



**IN THE INDUSTRIAL COURT OF ESWATINI**

**JUDGEMENT**

Case No. 268/2016

In the matter between:

**NHLANHLA ERNEST MDLULI**

Applicant

And

**TEACHING SERVICE COMMISSION**

1<sup>st</sup> Respondent

**ATTORNEY-GENERAL**

2<sup>nd</sup> Respondent

**NEUTRAL CITATION:** *Nhlanhla Ernest Mdluli vs v Attorney-General*  
(268/2016 [2016] SZIC 41 (11<sup>th</sup> May, 2023))

**CORAM:** N. Nkonyane

(sitting with S. Mvubu and G.Ndzinisa

Members of the Court)

**LAST HEARD :** 03/06/2021

**APPLICANT'S WRITTEN SUBMISSIONS:** 23/05/2022

**RESPONDENTS' WRITTEN SUBMISSIONS:** 18/07/2022

*SUMMARY---Labour Law---Applicant a former teacher charged with violating Regulation 15(1) of the Teaching Service Regulations dealing with immoral conduct---No definition of what constitutes immoral conduct in the Regulations---Dictionary definition invoked---Female student accessing male teacher's quarters---No evidence of school's regulations prohibiting such--  
-No evidence that Applicant had an intimate relationship with the female student---Applicant also charged with assaulting another teacher within the school premises---Evidence of assault led before the Court sufficient---Applicant was properly found guilty of the assault---Assault or violence is a serious act of misconduct and will not be countenanced by the Court*

*Held---Dismissal of the Applicant was therefore fair, Applicant's application dismissed accordingly*

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**JUDGEMENT 11/05/2023**

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**INTRODUCTION**

- [1] The Applicant is a former civil servant. He was employed by the Government through the Teaching Service Commission as a teacher on or about the 15<sup>th</sup> February 2006.

- [2] On or about 12<sup>th</sup> June 2008 the Applicant was posted to Sidlangatsini High School. He remained in continuous employment at that school until the 10<sup>th</sup> March 2015 when he was suspended from work on allegations of misconduct. He appeared before the Teaching Service Commission for a disciplinary hearing where he was facing three charges. He was found guilty on two charges and was dismissed by letter dated the 27<sup>th</sup> April 2016.
- [3] The Applicant did not accept the dismissal and he reported the matter to the Conciliation, Mediation and Commission (“CMAC”) as a dispute. The conciliation process ensued at CMAC but the parties were unable to reach a consensus. The Commission accordingly issued a certificate of unresolved dispute on the strength of which the Applicant instituted the current legal proceedings.
- [4] Whilst the Court was in the process of finalising the judgement herein, and as fate would always have it, one of the members of the Court passed on. This information was relayed to the parties by the Clerk and the parties agreed that the Judicial Officer and the remaining member could proceed and deliver the judgement.

#### **APPLICANT’S CLAIM**

- [5] The Applicant instituted the present legal proceedings in terms of Section 85(2) of the Industrial Relations Act N0.1 of 2000, as amended, read together with Rule 7 of the Industrial Court’s Rules of 2007. The Applicant claims that his dismissal was both substantively and procedurally unfair. He is now praying for the following relief;

reinstatement or alternatively maximum compensation, notice pay, additional notice pay, severance allowance, pension pay out and costs of suit.

- [6] The 1<sup>st</sup> Respondent denied that the Applicant was unfairly dismissed. The 1<sup>st</sup> Respondent stated in its Reply that the Applicant's dismissal was for a fair reason as he was found guilty of misconduct.

### **THE CHARGES**

- [7] The Applicant was facing three charges at the disciplinary hearing before the Teaching Service Commission. The charges appear as follows in paraphrase;

#### Count 1:

the accused is charged with contravening Regulation 15(1) of the Teaching Service Regulations of 1983 as read with Regulation 17 of the Teaching Service Regulations of 1983 in that on or about the year 2012 and 2013, it is alleged that the accused had an intimate relationship with a female student as a result of the relationship it is alleged that he was found with her in his house after school hours. This amounted to immoral conduct on the part of the accused who was a teacher and such conduct is prohibited to be done by a teacher.

#### Count 2:

The accused is charged with contravening Regulation 15(1) (j) of the Teaching Service Regulations of 1983 as read with Regulation 17 of the teaching Service Regulations of 1983 in that during the year 2014

it is alleged that he was found by a female student who was in Form 4 in a compromising position with another female student in a bush around the area.

Count 3:

The accused is charged with contravening Regulation 15(1) (j) as read with Regulation 17 of The Teaching Service Regulations of 1983 and Section 36 (b) of the Employment Act of 1980 (as amended) in that on or about April 2014, the accused threatened one Mr. Themba Malambe, who is a teacher in the school for trying to advise him against his alleged unbecoming behaviour of having intimate relationships with students.

[8] **THE EVIDENCE**

The Applicant pleaded not guilty to all the charges. He was found guilty on count 1 and count 3. He was found not guilty and acquitted on count 2. For the Applicant's case, two witnesses testified, being the Applicant himself and the alleged victim of the offence whose name will not be revealed in this judgment to protect her identity as she was still a minor at the relevant time. On behalf of the 1<sup>st</sup> Respondent four witnesses were paraded.

[9] The evidence led revealed that, at the time relevant to this application, the Applicant was a teacher stationed at Sidlangatsini High School. The school is a mixed gender learning institution. As regards Count 1, the Applicant told the Court that in the afternoon at around 4:00 P.M on the 20<sup>th</sup> November 2012, he took the route to the toilet to answer the call of nature. The Applicant was staying in the teachers' quarters located

within the school premises. On his way he noticed that there was a female student in one of the classrooms.

- [10] The Applicant noticed that the student was distressed and crying. He made a detour and drew near to her and enquired what the matter was. The student informed him that she was facing problems at home because she had fallen pregnant. The Applicant said he figured that a female teacher could be the right person to attend the student. No female teacher was found at that time however. The Applicant decided to call a male teacher by the name of Jabulani Nene (hereinafter referred to as Mr. Nene) to come and assist him. Mr. Nene came to the scene but soon left as it was late in the afternoon and he had to get public transport to Manzini where he stayed.
- [11] The Applicant requested another teacher by the name of Themba Christopher Malambe (hereinafter referred to as Mr. Malambe) to come and assist him deal with the situation of the female student. After a short while a police van came to the scene and two police officers alighted and introduced themselves to the people that they found there. The police officers said they were investigating a matter of a pupil who had been seen inside the Applicant's house. At that moment, a woman (RW1) who was said to be the female student's relative showed up and was in an angry mood. The Applicant said one of the police officers, Mr. Mkhonta, told the student to get into the Applicant's house for her safety and to give RW1 an opportunity to cool down. After a short discussion, the police officers drove away with the student to Sithobelweni Clinic so that she could be examined whether or not she

had been sexually violated by the Applicant. The police officers returned at about 10:00 P.M. They came back with a doctor's report which showed that there was no sexual penetration but that the student was six weeks pregnant. The whereabouts of the doctor's report are unknown and it was never presented to the Court as an exhibit by any of the witnesses.

- [12] On the following day, the Applicant in the company of his teacher colleague, Mr. Nene, went to report to the Head Teacher about the incidence.
- [13] The second witness who testified was the female student. She told the Court that she was doing Form 2 during the time of the incidence. She told the Court that she was inside a Form 2 classroom and was crying because she was pregnant and her mother was angry at her for falling pregnant when she was still a scholar. Her evidence about what occurred thereafter was on all fours with what the Applicant had already testified in Court about. She also denied that there was a love relationship between her and the Applicant.
- [14] AW3, Constable Comfort Mfanawenkhosi Mkhonta, was one of the two police officers that came to the scene. He was with constable Dlamini. He told the Court that when they arrived the Applicant and the female student were at the veranda of the Applicant's house. AW3 told the Court that he enquired from the two if there was a love relationship between them and they both denied. AW3 said it was him who told the female student to get inside the Applicant's house to be

safe from RW1 who had approached the scene in a visibly angry mood. AW3 also told the Court that the medical personnel at Sithobelweni Clinic examined the female student and it was found that there was no sexual penetration and that the student was six weeks pregnant.

[15] The Applicant thereafter closed his case. The 1<sup>st</sup> Respondent paraded four witnesses. RW1, Elizabeth Ntombazana Hleta, told the Court that the female student in question is her elder sister's child. She told the Court that on that fateful day she was in the maize field together with three of her children when she noticed a pupil that was alone inside the school premises. She said the pupil was sitting down and the Applicant and Mr. Nene were standing next to a water tap. RW1 then proceeded towards the school gate. The two teachers also walked to the school gate. RW1 went past them as she was going to collect her bundle of firewood from the nearby bush.

[16] RW1 said after a few minutes she saw the pupil enter the Applicant's house and the Applicant followed her and closed the windows. RW1 said later the two came out of the house and at that time a police van came to the house. She also told the Court that when the police van drove away with the pupil the pupil's mother was left behind.

[17] During cross examination RW1 told the Court that in her estimation the Applicant and the pupil spent less than an hour in the house.



- [18] The 1<sup>st</sup> Respondent then called RW2, Mr. Malambe. RW2 told the Court that he saw the Applicant together with Mr. Nene approaching the pupil whilst she was inside the classroom and also when the female student was outside the classroom when she followed them. RW2 said the female student entered into the Applicant's house. RW2 said at sunset a police van came and parked next to the Applicant's house. He said one police officer came to his house and told him that he had been asked by the Applicant to come and be a witness when they interview the Applicant. RW2 said he indeed went to the Applicant's house and the pupil came out and got into the police van. He said later the police drove away with the pupil.
- [19] RW2 also narrated to the Court the evidence about the assault by the Applicant and Mr. Nene. He told the Court that the incidence took place in the evening when he was from home and had parked his motor vehicle under a tree. He said when he went past the Applicant's house he was confronted by the Applicant and Mr. Nene. They blocked his way and held him on either side. They pulled him by his jacket which got torn. They shoved him and he fell down. The two teachers stood by blocking his way for over two hours, shoving and pulling him. RW2 was eventually set free when his wife switched on the outside lights.
- [20] RW2 reported the matter to the police. The Applicant and Mr. Nene were arraigned before the Nhlanguano Magistrate's Court. They were charged with common assault. They pleaded guilty to the charge. They were found guilty, cautioned and discharged.

- [21] During cross examination RW2 told the Court that he was outside his house when the police van arrived. He said the police van came and parked in front of the Applicant's house. RW2 also told the Court that he reported the assault incidence to the police on the very same night that it occurred.
- [22] RW3, Gugu Mondlane's evidence was brief. She told the Court that when the police came, they found her in the yard burning some refuse. The police asked her to show them the Applicant's house and she did so. She told the Court that RW2 communicated with her using a cellular phone and asked her to look at the student that was going to the teachers' quarters. She said she was able to identify the student. She said she was inside the house when RW2 communicated with her and she peeped through the window and saw the pupil moving towards the teacher's quarters, but did not see her entering any particular house.
- [23] During cross examination, RW3 told the Court that she did not hear any knock on her door by anyone. She said she was inside the house and the windows were opened.
- [24] The last witness was RW4, Philile Mbala (nee Bhembe). She told the Court that she is the Head Teacher of Sidlangatsini High School. She said the Applicant was dismissed for allegedly having sexual relations with students under his care and also for assault on a fellow teacher. She compiled a report and submitted it to the Regional Educational Officer ("REO"). She said she did give the Applicant an opportunity

to give his side of the story on the issues before she submitted the report. She told the Court that Mr. Nene was once a sports teacher for a long time and he requested to be relieved from the position.

[25] Under cross examination, RW4 told the Court that she compiled a report about the incidence and submitted it to the REO. She also told the Court that she did attend the disciplinary hearing of the Applicant when he appeared before the 1<sup>st</sup> Respondent. Her said her testimony was brief as it was largely to present the reports that she compiled to the panel that was conducting the disciplinary hearing against the Applicant.

#### **ANALYSIS OF THE EVIDENCE AND THE LAW**

[26] The Applicant was facing three charges. He was acquitted on count two. He was found guilty on count 1 and count 3. The charges appear in the ruling of the 1<sup>st</sup> Respondent, exhibit A herein. In count 1 the charge was that of contravening Regulation 15(1) of the Teaching Service Regulations as read together with Regulation 17. It is alleged that the Applicant had an intimate relationship with a female student and that as the result of such relationship he was found with the female student in his house after school hours. It is further alleged in the charge that that behaviour amounted to immoral conduct on the part of the Applicant who was a teacher and that such conduct was prohibited to be done by a teacher.

[27] Regulation 15(1) consists of paragraphs (a) to (j). To charge someone with contravening Regulation 15(1) without specifying the paragraph

is therefore vague. The further description of the charge however does reveal that the Applicant should have been properly charged with contravening Regulation 15 (1) (f) of the Regulations as the charge states that his actions amounted to immoral conduct. Accordingly, Regulation 15(1) (f) provides the following;

*“15(1) A teacher who –*

*(f) is guilty of immoral conduct....*

*Shall be deemed to guilty of misconduct.”*

[28] The next enquiry therefore is, did the Applicant commit the alleged act of immoral conduct? The Teaching Service Regulations do not define the word “immoral”. The dictionary defines this word as; “not conforming to accepted standards of morality”. The word “morality” is defined as; “principles concerning the distinction between right and wrong or good and bad behaviour” (see: Concise Oxford English Dictionary: eleventh edition, 2004, pages 172 and 927).

[29] It was alleged in the charge sheet that the Applicant had an intimate relationship with a female student. To be intimate with another person means to be closely acquainted with that person. It may also mean to have a sexual relationship with that other person. There was no evidence before the Court that the Applicant had a sexual relationship with the female pupil. There was also no evidence that the two were having a love affair. Both the Applicant and the female pupil (AW2)

denied that they were in a love relationship or an intimate sexual relationship. When the police officers took the female student to Sithobelweni Clinic, AW3 told the Court that she was medically examined and it was found that there was no evidence of sexual penetration of her private parts, but it was found that she was six weeks pregnant. There was no evidence that the pregnancy was caused by an act of sexual intercourse between the Applicant and the female student. AW3 told the Court that their investigations revealed that the female student was impregnated by a certain male student by the surname of Mamba. AW3 told the Court that the police did go to the Mamba homestead and they confirmed that the female student's pregnancy was caused by the Mamba male student.

[30] It was also alleged in the charge that the Applicant was found with the female student in his house after school hours. The Applicant's version of how the female student found herself at his house however was not shown to be false or improbable.

[31] The Applicant's evidence of how the female student was found at his house was that;

31.1 he found the female student inside the classroom crying.

31.2 he enquired from her why she was crying and she said she was afraid of going home because she was pregnant and her mother was angry at her for getting pregnant whilst she was still a scholar.

31.3 he then asked the female student to go and wait for him at his house as he was on his way to the lavatory.

31.4 whilst trying to offer counselling to the female student at his house, a police van came by with two policemen.

[32] The Applicant's version was confirmed by AW2.

[33] Although the medical report was not presented to the Court as its whereabouts were unknown, AW3 confirmed that the Medical personnel at Sithobelweni Clinic found that the female student was six weeks pregnant. This evidence corroborated the evidence of AW1 and AW2 that the female student was afraid to go home because her mother was angry against her because she had fallen pregnant.

[34] Taking into account all the evidence before the Court, the Court will accept the version of the Applicant because of the following reasons;

34.1 the evidence that the female student was sitting alone in the Form 2 classroom and was crying was not successfully challenged. It was highly unlikely that a person who was in distress could have soon thereafter engaged in an act of sexual intimacy.

34.2 the evidence that the female student was in the classroom was confirmed by the 1<sup>st</sup> Respondent's witness, RW2. RW2 said he was able to see the female student through the windows. If the

Applicant and the female student had the intention of having intimate relations on that day, why would she expose herself and let people notice that she was remaining behind after school.

34.3 the evidence revealed that it was during broad daylight when the female student proceeded to the Applicant's house. Her conduct was clearly inconsistent with someone who intended to commit an unlawful or immoral act with her teacher.

34.4 even if the Court were to accept the evidence that the Applicant was seen getting inside the house with the student, why would they come out and sit at the veranda for everyone to see them if it was unlawful for a female student to get inside a male teacher's living quarters.

34.5 the behaviour of the Applicant and the female student was clearly consistent with the evidence that the Applicant found her crying inside the classroom and he told her to go and wait for him at his house with the intention to help her as she was emotionally distressed.

[35] Taking into account all the evidence before it, the Court is unable to come to the conclusion that the 1<sup>st</sup> Respondent was able to prove on a balance of probabilities that the Applicant did commit the misconduct levelled against him in count 1. Further, there was no evidence that in terms of the school's regulations, the teachers' quarters were out of bounds for students. There was also no evidence of any record of

intimate telephone conversation between the Applicant and the female student which could be an indicator of an intimate relationship.

- [36] The next enquiry is whether or not the 1<sup>st</sup> Respondent was able to prove the charge that the Applicant faced in count 3. Count 3 was based on Regulation 15(1) (j) of the Teaching Service Regulations read together with Section 36 (b) of the Employment Act. That Regulation provides as follows;

***“15(1) A teacher who.....***

***(j) for any reason which entails for the service similar detrimental***

***consequences to those set out in this Regulation;***

***shall be deemed to be guilty of misconduct.”***

- [37] Section 36(b) of the Employment Act N0.5 of 1980 as amended reads as follows;

***“Fair reasons for the termination of an employee’s services.***

***36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons –***

***(a) .....***



*(b) Because the employee is guilty of a dishonest act, violence, threats or ill treatment towards his employer, or towards any member of the employer's family or any other employee of the undertaking in which he is employed ;”*

[38] The 1<sup>st</sup> Respondent led the evidence of RW2, Mr. Malambe to prove this charge. RW2 told the Court that he was confronted and assaulted by the Applicant who was together with his teacher colleague, Mr. Nene. RW2 did also report the matter of the assault to the police. The Applicant and Mr Nene were charged with common assault. They were arraigned before the Nhlanguano Magistrate's Court. They pleaded guilty to the charge. They were found guilty and were cautioned and discharged.

[39] Dealing with the subject of assault at the workplace, the learned author John Grogan in his publication "Workplace Law", 8<sup>th</sup> edition, 2005 stated the following on pages 173 – 174;

*“Assault is defined as the unlawful and intentional application of force to a person, or threat that such force will be applied. Such conduct is generally accepted as a valid ground for dismissal subject to the considerations mentioned below. The force can take a number of forms, and need not necessarily involve the actual application of physical force; threats of violence may suffice. The employer is entitled to dismiss even*

*if the assault takes place off the work premises, provided that it relates to the employment situation.”*

[40] The evidence before the Court revealed that indeed the assault on the witness related to the employment situation. According to RW2, the two colleague teachers assaulted him for reporting them that they were involved in intimate relationships with school girls. The Applicant's version was that the cause of the assault was that he reported Mr. Nene who was a sports teacher to the head teacher for having misappropriated a sum of E4,000.00 which had been given to him to cater for the students' sporting activities. That incidence led to Mr. Nene losing his position as the sports teacher at the school.

[41] Whether the real reason for the assault was the unseating of Mr. Nene from the position of sports teacher, or it was because RW2 reported them to the head teacher for allegedly having love relationships with female students does not matter. What matters is that it emanated from work related issues. Violence against a fellow employee is strictly prohibited by the labour laws of this country and constitutes one of the fair reasons for the termination of an employee's services.

[42] **CONCLUSION AND ORDER.**

The Court is satisfied with the evidence before it that the Applicant and his colleague, Mr. Nene did commit the offence of common assault against RW2, Mr. Malambe. The offence was committed within the employer's premises and it emanated from work related issues. The

Court therefore comes to the conclusion that the 1<sup>st</sup> Respondent was able to prove on a balance of probabilities that the Applicant did commit the offence specified in count 3. The dismissal of the Applicant was therefore fair. In the result, the Court will make the following order;

- a) The Applicant's application is dismissed.
- b) There is no order as to costs.

[43]. The member is in agreement.



**N. NKONYANE**

**JUDGE, INDUSTRIAL COURT OF ESWATINI**

***For the Applicant:***

*Mr. T.N. Sibandze*  
*(Rodrigues & Associates)*

***For the Respondents:***

*Mr.N.G. Dlamini*  
*(Attorney – General's Chambers)*