

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 378/09

In the matter between:

ABRAHAM BAFANA DLAMINI

Applicant

and

THE TEACHING SERVICE COMMISSION

1st Respondent

**THE UNDER SECRETARY (MINISTRY
OF EDUCATION)**

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

CORAM:

S. NSIBANDE:

PRESIDENT

NICHOLAS MANANA:

MEMBER

SIMON MVUBU:

MEMBER

MS. S. MNGOMEZULU:

FOR APPLICANT

NO APPEARANCE:

FOR RESPONDENT

JUDGEMENT - 8/04/10

1. The Applicant was employed by the 1 Respondent as a design and technology teacher and based at the Lomahasha Central High School at Lomahasha.
2. The Applicant alleges that towards the end of the 2nd term of school and sometime in August 2008 he fell ill and was given some days off to recuperate. He alleges that during the school holidays his condition worsened and that he was unable to resume duty when schools opened for the third term. He alleges he kept his head teacher informed about his condition and that he submitted medical certificates to account for his absence from duty.
3. He alleges further that when it became impossible to take the medical certificates physically to his head teacher he caused same to be sent to the head teacher by telefax around October 2008.
4. Applicant alleges further that at the end of October 2008, his salary was not paid. Being gravely ill, he says he was unable to query the non-payment of his salary until sometime in January 2009 when he approached the 1st Respondent. When he received no assistance from the 1st Respondent he approached his head teacher who denied all knowledge of his illness or the medical certificates that Applicant alleges he sent.
5. The Applicant alleges that on the 10th February 2009 the head teacher handed him a letter from the 1st Respondent inviting him to appear before the Commission on 11th February 2009. In terms of the letter he was invited *"to appear before the Commission on 11th February 2009 at 9:00hrs to show cause why your services should not be terminated for failing to execute your duties from 1st August 2008 to date."*
6. The letter further advised the Applicant that should he require witnesses/legal representation *"please make your own arrangements."* The letter is dated 9th January 2009 but was received by the Applicant on 10th February 2009.
7. The Applicant appeared before the Commission on 11th February 2009 and was questioned on his absence from duty. Thereafter he was advised by the 1st Respondent that his services were being terminated. In terms of the record of the hearing filed by the Respondents the *"Commission having carefully considered the matter, decided that Abraham Bafana Dlamini left the children without considering their welfare and directs that he be dismissed from the service with effect from 11.02,2009."*

8. By letter dated 13th February 2009 the Applicant was informed that:

"Having carefully considered the evidence submitted the Commission finds you guilty of absenteeism. The Commission directs that you have been dismissed from the service with effect from the 11.02.2009."

9. Being dissatisfied with the Respondents' action the Applicant instituted this application by way of notice of motion seeking an order in the following terms:

9.1. Reviewing, correcting and/or setting aside Applicant's dismissal from his employment as communicated to Applicant by the first Respondent in a letter dated 13th February 2009;

9.2. Declaring the first Respondent's termination of Applicant's employment as irregular, ultra vires the Teaching Service Commission Act/Regulations as of no force and effect;

9.3. Directing the Respondents to reinstate Applicant to his post as Teacher of Lomahasha Central High School with immediate effect;

9.4. Ordering the Respondents to pay the costs of this Application; and

9.5. Further and/or alternative relief.

10. It is now established in our law that an employee of the Government who is unhappy with the outcome of a disciplinary hearing by the relevant Service Commission has two alternate routes to seek redress:

10.1. He may choose to follow Part V111 of the Industrial Relations Act by reporting a dispute to CMAC and, if the dispute is unresolved it may be referred to the Industrial Court or to arbitration.

10.2. Alternatively the employee may approach the court for review of the disciplinary proceedings and or ruling on the grounds he has not been treated fairly by the Service Commission as required by the law. The Industrial Court has the jurisdiction to review the disciplinary proceedings and decisions of an administrative body such as the 1st Respondent where such body acts in its capacity as an employer. (See **Zebon Mhlanga v Swaziland Government Industrial Court of Appeal case number 210/2003**).

11. The Applicant has chosen to approach the court by way of judicial review and the court is bound to enquire whether he was *"treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness* -section 33 of the Constitution. The court may not interfere if the decision was reached fairly upon a point lying within the discretion of the Service Commission. The scope for interference by the court is more limited in a judicial review than where an application is brought as an unresolved dispute in terms of Part V111 of the Industrial Relations Act.

12. The Applicant was invited to a hearing on 11th February 2009 which he attended. The letter of invitation makes it clear why the Applicant was being invited - to show cause why his services should not be terminated for his failure to execute his duties from 1st August 2008 to the date of the letter. The letter also made it clear that he should arrange witnesses and legal representation himself, should he need same. Neither the Applicant nor the record filed by the Respondents indicates that Applicant complained of the short notice he was given. There is no indication that he applied for and was refused a postponement to enable him to prepare for the hearing and to arrange legal representation. It appears to us that Applicant was quite willing to deal with the matter on his own and even with the short notice given. He can not now be heard to complain about issues he was aware of at the time and willingly brushed aside. It seems to us that the Applicant chose to proceed with the hearing despite what we consider to have been an unreasonably short notice and the lack of legal representation. We do not find it proved that there was any irregularity in the manner in which the Applicant found himself before the Commission.

13. The Applicant complains further that he was not given an opportunity to state his case and that no one gave evidence at the hearing to establish the charge. Proceedings before a statutory tribunal do not have to comply with the procedural standards of a court of law.

(See Melody Dlamini v The Secretary Teaching Service Commission and 3 others IC Case no 121/08).

Since the Applicant admitted that he had been absent from school on the days alleged no further evidence was required to establish the facts of the charge. Applicant was given an opportunity to justify his absence from the school and appears to have done so for the period up to 3rd October 2008. When it was brought to his attention that he had not furnished an explanation for his absence from October 2008

to February 2009 his reply was that he had not provided reasons because his salary had been stopped already. He did not offer the Commission an explanation for his absence. If he had any medical certificates to explain his absence he did not produce them. Nor did he seek a postponement to enable him to fetch them if he required to do so.

It appears to us that Applicant had an opportunity to state his side and explain his absence and that he in fact did so as far as he could.

14. In the circumstances we do not find that it has been established that there was any irregularity with the manner in which the hearing was held.

15. The Applicant complains further that the stopping of his salary on October 2008 indicated that he had already been dismissed and that the hearing was made merely to endorse that dismissal. The stopping of the Applicant's salary in October 2008 may have been irregular in itself but does not per se indicate a repudiation of the contract of employment or any bias in the decision made against the Applicant. While the court does not condone the unilateral stoppage of salaries as it is wrongful and unlawful in terms of our law, the fact that the Applicant's salary was stopped in October 2008 does not in our view indicate that the Commission gave a predetermined decision.

16. The Applicant complains that the Respondent did not follow its own procedure set out in Regulation 15 (2), (3), (4) and (6) of the Teaching Service Commission Act in that he was not informed, in writing by the Schools Manager of the misconduct complained of and asked to respond thereto in writing to enable the School's Manager to decide whether the circumstances warranted a complaint being forwarded to the 1st Respondent. The regulations said to have been ignored by the 1st Respondent reads as follows:

15(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 against him:

(b) allow the teacher an opportunity to present his defence in writing.

15(3) If the Manager is not satisfied with the defence presented by the teacher, he shall forward the to the Commission a written complaint and a copy of the teacher's defence for consideration by the Commission.

17. The Respondents' response to Applicant's complaint is simply that the Applicant had absconded from work and was not accessible to the School's Manager. They say that because Applicant was no longer availing himself to the school it was impossible to ask him to respond to the allegations about his absenteeism as required by Regulation 15. The Respondents do not state what efforts it made to comply with its own procedure. They do not indicate whether they attempted to have a letter delivered at his residence. The head teacher in his supporting affidavit indicates that he was able to find the Applicant on two occasions one of which was to take him to his doctor to ascertain his medical condition. If the head teacher was able to find Applicant we can not accept that it was impossible to for the 1st Respondent to comply with its own procedure.

18. The importance of this pre-discipline procedure is that it enables an accused teacher an opportunity to explain himself regarding whatever allegations are levelled against him before any formal charge is laid. It also enables the School's Manager to final matters that are a result of mere misunderstandings and to select more serious matters to forward to the Commission which would then lay the formal charge of misconduct against the accused teacher.

19. This court has previously held that the termination of the services of a public officer must comply strictly with the laid down statutory procedures, failing which the termination is a nullity.

(See *Amos Bhekinkosi Maseko v Swaziland National Fire & Emergency Services and The Attorney General IC Case No. 302/2002.*)

20. The Respondent's failure to follow its own procedure is in our view a gross irregularity and was prejudicial to the Applicant in that he may never have had to appear before the Commission had he been given the opportunity to explain himself to the School's Manager. The failure to follow its own procedure is in our view irregular & on the **Amos Bhekinkosi Maseko** (supra) decision the termination of the Applicant's employment is rendered a nullity.

21. For these reasons the application will succeed. An order is hereby granted as

follows:

(a) The decision of the Teaching Service Commission to terminate the Applicant from service is hereby set aside.

(b) The respondents are to pay the costs of this application.

The members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT