

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1458/98

In the matter between

VINCENT JELE

APPLICANT

And

THE TEACHING SERVICE COMMISSION

1st RESPONDENT

THE PRINCIPAL SECRETARY OF THE

MINISTRY OF EDUCATION

2nd RESPONDENT

THE ACCOUNTANT GENERAL

3rd RESPONDENT

THE ATTORNEY GENERAL

4th RESPONDENT

Coram

S. B. MAPHALALA- J

For Applicant

MR. SIBANDZE

For Respondents

MISS GAMA

JUDGEMENT

(22/12/98)

Maphalala J:

This is an application brought by way of motion for an order that the 1st respondent assign the applicant to a school immediately. That the 3rd respondent should pay to the applicant his arrears salary due from August 1997 to date of payment. That the respondents should pay the costs of this application. Lastly, that the court grants applicant any further and/or alternative relief. The application is supported by the founding affidavit of the applicant. The respondents oppose the application being represented by the 3rd respondent and have filed an answering affidavit and confirmatory affidavits. The applicant in turn filed a replying affidavit in answer to respondents opposing papers.

The fact giving rise to the dispute according to the applicant are as follows:

In June 1994 the first respondent posted the applicant to Velebantfu High School in the Shiselweni Region where he was to teach English and Siswati. He proceeded to the said school and indeed he taught at the school from 1994. Sometime during 1997 and while employed by the respondents and teaching at the school, he encountered into some problems with the Deputy Head Teacher who claimed that he had

difficulties working with him. The school grantee then suggested that he be transferred to another school close to Velebantfu where he would not cause difficulties for the complaining Deputy/Acting Head Teacher. Applicant refused to accept the proposed transfer mainly because he was informed of what exactly the difficulties he was causing were and no attempt was made to find alternative means of

resolving the issue. As a result of the misunderstanding and without any notice the first respondent unlawfully stopped paying his salary in July 1997. At his request, the first respondent came to Velebantfu on 2nd October 1997 in an attempt to settle the misunderstanding.

As a result of the first respondent's intervention it was agreed that applicant would be transferred to Timphisini High School and a letter of transfer was given to him on 9th October 1997. The first respondent assured him that applicant would receive his salary for the months August and September 1997, to enable him to make the move from Velebantfu to Timphisini as soon as possible. The first respondent also advised that the Regional Education Office would provide transport to move his property to Timphisini. Applicant advised the first respondent that he would be unable to make the move to Timphisini unless he received his salary as he would need some form of sustenance there and there was no one he could depend on for assistance with his sustenance. At the end of October 1997, he did not receive his salary nor did he receive the salary for August and September 1997. Applicant was therefore unable to make the move to Timphisini in the circumstances. He attempted to speak to the Executive Secretary of the first respondent whom he had been dealing with at all times between October and November 1997, but was unsuccessful mainly because he could no longer afford to travel to Mbabane and had to resort to telephone calls.

In December 1997, he managed to borrow some money and came to the 1st respondent's office in Mbabane. He was admonished for not going to Timphisini as per the letter of transfer and told that the Executive Secretary would only be in a position to see him in January 1998. In January, he was told to see the Executive Secretary of first respondent on 10th February 1998.

He did see the Executive Secretary on the 10th February 1998 at the first respondent's office in Mbabane and again he was admonished for not going to Timphisini and was advised that he would be contacted by the first respondent refused to discuss the issue of his salary which was last paid to him in July 1997. To date hereof applicant have not been contacted by the first respondent about a new position nor has his salary been paid. At the time of the suspension of his salary, he was earning a basic salary of E2,151-75.

The school's second term is now approaching and first respondent has since February 1998 failed to find him a new position and to pay him his salary for the last (9) nine months which he has been suspended unlawfully. First respondent has not dismissed him from work nor have he been suspended nor are any disciplinary proceedings pending against him.

Applicant avers that he has not absconded from duty and that since October 1997 he has been available for posting to a new position and still remains so available. The first respondent is well aware of his availability and is well aware that as soon as he

3

was posted to a new school and paid his outstanding salary, he will report to that school immediately.

The delay, and/or failure and/or refusal by the first respondent to post him to a new school and to pay his salary which has been outstanding for nine (9) months is both unreasonable and unlawful as has caused him continuous hardships, particularly since the first respondent has not suspended or dismissed him for his employment and he remain in its employment and is not justified in law to keep him in limbo as it has done.

These are the factual allegations that form the basis of the applicant's case.

Now coming to the respondent's opposition. The respondents have filed answering affidavit of one P. M. Muir who is the Executive Secretary to the 1st respondent. He avers that paragraph 1 - 5, 6, 7 of the applicant's founding affidavit are admitted. In response to paragraph 8 the 1st respondent admits that applicant was transferred to Timphisini High School upon his request for a transfer, but he never reported from duty at his new station. The applicant had not worked during the months of August and September and therefore was not entitled to any salary though as a compromise the respondents offered to pay his

salary for the two months and transport him to his new station. The 1st respondent admits that applicant did not receive salary for the months of August, September and October as he has failed to report for duty at his new school on the 13th October 1997, to allow an instrument to be prepared to reactivate his salary on the teacher's payroll. 1st respondent further admits paragraph 11 that he admonished the applicant for failing to report for duty at Timphisini and denies knowledge of whether or not applicant borrowed money to visit him. Indeed, the applicant failed to make arrangements to be transported to the school by the respondent as had been earlier agreed. The 1st respondent admits that he met with the applicant on the 10th February 1998, where he was informed that another teacher had been posted to take up the post offered to the applicant at Timphisini High School and to date the applicant has not been working therefore is not entitled to any salary whatsoever in accordance with the general regulations governing the conduct of teachers and the relevant provisions of the Employment Act. Respondents deny that the suspension of the applicant's salary was unlawful and state that the applicant had unlawfully and without justification stopped working and was thus not entitled to any pay as claimed herein or at all. The applicant has placed himself in this predicament by failing to report for duty when he was transferred, however, the respondents are genuinely looking for a school to post him. The first respondent denies that the applicant did not abscond from duty and asserts that he deliberately absented himself from work from the month of August and September 1997, and when he was transferred at his own request in October he deliberately neglected to take up the offer. The first respondent pleads the principle of *volenti non fit injuria* in so far as the same applies to this case since the applicant deliberately refused and/or neglected to take up a posting made in October 1997. Further, the first respondent is still willing to post the applicant to a school as soon as a suitable vacancy arises.

These are the factual allegations that forms the basis of the respondent's opposition.

The applicant then file a replying affidavit to the respondent's answering affidavit. He denies paragraphs 1 - 6 of the answering affidavit. He stated further that he

4

denies that he did not work in August and September 1997. The first respondent was made aware of his problems with the Headmaster of Velabantfu in early August 1997, but only came to address them in October 1997. Between August and 2nd October 1997, he reported for work every school day without fail despite that the Headmaster had allocated his class loads to other teachers, to deal with the examinations. He avers further that his salary was unlawfully stopped in July 1998, even before he was transferred to the new school on 13th October 1997. The respondent could not have known in August and September 1997. His failure to pay his salary of August and September despite being advised of his dependent on same, to enable him to report for duty following the unlawful stoppage of same. He denies that he stopped working but submit that he was prevented from rendering his services in terms of the employment contract by the first respondent and/or its agents. He further denies that he placed himself in this predicament. The first respondent was the one who prevented him from taking up his posting and therefore placed him in this predicament.

These are the facts before the court. The court heard submissions in this matter of the 2nd November 1998, where Mr. Sibandze for the applicant contended that the applicant is entitled to his salary from 1997 to date. He availed himself to work. He directed the court to paragraph 6 of the answering affidavit in answer to paragraph 7 of the founding affidavit. Paragraph 6 of the answering affidavit reads as follows:

"-6-

AD Paragraph 7

Contents thereof are admitted"

This is in answer to paragraph 7 of the founding affidavit, which reads as follows:

7

As a result of the misunderstandings indicated above and without any notice to me, the first respondent unlawfully stopped paying my salary in July 1997. At my request, the first respondent came to Velebantfu on the 2nd October 1997, in an attempt to settle the misunderstandings".

Mr. Sibandze contended that throughout the period the applicant has held up to the disposal of the respondent. The respondent do not say why they did not pay him or they did not post him to another school. To this effect he referred the court to William and Millin on Merchantile Law of South Africa (18th ED) at page 350.

Further the first respondent could not possibly have known that applicant did not work in August and September 1997. It would need some supernatural powers in the part of the respondents to know that in July that a person would not work in August and September. Most of the allegations in the founding affidavit are not denied. It is not denied that applicant came to the first respondent's offices in December and was to come again in January. It is also not denied that the first respondent advised the applicant that he would be contacted as regards a new position and that took place in February. Right until the matter was taken to court the applicant was not contacted.

5

On the other hand the respondents as represented by Miss Gama argue that the applicant is not entitled to the relief he seeks. Respondents have offered to pay for August and September. What was unlawful was made lawful and there was an agreement between the parties. The applicant agreed to go to Timphisini. Applicant did not go to school on the 13th October 1997, and this act was contrary to the agreement between the parties. The applicant absconded from duty even when he was granted free transport to Timphisini. There was the whole year where the applicant was sitting at home at his own free will. He is the author of his own misfortune. The respondent contend that it is totally incorrect that applicant was entitled to withhold his services.

Mr. Sibandze on points of law directed the court to paragraph 8 of the applicant. Respondents do not dispute the allegation contained therein. An employer is not entitled to take the law in its own hands. There were supposed to have conducted a disciplinary inquiry as to why the applicant was not working or summarily dismiss him for failure to report for work. The respondent did not do so but sat back and told the applicant to come later and thereafter informed him that they will reply him by post. They cannot be heard to say that applicant was the author of his own fate.

These are the issues before me. It appears from the papers before me that paragraph 8 of the applicant is not denied by the respondent in its answering affidavit which is to the effect that it was agreed that applicant would be transferred to Timphisini High School and a letter of transfer was given to him on the 9th October 1997. The respondent assured him that he would receive his salary for the months of August and September 1997, to enable him to make the move from Velebantfu to Timphisini as soon as possible. The first respondent also advised him that the Regional Education office would provide transport to move his property to Timphisini. Applicant then advised the first respondent that he would be unable to make the move to Timphisini unless he received his salary as he would need some form of sustenance there and there and there was no one he could depend on for assistance with his sustenance.

The only response by the respondents to this allegation in its answering papers is that they admit that applicant was transferred to Timphisini High School, upon his request, but never reported for duty at his new station. I do not find any allegation in the answering affidavit that any disciplinary proceedings had been taken or that the applicant has been called upon to answer ant specific charges made against him. In other words there is nothing in the affidavit which suggests the reason for withholding the salary for the period in which it is claimed. One uncanny aspect of this matter as it was pointed out by Mr. Sibandze for the applicant is that the respondents could not have possibly have known that the applicant did not work for the month of August and September unless they had some "supernatural" powers to know in July that applicant would not work in August and September.

Most of the pertinent allegations in the applicant's founding affidavit are not denied by the respondents. It is not denied by the respondent that applicant went to 1st respondent's office in December and was told to come back in January. It is also not denied that 1st respondent advised applicant would be contacted as regards a new position and that was in February. To date applicant has not been contacted. This appears to me to be a classical case of red tape going haywire.

6

For these reasons there is no defence to the applicant's claim and an order is made directing the 1st respondent should assign the applicant to a school immediately. Secondly that the 3rd respondent should pay the applicant his arrears salary due from August 1997 to date of payment. Thirdly the respondents are ordered to pay the costs of this application.

S.B. MAPHALALA

JUDGE