IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO.157/05**

In the matter between:

ZANDILE MHLANGA & 14 OTHERS **APPLICANTS**

and

TEACHING SERVICE COMMISSION **1st RESPONDENT**

SWAZILAND GOVERNMENT **2nd RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **ACTING JUDGE**

GILBERT NDZINISA: **MEMBER**

DAN MANGO: **MEMEBR**

FOR THE APPLICANTS: NDUMISO MTHETHWA & MRS L. KHUMALO – MATSE

: DUNSEITH ATTORNEYS

: LINDIWE KHUMALO-MATSE & COMPANY

FOR THE RESPONDENTS: MR. N. DLAMINI & MISS H. NDZIMANDZE: ATTORNEY-GENERAL'S OFFICE

J U D G E M E N T 03.02.06

This application was argued simultaneously with case no. 168/05 before the court on 20.01.06. Case No. 157/05 first came before the Court on the 26th May 2005 and Case No. 168/05 first appeared before the Court on the 9th June 2005.

The applications were both brought to Court as urgent applications. The applications thereafter became subject to numerous postponements pending the outcome of the negotiations that the parties engaged in with a view to have the matters settled out of Court. The parties failed to reach an agreement, thus the matters were argued before the Court on the 20th January 2006.

BACKGROUND FACTS:-

The applicants in both cases were on various dates employed by the Ministry of Education through its agency, the Teaching Service Commission as Primary School Teachers. They were employed on one-year renewable contracts. These primary school teachers were not trained as teachers, but were engaged on the basis of their being holders of O' level or Form 5 certificates.

Some of the teachers had been employed by the Teaching Service commission under this arrangement of one year renewable contracts for as long as nineteen years. (See annexure "B" in Case No. 157/05).

The applicants then decided to upgrade themselves by obtaining a qualification in the teaching profession. They enrolled with a teachers training institution by the name of Promat College.

This college was affiliated to the University of Witwatersrand in South Africa. It offered a Senior Primary Diploma in Education. The Applicants enrolled with Promat College and they successfully completed the training. They were awarded Diplomas in Education.

Promat College was a teachers training college recognized by the Ministry of Education. The Court was told that the recognition has since been withdrawn. But when the applicants enrolled it was still recognized by the Ministry of Education.

In December 2004, the Teaching Service commission invited all Primary Teacher Diploma holders to report at the Ministry of Education and to bring with them their qualification certificates. The applicants responded to the advertisement.

The applicants were all hired by the Teaching Service Commission as they then possessed the necessary professional qualification to teach at Primary school level. They signed the acceptance of appointment letters (see annexture "AG2") and were given their posting letters.

Some were posted to the schools that they were previously engaged in on contract. Some were posted to new schools.

The applicants reported to their various duty stations and began to teach. In April 2005 the applicants were summoned by the Teaching Service Commission. They met with the Executive Secretary of the Teaching Service commission, Mr. Moses Zungu. Zungu in that meeting told the applicants that they did not qualify to teach and that the decision to employ them was wrongly taken and it had to be corrected. He required them to sign new contracts altogether being one-year contracts to end in

December 2005 and backdated to January 2005.

A misunderstanding between the parties ensued. There were serious exchanges such that one teacher, Khanyisile Mdluli was ordered by Zungu to leave the conference room, and she left. The applicants said because the situation was so volatile, they had no choice but to do what Zungu was telling them to do, and they signed the one year contract forms.

The applicants now want the Court to set aside those contracts and make an order that they are permanently employed by the Teaching Service Commission in terms of the earlier contracts that they signed.

ISSUES IN DISPUTE:-

The question that the Court must decide is whether the applicants' first contracts of employment should stand or the court should give effect to the second contracts that the Applicants were made to sign in April 2005. On behalf of the respondents it was argued that the signing of the acceptance of appointment and the posting of the applicants did not amount to permanent employment of the applicants as the Executive Secretary did not sign the documents.

On behalf of the applicants it was argued that the applicants having signed the acceptance of appointment form, a contract was entered into between the parties. I was also argued on behalf of the Applicants that the second set of contracts were signed under duress and should not be recognized by the court.

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-

The facts of these cases represent what one may call a paradox

of the year. The Government engaged the services of the teachers for some years to teach at the various primary schools when they were not qualified, but ordinary Form 5 certificate holders. After these teachers have taken the trouble to upgrade and acquire a teaching qualification, then the Teaching Service Commission decided that it did not need them. Strange.

The main argument on behalf of the Teaching Service Commission (hereinafter referred to as the'TSC") was that these teachers could not be employed on a permanent basis because they did not have three credits in primary teaching subjects and at least a pass in the English language. It was argued that these were the entry requirements of the University of Swaziland Board of Affiliated Institutions for a Primary Teacher's Diploma.

This argument is patently flawed. There was no evidence that Promat College was an affiliate of the University of Swaziland. The evidence showed that Promat College was an affiliate of the University of Witwatersrand in South Africa.

The three credits requirement is therefore only applicable to Colleges that are affiliated to the University of Swaziland. Promat College was not an affiliate of the University of Swaziland but an affiliate of the University of Witwatersrand. The applicants said they were admitted by Promat College on the basis of their 0' level certificates plus their teaching experiences.

It was therefore not proper for the TSC to apply the three credits standard to Promat College graduates, as that College was not an institution affiliated to the University of Swaziland, and by extension not subject to the regulations of the Board of Affiliated Institutions of the University of Swaziland.

From the evidence before the court, it seems that it was an afterthought by the 1st Respondent to bring up the issue of the entry requirements. This was evident from the fact that the Executive Secretary of the 1st Respondent had to recall the Applicants when they were four months in their employment. This also showed that Mr. Zungu was desparate as he wrongly thought that they had made a mistake to hire the teachers on permanent basis. It is understandable therefore why he would want them to sign new of contracts on a temporary basis in a bid to replace the earlier contracts of permanent employment that the teachers had already signed. The court will therefore accept the evidence that they were forced to sign the temporary contracts of employment. The element of duress is further evident from the fact that one of the teachers had to be forced to leave the meeting.

If the TSC did not recognize Promat College certificates it should have rejected them on presentation by the Applicants, and not to accept these qualifications and turn around four months later and start questioning the college's entry requirements to the prejudice of the applicants.

The second part of the Respondents' argument was that there was no permanent contract of employment concluded by the parties as the contract form was not signed by the Executive Secretary. An example of the contract form was annexed as exhibit, "AG2" in the Respondents' answering affidavit.

The document is titled "Letter of Appointment". It has all the details of the teacher being employed. In exhibit "AG2" the teacher's name is Tsabedze Kulile Bon'sile. Paragraph 1 states that,

"I am pleased to inform you that your application for

employment as a Primary Teacher has been successful and that you are initially posted to Geza to teach all subjects."

Paragraph 2 says that:-

"Your salary will be 58 080 on the scale C3 to

Paragraph 3 states that subject to the applicant's acceptance of this appointment the applicant should report to the Head teacher to be assigned duties in order to enable the applicant to start teaching on temporary basis. This paragraph also states that the applicant was being appointed as a qualified teacher. Paragraph 4 states that the appointment was probationary. Paragraph 8 states that the applicant should confirm its acceptance by signing the certificate below. The certificate is headed "Acceptance of Appointment".

The Applicants signed the acceptance of appointment certificate.

The form states that "I accept this appointment subject to the terms of this letter." One of the important terms of the letter of appointment is paragraph 10. It states that:-

"This letter constitutes an agreement between the Teaching Service Commission on the other hand and you as a teacher in the other."

There is nowhere in the letter of appointment where it states that the appointment of the applicant is subject to or conditional on the signing of the document by the Executive Secretary of the TSC. It does not make sense that the Applicants could be required to sign the acceptance of appointment certificate if they had not in fact been appointed. The court will find that the

contracts were concluded when the Applicants signed the acceptance of appointment certificates.

It was argued further on behalf of the Respondents that no contract of permanent employment had been entered into because the applicants did not retain the original copy of the letter of appointment. It was argued that after the applicants have signed the documents they were told to leave them behind so that the TSC could peruse them as there were many applicants there.

This argument will be dismissed by the Court, in terms of the letter of appointment the contract is concluded as soon as the applicant signs that he accepts the appointment. If it was a mistake to make the applicants to sign the acceptance of appointment certificates before the TSC could satisfy itself if they met all the requirements, then the Court must consider if it was a just error and one from which the TSC could resile.

On the subject of just error ***CHRISTIE, R.H.*** in his book ***"THE LAW OF CONTRACT IN SOUTH AFRICA" (2001) 4? EDITION*** has
this to say at page 366:-

"*However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, i.e. failure to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term,*

and in fact in any circumstances in which the mistake is due to his

own carelessness or inattention, for he cannot claim that his error is iustus."

In these cases, if the TSC did not mean to hire the applicants on a permanent basis, it was therefore carelessness on the part of the TSC to appoint them and also make them sign the acceptance of appointment certificates if it did not intend to bind itself. Unfortunately it cannot escape the consequences thereof.

Furthermore the Applicants having been appointed and signed the acceptance of appointment certificates, the TSC is estopped from denying that a contract was entered into between the parties.

LAWRENCE BAXTER in his book "***ADMINISTRATIVE LAW***" ***JUTA & CO. (1984)*** at page 402-3 discusses the subject of estoppel, and points out that public authorities are also subject to this principle. The learned author referred, *inter alia,* to the case of ***ROODEPOORT SETTLEMENT COMMITTEE V. RETIEF 1951(1) S.A. 73 (O).*** In that case the settlement committee tried to repudiate the sale of certain land on the grounds that when it made the decision to sell, two of its members were not qualified to be members, and that it had not obtained the required Governor-General's consent.

The Court in that case upheld the plea of estoppel on the basis that these were internal formalities which the committee should

itself have ensured to be properly observed.

Similarly, in these cases, assuming that the three credits requirement was applicable in the present situation, the TSC should itself have ensured that these were present before the Applicants were appointed and also made to sign the acceptance of appointment certificates.

The Court will make the environment, due to new technology does become necessary to u employer has no right to sim necessary skills. The employer equip them to meet the new challenges lpl

r wanted ordinary 0' level certificate Schools, it should have given those upgrade themselves.

In these cases before the Court, the Applicants did upgrade themselves. It is quite and unacceptable that after they strange taken all the trouble had their money to upgrade and paid themselves

and obtained the relevant qualifications, the TSC now wants to repudiate the contracts of employment on clearly misguided grounds.

It is clear therefore that the grounds advanced by the Respondents for not wanting to recognize the appointment of the Applicants on permanent basis cannot stand for the reasons aforementioned.

Taking into account all the above observations and the entirety

of the evidence before the Court, the applications before the Court must succeed.

The Court was told that the Applicants in case No.157/05 have since been paid their arrear salaries. The Court will therefore make no order in respect of that prayer. In case No. 168/05 there is no prayer for re-instatement to the permanent and pensionable establishment. The evidence however has clearly shown that the facts of the two cases are similar and the Court will make that order in terms of prayer 4 thereof for further and/ or alternative relief.

The Court will therefore make the following order which will be applicable to both cases:-

a) That the Applicants having been appointed as Primary School teachers and having signed the acceptance of appointment certificates those contracts and letters of posting are to remain in force.

b) That the subsequent temporary contracts of employment that they were made to sign in April 2005 after they had been appointed are declared null and void and are set aside.

c) That the 1st respondent is to pay any arrear salary that may be due to the Applicants calculated as from the date of their appointment.

d) That the 1st respondent is to pay the costs of these applications on the ordinary scale.

The members agree.

NKOSINATHI NKONYANE

ACTING JUDGE - INDUSTRIAL COURT