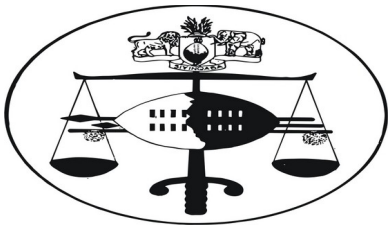

IN THE INDUSTRIAL COURT OF SWAZILAND

REASONS FOR JUDGEMENT

CASE NO. 469/2015

In the matter between:-

MDUDUZI BHEMBE **APPLICANT**

AND

THE PRINCIPAL SECRETARY MINISTRY OF EDUCATION AND TRAINING **1ST RESPONDENT**

THE UNDER SECRETARY, MINISTRY OF OF EDUCATION AND TRAINING **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

Neutral citation : *Mduduzi Bhembe v The PS Ministry of Education and Training and Others SZIC 60 (04 November 2015)*

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

Heard : **19 October 2015**

Delivered : **19 October 2015**

Summary: ***Labour law – Industrial Relations –*** *Applicant seeks order setting aside his suspension on the basis that he was not given an opportunity to be heard.* ***Held –*** *Applicant given sufficient opportunity to state his defence, application dismissed.*

1. Following an urgent application by the Applicant in this matter, this Court on 19 October 2015, delivered an *ex tempore* judgement in terms of which it dismissed the application. These now are the reasons of the Court for its judgement dismissing the case of the Applicant.

2. The nub of the Applicant's case before this Court is that he has been denied an opportunity to be heard, hence he feels that his suspension is unlawful and unfair and therefore wants same to be set aside. He also wants a declaratory order to the effect that the 1st Respondent's decision to ursup the duties and responsibilities of the school's Manager at Mbekelweni Lutheran High School and placing them on the 2nd Respondent was unprocedural and unlawful.

3. In his founding affidavit the Applicant states that he received a letter from the 1st Respondent informing him of misconduct complaints against him that he was required to answer to in writing within 48 hours. He was called upon to show cause why disciplinary action should not be taken against him. The allegations against the Applicant related to copying incidents at the school he was heading. The Applicant states that he received an identical letter from a certain

Reverend Khumalo who is the School Manager for his school. He wrote back to the 2nd Respondent raising the issue of the identical letters from two people on the same issues and wondered why this was so. The 2nd Respondent, by letter dated 29 September 2015, then accused him of engaging in delaying tactics and demanded that he responds to the allegations by close of on 01 October 2015. He states as well that he could not make any written answers to the allegations of misconduct against him because he had requested for further particulars to these complaints levelled at him and that he was given a very short notice to respond to same. He feels that he has not been allowed time to respond to the complaints and that this is in breach of regulation 15(2) (a) and (b).

4. On the contrary though, the Respondents deny the allegation against them that the Applicant was not allowed adequate time to present his defence in writing. Macanjana Motsa, the Under Secretary and Schools Manager, cited herein as the Second Respondent, states that the letter she wrote to the Applicant dated 21 September 2015, was in fact not the first time the Applicant was informed of the misconduct allegations against him and given an opportunity to present his

defence in writing. She deposes that the first time Mr. Bhembe had been first informed in 07 April 2015, of the complaints against him. However, the 2nd Respondent continues, instead of responding to the serious allegations against him, the Applicant adopted a legalistic stance in which he contested the Ms. Macanjana Motsa's authority to require him to present his defence.

5. Indeed the evidence before this Court is that the Applicant had been advised of these allegations against himself as far back as April, 2015. Instead of presenting his defence in writing by responding to the serious allegations against himself, he adopted a dilatory tactic by requesting for further particulars. The Court however has difficulty with the Applicant's request for further particulars as outlined above. This because, legally, the object of particulars is to enable the party asking for them to know exactly what case he has to meet at the trial, so as to save unnecessary expenses and to avoid being taken by surprise. (See ***Spedding v Fitzpatrick (1888) 38 Ch. D. 410 C.A. at 413***). Differently stated, it is to limit the generality of allegations in pleadings or to define issues which are to be tried and to prevent the requesting party from being taken by surprise at the trial. (See

Halsbury's Laws of England (4th edition) *volume 36 para 38,* see also the case of ***Curtis-Setchell, Lloyd and Mathews v Koeppen 1948 (3) SA 1024.***

6. As a general rule therefore, all the rules of practice and procedure of require of a party pleading is that his pleading should contain only a statement, in a summary form, of the material facts on which he relies for his claim or defence and not the evidence by which they are to be proved. The same applies to complaints such as those levelled against the Applicant in this matter.

7. In relation to this present matter of Mr. Mduduzi Bhembe, for instance, the first complaint against him was crafted as follows;

> *"During the 2012 S.G.C.S.E Examination, you contravened Regulations 7.4 bullet 3.5 and 7 of the Handbook for centres 2011/2012, as well as Regulations 15 (1) (f) & (j) of the Teaching Service Regulations of 1983, in that; It is alleged that, you helped candidate Number SZ508/067 Nontsikelelo Portia Dlamini, who was a private candidate in the school to write English Language Paper 1, twice."*

Complaints 2 up to 8 are worded similarly, with the only difference being the subjects Mr. Bhembe is alleged to have helped the same private candidate Nontsikelelo Portia Dlamini write twice. The allegation here being that he also helped the private candidate also write English Language Paper 2 and 3, Mathematics Paper 1 and 2, and Physical Science Paper 1 examinations all twice.

8. Now, clearly, and in fact it is also a factual finding of this Court, that these complaints against the Applicant have been written with sufficient particularity and material facts to allow him an opportunity to present his defence in writing in terms of Regulation 15 (b) of the Teaching Service Regulations 1983.

9. However, instead of presenting his defence in writing, initially the Applicant wrote back as follows;

> *"**AD COMPLAINTS 1 TO 8***
>
> *Kindly assist me with any form of evidence that the said candidate wrote these papers twice as I am not aware of such happening and need further particulars of such allegations."*

10. In effect, the Applicant wanted the Schools Manager to give him the evidence by which the complaints against him were to be proved. Clearly this was an unreasonable request by the Applicant. As stated at paragraph 8 above, the complaints against him had been written with sufficient particularity and material facts to allow him an opportunity to present his defence in writing. Price J, in ***Curtis-Setchell, Lloyd and Mathews v Koeppen supra at 1028,*** stated; "the request must be reasonable, and the particulars must be necessary for pleading."

11. Be that as it may, the Court points out that in his letter of 16 April 2015, directed to the Schools' Manager, Mr. Bhembe was in essence denying the complaints and allegations against him. What he omitted to do though was to state why he why disputing these allegations (his defence) instead he used the request for further particulars procedure as a fishing expedition to find out the evidence upon which the complaints were based, thus delaying the instituted process. Courts though have been reluctant to allow requests for further particulars, such as this of the Applicant, to be used as fishing expedition or delaying tactic. (See ***Purdon v Muller 1961 (2) SA 211 at 215***).

12. In this present matter, it would seem that Mr. Bhembe's object of the request for further particulars was to ascertain the exact particulars of the evidence upon which the complaints against him were based, which in fact is an abuse of the right to so request for same. He cannot therefore claim that he was not afforded an opportunity to be heard because the evidence before this Court indicates that in actual fact he was given not one or two but three opportunities to state his defence.

13. Perhaps it is apposite for this Court to mention here that it has been held that in some instances when dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately procedural fairness, may legitimately be attenuated (see ***Lewis v Heffer & Others [1978] 3 All ER 354 (CA) at 364 c-e,*** see also ***Member of Executive Council for Education, North West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC)***. However, and as this Court has already found, this is not to suggest that this was the case in this present matter of the Applicant. The Applicant was given all the opportunities to state his defence but spurned all of them by unreasonably seeking to find out

what exactly the evidence against him was and questioning the authority of the 2nd Respondent.

14. The evidence before this Court points out that after the scenario highlighted above, the School's Manager at his school, Reverend E.M. Khumalo wrote on 22 April 2015, requesting that he be allowed investigate the matter. The finding of this Court in this regard is that this was an unnecessary request by the reverend which would have duplicated an already complete investigation process. The matter had already been investigated under the auspices of the Ministry of Education, resulting in the complaints against Mr. Bhembe, there was therefore no need for any further investigations. Thereafter the Reverend did nothing with this matter until just slightly more than four months later when the Principal Secretary wrote to him directing that he follows procedure by referring the matter to the Teaching Service Commission in terms of the regulations. The Reverend would still not budge it would seem. Thereafter, and five months later, on 10 September 2015, to be exact, the Principal Secretary in the Ministry of Education then wrote to him raising concerns on the delay of the matter. This was apparently because the Examinations Council of

Swaziland had also raised concerns on the delay as well and had even threatened to deregister Mbekelweni high school as an examination centre as a result of these serious allegations against the Applicant. The Principal Secretary then advised Reverend Khumalo that the matter was as at that date of 10 September being taken over from him and was to be henceforth handled by the 2nd Respondent, the Ministry's Schools Manager, and rightfully so in the Court's opinion. And in fact it is not difficult to fathom why this action was taken by the 1st Respondent.

15. The Principal Secretary was concerned about the threats by the Examinations Council of Swaziland to deregister the school headed by Mr. Bhembe as an examination centre. This would obviously have dire consequences, especially for the pupils who are sitting this year's final examinations, whose interests cannot be ignored. In fact, the Court finds that the student's interests of sitting their final exams outweigh those of the Applicant being at the school and therefore risking deregistration of Mbekelweni High school as an examination centre by the Examination Council. This would obviously cause unnecessary confusion and anxiety to the students.

16. It is for these reasons above that this Court dismissed the application of the Applicant, Mduduzi Bhembe, with no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DATED THIS 04th DAY OF NOVEMBER 2015.

For the Applicant: *Attorney Mr. B. Zwane (B. Zwane Attorneys)*
For the Respondent: *Attorney Mr. M. Vilakati (Attorney General's Chambers)*