IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.380/2022

In the matter between:

MBONGWA DLAMINI Applicant

And

MINISTRY OF EDUCATION AND TRAINING 1st Respondent
ACCOUNTANT GENERAL 2nd Respondent
ATTORNEY GENERAL 3rd Respondent
THE TEACHING SERVICE COMMISSION 4th Respondent

Neutral Citation	:	Mbongwa Dlamini v Ministry of Education and Training and 2 Others (380/2022) SZIC 40 [2023] (May 2023)
Coram	:	**MSIMANGO J** *(Sitting with Mr. S. Mvubu and Ms.N Dlamini - Nominated Members of the Court)*
DATE HEARD	:	13th March, 2023
DATE DELIVERED	:	8 May 2023

SUMMARY: The Applicant alleges that the 1st Respondent has withheld his salary and wages for the months of October and November 2022 unlawfully and without a hearing or justification. The Applicant argues that the 1st Respondent has unilaterally taken the law into its own hands in that there is no court order effecting the stoppage of the salary,

and is now calling upon the court to declare that the Respondents conduct of withholding and not paying the said salary is illegal as it violates the contract between him and the employer

---

JUDGEMENT

---

[1] The Applicant is Mbongwa Dlamini an adult liswati male, employed by the 1st Respondent as a teacher at Moyeni High School, and currently the President of the Swaziland National Association of Teachers.

[2] The 1st Respondent is the Ministry of Education and Training, a ministry responsible for amongst other things, the employment of teachers and also responsible for education and training, with its principal offices situate at the 1st floor, Ministry of Education Building Mbabane, in the Hhohho Region.

[3] The 2nd Respondent is the Accountant General cited herein as the Senior Officer in the Treasury Department of the Kingdom of Eswatini. The order sought against the 2nd Respondent is to make the payment which is due on the order being granted by the Honourable court.

[4] The 3rd Respondent is the Attorney General N.O. cited herein in his official capacity as such, being an officer authorized to represent the Eswatini Government in legal matters, with its principal offices situate at 4th floor Justice Building, Mbabane, in the Hhohho Region.

[5] The Applicant has brought an application against the Respondents seeking an order in the following terms:-

5.1 Dispensing with the usual forms and procedures and rules relating to time limits, service of process and the institution of

proceedings, and enrolling the matter to be heard as an urgent matter as per the provisions of Rule 14 and 15 of the Rules of Court, further, condoning any non-compliance with the Rules of Court relating to notice and service of court process.

5.2 That a rule nisi with interim immediate effect do hereby issue calling upon the Respondents to show cause on the 5th day of December 2022, why the following order should not be made final.

5.2.1 That the 1st Respondent immediately pay the said salary and benefits due to the Applicant, for the months of October and November 2022, and any further months which have not been paid.

5.2.2 Ordering and declaring that the Respondents conduct of withholding and not paying the said salary is illegal and violates the contract between the said parties.

5.3 That prayers 5.2.1, 5.2.2 and 5.4 of this Notice of Motion operate with immediate and interim effect pending finalization of this matter.

5.4 That the intended disciplinary process which is intended against the Applicant pursuit to the notice by the Respondent dated the 10th of November 2022, which was delivered on the 24th November 2022, be and is hereby interdicted and stayed pending the outcome of these proceedings before the Honourable Court.

5.5 Costs of suit to be awarded against the Respondents jointly and/or severally the one paying the other to be absolved in the event of opposition of this application

5.6 Granting the Applicant further and/or alternative relief.

[6] The matter was initially set down to be heard on the 29th November 2022 and when the matter came before court on the said date, the Honourable Court made a directive for filing of the necessary papers by the parties and it was postponed to the 16th December 2022 for arguments. However, for one reason or the other the Respondents did not file their Answering Affidavit on the agreed date and thereafter brought an application for condonation for late filing of the affidavit.

[7] It must be mentioned that in the application for condonation the parties will retain their original citation like in the main application. The court will therefore proceed on that basis in order to avoid confusion.

[8] In support of the application for condonation the Respondents attorney argued to the effect that the Applicant's attorneys refused to accept service of the answering affidavit on the 9th December 2022 because same was supposed to be filed on the 6th December 2022. Further that, the affidavit was duly sworn to on the 6th December 2022, however, Applicant's head teacher was not available to confirm what he had reported to the ministry about Applicant's absenteeism, despite him been called by the ministry's legal advisor to come to the ministry to sign the confirmatory affidavit.

[9] The Respondents attorney submitted that the failure to file the answering affidavit timeously was not willful, it was due to unforeseeable circumstances as their witness was apparently reluctant to confirm his report, and that he also failed to disclose that he would not be available on the 6th December 2022, whereas the interests of justice required confirmation of the answering affidavit.

[10] From the above explanation the Respondents attorney requested the Honourable court to condone the late filing of the answering affidavit and further requested that it be admitted into the record of proceedings.

[11] The Applicant was opposed to the application for condonation and argued that the procedure adopted by the Respondents for condonation is not proper nor does it comply with the provisions of the law for the following reasons:-

(a) An application for condonation for the late filing of a pleading must also be accompanied by an application for leave to extend the time limits for within which the court had prescribed. The Respondents have not sought for leave for the extension of time therefore the Application cannot be successful.

(b) The condonation if it were to be granted will not assist the Respondents for the reason that they will still not be permitted to file because the time limit will not have been extended. The said time limits were prescribed by the court and must also be extended by the court.

(c) An application of this nature must be supported by all relevant facts and explanations for the default by an Applicant and on failure to do so no order may be granted by the court.

[12] The Applicant submitted that the present application does not fit and meet all these requirements and therefore must be dismissed with costs.

[13] Condonation is provided for under Rule 16 (3) of the Rules of this Honourable court and this rule provides as follows:-

"The court may, on good cause shown condone any non-compliance with these Rules".

[14] A plain reading of the sub-rule is that a party due to one reason or another fails to take a prescribed legal step within the stipulated time may seek the court to condone such a failure. This sub-rule serves as a basis for relief after the expiry of the prescribed dates.

[15] The court will always consider condonation of non-compliance with the rules, for the reason that the rules of court are not there to hinder and obstruct litigants, or to use mere technicalities in order to deprive litigants of their right to be heard. However, good cause needs to be shown by the party that seeks condonation for late filing of court process or an extension of time to file. For this general principle the party is to place facts before the court which could reasonably be expected to affect the court's discretion with regard to the granting of such relief.

[16] The court in order to exercise its discretion properly needs to know that amongst other factors that there has not been a reckless or intentional disregard of the rules of court and that the reasons given for the delay are reasonable. Furthermore, the court needs to be appraised of why the delay was occasioned, furnish a reason or explanation of the default sufficiently so for the court to understand how it came about, and also to assess the Applicant's conduct or motives.

[17] It is settled in our law that this Honourable court has the inherent right to grant condonation of late filing of documents, as is sought, where principles of justice and fair play or enquiry demand it, and when the reasons for non-compliance have been satisfactorily explained. The principles to be considered are also settled in so far as to what the court should consider in order to exercise its discretion.

[18] These principles were succinctly expressed in **UNITED PLANT (PTY) V HILLS 1976 (1) S.A**, where the court held as follows:-

"It is well settled that in considering applications for condonation, the court has a discretion to be exercised judiciously upon a consideration of all the facts, and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanations therefore, the prospects of success, the importance of the case ..... the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive and these factors are not individually decisive but are inter-related and must be weighed one against the other. A slight delay and a good explanation may help to compensate for prospects of success which are not strong".

[19] In *casu* the reason given by the Respondents for not filing the answering affidavit on time relates largely to the unavailability of Mr Manyatsi, who was supposed to depose to the confirmatory affidavit. The Respondents submitted that prospects of success were equally good for the reason that the Applicant was absent from duty without leave hence not entitled to wages for the period in which he was absent.

[20] Where there is a good explanation for not following the rules of court and where the court is fully satisfied that such explanation is made in good faith and the material contained in the affidavit is relevant to resolving the dispute between the parties, the court should be loath to dogmatically stick to the rules where to do so will result in the court not having the full facts before it or injustice in the case.

[21] When regard is being had to the facts of the application and the explanation put forward by the 1st Respondent, the court is inclined to grant the condonation. Accordingly, the condonation is hereby granted as prayed for in the notice of application for condonation of late filing of the answering affidavit.

[22] The Respondents further raised the following points of law:-

22.1 **NON-JOINDER**

The Respondents argued that the Teaching Service Commission (TSC) is the author of the complaint as per annexures "MD1" and "MD 2" of the founding affidavit, therefore T.S.C is the *de facto et de jure* employer of the Applicant in terms of **Section 176 (1) of the Constitution and Section 2 of the Employment Act 5/1980**. As a result the employer bears the duty to pay the withheld salary, in *casu* T.S.C has admitted the withholding of the salary and furnished the reason on annexure MD2 as absenteeism. T.S.C therefore has a substantial and vested interest in the cause of complaint, as well as the order sought, T.S.C ought to be joined as a matter of necessity.

22.1.1 The Applicant argued to the contrary that the correct position is that it was not the T.S.C which withheld the salary but the Ministry of Education, and that T.S.C further confirmed that the Ministry will continue to withhold the salary for the coming months until the Applicant has resumed his duties. According to the Applicant it is therefore not necessary to join the T.S.C as it has no material legal interest in the matter for it to be included in the proceedings.

22.1.2 If a third party is entitled to be joined in legal proceedings in the sense he is directly and substantially interested in the issues raised in the proceedings before the court, and that his rights may be affected by the judgement of the court, the court will not deal with those issues without such joinder being effected.

22.1.3 It must be mentioned, however, that each case is judged on its own peculiar circumstances. There are several cases where courts have correctly dismissed proceedings on non-joinder alone. The test applied in such cases is whether a party has a direct and substantial interest in the subject matter in the litigation which may prejudice the party that has not been joined. In **GORDON V DEPARTMENT HEALTH, KWAZULU NATAL [2008] ZA SCA 99 2008 (6) S.A 522 SCA**, the court held as follows:-

"If an order or judgement cannot be sustained without prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined".

22.1.4 It also merits to mention that the issue of non-joinder is a discretionary matter whether or nor the court could order a dismissal of the proceedings. Dismissal is, however, usually viewed as a drastic step as the common relief is to postpone the proceedings and order that the party not joined be so joined, as the learned Judge Ota J noted in the case of **SAVANNAH N. MAZIYA SANDANEZWE V GDI CONCEIPTS AND PROJECT MANAGEMENT (Pty) Ltd Case No. 905/ 2005** that,

"The question that arises at this juncture is, should the court throw the application into the waste bin, like a piece of unwanted meal by reason of this fact as is urged by the Respondent? I do not think so, I say this because the universal trend is towards substantial justice. Courts across jurisdictions have long departed from the era when justice

was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potential of occasioning a miscarriage of justice".

22.1.5 The court aligns itself with the observations of Ota J in the above cited case. The Applicant is granted leave to join the TSC as a necessary party.

22.2 **LOCUS STANDI**

The Respondent's argued that the Ministry of Education and Training has no legal persona being neither a human being nor a company. It is also none of the entities with quasi legal capacity specified under Rule 14 of the High Court Rules. Furthermore, government. Ministries such as the 1st Respondent cannot sue or be sued in their own names. Even if the ministry had legal capacity, it could not be sued on behalf of the TSC which is declared independent of the executive as per Section 178 of the constitution.

22.2.1 The Applicant argued to the contrary that the provision of Section 178 of the constitution has no bearing in this matter, the court should therefore disregard the Respondent's submission and point of law. The Applicant referred the court to annexure "MD3", which applicant argues initiated the complaint. It was Applicant's submission that the letter was written by the Ministry of Education and copied to the TSC, REO and the head teacher of Moyeni

High School, thus, it begs the question why the Ministry should not be cited in these proceedings.

22.2.2 Locus standi connotes two senses, firstly it refers to the capacity to litigate which is the capacity to sue or to be sued. Secondly, it denotes whether a person has a sufficient interest in the subject matter of the case. In *casu* the subject matter is the non-compliance with the audi alteram principle before the stoppage of the Applicant's salary who is a teacher by profession. Hence, the court is of the view that the 1st Respondent has a substantial interest in the subject matter and outcome of the proceedings, as the ministry responsible for amongst other things education and training in the country, as was stated by the court in the case of **SWAZILAND NATIONAL SPORTS COUNCIL V MINISTER OF SPORTS, CULTURE AND YOUTH AFFAIRS AND OTHERS H/C case No. 1455/2013**, where it was held that:-

"The issue of locus standi therefore does not depend on the success or merits of the case, but on whether the Applicant has sufficient interest in the subject matter of the dispute".

22.2.3 Furthermore, this Honourable Court in terms of **Section 11 (1) of the Industrial Relations Act 2000**, is not strictly bound by the rules of evidence or procedure which apply in civil proceedings, and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice.

22.2.4 In light of the above the point of law on locus standi is hereby dismissed.

22.3 MATERIAL DISPUTE OF FACT

In this regard the Respondents argued that in *casu* the material dispute of fact over Applicant's absence from duty without leave was foreseeable, the case therefore falls outside the rubric of Rule 14 (1) of the Industrial Court Rules and cannot be determined on the present motion proceedings.

22.3.1 The Applicant on the other hand argued that there is no material dispute of fact in this particular instance, what is before court and clearly not in dispute is the fact that the 1st Respondent has proceeded to withhold the salary, wages and benefits of the Applicant without first ascertaining and/or giving the Applicant a hearing and establishing a prima facie case which would entitle the imposition or enforcement of Regulation 14 of the T.S.C Regulations.

22.3.2 Rule 14 (1) of the Industrial Court Rules 2007, provides that:

"Where a dispute of fact is not reasonably forseen a party may institute an application by way of notice of motion supported by affidavit.

(1) In the event that a dispute of fact does arise in circumstances where it was not reasonably forseen, the court may make an order in terms of Rule (13) (a) or (b) which provides that the court may make an order as follows:-

(a) Referring the matter to oral evidence for determination of a specified dispute of fact.

(b) Referring the matter to trial and directing that it be enrolled in the trial register".

22.3.4 In brief Rule 14 allows a party to institute application proceedings in matters where there are no reasonably foreseeable material dispute of facts. Application proceedings unless concerned with interim relief are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities without oral evidence. Where in application proceedings dispute of facts arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's affidavits which have been admitted by the Respondent together with the facts alleged by the latter justify such order.

22.3.5 In *casu* the court is of the considered view that there is no material dispute of fact. The court is only called upon to decide whether or not the Respondents are justified to withhold the salary of the Applicant without giving him a hearing, and it is not in dispute that the salary of the Applicant has been withheld by the Respondents. In the result the point of law on material dispute of fact is hereby dismissed.

CERTIFICATE OF UNRESOLVED DISPUTE

22.4 The Respondents submitted that the wage dispute in *casu* falls among the disputes for which conciliation is compulsory under Rule 14 (a) (b) of the Industrial Court Rules, and that the Applicant had

ample opportunity to report a dispute with CMAC between 1st October 2022 and 25th November 2022.

22.4.1 The Applicant argued that no certificate of unresolved dispute is required, for the reason that the matter is a motion and an urgent application which is provided for under Rule 15 of the Industrial Court Rules. Furthermore, leave has been sought from the court for the matter to be enrolled as an urgent matter and that the Rules relating to timelines and procedure be waived. Thus the discretion lies with the court, which discretion should be exercised in favour of the Applicant as he will suffer more prejudice if the matter were to be delayed and were to proceed in terms of the provisions of Part VIII of the Act.

22.4.2 It must be pointed out that it is not always the orders sought that determine the forum between Industrial Court and CMAC. There are a number of factors influencing the decision on the appropriate forum. One of which is a question of whether in the eye of a reasonable litigant (usually the Applicant) there are reasonably foreseeable material dispute of facts. If the answer is, "yes", the matter should start at CMAC. If the answer is in the negative the applicant may come by way of motion. Sub-rule 6 of Rule 14 (b) fortifies this position of the law and provides as follows:-

"In the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission,

unless the application is solely for the determination of a question of law".

22.4.3 It is the court's considered view that matters which require arbitration, conciliation or mediation are one falling within the category of material dispute of facts. In other words the material circumstances alleged are contested, the Honourable Court may decline to hear the matter without evidence that it has been referred to CMAC unless the matter is brought for determination on a question of law *strictu sensu.*

22.4.4 A question of law is an issue that is within the province of the judge because it involves the application or interpretation of legal principles or statutes, or an issue arising in a law suit which only relates to determination of what the law is, how it is applied to the facts in the case, and other purely legal points in contention. All questions of law arising before, during and sometimes after a law suit are to be determined solely by a judge.

22.4.5 In **ISAAC DLAMINI V THE CIVIL SERVICE COMMISSION AND 2 OTHERS, CASE NO. 338/2012** the court held as follows on a similar point:-

"There is no need for the Applicant to report a dispute at CMAC or to follow the dispute resolution mechanism that is provided for in Part VIII of the Act, since the Applicant's claim can be determined solely on a question of law".

22.4.6 The court aligns itself with the decision as laid down in the above cited case. The matter is before court for

determination of a question of law, that is, whether or not the Respondents are justified in withholding the Applicant's salary without a pre-hearing consultation. Hence, it is not necessary for the Applicant to report a dispute to CMAC before the matter is brought to the Honourable Court for determination as per Rule 14 (6) (b) of the Industrial Court Rules. In the circumstances the point of law is hereby dismissed.

JURISDITION

22.5 The Respondents submitted that the Applicant alleges that the invoking of TSC Regulation 14 violated his right to a fair hearing under Section 21 of the Constitution. The Respondents argued that this issue falls outside the jurisdiction of this Honourable Court and ought to be referred to the High Court as per Section 35 (3) of the Constitution.

22.5.1 The Applicant argued to the Contrary that Section 35 (3) of the constitution directs that where there is a Constitutional challenge of a section which there is none in this particular instance, the matter should be referred to the High Court for determination. The Applicant submitted that the Respondents have totally missed his case, as his case is that the provisions of Regulation 14 cannot be invoked without complying and following the provisions of section 21 of the constitution. Further that, it is a basic principle of natural justice that must be followed before Regulation 14 can be invoked.

22.5.2 It was the Applicant's contention that the constitution clearly spells out and in simple words the right to be heard,

and that the said right to be heard is also provided for under Chapter III, Section 33 of the constitution and cannot be deviated from. Therefore, the point raised by the Respondent ought to be dismissed because there is no challenge to strike down Regulation 14 of the TSC Regulations.

22.5.3 Based on the arguments made by the parties the court is of the considered view that the referral of the matter to the High Court is not warranted in the circumstances. The Honourable Court will decide the matter without invoking any sections of the constitution. The rules of natural justice are adequate in deciding the matter and in particular the principle of "audi alteram partem" which requires that the other party be heard before a decision is taken.

22.5.4 Dealing with a similar matter the court in the case of **THE MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS AND ANOTHER V ZUKE AND ANOTHER, SUPREME COURT CASE NO. 96/2017,** held that:-

"..... The essence of the complaint in both cases is that the employees were not given the right of hearing in accordance with the rules of natural justice and in particular the principle of audi alteram. Such a dispute is not competent to be referred to the High Court as a Constitutional issue under section 35 (3) of the Constitution. The Industrial Court has the necessary jurisdiction and competence to deal with a dispute arising from the failure by an employer to observe the rules of natural justice ..... The remedy of referral under

Section 35 (3) of the Constitution is not automatic. A mere allegation of such contravention does not suffice".

22.5.5 The Court aligns itself with the decision in the above cited case, the point of law on jurisdiction is hereby dismissed.

THE MERITS

[23] During the hearing of the points in *limine* the Respondents raised a point of law on non-joinder of the TSC, wherein the court issued an order that the TSC should be joined as a necessary party. The Respondents have now raised a point of law to the effect that cited as a mere commission, it lacks *locus standi*. The Respondents argued that the TSC is independent, however, the independence must not be separated from the government of Eswatini, and as the papers stand they are not in order. The order granting leave to join the TSC does not defeat the statute. Furthermore, the Applicant should have joined the TSC through its chairperson, therefore the application cannot be disposed off without the necessary party, and any eventual judgement against the T.S.C would be a hollow order.

[24] It must be pointed out that the court will not delve much into this point of law as it has been addressed earlier on in this judgement. The court again aligns itself with the decision as laid down in the case of **SAVANNAH N MAZIYA, SUPRA**. As a result, the point of law is hereby dismissed.

[25] On the merits the Applicant argued that he always receives his monthly salary through first National Bank on the 21st of every month, however, on the 21st October 2022 without lawful justification and or reason, the Respondent who had paid the salary as expected reversed the payment of the salary.

[26] The Applicant submitted that subsequent to the reversal of the salary, he went to his bank to make enquiries, wherein, he was informed that it had

been paid but was thereafter reversed by the 1st Respondent. The Applicant submitted further that he then visited the Ministry of Education and Training, where upon, he was referred to his immediate supervisor the principal at Moyeni Secondary School, who in turn referred him back to the offices of the Manzini Regional Education Officer (REO). It was Applicant's contention that having been made to run from pillar to post, he then engaged his attorneys who addressed a letter dated 27th October 2022, to the 1st Respondent enquiring the reason for his salary not being paid and demanded that it be restored immediately.

[27] The Applicant submitted that on the 2nd November 2022 he eventually received a written response from the 1st Respondent dated 31st October 2022 explaining why his salary has been frozen and/or reversed. In the letter the 1st Respondent stated that the Applicant's salary was stopped in accordance with Regulation 14 (1) of The Teaching Service Regulations 1983, following the Applicant's prolonged absence from work by a total number of 109 (One Hundred and Nine) days without his immediate supervisor's permission nor a certificate signed by a medical practitioner certifying that the Applicant was unfit for work on those occasions.

[28] The Applicant argued that as a member of the executive of SNAT he is expected to attend to activities on behalf of the union, and other activities of the general membership which includes attending federation meetings, negotiations of conditions of service of members and the general civil service, further that, on all such occasions he reported to his work station attended his work and where he had to be released for the day he was released by his head teacher after reporting to the head of department who was satisfied that the appropriate arrangements had been made for lessons on the said dates.

[29] It was Applicant's argument that the invoking of Regulation 14 is not automatic to such an extent that the Respondents can apply it unilaterally. The Applicant argued further that due process has to be carried out for the same to be applicable as provided for in terms of the rules of natural justice and the constitution which is the right to a fair hearing.

[30] The Applicant submitted that he was then served with an invitation for a hearing dated 24th November 2022, together with a charge sheet dated the 10th November 2022, the Applicant argued in this regard that if the hearing proceeds as per the charge sheet and his salary is withheld in terms of Regulation 14, it would be double jeopardy in that he is now being punished twice for the same offence which is unlawful.

[31] The Respondents argued to the contrary that the head teacher of Moyeni High School as Applicant's immediate supervisor did not release him for trade union business, both the head teacher and head of department deny the alleged working arrangements. Furthermore, even if the Applicant attended trade union business, such attendance still required permission in terms of the recognition agreement between the Government of Swaziland and the Swaziland national Association of Teachers, which was entered into by the parties in March 1992.

[32] The Respondents argued further that TSC Regulation14 expressly provides for forfeiture of any wages paid for a period of absence spanning forty-eight hours. Such forfeiture being automatic, the Applicant can only have the salary restored upon proof of the head teacher's permission or submission of a medical certificate of ill health, of which Applicant has furnished neither.

[33] The Respondents submitted that the alleged violation of Applicant's right to a fair hearing is frivolous and vexatious, as the fact in issue in this matter

is Applicant's absence from duty without leave, and he does not deny the absence, thus TSC Regulation14 automatically kicks in. furthermore, the withholding of Applicant's salary is not actuated by malice but is a natural consequence of Applicant's refusal to render services to his employer in terms of his employment contract. The decision not to pay the salary for no work done is lawful, therefore, the application falls to be dismissed with costs.

[34] The essence of the Applicant's bone of contention is that he has been denied the so called procedural right by not being given an opportunity to make representations prior to the withholding of his salary. As a consequence, the principle of audi alteram partem comes into play. This principle is grounded on the notion of natural justice or procedural fairness, namely, that a person may not be condemned before he/she is given the opportunity to be heard on the issue under consideration.

[35] From the pleadings serving before the Honourable Court, it is clear that the Applicant was not invited to make representations before his salary was withheld at the instance of the 1st Respondent. The Respondents unilaterally invoked Regulation 14 of the TSC Regulations at the exclusion of the Applicant's side of the story. The cardinal rule is that a decision must be informed by all the parties who shall be directly and substantially affected by it.

[36] So paramount is the audi alteram partem as a principle of natural justice that a litigant who with good course shown lament such right must be given redress in a court of law, therefore, adherence to the principle is so vital such that **O REGAN J, IN MINISTER OF HEALTH AND ANOTHER V NEW CLICKS SOUTH AFRICA (Pty) Ltd and Others (CCT 59/04 A) [2005] ZACC 25**, espoused that:-

"It is not just a matter of procedural law only. It also calls for the court to take into account consideration of substantive issues in the determination of whether the functionary was informed by the party adversely affected before reaching its impugned decision, hence the elements of fairness and reasonableness are the substratum of the right to be heard principle".

[37] Following that the Applicant was not invited to a hearing in so far as the stoppage of his salary is concerned, the court is of the considered view that he was denied his right to be heard, as stated by the court in the case of **ABRAHAM BAFANA DLAMINI V THE TEACHING SERVICE COMMISSION AND 2 OTHERS, IC COURT CASE NO. 378/2009,** *wherein, the Applicant was employed by the 1st Respondent as a teacher and based at Lomahasha Central High School. Towards the end of the 2nd term of school the Applicant fell ill and was given some days off to recuperate, furthermore, the Applicant kept his head teacher informed about his condition and that he submitted medical certificates to account for his absence from duty.*

[38] *The Applicant alleged further that when it became impossible to take the medical certificates physically to his head teacher he caused same to be sent to the head teacher by telefax around October 2008. Applicant alleged further that at the end of October 2008, his salary was not paid, being gravely ill, he was unable to query the non-payment of his salary until sometime in January 2009 when he approached the 1st Respondent. When he received no assistance from the 1st Respondent he approached his head teacher who denied all knowledge of his illness or the medical certificates that Applicant alleges he sent. The Applicant was charged for absenteeism and eventually dismissed.*

[39] *Being dissatisfied with the Respondent's action the Applicant instituted an application by way of notice of motion seeking an order reviewing and*

setting aside the 1st Respondent's decision, wherein the court set aside the dismissal and further held that:-

"……The court does not condone the unilateral stoppage of salaries as it is wrongful and unlawful in terms of our law ……."

[40] Dealing with a similar matter the court in the case of **MUMCY NTOMBI MAZIYA V THE TEACHING SEVICE COMMISSION AND OTHERS, INDUSTRIAL COURT CASE NO. 512/2007**, it was held that:-

"The teaching service commission is not a court, it is a body of men and women appointed by His Majesty the King to deal with matters of the teaching service in the country. It is therefore not bound by the rules of judicial procedure. It is not obliged to call witnesses and hear oral evidence it can reach its decision in its own way, as long as it honestly applies its mind to the issues before it. It is obliged though to observe the requirements of the rules of natural justice, such as the audi alteram partem and take into cognisance any relevant statutory provisions".

[41] It was further held in **JOHN KUNENE V THE TEACHING SERVICE COMMISSION, THE ATTORNEY GENERAL AND UNDER SECRETARY MINISTRY OF EDUCATION, SUPREME COURT CASE NO. 15/2006**, that:-

".....I refer to the Regulations and their statutory source in order to make it clear that the 1st and 3rd Respondents exercise public powers and that therefore they are bound to conduct their procedures in accordance with natural justice and the rules of public law……the 3rd Respondent in his treatment of the case against the Appellant, and following that the 1st Respondent in its procedure were subject to the rules of natural justice one of which is the audi alteram partem rule".

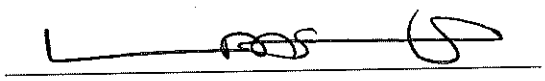
[42] In *casu*, the court aligns itself with the decisions as laid down in the above cited cases, and finds that the Respondents decision to withhold the

Applicant's salary without applying the audi alteram principle was irregular and prejudicial to the Applicant in that he was not afforded an opportunity to explain himself before the decision was taken. For these reasons the application succeeds, and an order is hereby granted as follows:-

(a) The decision to withhold the Applicant's salary for the months of October and November 2022 and other subsequent months not paid is hereby set aside.

(b) There is no order as to costs.

The Members agree.



L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	:	**MR L. HOWE**
		HOWE AND MASUKU ATTORNEYS
FOR RESPONDENT	:	**MR. N.G DLAMINI**
		ATTORNEY GENERAL'S CHAMBERS