IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Civil Appeal Case No. 15/2006

In the matter between

JOHN KUNENE Appellant

VS

THE TEACHING SERVICE COMMISSION 1st Respondent

THE ATTORNEY GENERAL 2nd Respondent

THE UNDER SECRETARY (EDUCATION) 3rd Respondent

Coram: BROWDE AJP

ZIETSMAN JA

RAMODIBEDI JA

JUDGMENT

BROWDE JA

[1] The Appellant is a school teacher. He has acted as such in this Kingdom since 1995. In February 2004 he was transferred to the Mbabane Central High School where, at all times material hereto, he worked as a science teacher.

[2] On the 26th October 2004 the Appellant received a letter

from the 3rd Respondent who is the Under Secretary of the Ministry of Education and who wrote the letter in his capacity as the ex-officio Schools Manager of all Government aided schools. The letter stated that the Appellant was charged with immoral conduct during the year 2004 involving a female Form 5 student by the name of N M. The alleged acts of misconduct were set out in detail and were described as "gross acts of misconduct in the Teaching Service Act Regulations of 1983". The Appellant was called upon to answer the allegations in writing before 5 November 2004 and was invited to meet the Schools Manager on that day in the Ministry of Education. That meeting took place but what precisely occurred at the meeting is in issue and I will return to it later in this judgment. What is common cause, however, is that the Appellant handed his written response to the 3rd Respondent.

[3] Shortly after that meeting and by letter from the 3rd respondent dated 8 November 2004 the Appellant was informed that

> "*Pursuant to the gross nature of charges of immoral conduct preferred against you in our letter of 26th October 2004 the Section 15(4) of the Teaching Service Act regulations of 1983 is hereby invoked. Consequently you are suspended from duty with immediate effect on one half* ***(1/2)*** *pay pending the decision of the Commission to which the matter is referred for consideration.*"

[4] The Appellant stayed home for some months after which he received a letter from the 1st Respondent (which is incidentally "the Commission" referred to in the letter of the 8th November) which is on stationery headed "Kingdom of

Swaziland, Teaching Service Commission" and which reads as follows:-

> "*Dear Sir, <u>Re</u>*
>
> *<u>Invitation</u>*
>
> *Mr. Kunene, I am duly authorised to invite you to appear before the Teaching Service Commission on the 9th day of March 2005 at 9 a.m. This is in relation to the charge of misconduct by the School Manager in his letter dated 26 October 2004.*
>
> *Should you require witnesses/ evidence, please bring it with you. By copy hereof the head is also invited, bringing with him the necessary witnesses/evidence.*"

[5] The intended meeting on 9 March was postponed to the 16th March 2005 and was attended by the Appellant, the Chairman and various members of the 1st Respondent, as well as the executive secretary of the 1st Respondent and others who had been called to give evidence in the proceedings. The minutes of that meeting form part of the record before us. Precisely what happened there, however, is also disputed and I leave that for the moment. Thereafter, and by letter from the 1st Respondent dated 13 April 2005 the Appellant was dismissed from service as a teacher with effect from 16 March 2005, "for (his) misconduct in terms of Regulation 17(1) of the Teaching Service Regulations of 1983 read in conjunction with the Teaching Service Act of 1982."

[6] On 8 June 2005 an application was launched by the Appellant in the High Court in which he sought an order reviewing and setting aside "The 1st Respondent's letter of dismissal from service dated 13 April 2005 as irregular, *ultra*

vires and of no force and effect". The Appellant also sought an order reinstating him to his post as teacher at Mbabane Central High School.

[7] The application was opposed and duly argued before Matsebula J. in the court *a quo.* The application was dismissed with costs and it is against that order that the present appeal has been brought before this Court.

[8] The appeal is based on alleged irregularities which the Appellant contends occurred in the procedure including the two meetings referred to above, leading to his dismissal. In his submissions on behalf of the Appellant before us Mr. Masuku referred us to regulation 15 of the Teaching Service Regulations 1983. The relevant provisions to which our attention has been directed are the following:-

> *"15(1) A teacher who:-*
> *........(f) is guilty of immoral conduct;*
> *........shall be deemed to be guilty of misconduct*
> *(2)A Manager of a teacher who has misconducted himself in terms of sub-regulation (1) shall*
>
> *(a) inform the teacher in writing of the misconduct alleged against him;*
>
> *(b) allow the teacher an opportunity to present his defence in writing;*
>
> *(3)If the Manager is not satisfied with the defence presented by the teacher he shall forward to the Commission a written complaint and a copy of the teacher's defence for consideration by the Commission.*
>
> *(4)If a Manager considers the misconduct alleged against the teacher to be of a serious nature, he may suspend the teacher from service pending a decision by the Commission thereon."*

[9] It is also relevant to refer to Regulation 17(1) which reads:-

> "*A teacher found guilty of misconduct under Regulation 15 ....by the Commission may -*
>
> *(a) be dismissed from the service......*"

[10] The complaints levelled by the Appellant at the procedures leading up to his dismissal may be divided into three categories, namely

(i) The conduct of the 3rd Respondent before and during the meeting of 5 November 2004.

(ii) The conduct of the 3rd Respondent in submitting documents to the 1st Respondent .

(iii) The conduct of the 1st Respondent at the meeting of 16th March 2005.

[11] Before I turn to the various criticisms in detail, it is pertinent to refer to the references by the attorney for the Appellant to the requirements of natural justice in relation to administrative action. The 1st Respondent is an agency of the Government of Swaziland whose functional authority lies within the Ministry of Education. It is common cause that the Commission is responsible for the recruitment and appointment of teachers as well as human resource management of the teaching service. It is also common cause that the 3rd Respondent is *ex officio* Schools Manager of all Government aided schools, whose office is at the Ministry of Education Headquarters in Mbabane. The regulations which are referred to as governing the conduct of the 1st and 3rd Respondents in dealing with, for example, allegations of misconduct on the part of a teacher came into force on 2nd May 1983 and in their terms refer to the

Teaching Service Act, 1982. A school, of which of course Mbabane Central High School is one, is defined in the regulations as "a School defined in the Education Act 1981". 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. In SOUTH AFRICAN ROADS BOARD v JOHANNESBURG CITY COUNCIL 1991 (SA) 1(A) at 10G - I the Appellate Division stated:

> "*(A) rule of natural justice ...comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates to the contrary...* *

[12] In my view therefore, in *casu* 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. Having said that I must add this rider. The proceedings at both the meetings which were arranged for the purpose, *inter alia,* of hearing the Appellant's answer to the charge were of a quasi-judicial nature and therefore those proceedings fall within the oft-cited passage from ROSE-INNES "JUDICIAL REVIEW OF ADMINISTRATIVE TRIBUNALS at page 160 which reads:

> "*Administrative bodies, generally speaking, and subject to the provisions of the statutes which constitute them, are free to decide and adopt their own procedures, provided such procedures are not calculated to cause inequity or apprehensions of bias in those who are subject to their decisions. They are*

> *not obliged to adopt the methods of oral evidence and examination of witnesses which are necessary for a trial in a Court of law. The rules of natural justice do not therefore compel the holding of an inquiry in the sense of proceedings at which witnesses are called and examined.*"

I must now advert to the Appellant's criticisms in detail, to decide whether they discharge the onus which rests on the Appellant to have satisfied the Court *a quo* that grounds exist to review the conduct complained of. See THE ADMINISTRATOR, TRANSVAAL, AND THE FIRST INVESTMENTS fPTY) LTD vs JOHANNESBURG CITY COUNCIL 1971(1) SA 56(A) at 86 A - C in regard to the onus being on the Applicant for review.

The first "irregularity" relied on by the Appellant in his founding affidavit is that he was "never given a chance to respond to allegations of misconduct contained in a letter of 5 November, 2004". This he contends was a failure of "the dictates of natural justice namely *audi alteram partem*". This contention evoked from the learned judge *a quo,* the observation that the contention is difficult to comprehend. I share the difficulty of Matsebula J. because not only did the Appellant, in his founding affidavit, state that in response to 3rd Respondent's letter of 5 November, setting out the complaints against him, (that letter was in fact dated 26 October 2004) "I availed myself to the 3rd Respondent with my written responses," but the deponent to the answering affidavit attached thereto the written response of the Appellant addressed to the "US, Schools Manager, Ministry of Education, Mbabane" and dated November 1, 2004. That written response commences with the following namely:

> '*Re: MISCONDUCT*

> *Your letter dated 26 October 2004 refers. I wish to respond to the charges contained therein as follows:*"

[15] There follows the Appellant's answers to the complaints of misconduct levelled at him. It is no wonder that Matsebula J. found this allegation of irregularity beyond his comprehension.

[16] The next complaint of the Appellant relates to the conduct by the 3rd Respondent at the meeting of 5 November 2004. The Appellant alleged in his founding affidavit that he took with him his tape recorder and that this offended the 3rd Respondent. The latter, he averred, sent him out and told him he would be receiving a letter of suspension as he was disrespectful of the 3rd Respondent. This is denied in the answering affidavit in which, apart from an admission that the tape recorder was seized, it is stated by the 3rd Respondent that the meeting proceeded in the ordinary way and the Appellant was given an opportunity to make his representations. Although the 3rd Respondent's version is corroborated by a witness who was present at the meeting, on the view I take of the matter it is not necessary to decide whether or not the Appellant has discharged the onus of proof regarding the procedure at the meeting. I say this for two reasons. Firstly it is clear that the provisions of Regulation 15(2) were satisfied if the 3rd Respondent

(a) informed the Appellant in writing of the misconduct alleged against him, which it is common cause he did, and

(b) allowed the Appellant an opportunity to present his defence in writing, which, as I have said above is both admitted and denied by the Appellant. Such dispute as exists in regard to this aspect of the matter, cannot in the circumstances, be regarded as bona fide.

The meeting called by the 3rd Respondent was not required to discharge the 3rd Respondent's duties laid down by regulation and the conduct of the meeting is, therefore, an issue which it is not necessary to decide. Suffice it to observe that both with regard to the meetings (and particularly that conducted by the Commission) that

> "*The Commission is not a court. It is a body of men appointed for their expertise in their particular field. It is not bound by rules o f judicial procedure. It is not obliged to hear oral evidence. It is not required to keep a record o f the proceedings. It can reach its decision in its own wan, so long as it honestly applies its mind to the issue: observe the requirements of natural justice, such as* audi alteram partem; *and bears in mind any relevant statutory provisions...*"

See NATIONAL TRANSPORT COMMISSION AND ANOTHER vs CHETTY'S MOTOR TRANSPORT fPTY) LTD 1972(3) 726(A) at 734 H - 735A

The next allegation of irregularity relied on by the Appellant is that "the Appellant did not have an opportunity to be informed of the 3rd Respondent's intention to forward the complaint together with the written submission to the 1st Respondent". This was submitted to this Court by Appellant's attorney in the face of a letter, attached to the Appellant's founding affidavit, dated 8 November 2004 (i.e. 3 days after the meeting) and addressed by the Manager to the Appellant. The letter reads as follows:-

"Dear Teacher,

SUSPENSION FROM DUTY: YOURSELF

Pursuant to the gross nature of charges of immoral conduct preferred against you in our letter of the 26th October 2004 the section 15(4) of the Teaching Service Act regulations of 1983 is hereby invoked. Consequently you are suspended from duty with immediate effect on one half (**^2)** *pay pending the decision of the Commission to which the matter is referred for consideration.*

Yours faithfully,

P.P. Simelane
US SCHOOLS MANAGER"

In submitting the matter for decision by the 1st Respondent, the 3rd Respondent was doing no more than was required of him in terms of sub-rules (3), (4) and (v) of Regulation 15. The submission that the Appellant was not made aware of the 3rd Respondent's intention to forward the written complaint and the Appellant's written response to the 1st Respondent for the latter's consideration is without substance. Coupled with that submission are the further points argued by Mr. Masuku, namely

(i) That the Appellant was entitled to be informed what charges he would be facing before the 1st Respondent so that he could prepare himself, and

(ii) The 3rd Respondent did not apply his mind judiciously as there was no opportunity for him to hear the Appellant's side of the story and consider his responses.

(iii) As far as (i) is concerned it is clearly answered by the letter of 8 November. As for (ii) I have already alluded to the fact that the 3rd Respondent was furnished with the Appellant's written response by the Appellant himself and that, therefore it is once again without foundation to

suggest that the 3rd Respondent had no opportunities to consider the Appellant's "side of the story."

[20] I now turn to consider the irregularities alleged concerning the meeting called by the 1st Respondent and held on 16 March 2005.

[21] The first allegation of unfairness is contained in the founding affidavit and reads "I was not asked to plead to the allegations levelled against me". In answer to this allegation the 1st Respondent has attached to its affidavit filed, the record of proceedings of 16 March. While the Appellant, in dealing with the minutes in his reply, alleges that there were some instances of omission from those minutes, he does not allege that there are any falsehoods in them. That being so one needs only to refer to the following questions and answers that appear in *initio:-*

"***Executive Secretary:*** *Mr. Kunene the matter was postponed last week because witnesses were absent and now we have secured their attendance. Are you prepared to answer?*

Accused: *I am prepared.*

Executive Secretary: *How do you plead to the charges preferred against you?*

Accused: *I deny the charges.*"

In my view this illustrates clearly that the Appellant has not been entirely candid in his affidavit. He was prepared for the meeting and was asked to plead to the

allegations levelled against him. His denial is, therefore, patently untrue.

His other complaints, briefly put, are that the Commission went directly to the charge of grabbing N M's buttocks, that he was not given "a chance" to cross examine witnesses, and that he was mocked by the Commissioners. All these complaints are irreconcilable with a reading of the minutes. It is perhaps sufficient to cite two passages from the minutes to illustrate the manner in which the meeting was conducted. I refer to the following: -

After N M had completed her evidence in which she described the immoral conduct, the minute reads:

> "***Nomfundo:*** *At first he denied everything, however, later he apologised saying that there may be a misunderstanding and had never proposed love to me.*
>
> **Commission:** *Did you apologise at the end Mr. Kunene?*
>
> **Accused:** *Nomfundo is telling the truth. However, not that I proposed love to her.*" (my emphasis)

[24] The other excerpt from the minutes is this which came after the evidence of Mary Mphila, the cleaner who said that the Appellant had told her "he loved the child" -meaning Nomfundo.

> "***Commission:*** *Do you know what is being said*

by Mary Mr. Kunene?

Accused: *I don't know anything and I don't know where she stays.*

Commission: *Mr. Kunene you can ask questions*

Kunene: *Headteacher, what transpired in your meeting with parents*"

[25] The questions then put by the Appellant ended with him saying, after being asked to "make his representation", "I plead that I be returned to work and I thank you for calling me and affording me this opportunity as I was never afforded such."

[26] In his heads of argument Mr. Masuku has suggested that the record shows "an element of biasness" on the part of 1st Respondent. The passages referred to once again refer to an alleged "absence of a full representation of my side of the story." I have already dealt with what was required by the Regulations of the 1st Respondent and in my judgment the suggestion of bias is without foundation. The Appellant himself expressed gratitude to the Commission for the opportunity afforded to him to answer the allegations. This is quite incompatible with the allegation of bias.

[27] In the result I agree entirely with the decision of Matsebula J. A successful review of the kind sought in this matter requires proof of a gross irregularity.

[28] The Appellant has not proved an irregularity, let alone a gross one.

[29] The appeal is dismissed with costs.

Delivered in open Court this 16th day of November 2006

J. BROWDE
ACTING JUDGE PRESIDENT

I agree

N.W. ZIETSMAN

JUDGE OF APPEAL

I agree

M.M. RAMODIBEDI

JUDGE OF APPEAL