

IN THE LESOTHO COURT OF APPEAL

In the matter of:

JUSTINA MPHOKA  
(duly assisted by her husband)

APPELLANT

AND

ANGLICAN CHURCH OF LESOTHO  
LEBOHANG KHEEKHE

1ST RESPONDENT  
2ND RESPONDENT

Held at:

MASERU

CORAM:

MAHOMED P,  
STEYN JA,  
LEON JA.

JUDGMENT

STEYN JA:

In the Court *a quo* Appellant applied for an order:

\*1. That a rule nisi do hereby issue calling upon the

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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.

The rule was granted in this form on August 10, 1993. However it was subsequently discharged by Kheola CJ on July 6, 1994 after full argument was presented to him.

It is against the latter order that Appellant appeals to this Court.

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The facts are the following. Appellant was employed for some twenty years as a teacher at the Rankhelepe A.C.L. Primary School (the School). She was dismissed by the 1st Respondent, acting through the medium of the Second Respondent on the 1st of June, 1993.

The circumstances in which she came to be dismissed relates to her refusal to comply with a directive that she was to be transferred to a different primary school located at Setleketseng. In order to determine whether her dismissal was lawful, it is necessary to examine how it came about that she was transferred.

Respondents alleged in their opposing affidavits that "there were problems concerning (Appellant) and the school". They go on to expand on this allegation as follows:

"Her cattle damaged crops in the school vegetable garden and when the cattle were impounded violent incidents were reported between her children and the teachers. The Police had to intervene.

In March 1993 I invited the villagers to the Chief's place. I asked them to protect the school garden. There were complaints about Mrs. Justina Mpho kepa and her children concerning the damage

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to the school garden. Two teachers who lived in the school premises asked to be transferred from the school. Some individuals were clamouring for the transfer of Mrs. Justina Mpho Kepa.

Mrs. Justina Mpho Kepa has been a teacher at Rankhelepe's since April 1973. Her residence is near the school.

As trouble was brewing and tension mounting teachers threatening to leave the school I had to ask Mrs. Justina Mpho Kepa to accept a transfer to another school. The local community seemed to have developed a hostile attitude.

I felt the Secretary of Schools would support me. He did not approve the transfer of Mrs. Justina Mpho Kepa in advance"

These allegations are denied in detailed averments contained in Appellant's replying affidavit. These read as follows:

"10.1 I deny that there were problems at the school concerning me. I never had problems with the said school or any school for that matter. If the problems deponent says I had with the school are the damaging of school crops

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and violent incidents referred to herein, I wish to aver as follows:-

- 10.2 It is not true that my cattle destroyed crops in the school garden. There is not a single day when my cattle were impounded as alleged nor were there violent incidents as alleged. Deponent has placed no iota of evidence to prove same, he does not even quote a single date on which the said incidents occurred as he gives the impression that they happened on a continuous basis. In any event my husband is still alive and as the administrator of the joint estate and head of the family he has overriding responsibility for the said cattle and children. Deponent does not even say that he ever talked to him about the said events and creates the impression that I did whatever I liked in complete disregard of my husband, him as my manager and teachers at the school till the Police had to intervene. If deponent's allegations were true, the police would have obviously taken action against me, my husband and my children and they have never done so.

- 10.3 On a single occasion when my cattle were alleged to have damaged the school crops this too turned out to be false. I

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refer this Honourable Court to the affidavit of MALISEMELO MOTSOANE which deals fully with the said occasion.

AD PARAGRAPHS 4.2 AND 4.3

10.4 I attended the meeting deponent refers to therein. All the villagers were called to attend and a general request made that they take care that their stock did not rampage on the school garden. It is not true, however, that a specific request was made to the whole village, as deponent suggests, that the school, its teachers and its property be protected against myself, my children and my cattle nor that people were clamouring for my transfer."

The disputes reflected above were not and cannot be resolved on the papers. I am prepared for the purposes of the decision of these matters to accept that Respondents had received complaints concerning the issues which Respondents advert to in their opposing affidavits. I am also prepared to accept for present purposes (but for such purposes only) that Respondents were *bona fide* in their belief that the transfer of the Appellant was justified in view of the circumstances and was in the interests of the school, based

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upon the information Respondents had received. The questions to be answered however are, do the rules of natural justice apply to these proceedings; if so, did Respondents act fairly in coming to the decision which they did and was the manner in which they proceeded to deal with the Appellant in accordance with duty to observe natural justice. These questions require an examination of Respondents duties and their conduct.

It is common cause that the first time that Appellant learns that her transfer from the post she has been occupying for some 20 years is when she is confronted on March 5, 1993 by the "manager" of the school, one Mr. Sonti, with the news that an application had been made for Appellant's transfer to Setleketseng Anglican Church Primary School. At the same time he presented Appellant with a form—annexure M.K.1 to the application—and requested her to complete same in order to facilitate her transfer.

Applicant then goes on to make the following uncontested averments which are not contested. She says,

"On the same day the manager of my school wrote me a letter (a fair copy and its translation are

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attached hereto marked "MK2" and "MK3" respectively) informing me that the School Management Committee and Second Respondent had arrived at a decision that I should go to Setleketseng Primary School on 9th March, 1993. This letter enclosed the transfer forms set out in the Eleventh Schedule to the regulations."

There is some dispute as to exactly what occurred between the 5th and the 9th of March, 1993. It is however not relevant to the questions posed above. What is common cause is that on the 10th of March, 1993, Appellant completed the transfer forms referred to above. Annexure MK1, one of the forms concerned and which is one of the key documents to be considered in deciding this matter, reads as follows:

"ELEVENTH SCHEDULE

Rec. 11 (1)

PART 1

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Teacher's full name and<br>employment Number          | Mpho J. Kapa<br>.....             |
| 2. | Particulars of school or<br>post from which a teacher | Grant Aided<br>Rankhelepe Primary |

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PART IV

I agree to the proposed transfer for the following reasons:-

For the good of both the school and the teachers.  
For proper administration and management within the parish.

Signed:

Signature of Educational Secretary .....

(ACL Educational Secretariat  
Date Stamp)

Date forward to Secretary Teaching Service Commission\*

A fair translation of the letter handed to Appellant  
annexure MK 2 dated the 5th of March 1993, reads as follows:

\*St. Barnabas Rectory  
Masite Mission  
05-03-93

Mrs. Mpho Kepa,

The decision of the Management Committee and School Secretary is that you should leave for Setleketseng on the 9th March, 1993. Please complete those transfer forms and send them to Mr Taaso.

Yours faithfully,

Rev., Fr. G.H. Sonti  
(Chairman)\*

(my emphasis)

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This documentation as well as a careful examination of the evidence establishes beyond question that Appellant was never confronted with the true reason for her purported transfer. Annexure MK1, which reflected as the reason for the transfer only one "magical" word - "Re-organization". Not only did this fail to convey with any clarity or content what motivated Appellant's transfer and was rightly regarded by her as incomprehensible, but it was not the true reason. Respondent was in fact using "reorganization" as a "screen" reason for obscuring the true motive i.e. some form of misconduct on Appellant's part and the behaviour of her children and animals in relation to the school garden and the tensions this had caused.

It should also be noted, that the decision to transfer Appellant had already been taken as per the letter from Mr. Sonti on the 5th of March 1993, before she had filled in the form MK 1, and 2, that she was to leave for her new post within four (4) days of the date of the letter. Moreover, the letter and the verbal intimation from the said Sonti, was, according to Second Respondent, untrue inasmuch as it purported to indicate that her transfer had been approved by the latter official at that time (March 5). Second Respondent states very clearly and very properly that "the Manager's

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(Mr. Sonti) allegation (that he had already approved the transfer) is not true."

I summarize the conduct of the First Respondent which Appellant seeks to impugn.

1. She is informed that she is to be transferred because of "re-organisation". This is untrue, the real reason is the misconduct referred to above.
2. She is given no opportunity prior to receipt of the letter MK 2 to respond to or to be heard in relation to either the true or the "screen" reason for her transfer. This, despite the fact that her response reflected in the form (MK 1) is in essence a plea to be heard. ("Transfer is negotiable subject to agreement between the parties concerned")
3. She is falsely informed in the letter MK 2 that the Secretary (Second Respondent) had by the 5th of March and certainly before any form of hearing had taken place, already approved of her transfer.

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4. She is given four days in which to move to the new location to which she has been assigned after having been at her post for 20 years.

A mere recitation of these undisputed facts speaks loudly of the manifest unfairness with which Appellant was treated by her employer. Mrs. Kotelo for Respondent who argued Respondents' case with considerable tenacity, was however ultimately constrained to concede that the process to which Appellant had been subjected was not fair. She was heard to argue, somewhat forlornly, that the *audi alteram partem* rule did not apply because Appellant was being transferred and not dismissed, and that her failure to comply with the directive to move was a valid ground upon which she could be dismissed. Directions of this kind- she submitted - should for reasons of good order and discipline not be ignored simply because an affected party is subjectively of the view that the decision is unjust and invalid.

These contentions cannot on the facts of this case be upheld. In the first case Appellant's purported transfer was falsely represented to her as being motivated by a need to reorganize. Secondly, she was untruthfully informed that the sanctioning authority had in fact already approved her

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transfer. Thirdly, the transfer in this case was *prima facie* a matter that could cause her grave prejudice and almost undoubtedly would have done so in the circumstances described above.

Without laying down general rules, the facts cited above in my view made it imperative for Respondents to have acted in accordance with natural justice. See in this regard *Ngubane v. Minister of Education and Culture Ulundi and Another* 1985 (3) SA 160 (N).

The spurious reasons for transfer, the falsity of the information conveyed to the Appellant and the unreasonable time given to her to comply with the unauthorised directive were all factors that fatally flawed the "decision" conveyed to her.

In these circumstances and on the facts peculiar to this case Appellant's conduct in refusing to obey the directive to be transferred, with all the prejudicial consequences demonstrable on the facts set out above, was not in any way unreasonable. Nor can her refusal be relied upon by Respondents to justify her subsequent dismissal. The unfairness with which the proceedings concerning her

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transfer were conducted is a taint which permeates and impugns all the subsequent actions of the Respondents including Appellant's purported dismissal.

For these reasons the appeal succeeds with costs. The order discharging the *rule nisi* is set aside. In place thereof the following order is substituted:

"The *rule nisi* is confirmed with costs."

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J.H. STEYN  
JUDGE OF APPEAL

I agree

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I. MAHOMED  
PRESIDENT OF THE COURT OF  
APPEAL

I agree

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R.N. LEON  
JUDGE OF APPEAL

Delivered at Maseru this 25<sup>th</sup>..... day of July, 1995.