

IN THE HIGH COURT OF LESOTHO

In the matter of:

BARTHOLOMEW P. MOTHOB I

Applicant

v

MINISTER OF EDUCATION
ATTORNEY-GENERAL
EDUCATIONAL SECRETARY FOR
ROMAN CATHOLIC SCHOOLS

1st Respondent

2nd Respondent

3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice Sir Peter Allen
on the 28th day of November, 1988

This is an application by way of Notice of Motion for
an order

- (a) Directing the respondents to pay the applicant's salary from December 1986 to date;
- (b) Directing the 1st and 3rd respondents to recognise the applicant as their employee in terms of a contract entered into between the applicant and the Teaching Service Unit on behalf of the 1st respondent and 3rd respondent dated 25 February 1986.

The applicant claimed to be a qualified teacher presently employed as a teacher at the Mamohau R.C. School at Leribe. In his Founding Affidavit the applicant stated that he commenced teaching there in 1965 until he terminated his contract in September 1985 when he resigned to take up

politics. He became a BNP member of Parliament and remained so until 20 January 1986 when there was a change of Government and Parliament was dissolved.

As a consequence he ceased to be a member of Parliament and he then claimed to be qualified to resume work as a teacher. On 30 January 1986 he signed what purports to be a Contract of Employment for Teachers on Permanent Terms, to commence on 1 February 1986 purporting to be signed by someone "for the Educational Secretary." The space for approval by the Permanent Secretary is blank.

No query was raised about this contract although it seems to me to be a rather strange one since the two signatories are supposed to be the teacher and the school manager. In this instance both have the same name, B. P. Mothobi, and both signatures are almost identical. It would seem to be a rather odd coincidence that both people would have the same name as well as the same signature. However, I will leave this point.

In his affidavit the applicant stated that he was paid his salary as a teacher from March to November 1986 (inclusive) but his December 1986 salary was withheld although his contract was not terminated, nor was he discharged.

On 5 January 1987 he wrote to the 3rd respondent complaining about the position and he stated that he would take the matter to court if he was not reinstated and paid. He declared that he was no longer involved in politics. There was no further annexure to the Founding Affidavit so it may be that the applicant received no reply to this letter.

/He did ...

He did not mention the matter in his affidavit.

The applicant then annexed two additional documents to his Replying Affidavit (annexures A.1 and A.2.) Since these were relevant and important and in his possession before he filed this application in October 1987, they should properly have been annexed to the Founding Affidavit and not brought in as an apparent after thought.

Annexure A.1 to the Replying Affidavit is entitled Teaching Service Commission Circular Letter No.1 of 1987 dated 6 February 1987. It reads as follows:

ADMISSION OF TEACHERS TO LESOTHO TEACHING SERVICE

1. The Teaching Service Commission (TSC) is required under section 7(a) and (b) of the Teaching Service Commission Act 1983 to, inter alia:

"(a) establish and keep a register of teachers;

(b) to establish and maintain a teaching service adequate for the needs of schools in Lesotho."

Education Order (Amendment) Act 1983 under section 16 provides that "the Teaching Service Regulations, 1974 shall continue to have effect until revoked or suspended by Regulations under the Teaching Service Commission Act 1983."

2. The TSC has to start immediately performing the duties defined under section 7(a) and (b) of the TSC Act 1983, which are cited in paragraph 1 of this circular letter.

/The TSC ...

The TSC will apply the provisions of sub-regulation (1) of regulation 2 of the Teaching Service Regulations 1974 in carrying out these two duties. The sub-regulation referred to here reads as follows:

"No person shall enter into a contract of employment as a teacher unless he has been admitted to the Lesotho Teaching Service and has received notice of his admission in the form set out in the Ninth Schedule."

3. The TSC notes that this sub-regulation is mandatory and an essential condition for lawfulness of any teaching contract. For this reason it has decided to strictly ensure that all serving teachers enjoy immediately the benefits of its safeguards. The TSC also observes that this sub-regulation was never applied to employment of any teacher and has, therefore, decided to require every serving teacher to seek application of this sub-regulation to his/her employment.

4. In the case of teachers already employed the intended effect of this procedure is regularisation of the existing employment for the entire past and future periods of the employment. The TSC notes that teachers are now eligible for pensions, gratuities and other allowances. The TSC notes also that application of these to whoever is to be considered for that, inevitably occasions re-examination of his/her employment to ensure that it has been fully lawful. For this reason the TSC declares it compulsory for all employed teachers to seek application of this sub-regulation to their employment immediately.

- 5. The TSC informs the Educational Secretaries, the supervisor of controlled schools and school managers that with immediate effect no teaching contract shall be considered unless this requirement has been complied with. The addressees are notified also that observance of this procedure shall strictly precede every application for a certificate of employment in the case of those expatriate teachers whose applications for certificates of employment have already been submitted and have not yet received such certificates.
- 6. (regarding application forms)
- 7. " " "
- 8. All applications of teachers already employed must be submitted immediately, which must not be later than 15 March 1987.

E. L. RAMAKHULA
Secretary-Teaching Service Commission

The applicant stated that he sent in his application form as required above and that he received the small document annexed as A.2, which reads as follows:

Ref: No. 362807	Teaching Service Commission Private Bag A96 Maseru 100
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Mr/Mrs/Miss Mothobi B

Dear Sir/Madam,

Admission to Lesotho Teaching Service

/Your

Your application dated 12.2.87 is acknowledged.
I am pleased to/~~regret~~ to advise that your
application for admission to the Lesotho
Teaching Service has been successful/~~unsuccessful~~.

Yours faithfully

xxxxxxxxxxxx

for: Signature of Secretary Teaching Service Commission.

It will be noticed that the dotted line under the
address, which is presumably where the date of the notification
is supposed to be inserted, is in fact blank. The notification
was therefore undated and it appears to have no effective date
on it at all.

The TSC circular quoted above reveals an astonishing
situation. It appears that for many years the Ministry of
Education and the TSC had simply ignored the requirements
of relevant legislation. The TSC Regulations of 1974 which
required a potential teacher to obtain admission to the Lesotho
Teaching Service before entering into a contract of employ-
ment had been ignored in the case of every teacher. These
regulations were eventually replaced by the Teaching Service
Regulations 1986, which did not come into force until July
1987, and so they are not applicable in this case, since we
are here concerned with what happened up until February 1987.

Apparently, according to the Circular, the TSC Act 1983
had also been ignored and there was not even a register of
teachers established and kept by the TSC. Nobody in authority
/evidently ...

evidently realised the seriousness of the situation until early in 1987, hence the above circular issued in an apparent attempt to regularise the positions of all the members of the teaching service, who were all evidently then in possession of illegal contracts of service. These appointments had apparently been made ultra vires since the requirements of the legislation, particularly the TSC Regulations 1974, had not been complied with. But the TSC, like everyone and every organisation in the country was and is required to comply with the law.

Mr Mofolo for the applicant submitted that the applicant was an established teacher with a contract of employment which he had carried out without any breach of that contract and so he must be paid his salary. He had been paid until the end of November 1986 but not since. The applicant could not have applied earlier under regulation 3(1) of the Teaching Service Regulations 1974 for admission into the teaching profession as required because, before the Circular was issued in February 1987, there were no application forms available and the procedure was in any case not followed. This was not the fault of the applicant and he had done all that he was required to do by the authorities.

The Attorney General on behalf of the respondents submitted that the Ministry of Education and the Teaching Service Commission both derive their authority and powers entirely from legislation and they are bound by it. They cannot go beyond it nor can they ignore it. He referred to a number of cases:

/In ...

In Collector of Customs v Cape Central Railways Ltd (1889)6 SC 402, the defendant imported a quantity of cement into Cape Colony. The relevant Act required a customs duty to be paid on each barrel of cement. The Premier of the Colony decided to remit the duty and so allowed the cement to be imported free of duty. The plaintiff insisted upon duty being paid as required by law. It was held that the plaintiff was bound by law to collect the customs duty as provided for in the legislation and only the Legislature could grant the defendant special relief. The representatives of the Government had illegally abandoned the payment of the duty contrary to the Act which must be enforced. The defendant was ordered to pay the customs duty.

In Hoisain v Town Clerk Wynberg (1916) ad 236, one Ismail had a shop and a trading licence. The applicant applied to the Town Council to transfer the shop to new premises and to transfer the trading licence in his name. The Council agreed to the first but left the second to the Mayor who then agreed regarding transferring the licence and it was issued. But the relevant ordinance did not provide for transferring of an existing trading licence to a new person. It was held that the insertion of a wrong name in a certificate, or the affixing of a signature in error by the Town Clerk could not deprive the Council of its statutory authority and allow its officer to usurp its functions. The doctrine of estoppel was also held not to apply. Furthermore, the Council had no right to delegate to the Mayor a duty imposed upon it as a whole and one for the discharge of which express directions were contained in the Ordinance.

/In ...

In Macheke Rural Council v Cilliers 1980 ZLR 144 (GD), the respondent owned a farm in Zimbabwe in the council's area which he sold. He duly paid an amount said to be owing to the council as unit tax and he was given a clearance certificate certifying that no further tax was due. In fact an amount was still outstanding. The respondent claimed that the council was estopped from claiming it having issued its clearance certificate. It was held that once a council has levied a tax in terms of the Rural Councils Act, it is its duty to enforce it, and it cannot be estopped from recovering it.

In that same case the judge referred to Halsbury, 4th edition (1976) volume 16 paragraph 1596, which reads:

A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what is its duty to do; and the same principle applies to individuals. No person can by his conduct, or otherwise, waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so.

Regulation 3(1) of the Teaching Service Regulations,

/1974 ...

1974 placed a duty on those who desired to teach, not to enter into teaching contracts unless and until they had been duly admitted to the teaching service. It was not disputed that prior to the Circular of February 1987 the applicant and others had been doing just that; and the applicant and other teachers as well as the Ministry of Education and the TSC had all ignored and failed to comply with the provisions of this legislation.

Although the applicant did not say so specifically, he was by implication claiming that the respondents were estopped from denying the fact that they had given him a contract and allowed him to perform his teaching duties, and had paid his salary for so doing up until the end of November 1986. However, as we have seen in the authorities cited above, and particularly the passage from Halsbury, there can be no estoppel raised so as to create a state of things which the respondents were legally disabled from creating.

Clearly by giving the applicant a contract in 1986 and by allowing him to teach under that contract, the respondents were acting ultra vires because they had not complied with the requirements of the relevant legislation quoted above. Indeed the appointment was contrary to that legislation and the respondents, whether as representatives of the Government or not, have a duty to carry out their functions in this respect in accordance with that legislation. This Court cannot condone a breach of legislation or a failure to enforce it. Yet that is what the applicant is asking for in this application. The appropriate cure for such
/a massive ...

a massive error in the teaching service would be by further legislation to rectify and regularise the position of all teachers so affected.

Consequently the contract dated 30 January 1986 (annexure 'A') and approved in February 1986, purporting to appoint the applicant as a teacher, is null and void because he had not first been properly admitted to the teaching service. His subsequent purported admission could not rectify the illegality.

Accordingly, this application is dismissed with costs.

P. A. P. J. ALLEN
J U D G E

28 November 1988

Mr Mofolo for the applicant

The Attorney-General for the respondents