

THE HIGH COURT OF SWAZILAND

FUTHI P. DLAMINI

Applicant

And

THE TEACHING SERVICE COMMISSION

1st Respondent

THE SCHOOL'S MANAGER

2nd Respondent

THE HEADTEACHER NKILJI SECONDARY SCHOOL

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civil Case No. 3179/2004

Coram: S.B. MAPHALALA - J

For the Applicant: MR. S. SIBANDZE

For the Respondents: MR. DLAMINI

JUDGMENT

(7th October 2005)

The relief sought

[1] The Applicant seeks an order reviewing and setting aside the proceedings and acts leading to her suspension by the 1st Respondent. The review application is premised on a submission that relate to allegations of procedural irregularities or unfairness and unreasonableness prior to and during a disciplinary hearing conducted by the 1st Respondent.

The historical background.

[2] The Applicant is a teacher under the employ of the 1st Respondent who is the Teaching Service Commission (hereinafter referred to as the "TSC") a statutory board established as a universitas with power to sue and be sued in terms of the Teaching Service Commission Act.

The 2nd Respondent is the School Manager, being the Under Secretary of the Ministry of

Education and is responsible for the management of schools. The 3rd Respondent is the Headteacher of Nkiliji Secondary School, being the person in authority and in charge of the school. The school is a legal entity created in terms of the Education Act, 1981. The 4th Respondent is the Attorney -General, cited in his capacity as the Legal Advisor of the Government of Swaziland.

[3] The brief history of the matter is that the Applicant and others were all schoolteachers at Nkiliji Secondary School in the Manzini District who were subjected to disciplinary action by the Teaching Service Commission for various charges having preferred against them. From the papers filed of record it appears on the facts that there was friction between the Applicant and the Headmaster of the school who is cited as the 3rd Respondent.

[4] The present application was argued simultaneously with the applications of the other teachers with a view to curtail proceedings. It was agreed by the parties that the outcome in this application will have equal force in the other applications which involve Miss Sibongile Ngwenya, Mr. Nhlanhla Shongwe and Mr. Walter Kunene.

The facts founding the Applicant's case.

[5] The Founding affidavit of the Applicant spells out at length the circumstances leading to

this application and it emerges therein that Applicant seeks to rely on certain provisions of the Education Act No. 9 of 1981 as read with the Teaching Service Act and Regulation of 1982 and 1983 respectively and Circular No. 1 of 1984 as pertains to certain procedural requirements specifically, this court is urged that the following provisions of the enabling legislation and regulatory instruments are pertinent.

[6] Regulation 3 (1) (e) of the Teaching Service Commission to "comply and establish a code of conduct binding on all persons in the teaching profession".

[7] Regulation 15 (1) enumerates certain instances of misconduct; and

[8] Regulation 15 (2) state that:

"A manager of a teacher who has mis-conducted himself in terms of sub regulation (1) shall:

- a) Inform the teacher in writing of the misconduct alleged against him;
- b) All the teachers an opportunity to present his defence in writing".

[9] In terms of Regulation 15 (3):

"If the manager is not satisfied with the defence presented by the teacher, he shall forward to

the commission a written complainant and a copy of the teacher's defence for consideration by the commission".

[10] The grounds of review that can be gleaned from the Applicant's Founding affidavit against 1st to 3rd Respondents' actions as being irregular may be capsued as follows:

i) The disciplinary proceeds adopted by the Headteacher was irregular and should be set aside because he failed to follow the necessary steps and procedure, (these are particularised in paragraph 25 thereof).

ii) The schools manager failed to inform Applicant of the misconduct alleged against her and she was not given a reasonable opportunity to respond.

iii) The Teaching Service Commission was not properly informed of the case. It is further alleged by Applicant that Section 3.4 of Circular No. 1 1984 was not followed.

The defence.

[11] The defence proffered by the Respondents is found in the Answering affidavit of the Head teacher at Nkiliji Secondary School, Mr. Moses Matsebula. The general defence advanced therein is that the disciplinary proceedings against Applicant were procedural and fair. The Applicant has failed to satisfy the grounds of review. At paragraph 17 thereof the following

averments are made:

"I state that I had not failed to follow the necessary steps and procedures as laid down in Section 3 of the Teaching Service Regulation, 1983 for it has not disputed that on numerous occasion I would hold talks with the teachers and explain to them how the school is run. The Applicant failed to execute lawful orders from me. She failed to follow the examination timetable I had issues and she ended up invigilating her own class. He also failed to complete her work in time for the end of term results and I wrote her a letter in this regard. I beg leave to refer the court to annexure FPD1 attached to the Applicant's Founding affidavit".

[12] In paragraph 23 the following defence is advanced:

"AD paragraph 34.

The contents of this paragraph are denied and the Applicant is put to strict proof hereof. I state that Applicant's side of the story was considered before a decision was reached. Further I state that the four teachers that were accused were those who failed to have reports ready when schools closed not that I was bias".

[13] Paragraph 22 reads as follows:

"AD paragraph 33

1 state that there was no collusion whatsoever between myself and the 1st and 2nd Respondents and that the final decision of the Teaching Service Commission was just, fair and proper under the circumstances".

The legal arguments for and against.

[14] Mr. Sibandze who appeared for the Applicant contended that the procedural conditions placed on the exercise by the manager, of the powers conferred in terms of the regulations are specific and are couched in a mandatory or peremptory language as would not permit deviation and discretion. It is common cause that the 2nd Respondent was at all times material hereto, acting in the capacity as manager as envisaged in the regulations. It is submitted that ex facie the record, the 2nd Respondent (acting as manager as envisaged) failed to comply with Regulation 15 (2) of the regulations, regard being had to the following.:

6.1 He failed to inform the Applicant of the specific instances of misconduct alleged against her nor;

6.2 To afford her a reasonable opportunity to present her defence in writing.

[15] A further contention on behalf of the Applicant is that the specific provisions of Regulation 15 (3) were also disregarded by the 2nd Respondent in so far as that regulation provides:

"15 (3) If the manager is not satisfied with the defence presented, he shall forward to the commission a written complaint and a copy of the teacher's defence for consideration by the commission thereon"

[16] Therefore, as such, the record as envisaged in Regulation 15(3) was not transmitted to the 1st Respondent by the 2nd Respondent and as a result it was not competent for the 1st Respondent to entertain the disciplinary process. Therefore, so the argument goes, the handling by the Teaching Service Commission of the proceedings was irregular and ultra vires the regulations. In this regard the court was referred to the South African leading case of *Amalgamated Packaging Industries Ltd 1975 (4) S.A. 943 A at 950* to the argument that in as much as the procedural requirements of the regulation impose a mandatory obligation, as such, the relevant provisions must be strictly construed.

[17] Per contra arguments for the Respondents are simply that the disciplinary proceedings against Applicant were procedural and fair. The Applicant has failed to satisfy the grounds of review. The gravamen of the Respondents' argument in this regard is that the facts as presented on affidavits do not show that "any failure of justice" occurred as required by legal authorities on the subject. In this respect the court was referred to the following cases: *Councillor Mandla Dlamini, Manzini City Council vs Musa Nxumalo (unreported) No. 10/2002*, *Musa Gwebu vs Manzini City Council (unreported) No. 2802/2002* and that of *Johannesburg Consolidated*

Investment vs Johannesburg Town Council 1903 T.S.

The applicable law

[18] The principles that should guide the superior courts in exercising their powers of review under the common law were set out by Bristone J in the leading case of African Reality Trust Ltd vs Johannesburg Municipality 1906 T.H. 179 at 182 as follows;

"If a public body ... exceeds its powers, the court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not the one at which it would have itself arrived".

[19] Innes CJ in the case of Dabner vs SAR & H 1920 A.D. 583 at 598 formulated the following rules for quasi-judicial statutory tribunals:

"Certain elementary principles, speaking generally, they must be observed: they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions, and the statutory duties imposed must be honestly and impartially discharged".

[20] Zulman J in *Davies vs Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) S.A. 43 (W) at 46 F - 48 G restated the modern law relating to common law review in the following terms:

- (1) The conduct of a statutory body exercising quasi-judicial function is subject to review by the Supreme Court
- (2) The issue before a court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review.
- (3) The remarks of Innes CJ in *Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* continue to apply.
- (4) A court has limited jurisdiction in review proceedings and supervises administrative action in appropriate cases on the basis of "gross irregularity".
- (5) There is no onus on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the onus rests upon the Applicant for review to satisfy the court that

good grounds exist to review the conduct complained of.

(6) The rules relating to judicial proceedings do not necessarily apply to quasi-judicial proceedings.

(7) The body whose conduct is under review is entitled, subject to its own rules, to determine the rules of procedure it will follow.

(8) The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a court of law, to hear witnesses orally, to permit the person charged to be legally represented, or to call witnesses or to cross-examine witnesses.

(9) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been "a failure of justice". A mere possibility of prejudice not of a serious nature will not justify interference by a superior court, (my emphasis).

[21] (See also the unanimous decision of the Appellate Division in the leading case of Hira & another vs Booysen and another 1992 (4) S.A. at 69 (A) at 93 A - 94 B (per Corbett CJ).

[22] The above therefore is the legal framework in which the present case ought to be decided.

The law applied to the facts in casu.

[23] To recap, as outlined in paragraph [10] supra the present application rests on three pillars

viz (i) against the actions of the Headmaster; (ii) against the actions of the School Manager; and (iii) the actions of the Teaching Service Commission. I shall therefore address each ground ad seriatim hereinunder, thusly:

i) Actions of the Headmaster.

[24] In paragraph 24 of the Applicant's Founding affidavit it is averred that the Headmaster contravened the provisions of Section 3 of the Teaching Service Regulations of 1983 annexed thereto as "FPD7" in that he failed to follow the necessary steps and procedures and as a result, his conduct was irregular and should be set aside. Section 3 thereof provides the following:

3.0 Discipline.

3.1 The Headmaster talks to the teacher and records the discussion.

3.2 The Headmaster after 3 warnings mentioned in 3.1 above writes to the teacher requesting for an explanation in writing of his behaviour.

Z.3 If the problem continues, the Headmaster writes to the teacher sending copies to the Manager and the Regional Education Officer.

3.4 If the combine efforts of the Manager and the Regional Education Officer fail, they write to the Teaching Service Commission giving their evidence and recommendations in the case of Aided Schools. The Regional Education Officer submits evidence to the Manager (Under Secretary for Education) who transmits his evidence and recommendations to the Teaching

Service Commission in the case of Maintained Schools.

3.5 The Teaching Service Commission's decision is communicated, in writing, to the teacher sending copies to the School Manager, Headmaster and the Regional Education Officer.

[25] It would appear from the affidavit evidence filed of record that the Headmaster has not complied with Section 3.1, 3.2 and 3.3 stated above. The Applicant only received a letter on the 18th September 2001, together with three other teachers, namely Miss Sibongile Ngwenya, Mr. Nhlanhla Shongwe and Mr. Walter Kunene from the Headmaster dated 30th August 2001, raising a number of issues stating, inter alia, that it was clear from her conduct that she was not prepared to co-operate with the administrator which amounted to insubordination and she could be charged in terms of the Education Act. The Applicant replied to this letter on the 20 September 2001, denying the allegations contained in his letter (per annexure "FPD2").

[26] Clearly, on the facts the 3rd Respondent has failed to comply with the provisions of the cited regulation, thus prejudicing the Applicant and further contravening the general principles of natural justice commonly known as the audi alteram partem. It is my considered view on the facts that the above ground of review ought to succeed.

ii) Actions against the School Manager.

[27] The averments in respect thereto are found in paragraphs 25, 26, 27, 28 and 29 of the Applicant's Founding affidavit to the effect that the School Manager contravened Section 15 of the Teaching Service Regulations of 1983 which provides as follows:

"(2) a Manager of a teacher who has misconducted himself (sic) in terms of Sub-Regulations

(1) shall: a) b)

Inform the teacher in writing of the misconduct alleged against him; Allow the teacher an opportunity to present his defence in writing".

[28] On the facts of the present case the 2nd Respondent failed to inform the Applicant of the misconduct against her. Annexure "FPD3" falls far too short in satisfying the peremptory provisions of Section 15 (2) (a) cited above. Annexure "FPD3" makes reference "to our letter dated 01/10/2001" and is vague in the extreme, contrary to the clear provisions of Section 15 which requires that a teacher who has misconducted himself shall be informed in writing of the misconduct alleged against him and also allows the teacher an opportunity to present his defence in writing. In the present case it appears that the latter requirement has not been met in that the Applicant was given only three days to respond where annexure "FPD3" purported to afford Applicant a period of 7 days to respond to the unspecified "charges". It appears to me that this was a trial by ambush thus offending against the established tenets of natural justice, (see Manzini City Council vs Musa Nxumalo -supra (unreported at page 12 in fin and the cases cited thereat).

[29] Again I have come to the considered conclusion that this ground for review also ought to succeed.

iii) Actions of the Teaching Service Commission.

[30] In paragraph 30 of the Applicant's Founding affidavit, it is averred that Section 15 (3) of the Regulations have not been complied with in casu which requires that if the Manager is not satisfied with the defence presented by the teacher, he shall forward to the Commission a written complainant and a copy of the teacher's defence for consideration by the Commission.

[31] Further, that Section 3.4 of Circular No. 1 of 1984 was not complied with. The said Section provides as follows:

"If the combined efforts of the Manager and the Regional Education Officer fail, they write to the Teaching Service Commission giving their evidence and recommendations in the case of Aided Schools. The Regional Education Officer submits evidence to the Manager (Under Secretary for Education) who transmits his evidence and recommendations to the Teaching Service Commission in the case of maintained schools".

[32] Clearly on the facts averred a record as envisaged in Regulation 15 (3) was not transmitted

to the 1st Respondent by the 2nd Respondent and therefore it was not competent for the 1st Respondent to entertain the disciplinary process. These regulations impose mandatory obligations on the Respondents, as such, the relevant provisions must be strictly construed, (see Amalgamated Packaging Industries Ltd, 1975 (4) S.A. 943 A at 950). The importance of these rules is clear to allow the Commission to have both a written complaint and a copy of the teacher's defence for consideration by the Commission. This is tailored to prevent such allegations which are now being made by the Applicant that her defence was not considered by the Commission. This being the allegation that she was sexually harassed by the Headmaster as shown in all her correspondence to the Respondents. These rules accord with the principles of natural justice. It would appear to me, that the handling by the Teaching Service Commission of the proceedings was irregular and ultra vires the Regulations.

[33] In the result, for the afore-going reasons the application for review succeeds in terms of prayer 1, 2 and 3 of the Notice of Motion.

S.B. MAPHALALA

JUDGE