

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 71/2009

In the matter between:

ANDILE ZIKALALA

APPLICANT

and

THE TEACHING SERVICE COMMISSION THE
ATTORNEY GENERAL

1st RESPONDENT 2nd
RESPONDENT

CORAM:

S. NSIBANDE A.M.
NKAMBULE M.
MTETWA

ACTING JUDGE
MEMBER
MEMBER

MR. B.S. DLAMINI
MR. S. KHUMALO

FOR APPLICANT FOR
RESPONDENT

**JUDGEMENT 16th
MARCH 2009**

[1] The Applicant launched an urgent application against the Respondents on 23rd February for the following relief:

That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis;

2. *That a **rule nisi** be and is hereby issued interdicting and restraining the first respondent from proceeding with the disciplinary hearing against the applicant scheduled for 17th March 2009 pending the finalization of the present application.*

21.1 *That an order be and is hereby issued declaring that the entire proceedings*

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involving the parties herein held on 18th February 2009 were irregular and improper there being no person or instrument to record the minutes of the proceedings;

21.2 *That an order be and is hereby issued reviewing, correcting and /or setting aside as irregular and improper the proceedings of 18th February 2009 on account of the failure by the first respondent to furnish to the applicant, a ruling and reasons on certain preliminary points of law raised on behalf of the applicant prior to the commencement of the proceedings;*

21.3 *That an order be and is hereby issued declaring that Regulation 15 (1)(f) of The Teaching Service Regulations does not prohibit a relationship between an adult student above the age of 16 years, such a student being capable under the Girls and Women's Protection Act to lawfully give consent to a sexual partner of her choice;*

Alternatively;

6. *That an order be and is hereby issued declaring that Regulation 15(1)(f) infringes on the principles of natural justice on account of it being ambiguous, lacking in clarity and failure to define the kind of conduct that can be classified as immoral and thus **ultra vires** Section 21 of the Constitution of Swaziland;*

Alternatively;

21.4 *That an order be and is hereby issued declaring that Regulation 15(1) (f) Of The Teaching Service Regulations infringes on the rule of law, it being established law that immoral conduct is not punishable by law unless the immoral conduct complained of is translated into legislation or upon an agreement being specifically made by the parties to the employment relationship prohibiting such conduct.*

21.5 *That an order be and is hereby issued declaring that in the absence of an allegation by the first respondent to the effect that the applicant had a relationship with a minor student below the age of 16 years that the charges preferred against the applicant have no legal basis;*

Alternatively;

21.6 *That an order be and is hereby issued declaring that the only proper interpretation to be given to Regulation 15 (1) (f) of The Teaching Service Regulations is that there must be a due process of law in the form of criminal*

proceedings and a finding of guilt against an offender prior to the determination of issues by the first respondent;

21.7 *That an order be and is hereby issued declaring that first respondent is time barred from institution proceedings against the applicant, the alleged offences having taken place in the years 2004 and 2005 respectively;*

21.8 *Costs of the application;*

21.9 *Further and/or alternative relief."*

[2] The matter first came to Court on 26th February 2009 and the Court agreed to have it enrolled as an urgent matter in its ruling of 3rd March 2009. Full sets of affidavits were then filed by the parties and the matter was postponed to 10th March 2009 for argument on the merits.

[3] On the said date the applicant's representative appeared but the respondents' representative did not. Respondents were called by the court orderly three times without answer. There being no explanation of the Respondents' absence and following an application by the applicant, the matter proceeded in the Respondents' absence.

[4] The applicant faces disciplinary action relating to allegations of misconduct against him, it being alleged that he proposed and conducted intimate relationships with three school going girls between the third term in 2004 and the second term in 2007. The applicant appeared before the first respondent to answer to these charges on 18th February 2009.

[5] At the commencement of the hearing, and in response to the chairman's invite, the applicant's representative raised three preliminary issues, being:

21.10 *"that the first respondent is time barred in bringing charges against applicant, because the alleged offences are said to have taken place in 2004,2005 and 2007;*

21.11 *the matter was prematurely before the Commission because Regulation 15(1) (f) of the Teaching Service Regulations requires that the conduct complained of must have been subject to criminal proceedings and a finding of guilt made by a competent court of law prior to it being referred to the Commission in line of the phrase 'is guilty of immoral conduct'. This interpretation is in line with the Government General orders.*

5.3 *that the Commission ought to consider outsourcing the function of the*

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disciplinary hearing as the decision that applicant has a case to answer was made by the same Commission."

[6] The respondent considered the submissions made and ruled that they could not be upheld because:

21.12 "there was nothing sinister with the charges dating back to 2005 considering the given explanation." It appears to the court that the Commission accepted the prosecutor's explanation that the allegations against the applicant surfaced upon investigation and that there was no malice therein. This is set out in the record of proceedings attached to first respondent's papers.

21.13 the Commission is empowered by both the Teaching Service Regulations and the Constitution of Swaziland *"to exercise disciplinary control over all teachers in the service."*

21.14 the Commission was not involved in the administrative aspect of matters but got involved only when matters are referred to it. In this regard the first respondent attached a letter written by the Under Secretary Schools Manager advising the applicant his response was *"not satisfactory, I am now forwarding the matter to the Teaching Service Commission for its consideration as per the Teaching Service Act Regulations of 1983 Section15."*

[7] The applicant seeks to review the first respondent's decision on the ground that the members of the first respondent failed to apply their minds to the preliminary issues raised and thus committed a gross irregularity. The applicant states that the first respondent could not have applied its mind to the preliminary issues because it simply responded to them by saying that *"they are empowered by the Constitution to hear and decide disciplinary issues against teachers in Swaziland."*

[8] Applicant also complains that the first respondent was not recording the proceedings and states that such failure constitutes a serious irregularity. It was the applicant's contention that the irregularities complained of were of a serious nature that the proceedings were to be set aside.

[9] In opposing the application the respondents argue that the court should be extremely slow to intervene in an incomplete disciplinary enquiry and that the

applicant has prematurely rushed to court - he ought to wait for the hearing to be finalized before bringing the review proceedings.

[10] The attitude of the Courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course except in exceptional circumstances. In the case of **Graham Rudolph vs Mananga College (IC Case No. 94/2007)** this court did not require an employee to wait until the termination of his disciplinary hearing before challenging the chairman's refusal to recuse himself. Dunseith J.P stated therein that the court will interfere to prevent a procedural unfairness which may cause the applicant irreparable harm.

(See also **Sazikazi Mabuza vs Standard Bank of Swaziland Limited & Errol Ndlovu N.O. (IC Case No. 311/2007)**).

[11] In the premise we are of the view that the court may entertain the application at this stage, notwithstanding that the disciplinary enquiry has not been finalized.

[12] The court will only come to the applicant's assistance if it is satisfied that the first respondent did not exercise its discretion judiciously.

[13] The Court in its ruling of 3rd March 2009 held that the applicant's rights to a fair hearing were compromised by the non-recording of the proceedings when the Commission was enjoined to do so. At the time of the ruling the respondents had not filed their answering affidavits and a prima facie case had been made regarding the non-recording of the proceedings.

[14] In response to the allegation that the hearing was not recorded, the first respondent has filed a record of the proceedings dating back to 30th April 2008 to prove that the proceedings were being recorded. The applicant's response in its replying affidavit is to say that "no proper" record was being kept by the first respondent and that most submissions were conveniently not recorded. He takes issue with the fact that it is said by first respondent that its Executive Secretary was recording the proceedings because, he alleges that it is the Executive Secretary who is *"pushing for a finding of guilt against myself."*

[15] The Court is of the view that there is no merit to this complaint by the applicant regarding the recording of the proceedings. The applicant's original position was that there was no recording of the proceedings at all. Even his complaint, in reply, that the record filed is incomplete is unsubstantiated as he has failed to

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point out even one submission that was not recorded. The Court finds that the applicant has failed to show, on a balance of probability, that the proceedings were not recorded. On the contrary a record of proceedings was filed with the Court. The Court will not vitiate the proceedings on this basis.

[16] In the **Sazikazi Mabuza** matter (supra), the Court set out the position of our law regarding the duty resting on the chairman of a disciplinary enquiry to exercise his discretion judiciously. Dunseith J.P states at page 17 of that judgement that;

"The duty resting on the chairman of a disciplinary enquiry to exercise his discretion "judiciously" means he is required to listen to the relevant evidence, weigh it to determine what is probable, and reach a conclusion based on facts and the law. The court can not interfere with his decision where he has applied his mind to these matters, even if the court disagrees with his conclusions on the facts and on the law. No more is required of the chairman than that he should properly apply his mind to the matter."

[17] In the present matter, we are of the view that the members of first respondent applied their minds to the issues before them. While it is correct that a hearing must be held as soon as possible after the incident leading to the disciplinary action, it is also true that an employer can only bring disciplinary action once he has become aware of the transgression. The applicant does not allege that the transgressions were known to the first respondent and not acted upon since 2004 nor does he allege that on the basis of some agreement there is an agreed time limit within which disciplinary action must be taken. Respondent's position seems to be that these issues came to the fore in the course of certain investigations, resulting in the laying of the charges against applicant and that there was nothing malicious about the charges. We accept this position.

[18] With regard to the issue of criminal proceedings having to predate any disciplinary hearing, here is no legal basis for such contention. The transgression complained of may not be criminal but may be a disciplinary offence. Regulation 15(1) (f) of the Teaching Service Regulations provides that immoral conduct is a disciplinary offence. The Regulations lay down a minimum standard of professional conduct for teachers in Swaziland. Sexual exploitation of students under a teacher's care is immoral beyond doubt. It brings the teaching profession into disrepute and compromises the integrity of the school and the education system as a whole (**Hilton Dlamini vs The Teaching**

Service Commission and The Attorney General I.C Case 62/03). Although the court in that instance was referring to the sexual exploitation of under age children, even those students that are over the age

of consent are entitled to protection against sexual predators especially those appointed to be their moral guardians. Disciplinary action may be one way of protecting such children even if they are not underage. The fact that the applicant does not and has not faced any criminal charges in connection with the charges he faces before first respondent cannot prevent him from being disciplined.

[19] Finally the first respondent has set out that it was the Under Secretary Schools Manager who made the decision that the applicant had a case to answer on the allegations made against him. In most cases, it is the employer who concludes that disciplinary action must be taken against an employee and such action can not be vitiated simply on the ground that it was initiated by the employer.

[20] It is our view that despite the simplistic manner in which the first respondent explains its decision on the preliminary points, its discretion was exercised judiciously in this matter.

[21] The applicant, in his papers also raised issue with the charges of misconduct he faces. In particular he complained that;

21.15 there is no allegation that the students he is alleged to have had intimate relationships with were below the age of 16;

21.16 the Teaching Service Regulations, in particular Regulation 15(1)(f) does not define what constitutes immoral conduct;

21.17 regulation 15 (1) (f) of The Teaching Service Regulations should be read together with the Girls' and Women's' Protection Act.

21.18 the said Regulation 15(1) (f) of the Teaching Service Regulations is ultra vires Section 21 of the Constitution of Swaziland on the grounds of being ambiguous and lacking clarity.

[22] These issues were never raised before the first respondent nor were they ventilated before us. They appear only in the applicant's papers. It is our view

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that if the applicant intends to advance such arguments as part of his defence to the charges he faces, then he must put these matters before the first respondent for determination. The Court should not be seen to be usurping the discretion of the first respondent on these issues.

[23] Regard being had to the foregoing it is the Court's view that the applicant has not established that the first respondent failed to exercise its discretion judiciously. The application is dismissed. We make no order as to costs.

The members agree.

ACTING JUDGE OF THE INDUSTRIAL COURT