointed as Principal of Thathunyawo High School.
- [5] In 2004 the Applicant was transferred to Thubelihle High School, as Principal. This was a promotion.

- [6] The Third Respondent, sometime thereafter, caused a financial inspection of Thathunyawo High School to be held in order to investigate alleged irregular practices which may have prevailed in 2003. The source of the allegations was a member of the community.
- [7] The Third Respondent's inspection and attendant report was completed on 14 June 2006.
- [8] On 7 May 2008, the Applicant was issued with a notice of an intended disciplinary enquiry by the Third Respondent.
- [9] The disciplinary enquiry was conducted and, after some delay, was concluded and the Applicant informed of the decision to dismiss on 15 April 2009.
- [10] The Applicant appealed to the Third Respondent but this was unsuccessful.
- [11] The Applicant was never suspended and he worked in his position as Principal of Thubelihle High School until 15 April 2009 when he was informed of the decision.

#### Grounds of review

- [12] The Applicant argues that the delays in disciplining him were inordinate. The report was completed by 14 June 2006 but it took the

Third Respondent a few days short of two years to invoke disciplinary action. The Labour Relations Act contemplates that matters must be dealt with expeditiously and this length of delay is not within the time frames imposed by the Provisions of the Employment of Educators Act 76 of 1998. The Applicant submits that the Third Respondent provides no explanation for the delay and therefore at the time of disciplining, the Applicant had waived its right to invoke disciplinary proceedings or alternatively, the delay was such as to render any disciplinary inquiry inherently unfair. The judgments of this Court in *Van Eyk v Minister of Correctional Services and Others* (2005) 26 ILJ 1039 (E), *Riekert v CCMA* (2006) 27 ILJ 1706 (LC) and *National Union of Mineworkers and Another v CCMA and Others* (2008) 29 ILJ 1966 (LC) were referred to as support for this argument. The Applicant placed this directly in issue before the First Respondent. The First Respondent's failure to give consideration to the applicable legal principles is misconduct on the part of the First Respondent, leading to a result that is not reasonable.

- [13] The Applicant further attacks the manner in which the First Respondent assesses the evidence which was properly placed before him. The evidence simply did not show deliberate and wilful conduct by the Applicant to misappropriate funds. At most, the evidence established a failure to follow proper procedures. In argument, Mr Blomkamp submitted that the First Respondent based his findings on the erroneous fact that the Applicant was the accounting officer. Mr

Blomkamp referred to Section 21 of the South African Schools Act 84 of 1996 setting out the functions of a Principal. He pointed out that it was only in the 2011 amendment to the South African School Act, that there is reference to the Principal being an accounting officer. Mr Blomkamp further pointed out two aspects of the evidence which the First Respondent failed to address. Firstly, there was no direct evidence as to whom the School dealt with at Cashbuild, nor the terms of the agreement between Cashbuild and the School, and secondly, who the signatories on the cheques were. It was submitted that the evidence properly construed does not implicate the Applicant.

[14] The Applicant further argued that there was no evidence of a breakdown in the relationship. Mr Blomkamp argued that in terms of the delay and the fact that the Applicant continued to work, there was at least a need for an explanation by the Third Respondent.

[15] The Third Respondent argued that the time frames set out in the Employment of Educators Act 76 of 1998 are not mandatory and the decision of the First Respondent took all factors into consideration and cannot be faulted. Ms Rasool argued that even though the Applicant may not have expressly been the accounting officer, he *de facto* was as the Principal.

- [16] It was further submitted that the Applicant blurs the ground between an appeal and a review application and there is no basis on which the Court can interfere with the First Respondent's finding.

The allegations of misconduct

- [17] The allegations put to the Applicant by the Third Respondent were as follows:

‘Count 1 – In that on or about the period stated hereunder (figure 1) you failed to comply with legal obligation relating to education when you issued cheques in favour of Cashbuild before the goods were received / requisitioned. By so doing you contravened Section 18 (1) (a) of the Act.

Count 2 – In that on or about the period provided in figure 2 below you wilfully or negligently mismanaged the finances of Thathunyawo Secondary School. By so doing you contravened Section 18 (1) (b) of the Act.

Count 3 – In that on or about the period reflected in figure 3 below you committed fraud when you used Thathunyawo Secondary School funds to purchase items indicated in the same table. By so doing you contravened Section 17 (1) (a) of the Act.

Count 4 – In that on or about the dates indicated below (figure 4) you failed to comply with the legal obligation relating to education by failing to issue invoices for one or more of the following payments made. By so doing you contravened Section 18 (1) (a) of the Act.

Count 5 – In that on or about 18/02/03 and at or near Thathunyawo School you failed to comply with the legal obligation relating to education by failing to issue the cash slip that justifies the refund of R450.00 issued to MGH Mbuli through cheque no. 294. By so doing you contravened Section 18 (1) (a) of the Act.

Count 6 – In that on or about 08/02/03 you committed fraud when you used school funds to purchase Telkom airtime to the value of R250.00 for your personal telephone. By so doing you contravened Section 17 (1) (a) of the Act’.

#### The award

[18] The Applicant, at the commencement of the arbitration proceedings, sought to persuade the First Respondent that the Third Respondent had waived its right to discipline the Applicant due to the delay in instructing disciplinary action. In dismissing the point-*in-limine*, the First Respondent finds:

- (i) ‘the point raised by the Applicant is not a jurisdictional issue in this dispute. It goes down to the merits of whether the dismissal of the Applicant was fair and therefore should not be addressed as a point-*in-limine*’.
- (ii) "I do not believe that the Applicant has proved that the conduct of the Respondent was inconsistent with its intention to discipline the

Applicant. Any delays that may have occurred cannot in itself constitute a waiver of its right to discipline the Applicant."

- (iii) 'The Applicant is, however, not precluded from raising any argument related to the fairness of the dismissal at the arbitration hearing'.

[19] On the first allegation the First Respondent finds that the cheques were issued to Cashbuild by the Applicant. These were bulk deposits and payment was therefore made before the goods were received. The First Respondent found the Applicant guilty of issuing cheques before goods were received. On the Second allegation, the First Respondent accepts that there were multiple deliveries made from Cashbuild on 17 July 2003 and 26 July 2003 which amounted to fruitless and wasteful expenditure. The First Respondent finds that the Third Respondent was unable to prove knowledge and training on the Public Finance Management Act 1 of 1999 (PFMA) and therefore cannot find the Applicant guilty of non-compliance with the PFMA's provisions but that it nonetheless amounted to mismanagement by the Applicant. On the third allegation, the First Respondent finds a series of items were purchased which were not relevant or appropriate for the School and which could not subsequently be found there by the investigator. The First Respondent finds that the Third Respondent 'succeeded in presenting *prima facie* evidence of fraud or misappropriation', that the Applicant's explanation was insufficient and that the Applicant committed fraud. The fourth allegation was incorrectly worded; the actual allegation was that payments were made without supporting



invoices. The First Respondent finds that payments were made to, *inter alia*, the Applicant himself and there were no supporting documents to justify the payments and that a "conclusion of misappropriation cannot be escaped." There was no finding made in regard to Count 5 and the First Respondent was not satisfied that there was sufficient evidence to justify a finding of guilty on Count 6.

### Analysis

[20] The Applicant's obligations, responsibilities, duties and practical functions with regard to the School's finances, are the foundation on which all the allegations rest. From the award, it is apparent that the First Respondent accepts that the Applicant was responsible for the School fund, managed and controlled the School fund and could make payments from the School fund. He approaches the Applicant as Principal as though he is an accounting officer as contemplated in Section 36 of the PFMA.

[21] From the record and evidence, it appears that the source of these obligations, responsibilities, duties, and practical functions is the Applicant's contract of employment, the Employment of Educators Act 76 of 1998 ("the Employment of Education Act") and the South African Schools Act 84 of 1996 ("the Schools Act"). The Third Respondent also gave evidence on the Public Finance Management Act 1 of 1999 ("the PFMA") and a Departmental instruction or directive.

[22] Thathunyawo High School received Section 21 status in terms of the Schools Act. A reading of this provision reveals that it is the School Governing Body who applies to the Head of Department to be allocated certain functions. Section 21 states:

‘(1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:

- (a) To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;
- (b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;
- (c) to purchase textbooks, educational materials or equipment for the school;
- (d) to pay for services to the school;
- (d A) to provide an adult basic education and training class or centre subject to any applicable law; or  
[Para. (dA) inserted by s. 10 (b) of Act 48 of 1999.]
- (e) other functions consistent with this Act and any applicable provincial law.

(2) The Head of Department may refuse an application contemplated in subsection (1) only if the governing body concerned does not have the capacity to perform such function effectively.

- (3) The Head of Department may approve such application unconditionally or subject to conditions.
- (4) The decision of the Head of Department on such application must be conveyed in writing to the governing body concerned, giving reasons.
- (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal to the Member of the Executive Council.
- (6) The Member of the Executive Council may, by notice in the Provincial Gazette, determine that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if –
  - (a) he or she is satisfied that the governing bodies concerned have the capacity to perform such functions effectively; and
  - (b) there is a reasonable and equitable basis for doing so’.

In Section 37 of the same Act, it is the Governing Body that is required to establish a school fund and administer it in accordance with directions issued by the Head of Department. It reads:

- ‘(1) The governing body of a public school must establish a school fund and administer it in accordance with direction issued by the Head of Department.
- (2) Subject to subsection (3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund.

- (3) The governing body of a public school must open and maintain one banking account, but a governing body of a public school may, with the approval of the Member of the Executive Council, invest surplus money in another account.

[Sub-s. (3) substituted by s. 6 (a) of Act 57 of 2011.]

[23] The functions and responsibilities of Principals of public school(s) are set out in Section 16A of the Schools Act 84 of 1996. At the time of the alleged misconduct in 2003, the Section 16A listed one of the duties as:

‘(f) inform the governing body about policy and legislation; and’

[24] In 2007, Section 16A (3) was inserted and then required the Principal to assist the Governing Body in the performance of its functions. It reads:

‘(3) The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with –

- (a) instructions of the Head of Department;
- (b) legislation or policy;
- (c) an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
- (d) a provision of the Employment of Educators Act 1998 (Act 76 of 1998), and the Personnel Administration Measures determined in terms thereof.

[S. 16A inserted by s. 8 of Act 31 of 2007.]

[25] In an amendment in 2011, the following clauses were further included into the Section 16A (3) functions and responsibilities:

‘(h) assist the governing body with the management of the school’s funds, which assistance must include-:

- (i) the provision of information relating to any conditions imposed or directions issued by the Minister, the Member of the Executive Council or the Head of Department in respect of all financial matters of the school contemplated in Chapter 4; and
- (ii) the giving of advice to the governing body on the financial implications of decisions relating to the financial matters of the school;

[Para. (h) added by s. 9 of Act No. 15 of 2011.]

- (i) take all reasonable steps to prevent any financial maladministration or mismanagement by any staff member or by the governing body of the school;

[Para. (i) added by s. 9 of Act No. 15 of 2011.]

- (j) be a member of a finance committee or delegation of the governing body in order to manage any matter that has financial implications for the school; and

[Para. (j) added by s. 9 of Act No. 15 of 2011.]

- (k) report any maladministration or mismanagement of financial matters to the governing body of the school and to the Head of Department.

[Para. (k) added by s. 9 of Act No. 15 of 2011.]’

[26] During the arbitration there was evidence and argument over the PFMA, not only the Applicant's knowledge thereof and training but also what obligations extended to the Applicant as Principal. The PFMA in Section 3 sets out the institutions to which the Act applies and states:

- '(1) This Act, to the extent indicated in the Act, applies to-
    - (a) departments;
    - (b) public entities listed in Schedule 2 or 3;
    - (c) constitutional institutions; and
    - (d) Parliament and the provincial legislatures, subject to subsection (2)
- [Para. (d) substituted by s. 2 (a) of Act 29 of 1999.]"

Section 36 of the PFMA deals with Accounting Officers and states:

- '(1) Every department and every constitutional institution must have an accounting officer.
- (2) Subject to subsection (3) –
  - (a) the head of a department must be the accounting officer for the department; and'

[27] The Third Respondent adduced evidence of School Fund Departmental instructions as a further source of obligation on the Applicant. The evidence is not clear from the record, the document did not form part of the record and the First Respondent does not place

significance on this. It would, however, seem to be the directions in accordance with Section 37 of the Schools Act. This would be directions to the School Governing Body.

[28] The Third Respondent further sought to lay significance on the certification in terms of Section 38 (i) (j) (k) of the PFMA which was signed by the Applicant in 2004. On a reading of this document, it is apparent that it is required by the Third Respondent's accounting officer prior to any transfer of funds to the School and it needs to be signed by the Chair of the Governing Body and the Principal. The following appear from the certification itself:

- (i) the abovementioned school and governing body have implemented effective, efficient and transparent financial management and internal control systems;
- ii) the school governing body has established a school fund that is administered in accordance with directions issued by the Head of Department;
- iii) all monies received including school fees and voluntary contributions are paid into the school fund and that such monies are deposited into a banking account opened and maintained for this purpose;
- iv) ...
- v) ...
- vi) ...
- vii) ...

- viii) the school governing body will keep record of funds received and expended by the school and of its assets, liabilities and financial transactions and;
- ix) ...'

[29] The First Respondent's point of departure, when dealing with the allegations, is that the Principal was responsible for the School fund, managed and controlled it. This is incorrect. It has no evidential basis, it ignores material facts, it is a mis-direction in the sense that it is a failure to appreciate that the Third Respondent bore an onus to prove such obligations and it leads to conclusions and findings that cannot be said to be reasonable. It emanates from a failure to properly consider the Section 21 status and the nature and workings of the school fund, the responsibilities and obligations that the Principal has to the Department and School Governing Body, the decision making regarding expenditure and then the practicalities of how the money is spent (which I shall return to later). The First Respondent further did not concern himself with the relationship between the Principal and the School Governing Body and the finance committee of the School Governing Body and *vis-a-vis* the School fund. There was evidence of a Mnyathi who was the school appointed auditor. The First Respondent found this only to be significant in that the Applicant did not call him as a witness. The First Respondent further found it significant that the Applicant did not call any School Governing Body members. There was, however, neither evidence of a complaint by the School



Governing Body nor the auditor and the First Respondent did not find this of significance.

[30] The difficulties are then compounded; it would seem at least in part, by the fact that the Third Respondent was unable to produce the original cheques on which all the transactions in the allegations are based. The First Respondent focuses his attention on whether the payments from the school fund could be proved. He reasonably concludes that the payments could be proved. His determination, however, stops there. There was evidence that there would have to be two signatures on a cheque. There is simply no evidence as to who signed the cheques and who made payments from the school fund. There is no evidential basis to conclude that it was the Applicant. It does not appear from the record and was not dealt with by the Third Respondent in evidence. The Third Respondent's evidence only went as far as that the Applicant would advise the School Governing Body. Without this evidential foundation, the allegations simply cannot stand. The First Respondent simply makes assumptions absent any rational evidential link.

[31] Then, turning to the individual allegations. On the first allegation, whilst the original cheques were not produced, there is no dispute that deposits were made to Cashbuild. These were referred to as bulk deposits. This was reflected in Cashbuild's books as a credit amount and when the School subsequently made purchases, the amount of the purchase was debited against the credit amount. The First Respondent

finds that the Applicant is guilty of issuing cheques in favour of Cashbuild before the goods were received / requisitioned and this is a contravention of Section 18 (1) (a) of the Act. Notwithstanding there being no evidential basis to conclude that the Applicant issued the cheques, there was no evidence that the School Governing Body or the auditors complained or that the School was not ultimately invoiced for goods it received. There was no clear evidence at what point the School was debited, that is, when they actually paid for the goods. In fact, the First Respondent refers in the award to a diminishing credit balance after each invoice. There was no evidence as to exactly what provision of the PFMA was breached by paying a bulk deposit.

[32] The second allegation involved the fact that multiple deliveries were made from Cashbuild on the same day. The First Respondent finds the Applicant guilty of mismanagement. The total of the charges for multiple deliveries was in the order of R620.00. The conclusion that the Applicant was to manage the practical process of ordering and deliveries cannot be said to be rationally connected to the evidence.

[33] In respect of the third allegation, if the evidence of Ngubane is accepted, the Third Respondent is able to prove that purchases were made from Cashbuild out of the School fund and such purchases Ngubane could not find at the School. The First Respondent not only misdirects himself by shifting the onus in that he indicates that "the Respondent succeeded in presenting *prima facie* evidence of fraud or

misappropriation and the onus therefore shifts to the Applicant to prove that his conduct did not amount to misappropriation or fraud", he misdirects himself in that the allegation was of fraud. This was the allegation put to the Applicant. The basic elements of fraud were not present or proved. Who made what representation to whom? There was further no evidential basis to infer that the Applicant misappropriated the purchases. There was simply no evidence to this effect. The finding was not rationally linked to the evidence and cannot therefore be said to be reasonable. The Applicant likewise cannot reasonably be found to be guilty of "fraud or misappropriation".

[34] The fourth allegation relates to the Applicant not being able to produce invoices for payments made. The First Respondent finds the Applicant guilty of this misconduct but goes further and finds that under such circumstances, and in the absence of an explanation, misappropriation is a necessary inference. The First Respondent misdirects himself as firstly, this was not the allegation and secondly, there is no evidential basis on which he reasonably can draw this conclusion. There simply was no evidence of misappropriation by the Applicant.

[35] Once the First Respondent determined the Applicant to be guilty of the alleged misconduct, he found that dismissal was appropriate. The First Respondent does not deal with the Applicant's length of service, clean disciplinary record or the delay in disciplining the Applicant, save for listing length of service and clean disciplinary record as a factor in

determining the amount of compensation for the procedural unfairness. Assuming the ruling that the First Respondent made on waiver in determining the point-*in-limine* is a ruling that a reasonable Commissioner can make, the First Respondent was still required to consider the delay as a factor in his assessment of the impact any misconduct had on the employment relationship. It looms large. The Applicant has 30 years service and a clean disciplinary record. There was a very significant delay by the Third Respondent in disciplining him. In the interim, the Applicant is promoted and continues to work for a long period, up until 2009. The Third Respondent can provide no meaningful reason for the delay and there is no proper evidence before the First Respondent as to the breakdown in the relationship. The First Respondent misconducts himself in relation to his duty as Commissioner in not dealing with this issue. A reasonable decision maker without giving consideration to the delay cannot reasonably come to a conclusion that the dismissal was fair. The first Respondent simply does not deal with the issue. The delay was lengthy and unexplained. The Labour Relations Act places an emphasis on expeditious disciplinary action. Whilst it is correct that in terms of the Employment of Educators Act there was no stipulated time frame for bringing disciplinary action, the time period between the alleged misconduct, the investigation thereof, the disciplinary enquiry and the decision to dismiss was so far beyond any other comparative time frame set in the Employment of Educators Act and the Public Service Collective Agreements. The First Respondent did not give regard to the

legal principles set out in *Van Eyk v Minister of Correctional Services and Others* (2005) 26 ILJ 1039 (E), *Riekert v CCMA* (2006) 27 ILJ 1706 (LC) and *National Union of Mineworkers and Another v CCMA and Others* (2008) 29 ILJ 1966 (LC). He did not determine whether it was fair to continue with disciplinary action after so long and never considered the fact that the facts did not point to a breakdown in the relationship.

[36] On an assessment of the record and of the evidence during the arbitration, I am satisfied that the Third Respondent did not prove misconduct of a nature sufficient to justify the Applicant's dismissal, particularly in the circumstances where no evidence was led as to the breakdown in the relationship and the facts actually seem to indicate the contrary.

[37] I am of the view that the award is reviewable for the reasons set out above. These relate to the determination of the substantive fairness of the dismissal. I accept that from the record, Thathunyawo School's finances were not in perfect order and that the Applicant would have some responsibility as Principal and as set out in the legislation. It was referred to in argument as mismanagement. This may be so, but I am satisfied that the misconduct as alleged, was not proved. On this basis the dismissal is unfair.

[38] The order I therefore make is:

1. The application is granted with costs.
2. The arbitration award is reviewed and the award is substituted with an award that reads:
  - 2.1 The dismissal of the Applicant was substantively and procedurally unfair.
  - 2.2 The Third Respondent is to re-instate the Applicant to the position he held as at the date of his dismissal.

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Hobden AJ

Acting Judge of the Labour Court of South Africa

#### APPEARANCES

For Applicant:	P. J. Blomkamp
Instructed by:	Llewellyn Cain Attorneys
For Third Respondent:	Z. Rasool
Instructed by:	State Attorney