

IN THE HIGH COURT OF SWAZILAND

Eric Themba Ngcobo

Applicant

V

Attorney General 1st Respondent

Accountant General 2nd Respondent

Teaching Service Commission 3rd Respondent

Civ. Case No. 2536/98

Coram SB. MAPHALALA- J

For the Applicant MR. A. SHABANGU

For the Respondents MR. P. SIMELANE

JUDGEMENT

(15/09/99)

Maphalala J:

The applicant is a teacher in the employ of the Ministry of Education. He filed on motion an application seeking an order in the following terms:

1. "1. The respondents are ordered and directed to pay to the applicant his salary for the months of August, September and October 1998, and his salary for the subsequent months as when such salary become due.
2. Costs of this application.
3. Further and alternative relief.

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The application was opposed, the Attorney General filing affidavits deposed by William Shongwe, the Secretary to the Teaching Service Commission, and Mr. Sibusiso Mkhonta, the Director of Education.

The applicant deposed in his founding affidavit that he is employed by Swaziland Government through the third respondent as a teacher in its teaching establishment by virtue of a contract dated 10th July 1991. In accordance with the terms of the contract and by virtue of being holder of the office of a teacher in the respondents' establishment is entitled to an annual salary amounting E27, 030 - 00 but payable in twelve equal monthly installment E2, 252 - 50. On or about 17th August 1991, he entered into another agreement with the 3rd respondent in terms of which he agreed to go on an in-service training and development course offered by the University of Swaziland towards a Bachelor of Education course (Secondary Education). The agreement is annexed hereto and marked "A". The 3rd respondent was represented in the agreement by an official of the in-service training section in the Ministry of Labour and Public Service a certain Mcfadden. In terms of paragraph 2 of the agreement he was obliged to attend the course diligently as part of his duties and it provides as follows:

"The employee shall as part of his duties under the contract attend the course diligently and apply the whole of his energies during the course to the acquisition of the skills and knowledge taught or otherwise made available in connection with the course and to the successful achievement of all work, tests and examinations set in connection with the course".

The respondent are obliged both in terms of his conditions of service and in terms of paragraph 2, 4

and 5 of the in-service training contract to pay his salary for the months of August, September, October and for at least the continuous twelve months from September 1998 to August 1999.

Applicant avers that the respondents' have wrongfully and without any legal justification withheld payment of his salary for the said period and have indicated to him that the said salary would not be paid to him because he was not teaching but attending the course at the University of Swaziland.

On the other hand the respondents' in their answering affidavit aver that the terms and conditions of the said contract of service are subject to exceptions as may from time to time be stipulated by the Ministry of Education in certain rules and regulations. In this particular case the Ministry of Education had made a regulation to the effect that as from 1997 teachers who have experience of less than eight (8) years were not entitled to paid study leave, this is contained in Circular No. EI/96 marked for purposes of these proceedings as "R1". The applicant had not obtained such experience at the time he went on study leave. The respondents' also referred the court to annexure "R2".

The respondents denies that applicant ever entered into such an agreement in as far as he has not attached the said annexure "A" to his papers. Even if the applicant may have attached such a copy of the agreement in his original papers such agreement does not take his case any further in as much as it is signed by a government employee in whatever Ministry who wishes to go on study leave and it does not determine whether one will get leave pay or not. What determines whether is entitled

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to a study leave pay are rules and regulations of that particular Ministry; and in this case is the Circular no. EI/96. The respondents' denies most of the averments in applicant's founding affidavit.

The applicant filed a replying affidavit where he denied paragraphs 7 and annexed the agreement referred to in his affidavit which he deposed was inadvertently omitted.

The court then heard submissions.

It was argued on behalf of the applicant that it is common cause that the applicant is employed by the 3rd respondent. It is further common ground that the applicant is an employee who has been employed for a period in excess of one month and that his salary or wages are paid on monthly intervals. Clause 2 of the in-service training bonding agreement between the government and the applicant being annexure "A" in his replying affidavit states as follows:

"2 The employee shall as part of his duties under the contract attend the course diligently and apply the whole of his energies during the course to the acquisition of the skills and knowledge taught or otherwise made available in connection with the course and to the successful achievement of all work, tests and examinations set in connection with the course"

The second point raised is that under Part IV of the Employment Act Section 47 (1) (B) wages flow from the status of being employed. The section reads as follows:

"47 (1) The times when wages shall be deemed (my emphasis) to be due from an employer to an employee shall be as follows:

- a)
- b) In the case of an employee employed for a period in excess of one month, at intervals not exceeding one month.
- c)
- d)

I was referred to Classen's Dictionary of Legal Words and Phrases Vol. I at page 385 as to the meaning to be attributable to the word "deemed" in the context of this Act.

The last point raised by the applicant is that the defence raised by the respondents' in their paragraph 7 of their answering affidavit has no merit as it is not the Ministry of Education which is involved in this

matter but the 3rd respondent (the Teaching Service Commission). The said paragraph reads ipsissima verba as follows:

-7-AD paragraph 6

"I wish to state that the terms and conditions of the said contract of service are subject to exceptions as may from time to time be stipulated by the Ministry of Education in certain rules and regulations. In this particular case the Ministry of

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Education had made a regulation to the effect that as from 1997 teachers who have experience of less than eight (8 years) were not entitled to paid study leave, this being contained in Circular No. EI/96 which is enclosed hereto and marked "R1". The applicant had not obtained such experience at the time he went on study leave"

On the other hand Mr. Simelane for the respondents contended that Mr. Shabangu for the applicant was missing the whole point in that the matter is solely governed by Section 11 of the Education Act of 1982 which prescribes that the Minister by notice in the gazette make rules. By Section 12 of the said Act he may delegate those functions to other officers in the Ministry especially the Principal Secretary. In the instant case the Principal Secretary acting on his delegated powers directed one Sibusiso Mkhonta.

It was argued further that it was wrong for the applicant to cite the Attorney - General in this matter. That this is technically wrong.

Furthermore, it was contended on behalf of the respondents' that the agreement referred to by the applicant should not be used to defeat statutory provisions. It is Mr. Simelane's view that Section 47 (1) of the Employment Act cited by the applicant is of no relevancy in this case as there is a clear statute which governs the teaching profession. The Employment Act can only have general application if there is something lacking in the Education Act.

All in all the applicant is not entitled to the order he is seeking and thus the application ought to be dismissed with costs.

On points of law Mr. Shabangu contended that the parties in this case entered into an agreement with their eyes open. There is a contract. What the court has to do is to look at the actions of the parties thereto. The Education Act does not contain conditions of service for teachers. It gives the Minister the power to direct education generally. On the point that the Attorney - General was wrongly cited it is Mr. Shabangu's view that this point has no merit, as respondent has not raised it as a point of law.

These are the issues before me. The issues in the present case are at all fours with those in the Appeal Court Case No. 25/99 that of Phumzile Vilakati vs The Principal Secretary/Ministry of Education and three others decided in June 1999. In that case the in-service training bonding agreement between Government of the Kingdom of Swaziland (the Government) and Mr/Mrs/Miss Phumzile Patience Vilakazi (the employee) the "bonding form" is similar to the one entered into between the present applicant and the respondent. The learned judge of the Court of Appeal Van Den Heever, A J A (as she then was) found that this agreement was binding on Government. Circular 1/96 which is also relied upon by the respondents in the case in casu was described by the learned judge in the following terms:

""PVA1" [Circular 1/96] dated 1st December 1996, does not purport to reflect a decision of Government applicable throughout all its component parts - Ministries as "D" does "PV1" is an internal circular directed at (only) "All Heads of Schools: all School Managers, all Regional Education Officers" its aim is "to remind and reiterate the policy of the Ministry of Education" on a number of matters largely relating to the workload of teachers as determined by the number of pupils in classes. Regional Education officers are empowered to not only approve the establishment of new posts

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but also the re-deployment of teachers who are under employed. The introduction of practical subjects is dealt with. The last paragraph of the circular reads "6 in addition all teachers wishing to apply and be nominated for paid study leave are requested to take note that: as of 1997 the Ministry of Education will grant paid study leave to teachers who have 8 years or more teaching experience".

The learned judge went on:

"This clause is expressed as a promise rather than a prohibition (my emphasis). It does not state that only teachers who have eight years or more of teaching experience will qualify for consideration. The document is not directed at teachers generally. There is nothing to suggest, where it intended as a prohibition, that could by itself bind anyone, as any more that a teacher could regard it as an offer by education which could be converted into a binding agreement by acceptance".

The above mentioned observations by the learned judge disposes of paragraph 7 and 8 of the 3rd respondent answering affidavit which seems to be the defence advanced by the respondent against this application.

In sum, therefore, in view of the decision in Phumzile Vilakati (supra) I hold that the applicant is entitled to an order in terms of prayer 1 and 2 of the notice of motion.

I accordingly grant the order as prayed.

S. B. MAPHALALA

JUDGE