IN THE HIGH COURT OF LESOTHO

CIV/APN/287/2021

Held at Maseru

In the matter between:

JOALANE TLALI	**APPLICANT**
AND	
EIGHTEENTH EPISCOPAL DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH	**1ST RESPONDENT**
THE CHAIRPERSON OF THE BOARD FOR EIGHTEENTH EPISCOPAL DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH	**2ND RESPONDENT**
THE PRINCIPAL SECRETARY MINISTRY OF EDUCATION & TRAINING	**3RD RESPONDENT**
MINISTER OF EDUCATION & TRAINING	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral citation: Joalane Tlali v. Eighteenth Episcopal District of the African Methodist Church and Others [2022] LSHC 174 Civ (9th August 2022)

CORAM: M. J. MAKHETHA J
HEARD: 13TH JUNE 2022

DELIVERED: 9TH AUGUST 2022

SUMMARY

Application for reviewing, correcting and setting aside Employer's decision to stop payment of employee's monthly salary without giving her a hearing (audi alteram partem) and payment of salary arrears – Applicant stating in her founding affidavit that she was dismissed from work as the Educational Secretary of AME schools in 2017, but continued to be paid a monthly salary until June 2021 – Applicant later claiming in her replying affidavit that she had not been dismissed - Issues for determination: Whether Applicant was entitled to a hearing upon a decision to stop salary and whether she was entitled to payment of salary arrears in view of her account of dismissal – Held: Applicant not allowed to introduce new evidence in the replying affidavit - Applicant bound by her evidence in the founding affidavit - Applicant not entitled to a hearing and unpaid salary payments – application dismissed.

ANNOTATIONS:

CITED CASES

LESOTHO

Commissioner of Police and Anther v Ntlo Tsoeu C of A (CIV) 12/2004 LAC [2005 – 2006]

L Mangoejane and Another v S Mangoejane and Another C of A (Civ) no. 43/2017 CIV/APN/159/2017 [20]

Matsoso Ntsihlele & 127 Others vs IEC C of A (CIV) 17 of 2020

Mohaleroe v Lesotho Public Motor Transport Co. (Pty) Ltd and Another C of A (CIV)16/10

President of the Court of Appeal v The Prime Minister and Others C of A (CIV) NO 62/2013

SOUTH AFRICA

Hospital Services v Mistry 1979 (1) SA 626 (AD)

Juta and Co Ltd and Others v De Koker 1994 (3) SA 499

Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA).

Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger 1976 (2) SA 701 D

STATUTES

Education Act No. 10 of 1995

Education Act No. 3 of 2010

JUDGMENT

A. INTRODUCTION

[1] The Applicant approached this court seeking an order reviewing, correcting and setting aside the 3rd and 4th Respondents' decision to stop her salary from the month of June 2021 without observing rules of natural justice as irregular, invalid and unfair. The Applicant further prays for an order directing the 3rd and 4th Respondents to pay her salary withheld (arrears) from June 2021 up to the date of the order. The prayers are clearly set out in the Applicant's Notice of Motion.[1]

[2] All the Respondents have opposed the application and filed their Answering Affidavits. The 3rd Respondent deposed to the Answering Affidavit in opposition on behalf of the 3rd to 5th Respondents, followed by filing of a separate Answering Affidavit deposed to by the 2nd Respondent on behalf of the 1st and 2nd Respondents. The Applicant in turn filed her Replying Affidavits to the Answering Affidavits respectively.

I have observed with displeasure that the Respondents, especially the 1st Respondent took their time to file their answering papers in this

[1] Record page 7

application, way out of time in violation with the Rules of Court. No application for condonation for non-compliance with Rules has been filed and this conduct is condemnable.

B. FACTUAL BACKGROUND

The facts of this application are largely common cause, and they can conveniently be summarized as follows;

[3] The Applicant was appointed by the 1st Respondent on the 1st December 2009 as the AME schools Educational Secretary through a letter **(Annexure RM1)** to the 4th Respondent, dated 2nd September 2009. Her appointment was later approved by the latter through a letter **(Annexure RM2)** dated 11th November 2010, effective from January 2010. Both annexures form part of the Applicant's founding affidavit.

[4] It is common cause that before the Applicant was appointed as the Educational Secretary, she was employed as a teacher. However, in terms of **RM2**, the Applicant's contract with the Teaching Service was terminated just before she was appointed as the Educational Secretary. According to **RM2** the Applicant would have to sign a new contract as the (Educational Secretary) under the new **Education Act** (hereinafter referred to as the **new Act**).[2]

[2] No. 3 of 2010

[5] The Applicant performed her duties as the Educational Secretary for 1st Respondent from January 2010 until she was suspended with pay and with immediate effect, and subsequently dismissed in 2017.[3] The applicant relied on **Annexures RM4 and RM5** attached to her founding affidavit as proof of her dismissal.

[6] Immediately following her dismissal, she challenged the 1st and 2nd Respondents' decision recommending her dismissal in this court under case **No. CIV/APN/229/2017** which was heard in 2018 and the judgment is still pending.[4] It is worth mentioning that the Applicant later in her replying affidavit indicated that she had never been dismissed when she challenged her dismissal in the above case.

[7] It is common cause that the 3rd Respondent continued to pay the Applicant a monthly salary until the end of May 2021.

[8] It is further common cause that when the 3rd and 4th Respondents stopped paying the Applicant a monthly salary any further, she was not given a hearing.

[3] Record page 14 Founding Affidavit para 8.1
[4] Record page 14 Founding Affidavit para 8.2

[9] The Applicant has not been rendering any services as the Educational Secretary for the 1st Respondent since her suspension in May 2017 to date.

C. ISSUES FOR DETERMINATION

a. Was the Applicant entitled to a hearing before her salary was stopped in June 2021?
b. Was the Applicant entitled to a salary from the month of June 2021 to date?

D. ARGUMENTS FOR THE PARTIES

I. APPLICANT'S CASE

[10] The starting point for the Applicant's case is that upon her appointment as the Educational Secretary under the old **Education Act**[5] (hereinafter referred to as the **old Act**) in January 2010, she became a permanent and pensionable employee of the Ministry of Education and Training, confirmed by her monthly contribution towards payment of Public Officer's Pension Fund.[6]

[5] No.10 of 1995, Section 24(1)
[6] Record page 12 Founding Affidavit para 4.5

[11] It is further the Applicant's case that when the **new Act** came into operation it provided for, among others, the appointment of the Educational Secretaries and an option by the Educational Secretaries who had already been appointed under the **old Act** to either **retain their positions** or **be appointed under the appointing sub-section.**

[12] The relevant provisions of the **new Act** referred to above read as follows;

Section 26(1)

> *"A proprietor who has more than 20 schools shall establish and educational secretariat which shall be headed by an* ***Educational Secretary appointed by the proprietor and approved by the Minister****"*

Section 26(11)

> "*An Educational Secretary who is already appointed upon the coming into effect of this Act shall have an option to either retain his/her position or to be appointed under Sub-Section 1."*

[13] The Applicant claims that she continued and retained her employment with the 4th Respondent's Ministry under the **old Act** since she did not exercise the option of being appointed and signing a contract of employment under the **new Act (Section 26(11))**.[7]

[7] Record pages 14 and 16 Founding Affidavit, para 7.3 and 11.3(a) respectively

[**14]** Counsel for the Applicant therefore submits that by so retaining and continuing with her employment under the **old Act, Section 26(10)** of the **new Act** which provides for a five-year tenure of office for Educational Secretaries, clearly contractual, does not apply to the client's permanent and pensionable employment. For the abovementioned reason, the Applicant's employment with the 3rd and 4th Respondents did not come to an end in 2020 as alleged by the Respondents, she further submits. **Section 26(10)** reads as follows;

"The tenure of office of an educational secretary is five years."

[15]While the Applicant's case in her founding affidavit was that she had faced a disciplinary hearing in 2017 following which she was dismissed, her account took a completely different turn in her latest replying affidavit to the 1st and 2nd Respondents' answering affidavit. After all, she has not indicated anywhere in her founding affidavit that she asked for stay of her dismissal pending a final determination of her application in **CIV/APN/229/2017.** So relying on the latest version about the Applicant's dismissal as appears from her replying affidavit, Advocate Lesaoana is essentially contending that the client's employment neither terminated in 2017 nor 2020 because there has not been a dismissal in 2017 and her employment could not terminate in 2020 because the section of the new Act (Section 26(10) is not applicable to her. Her

employment is rather governed by the old Act under which she is permanent and pensionable.

[16] On the basis of the above contentions Advocate Lesaoana therefore, submits that failure of the 3rd and 4th Respondents to give the Applicant a hearing in terms of the *audi alteram partem* rule before they stopped payment of her monthly salary from June 2021 amounts to a reviewable irregularity and unfairness[8] as the client remained legally employed at the time.

[17] The Applicant contends that a sudden stoppage of her salary has affected the client's property and other rights in general, which could not be stopped without hearing her side.[9] Her monthly commitments such as payment of her monthly policies and contribution to the Pension Fund have been affected by the stoppage of her monthly salary, as a result of which she suffers a tremendous prejudice.[10]

II. RESPONDENTS' CASE

[18] The Respondents have filed two separate founding affidavits, one on behalf of the 1st and 2nd Respondents and the other for the 3rd and 4th

[8] Record page 17 Founding Affidavit, para 12.1
[9] Record page 16 Founding Affidavit para 11.3 (d)
[10] Ibid, page 19 para 14.3

Respondents. In both their affidavits, the Respondents' case is that the Applicant's employment terminated when she was dismissed in **2017** and in **2020** when her five-year term under the new Act expired.[11] I do not have reasons for Respondents' reliance on both the Applicant's version of her 2017 dismissal and the 2020 termination of her employment as both events have the effect of termination of employment, whichever comes first. The correct position in my view is that the Respondents ought to have pleaded their defence in the alternative. It is either that the Applicant's employment was terminated when she was dismissed in 2017, alternatively in 2020 when her five-year contract expired as alleged by the Respondents.

[19] It would seem that the Respondents' basis for admitting the Applicant's dismissal had much to do with her own version in her founding affidavit that she was dismissed in 2017 following her disciplinary hearing and that she even challenged her dismissal in this court. As mentioned above, the Respondents' case is also based on the purported termination of the Applicant's contract of employment under the new Education Act and in terms of the Applicant's own **Annexure D** (a letter to the 3rd and 4th Respondents requesting stoppage of Applicant's salary).

[11] Record page 49 Answering Affidavit para 13 and

[20] In their answering affidavits the Respondents deny vehemently that the Applicant was employed on permanent and pensionable basis, in the absence of proof to that effect.[12] They contend that the Applicant was appointed on **contractual** basis as the Educational Secretary of the 1st Respondent. In her answering affidavit the 2nd Respondent's Chairperson clearly states on behalf of the 1st Respondent that the Applicant was appointed on contractual basis as the Educational Secretary by the 1st Respondent around 2009 under the **old Act.** She further states that after the promulgation of the **new Act** the Applicant exercised her option under the **new Act** and signed a new contract in terms of which she was appointed by the 1st Respondent and approved by the 3rd Respondent as such, with effect from January 2010 in conformity with the **new Act**.

[21] In his Heads of Argument, motivated during oral argument, Counsel for the 1st and 2nd Respondents insisted that under the **New Act** which repealed the **old Act**, the appointment of the **Educational Secretary** is governed by **Section 26 (1)** and the tenure of office of that position is five years in terms of **Section 26(10)**.

[12] Record page 50 3rd Respondent Answering Affidavit para 16 and page 74 1st Respondent's Answering Affidavit para 7.3, 7.4 and 7.5

[22] Counsel strongly opposed the Applicant's claim that in the exercise of her option to retain her position under **Section 26(11)** of the **new Act** she elected her employment to be governed by the **old Act** under which she was allegedly permanent and pensionable**.** The basis for Counsel's argument is the Applicant's own **Annexure RM2** letter authored by the then Honourable Minister of Education and Training, dated the 11th November 2010. According to the Respondents, that letter clearly indicated in no uncertain terms that since the AME Educational Secretary's former contract with the Teaching Service **(as a teacher)** was terminated just before she was appointed into her current position (**as the Educational Secretary**), she had to sign a new contract under the **new Act.** The Applicant nowhere in her papers disputed the correctness or otherwise of the contents of her **RM2**. Counsel therefore submitted that through **Annexure RM2,** the Minister **e**xercised her powers in line with **Section 70** of the **new Act** and approved the Applicant's appointment as the Educational Secretary as envisaged by **Section 26 (1)** of the same Act.

The said **Section 70** reads as follows;

> *"All bodies and Offices established or otherwise given functions under the Education Act 1995 as amended, shall continue to operate until such time that the Minister has approved or appointed bodies, Officers and persons under this Act".*

[23] During oral argument Counsel for the Respondents also referred the court to **Section 69** of the **new Act.** The section reads as follows;

> *"The Educational Secretaries appointed under Section 24 of the Education Act 1995 shall continue to hold office as if appointed under this Act".*

And on the basis of the above contentions, it was submitted by Counsel on behalf of the Respondents that the Applicant's tenure of office as the Educational Secretary under the **new Act** was accordingly five years in accordance with **Section 26(10).**

[24] The Respondents further oppose the Applicant's claim that she was entitled to a hearing before her salary was stopped in June 2021 because her employment had already terminated by then.

E. ANALYSIS

[25] This is an application for an order reviewing, correcting and setting aside a decision by the 3rd and 4th Respondents to stop payment of the Applicant's monthly salary from June 2021 without giving her a hearing. The Applicant also prays for payment to her of the unpaid salary arrears from June 2021 up to the time of the order.

[26] Counsel for the Applicant and the Respondents share a common view that the main issues for determination in this application are whether the

Applicant was entitled to a hearing before stoppage of her monthly salary from June 2021, if she was entitled to a monthly salary after June 2021 and if the 3rd and 4th Respondents' decision is reviewable. Counsel for the Applicant is also of the view that another issue for determination is whether the Applicant's employment was contractual or permanent and pensionable.

[27] I agree on a determination of the first two issues. The starting point is the sworn evidence of the Applicant, at **paragraph 8.1** of her founding affidavit as mentioned in the preceding paragraphs, where in express terms she states that she had been performing her duties (as the Educational Secretary) …. since January 2010 until she was suspended with pay and subsequently dismissed by the 1st and 2nd Respondents in 2017 (underline for emphasis). The Applicant goes further to state in a subsequent **paragraph 8.2** that she even challenged her dismissal in this court under a separate case No. **CIV/APN/229/2017** which was heard in 2018 and judgment is still pending. There is no allegation, not to speak of proof, that the Applicant in the above application applied for stay of her dismissal pending finalization of the matter. Relying on her own evidence from her founding affidavit, and in the absence of any other evidence to the contrary, it would be indisputable that the Applicant's rights and obligations under her employment relationship with the 1st

Respondent arising from the January 2010 appointment terminated upon her dismissal in 2017, **permanent** and pensionable or **contractual.** This part would then answer the next questions whether the Applicant was entitled to a hearing before her salary was stopped by the 3rd and 4th Respondents in June 2021 and to payment of any salary arrears accruing from the said salary stoppage.

[28] While it appeared unclear at first glance at the court record as to what rights the Applicant is seeking to enforce under a terminated employment or work relationship, the answer was immediately found in her 2nd replying affidavit to 1st and 2nd Respondents' answering affidavit filed on the 25th March 2022. In her replying papers, the Applicant introduced a totally contradicting account from her founding affidavit about her alleged dismissal in 2017. She states at **paragraph 6.3** that she had not yet been dismissed by the 3rd and 4th Respondents when she challenged the 1st and 2nd Respondents' decision recommending her dismissal in this court.[13] By seeking 'to set the record straight,' the Applicant introduced new evidence that contradicts her own evidence in her founding affidavit.

[13] Record page 84 Replying Affidavit, para 6.3

[29] Now the law is very clear in dealing with the kind of conduct adopted by the Applicant in *casu.* It is trite that the applicant in motion proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. There is a plethora of authorities in support the above principle.

[30] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom.[14] The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his founding affidavit.[15]

[31] However, the law of pleadings is not without exceptions. It is well established that the courts have a discretion to allow new evidence in a replying affidavit.[16] The indulgence of allowing the new material will generally be allowed when warranted by special circumstances. At home here, in ***Mohaleroe v Lesotho Public Motor Transport Co. (Pty) Ltd and Another (C of A (CIV/16/10),*** the court had this to say:

[14] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D.
[15] Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D. [17]
[16] L Mangoejane and Another v S Mangoejane and Another C OF A (CIV) No. 43/2017 CIV/APN/159/2017 [20]

> *"28. The objection that the new facts had been wrongly permitted in the replying affidavit is also without substance ... the rule that a new matter in replying affidavits must be struck out is 'not a law of the Medes and Persians'. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent an opportunity to deal with it in a second set of affidavits."*

[32] The approach to adopt in considering whether to allow a new matter in the replying affidavit also received attention in ***Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger*** where the Court accepted and quoted with approval the following;

> *"In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be between a case in which the new material is first brought to light by the applicant who knew (or ought to know) of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'*

[33] In the present instance, I am not persuaded that there is a basis upon which I should exercise my discretion in favour of allowing the new evidence introduced by the applicant in the replying affidavit as she did. The new evidence in a replying affidavit will generally be allowed in circumstances where the applicant could not have known of such issues at the time of deposing to the founding affidavit. In other words, the Court will not permit or will strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding

affidavit. In *casu*, the new material introduced by the applicant in the replying affidavit relates to the evidence that seeks to support her falling cause of action in her founding affidavit. When she introduced the change about the fact of her dismissal in her replying affidavit she must have known about it even before she received the respondent's answering affidavit because she was already in possession of the very documents that she relied on in her founding affidavits namely, Annexures **RM4** and **RM5** that she had not been dismissed. In addition, the Applicant was also aware of the 1st Respondent's letter relying on termination of her contract by reason of expiration.

[34] In this case, permitting the use of the Applicant's new material (that she was not dismissed to found a cause of action) in her replying affidavit when the Respondents were not afforded a chance to file further answering affidavit would amount prejudice the Respondents out of the Applicant's own negligence or carelessness in the preparation of her pleadings. It would seem that this latest material the Applicant squeezed in her 2nd replying affidavit when she noticed that she would end up with no cause of action against the Respondents after making it clear in her founding affidavit that she had been dismissed in 2017, way back before the alleged stoppage of her monthly salary in 2021. The Applicant must stand and fall by her papers. Thus a fair

determination of the Applicant's claim must proceed from her own evidence in her founding affidavit that she had been dismissed when she lodged the present application.

And on the basis of the above conclusion, it is therefore convenient to determine the two issues under review; (a) Was the Applicant entitled to a hearing when the 3rd and 4th Respondents stopped her salary in June 2021, and (b) Is the Applicant entitled to salary arrears from June 2021 to date?

(a) Was the Applicant entitled to a hearing when the 3rd and 4th Respondents stopped her salary in June 2021?

[35] The Applicant's case as shown in the preceding paragraphs is that when the 3rd and 4th Respondent stopped her salary without a hearing in June 2021, she was legally employed on permanent and pensionable basis under the old Act. Counsel for the Applicant therefore submitted in her heads of argument and during oral argument that failure of the 3rd and 4th Respondents to give the Applicant a hearing before they could stop her salary payment amounts to a reviewable irregularity and unfairness.

[36] Counsel has commendably referred the court to relevant local authorities speaking to the importance of the *audi alteram partem* principle. I wholly support the view in ***Matsoso Ntsihlele & 127 Others vs IEC***[17] wherein the court held that, " … a person whose rights or interests are affected by the administrative decision ought to be heard before such a decision (affecting him) is taken or made. …" In that case the court particularly expressed that in the application of the rule the basis of what constitutes being heard will vary from case to case depending on the circumstances. Indeed, the rule seeks to offer fairness in decision-making; no one should be condemned unheard.

[37] Now turning to determine the relevance of this rule to the present case is as equally important as it is to other cases. In *casu,* the question of whether the Applicant was entitled to a hearing or not is whether at the time of salary stoppage, she was still an employee of 1st Respondent. According to her founding affidavit the Applicant got dismissed in 2017. Whether she was **permanent and pensionable** or **contractual** before 2017 has no bearing on the determination of her entitlement to a hearing before her salary was stopped in June 2021.

[17] C O A (CIV) 17 of 2020

[38] I agree with Counsel for the Respondents that when a complaint is made before a court of law that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision of the facts of each case. As indeed was stated in ***President of the Court of Appeal v The Prime Minister and Others***[18] I further agree that the *audi alteram partem* rule relied on by the Applicant is flexible and dependent on the facts and circumstances of each particular case. One earns the right to a salary arising out of a work relationship, the absence of which the *audi alteram partem* rule cannot be relevant.

[39] In the present case, the onus rests on the Applicant to show that she was an employee of the 1st Respondent when a decision to stop monthly salary payments to her was made. In her own pleadings, she had been dismissed by the 1st Respondent in 2017 which marked an end to her employment relationship with the Respondents. There being no more rights flowing from a terminated employment relationship, whether it had been permanent or contractual, nothing in my view obliged the Respondents to give notice to the Applicant when they stopped making payments which were no longer due to her under the cover of permanent and pensionable employment.

[18] C of A (CIV) NO 62/2013 at para 20

[40] As submitted by Counsel for the Respondents, the 3rd and 4th Respondents did not commit any irregularity by stopping the Applicant's monthly salary without affording her any hearing regard being had to the fact that the decision to stop her salary did not affect the Applicant's property or existing rights. The Applicant was not entitled to be paid while being dismissed. I agree with Counsel's submission.

[41] It was further submitted by Counsel during oral argument for the Respondents that in the present case, the Applicant had not been rendering any services after her dismissal warranting the argument that she had earned the right to a salary. Counsel referred the court to the case of ***Commissioner of Police and Anther v Ntlo Tsoeu***[19] where the court, invoking the common law principle of 'no work no pay', held as follows:-

> *"…. In other words, the first Appellant specifically invoked the common law principle of no work no pay in relation to the first period. Apart from the fact that this period was conditional upon no salary being paid to him, the Respondent, in my view, made out no proper case for payment of salary in respect of that period".*

[42] I think Counsel's reference to the principle of 'no work no pay' in the present case is misplaced. The principle as I understand it must flow

[19] C OF A (CIV) 12/2004 LAC [2005 – 2006] page 156 para 13

from an existing work relationship between and employer and employee. Where such a relationship has come to an end or does not exist, then the principle is irrelevant. So is the case in *casu*, I conclude.

(b) Was the Applicant entitled to a salary from the month of June 2021 to date?

[43] The next and final issue for review is whether on the basis of the established Applicant's employment status with the 1st Respondent as at June 2021 one can insist that she (the Applicant) was entitled to any salary arrears from June 2021 to present. The 1st Respondent submitted that the Applicant has dismally failed to make out a case for **Prayer 4** of the Notice of Motion regard being had to the fact that she had not tendered any services since her dismissal in **2017** and as such, the common law principle of "no work no pay" was correctly triggered by the 3rd and 4th Respondents. I must repeat that the Respondents' argument based on this principle is misplaced for purposes of the present case, especially when they are firm in their submission that at the time that the Applicant's salary was stopped, the Applicant's employment with the 1st Respondent had come to an end, or rather terminated.

[44] The principle of "no work, no pay" is a part of our labour law and common law and is rooted in one of the core principles of the employment relationship, this being that an employee has an obligation to place his or her services at the employer's disposal and the employer has an obligation to remunerate the employee for such services.[20] It follows therefore, that the principle cannot not apply where there is no employer-employee relationship. The term of Applicant's employment terminated with her dismissal in 2017. Any arguments about termination of the Applicant's contract in terms of the Education Act, permanent or contractual I consider irrelevant for the purpose of determining the issue at hand. In June 2021 therefore, there was no mandate on the part of the 3rd and 4th Respondents to pay any salary to the Applicant.

[45] CONCLUSION

The Applicant has not made out a case for the reliefs sought. She cannot successfully claim any right to a hearing (*audi alteram partem*) and salary payment under a non-existing employment contract, whether permanent and pensionable or contractual. She must stand and fall by her sworn averments in her founding affidavit. She cannot rely on new evidence in

[20]https://www.brookes.co.za/no-work-no-pay/

the replying affidavit to support a vague and embarrassing claim in the founding affidavit.

In the light of my views expressed in the aforegoing paragraphs, I have not found any significance of determining the Applicant's employment status in terms of the old and new Education Act.

[47] In the result, it is ordered as follows;

(a) The Application is dismissed;

(b) The Applicant must pay the cost of suit on ordinary scale

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M. J. MAKHETHA
JUDGE

For the Applicant: ADV. T.A. LESAOANA

For the 1st and 2nd Respondents: ADV. R.D. SETLOJOANE

For the 3rd, 4th and 5th Respondents: No representations