

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BISHO)**

CASE NO: 536/2016

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES:</u>
<u>YES/NO</u> |
| (3) | <u>REVISED.</u> |

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DATE

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SIGNATURE

In the matter between:

BETTY MAMOREMA DINGEZWENI

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF EDUCATION, EASTERN
CAPE PROVINCE**

First Defendant

**THE HEAD OF DEPARTMENT, DEPARTMENT
OF EDUCATION, EASTERN CAPE PROVINCE**

Second Defendant

J U D G M E N T

DREYER AJ

- [1] The Eastern Cape Department of Education (“the Department”) employed the plaintiff, Mrs Betty Dingenzeni, on a fixed-term contract for the period 9 February 2015 to 31 December 2015, to teach life sciences at the Luvuyo Leruma High School in Queenstown, Eastern Cape. Mrs Dingenzeni was appointed as a substitute educator as a substitute educator as the incumbent, a Mr Mana, was on incapacity sick leave as he had had a stroke and was diagnosed with dementia.
- [2] Mrs Dingenzeni was recommended to the post by the Luvuyo Lerumo High School selection panel, chaired by its principal Mr Tyilana.
- [3] Mrs Dingenzeni’s appointment was approved by three Department of Education Eastern Cape officials (the circuit manager, deputy director human relations management and the district director) The approval recorded that Mrs Dingenzeni’s appointment was in addition to the establishment of the school.
- [4] The term “*establishment of a school*” relates to the post-establishment of a school, a metric used by the Department of Education to determine the number of educators required at any particular public school.

- [5] Mrs Dingezweni was informed of her appointment on 9 February 2015. She completed and signed her assumption of duty documentation. Mrs Dingezweni commenced teaching that day.
- [6] Mrs Dingezweni testified that Mr Tyilana gave her a letter in March 2015 from the Eastern Cape Department of Education, dated 19 March 2015 (“appointment letter”). The appointment letter recorded her employment at the Luvuyo Leruma High School for a fixed term period from 1 February 2015 to December 2015, the rate of her salary, and the option to be paid an allowance of 37% of her annual salary in lieu of benefits. The term contract was in accordance with the provisions of section 7(2)(b) of the Employment of Educators Act 1998. The allowance was payable as her term contract was longer than 6 months.
- [7] Though Mrs Dingezweni taught life sciences in February, March and April 2015, the Department of Education did not pay her. Mrs Dingezweni approached the principal, Mr Tyilana, to enquire whether the school could advance her a loan until such time as the Department paid her salary. Mr Tyilana in turn, approached the School Government Body (“the SGB”). The SGB agreed to pay Mrs Dingezweni a R5 000 stipend per month. Mrs Dingezweni was required to repay SGB the stipend when the Department paid her salary.

- [8] Mr Tyilana had a cheque drawn in favour of Mrs Dingezweni on the SGB's bank account for the sum of R5 000 for the months of May, June, July, and August 2015. For the record keeping of the school, Mr Tyilana signed off on a cheque requisition form recording the payment of R5 000 to Mrs Dingezweni from the cost centre entitled "*fund raising*". A document called a "*pay slip*" was issued in the name of Mrs Dingezweni. This document records a date and a signature. Mr Tyilana testified that the date when the cheque was provided to Mrs Dingezweni and the signature that the cheque was received by her. Mrs Dingezweni acknowledged receipt of the cheques. She recognised her signature on certain of the pay slips, but not on others.
- [9] Mr Mana died in April 2015.
- [10] On 20 August 2015, the Department of Education paid to Mrs Dingezweni the equivalent of three months' basic salary. Mrs Dingezweni testified that she repaid the SGB the R15 000 that had been advanced to her. This is not refuted by Mr Tyilana.
- [11] Mrs Dingezweni testified that she did not receive payment of her allowance in lieu of benefits. She queried this shortfall with Mr Tyilana.
- [12] Mrs Dingezweni testified that Mr Tyilana approached the Department of Education to obtain clarity regarding Mrs Dingezweni 's salary. On his return, Mr Tyilana informed Mrs Dingezweni that the Department

had terminated her contact as Mr Mana had died. Mrs Dingezweni testified that Mr Tyilana suggested to her that she seeks advice as he had not encountered such an issue before.

[13] This is where the evidence of the parties diverges.

[14] Mr Tyilana refuted that Mrs Dingezweni was only informed of her termination of employment in August 2015. His evidence was that Mrs Dingezweni had been informed that her position was terminated in May 2015, when Mr Tyilana informed the Department of Mr Mana's death. Mr Tyilana did not testify as to the exact date when the Department was so informed or when he informed Mrs Dingezweni that her contract had been terminated.

[15] Mrs Dingezweni testified that following Mr Tyilana's suggestion, she sought legal advice. On the strength of this advice, in September 2015 Mrs Dingezweni tendered her continued services to the school to teach life sciences for the balance of her fixed-term contract to the end of December 2015. Mrs Dingezweni testified that Mr Tyilana accepted her tender and told her that the SGB would continue paying her the R5 000 stipend, which would be repayable to the SGB when she was paid her salary by the Department.

[16] Mrs Dingezweni testified that she lodged a grievance with the Department of Education, recording that she had not been paid her full salary for the period February, March and April 2015 and had not

been paid at all since May 2015. She handed the written grievance to Mr Tyilana, as a representative of the Department. Mr Tyilana acknowledges that he received the grievance on behalf of the Department. Mrs Dingezweni heard nothing further from the Department relating to this grievance. Her full salary for the period February to April 2015 was paid on 1 October 2015.

[17] Mr Tyilana 's evidence was that he informed Mrs Dingezweni of the SGB's decision to appoint her as an educator in the life sciences post at a salary of R5 000 a month, for the balance of the year, which Mrs Dingezweni accepted. It is unclear when the SGB made this decision or when Mr Tyilana told Mrs Dingezweni of this decision. Mrs Dingezweni vociferously denied that she was employed by the SGB in an SGB post.

[18] Mrs Dingezweni testified that she received an amount of R2 500 per month from the SGB in September, October, November, and December 2015 in the same manner that she had received the R5 000 monthly stipend advanced to her by the SGB as a loan. Mrs Dingezweni denied that the signature which appeared on the documents headed "*pay slip*" was hers. Mr Tyilana testified that the document "*pay slip*" is proof that Mrs Dingezweni was employed by the SGB.

[19] There was no evidence that Mrs Dingezweni was paid R5 000 monthly as the "salary" for the SGB post.

[20] The nub of dispute is whether Mrs Dingezweni was employed by the Department in the period May to December 2015 or the SGB.

[21] Mrs Dingezweni 's claim is a pecuniary one for payment of the balance of her fixed-term contract, namely, from 1 May 2015 to 31 December 2015.

[22] The jurisdiction of the High Court to determine such monetary claims, arising from a fixed-term contract, was recognised in the matter of *Fedlife Assurance Limited v Wolfaardt*¹ where the Supreme Court held that the Labour Relations Act 1995² did not interfere with the common law right to pursue such a claim in the High Court.

[23] Section 157(2) of the Labour Relations Act recognises the duality of the Labour Court and the High Court to consider such monetary claims. The section reads:

(2) *The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –*

(a) *employment and from labour relations;*

¹ [2002] 2 All SA 295 (A).

² Act 66 of 1995

(b) *any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*

(c) *the application of any law for the administration of which the Minister is responsible.”*

[24] Similarly, section 77(3) of the Basic Conditions of Employment Act 1998 recognises the duality in jurisdiction between the Labour Court and the High Court.

The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. irrespective of whether any basic condition of employment constitutes a term of that contract.”

[25] The Labour Appeal Court, in *Buthelezi v The Municipal Demarcation Board*,³ held that a premature termination of a fixed-term contract, on the grounds of operational requirements, was substantively unfair as:

25.1 at common law, a party to a fixed-term contract has no right to terminate the contract in the absence of repudiation or a material breach;

³ (2004) 25 ILJ 2317 (LAC)

25.2 the principal that a fixed-term contract may not be unilaterally cancelled has not been altered by labour legislation.

[26] The *Buthelezi* decision was approved and followed by the Constitutional Court in *The Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Limited and Others*.⁴

[27] I am bound by these decisions. If Mrs Dingezweni's fixed term contract with the Department was terminated prematurely, it is liable to pay her the balance of the contract.

[28] The Department of Education pleads, that it was an implied term of the contract that Mrs Dingezweni was appointed as a substitute against the post of Mr Mana and, consequently, on his death, Mrs Dingezweni's employment came to an end.

[29] An implied term is one implied by law. In the locus classicus of Alfred McAlpine, the Appellate Division (as it then was) couched an implied term as one which

"...is used to describe the unexpressed provision of a contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of

⁴ 2020 (4) BCLR 373 (CC) at [64]

the contract. Implied terms in context simply represent a legal duty (giving rise to a correlative duty) imposed by law unless excluded by the parties.”⁵

[30] Mrs Dingezweni’s employment contract specified that she was appointed by virtue of section 7(2)(b) of the Employment of Educators Act. This section recognises that an educator can be employed for a fixed term either on a full time or part time basis, subject to the Labour Relations Act.

[31] The implied term contended for by the Department (namely the termination of Mrs Dingezweni employment within the fixed term) is at odds with section 7(2)(b) of the Employment of Educators Act.

[32] The Employment of Educators Act identifies three circumstances for an educator’s employment to be terminated. These are retirement,⁶ resignation⁷ and the discharge.⁸

[33] The discharge of educators is subject to the provision of the Labour Relations Act.⁹ There are three categories applicable to the discharge of educators for ill-health,¹⁰ at the end of a probation period¹¹ and those educators who are deemed to have been discharged.¹² The

⁵ *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E-H

⁶ Section 10

⁷ Section 15

⁸ Section 11 to 14

⁹ Section 11(1)

¹⁰ Section 12

¹¹ Section 13

¹² Section 14

deeming provision only applies to permanently appointed educators. Mrs Dingezweni was not permanently appointed nor appointed with a probation period, nor was she discharged because of ill-health. Mrs Dingezweni could only be lawfully discharged as an educator, in terms of the prescribed procedures under the Labour Relations Act. There was no evidence that that these procedures were followed.

[34] At common law, the premature termination of a fixed-term contract is unlawful. This common law position was an implied term to the fixed-term contract concluded between Mrs Dingezweni and the Department. Had the parties wished to exclude the consequence of a fixed-term contract, they would, as recognised in the *Alfred McAlpine* matter, have had to exclude this term expressly. The parties did not do so.

[35] I find that there was no implied term that Mrs Dingezweni 's fixed-term contract with the Department of Education would terminate on the death of Mr Mana.

[36] Two version of the appointment letter were tendered in evidence. The first relied on by Mrs Dingezweni recorded the fixed term contact for the period 9 February 2015 to 31 December 2015. The second relied on by the Department, had a manuscript correction to the date 31 December 2015 date, amending this to 30 April 2015. The manuscript correction was signed. No evidence was led regarding the identity of the person who made the amendment. Mrs Dingezweni

denied receiving that version appointment letter in 2015. She saw this version her evidence was, in these proceedings.

[37] The contemporaneous documentary evidence supports Mrs Dingezweni 's version. Mrs Dingezweni was only entitled to the 37% allowance in lieu of benefits in the event that her appointment was for a period equal to or exceeding six calendar months. Mrs Dingezweni 's evidence was that she signed the election to receive the 37% benefit payment in cash on 25 August 2015. The Department approved benefit payment in cash on 1 September 2015. On 1 October 2015, the Department and paid Mrs Dingezweni the equivalent of the benefit for 3 months. Had the contract expired on 30 April 2015, as contended by the Department, and testified by Mr Tyilana it is improbable that the Department would approve the payment of the allowance in September 2015 or paid it in October 2015. Mrs Dingezweni' would not have been entitled to the benefit. Her fixed term contract would have lapsed three months before such payment was triggered. I accept Mrs Dingezweni 's evidence.

[38] The Department contends that it was not liable to pay Mrs Dingezweni as she was not employed by the Department from 1 May 2015. Mr Tyilana supported this testifying that Mrs Dinesen was employed by the SGB in a SGB post.

[39] Section 20(10) of the South African Schools Act exonerates the Department of Education for "*any act or omission by a public school*

relating to its contractual responsibility as the employer in respect of staff employed in terms of subsections (4) and (5)".

- [40] Subsection 4 and 5 referred to above, relate to SGB posts. All school governing bodies may *"establish posts for educators and employ educators additional to the establishment determined by the members of the executive council in terms of section 3(1) of the Educators Employment Act 1994"*.¹³ When an SGB establishes these posts, the posts must be funded in the school's annual budget.

"When presenting the annual budget contemplated in section 38, the governing body of a public school must provide sufficient detail of any posts envisaged in terms of subsections (4) and (5) including the estimated costs relating to the employment of staff in such posts and the manner in which it is proposed that such costs will be met."

- [41] Mr Tyilana testified that the SGB had included provision in the school's annual budget approved in September 2014, for funds required to pay relief teachers, like Mrs Dingezweni. This was the full extent of his evidence.

- [42] The requirements of the South African Schools Act are specific. A school governing body bears the responsibility, firstly, to establish posts additional to the establishment and then, secondly, to make

¹³ Section 20(4) of the South African Schools Act 1996

provision fund the posts in the annual budget as approved by the parents and/or natural guardians of the learners.

[43] There was no evidence that the SGB had approved a life sciences post outside the establishment of the school or that this post was specifically funded. Mr Tyilana could give no explanation as to why the SGB only paid Mrs Dingezweni a salary of R2 500.00 per month from September 2015, when this post was funded.

[44] This evidence is in sharp contrast to the letter Mr Tyilana addressed to the District Director in January 2015 requesting that the Department provide a substitute teacher for Mr Mana. Had the SGB established a funded post for the life sciences as Mr Tyilana testified, such a request would not have been made to the Department.

[45] The terms of employment of educators in SGB posts are governed by the Labour Relations Act. It would be contrary to the Labour Relations Act to employ an educator at monthly salary of R5 000 or to unilaterally reduce the monthly salary to R2 500.

[46] Mr Tyilana 's evidence that Mrs Dingezweni was employed by the SGB is highly improbable. Mrs Dingezweni 's evidence is more probable.

[47] I find that Mrs Dingezweni was not employed by the SGB in the period May 2015 to December 2015. Mrs Dingezweni was employed by the

Department in terms of her fixed term contract. The Department failed to pay Mrs Dingezweni for the period May to December 2015.

[48] Having found that there was no implied term in Mrs Dingezweni 's fixed term contract that it terminated on the death of Mr Mana, and that Mrs Dingezweni was not employed by the SGB, it is not necessary for me to deal with Mrs Dingezweni 's alternate enrichment claim.

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

49.1 the first and/or second defendants unlawfully breached the fixed-term contract concluded with Mrs Dingezweni for the period 9 February 2015 to 31 December 2015;

49.2 the defendants are to pay the plaintiff the following sums, jointly and severally, the one paying the other to be absolved:

49.2.1 the sum of R255 513.74;

49.2.2 interest at the prescribed legal rate a tempore morae calculated on each monthly payment for the period May to December 2015, when each payment fell due on the last day of each month to date of payment;

49.3 costs of suit.

DREYER AJ
ACTING JUDGE OF THE HIGH COURT

Representation for plaintiff

Counsel: Adv Burger
Instructed by: Hutton & Cook
King William's Town

Representation for defendants

Counsel: Adv Nebela
Instructed by: The State Attorney
King William's Town
Date of hearing: 10,11 & 25 August 2022
Date of judgment: 27 September 2022