

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 28/07

In the matter between:

AMOS NDLANGAMANDLA

APPLICANT

And

THE TEACHING SERVICE COMMISSION

1ST RESPONDENT

THE ATTORNEY-GERNERAL

2nd RESPONDENT

CORAM:

NKOSINATHI NKONYANE

ACTING JUDGE

DAN MANGO

MEMBER

GILBERT NDZINISA

MEMBER

FOR APPLICANT

MR. S. NSIBANDE

FOR RESPONDENT

MR. S. KHUMALO

JUDGEMENT 16.03.07

[1] This is an application brought before the court to be heard on an urgent basis.

[2] The applicant is seeking an order, inter alia, that the decision of the 1st respondent to transfer him from Chibidze Primary School to Ntjanini Primary School be reviewed and set aside as irregular.

- [3] The application is opposed by the 1st respondent. The 1st respondent in its answering affidavit also raise a point *in limine* that the matter was not urgent.
- [4] The point *in limine* and the merits were argued simultaneously before the court.
- [5] The applicant stated in his papers that he was employed by the Swaziland Government in 1983. He was promoted to the position of head teacher in 1998. He is presently stationed at Chibidze Primary School since the year 2000.
- [6] He said there is a struggle for the control of the school between the grantee of the school Mr. Solomon Nxumalo and the community. He said Mr. Nxumalo formed an opinion that he (the applicant) was on the side of the community and began to push for his removal or transfer from the school.
- [7] He said Mr. Nxumalo was successful in his bid to have him transferred as he (Nxumalo) is also a member of the 1st respondent. He was therefore transferred, and was so advised by letter dated the 14th February 2006.
- [8] The applicant said he did not get a chance of stating his side of the story before the decision to transfer him was taken. He also said he was not happy because Mr. Nxumalo was part of the panel of the 1st respondent that took the decision.
- [9] The applicant then launched review proceedings at the High Court. The application was however withdrawn after the 1st respondent had indicated that it was withdrawing the notice of transfer.
- [10] The transfer process was however re-launched by the 1st respondent in October 2006. On the 27th October 2006 the applicant appeared before Mr. Zungu and Mrs Mavuso, who are officers of the 1st respondent. In that meeting he was advised that the transfer was going to be effected. He was told to choose a school from a list of schools to which he would like to go to and to indicate his choice on the 9th November 2006.
- [11] On the 9th November 2006 the applicant appeared before Mrs. Mavuso. When he tried to state his reasons for not wanting to take the transfer, Mrs Mavuso could hear nothing of it, and told him that as he had failed to choose a school, he was going to be transferred to Ntjanini Primary School.

- [12] Accordingly, on the 16th November 2006 a notice of transfer was written to the applicant by the 1st respondent.
- [13] The applicant stated that the transfer was irregular, as he was not afforded a chance to be heard before the decision was taken. Secondly, the applicant stated that the transfer was in violation of circular No.1 of 1995, which provides that transfers must be initiated at the beginning of the third term.
- [14] The 1st respondent stated to the contrary that the applicant was given an opportunity to be heard before the transfer decision was made.
- [15] The 1st respondent further stated in the answering affidavit that the reason behind the transfer of the applicant was an allegation of misuse of school funds. The 1st respondent said that the decision was therefore purely administrative. The 1st respondent also stated that the applicant will not suffer any prejudice as he was given enough time to prepare.
- [16] The 1st respondent further stated that the grantee of Chibidze, Mr. Solomon Nxumalo was not present when the second transfer was effected.

[17] **Urgency:-**

The evidence before the court showed that the applicant did not remain passive after he had got the transfer notice. He instituted legal proceedings at the High Court.

[18] Whilst the matter was at the High Court the transfer notice was withdrawn as the 1st respondent was advised by the office of the Attorney General that it was irregular.

[19] The 1st respondent however resuscitated the process again in October 2006. The second transfer notice was issued on the 16th November 2006. The applicant launched the present application on the 30th January 2007 and the matter was placed before the court on the 5th February 2007.

[20] In support of its position the 1st respondent's attorney referred the court to the case of **GALLAGHER V. NORMAN'S TRANSPORT LINES (PTY) LTD 1992 (3) S.A. 500 (w)**.

In support of the proposition that the court should hear the matter on the basis of urgency, the applicant's attorney referred the court to the case of **NHLANHLA HLATSHWAYO V. SWAZILAND GOVERNMENT & THE ATTORNEY GENERAL NO. 398/06 (I.C.)**.

[22] In the Hlatshwayo case Mr. Khumalo was appearing for the respondents, as he does *in casu*. In that case Mr. Khumalo also did raise the question of urgency as a preliminary point. He also referred to the case of **GALLAGHER V. NORMAN'S TRANSPORT LINES (PTY) LTD 1992 (3) S.A. 500 (w)**.

[23] Mr. Khumalo argued that the applicants in those cases had unduly delayed in approaching the court.

[24] In the Hlatshwayo case, and after having considered Gallagher's case, the President of the court Dunseith J found that the applicant had not unduly delayed in approaching the court. He held as follows at page 6:-

"... He first wrote to the appointing authority expressing his concerns and seeking reassurance. When no such reassurance was forthcoming, he instituted proceedings after a period of about ten days. In our view, this period does not constitute an unreasonable delay, bearing in mind the need to consult with an attorney and draft court papers, not to mention the natural reluctance of an employee to rush into litigation against his employer without careful consideration of his legal position."

[25] There was no evidence in this case as to when did the applicant give his attorney the instruction to institute the present proceedings challenging the second transfer.

[26] Granted that on the face of the record, it does appear that the applicant delayed in instituting the present proceedings, such delay however, cannot be said to have been unduly or unreasonable taking into account that the applicant had to consult with his attorney and have the court papers drafted.

•SEE VUSI GAMEDZE V. MANANGA COLLEGE CASE NO. 267/06 (I.C.)

[27] The court will accordingly dismiss the point raised in *limine*.

[28] **ANALYSIS OF THE EVIDENCE:-**

The 1st respondent did not deny that the first transfer was wrongly carried out. Thus it was withdrawn at the advice of the 2nd respondent.

[29] The 1st respondent stated that on the second instance the applicant was given a chance to be

heard. The applicant said he was not given a chance to be heard. He said when he appeared before Mr. Zungu and Mrs. Mavuso on the 27th October 2006, he was only given a list of schools to choose the school that he would want to go to.

[30] The evidence of the applicant is more probably than that of the first respondent. The court says this because of what appears in paragraphs 15.2 and 15.3 of the answering affidavit as follows:-

"15.2 Respondents state that annexure AN2 referred to at paragraph 4.6 of the founding affidavit, a letter written to the applicant's attorneys did advise at paragraph 3 thereon that the applicant will be issued with fresh notice of transfer and it appeared the parties were in agreement in that regard.

15.3. Applicant was indeed verbally advised that he would transfer at the meeting with members of the Commission on the 27th October 2006 with effect from 8th February 2007."

[31] From what appears from the 1st respondent's papers, the transfer hearing was just a sham. The 1st respondent seemed to have taken the view that there was no need to consult the applicant on the question of the transfer.

[32] In terms of paragraph 4.7.2 of the founding affidavit, when the applicant made the second appearance before the 1st respondent on the 9th November 2006, there was only one officer of the 1st respondent, Mrs. Mavuso. The applicant said when he attempted to state his concerns about the transfer, she told him to stop as the decision to transfer him was not going to be reversed.

[33] Mrs. Mavuso did not file any affidavit to rebut this evidence.

[34] It seems to the court that the 1st respondent did not bother to seek advice from the Attorney General's office when it issued the second transfer notice. The 1st respondent repeated the same mistake even on the second transfer. It is not clear why some government departments don't take the advice of the Attorney General's office seriously. There was clearly no reason for the 1st respondent to carry on with its unlawful conduct when there is free legal advice from the 2nd respondent's office.

[35] The transfer of the applicant was clearly in violation of circular No. 1 of 1995, which regulates the transfer of teachers.

[36] Regulation 24(2) states that: -

"A transferred teacher will be given a chance to challenge the transfer in writing to the TSC

within two weeks after receiving the letter of transfer."

[37] Regulation 24 (4) states that: -

"Notice of transfer will be given at the beginning of the third term and transfers will be effected at the beginning of the following year."

[38] In this case the notice to transfer was given to the applicant on the 16th November 2006, which was **not** the "beginning of the third term."

[39] The notice to transfer was therefore clearly irregular and cannot stand.

[40] Mr. Khumalo argued that the 1st respondent has the right to transfer a teacher at any time as and when circumstances require as per regulation 24(l). Such interpretation of the regulations is parochial. The regulations must be read as a whole and rationale behind fully appreciated.

[41] The transferred teacher needs enough time to prepare himself for relocation. In the present case the applicant stated that he would not have enough time to secure a school for his children's education, and that he has a sickly wife,

[42] The 1st respondent stated in its answering affidavit that the applicant was being transferred on suspicion of misuse of school funds. There was no averment in the 1st respondent papers that these were exceptional circumstances warranting the non-observance of the regulations.

[43] If the applicant was being suspected of having misused school funds, why is it that he was not suspended pending police investigations, and a charge preferred against him, and thereafter face a trial.

[44] In this case the 1st respondent violated its own regulations. Taking into account all the evidence before the court, it is clear that the applicant was unfairly treated by the 1st respondent, and that the transfer was irregularly carried out.

[45] The transfer is accordingly set aside as irregular, and the 1st respondent is ordered to pay the costs.

[46] The members agree.

NKOSINATHI NKONYANE- ACTING JUDGE

INDUSTRIAL COURT