IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 135/2015

In the matter between:-

NELSON MANDELA LUKHELE **1ST APPLICANT**

AND

THE TEACHING SERVICE COMMISSION **1ST RESPONDENT**

ACCOUNTANT GENERAL **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

Neutral citation: *Nelson Mandela Lukhele v The Teaching Service Commission & 2 Others* (*135/2015) [2015] SZIC 30 (19 June 2015)*

CORAM : DLAMINI J,

Heard : 28 MAY 2015
Delivered : 19 JUNE 2015

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

1. Nelson Mandela, not the late South African struggle icon, goes by the surname Lukhele. He is the Head-teacher at Kwaluseni Infant Primary school. Lukhele has approached this Court in haste seeking orders as follows;

"1. Condoning Applicant's non-compliance with the Rules of Court relating to service procedure and dealing with this matter as a matter of urgency;

2. Staying the decision of the 1st Respondent suspending Applicant without pay, pending finalisation of this matter;

3. Ordering and directing the 2nd Respondent to pay Applicant his salary pending the finalisation of the matter;

4. Reviewing and setting aside the decision of the 1st Respondent suspending Applicant;

5. Costs of suit;

6. Further and / or alternative relief.

2. Lukhele's case against the his Employer, the Teaching Service Commission, is that following a disciplinary hearing against him a sanction of suspension without pay for a period of six (6) months was imposed as punishment for his transgressions. He has qualms with the sanctions hence now this present

review application. At the commencement of this matter I sat to hear the matter without the Court Members. I duly explained to the litigant's representatives that in terms of Section 6(7) of the Industrial Relations Act, as amended, nothwithstanding the legal requirement on the constitution on the Court, I could still hear and decide their dispute if they so agreed, which they did.

3. The Applicant has given a brief back ground to the matter. He states that at the disciplinary hearing he faced two counts, namely; 1) contravening Regulation 15(1)g and (j) of the Teaching Service Regulations of 1983 as read with Regulation 17 in that, on or about 22 October 2013 he suspended Ms Kethiwe P. Simelane TSC number 22603 which powers he did not possess and as a result government remunerated the teacher for services she did not render, and 2) he was charged for contravening Regulation 1(c) of the Teaching Service Regulations of 1983 as read with Regulation 17 in that, on or about February 2014 he failed to comply with the instruction from the Schools Manager's office to reinstate the said Ms Khethiwe Simelane as per the letter dated 10 February, 2014, instructing him to allocate her a class with effect from 21 February 2014. As stated above, at the conclusion of the

hearing he was found guilty and his sanction was that was suspended for a period of six (6) months without pay.

4. Lukhele contends that the decision of the Commission is reviewable and ought to be set aside for the following reasons;

- *He states that the decision of the TSC to find him guilty and the penalty ultimately meted on him was unreasonable, alternatively grossly so, and that no reasonable Commission could have come to the conclusion it did both on guilt and the penalty imposed based on the facts before it. He states that the Commission failed to consider submissions he made before it at the hearing and in mitigation in arriving at its final decision.*
- *Lukhele further contends that in relation to count one, the Commission found him guilty of an offence he had no control over. He states that it ignored his submissions that the quota of teachers at the school was full. He blames the very TSC for having created this situation of the full quota, in that it posted an extra teacher at the school and ignored his communication regarding the situation dated as far back as 2006.*
- *He states as well that Commission failed to take into account that he, in his capacity as Head-teacher, found it proper that he instructs the teacher in question to remain at home to allow the smooth running of the external examinations for the Grade 7 class. Apparently the teacher in question had*

been involved in an altercation with another teacher who was responsible for the revision and preparation for these external examinations. This altercation between the two teachers followed a series of messages sent by the concerned teacher to the teacher she attacked through the cellular phone short message service.

- *Lukhele states further that the TSC ignored his plea that he did not suspend the teacher in question but just asked her to remain at home for her dispute to be handled properly on finalisation of the examinations. He states that it (TSC) should have taken into account his honest and genuine effort at maintaining peace and order in the school. He points out that he had been subjected to a skills audit exercise by the Ministry of Public Service, which required that he reports duties of all employees working under him and their posting. Apparently this teacher in question did not have an instrument posting him to the school, Kwaluseni Infant Primary school, hence his contention that she did not belong to his school.*
- *He contends that in its decision the TSC failed to apply its mind to his submissions regarding the fact there being no instrument posting this teacher in question to his school, it follows therefore that the instruction by the schools Manager to allocate her a class to teach was not lawful.*

5. At the commencement of the submissions of Counsel, I questioned the Applicant's representative on the failure of the Applicant in his pleadings to comply with the peremptory requirements of Rule 15(2) of the Rules of this Court. This rule states that;

> *"15(2) The affidavit in support of the application shall set forth explicitly–*
>
> *(a) the circumstances and reasons which render the matter urgent;*
>
> *(b) the reasons why the provisions of Part VIII of the Act should be waived; and*
>
> *(c) the reasons why the applicant cannot be afforded substantial relief at a hearing in due course.*

6. Then rule 15(3) gives this Court the ultimate powers of deciding whether a matter enrolled on a certificate of urgency may be so heard as urgent. It states that *'[On] good cause shown, the court may direct that a matter be heard as one of urgency.'* I point out that the trite principle and rule in respect of matters that find their way to this Court on certificates of urgency is this; that it is only on good cause being shown that by a party for urgent application that this Court may direct that a matter be heard as one of urgency. The rules are clear in this regard. The affidavit in support of the application for urgent relief *'…shall set forth explicitly'* the 'reasons why the provisions of Part VIII of the Act should be waived.' And the duty of the Court is to determine if such good cause has been shown.

7. The purpose of the rules of this Court in respect of urgency is self-evident. Considerations of fairness dictate that litigious matters should be heard in more or less the sequence in which they are filed in Court and become ripe for hearing. If it were otherwise, it would bring additional delays in the hearing of matters already awaiting their turn and this would ultimately result in self-evident unfairness and the potential for prejudice. It is therefore imperative that an Applicant, such as Nelson Mandela Lukhele, places such facts before the Court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify the particular matter being accorded preference.

8. The factors that are taken into account in the exercise of such discretion are; a) any prejudice that an Applicant might suffer if the application were to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the Respondents might or have had to endure as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time limits and an acceleration of the hearing (See: **IL & B Marcow Caterers (Pty) Ltd v**

Greatermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA (C) at 112H – 113A; 114A -B)

9. In this matter of Nelson Mandela Lukhele, the affidavit he has filed in support of his application for urgent does not set forth explicitly the reasons why the provisions of Part VIII of the Act should be waived. He makes no attempt at all in respect. At paragraph 16 of his founding affidavit he states that his matter is urgent because it affects his livelihood, in that he and his family are solely dependent on his salary and that therefore the six months suspension is a hard blow to him. Clearly, it cannot be said that good cause has been shown for this matter to be heard as one of urgency. I also cannot ignore the fact the Applicant previously brought a similar application, also on a certificate of urgency in which he was seeking exactly the same prayers under case number 83/2015. He later withdrew this application with the excuse that same had been made without reference to the ruling of the Commission. But the Court finds this to be a flimsy excuse by the Applicant. He knew as far back as March 2015, when he launched his application on a certificate of urgency that reference had not been made to the ruling but that did not stop him from coming to Court in such haste.

10. The Respondents in this matter oppose this urgent review application by the Applicant. In this respect, they have filed the answering affidavit of the Deputy Executive Secretary of the Teaching Service Commission, Sibusiso Mbuyazi Vilakati. Vilakati states that in arriving at its decision the Commission took into consideration all factors before it. He further states that what compounded matters for the Applicant was the fact that when he was ordered by the TSC to reinstate the teacher question, he failed to comply with the instruction. This was despite the undisputed fact that Mr Lukhele had found this teacher already at the school when he was posted to head it and that this teacher had been all along allocated classes to teach. Vilakati further states that it was the Applicant who then started declaring a vacant post despite the fact that the teacher in question was always available. He also disputes that Lukhele's matter is urgent, contending instead that it is not. The Deputy Executive Secretary of the Commission finally prays for a dismissal of the Applicant's application.

11. In her submissions and arguments before Court, Ms Maziya on behalf of the Applicant contended that the decision of the TSC to suspend Nelson Mandela Lukhele for six months without pay is grossly unreasonable

because he made a genuine mistake in telling the teacher in question to stay at home. She argued that this was an honest act and mistake by the Head-teacher at trying to resolve the impasse between the two teachers involved in the altercation. I quickly point out though that it would seem Ms Maziya was not properly instructed by her client, Mr Lukhele in this regard. In this regard I refer to the record of proceedings at the hearing of Mr Lukhele's matter before the Teaching Service Commission. Ordinarily, the application for review should have been accompanied by a prayer for the filing of such record of proceedings but that was not the case in this matter. I then requested Ms Dlamini for the Respondents that same be filed for me to look into whether indeed there was any gross irregularity in the hearing. At page 4 of the record of proceedings, Mr Lukhele is recorded as having stated as follows;

> *"May be if given the chance to explain why it happened like this but I admit that I suspended a teacher and secondly that I didn't comply with the instruction, I did write letters to state that I won't be able to do that. I understand what is said but I will give an explanation when I am given a chance to do."* (Sic)

12. From this quote above it is succinctly clear that when Lukhele suspended the teacher in question, Khetsiwe Simelane, he knew exactly what he was doing.

And in his own words before the TSC, he was saying when he suspended the teacher he did so deliberately, not that this was a mistake on his part. He further stated that he even defied the instruction of the School's Manager that he reinstates teacher Khetsiwe Simelane. Indeed from his evidence at the hearing, before the Commission it is clear that this was a deliberate act of defiance on his part. In effect he was saying teacher Khetsiwe Simelane was not at his school lawfully because she had no instrument posting her to the school and that she was a sickly person. But a question I asked his representative was whether he had the requisite powers to so suspend the teacher. The obvious answer to my question is that he did not, period. These powers statutorily vest with the Teaching Service Commission. If the Applicant had wanted to deal with the issue of the posting of teacher Khetsiwe Simelane he should have directly engaged the TSC through the office of the Schools Manager or the Executive Secretary, not to usurp its powers. Evidence before me indicates that teacher Khetsiwe Simelane had been at this school since 2002 and that she had been transferred to the school due to her medical condition. She had served under two Headteachers before Mr Lukhele and was always allocated classes to teach. Then after the altercation with the other teacher she was unlawfully suspended by Mr Lukhele.

13. To me it would seem that Mr Lukhele used the altercation of the two teachers as an excuse to get rid of teacher Khetsiwe Simelane. This I say based on the record of proceedings before the TSC where it indicates at page 48 that Mr Lukhele was against the allocation of classes to teacher Khetsiwe Simelane to teach because he felt she did not belong to his school. Instead he was pestering the teacher in question to look for an alternative school to teach. What is even more worrisome to the Court is that when the pastoral Inspector for Kwaluseni Infant school, Siboniso Gumbi, tried to intervene in this impasse of the unlawfully suspended teacher, the undisputed evidence in the record of the proceedings at the hearing before the TSC indicates that the Applicant informed him he was just 'blowing off air, he would not bother coming to him', **('…*ngikhuluma umoya ngeke ete lapha.*').** He went on to tell the Inspector that even if he were to be summoned by the Prime Minister [and even the highest Authority in the country, quite shocking indeed!] he would still not bother coming because this teacher did not belong to the school. He was even prepared to resign from his position as Headteacher and rather go home to after his livestock if teacher Khetsiwe were to come back to the school. (See page 62 of the record). He blatantly defied the instruction of the School's Manager and displayed a 'do what you wish and see if I

care…' kind of attitude. Clearly, this shows a wanton disregard for authority on the part of the Applicant, which cannot be countenanced by this Court. In relation to this matter, Nelson Mandela Lukhele was very arrogant. In effect he was unashamedly showing his employer, the Teaching Service Commission, the thick middle finger. And this is a whole Head teacher we are talking about here!

14. The decision of the Teaching Service Commission was that the Applicant did not have the powers to suspend a teacher under his authority. And this was the correct decision. The TSC further found that the issue of the abnormality of the posting of the teacher was an administrative issue which had to be dealt with in consultation with the relevant structures within the offices of the REO, School's Manager and the Executive Secretary to the Commission. Again the TSC was spot on in this regard. Indeed the Commission was correct in finding that Nelson Mandela Lukhele became a law unto himself. He waited until the teacher had a misunderstanding with her colleague to frustrate her, allegedly because she did not belong to his school. He treated the school as his own farm, which was wrong. The arrogant attitude he displayed to the Pastoral Inspector and the Schools Manager is not acceptable, especially for a position of authority like that of the Applicant.

15. In the exercise of its statutory powers 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. (See section 14(1) of the Teaching Service Act 1982). No one else has any right whatsoever to usurp the powers of the TSC in this regard, except with the written authority of the Commission in terms of section 14(2).

16. The uncontroverted evidence before this Court is that; a) the Applicant was informed in writing of the misconduct alleged against him, b) he was allowed an opportunity to present his defence in writing and at the hearing and c) he was informed of his right to legal representation at the hearing of his matter. This was in satisfaction of the provisions of Regulation 15(2) of the Teaching Service Regulations. I have gone through the record of proceedings of the hearing of the Applicant and have not been able to come across any irregularity in the conduct of his hearing that would entail the reviewing and setting of the decision of the decision of the Teaching Service Commission.

17. In the ***Mumcy Ntombi Maziya unreported IC Case No 512/2007*** this Court stated that;

> *"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 of any relevant statutory provisions."*

18. In this matter, I make a finding that the Teaching Service Commission applied its mind honestly to the matter of Nelson Mandela Lukhele. I also find that it observed the requirements of the rules of natural justice in arriving at its ultimate decision. In *casu*, the TSC tribunal at the Applicant's hearing was demonstrably unbiased, and it retained an open mind during the full course of the proceedings. In fact, in my opinion, Nelson Mandela Lukhele should thank his lucky stars that he still has a job. His conduct and

arrogance has no place in the office of Head teacher he occupies. He is not a good example to his colleagues and subordinates.

19. It has been held in a plethora of decision in this jurisdiction and others that '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.' 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 has been held to be 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. It is therefore not every irregularity that will culminate in setting aside of a decision of the TSC. More is required.

20. Having assessed the reasonableness, or otherwise, of the decision of the Teaching Service Commission in this matter, which I did in light of the

totality of all facts and evidence that were before it at the time it made its decision, I make a determination that the case of Nelson Mandela Lukhele is without merit and is hereby dismissed. I have also taken into account all the facts and circumstances surrounding this matter, including the conduct of the Applicant in this whole fiasco and hereby also order that he be mulcted with an order for costs in the ordinary scale.

21. The order of this Court in respect of this matter therefore is this;

a) The present application of the Applicant be and is hereby dismissed.

b) The Applicant be and is hereby ordered and directed to pay the costs of the Respondents on the ordinary scale.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 19th DAY OF JUNE 2015.

For the Applicant : Attorney T. Maziya (B. Zwane Attorneys).
For the Respondent : Attorney N. Dlamini (Attorney General's Chambers).