IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 27/08**

In the matter between:

MANDLA NDLANGAMANDLA **APPLICANT**

And

SWAZILAND GOVERNMENT **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE ANDREAS **JUDGE MEMBER**

NKAMBULE GILBERT NDZINISA **MEMBER**

FOR APPLICANT FOR RESPONDENT **MR. C. BHEMBE MR. N. ZWANE**

JUDGEMENT 21.10.09

[1] This is an application for determination of an unresolved dispute brought by the applicant against the respondent. The application is opposed by the respondent.

[2] The applicant was dismissed by the respondent on 14.02.07 on allegations of gross immoral conduct. The applicant averred in his papers that his dismissal was both procedurally and substantively unfair. The respondent denied that the dismissal of the applicant was unfair hence the present application before the court.

[3] The evidence led before the court revealed that the applicant was employed by the respondent through its agent, the Teaching Service Commission, as a Teacher on 29.05.98. The applicant was based at Cana High School. He continued to be in the service of the

respondent until he was suspended by letter dated 13th November 2006, "Exhibit D" herein.

[4] The applicant was facing a charge of gross immoral conduct allegedly committed against two students at the school where he was a Teacher. On the first part of the charge it was alleged that;

"(i) In term 1, 1999 during schools athletics competitions you proposed an intimate relationship to Vilakati Ntombifuthi Ncobile Form one student under your care which is against the teaching profession. You had an intimate relationship during the second term, in which during the third term you had a sexual encounter with the said student"

On the second part of the charge it was alleged that;

"(H) In term 2, 2000 you proposed an intimate relationship to Vilakati Bongiwe Form two student under your care which is against the teaching profession. You had an intimate/sexual relationship during the second term in 2001."

[5] The applicant was called to a disciplinary hearing which was conducted by the Teaching Service Commission on 05.12.06. The applicant went to the hearing together with his brother. His right to legal representation at the hearing was not explained to him. The letter inviting him to the disciplinary hearing, "Exhibit F" also did not advise him of his right to legal representation. The applicant said the proceedings were like a mini circus as there was no order and everyone present would just say something at any time including the headmaster of the school who was invited to be present at the hearing.

[6] The applicant told the court that the Executive Secretary of the Teaching Service Commission, Mr. M. V. Zungu was both the initiator and the recorder. The applicant said he was at times prevented from cross-examining the respondent's witness. The applicant denied that he proposed love to Ntombifuthi Vilakati and had sexual intercourse with her. He also denied that he once invited Nonduduzo Maseko together with Ntombifuthi Vilakati to his house where he had sexual intercourse with Ntombifuthi Vilakati.

[7] AW2, Nonhlanhla Maziya told the court that she is a former student of Cana High School. She completed in 2002. She said on 20.11.06 the headteacher of Cana High School, Musa Dlamini visited her at her parental home and asked to discuss with her a matter that appeared in his records to the effect that in 2002 she was in love with the applicant. AW2 said Musa Dlamini offered to help her get her employment and asked her to write down information that implicated the applicant.

[8] AW2 said on 21.11.06 two gentlemen again approached her at home and asked her if she knew the applicant. One of these two gentlemen was RW3, Knowledge Ngwenya. They also asked her to co-operate with them and asked her to write down information that will show that she was once in love with the applicant as they had discovered that the applicant was an abuser. AW2 at that time had a minor child and Knowledge Ngwenya asked her to say that the child was fathered by the applicant. AW2 said she was not happy to do what she did as she caused the applicant to lose his job.

[9] RW1, Ntombifuthi Vilakati told the court that she left Cana High School in 2000. She said she returned to Cana High School in 2007. She said she got sponsorship from SWAGAA after she had related to this organization the circumstances that led her to leave school without having completed Form Five. She told the court that she is twenty

five years old and is presently doing her Form Five at Cana High School. She said the applicant was her teacher in 2000. She said during the third term the applicant called her to his house. The applicant was in the

company of another teacher whose surname was Tsabedze, an Accounts teacher at the school.

[10] RW1 said she went to the applicant's house together with her friend Nonduduzo Maseko. The applicant called RW1 to his bedroom where he grabbed her and had sexual intercourse with her without her consent. RW1 said Tsabedze also grabbed Nonduduzo Maseko. The applicant gave RW1 a sum of E20.00 and some carrots which were in the kitchen. At that time RW1 was fifteen years old and was doing Form 2. She said she was not in love with the applicant, but said the applicant was in the process of proposing love to her. She said it was not the first that she visited the applicant's house on the day that the applicant had sexual intercourse with her without her consent. She said she would also go to the applicant's house if she was sent by the applicant to fetch exercise books.

[11] RW1 did not report to anyone that the applicant had sexual intercourse with her without her consent. She said the applicant told her not to tell anyone about the incidence. She said the applicant once gave her E100.00 and that he once dated her and they went to Steers where he asked her to deny before the Teaching Service Commission that he once had sexual intercourse with her.

[12] RW1 said she left school because she fell pregnant. She said the father of the child is Peter Sacolo, and that this fact was further proved by DNA results. She agreed that she also had sexual intercourse with other teachers at the school. She said she also had sexual intercourse with her English teacher, John Bongani Dlamini who the students at the school referred to as "J.B." She said when

the applicant had sexual intercourse with her, she was also in love with two other men, Peter Sacolo and J.B. Dlamini, the English teacher.

[13] RW2, Musa Dlamini told the court that he is the headmaster of Cana High School. He said he investigated a case of child abuse against John Bongani Dlamini and Vusi Mavimbela. His evidence did not implicate the applicant

[14] RW3, Knowledge Ngwenya told the court that he is employed by the respondent as a Career Guidance Officer. He said his office was instructed to investigate cases of school children abuse. He said in November 2003, a help line for victims of abuse was installed and indeed they did get calls from students. He said in 2006 they received calls from two Form 4 students, and one Form 5 student at Cana High School. RW3 and another officer were assigned to investigate. They went to Cana High School where they talked to Form 4 and Form 5 students. He said they found that there were about five to six teachers that were having love affairs with students at the school.

[15] RW3 said the applicant was one of the teachers that were implicated. He said they discovered that four teachers had turned their houses into sex dens and that the applicant was one of those teachers. He said they got information that one student had to leave school because she was impregnated by a teacher. They also investigated that matter.

[16] RW4, Moses Vusumuzi Zungu told the court that he was part of the members of the disciplinary hearing panel before which the applicant appeared. He said he was both the secretary and the prosecutor. He admitted that the applicant did not get the opportunity to mitigate and he said that was because the applicant did not show up.

[17] **ANALYSIS OF THE EVIDENCE:**

It was not in dispute that the applicant was an employee to whom **Section 35 of the Employment Act** applied. The applicant was therefore able to discharge the burden placed upon him by **Section 42 (1) of the Employment Act.** The burden of proving that the dismissal of the applicant was both fair and reasonable in all the circumstances of the case was on the respondent. (See: **Section 42(2) of the Employment Act.)**

[18] The applicant was facing a charge of gross immoral conduct committed against two students namely Ntombifuthi Vilakati and Bongiwe Vilakati. Bongiwe Vilakati did not appear before the court. The present proceedings are not review proceedings.

This court makes its own independent enquiry of the matter. The respondent having failed to lead the evidence of Bongiwe Vilakati, it cannot be said that the respondent was able to prove that aspect of the charge against the applicant on a balance of probabilities.

[19] AW2 was clearly not a credible witness. She admitted during cross-examination that she wrote a false statement implicating the applicant because Musa Dlamini promised her a job and she had pressure to get a job. The court will therefore place no reliance on her evidence at all.

[20] RW2's evidence was irrelevant to the present proceedings. He conducted investigations against John B. Dlamini and Vusi Mavimbela and not the applicant. Otherwise he was an honest and credible witness and he did not try to implicate the applicant with false evidence.

[21] RW3's evidence was also not helpful to the court. He admitted during cross-examination that he could not recall all the facts of the matter before the court because he deals with many cases. Further, his evidence about what he was told by the students that he went for an

interview was clearly hearsay and is inadmissible.

[22] RW1 emphatically denied in court that she was in love with the applicant. She said the applicant had sexual intercourse with her against her will. From her evidence it appears that she was actually raped by the applicant. This was during school hours. She did not report the rape to the headteacher or anyone else. She did not report even to her parents. If the applicant was proposing love to RW1 and RW1 had not accepted the proposal, there were all the reasons for her to be angry against the applicant and therefore expose him by laying a rape charge against him. She did not however do that.

[23] In court RW1 said she never fell in love with the applicant. In the report compiled by Knowledge Ngwenya "Exhibit G" however, RW1 said she did fall in love with the applicant during the second term in 1999. RW1 admitted during cross-examination that she did have sexual intercourse with the English teacher J.B. Dlamini. She admitted further that at that time she was also having an affair with Peter Sacolo.

[24] The complainant, RW1, having given different versions of the incident to the court and to RW3, it will be unsafe for the court to accept her evidence as the truth.

[25] The applicant was facing a charge of gross immoral conduct. On the charge sheet, "Exhibit C", there is no indication that the charge was in terms of Regulation 15 of the Teaching Service Regulations which deals with misconduct. The verdict however was clear that the charge was in terms of Regulation 15 of the Teaching Service Regulations as it is stated therein that the applicant was being found guilty and dismissed from the Teaching Service in accordance with **Regulation 17 (1) (a)** of **the Teaching Service Regulations of 1983.** Regulation 17(1) (a) provides that;

> **"(1) A teacher found guilty of misconduct under Regulation 15 or inefficiency under Regulation 16 by the Commission may -**
>
> **(a) be dismissed from the service**

[26] It is clear therefore from the verdict that the applicant was dismissed for committing an offence under Regulation 15. Under Regulation 15 however there is no offence or misconduct called **"gross immoral conduct".** The applicant was therefore wrongly charged, and the conviction cannot stand. There is therefore no doubt to the court that the dismissal of the applicant was unfair as he was dismissed for an offence that did not exist in Regulation 15 of the Teaching Service Regulations.

[27] The evidence also showed that the applicant when he was invited to appear at the disciplinary hearing, he was not advised of his right to legal representation. There was an assumption that because the applicant was a teacher he was supposed to know that he had the right to have legal representation. The

duty is on the employer to expressly and timeously inform the accused employee of the right to legal representation so that the accused employee can have adequate opportunity to consult his representative and fully brief him.

See: **Ndoda H. Simelane v. National Maize Corporation (Pty) Ltd case No. 453/06 (I.C.)**

Thembani Simelane v. Chairman of the Civil Service Commission & Others case No. 87/07 (I.C.)

The respondent became aware that it had erred by not informing the applicant of his right to legal representation. Thus when it later invited the applicant, for the last session of the hearing on another date on 14.02.07, the respondent did inform the applicant that he had the right to come with a representative of his choice, see ""Exhibit H". On this date the applicant was however unable to attend and the hearing was finalized in his absence. The accused did not therefore get a chance to address the chairperson of the hearing in mitigation. This much was also conceded by the respondent. No reason was given why the respondent could not simply postpone the matter to allow the applicant to attend. The applicant was on suspension, so his whereabouts were supposed to be known by the employer as he was still an employee. There was no evidence that the absence by the applicant was deliberate and was such that the respondent was entitled to conclude that he

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waived his right to mitigate. This was a serious procedural lapse which can not be ignored by the court.

[29] The evidence revealed that RW4, Moses Zungu was both the initiator and the recorder at the hearing. The applicant told the court that the proceedings were like a mini circus. Every one present would speak as and when they wanted to. This however does not appear from the

record. It is easy therefore to see why the record does not reflect these irregularities. The person who was recording was also the prosecutor. Naturally, he could not record what would later show that the proceedings were not being properly conducted.

[30] As an aside, the court will note that evidence in this case revealed that there was just too much free time in this school. There was also too much sexual activity going on during school hours. The pupils would have sexual intercourse with some of the teachers during the break and thereafter come back to class to learn. It is not clear to the court why did the headmaster allow the male teachers to be visited by female students in their houses during school hours. Even if the prefect was a female student, that should not be an excuse for a male teacher to send a female student to his room. There was a trend in this school that some male teachers would almost always find a reason to send a female student to their rooms to fetch something, and once inside the room, the teacher would start proposing love to the student.

[31] The evidence also revealed that sports days and schools competitions were nothing but good excuses for sexual escapades between some teachers and some students at this school.

[32] Taking into account all the foregoing observations and evidence led before the court and also all the circumstances of this case, the court will come to the conclusion that the dismissal of the applicant was both substantively and procedurally unfair. The court will accordingly make the following order;

a) **The respondent is to re-instate the applicant with immediate effect. In light of the evidence before the court however, the court will recommend that the applicant be transferred to another school.**

b) **No order as to costs is made.**

The members agree.