



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1731/21

In the matter between:

NEW MODEL PRIVATE COLLEGE

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

1st Respondent

GLORIA NCALA, N.O.

2nd Respondent

PROSPER MAPHOSA & OTHERS

3rd to 26th Respondents

Heard: 3 September 2024

Delivered: 3 March 2025

(This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be on 3 March 2025)

JUDGMENT

MYBURGH, AJ

Introduction

[1] In her arbitration award, the second respondent (the commissioner) found that the individual respondents (the educators) had been unfairly suspended by the applicant (the School) and awarded them each 12 months' salary as compensation. The finding of an unfair suspension was premised on an antecedent finding by the commissioner that the educators were in the employ of the School when they were suspended.

[2] The School now seeks to review the award in terms of section 145 of the LRA.

The common cause factual matrix

[3] The educators had worked for the School for several years on fixed-term contracts that had been consistently rolled over.

[4] In 2020, the parties entered into a 12-month fixed-term contract (for the year). (This contract was entered into in the context of the Covid-19 pandemic and contained terms that may have broken the chain of renewals, but this was not pursued at the arbitration.)

[5] On 15 December 2020, the educators were issued with letters by the School reading as follows under the heading "End of contract of employment":

"We refer to the above contract of employment that you have with the School.

We would like to remind you that the contract ends on 31st December 2020.

Please note that, subject to learner enrolment numbers for 2021 and other business constraints including Corona virus related challenges, we be (sic) employing based on the year enrolment.

In the premises, you are at liberty to apply to the School to be considered to appointment in your field for the 2021 school period. If you are interested, please submit an application letter in writing on or before 31st December 2020.

Please note that if your services are required, the school will inform you so telephonically. It is therefore important that in your application letter you supply contact numbers on which the School can reach you, including alternative contact numbers.

Otherwise, the school wishes to take this time to heartly thank you for your services for the duration of your contract.”

- [6] The educators all then applied for positions in 2021, but they received no response from the School.
- [7] On 24 December 2020, Ms Mhlanga (the principal of the Junior School) sent a WhatsApp advising that the School would open on 13 January 2021. The WhatsApp was received by the educators (as they remained on a general WhatsApp group).
- [8] On 29 December 2020, Ms Mhlanga sent a WhatsApp requesting staff “to come and collect your payslips and letters tomorrow”. The WhatsApp was, again, received by the educators (and all other staff).
- [9] Also on 29 December 2020, the School addressed letters to the educators reading:

“On the 2nd December 2020 you participated in an unlawful and/or unprotected strike and you did so without notifying the School to enable the School to make necessary arrangements to ensure that learners, staff, parents and visitors were not compromised in view of the Covid-19 health risk.

As a result of your actions learners and your duties were left unattended and this posed a huge health risk to learners, staff, parents and visitors to the School.

Please note that your action constitute misconduct as defined in paragraph 3.13 of your contract of employment, entitling the School to institute disciplinary action against you.

Kindly be advised that the School is taking legal advice on the matter and reserves its right to institute disciplinary action against you.”

- [10] It appears that the educators received these letters when they arrived at the School on 30 December 2020 (as per Ms Mhlanga’s WhatsApp of the previous day).
- [11] On 31 December 2020, the educators’ 12-month fixed-term contracts expired.
- [12] On 4 January 2021, the educators were paid for the month of December 2020. Their payslips reflected their “next pay day” as being 4 February 2021. (This annotation appears to have generic in nature.)
- [13] On 6 January 2021, Mr Mafu (the principal of the High School) sent a WhatsApp to four people, including Mr Dewa (one of the educators¹), advising them that “the social distance markings need to be redone in preparation for the opening of the School.”
- [14] On 7 January 2021, Mr Dewa attended the School, but could not undertake the marking exercise as the necessary materials had not been purchased.
- [15] On 10 January 2021, Mr Mafu sent a WhatsApp advising the six HODs, including Mr Hlabangana (one of the educators²), of a meeting scheduled for 09:00 the following day.

¹ He testified at the arbitration.

² He also testified at the arbitration.

- [16] On 11 January 2021, the HOD meeting did not go ahead.
- [17] On 12 January 2021, Mr Mafu sent a further WhatsApp advising that “the staff meeting has been postponed”. This also appears to have been received by the educators (who remained on the general WhatsApp group).
- [18] On 13 January 2021, the School opened, but the educators were not reengaged.
- [19] On 4 February 2021 – three weeks later – the educators completed their referral of an unfair suspension dispute to the CCMA. In their referral, they summarised the facts of the dispute as follows:

“We were given letters on the 29th of December 2020 that the School is instituting disciplinary action against us. Since then have been waiting for the date but the School has already employed new staff and pupils are there learning.”

- [20] Significantly, it is contended in the CCMA referral that the dispute (i.e. the unfair suspension) arose on 31 December 2020. No suspension occurred on this day; instead, it is the date upon which the educators’ fixed-term contracts expired.

The commissioner’s award

- [21] The commissioner framed what she termed the “destructive versions” before her as follows:

“[T]he [educators] testified that they were still employees of the [School] and were unfairly suspended, [w]hilst it is the [School’s] contention that the [educators] were never suspended but their contracts came to an end, thus they were no longer employees of the [School].”

- [22] The commissioner went on to find that these five factors supported the educators’ belief that the employment relationship continued (post 31 December 2020) and that they were suspended:

- a) Firstly, the letter of 29 December 2020, with the commissioner finding that it was improbable that the School would have gone through the time and trouble of writing the letters “to employees whose contracts were ending in just two days”.
- b) Secondly, the School’s failure to remove the educators from the WhatsApp group.
- c) Thirdly, and related to this, the call for one of the educators to assist with Covid-19 markings, and another to attend the HOD meeting.
- d) Fourthly, the testimony of Ms Mhlanga (the sole witness for the School) to the effect that when Ms Maphosa (one of the educators³) phoned her on 27 January 2021 to find out what was happening, she told her that the School was still seeking legal advice.
- e) Fifthly, the failure by the School to provide the educators with their UIF forms, as confirmation that their contracts were not renewed.

[23] It is not clear to me whether all of these factual findings reasonably support the commissioner’s conclusion, and it does appear that the commissioner may have left some material facts out of account. But given the approach that I have adopted to the matter, there is no need to explore this any further.

[24] Reverting to the scheme of the commissioner’s findings, she then proceeded to have regard to a judgment of this court⁴ dealing with section 186(1)(b)(i) of the LRA. The section provides that a “dismissal” takes place in circumstances where an employee on a fixed-term contract “reasonably expected” the employer to renew a fixed-term contract on the same or similar terms, but the employer offered to renew it on less favourable terms or did not renew it.

³ She also testified at the arbitration.

⁴ *King Sabata Dalindyebo Municipality v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 ILJ 474 (LC).

[25] Drawing on this judgment, the commissioner found that –

“the ‘rolling over’ of the contract for a period of nine in some cases ten years, had also established a reasonable expectation that the contracts will be renewed and the reapplying for the position was merely an exercise to confirm staff complement for the following year.”

[26] In the light of this, the commissioner proceeded to find that the educators “discharged the onus of proving their [employment] relationship with the [School]”, and they “*are still employees of the [School]*” (own emphasis).

[27] With this as her point of departure, the commissioner went on to find that the educators’ “precautionary suspension” was unfair, inter alia, because “no explanation was given to [them] to be at home for over six months now and as to why their services were being suspended for such a long time.”

[28] Turning to relief, the commissioner held that the School must pay the educators the “remaining term of their contracts, January to December 2021”⁵ – this in circumstances where she had found that the School had replaced them. It is clear from this that the commissioner, in effect, determined the existence of a new 12-month fixed-term contract for the educators covering the 2021 academic year.

The principal basis for the award being reviewable

[29] Predictably, much of the argument in this matter centred on whether, properly construed, the educators’ remedy lay in challenging their unfair dismissal, instead of their unfair suspension.

[30] Had the commissioner presided over an unfair dismissal dispute arising from an alleged dismissal in terms of section 186(1)(b), she may well have found that the educators had a reasonable expectation that their fixed-term contracts

⁵ The award was issued on 12 July 2021, and varied on 13 July 2021.

would be renewed,⁶ and thus that the School's failure to renew the fixed-term contracts⁷ constituted a dismissal. She might then have gone on to find that there was no fair reason for the dismissal, and awarded 12 months' compensation (if appropriate).

[31] However, the commissioner did not preside over an unfair dismissal dispute arising from a dismissal in terms of section 186(1)(b), but rather over an unfair suspension dispute, which was *premised on* a contract of employment⁸ actually being in existence on the date of the educators' suspension. In my view, the fact that the LRA, in effect, deems the failure to renew a fixed-term contract where a reasonable expectation of renewal exists as constituting a "dismissal", does not mean that – in law – the failure to renew a fixed-term contract in such circumstances per se gives rise to the actual existence of such a contract (capable of being suspended).

[32] In my view, the commissioner thus committed a material error of law in finding that because the educators had a reasonable expectation of the renewal of their fixed-term contracts, they were "still employees of the School", and thus capable of being suspended.

Order

[33] Accordingly, the following order is made:

1. The arbitration award issued by the second respondent is reviewed and set aside, and substituted with an order that the 3rd to 26th respondents were not unfairly suspended by the applicant;
2. There is no order as to costs.

⁶ Or that they be retained on an indefinite basis.

⁷ Or retain the educators indefinitely.

⁸ Or at least an employment relationship.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv M Mafu instructed by Koena Mpshe Attorneys

For the 3rd to 26th respondents: Mr D Lebethe of Ditheko Lebethe Attorneys