



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – BHISHO]**

CASE NO.: 729/2017

In the matter between: -

**MEC FOR THE DEPARTMENT OF EDUCATION,
EASTERN CAPE**

1ST APPLICANT

**THE HEAD OF DEPARTMENT, DEPARTMENT OF
EDUCATION**

2ND APPLICANT

and

THANDIWE ROSEMARY MXOLI

RESPONDENT

JUDGMENT

NORMAN J:

- [1] The parties have been cited in the manner they appeared in one of the cases. This may create confusion in relation to the relief sought. I shall accordingly refer to the respondent as Ms Mxoli and the applicants as the “department”. Ms Mxoli brought an application on 24 June 2023 seeking the following order:

“Directing that the abovenamed applicant take such administrative or other steps as may be necessary:

- 1.1 *To comply with, alternatively, to facilitate compliance with, the purport and substance of the order granted on 10 July 2019 in terms of which the applicants were ordered to reinstate the Respondent as an educator in terms of section 14(2) of the Employment of Educators Act 76 of 1998.*
- 1.2 *To comply with paragraph 6 of the further order granted on 10 June 2021, directing the Applicants to procure payment to the Respondent of the arrear salaries due to her.*
2. *Condoning the Respondent's non-compliance with the order of 10 June 2021 which directed her to travel to Mthatha "... for purposes of completing the Assumption of Duty form with the school principal of the said school within fifteen (15) days from date of this order."*
- 1.3 *Directing that the Applicants pay the costs of this application, including those costs reserved on 10 June 2021."*

Background facts

[2] On 10 July 2019 Ms Mxoli brought an application against the respondents, namely, the Member of the Executive Council Department of Education and the Head of Department of Education (the department) wherein she sought an order that:

- "1. *The second respondent's decision declining the applicant's request for reinstatement be set aside.*
2. *The applicant is reinstated as an Educator in terms of the provisions of section 14(2) of the Employment of Educators Act No.76 of 1998 (the Act). and*
3. *The respondents are to pay the applicant's costs jointly and severally."*

[3] Ms Mxoli alleged that on 29 August 2017, the department invoked the provisions of section 14(1) of the Employment of Educators Act 76 of 1998 (the EEA) and dismissed her. She appealed against that decision but the appeal was refused. She then approached the court challenging the department's decision refusing her reinstatement. She was successful and the order sought was granted by Hartle J, on 10 July 2019 (2019 order).

[4] She alleged that the department failed to comply with the order instead it raised administrative issues which they argue needed to be satisfied before they procure her reinstatement. Thereafter the department brought a

substantive application under the same case number for an order in terms of Rule 42(1)(b) contending that the order granted by Hartle J in its current form requires interpretation in terms of its practical implementation as it is obscure, ambiguous and uncertain.

[5] The department argued that to comply with the order of reinstatement the applicant would have to attend at the Vulindlela Senior Secondary School in Port St. Johns to complete an assumption of duty form. She opposed the relief that the department sought and contended that the department was in fact deliberately obstructing the implementation of the order. An order was issued by Stretch J, on 10 June 2021 (2021 order). It appears that the order was consented to by both parties. The order reflects that both parties were legally represented. Mr Mayekiso represented the department and Ms Burger represented Ms Mxoli in the proceedings, before Stretch J.

[6] The Order reads:

"IT IS ORDERED BY CONSENT THAT:

- 1. Respondent is to report at KD Matanzima Building, Mthatha for purposes of completing the assumption of duty form with the school principal of the said school within fifteen (15) days from the date of this order.*
- 2. Respondent is ordered to facilitate submission of relevant documentation for her reinstatement including banking details forms duly completed for submission at OR Tambo Coastal District offices of the Department in Mthatha.*
- 3. If the respondent feels incapacitated or sick she is required to apply for incapacity leave or sick leave immediately after finalisation of submission of reinstatement documentation and completion of assumption duty forms.*
- 4. If the respondent intends to apply for medical boarding she is required to complete the necessary application forms and follow the process in terms of the applicable policies and prescripts.*
- 5. Applicants and respondent are duly authorised to communicate with each other directly as employer and employee whether through telephone communication or other means in order to speedily finalise the reinstatement process.*
- 6. Applicants are ordered to pay the arrear salary due to the respondent.*
- 7. The issue of costs is reserved."*

[7] On 28 June 2021, Nolands Law, Ms Mxoli's attorneys wrote to the state attorney wherein they stated that in terms of the order agreed to by the parties

their client was expected to travel to Mthatha from Port Elizabeth to complete certain documents. Given the fact that their client had been deprived of her income for years and is destitute she would not be able to comply with the order. Once the arrear salary is paid she will be able to do so. They then requested the state attorney to expedite payment so that the rest of the order may be implemented.

[8] On 6 July 2021 another letter was written to the state attorney by Ms Mxoli's attorneys advising the state attorney that because of the department's failure to pay their client's salary, her bank account, has been frozen. They stated that First National Bank required her to open another account. They accordingly attached a copy of the customer information agreement dated 1 July 2021 which reflected Ms Mxoli's new bank details. The state attorney was then requested to communicate those bank details to the department.

[9] On 31 August 2021, the state attorney wrote to Ms Mxoli's attorneys, and recorded the following:

"We refer to your letter dated 28 June 2021 in the matter and respond as follows:

Your client has not complied with paragraph 1 of the court order in that she has not reported to KD Matanzima Building, Mthatha for purposes of completing an assumption of duty form with the school principal and a period of fifteen (15) days from the date of the order has lapsed. Your client has to be reinstated in order for the Department to be able to pay her arrear salary. Your client will have to communicate with the Department to finalise the reinstatement process and the Department will be able to process payment of her arrear salary.

Kindly therefore advise your client accordingly.

NP Yako

State Attorney, East London."

[10] Nolands Law attorneys responded and stated the following:

“We refer to our prior letter of 6 July 2021 and our subsequent letter of 13 August 2021 copies of which are annexed hereto. We respectfully suggest to you that your client’s contention that our client must travel to Mthatha notwithstanding that your client has deprived her of all forms of income for literally years is disingenuous. If your client does not comply with paragraph 6 of the order of 10 June 2021 within fourteen (14) days we propose launching contempt proceedings. We will do so without further notice.”

[11] On 2 November 2021, Ms Mxoli’s attorneys wrote again to the state attorney suggesting that the assumption of duty forms must be forwarded to them and they would ensure that their client completes the forms. They would then send them back to the state attorney. They also contended that payment of arrear salary was not dependent on their client travelling to Mthatha to sign an assumption of duty form. They insisted that the monies should be paid to their client or alternatively, the department should send money to Ms Mxoli to enable her to travel to Mthatha.

[12] On 21 February 2022, Ms Mxoli’s attorneys wrote again and threatened that if there was no compliance with their demand they would lodge further proceedings.

Ms Mxoli’s case

[13] On 05 December 2022 the current proceedings were launched. In these proceedings, Ms Mxoli contends that she is destitute. She stated that she does not have money and is not able to raise monies to travel to Mthatha. She accordingly seeks payment of arrear salary due to her. She also seeks an order directing the department to comply or facilitate her reinstatement in terms of the 2019 order.

[14] All the correspondence exchanged between the parties is attached to Ms Mxoli’s papers.

Department's case

[15] The Acting Head of department, Mr Mahlubandile Qwase deposed to the answering affidavit on behalf of the department. The department contends that the applicant has failed to honour the court order because she failed to report for duty. She failed to complete her assumption of duty form with her district office being the OR Tambo Coastal District office at KD Matanzima Building in Mthatha where she was stationed before the invocation of the deemed discharged provision, which was later set aside, by the court. She also failed to honour a further court order where the parties had agreed on certain terms as contained in the 2021 order.

[16] The department contends that Ms Mxoli failed to report at the KD Matanzima Building for purposes of completing the assumption of duty form with the school principal of Vulindlela Senior Secondary School (Vulindlela) in Port St. Johns within fifteen (15) days of granting of that order. Ms Mxoli has not submitted documents necessary to facilitate her reinstatement, which included, among other documents, the banking details forms duly completed which must be submitted in person to the district office. She had not submitted any sick leave or incapacity leave application forms to the school principal of Vulindlela or to her district office at KD Matanzima Building in Mthatha. She has simply absented herself from 10 July 2019 to date of deposing to the affidavit.

[17] The department alleged that Ms Mxoli has committed another episode of abscondment because she has failed to report for duty despite having been reinstated on 10 July 2019 by an order of court, and thus has not been at work for a period in excess of three (3) years. She has again offended the provisions of section 14(1) of the EEA. She has been absent from work for a period in excess of fourteen (14) days without any permission or authorisation from her employer. The department contends that Ms Mxoli is not entitled to any remuneration or salary due to her unauthorised absence from work during the period commencing from 10 July 2019 to the date of the affidavit.

[18] The department further alleged that Ms Mxoli was abusing the court processes because she went to court to seek relief but failed to comply with the orders issued by the court. It concluded that Ms Mxoli is not willing to render services as an educator to the department. The deponent stated that all the employees of the department are treated equally and Ms Mxoli cannot expect special treatment in flagrant disregard of the policies and prescripts of the department.

[19] An employee is expected to offer her services to the employer in exchange for remuneration and the respondent has failed to do so for three (3) years since her reinstatement. The procedural steps that they mentioned in the affidavit are necessary in order to procure reinstatement of Ms Mxoli into the persal system of the department. No salary can be processed if an employee has not assumed duty and signed all the relevant assumption of duty forms in person at a designated district office.

[20] The department had extended a favour to Ms Mxoli by stating that she must report at the district office in Mthatha because ordinarily she is required to report at her school being her workstation at Vulindlela. They asked for the application to be dismissed with costs. He stated:

“26.6 I wish to reiterate that a person who is not on the persal system cannot receive a salary and further that in order to be loaded in the persal system an employee was removed through a deemed discharged must physically report for duty at her work station in order to be reinstated, when a court has so ordered through signing the assumption of duty forms and other related documents as outlined above.”

[21] The department contends that Ms Mxoli has abandoned the various court orders. In responding to the allegation that Ms Mxoli's attorneys had asked that the forms be sent to them, he stated that, forwarding of a bank printout is not in compliance with the reinstatement requirements, because there are banking detail forms of the department which must be completed and stamped by the relevant banking institution of the employee. Thereafter those forms must be submitted back to the department. He contends that reporting to a relevant workstation cannot be substituted because it is necessary to do so in order to avoid the issue of having 'ghosts' as employees.

[22] The department submitted that Ms Mxoli has failed to make out a case for the relief sought and her application must be dismissed with costs, alternatively, the court must declare that she has abandoned the court orders which were granted in her favour and that she be deemed to have been discharged.

Reply by applicant

[23] In reply Ms Mxoli stated that because she has not been reinstated yet, she is not an employee and is thus not subject to the EEA.

Ms Mxoli's legal submissions

[24] In argument Mr Maseti appeared for Ms Mxoli and Mr Mayekiso appeared for the department. Mr Maseti submitted that Ms Mxoli has brought this application to enforce the 2019 order. In the proposed draft order Ms Mxoli seeks an order condoning her failure to comply with the 2021 order; that the department pay the arrear salaries in compliance with the 2021 order within 30 days of the granting of the order, and that the department should pay costs of the application including costs reserved on 10 June 2021. Mr Maseti submitted that Ms Mxoli's failure to attend to Mthatha to complete the assumption of duty forms must be condoned and that the department should pay costs of the application including those of 10 June 2021. He argued that the department and its officials are recalcitrant and lack accountability, efficiency and professional ethics. He relied on ***Matjhabeng Local Municipality v Eskom Holdings Limited & Others***¹, ***Mkhonto & Others v Compensation Solutions (Pty) Ltd***² for the submission that the order proposed in the draft order is appropriate, namely, that Ms Mxoli's conduct of not reporting for duty be condoned; and that the department pay costs. The cost order, he submitted, would be consistent with the reasoning in those decisions. He submitted that where it was contemplated that in dealing with public officials who fail to comply with court orders, those principles ought to be applied. He also relied on ***Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng***³.

¹ 2018 (1) SA 1 (CC).

² 2018 (1) SA 1 (CC).

³ [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 CC.

Department's legal submissions

[25] Mr Mayekiso, on behalf of the department submitted that the main issue upon which this court is called to decide is whether a salary backpay can be enforceable before an employee is reinstated, meaning, prior to Ms Mxoli tendering her services. It was submitted that the court must decide whether an employee who refuses to tender services to the employer has not in effect abandoned the judgment and a court order which reinstated her in the first place. The other issue that the department raised is for this court to determine whether the purported contempt proceedings are appropriate to enforce the arrear salaries.

[26] Relying on the legal principles applicable on reinstatement, it was submitted that an employee's entitlement to arrear salary to a reinstatement court order is dependent on the restoration of the contract of employment between the parties. In this regard, reference was made to ***Kubeka & Others v Nida Transport (Pty) Ltd***⁴. It was further submitted that the contract of employment is revived only when the formally dismissed employee tender her services pursuant to a reinstatement order⁵.

[27] Relying on the same judgment the department contends that in the *Kubeka* matter the court dealt with the requirements that must be met before a formally dismissed employee can claim salary backpay. A requirement that a back pay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of section 193 of the Labour Relations Act (the LRA). As Mr Watt- Pringle, counsel for the respondents correctly submitted, if

⁴ 2021 42 ILJ 499 (LAC).

⁵ See ***NUMSA obo Fohlisa & Others v Hendor Mining Supplies (Pty) Ltd*** 2017 38 ILJ 1560 (CC).

an employee in receipt of a reinstatement order could on the strength of the order alone claim contractual payment for the retrospective part of the order without actually seeking reinstatement (tendering prospective services). It would convert a reinstatement remedy which requires a tender of services into a compensation award (which does not, in excess of the statutory limitation on compensation awards. Such an outcome would be inconsistent with the purpose of section 193 and 194 of the LRA. An unfairly dismissed employee must elect his or her preferred remedy and if granted reinstatement must tender his or her services within a reasonable time of the order becoming enforceable. If reinstatement has become impracticable through a reflection of time, for instance where the employee has found alternative employment, he or she should seek to amend his or her prayer for relief to one seeking compensation.

[28] It is submitted on behalf of the department that based on those authorities an employee is barred or precluded from claiming any perceived arrear wages until he or she tenders her services to the employer within a reasonable time after the reinstatement court order. In this case, Ms Mxoli refused to tender her services to the employer within a reasonable time and thus is not entitled to the relief she is seeking. He then submitted that the Court should dismiss Ms Mxoli's case with costs and to incorporate the declarations that are proposed that she must be regarded as having abandoned the court orders and also as having absconded because she has absented herself without authorisation.

Discussion

[29] As aforementioned, Ms Mxoli has stated in reply that because she has not been reinstated yet, she is not an employee and the EEA does not apply to her. Section 14 (2) of the EEA provides that:

“(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine.”

[30] This section places the obligation of taking the step of ‘reporting for duty’ on the employee. *In casu*, the reinstatement was ordered by court. Ms Mxoli’s reinstatement cannot be effected until Ms Mxoli has reported for duty. She has decided to make reporting for duty conditional upon payment of her arrear salary. Despite several advices from the department and even when she agreed to report for duty, as per the 2021 court order, she still refused to do so until her arrear salary has been paid.

[31] By her actions she is making it impossible for the department to comply with its obligations in terms of both court orders. The issue of reporting for duty is not only administrative but it restores the contract of employment between Ms Mxoli and the department.

[32] In the case of *Kubeka, supra*, at paragraph 35 the Labour Appeal Court remarked as follows:

“[35] The decision of the Constitutional Court in Hendor therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee’s remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.”

[33] In *National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd*⁶, the Constitutional Court made it clear that there were reciprocal obligations. The employee had obligations to present her or himself for work and the corresponding obligation to accept him or her to workflows from the court order. In the NUMSA case the employees reported for duty as directed by the court order but the employer refused to reinstate them. This case stands on a different footing as the employee in whose favour the reinstatement order was made in the 2019 order, refuses to report for duty, even when the employer has agreed that she reports at the district office instead of Port St. Johns. Ms Mxoli now seeks condonation for her failure to report for duty. That unfortunately is not an answer to the reinstatement issue. No reinstatement will take place until she reports for duty. No court is empowered to condone her failure to report for duty because her failure to do so does not revive the contract of employment with the department.

[34] Ms Mxoli has approached court for her reinstatement but has since the grant of the order failed to take steps, such as reporting for duty, to ensure that the order is effected. She agreed to the 2021 order which also sought to give effect to the 2019 order in a more practical way. She still refused to report for duty.

[35] Ms Mxoli is legally represented and has been so represented throughout this litigation. It is not clear to me what advice she is being given and if she rejects it, the basis upon which she does so.

⁶ [2017] ZACC 9.

[36] I am not satisfied that a case has been made out for this court to come to the aid of Ms Mxoli, again, who refuses to report for duty to date. I am not inclined to dismiss the application since this is a matter that relates to her employment. I shall simply strike the matter off the roll in the hope that she will, after reading this judgment, realise that she is putting her career and livelihood at risk by not reporting for duty. Since she has placed under oath that she is indigent, I will not order that she pays costs of this application.

ORDER

[37] I accordingly make the following Order:

37.1. The matter is struck from the roll.

37.2. Each party is to bear its own costs.

T.V. NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : 15 June 2023

Judgement Delivered on : 20 June 2023

APPEARANCES

For the APPLICANTS : MR MAYEKISO

Instructed by : THE STATE ATTORNEY

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