IN THE COURT OF APPEAL SWAZILAND
CIVIL APPEAL NO.622/96

In the matter between:

THE ASSOCIATION OF LECTURERS AND ACADEMIC
PERSONNEL FIRST APPELLANT

PROFESSOR M..S. MATSEBULA SECOND APPELLANT

and

CHAIRMAN OF THE COUNCIL OF
UNISWA FIRST RESPONDENT

CHAIRMAN OF THE JOINT COMMITTEE
OF THE COUNCIL & THE SENATE SECOND RESPONDENT

UNIVERSITY OF SWAZILAND THIRD RESPONDENT

PROFESSOR M.B. DLAMINI FOURTH RESPONDENT

CORAM : SCHREINER JA

: LEON JA

: STEYN JA

FOR THE APPELLANTS : MR. H. FINE

FOR THE RESPONDENTS : MR. D KUNY

JUDGMENT

Sehreiner; Leon and Steyn JJA:

This appeal arises from unsuccessful review proceedings

taken by the Appellants against the Respondents in the High Court. The Appellants alleged that the election of the Fourth Respondent as Pro Vice-chancellor of the Third Respondent was irregular and that the resolution in electing and appointing him should be reviewed and set aside. Costs were claimed.

The present proceedings were ultimately brought by way of application for review in terms of Rule 53 of the Rules of the High Court, having originally been commenced in the Industrial Court by the Third Respondent. An agreement was entered into whereby certain Industrial Court proceedings were withdrawn and the First Appellant's strike notice was also withdrawn, but it reserved its right to institute proceedings by way of review in the High Court. The learned Acting Chief Justice dismissed the application with costs holding that there no proper basis for the review and setting aside of the election of the Fourth Respondent to the office of Pro Vice-Chancellor.

At the hearing of the review application, objection was taken on behalf of the Rspondents to the locus

standi of the First Appellant, it not being clear from its constitution that it was a legal persona with power to sue and be sued. The constitution did not say so and it had not been yet been recognised in terms of Section 43 of the Industrial Relations Act of 1995. However, the matter was not pursued

at the hearing of the review application because there could be no doubt that the Second Appellant who was the unsuccessful candidate for the office of Pro Vice-Chancellor clearly had a sufficiently direct interest to justify bringing the proceedings. No material costs were incurred in joining the 'First Appellant in the review application and the step had presumably been taken to demonstrate that the review was not being brought only by a disappointed candidate but also by an association of members of the staff of the University.

The Pro Vice-Chancellor who holds office for a period of three years is, in terms of the University Statute, appointed by the Council from amongst the academic staff "holding posts" at Associate Professional level or above, on the recommendation of a Joint Committee of the Council and the Senate. The Joint Committee of the Council consists of the Chairman of the Council who shall be Chairman of the Committee, the Vice Chancellor, two members of the Council who are not members of the Senate and who are appointed by the Council and two members elected by the Senate from amongst its members.

When the Joint Committee met on the 26th and 31st July 1995 to appoint a Pro Vice-Chacei lor it was presided over by one Prince Phinda who previously had been Minister of Broadcasting, Information and Tourism and was a Director of

the Swaziland Television Authority in his capacity as Minister. The deponent to the founding affidavit on behalf of the Appellants was provided by Dr. M.J. Simelane the Secretary General of the First Applicant. He states:

"As it appears from the annexed affidavit of the Second Applicant, there is apparent ill-feeling and hostility between Prince Phinda and the 2nd Applicant arising from a prior conflict relating to the arbitrary removal of the 2nd Applicant as a Director of the Swaziland Television Authority by Prince Phinda...."

The Second Appellant states that in his view Prince Phinda is "biased, non-objective and non-neutral."

He says that Prince Phinda did not, before removing him from the Board of Directors of the Swaziland Television Authority, call him for a discussion of the reasons why he felt he should be removed. The Second Appellant in a letter requested payment of a retainer fee to which he considered himself entitled. This letter was leaked to the Press. The Second Appellant denies that he had anything to do with this. He received no reply to his letter and wrote a reminder about a month later in which he threatened legal steps if he did not receive a reply. He referred his claim to his attorney. The Second Appellant says that this incident created considerable ill-will against him and that it meant: the Prince became unable properly to fulfil] his roll as Chairman of. the Committee and of the Council in selecting a canditate for the office of Pro Vice-Chancellor.

been any personal conflict between him and the Second Appellant. He had no direct dealings with him. He had not known him or met him prior to his becoming a member of the Council of the University. During this time and in their respective capacities there had never been any conflict between them. He explicitly denied either bias or prejudice.

In the light of our views on this aspect of matter it is not necessary to refer to other allegations and counter allegations concerning the question of bias. There are conflicting factual averments which would be impossible to determine in notice of motion proceedings or to be adjudicated upon without

reference to oral evidence.

It is therefore clear from the brief summary of the allegations made by the parties, that an irreconcilable dispute of fact exists on the question as to whether bias or prejudice of sufficient significance could be attributed to Prince Phinda in relation to the candidature of the Second Apellant.

Such dispute could not have been resolved on the affidavits before the Court a quo. In the absence of an application (by the appellants) to refer the matter for oral evidence on this issue, the court a quo was right not to uphold the application for review on this ground.

The Appellants also challenge the legality of the

proceedings at and the recommendation of the Joint Committee made pursuant to the meeting commenced on the 28th July and resumed on 31st July 1995. The first challenge concerns the fact that at such meeting Prince Phinda exercised his deliberative vote in favour of the Fourth Respondent and thereafter, when it appeared that the voting was equally distributed, exercised a casting vote in favour of the Fourth Respondent. It was the latter's name that was forwarded to the Council as the recommended candidate of the Joint Committee.

In view of the conclusion we have reached on another ground on which the Appellants are seeking to review the decision of Council, it is not necessary for us to decide this challenge directed at the procedure adopted as described above. We would, however, point out that the University authorities would be well advised to ensure that the procedures it adopts are regular and conform in every respect with its statutes and other regulatory provisions. The question as to whether the exercise of a casting vote in addition to a deliberative vote by the Chairman in the circumstances reflected in the minutes was procedurally regular, is not free from doubt. Whilst the Joint Committee was entitled in terms of Article 39(1) and (2) of the Statutes to regulate its own procedure, such regulation should not depend on inference or presumption but should best be explicit or in accordance with clearly defined

regulatory provisions.

In this context and because we wish to assist the University authorities, we are obliged to record our disagreement with the approach of the court a quo when dealing with the challenge levelled by the Appellants at the regularity of the proceedings.

The allegation that Prince Phinda acted irregularly and unlawfully in purporting to exercise a casting vote was summarily dismissed by the learned Judge a quo. He said inter alia:

The argument places a construction on the Minutes which is technical and removed from reality."

He goes on to say:

"How the Committee came to its decision is of no significance. The method adopted by the Committee is not,open to criticism by non-members. There is accordingly no case to review or set aside the recommendation of the sub-Committee."

As we have indicated above, the question of the regularity of the proceedings in this respect is indeed open to question. See e.g. NELL VS LONGBOTTOM (1894)1 Q.B.D. 771, a case cited by the Appellants which is supportive of the contention that "the common law appears to have provided no way out of this difficulty" (where an equal number of votes have been cast for and against a proposal,

The question to which the learned Judge ought to have addressed himself is whether the Chairman of the Joint Committee was in all the circumstances entitled to exercise a casting vote. If this is not explicitly authorised either by Statute or other regulatory provision or by common law, the question arises whether his decision to do so was either explicitly or impliedly authorised as a proper and acceptable procedure by the Joint Committee acting in terms of paragraphs 39(1) and (2) of the Schedule of Statutes which provides for a Joint Committeee to regulate its own procedure.

If accordingly the Chairman was entitled to do so caedit quaestio. If not, there would have been no recommendation to be submitted to Council. The Council could not appoint in the absence of a recommendation. If the Appellants' contention in this regard was a good one, then the approved party would certainly be entitled to approach the Court for relief.

The same cautionary note needs to be recorded in respect of the participation or non-participation in the proceedings of Council by the Student Representative duly elected in terms of the Act.

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In this regard the Respondents rely for their rebuttal of the allegation of an irregularity in the proceedings on the provisions of Section 14(2)(i) of the Act. This provides that such representative, elected by the S.R.C., "shall not participate in the consideration of or voting upon matters of a confidential or personal nature as determined by the Chairman."

As in the case of the right of a Chairman to bring out both a deliberative and a casting vote, the procedural propriety of the manner in which the Student Representative was excluded from the deliberations may well be open to question. We would caution the University authorities to ensure that any procedure they deem fit to adopt in this regard is strictly in conformity with the provisions of the Statute or such regulatory provisions as may apply.

We come now to deal with an issue which in our view is of decisive significance in a consideration of the regularity of the proceedings at the Council meeting of 4th August 1995. Professor E.C.L. Kunene's appointment as a member of Council had expired at the time this meeting was held. It is common cause that she was not a member of Council at this point in time. Despite this fact she attended at this Meeting and participated in the election process. Professor Kunene had served on the Council as a Senate Represenaiive. However, the Senate had not, as at the date in question i.e.

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4th August appointed her successor. Such appointment only took place in March 1996. The Respondents' assertion is that because no successor had been appointed, her membership of Council continued until such time as a new representative had been appointed in her place.

In terms of Section 14(3) of the Act Professor Kunene ceased to hold office as a member of Council when her term of office expired. We can find no basis on which it can be held that merely by virtue of the fact that Senate had failed to appoint a successor as one of their representatives, her term of office could be deemed to have been extended.

On behalf of the Respondents their Counsel contended that the provisions of paragraph 50 of the Statutes could be invoked in order to save the decision taken at a meeting which she attended irregularly and at which she was improperly allowed to participate and to vote.

This provision reads as follows:

"No act or resolution of Council or the Senate shall be invalid by reason only of any vacancy in the body doing or passing it or by reason of any want of qualifications by or invalidity in the election or appointment of any member of that body whether present or absent.

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The reliance on this provision is misplaced. It could certainly not be invoked to justify the attendance at or participation in a meeting of someone who was never appointed. In our view Professor Kunene's previous and expired term of office is irrelevant when considering the legal propriety of her attendance and participation at the Meeting. She was not at that time a legally appointed member of Council and her attendance and participation was irregular.

It was not contended, nor could it be, that the irregularity concerned was of such a nature that it did not vitiate the proceedings. It clearly was a serious irregularity which tainted the proceedings fundamentally. The decisions taken at a meeting so constituted can accordingly not be allowed to stand.

It is therefore not necessary for us to deal with the other alleged irregularities relied upon by the Appellants.

For these reasons the appeal succeeds. The order of this Court is the following:

1. The appeal is upheld and the order of the High Court is set aside.
2. The appointment of the 4th Respondent as Pro Vice-Chancellor of the Third Respondent is set aside.
3. The Respondents are ordered jointly and severally - the

one paying the others to be absolved - to pay the costs of the proceedings in the High Court and of the appeal to this Court.

W.H.R. SCHREINER JA

R.N. LEON JA

J . H STEYN J A

Delivered in open Court MBABANE on the 8th April 1997.