

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1101/95

In the matter between;

TIMOTHY BHEKI SIMELANE Applicant

and

THE EXECUTIVE SECRETARY OF

TEACHING SERVICE COMMISSION 1st Respondent

PRINCIPAL SECRETARY OF

MINISTRY OF EDUCATION 2nd Respondent

ATTORNEY GENERAL 3rd Respondent

CORAM: S.W. Sapire A.C.J.

FOR THE APPLICANT Mr. Maphalala

FOR THE RESPONDENTS Miss S. Sikhondze

Judgment

(13/5/96)

The applicant is a teacher, employed by the second respondent, stationed at Lobamba National High School in the district of Manzini.

Last year the respondent issued a directive to transfer the applicant from the post he has held since 1991 to a post at Nsukumbili High School. To this the applicant

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objected and made an application to this court to interdict and restrain the second respondent from carrying out the directive. The application was unopposed, and the question of the justification of the transfer was not canvassed, and apparently no steps were taken to proceed with the transfer.

In a Government Gazette Extraordinary of September 8th 1995, amendments to the Teaching Service Regulations were announced, including a new regulation 24 reading as follows:

" Transfers.

24.(1) The Teaching Service Commission may at any time as and when circumstances require, transfer a teacher from one school to another school.

(2) A teacher who refuses to comply with an order of transfer issued in terms of sub-regulation (1) shall have his salary suspended by the Teaching Service Commission.

(3) If a teacher wants to transfer from one school to another, he shall in the case of -

- a) a maintained school, direct his request in writing to the Regional Education Officer;
- b) an aided school, direct his request in writing to the school manager."

The applicant's enjoyment of the success of his application was short lived for apparently the respondent and the Headmaster of the school where he was stationed were determined to proceed with the proposed transfer, and according to the applicant their resentment at their frustration was apparent in the attitude to the applicant shown by them to him.

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On February 6th the new term began and fortified with the new regulation to which I referred, the respondent informed the applicant by letter handed to him by the Headmaster that he had been transferred to the Ntshanini High School. The letter was dated 19th December 1995. No reasons have been given for the transfer.

The applicant had an interview with Mr. Pat Muir, the Executive Secretary of the Teaching Service Commission, (the nominal respondent in this application) which was unsatisfactory to both. The reason for the transfer according to the respondent is over staffing and the applicant's redundancy at his present post. The applicant challenges this view, going so far as to suggest that it is not held bona fide and that there are other more sinister reasons for the respondent wishing to transfer him. On the merits of this disputed issue, no finding can be made in these proceedings.

The decision to transfer the applicant was however taken without affording him an opportunity of being heard. What is therefore in issue is whether the decision to transfer the applicant can stand because of this. The views of the respondent are expressed by Mr. Muir in his affidavit filed on behalf of the respondent.

In paragraph 5 of the affidavit, Mr. Muir explains that the applicant's first application was not opposed because the respondent conceived that "it had no explicit powers to effect transfers, hence such fell within the discretionary powers of the Commission." This is difficult to understand for if in issuing a directive for the transfer of the applicant the respondent had been acting within its discretionary powers, there would have been no less reason to oppose the first application than there is now.

Surely the second decision to transfer the applicant is an exercise of discretionary powers. The only distinction is that the discretionary power is now in express terms provided for in the new Regulation 24.

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Regulation 24 however prescribes the circumstances in which the power to transfer a teacher may be exercised. It may so transfer a teacher "at any time as and when circumstances require". The regulation does not say when the Commission may consider that the circumstances so require". In other words subjectively speaking the proposed transfer must be necessary before the power is exercised.

In order to determine whether such circumstances exist, the teacher whose transfer is contemplated should in accordance with the audi alterem partem rule be consulted or heard. Such a transfer may have important effects on the teacher's life and family. There may be reasons why some other teacher rather than he should be sent to another post This is only one of the considerations which may have to be taken when considering whether it is necessary that that particular teacher should be transferred to the particular intended post.

There have been a number of cases decided in South Africa in which the question has been considered whether or not a public service body such as the respondent in this case is obliged to inform the person concerned of its intention to alter his conditions of service by transfer. See for instance, Union of Teachers' Association of South Africa vs Minister of Education and Culture 1993 (2) SA 828 (c) where consultations on proposed changes were held to be required. There are cases to the contrary, involving transfers of officials. It seems that the exact wording of the relevant statutory provisions could be a deciding factor.

In the present case, the governing regulation prescribes an objective criterion for the basis of any transfer. This being so, the affected party in principle must have the right to contest the existence of the basis of a decision to transfer him. How is it possible for him to

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do so If he is not given notice of the consideration by the respondent of his possible transfer and afforded an opportunity of making out a case why the transfer should not take place, or if someone has to be transferred that it should be some other teacher.

No reference has been made by either side to the terms on which the applicant was employed and whether the question of transfer from one post to another may be governed by such terms I assume therefore that Regulation 24 is the only basis of the transfer.

That being so, the respondent's decision to transfer the applicant is reviewable by this court. As the decision was taken without giving the applicant the opportunity to make out his case as to why he should not be transferred such decision must be set aside. This does not mean that the respondent may not reconsider the question of the applicant's transfer again, this time after affording him the opportunity of being heard, and for adequate reasons which should be conveyed to the applicant, coming to the decision, notwithstanding applicant's objections, that "circumstances require" that he be transferred from one school to another.

For these reasons, the rule nisi will be confirmed and the respondent is to pay the applicant's costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE