148/1958

148/58

G.P.-S.134917-1955-6-1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division.)
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

DURBAN CATO MANOR BANTU SCHOOL Bd + ANO. Appellants

versus

DAVID MCAKUMBANA Respondent.

Appellant's Attorney
Prokureur vir Appellant R.W. Leon
Respondent's Attorney
Prokureur vir Respondent Ed Wall LTD.

Appellant's Advocate
Advokaat vir Appellant H.V.L. Bizzell Q.C.
Respondent's Advocate
Advokaat vir Respondent Leo v.d. Heever

(DCL) (Consent)

Set down for hearing on
Op die rol geplaas vir verhoor op Tuesday 18th Nov, 1958.

9.45-12.50, 2.15-3.55 C.AV

1.2.4.10.11 (A)

JUDGMENT: WEDNESDAY, 10th DECEMBER, 1958.

Appeal dismissed with costs.

Coram: [illegible], Price [illegible], [illegible] JJA

[illegible]
REGISTRAR.
10/12/58

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DURBAN CATO MANOR BANTU SCHOOL BOARD. 1st Appellan/t

and THE MINISTER OF NATIVE AFFAIRS. 2nd.Appellant

and

DAVID MCAKUMBANA Respondent

Coram:Schreiner, A.C. J. Hoexter, de Beer, JJ.A. Price et Smit, A.JJ.A.

Heard: 18th November, 1958. Delivered: 10 - 12 - 58

J U D G M E N T

SCHREINER A.C.J. :- This appeal was argued,both in the court below and in this Court, in conjunction with that of Umlazi Coastal Bantu Area School Board and the Minister of Native Affairs v. Mildred Mahanjana. The claims for relief were similar and the ststutory provisions involved were the same. I do not therefore propose to repeat what was said in that case or refer again in detail to the Glen Grey-Butterworth case, where the provisions were examined and correlated.

The respondent was in the service of the Natal Department of Education as a teacher in native schools/.....

schools from the year 1948 until the Bantu Education Act (No. 47 of 1953), which I shall call "the Act", came into operation on the 1st January 1954. He taught at Lorsm Government Secondary School from 1949 until, in April 1955, he was transferred to Lamontville Government Secondary School; in August 1955 he was transferred to Chesterville Government Senior School. At all material times the last-named school was under the control of the first appellant; It was a Government Bantu School from the 1st January 1954 until the 7th October 1955 when a dis-establishing order, issued in July 1955 under section 7 (3) of the Act, came into operation and the school became a Bantu Community School. The respondent continued to teach at this school until he received from the first appellant notice of dismissal, dated the 1st February 1956, the validity of which he successfully challenged in the court below. Whether the notice of dismissal was valid depended on what the respondent's conditions of service were at the time when the notice was given.

His conditions of service were admittedly those contained in the Natal Education Ordinance, 1942, including section 55 referred to in Mildred Mahanjana's case, until the Chesterfield School became a Bantu Community

School/.....

School on the 7th October 1955; but the appellants contended that as from that date the conditions were those to be found in Appendix A to the Schedule to Government Notice 86 of 1955. If the old Natal conditions applied the notice of dismissal was bad; if the conditions in the Appendix applied the notice was good.

No regulation directly made the conditions in the Appendix applicable to the respondent. But the appellants claimed that, if the respondent could be shown to have agreed with the first appellant that his contract of service was to be governed by the conditions in the Appendix, that agreement would be effective in terms of the Act and the regulations, as interpreted in the Glen Grey - Butterworth case. It was, however, common cause that in the present case, unlike the position in the case of Mildred Mahanjana, the form Annexure A to Appendix A to the Schedule of Government Notice 86 was not completed by the first appellant and the respondent. The appellants were therefore constrained to seek elsewhere a contract binding the respondent to the conditions in Appendix A.

The appellants relied upon a letter, apparently in standard form, which was sent by the secretary/.....

-retary of the first appellant to the respondent on the 15th August 1955, and upon the respondent's reply thereto.

The letter of the first appellant reads :-

"As a result of the publication of Government Notice No.86 of 14th January,1955 and the placing of the control of the School in which you now serve under the School Board for (Durban Cato Manor) it has become necessary to negotiate new conditions of service under which you may be employed by this School Board.

A copy of the conditions of service of my School Board, duly approved by the Secretary for Native Affairs, has been posted to your school principal, and I have to request you to inform me in writing within one month of the date of this letter whether you are prepared to continue in your present post at the same salary but subject to the new conditions of service, or you refuse to accept the new conditions of service. If you refuse to accept the new conditions of service, notice of termination of service will be sent to you under existing regulations.

It should be noted that failure to inform this School Board of your decision before.....1955, will be interpreted as refusal to agree to accept the new conditions of service.

To facilitate correspondence a form is attached for your use.

Please complete form 'C' in duplicate and return both forms to the Secretary. "

Form "C" was completed by the respondent and sent to the first appellant on the 16th August 1955. As completed it reads -

"I,/.....

"I, David Wiseman Mcakumbana, acknowledge receipt of your letter of the 15th August 1955. I have duly considered the conditions of service and I hereby accept the new conditions of service attached to my post.

D.W. Mcakumbana. "

Now in August 1955 when these letters were exchanged the Chesterfield Chesterville School was still a Government Bantu School and although it was under the control of the first appellant the latter was not the employer of the respondent. His employer was the Union Government in its Department of Native Affairs and the conditions of his service were still those to be found in the Natal Ordinance. It is true that in July 1955 a notice had been published in the Gazette that Chesterville School, among others, was being dis-established as from the 7th October 1955, after which it would be a Bantu Community School, but the fact remains that in August 1955 the respondent was not employed by the first appellant, and any agreement that might be entered into regarding the conditions of service which would obtain if he should come to be employed by it could only be provisional and dependent upon his subsequently making a contract of employment with the first appellant. The form annexed to the conditions in Appendix A contains the contract which would have to be entered into before the first appellant would be

entitled/.....

entitled to draw subsidy in respect of his salary. The first appellant could not have been bound by contract as a result of the August correspondence, since it certainly could not have intended to employ the respondent without receiving subsidy. What happened in August was that the first appellant ascertained in advance that if the respondent were subsequently employed by it he would have no objection to the new terms of service. But there was at that stage no contract of employment - that could only come about as a result of completion of the form annexed to Appendix A. As that form was never completed the case is covered by the Glen Grey - Butterworth decision and subject to the prescription argument advanced by the appellants the respondent must succeed.

The prescription argument is based on section 68 of the Natal Education Ordinance (No.23 of 1942). It reads :-

"68(1) No legal proceedings of any nature shall be brought against the Administrator or the Natal Provincial Administration in respect of anything done or omitted to be done after the commencement of this Ordinance, or in connection with any school maintained by the said Administration, unless such proceedings are brought before the expiration of a period of six months from the date upon which the claimant had -

knowledge/.....

knowledge or could reasonably have had knowledge of the act or omission alleged.

(2) No such proceedings shall be commenced until one month after written notice of the intention to bring such proceedings has been served upon the Administration, and particulars as to the alleged act or omission shall be clearly and explicitly given in such notice. "

It is not in dispute that if the appellants are entitled to the benefit of this provision the respondent did not observe subsection (2) and that he filed his application after the period mentioned in subsection (1) had expired. For the contention that section 68 is applicable to these proceedings the appellants rely on section 15(4 of the Act. So far as material that subsection reads -

"(4) Until the Minister makes regulations, the laws in force in the respective provinces immediately prior to the date of commencement of this Act.....shall, in so far as they relate to native education and are not inconsistent with the provisions of this Act, continue to apply mutatis mutandis in respect of native education. Provided that in any such law, any reference to the 'Governor' or the 'Administrator' shall be construed as reference to the Minister..... and any reference to the 'Department' as a reference to the Department....."

HENOCHSBERG J. held that section 68 does not bar the respondent's claim because, in the learned Judge's view, it does not relate to native education

within/.....

within the meaning of section 15(4). In this connection reliance was placed on the absence from the list of matters on which in terms of section 15(1) the Minister may make regulations of any reference to a special period of prescription. The only provision under which such a form of regulations could be supported would be the "blanket" paragraph section 15(1)(s). I find it unnecessary, however, to express any view on the correctness of this reasoning. For, assuming that the benefit of section 68 can in some circumstances be claimed by the Minister, it is in terms limited to proceedings "in respect of anything done or omitted to be done after the "commencement of this Ordinance, or in connection with any "school maintained by the said Administration." Neither the authorised edition of the 1942 Ordinances nor the version published in the Natal Provincial Gazette of the 13th August 1942 shows whether the English or Afrikaans text was signed by the Administrator. There is a difference, since the Afrikaans text reads "in of in verband met," where the English text has "or in connection with," without a preceding "in". Counsel for the appellants argued (a) that the English text should be followed, and (b) that if it is followed, section 68 covers all legal proceedings against the Administrator,

falling/.....

falling within the subject matter of the Ordinance, in respect of anything done or omitted after the commencement of the Ordinance, without regard to the words that follow, namely "or in connection with etc. ".

Whatever view be taken of the effect of sections 67 and 91 of the South Africa Act (see Regina v. Silinga, 1957(3) S.A. 354), it is not open to question that in some cases it would be necessary to ascertain which text was signed. In this case, however, I am prepared to assume, in favour of the appellants, that the signed text was the English one. On this view counsel for the appellants advanced the contention which I have lettered (b) above, and submitted that the present proceedings fell within the subject matter of the Ordinance and were in respect of something done after the commencement of the Ordinance. In my view, however, contention (b) cannot be sustained. To give it a semblance of plausibility counsel was constrained to limit the section's operation to proceedings falling within the subject matter of the Ordinance. No doubt such a limitation could be accepted if there were no other possibility. But on the suggested view there is grave grammatical awkwardness, and worse. One would have to read the "or" after "Ordinance" as separating, in the alternative, things done or omitted

"after/.....

"after the commencement of this Ordinance" and things done or omitted "in connection with any school etc." The result would not make sense.

Even therefore without recourse to the Afrikaans text for a suggestion it seems to me that the proper rendering of the English text is to read it as "in or "in connection with", by introducing the word "in", or else as "in connection with", by omitting the word "or". The result is certainly for present, and ~~probably~~ possibly for all purposes exactly the same, whether the "in" is inserted or the "or" omitted. Moreover, assuming that, even where there is no more than a difference between the two texts, the signed one must be preferred, this would not exclude the use of the unsigned text to suggest what might be the proper interpretation to be given to the signed text.

For these reasons it seems to me that section 68 only applies where the school in or in connection with which the proceedings are brought is "maintained "by the said Administration." Section 2 of the Ordinance provides that the Administrator may -

"(a) establish schools and for that purpose provide equipment and maintain such school buildings.....as he may deem necessary.....

(b) make grants-in-aid or loans to or for the assistance of -

(i)/.....

(i) schools not established or conducted by the Natal Provincial Administration....."

Section 4 reads -

"4. For administrative purposes all schools in the Province shall be divided into the following categories :-

(a) Government Schools;

(b) Government-aided Schools;

(c) farm schools;

(d) private schools; and

(e) special schools;

and such schools may be further divided into schools for European or for Coloured or for Indian or for Native pupils or for pupils belonging to any one or more of such classes of persons. "

An argument for the appellants was based on the amendment of section 23 (1) of the Ordinance by section 1 of Ordinance 12 of 1943 (N.), which resulted in empowering the Administrator to grant aid to non-European schools in the form of providing teachers, with the consequence that the provisions of Chapter V of the Ordinance, including section 55, would apply to them. No doubt the effect of the putting into operation of the amending provision might make it reasonable to place teachers in Government-aided schools on the same basis as teachers in Government maintained schools in respect of such a matter as the operation of section 68. But the 1943 amendment or anything done under it could not change the wording of section 68(1) so as to bring it within

the/.....

the phrase "any school maintained by the said Administration," schools in which the Administration provided grants-in-aid in the form of teaching staff. The argument must therefore be rejected.

A further argument advanced by the appellants rested upon the assumption that, for the reasons advanced by the respondent in the case of Mildred Mahanjana, Government Notice 61 of 1955 was invalid. Since for the reasons given in the judgment in that case the Government Notice was not invalid, the argument based on ~~that~~ the assumption that it was need not be further investigated.

Since Act 47 of 1953 came into force schools for natives are either (1)Government Bantu Schools, which are maintained by the Department of Native Affairs (section 7), or (2) other native schools, principally Bantu Community Schools subsidized under section 6. It is only the former that could be said to be maintained by the successor to "the Administration" mentioned in section 68, assuming that successor to be the Minister or the Department. It follows that the respondent's claim is not affected by section 68.

In the result, therefore, the conclusion reached by the learned judge was correct and the appeal is dismissed with costs.

Hoexter,J.A.
de Beer,J.A.
Price et Smit A.JJ.A. } Concur

H.J. Ackermann
9/12/58