IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3682/2004

In the matter between

ISAIAH DLAMINI Applicant

versus

Teaching Service Commission 1st Respondent

Minister of Education 2nd Respondent

Attorney General 3rd Respondent

Coram Annandale, AC J

For Applicant Mr. M. Mabila from
R.J.S. Perry Attorneys

For Respondents Mr. L. Dlamini of the
Attorney General's Chambers

JUDGMENT

18 November 2005 *(Ex tempore judgment pronounced in open court)*

[1] This Court has today heard argument presented for the applicant by Mr. Mabila and for the three Respondents by Mr. L. Dlamini. This Court has also had the opportunity to read the papers sometime in the past and to refresh my memory today. It is common cause between the parties

that the application entails a complaint about the outcome of a disciplinary enquiry held by the Teaching Service Commission in respect of the applicant. It is the hearing and the consequences thereof that form the subject matter of this matter brought on review to the High Court. The review application is opposed.

[2] The parties are agreed that the one and only issue that this court is to decide is whether or not the hearing which is placed before this court on review by way of a transcript of the proceedings and which was conducted on the 22nd September 2004, was procedurally and substantively fair. That is the only issue to decide. All other aspects raised in the application and dealt with by the respondent are not necessary to be determined. As said, it is only whether the hearing, as recorded in the record of proceedings, was substantially, substantively and procedurally fair or not.

[3] It is trite and it is common ground that this court has the jurisdiction to review matters of statutory bodies which sit as disciplinary tribunals in matters like this. The respondents' attorney has very helpfully provided heads of argument which set out appropriate aspects of the legal position correctly, in my view, and I express my gratitude to counsel and incorporate relevant aspects of the respondent's heads into this judgment.

[4] For this purpose I refer to the judgment of Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 at p 115. The learned Chief Justice held that:

" *Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of a duty, this Court (i.e.* the High Court (my insert)) *may be asked to review the proceedings complained of and set aside or correct them.*"

A further aspect of the jurisdiction of this Court on review is what it is that is to be considered when such proceedings are judicially examined. At the hearing, Mr. Dlamini referred to a decision, which I agree with, in
National Transport Commission and Another v Chetty Motor Transport (Pty) Ltd 1972(3) SA 76(A) 735 E - G where Holmes J stated that:

"*The Legislature has appointed a commission as a final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands - unless it is vitiated by proof on review in the Supreme Court that -*

(a) *the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that,* de jure, *it failed to decide the matter at all. Such failure could be established by reference to mala,* fides, *improper motive, arbitrariness or caprice.*

(b) *The Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid.*"

[5] In this regard, a point was raised by the respondents as to whether the contention of the applicant could have substance in that the applicant averred that he was not afforded the opportunity to cross examine and to give his evidence. The argument of the respondents was that there is no requirement under the tenets of natural justice for the commission to have afforded the applicant the right to legal representation or cross examination. For that, the respondent relies on a judgment reported in *Davis v Chairman, Committee of the JSE* 1991(4) SA 43(A) at 48 where it was held that:

"*The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a Court of law...to hear witnesses orally ... to permit the person charged to be legally represented ... or to call witnesses or to cross examine witnesses*".

[6] It is not necessary for this purpose to decide as to whether this authority is quoted contextually correct or not. The respondents contend that there was no requirement on the commission to afford an opportunity to cross examine, relying on the *Davis* decision. The applicant has raised specifically the absence of being able to cross examine as a ground for review. In this regard this Court refers to the transcript of the record of proceedings at page 40 of the record, which is the last page of the transcript of the proceedings of the TSC at page 13 on top and I quote:-

"*Mr. Dlamini, you can make your submission and cross examine the witness.*"

The response of the then accused, now the applicant was:-

"*Thank you Chairman. I am afraid that one day the child will speak the truth. I pray that she does not die before she reveals it.*"

[7] From this it is *prima facie* clear that the applicant/accused at the hearing did not appreciate what was afforded to him. He did not appreciate, when looking at his response, that he now was afforded the opportunity to cross examine or also to give his own evidence. The respondent contends that this *prima facie* appearance of non understanding of his rights by accused or applicant cannot be held to be what it seems to be. It says that the applicant improperly relies on the absence of the right to cross examine and further that the disciplinary tribunal is entitled to follow its own rules of procedure when conducting such an enquiry.

[8] However, once a disciplinary tribunal like the Teaching Service Commission, in its proceedings complained of, has adopted some of the natural rules of justice, namely, the *audi alteram partem* principle and also the right to cross examine witnesses that testify against the person under enquiry, then that commission is bound to follow the rules and procedure that it has itself adopted. From the extract quoted from the record of proceedings at page 30 of the transcript, it is clear that the commission did in fact decide that it shall afford the then accused an opportunity to be heard and further that it shall afford the

then accused an opportunity to cross examine the witness. This is clear from the extract - "*Mr. Dlamini you can make your submission and cross examine the witness*".

[9] Once the commission, or the tribunal as a statutory body, has decided to follow those two crucial aspects it is then required of them to not pay mere lip service, but to give it proper effect. The respondents' answer to that is that yes, indeed the applicant was appraised of the hearing that was about to be instituted in a letter written to him, which is annexed as annexure "B" in the papers at page 16, which is addressed to the applicant under the heading "Invitation" (and not summons). In that, it did say that "should you require witnesses/evidence please bring it with you". From that, the respondent argues that it suffices to have appraised the applicant of his right to adduce evidence at the trial and to call witnesses to his defence.

[10] As said, from the response by the applicant at the hearing, it is evidently clear that it cannot be so. When he was told at the hearing, "you can make submissions" he was not told that he has the right to testify and to call witnesses. He was not informed that in absence of his own evidence or that of his witnesses, the tribunal may find itself entitled to find that the evidence against him which was heard during the enquiry, by way of oral evidence and a written letter, that the evidence could be found to militate against him unless his own version is also placed before the tribunal for consideration. That in itself is a major departure from the rule of natural justice which requires the other side to also be heard, the so called *audi alteram partem* rule. That was totally negated and mere lip-service was paid to it.

[11] A further aspect that renders the hearing to be defective is that the commission again paid the merest of mere lip-service in respect of cross examination. The respondent commission told the accused at the hearing that "you may cross examine". That is all which is recorded on the transcript of the proceedings. There is no indication whatsoever that any member of the commission or the accused himself are persons of legal learning. Apparently, and it must be so assumed, the commission knew what it entails to cross examine because it told the person "you may cross examine". There is no indication on the other hand that the accused knew at all what is understood under "cross examination".

[12] There is no indication that it was explained to him that if he fails to dispute evidence against him during cross examination that such evidence could perhaps be found to be not disputed because he did not challenge it. That was not explained. It was also not explained to him that whilst cross examining, he should put his defence or his version, his side of the story, to the witness so that the witness can be heard in response prior to that witness not being available anymore and that thereafter, if he gives his own evidence, that he could be found to have fabricated the recent defence in respect of what he failed to put to the witness, a so-called "afterthought". It was also not explained to him, *ex facie* the record or from any of the papers or affidavits before me, that a failure to give his own version of the events, whether it be his own evidence, (sworn or unsworn), or evidence given by someone else on his behalf, that if he does not put

his version before the tribunal, then the tribunal cannot consider the possibility of his own version as to whether it could be true or not.

[12] These two aspects, in my view, are patently and clearly departures from the obligation of the commission to inform an unrepresented person who is subjected to an enquiry, of how to deal with the matter at hand in order for him to be said to have had a substantially, substantively and procedurally fair hearing.

[13] That is the complaint of the applicant, namely that he did not have a substantively and procedurally fair hearing. The grounds advanced by him, as to the total absence of an opportunity to cross examine, cannot in the context as set out, be correctly pleaded. But when regard is had to the proper ambit of the plea of the applicant to have these proceedings set aside on review, then I have no doubt whatsoever that the proceedings complained of were indeed very adverse to him. He was not afforded the opportunity to be heard, and if he was afforded it, it was mere lip service. It is of no use for a person to have a specific right but not to be told of what that right entails. The *onus* is on the commission to make him aware of that. This, it failed to do.
It is for these reasons that there is sufficient and good grounds for this court to interfere with the proceedings on review. It is therefore ordered as follows:-

"Having heard argument for both applicant and respondent and having read the papers filed of record, it is held that the hearing which is subject to review herein was not substantially and procedurally fair. It

is ordered to be set aside on review. The respondents are at liberty to institute a new hearing afresh if it so chooses. Costs are ordered to follow the event”.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE