IN THE HIGH COURT OF SWAZILAND

Civ. Trial No. 622/1996

In the matter between:

The Association of Lecturers & Academic

Personnel & Another — Plaintiff

vs

Chairman of the Council of UNISWA & 3 others — Defendant

CORAM — S.W. SAPIRE, A C J

FOR PLAINTIFF — MR. H. Fine

FOR DEFENDANT — Mr. Kuny

Judgment

(21/01/97)

A founding affidavit is attested to by Dr. M. J. Simelane who describes himself as the Secretary-General of the first applicant (which will be referred to by its acronym "ALAP"). Professor Simelane asserts that he is duly authorised by the first applicant to make this application. In support of this he attaches a resolution of the applicant. Annexure A which is attached purports to be a certified copy of a resolution passed at a special meeting of ALAP on 14th October, 1995, in terms of which ALAP resolved to institute the instant legal proceedings and to authorise Dr. Simelane, in his capacity as Chairperson to brief attorneys and to sign all necessary affidavits and documents to give effect to this resolution.

The document is signed by an individual immediately above the word Chairman. The signature is not that of Professor Simelane, a specimen of which is to be found as the deponent of the Founding Affidavit. Simelane does not state that he was present at a meeting at which the resolution was passed.

It has been pointed out time and time again that no affidavit is attested by a deponent acting on the authority of the party on whose behalf the affidavit is filed. Deposing to an affidavit is essentially the giving of testimony under oath, and is personal to the person concerned. It is his personal act for which he requires no authority. The giving of evidence must however be clearly distinguished from the institution and prosecution of proceedings.

The so called certified resolution is meaningless, it is also hearsay, and it does not constitute proof that a special meeting of ALAP membership was convened at which the resolution was passed. The signature of the individual who does the certifying is not identified.

A copy of ALAP's constitution is attached to the founding affidavit. There is no allegation in the founding affidavit that ALAP has any locus stand to institute or defend legal proceedings in the High Court and the constitution does not provide therefor.

The Respondents have raised the issue of the first applicants capacity to litigate. As the second Applicant is on firmer ground in this respect and would appear to have an interest in the matter, being an unsuccessful applicant for appointment to the position. Counsel for the parties were agreed that the first applicant's apparent lack of locus standi was of no practical concern, and that the application should be argued on second applicant's case. It also becomes unnecessary for me to consider whether it is within scope and the objects of the First Applicant to take up the cudgels in a matter such as this where the competition for the post was between two high ranking members of the academic staff.

During the course of argument I raised with Counsel the question of this court's jurisdiction to hear the application. The provisions of section 5(1) of the Industrial Relations Act No. 1 of 1966 in rather obscure language confers exclusive jurisdiction on the Industrial Court in a wide range of disputes between employers and employees and their respective organizations. The applicants (misguidedly it now seems) to regard the present dispute as one of such matters, and reported a dispute to the Labour Commissioner. The issue was not resolved by the conciliation and the Labour Commissioner issued a certificate of an unresolved dispute on 26th September, 1995. The first Applicant then gave notice of an intended strike, in response to which the University applied to the Industrial Court to determine whether the dispute was strikeable. A Deed of settlement of what applicants call an industrial dispute was concluded by the parties and a copy thereof is attached to the founding affidavit.

I am satisfied on further consideration that the dispute regarding the validity of the appointment of the Pro-Vice Chancellor is not included among those in respect of which the Industrial Court is given jurisdiction, exclusive or otherwise. The dispute relates only to the provisions of the University of Swaziland Act, 1983 (The Act). The fact that the University is the Employer of the second applicant is coincidental, and such relationship or anything flowing therefrom is not an issue in these proceedings.

The procedure for the selection and appointment of a Pro-Vice Chancellor is governed by the statute,

In Terms of the ACT the Pro Vice Chancellor is one of the members of the body corporate which constitutes the University. The first applicant has no such status. The second applicant like the fourth respondent is also a member of the Academic Staff and as such a member of the University. Section 10 of the ACT creates the position of Pro-Vice Chancellor.

In terms of Section 5 of the Statutes of the University, as distinguished from the ACT, the Pro-Vice-Chancellor is to be appointed by the Council from among the members of the academic staff holding posts at Associate Professorial level or above, on the recommendation of a Joint Committee of the Council and the Senate, and subject to the Statute, on such terms and conditions as the Council may determine. The statute also prescribes the officers and individuals who are to serve on the joint committee.

When the period of office of the previous incumbent of the position of Pro-Vice-Chancellor was about to come to an end, a sitting of the joint committee was convened. The Committee sat on Friday 28th July, 1995 when the chairman, Prince Phinda briefed the members on the purpose of their meeting.

He advised them that four applications for the position had been received. The meeting noted this and the considerations germane to their deliberations. They then adjourned to consider the documents which had been received with the applications.

The committee met again three days later on 31st July, 1995 and on a secret ballot eliminated two of the candidates. There was further discussion on the merits of the remaining two candidates who were the second applicant and the fourth respondent respectively. On a further secret ballot vote the votes for each of the candidates were equal. The Chairman exercised a casting vote in favour of recommending the fourth Respondent. The joint committee adopted this resolution and its recommendation went to the Council.

The second applicant says that this procedure was fatally flawed by reason of which this court should set aside the resolution recommending the appointment of the Fourth Respondent. It is alleged in the first instance that Prince Phinda, the Chairman, harboured personal ill will towards the Second applicant, as a result of which he could not bring an objective mind to bear in carrying out his duties and function.

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In support of this allegation Second Applicant cites the occasion and manner of the termination of Second Applicant's period of service on the Board of directors of the Swaziland Television Authority.

At the time, Prince Phinda was the Minister of Broadcasting, Information and Tourism, and in that capacity signed the letter from the Ministry informing the second applicant that his appointment would not be renewed on the expiry of his then current term of office. The letter appears at page 36 of the record. The Ministry as it turned out was incorrect in its assumption that the period had come to an end and eventually made compensation to the Second applicant for his premature retirement. All this is not proof of bias or of an improper exercise of his duties by the second respondent.

The second applicant has expressed his surprise that he was not called to any interview before the selection took place. He submits that if he had been invited to state his views, he would have had an opportunity to call upon the Chairman to recuse himself. The procedure prescribed for selection of someone to be recommended to the Council for appointment does not include the holding of interviews with prospective candidates, and this the affidavits show is never done. The field of possible candidates is limited to the upper echelons of the academic staff and those eligible for recommendation must be well known to the members of the committee who are all University staff. In the closed community of the University there are bound to be interpersonal dislikes, jealousies, prejudices or preferences. It would be impossible to form a committee of completely impartial academics. It is for this reason why the recommendation is in fact left to a committee in the first place.

The factual basis for Second applicant's contention that Prince Phinda was prejudiced against him has not in the light of the replying affidavit been established. On this point there is a clear dispute of fact. The respondents have denied the existence of any personal animosity on the part of the Chairman. Without hearing oral evidence it is not possible to resolve the conflict.

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There has been no application that the matter be referred for the hearing of viva voce evidence, and I do not propose ordering the same mero motu.

The Second applicant, contends that the exercise by the chairman of a casting vote, which in the absence of provision therefor, he does not have, vitiates the recommendation of the committee. This argument places a construction on the minutes which is technical and removed from reality. What in fact happened is that committee first voted on all four candidates and there is no indication of the number of votes received by each of the four candidates, In the end the committee adopted the resolution. Those committee members who had voted for recommendation of the Second applicant on

the ballot, did not object once the result of the ballot w as known, to the passing of the resolution and must be taken to have concurred therein once the chairman had expressed his view by casting a vote.

The recommendation went to the Council not as a majority decision but as that of the committee as a whole. How the committee came to its decision is of no significance. The method adopted by the committee is not open to criticism by non members. There is accordingly no cause to review or set aside the recommendation of the sub committee.

The recommendation of the joint committee went to the University Council. The Council did not seem to consider itself bound by the recommendation of the Joint Committee. The minutes of its meeting held on Friday 4th August 1995, disclose that the merits of both candidates were reassessed, after which a secret ballot was held. The outcome once again was an equality of votes for each of the candidates. Once again Prince Phinda exercised a casting vote and the 4th Respondent was elected.

The applicants have attacked these proceedings on a number of grounds. Again it is alleged that Prince Phinda should have recused himself because of his personal animosity to the second applicant. As in the case of the same criticism of the Joint committee there is no factual basis established.

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The Council meeting like that of the Joint Committee appears to have been conducted in a fair and open manner and there is no evidence of improper bias having influenced the outcome. Obviously Prince Phinda favoured the candidacy of the 4th respondent. This in itself does not mean that he was motivated by prejudice.

The applicants do not challenge the propriety of the chairman exercising a casting vote, as this is expressly permitted in terms of the Statute. They do however complain that such casting or second vote was exercised by one who was opposed to the second applicant's election. That may be so, but it must be so in every case where a casting vote is permitted.

There are a number of other alleged irregularities relied on by the applicants.

It is suggested that the council should have interviewed the candidates and that the proposal of some members that this take place should not have been overruled by the chairman. This the second applicant claims denied him the right of being heard and the opportunity of demanding the recusal by the Chairman. This complaint reveals a misconception of the nature of the proceedings on the part of the applicants. The council may only appoint a pro-vice-chancellor on the recommendation of the joint committee. It may be open to council to reject a recommendation of a particular individual and ask the joint committee to make a further alternative recommendation. It does not seem however that council can appoint someone who had not been recommended by the joint committee. What is clear is that there is no provision for the council to interview the candidates. There is also no provision for the candidates to give evidence or argue their respective merits either before the joint committee or the council. This is entirely an internal matter at the University where the people concerned are well known to each other and the allegation of material irregularity in this respect is without basis or substance.

A second irregularity alleged is that a Council member, one Ndumiso Mamba was not given notice of or invited to the council meeting.

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It is said, baldly that Mamba had made no secret of his support for the candidacy of the 2nd applicant.

This hearsay allegation is not confirmed on affidavit by Mamba himself. Against this there is the evidence of the acting Registrar Samuel Vilakati who states that notices of both meetings were sent to all the members entitled thereto. There is accordingly no substance to this allegation of irregularity.

A further similar complaint that Sikelela Magongo was not invited to the Council Meeting cannot be treated as an irregularity. Magongo was elected to council as a student member by the Students' Representative Council in terms of Section 14(1) of the Statutes. As such he was not entitled to participate in the consideration of or voting upon matters of a confidential or personal nature, as determined by the chairman. The chairman in this matter decided that this particular member had no interest or concern in the matter before the council.

The objection raised by the applicants to the participation of Professor Kunene is also without foundation. The presence and participation of Professor Kunene if irregular would not vitiate the proceedings having regard to the provisions of section 50 of the statutes.

Yet another irregularity is said to have been constituted by the presence of Professor Makhubu at the Council meeting and her participation in the voting on the appointment. The grounds of complaint are that she was officially on Sabbatical leave and there was someone acting in her place. It is not alleged that both she and her acting replacement both voted. Her presence however made it unnecessary for her acting replacement to perform the function of attending the council meeting and there appears to be no reason who she should not have exercised her functions and privileges of office if she was in fact available to do so.

On the above analysis it is clear that there is no proper basis for the review and setting aside of the election of the incumbent Pro-Vice-Chancellor.

The application is accordingly dismissed with costs. The employment of council by the Respondents was justified in a matter of this nature, and the fees of counsel will be allowed.

S.W. SAPIRE

ACTING CHIEF JUSTICE