CIV\APN\220\92

IN THE HIGH COURT OF LESOTHO

In the Application of :

TAOANA MATOOANE	**1st Applicant**
MALIMABE MOTOPELA	**2nd Applicant**
LESOTHO TEACHERS TRADE UNION	**3rd Applicant**

v

THE ADJUDICATOR OF CONTROLLED SCHOOLS (MR. KAPHE)	1st Respondent
MASERU HIGH SCHOOL	2nd Respondent
T.S.U.	3rd Respondent
THE MINISTER OF EDUCATION	4th Respondent
THE ATTORNEY GENERAL	5th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 7th day of February, 1994

On 19th June 1992 the applicants sought a Rule Nisi calling upon the respondents to show cause why -

(a) The 1st respondent shall not be directed to dispatch to the Registrar within 14 days of the receipt of this application, the record of the disciplinary proceedings held by the said respondent on an unknown venue and time against the 1st and 2nd applicants,

(b) The execution of the decision of the 1st respondent in the said disciplinary proceedings shall not be suspended pending the outcome of this application

(c) The said proceedings shall not be reviewed, set aside and declared null and void,

(d) Regulations 32(2) (3) (4) (5), 39(2), 54 and Schedule 18 of the Teaching Service Regulations shall not be declared null and void.

3. Prayers 2(a) and (b) operate with immediate effect as interim orders pending finalisation of these proceedings.

4. Directing the respondents to pay the costs of this application.

5. Granting applicants such further and\or alternative relief.

There was also a prayer for dispensation with the Rules as to service.

The Court seeing that no harm would be occasioned by service of papers on respondents ordered that service be effected on short notice.

I may go further to indicate even at this stage that on consideration and perusal of the papers filed by the applicants there doesn't seem to have been such fear that if made aware of the pending application against them the respondents would in any way frustrate the course of justice by precipitating the very evil that could only be avoided if this proceeding was brought ex parte. To the extent that this application was brought ex parte the Court is bound to frown upon it as an abuse and unnecessary encroachment on Court's time.

In terms of the 1st applicant's affidavit it is averred at paragraph 5 that he and 2nd applicant are members of the 3rd applicant i e the Lesotho Teachers Trade Union of which the 2nd applicant is Secretary General.

The 1st applicant avers further that arrangements were made by the 2nd respondent on 6th September 1991, for an educational tour to be undertaken by students and teachers to the Highland Water Project Area at Katse It was intended that the journey would be broken at 'Mamohau High School in Leribe where the tourists would put up for an undisclosed period However a point is made of the fact that the Headmaster was also present. See paragraph 6

It is not stated of which school or schools the students made mention of in the above paragraph are Nor indeed the teachers either I can only presume they all belong to 2nd respondent

Although it may have been necessary to give background to events which gave rise to this application, it seems to me that much space and time were consumed by the prolixity of the 1st applicant in his affidavit seeking to avoid the inwardness and essence of the dispute in this matter

In brief the first two applicants seek to avoid liability for damages occasioned to the 2nd respondent's vehicle which had been under their care and custody at the time of the damage.

The 1st applicant seeks to make a merit of the fact that he did not force the Headmaster to part with the keys of the vehicle in question. But in my view whether the Headmaster parted with the keys of the vehicle voluntarily or under duress, the important question to determine is "to whom does liability for damages lie"

Apparent from the papers is utter lack of need or interest by the Headmaster to go to Thaba Tseka to attend the concert staged by one Ntabanyane miles and miles away from Mamohau High School. In the result when the vehicle reached Thaba Tseka the concert had stopped. A point which is not far related to the state of the first two applicants' sobriety is that they support each other in saying the Headmaster was drunk when they parted with him. He on the other hand says it is they who were drunk and menacing hence the fact that he parted with the vehicle's keys under duress. Relevant factors seem to point who of the parties were drunk. There is first the question of utter miscalculation of the time it would take the first two applicants to reach Thaba Tseka before the concert was over. Secondly it is not clear how in their view it was preferable to leave students who were under their collective care and attend a concert miles

and miles away, yet such conceit was not part of the tour in the first place. Thirdly, their failure to appreciate that without proper care that the fuel in the tank of the vehicle was replenished it would increasingly get diminished, with the result that they would fail to make Mamohau on the round trip. The end result is that due to negligence of the one who was driving that vehicle it ended in a ditch. The first applicant makes a merit of describing the damage suffered as minor. But the facts gleaned from enlightened assessment of the damage put a lie to the first two applicants' contention that it was minor.

Papers perused in this record show that the total sum of expenses incurred by the school in repairs to the vehicle amounts to M8 843 30. The result of the adjudication was that payment of this sum should be shouldered by the first two applicants and one Moshe Tsehlo in equal amounts of M2 947.80 each.

The applicants' contentions seem to be based more on what they perceive as defects in the law than on what is revealed by the bare facts of the case

The Minister of Education in his opposing affidavit set out in my view what the simple operation of the law in a situation such as the instant one should be.

He avers that he is

> "charged with the overall administration of the teaching service and to ensure obedience to the laws and regulations made in pursuance of the smooth functioning of the teaching service"

This deponent further indicates that the Teaching Service Regulations of 1986 were promulgated by his predecessor in office in terms of Section 21 of Education Order 1971 read with Section 21 of the Teaching Service Commission Act 1983

The deponent further avers at paragraph 5 that

> "There is nothing wrong with utilising the provisions of the Regulations without having recourse to the Courts where circumstances permit. For example, in this case the teachers were not being charged with a criminal offence of contravening (provisions of) the Road Traffic Act, wherein the correct forum in which they were to be tried would be a Court of Law, but they were being charged, as teachers, with damage to school property, and the Regulations provide a procedure by which the Adjudicator can determine such matters".

The 1st applicant's reaction to this serious and heavily loaded averment is simply -

> "I reiterate the contents of paragraph 17 of my founding affidavit".

But paragraph 17 is silent on the important point and a very sensible one that provisions of the Regulations can be utilised without resort to Courts of Law. This silence is most telling regard being had to the fact that the principle behind the enactment of the Regulations is to ensure that resolution of

disputes in the teaching service is reached without inconvenience to the parties, students the administration and at far reduced costs.

The above contention is well highlighted in Paragraph 7 where the deponent avers as to the quick and fair manner of disposing of alleged acts of misconduct by teachers that pursuant to Teaching Service Regulations 1986 (32 to 37) -

> "This has an advantage in that, due to its speedy nature, the interests of the students are indirectly safeguarded as their studies are not adversely interrupted for a long time. This procedure is designed for matters wherein there is no real dispute of fact and the issue can adequately be disposed of and decided on the papers before the Adjudicator".

Significantly the applicants' reaction to this very telling contention by the respondents is simply

> "I reiterate the contents of paragraphs 20 and 22 of my founding affidavit. Further arguments will be advanced by my Counsel on the hearing of this matter"

In fact the aggregate of the applicants' reaction in their replying affidavits tells the Court no more than reiteration of their previous averments in their founding and supporting affidavits. Beyond that the Court is promised better clarity of applicants' contentions in the arguments by their Counsel.

While there is nothing wrong in a party reposing confidence in the oratory of his Counsel, there is everything wrong with

thinking that Counsel's arguments constitute evidence.

In this application there is glaring lack of evidence to meet the respondents' answering affidavits.

I accordingly accept the respondents' contention that the Teaching Service Regulations 1986 were promulgated in terms of Section 21 of the Education Order 1971 read with Section 21 of the Teaching Service Commission Act 1983. I accept that these Regulations were designed to facilitate the smooth functioning of the teaching service as a whole to provide for the administration of the same.

The ground for challenging Regulation 39 is that it is unreasonable in that it provides for an association for whose formation there is no provision

But regard being had to the fact that this Regulation provides for the establishment of a Teaching Service Appeal Board, I fail to see the perceived unreasonableness.

Furthermore the bold statement unsupported by evidence as to how the Regulation is unreasonable cannot find favour in this Court. The onus is on him who asserts to prove his assertion.

With regard to the Audi Alterem Partem Rule, it goes without

saying that delegated legislation should not conflict with Rules of Natural Justice of which the above rule is a fundamental tenet. I fail to see that the Teaching Service Regulations violate this rule regard being had to the fact that Baxter in 1984 Administrative Law at 542-3 says

> "fair hearings need not necessarily meet all the formal standards of the proceedings adopted by courts of law The vagaries of the administrative process demand less formality and much greater flexibility".

Argued in the same vein in Heatherdale Farms (Pty) Ltd vs Deputy Minister of Agriculture 1980(3) SA 476 the principle was enunciated as follows

> "It is clear on the authorities that a person who is entitled to the benefit of the Audi Alterem Partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel, he need not be given an opportunity to cross examine.... .. But on the other hand.... .....the person concerned must be given a reasonable time in which to assemble the relevant information"
>
> "There is no right to an oral hearing unless this is expressly prescribed by statute. Written representation may be adequate"

See R. vs Ngwevela 1954(1) SA 123 AD at 128.

At 552 Baxter above says -

> "The Courts incline against requiring oral proceedings and personal presence as a necessary aspect of Natural Justice, unless the statute provides otherwise. In many cases written submissions would be a perfectly adequate means of conveying one's views. They are usually quicker, cheaper, more precise and reliable".

Thus it cannot be accurate to say or suggest that the Regulations do not give one an opportunity to be heard.

Another challenge was that the delegated legislation is lacking in aspects of certainty, and that it is vague and not positive. This submission was strongly disputed by reliance on Baxter above at 530 where the test for certainty was enunciated as follows -

> "The test is whether a reasonably precise meaning is ascertainable. It must not be so vague as to create a substantial uncertainty in the minds of those who have to apply it or of those to whom it applies The courts do not require perfect lucidity, reasonable certainty is sufficient".

It would seem that treatment of the phrase above which by implication condones a certain degree of vagueness (or put in another way does not exclude vagueness) or uncertainty to an absolute degree is very instructive indeed and for that I am greatly indebted to the learned Author.

How, in the instant circumstances where provision is made for the establishment of a Teaching Service Appeal Board and of members of the said Board, could a submission hold that Regulation 39(2) is lacking in the subminimum requirement of certainty?

Another challenge consists in the fact that the 1st

respondent had prior knowledge of the facts and thus breached the maxim that no one can be judge in his own cause.

The submission is based on the fear that because 1st respondent had prior knowledge of the facts before there was a hearing his attitude was likely to have been influenced by that prior knowledge

My reading of 1st respondent's affidavit betrays nothing contrary to a fair application of the law to the facts.

In terms of Annexture "F" one sees 1st respondent's effort to afford the first two applicants the fairest and most impartial hearing.

I wish to borrow a quotation relied on by respondents' counsel to the effect that

> "On a more general level, past activities may well reveal an official to have so identified himself with a particular view, directly relevant to the subject-matter of the administrative decision, that there is a reasonable apprehension that he cannot remain impartial It is important not to take the significance of the apparent 'prejudice' too far, it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision. To give a commonly cited example, the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. We all hold preconceived views but this does not prevent us from acting objectively in particular cases.

> It does not necessarily prevent the official concerned from being fair and objective in deciding particular cases". BAXTER 566.

In Snyman vs Liquor Licensing Court Windhoek 1963(1) SA 460 and in Miller and Cloete vs Lady Grey Divisional Council 1929 ELD 307, 313-6 it was pointed out that

> "Natural justice requires that the affected individual be afforded the opportunity of a fair unbiased hearing; and where he suspects the decision-maker of bias but does not request a recusal, or possibly even if a request of recusal is refused and the complainant continues with the hearing, he cannot later attack the decision for bias".

In Snyman it was held that

> "prima facie the applicants had acquiesced in the jurisdiction of the court as constituted and could not now raise this point" of recusal.

On the basis of the above considerations this application ought to be refused and prayers 1(b) (c) in so far as it seeks to declare proceedings before the adjudicator null and void (d) (4) and (5) are dismissed with costs.

JUDGE
7th February, 1994

For Applicant Mr. Mosito
For Respondents Mr. Letsie