IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 3118/03

HELD IN MBABANE

In the matter between

IDAH TSABEDZE	APPLICANT
AND	
THE TEACHING SERVICE COMMISSION	1st RESPONDENT
THE ATTORNEY GENERAL	2nd RESPONDENT
CORAM	SHABANGU AJ
FOR APPLICANT	MR J. MAVUSO
FOR RESPONDENT	MR S. KHUMALO

15th JUNE, 2004

The applicant who is a teacher by occupation has instituted the present proceedings seeking an order in the following terms;

1. Reviewing, correcting and or setting aside the decision of the 1s' Respondent of the 6th day of August, 2003 suspending the applicant from work for a period of twenty four (24) months.
2. Costs of suit.
3. Further and or alternative relief

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The first respondent is the Teaching Service Commission a statutory body whose function inter alia is to hire, and discipline teachers who are on government payroll. The applicant is stationed at Nkhaba Primary School. Sometime on or about 3rd June, 2003 she received a letter from one D.P. Simelane the Under Secretary in the Ministry of Education. The letter itself which is dated 3rd June, 2003 lists sixteen allegations of what is described therein as charges of misconduct. The letter which is annexure A of the applicant's founding affidavit concludes by requiring the applicant to "show cause in writing why disciplinary action should not be taken against" her for misconduct. The letter requires that applicant's written response ought to reach the office of the Under Secretary, who is also described as the schools Manager before 13th June, 2003. The letter is copied to the Headteacher and the Regional Education Officer. I should note at this stage that the allegations of misconduct listed in the aforementioned letter are expressed in a language which is too general for the person against whom they are directed to be able to respond appropriately. I will not list each and every allegation made in the letter but for illustrative purposes I will mention the first four wherein the following is stated. The letter which is annexure A of the Applicants' founding affidavit reads.

"Misconduct: Yourself

1. You often abscond from school whenever you feel like, leaving pupils unattended for the rest of the day.
2. You often absented yourself from school without the permission of the headteacher and on your return you showed no remorse for your absence.
3. You often refused to appear in the office whenever the headteacher invited you.
4. You often failed to reply to official correspondence from the office of the head teacher. ..."

The letter continues in this manner with almost each and every accusation beginning with the

expression "you often". Only items five, seven and ten of annexure A of the applicants' founding affidavit do not begin with the expression "you often". Formulated in this manner the charges or accusations against the applicant are not sufficiently particularised to enable the applicant to respond thereto. As a matter of common sense without the dates and times being mentioned of the alleged absences and other forms of misconduct it would be impossible for the applicant to respond appropriately in relation to each of this charges. Indeed the applicant states at paragraph thirteen of the founding affidavit that upon realising that some of the charges against him were not clear he

proceeded to request further particulars. Though the letter containing the charges required that the applicant's written response should reach the office of the said D.P. Simelane, before 13th June, 2003, the applicant's response is dated 25th June, 2003, The applicants' request for further particulars begin by stating the following;

"Your letter dated 3rd June, 2003 refers, (a) I apologise for having been unable to respond on time. The reason for the delay is that some of the allegations were baseless and lacked clarity which necessitated more time in responding to them, (b) Having said the above and in order to be able to respond comprehensively, I request the following further particulars."

It is common cause that instead of responding to the applicants' request for further particulars, the 1st Respondent proceeded to prefer other charges, which are contained in a letter dated 9th July, 2003 and is annexure C of the applicants' founding affidavit. Annexure C required the applicants' written response to reach the Under Secretary-Schools Manager before 18th July 2003, Annexure C appears to me to lack particularity in the same manner as annexure A. Annexure C contained an invitation, to the effect that the applicant was to appear before the Schools Manager-Under Secretary on 15th July, 2003. It is common cause that the applicant could not appear before the Schools Manager on the said date and that she sent her sister, one Juana Lomnikelo Mashwama to the Schools Manager to report chat she was not well and was therefore indisposed. However another letter of invitation dated 23rd July, 2003 was sent to the applicant inviting her to "offices at the Ministry of Education." It is also common cause that the applicant honoured the invitation and attended at the Schools Manager's offices in the company of Robert Mhlanga, an attorney practising under the firm of Justice M. Mavuso and Company. It is also common cause that on arrival at the Schools Manager's offices the applicant found the School Manager in the company of Mrs Chazile Florence Mabuza and that after introductions the School Manager became incensed upon hearing that the applicant was accompanied by an attorney and ordered Mr Mhlanga, the attorney out of his office shouting that his office was not a court house. The Schools Manager explains his conduct by stating that he felt Mr Mhlanga's presence was unnecessary because he had merely called the applicant to be warned and not for a formal hearing. The applicant says that Mr Mhlanga left the Schools Manager's office because of the mood which he was met with there, and realising that nothing could be achieved at this meeting she

followed her attorney and left. Subsequent to this by a letter which is undated but bearing a Ministry of Education stamp marking dated 4 August, 2003 the applicant was invited "to appear before the Commission on the 6th August, 2003 at 09.00 a.m. This letter which is signed by one M.C. Mntungwa who describes himself/herself as the Executive Secretary states the following;

"Mrs Thabede I am duly authorised to invite you to appear before the commission on the 6rh August, 2003 at 9.00 a.m. This is in relation to the charges preferred against you by the Schools Manager in his letter dated 3rd June, and 9thth June, 2003. Should you require witnesses/evidence please bring it with you. By copy hereof the headteacher is also invited to bring with her the necessary witnesses or evidence."

Pursuant to the aforementioned letter the applicant appeared before the first respondent on 6th August, 2003. She also mentions that on 6th August, 2003 the Schools Manager or Under Secretary handed to him a letter containing new charges. This letter which is dated 5th August, 2003 is annexure "F" of the applicants' founding affidavit and relates to alleged misconduct said to have taken place on the 5* August, 2003. The accusation is that on the 5th August, 2003 the applicant refused to

enter the office of the headteacher when invited to do so by the Schools Manager, by the headteacher and by the Deputy headteacher respectively. It is also alleged that on the same day on 5th August, she refused to speak to the Schools Manager and Deputy Headteacher when they went to her house and that she made a report that two criminals were attacking her. There is a dispute over whether the charges contained in annexure F, which is the aforementioned letter dated 5th August, 2003 were put to the applicant and whether she was asked to respond to same during the hearing of 6th August, 2003. The respondents dispute further that a request for legal representation was made by the applicant. Though the respondents' have not filed the record of the proceedings on this date it appears to be common cause that there was some discussion of the matters raised in annexures A and C of the applicants' founding affidavit. At paragraph 19 of the founding affidavit the applicant goes on to state inter alia, that at the conclusion of the discussion or "hearing" he was instructed by the "members" to apologise. The applicant says that she apologised and denied at the same time most of the allegations levelled against her. She was further advised by the secretary of the first respondent to write a letter of apology which she did. The letter is annexure G of the founding affidavit and is dated 12th August, 2003. The

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applicant does not say that the advise given to her by the first respondents' secretary was part of the conclusion reached by the first respondent, nor is there any indication that the letter, that is, annexure G was part of the hearing or deliberations of the first respondent. Other than what the applicant states in paragraph nineteen of the founding affidavit to have been the conclusion of the first respondent, namely that she should apologise there is nothing to indicate that the first respondent was still to consider and reach a decision which was to be communicated later in the matter. The allegation made in paragraph nineteen of the founding affidavit that at the conclusion of the "hearing" the applicant was instructed to apologise is not specifically dealt with or denied by the respondents. Paragraph twelve of the respondents' answering affidavit which is a response to paragraph nineteen of the founding affidavit only specifically disputes two matters, namely that (a) applicant requested to be represented by her legal advisor and (b) that she was required to respond to the letter dated 5th August, 2003 which letter is annexure F of the applicants' founding affidavit. I must further mention that in the absence of the record of the proceedings which the first respondent had a responsibility to file there is no evidence in support of the bare denial recorded in paragraph twelve of the respondents' answering affidavit, to the effect that the applicant never requested to be legally represented and that she was required to respond to the contents of the letter marked F which is dated 5th Agust, 2003. It is also common cause that on 6th August, 2003 the applicant returned to her work station and was there until the 8th September, 2003, when she received a letter form the first respondent dated 27th August, 2003. This letter which is annexure H of the founding affidavit communicated to the applicant that she was being suspended for a period of 24 months beginning on 13th August, 2003. It is common cause that the letter of suspension does not state whether the suspension was with or without pay. The applicant says that she has been led to draw an inference to the effect that her suspension was without pay by the fact that on the 23rd September, 2003 and 23rd October, 2003 she found that her salary had not been deposited into her account. She does not say that the inference she has drawn is a necessary and only reasonable inference to be drawn from the fact that her salary had not been deposited. It also appears to be common cause on the papers that there was no response ever to the applicants'

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request for further particulars. In paragraph 24,1 of the answering affidavit the respondents' response is as follows;

"The applicant had on numerous occassions been given warning letters; thus we failed to understand what she meant by further particulars as the allegations had been clearly laid out in those letters."

Earlier on at paragraph ten of the founding affidavit the applicant states that;

"Instead of responding to my request for further particulars, the 1st Respondent proceeded to prefer other charges, these are contained in a letter dated the 9th July, 2003, a copy of which is hereto annexed marked C. "

The respondents admit the contents of the last paragraph quoted herein. A reference is made by the deponent to the respondents' answering affidavit, to letters referred to and written by the school headteacher, one Mrs F.C. Mabuza to the applicant. These letters are described by the deponent as elaborating on the alleged misconduct. The letters are annexures B, C, D and E of the respondents' answering affidavit. These letters which were written after the 20th June, 2003 and refer to other allegations of misconduct all of which allegedly occurred after 20 June, 2003, cannot be a response to the request for further particulars requested in response to the earlier letter of 3rd June, 2003. It is also interesting that annexures C and D required from the applicant what appears to have been impossible. Annexure C, is dated 16th June, 2003 and I should ordinarily accept this as the date upon which the letter was written. However the strange thing about this letter which appears to have been written on 16th June, 2003 is that it appears to require the applicant to respond to it before 1.30 p.m. on the 10th June, 2003. Similarly, annexure D which is a letter dated 8th July, 2003 expressly requires that the applicants' written response be made before 1.30 p.m. on 10th June, 2003, The requirement that the applicant responds to this letters before 10th June, 2003 provides a clear case of gross unreasonableness, because no one can possibly do something on a date which has already passed.

Mr Mavuso who appeared on behalf of the applicant submitted inter alia that the applicant was not given adequate notice of the intended disciplinary hearing in as much as annexure F being fresh charges were served on her a few minutes before the hearing

and that she was requested to plead thereto. I have already observed earlier in this judgement that there is no support in evidence for the respondents' assertion that annexure F was not 'ventured into' during the hearing. The respondents have not filed a record of the proceedings as they were required to do in terms of the notice of motion and rule 53 of the rules of this court. The respondents have not even stated whether as a body they keep such a record or whether the record is in existence. The letter which is annexure F was handed to the applicant just before the hearing of the 6th August, 2003. If this letter was intended to contain additional charges which were to be dealt with later, such does not appear to be so from the contents thereof. This letter does not require the applicant to respond thereto in writing as contemplated by regulation 15(2) of the Teaching Service Regulations. The aforementioned regulation provides that;

"A Manager of a teacher who has misconducted himself in terms of sub regulation (1) shall-
(a) inform the teacher in writing of the misconduct alleged against him; (b) allow the teacher an opportunity to present his defence in writing. "

Then in sub-regulations (3) (4) and (6) the Teaching Service Regulations provide;

"3 If the Manager is not satisfied with the defence presented by the teacher, he shall forward to the Commission a written complaint and a copy of the teacher's defence for consideration by the commission. (4) If a Manager considers the misconduct alleged against a teacher to be of a serious nature, he may suspend the teacher from service pending a decision... (6) If after consideration of his case by the Commission, a teacher is found not guilty of misconduct, he shall be entitled to receive the portion of his salary withheld during the suspension period. "

Regulation 15 (5) of the Regulation simply makes provision for the withholding of an amount not exceeding one half from the teachers salary during the period of suspension. In accordance with regulation 17 of the aforementioned regulations - a teacher who is found guilty of misconduct under Regulation 15 or inefficiency under Regulation 16 by the Commission may-

(a) be dismissed from the service;
(b) be suspended from the service without pay for a period not exceeding 2 years;
(c) be reduced in rank if he holds the position of headmaster;
(d) have any allowance he might be receiving by virtue of his office withdrawn;
(e) have his increment stopped for a period as the commission may determine.

(f) be given a written reprimand."

Inspite of the provisions of regulation 15(2) and 15(3) the applicant did not present his defence in writing and consequently the first respondent could not be presented with the applicants' defence for consideration. The applicant request for further particulars appears to have simple been ignored. No communication appears to have been made to the applicant whether such request for further particulars was considered unjustified by the Schools Manager. The Schools Manager does not even appear to have considered whether it was satisfied with the response or defence by the applicant. The Schools Manager's failure to communicate whether on his view the particulars requested were appropriately sought resulted in there being no written defence by the applicant which the Schools Manager could consider and forward to the first respondent if not satisfied with. The non-existence of the applicants' written defence and its unavailability to the first respondent was not because the applicant can be said to have declined the opportunity and therefore waived his right to present his defence in writing. The result is that not only was the applicant denied the opportunity to present his defence in writing in terms of regulation 15(3) but the Manager had no written defence to consider before he could reach the decision that he was not satisfied with the defence. Furthermore, the first respondent did not and could not have considered the applicants' written defence because there was none filed. In my view it was not unreasonable for the applicant to request further particulars in respect of the alleged misconduct because such right was not only recognised by the common law but was also expressly recognised in regulation 15(2)(a) that a teacher accused of such conduct has to be informed in writing of the misconduct alleged against him in order to be able to appropriately respond thereto. In any event whether the requested particulars were appropriately sought or not the Schools Manager ought to have communicated to the applicant that in his view the further particulars were not appropriately sought and require the applicant to respond within an extended reasonable time. The Schools Manager's failure to do this resulted in the applicant being denied her right to natural justice, namely her right to be heard, which right is also expressly recognised in regulation 15(2)(b) of the abovequoted Teaching Service Regulations, Furthermore in my view the request for further particulars which the

applicant sought were appropriately sought because without the actual dates, times and identification of the correspondence to which the alleged misconduct related it would have been difficult if not impossible for the applicant to respond appropriately thereto. When the charges or allegations are formulated in such a wide and general manner with no specific allegations as to time, place and date, all that the applicant could do was simple to record a general and bare denial. She could not be in a position to say for instance, that she disputes that she was absent from school on a date specified and produce supporting evidence to that effect. In the circumstance it cannot be said that there was adequate disclosure by the Schools Manager or the first respondent of the information upon which the charges emanated. As Lawrence Baxter correctly observes at page 546-7.

"In order to enjoy a proper opportunity to be heard, an individual must be properly apprised of the information and reason which underly the impending decision to take action against him. As is sometimes said in cases involving disciplinary action, he must 'have some warning of the nature of the charge against him and the circumstances upon which that charge is founded. The administrative authority should not 'keep anything up its sleeve.'"

Regulation 15(3) requires the School Manager who is not satisfied with a teacher's written defence to forward to the first respondent commission both a written complaint and a copy of the teacher's defence for consideration by the commission. It appears to me that the decision and act by the School's Manager as contemplated by the regulation has the effect of submitting the complaint before the commission for the purpose of a disciplinary enquiry. The rules of natural justice require that adequate notice of intended administrative action be given to the affected individual. In the present action this would mean that the School Manager's duty under regulation 15 and 16 of the Teaching Service Regulations is not only to describe sufficiently and appropriately the allegations or complaints against the teacher, but also of the intention to forward the written complaint and the teachers written defence to the first respondent commission for the purpose of considering whether the teacher is guilty of misconduct as defined and contemplated in regulation 15(1) of the Teaching Service Regulations. Lawrence Baxter again observes in this regard,

"An opportunity to be heard presupposes adequate notice of intended administrative action. Whether this is required by statute or not, an effected party must be given adequate notice of the possibility that administrative action may be taken against him. "

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I am in agreement with the abovequoted statement by Professor Baxter. In this regard I may point out that the nature of the response and the level of its presentation will be affected from the accused teacher's point of view by the seriousness of the action intended against him. In the circumstances it is my view that the failure in annexures "A" "C" and "F" to notify the applicant of the intended action constituted another reviewable irregularity. The letter dated 5th August, 2003 fails to do this.

However this letter clearly did not give the applicant a reasonable time to prepare for the hearing or even to respond thereto in writing in accordance with the provisions of regulation 15(2)(b). Regardless of whether annexure "F" which was handed to the applicant was considered or not on the date of the hearing it was calculated to confuse and embarrass the applicant who might reasonably been unsure whether the allegations contained in annexure "F" were to be considered at the hearing of 6th August, 2003. Another interesting feature of the matter is that if one has regard to the listed offences of misconduct in regulation 15(1) of the Teaching Service Regulations most of the matters complained of in annexures "A", "C" and "F" were not expressed in a manner which clearly linked them to the offences of misconduct created in the said regulation 15. When the first respondent's secretary writes to the applicant to inform her of the decision of the first respondent the applicant is informed that she has been found guilty of conducting himself in a manner which is described as interefering to a material extent with the efficient operation of the school. Inspite of this finding there does not appear to be an attempt, in the manner the charges were formulated, to allege that the efficient operation of the school has been materially interefered with. I am not certain that the description of the charges and the decision of the first respondent clearly and without doubt reveals an offence of misconduct as contemplated by regulation 15(1). However I need not make any finding on this aspect of the matter in light of the other considerations already alluded to above. In the circumstances I hold that the process to which the applicant was subjected to was irregular and offended not only against the principles of natural justice but also against the express and specific provisions of regulation 15 of the Teaching Service Regulations.

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The result is that the application for the review, correction and setting aside of the decision or proceedings of the first respondent of the 6th day of August, 2003 suspending the applicant from work for a period of twenty four months, is granted with costs.

ALEX S. SHABANGU

ACTING JUDGE