

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 35/03

MPHO GIVEN PHENITHI

Applicant

versus

THE MINISTER OF EDUCATION

First Respondent

MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION IN THE PROVINCIAL
GOVERNMENT OF THE FREE STATE

Second Respondent

THE HEAD OF DEPARTMENT OF EDUCATION
IN THE PROVINCIAL GOVERNMENT
OF THE FREE STATE

Third Respondent

Decided on : 6 October 2003

JUDGMENT

THE COURT:

[1] The applicant seeks direct access to this Court to have parts of section 14(1) and section 14(2) of the Employment of Educators Act¹ (the Act) declared unconstitutional and invalid. She had been employed by the Free State Provincial government in a permanent capacity as an educator until 18 May 2000. She says in her affidavit that she had to be away from work for more than a month because she

¹ Act 76 of 1998.

was ill. When the applicant returned to work, however, she was informed by the provincial Department of Education that she was deemed to have been discharged from service by reason of the provision of section 14(1) of the Act. That section is to the effect that:

“An educator appointed in a permanent capacity who . . . is absent from work for a period exceeding 14 consecutive days without permission of the employer . . . shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct”

[2] The matter was referred to the Education Labour Relations Council and, after conciliation failed, came before an arbitrator. On 21 February 2002, the arbitrator concluded that he had no power to arbitrate on the issue² and expressed the view that the applicant could apply to the High Court or to this Court to challenge the constitutional validity of section 14.

[3] The application for direct access to this Court was lodged about a year and a half after the arbitrator’s award. In essence, the applicant urges us on two grounds to hear this case without her first approaching the High Court. First, she says that she is unemployed and would be financially prejudiced by having to incur additional costs if the matter had to serve before two courts. Second, she claims that the delay occasioned by two court hearings as well as the “appeals and cross appeals” that could arise would further prejudice her.

² The reasons for that conclusion or its correctness are not relevant here.

[4] Applications for direct access are granted only in exceptional circumstances.³

This Court expanded on the requirement of exceptional circumstances in *Fleecytex* as follows:

“[T]he mere fact that the validity of a provision of an Act of Parliament is in issue does not in itself justify an application for direct access. There must in addition be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure.” [footnote omitted].⁴

[5] The applicant raises a constitutional point which warrants consideration. However, she has delayed more than eighteen months in pursuing relief, and discloses no good reason for this delay. Moreover the applicant, instead of launching proceedings in the High Court in the ordinary way, has sought to approach this Court directly. On the limited papers we have, it seems possible that factual disputes may arise between the applicant and the respondents. This Court has stated on many occasions that it is not desirable for this Court to sit as a court of first and final instance in any circumstances, but especially where disputes of fact may arise.⁵ The fact that the applicant is indigent and the fact that the ordinary procedure would take time before relief is finalised are not sufficient, in the light of these other considerations to warrant the grant of direct access.

³ Authority in support of this proposition is usefully catalogued in *Ex parte Omar* CCT 32/03, 11 September 2003, as yet unreported, para 4 n 1.

⁴ *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 19.

⁵ *Van der Spuy v General Council of the Bar of South Africa and Others* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 (CC) para 18 is an example.

[6] The application for direct access is accordingly dismissed.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J,
Moseneke J, Ngcobo J, O'Regan J, Sachs J, Yacoob J.

For the applicant:

Mapitse & Khang Attorneys

For the respondents:

The State Attorney