

IN THE HIGH COURT OF LESOTHO

In matter between:

JUSTINA MPHOKA (Duly assisted by her husband) Applicant

and

ANGLICAN CHURCH OF LESOTHO 1st Respondent
LEBOHANG KHEEKHE 2nd Respondent

J U D G M E N T

Delivered by the Honourable Chief Justice
Mr. Justice J.L. Kheola on the 6th day
of July, 1994

This is an application for an order in the following terms:

1. That a rule nisi do hereby issue calling upon the Respondents to show cause, if any, on a date to be determined by this Honourable Court why:-

(a) The decision of Second Respondent of 1st June 1993 to dismiss Applicant as a teacher shall not be declared to be null and void;

(b) The salary of Applicant with effect from April 1993 shall not be paid to Applicant;

(c) Respondent shall not be directed to pay the costs hereof;

2. That the interim rule should be returnable on August, 1993 at 9.30 a.m. on the grounds of urgency of this application.

The facts of this application seem to be common cause. They are as follows:

The applicant was a teacher at Rankhelepe A.C.L. Primary School since 1973. On the 5th March, 1993 the Manager of that school, one Rev. G. Sonti, applied pursuant to Regulation 11 (1) of the Teaching Service Regulations 1986 to the second respondent for the applicant's transfer from Rankhelepe A.C.L. Primary school to Setleketseng A.C.L. Primary School. The form set out in the Eleventh Schedule to the Teaching Service Regulations 1986 (the Regulations) was filled by the Manager (See Annexure "MK1").

On the same day the Manager wrote a letter to the applicant (Annexure "MK2") informing her that he (the Manager), the school committee and the second respondent had arrived at a decision that the applicant must go to Setleketseng A.C.L. Primary School on the 9th March, 1993. I must point out that the contents of that letter are not accurate because on the 5th March, 1993 the second respondent had not yet received the transfer form. It came to him on the 6th April, 1993 when he approved the transfer.

On the 9th March, 1993 the second respondent instructed the applicant to go to the Manager and collect the transfer forms so

that she could fill her part. On the 10th March, 1993 she filled her part and gave the form back to the Manager. She indicated that she did not accept the transfer on the following reasons:

1. There were no substantial reasons given by the Management Committee why she should be transferred.
2. The question of re-organisation is absolutely incomprehensible.
3. In her knowledge the question of any proposed transfer is negotiable subject to agreement or disagreement between the parties concerned.

On the 6th April, 1993 the second respondent agreed to the proposed transfer on the ground that it was for the good of both the school and the teachers and for proper administration and management within the parish.

On the 19th April, 1993 the Manager informed the applicant that her transfer had been approved.

The applicant refused to go to Setleketseng on the grounds she had tabulated in the transfer form. After considering her reasons against the transfer, the Central Circuit department of the Ministry of Education and the second respondent approved the

transfer. This decision was communicated to the applicant on the 19th April, 1993.

It seems to me that there was proper compliance with the provisions of Regulation 11(1) of the Regulations. The Manager made the application on the proper form. On the same day he wrote a letter in which he alleged that the second respondent had already approved the transfer before he had even signed the transfer form. This was proved to be untrue by the second respondent and by the transfer form which remained blank where the second respondent had to record his approval. After that the transfer form was properly signed by the teacher (the applicant), the Central Circuit department and finally by the second respondent.

The applicant seems to be confusing the provisions of Regulation 11(1) with those of Regulation 32(2) which provides that on receipt of such a charge of misconduct, a teacher shall submit a written reply to the manager within fourteen (14) days. In paragraph 3.4 of her founding affidavit the applicant alleges that in terms of Regulation 32(2) she had fourteen days within which to reply. I do not agree with that allegation because Regulation 32(2) deals with an entirely different matter of receipt of a charge of misconduct. The transfer is not a charge of misconduct.

In terms of Regulation 11(7) if the teacher is transferred under Regulation 11(1) the Educational Secretary or Supervisor's

decision shall be final. I do not see any reason why it should not be so because the teacher would have been given a chance to be heard by giving his or her reasons against the transfer in the form for transfer.

By refusing the transfer the applicant was guilty of misconduct and was charged accordingly. The charge of misconduct was sent to the applicant by registered post at his place of work which was Rankhelepe A.C.L. Primary School. The applicant decided not to receive the letter addressed to her. Section 5(1) of the Interpretation Act, 1977 provides that:

"Where an Act authorises or requires a document to be served or a notice to be given by post or by registered post, the service or notice shall be deemed to be effected by properly addressing, pre-paying the postage thereon and dispatching by post or by registered post, as the case may be, to the last known postal address of the person to be served or given notice, a letter containing the document or notice, and unless the contrary is proved, such service or notice shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

In that charge she was ordered to submit her reply to the charge within fourteen days in terms of Regulation 32(2) of the Regulations. On the 1st June, 1993 the second respondent

considered the matter and found the applicant guilty of misconduct and sentenced her to a dismissal from her teaching post.

The applicant's transfer to Setleketseng A.C.L. Primary School was approved by the second respondent on the 6th April, 1993. She was formally informed of the transfer on the 19th April, 1993. That must be regarded as the date on which the applicant started committing the breach of discipline or misconduct by refusing to go to Setleketseng. She was found guilty on misconduct on the 1st day of June, 1993. It was submitted on behalf of the applicant that the punishment of dismissal was null and void because it was retrospective from the 1st April, 1993.

It must be borne in mind that the 1st of April, 1993 was the date on which the applicant stopped rendering her services to the school. At the end of April, 1993 her salary cheque was returned to the Teaching Service Unit by the Manager because she was no longer serving in his parish. She had not gone to Setleketseng. It was only just that her dismissal should take effect from the day she stopped rendering her service to her school.

In terms of section 34(1)(a) of the Interpretation Act 1977 power to appoint includes power to dismiss. This section must be read with section 38 of the same Act which provides that:

"Any appointment made under the provisions

of an Act may be declared to have effect as from the date upon which the person appointed in fact began to exercise the powers and perform the duties of his appointment, not being a date earlier than the commencement of the Act under which the appointment is made."

It seems to me that in the terms of section 38 a sentence of dismissal can be made retrospective.

In the result the application is dismissed with costs.

F.L. KHEOLA
CHIEF JUSTICE

6th July, 1994

For Applicant - Mr. Nathane
For Respondents - Mrs Kotelo.