



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 512/2007

In the matter between:-

MUMCY NTOMBI MAZIYA

1ST APPLICANT

AND

THE TEACHING SERVICE COMMISSION

1ST RESPONDENT

THE SCHOOL'S MANAGER

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

Neutral citation: *Mumcy Ntombi Maziya v The Teaching Service Commission & 2 Others (512/2007) [2015] SZIC 26 (08 June 2015)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heard : **02 MARCH 2015**

Delivered : **08 JUNE 2015**

Summary: *Review – gross irregularity – misconceiving the nature of inquiry- review application dismissed.*

1. Mumcy Ntombi Maziya is a former employee of the Swaziland Government and she is the Applicant in this matter. She had been initially employed as a Teacher by the 1st Respondent in 1986, a position she occupied until June 1998 when she was then promoted to be the Head Teacher of Kholwane Primary School. At the time of her dismissal in August 2007, she was still the head teacher of the school. Maziya has brought this present application before this Court in which she seeks to review and set aside the decision of the Teaching Service Commission – the 1st Respondent – dismissing her. She also seeks an order that she be reinstated to the position of Head Teacher at the same school, Kholwane Primary School.

2. The case of the Applicant is that she was charged for misconduct, the allegation being that in the year 2005, during the Grade 7 final examinations, she as Chief Invigilator knowingly and wrongfully allowed a certain Phumlile Dlamini and a Mr Magagula (Teachers at the school) into the examination room to assist candidates in answering the examination questions. As a result of this wrongful conduct the Examination Council of Swaziland nullified the results of all the candidates in the school thus causing emotional and financial prejudice to the students who sat for the external examination at the school.

3. The Applicant's grounds for review in this matter are these; she states that she was denied her constitutional right to a fair hearing by an independent and impartial body. She complains that the manner in which the proceedings were conducted violated the basic elements of the principles of natural justice, in this regard alleging that the then Secretary of the TSC, Moses Zungu, usurped all the powers and functions of the Commission by acting as the Prosecutor yet he was at the same time its member. She complains that this Mr Zungu was a prosecutor and judge at the same time. She also states that he overwhelmed the Commission with his influence, hence the rest of the members of the Commission were swayed into everything he said such that there was very little, if anything at all, which the other members contributed in the proceedings. In other words, this was Zungu's show. As such the Commission failed to be independent and impartial in handling this matter.

4. Maziya further contends that she was never given an opportunity to present her defence to the charge she was facing because she was constantly interrupted by the Commissioners. She alleges as well that no evidence was presented against her by anyone in proof of the allegations against her. Her complaint in this regard being that no witnesses were introduced to testify

against her to prove the allegations she was facing at the hearing. Maziya also complains that the Commission misdirected itself by basing their decision on assumptions and hearsay rather than enquiring from her as to what had exactly happened at the school she was heading.

5. She alleges as well that the Commission appeared to have prejudged the matter from the beginning of the hearing in that they took into account irrelevant considerations and leaving out relevant ones in their ultimate decision. She concludes by stating that she was condemned unheard which is unfair, grossly irregular, *ultra vires* and unconstitutional, hence her prayers for a review and setting aside of the decision of the Teaching Service Commission and reinstatement.

6. The Respondents in this matter oppose the review application by Mumcy Ntombi Maziya. Through the then Executive Secretary of the Teaching Service Commission, Moses V. Zungu, the Swaziland Government contends that there were abnormalities in the conduct of the 2005 Grade 7 external examinations at the Applicant's school, Kholwane Primary School. Investigations were instituted and the findings thereof were to the effect that the rules of conducting examinations were grossly breached in that; a)

examination papers were removed from the examination room during the course of the examination and b) teachers were allowed into the examination room to assist candidates with answers of the very examination they were sitting for hence the decision of the Examination Council to nullify the results of the school for the 2005 examination. Zungu also deposes that Mumcy Ntombi Maziya confessed through a letter she wrote to the Commission. Over and above this she also admitted before the Commission that the abnormalities indeed occurred. In this regard Zungu referred the Court to document 'TSC 6' which is the confession letter written by Mrs Maziya and the record of proceedings in which she admits to the abnormalities.

7. Zungu further avers that the Teaching Service Commission followed the principles of natural justice in the disciplinary hearing of the Applicant and that therefore her hearing was fair. He points out that the Applicant made admissions before the investigators during the investigation stage of the matter and also to the Commission during the hearing and that the decision of the Commission was based mostly on her own admissions. He states further that the Applicant was given an opportunity to mitigate but she apparently declined to do so.

8. Zungu denies that the decision of the Commission was flawed. Instead, he contends that the Commission was exercising its statutory functions as a quasi-judicial body which deals with allegations of misconduct within the teaching service and that in the conduct of hearings all its members fully participate. Furthermore, Zungu continues, the Commission is free to decide and adopt its own procedures in the conduct of its proceedings, provided such procedure is not calculated to cause inequity or apprehension of bias to those who are subject to its decisions, subject of course to principles of natural justice and the Teaching Service Act, 1982. He contends therefore that the rules of natural justice do not compel the Commission to hold an inquiry in the sense of proceedings at which witnesses are called to testify and examined. In this regard he referred the Court to the record of proceedings which he states proves that there was no misdirection on the part of the Commission. The Applicant, he submits, was given an opportunity to state her side of the story and what she stated confirmed that there was a great deal of misconduct on her part. Zungu accordingly prays for a dismissal of Muncy Ntombi Maziya's case with costs.

9. In his submissions and arguments in support of the Applicants' case, Attorney Madzinane relied heavily on the issue of the calling of witnesses and presenting of documentary evidence to support the assertion that the hearing was unfair, grossly irregular, *ultra vires* and unconstitutional, hence her current application before this Court. He stated though that the Applicant was seeking to review the decision of the Employer and was no longer seeking reinstatement.
10. In the other corner, Attorney Manana on behalf of the Respondents strongly and forcefully contended that there was a fair and proper disciplinary hearing in which there was first an investigation, then a preliminary hearing in which she was given an opportunity to answer to the allegations against her. After denying knowledge of the allegations she was then charged. Attorney Manana referred the Court to document 'TSC 6', which is a letter written by the Applicant at page 57 of the book of pleadings. In this letter the Applicant wrote thus;

"...I asked a Grade 7 Teacher to explain a question in Science Paper 2 thinking I was somehow wrong because more than two pupils asked one and the same question

I asked a Maths Teacher to explain a question because more than three pupils asked one and the same question I thought it was wrong somehow.

I allowed a Grade 7 Teacher to explain a Social Studies question because the pupils were asking one and the same question I thought there was something wrong with it...”

11. The Respondents’ Counsel also referred the Court document ‘TSC 5’ at page 55 of the book of pleadings, which is a checklist for invigilators from the Examination Council of Swaziland. Under the sub heading D titled **‘During the Assessment’** at number 4 it states that *‘Do not give any information to candidates about: a) suspected errors in the question paper, unless an erratum notice has been issued; b) any question on the paper or the requirements for answering particular questions.’* Then at number 6 the checklist states thus; *‘Ensure that no question paper is removed from the examination room.’* He reiterated his contention that in arriving at its decision the Teaching Service Commission did not commit any irregularity.

12. It is without doubt to this Court that this review application is based on alleged irregularities which the Applicant contends occurred in the conduct of her hearing leading to the termination of her services. In this regard the Court points out at the very outset that the Teaching Service Commission is an agency of the Government of Swaziland whose functional authority lies within the Ministry of Education. It is responsible for the recruitment and

appointment of teachers as well as the human resource management of the teaching service, which includes discipline. The Commission exercises public powers and therefore it is bound to conduct their procedures in accordance with natural justice and the rules of public law. In the Court of Appeal of Swaziland decision of ***John Kunene v The Teaching Service Commission and 2 Others Unreported Case No. 15/2006*** the Court per Browde JA referring to the South African case of ***South African Roads Board v Johannesburg City Council 1991 (SA) 1 (A) at paragraph 10G – I*** where 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...”

13. The above quote by the South African Appeal Court simply means that the Teaching Service Commission in dealing with the matter of Mumcy Ntombi Maziya was subject to the rules of natural justice and principally the *audi alteram partem* rule. The critical question for determination by this Court in this matter therefore is whether Mumcy Ntombi Maziya was accorded the

right to be heard and to put her defence before the Commission both constitutionally (see in this regard section 33 of the Constitution) and in terms of the rules of natural justice?

14. Now, in this matter before us, the evidence at our disposal is to the effect that after the suspicions of anomalies in the conduct of examinations at the school headed by the Applicant, which the Applicant denied knowledge of, the Examination Council of Swaziland, the body responsible for external national examinations, instituted independent investigations to interrogate these suspicions. Indeed these suspicions turned out to be valid. A damning report was compiled and was presented to Court as exhibit 'TSC 4' headed '**REPORT OF EXAMINATION MALPRACTICE – KHOLWANE PRIMARY SCHOOL.**' This report states that on Monday 14 November 2005, Officers of the Examination Council of Swaziland went to investigate allegations of teachers/invigilators helping candidates to copy by providing the correct answers to them in the exam room. They found the Applicant invigilating the Mathematics Paper 1 exam. They discovered that one exam paper was missing, and when they enquired from the Applicant about this missing exam paper she denied knowledge of it. The mathematics teacher was also questioned about same and she too denied knowledge of same.

After persistence by the Exams Council Officers the Maths teacher finally admitted knowledge of same, indicating that it was with the Science teacher. When the exam paper was finally retrieved from the science teacher it was discovered that it had been methodically answered with all workings in respect of all the questions therein.

15. A second visit by Officers of the Exams Councils was undertaken to the school, this time eleven days later, on 25 November 2005, to continue with the investigations. On this day, the report indicates that no teachers were found at the school, so the investigators rounded up 3 Grade 7 pupils who had written the exams for questioning. These candidates, with examination numbers 001, 004, and 006 related how teachers Mr Magagula and a Mrs Dlamini had come into the exam room to give some of them answers to the paper they were being examined on. They further alleged that whilst this was going on, the Applicant – who was the Chief Invigilator – was present and would sometimes admonish the teachers when they took too long in the exam room. Further allegations against this Mrs Dlamini were to the effect that she would frequently enter the exam room to assist two candidates with answers, one of whom was her biological daughter. One of these interrogated candidates even alleged that this illegal practice had been done even the

previous year at the Applicant's school. Another candidate alleged that this Mrs Dlamini slapped her on the head because she was not impressed with what this pupil had written as answers to the exam questions. Another teacher implicated by the candidates was a certain Mr Sukati who was invigilating Social Studies paper 2. He is said to have assisted the pupils whenever they had problems with questions.

16. On the third visit, exactly two weeks after the first one, Mrs Dlamini was interrogated by the Exams Council Officers. She admitted to having invigilated the Science paper 2 examination yet she taught that class. At first she denied having a biological daughter in the grade 7 class, but after a long and winding interrogation she relented and admitted that this Simile was indeed her daughter and that she was in the grade 7 class. She further admitted to slapping one candidate, Ntombifuthi, for writing what she had not taught her. She also informed the Exams Council Officers that whenever there was a problem in the subject she taught, the head teacher – Mumcy Ntombi Maziya – would call her and say '***sekunenkinga ngale, come and help...***'

17. The Applicant in this matter was also interrogated by the Exams Councils Officers. Interestingly she admitted to having allowed Grade 7 teachers into the examination room to assist the candidates and that in many instances she would sit at by the door while the teachers assisted the candidates. She also admitted to not having heeded the advice given by the Exams Council officials against such malpractices.

18. The Checklist for Invigilators is succinctly clear on the guidelines in respect of what is expected in the invigilation of examinations in the country. In terms of guideline 4, candidates are not to be given information about suspected errors in the question paper unless an erratum notice has been issued. Guideline 4 also states clearly that candidates are not to be given any information about any question in the examination paper or on how any question is to be answered or tackled! The Court points out that there should be no compromise on this.

19. After the report by the Exams Council, the Applicant was asked to compile a response to the serious anomalies alleged in the conduct of examinations at the school she headed. She compiled one (see paragraph 10 above) in which

she basically admitted to having flouted the procedures as outlined in the Exams Council checklist. It was on the basis of this response that she was then charged for the misconduct. Even then, the Schools Manager still requested her to put forth in writing reasons on why disciplinary action against her should not be taken. And she was given two full weeks and 2 days to give these reasons. The Schools Manager then finally referred her matter to the TSC for consideration on 04 January 2007.

20. On receipt of the referral from the Schools Manager the TSC, through its Executive Secretary then wrote to the Applicant on 27 February 2007, inviting her to appear before it on 14 March 2007. She was also advised of her rights to bring her representative, to call witnesses and to present evidence before the Commission. On 14 March 2007 her matter was rescheduled to 28 March 2007 as it apparently could not be heard on that day and the Applicant had ignored the invitation letter of 27 February 2007. Again on the rescheduled date of 14 March 2007, the matter of the Applicant could still not be proceeded with. The rescheduling was by letter dated 03 April 2007. In all these correspondences she was duly advised of her rights to representation, calling witnesses and presenting her case.

21. The Applicant finally responded to the TSC invites by way of a letter dated 16 May 2007, in which she denied knowledge of any abnormalities as referred to in the correspondence of the TSC of 04 January 2007. Thereafter the TSC invited her to appear before it on 18 July 2007, for hearing and her rights were still explained to her. Again on 18 July 2007, the hearing could not be proceeded with and it was postponed to 24 July 2007, and she was yet again informed of her rights and that all rules of natural justice continued to apply to her.

22. The disciplinary hearing of the Applicant was finally concluded on 24 July 2007. After giving the Applicant an opportunity to state her side of the story in defence of the allegations against her, the Teaching Service Commission decided that she was guilty as charged and she was dismissed from the teaching service. And from the record of proceedings of the hearing at the TSC what is succinctly clear is that the decision of the TSC to find the Applicant guilty was reasonable in the circumstances. The evidence of Patience Phumlile Dlamini-Mdluli for instance, at page 5 of the record of proceedings was very damning against the Applicant. She had been called

by the Teaching Service Commission as witness PW1. Her evidence was as follows;

“...I am a teacher at Kholwane Primary. I joined the school in 1999. I have been teaching for 9 years. In 2005 on 14th November I remember the day students were writing a Maths paper. Maziya appeared in my class and told me that students were asking the same questions. I had already been given the paper by the Headteacher. I worked out the answers in Grade 6 classroom. I advised the children to skip question 9 Section (b) because it was wrongly constructed. I also went to one girl who was behind in answering the questions. I repeated the same instruction. She was slow to understand so I hit her on the head and told her what to write. I am very sorry about all this but I was really frustrated because they were so confused. (Sic).

Interestingly when the Applicant was given an opportunity to cross examine this witness before the TSC hearing her response was that ‘*...I know all what she said and I cannot dispute it.*’ Further to this, the record of proceedings at page 7 indicates that the Applicant unequivocally stated that she did allow teachers into the examination room in total disregard and violation of the Examinations Council’s rules. She stated that she did not realise it was wrong at the time and apologised to the Commission asking that it have mercy on her. Thereafter, and after being given an opportunity to write a formal letter of apology she disappeared.

23. The Court points out that all the invitations to the Applicant by the TSC and the proceedings at the hearing of her disciplinary hearing were solely arranged for the purpose of hearing the Applicant's answer to the charge she was facing. These proceedings before the TSC were of a *quasi-judicial* nature and therefore are classified within the often cited passage from the work of Rose Ines 'Judicial Review Of Administrative Tribunals' at page 160 which reads thus:

“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 apprehension of bias in those who are subject of their decisions. They are not obliged to adopt the methods of oral evidence and examination of witnesses which are necessary for 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.

24. The uncontroverted evidence before this Court is that; a) the Applicant was informed in writing of the misconduct alleged against her, b) she was allowed an opportunity to present her defence in writing and at the hearing and c) she was informed of her right to legal representation at the hearing of

her matter. This was in satisfaction of the provisions of Regulation 15(2) of the Teaching Service Regulations.

25. The Teaching Service Commission is not a Court. It is a body of men and women appointed by His Majesty The King to deal with matters of the teaching service in the country. It is therefore not bound by the rules of judicial procedure. It is not obliged to call witnesses and hear oral evidence. It can reach its decision in its own way, as long as it honestly applies its mind to the issues before it. It is obliged though to observe the requirements of the rules of natural justice, such as *audi alteram partem* and take into cognisance any relevant statutory provisions. (See ***National Transport Commission and Another v Chetty's Motor Transport (PTY) LTD 1972 (3) SA 726(A) at 734H – 735A***).

26. In ***Moses Dlamini v The Teaching Service Commission and Another Unreported Industrial Court of Appeal Case No. 17/2005 at paragraph 7*** the Court stated that '(A) *disciplinary tribunal under the auspices of the TSC is not expected to be seasoned jurists, knowledgeable in the intricacies of the law relating to admissibility of evidence, procedure and such like, but the*

minimum requirements of a fair hearing are universal and well established...Moreover, the tribunal at such hearing must demonstrably be unbiased, retaining an open mind during the full course of the proceedings. In the absence of that, the outcome of such disciplinary proceedings may well be set aside on review or appeal, as the case may be.'

27. The law is that proceedings by way of review are resorted to where there has been some gross irregularity in the conduct of the case. On the same breath though, the Court quickly points out that a review Court is not required to take into account every factor individually and consider how the Commission treated and dealt with each of those factors and then determine whether a failure by the Commission to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the decision of the Commission. This approach is improper. What is required of the review Court is to consider the totality of the evidence and then decide whether the decision made by the Commission is one a reasonable decision-maker could make.

28. Litigants coming to this Court for relief by way of review should take note that it is not every irregularity committed by a quasi-judicial body which must be set aside on review. In other words, the Court warns that it is not every irregularity that will vitiate the entire decision of the Teaching Service Commission! The reasonableness of the decision of the TSC decision, in cases such as this present one, must be assessed in light of the totality of whatever facts and evidence were before it at the time it made its decision.
29. Taking into account all the circumstances of this case, coupled with all the evidence and submissions of Counsel, the Court makes a finding that the Applicant in this matter, Mumcy Ntombi Maziya, has not proved an irregularity, let alone a gross one. Her case for review is without merit. In the result therefore, the application of the Applicant stands to be dismissed. And that is the judgement of the Court, with no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 08th DAY OF JUNE 2015.

For the Applicant : Attorney S. Madzinane (Madzinane Attorneys).

For the Respondent : Attorney V. Manana (Attorney General's Chambers).