

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**LAWRENCE MOTLHOKOA**

**APPLICANT**

and

**ST. PATRICK'S HIGH SCHOOL  
MANAGING BOARD**

**1ST RESPONDENT**

**REV. PATRICK PATŠOANE**

**2ND RESPONDENT**

**'MANKHETHELENG NTEPE**

**3RD RESPONDENT**

**MOHALE LEBONA**

**4TH RESPONDENT**

**GABRIEL MOHALE**

**5TH RESPONDENT**

**VINCENT MPHOU**

**6TH RESPONDENT**

**O/C MOHALE'S HOEK POLICE STATION**

**7TH RESPONDENT**

**THE ATTORNEY GENERAL**

**8TH RESPONDENT**

**JUDGMENT**

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

on the 16th day of March 1998.

The Applicant has applied as a matter of urgency for an order in the following terms:

“-]-

That a Rule Nisi be issued, returnable on a date to be determined by the above Honourable Court, calling upon the First to Sixth Respondents to show cause, if any, why an order in the following terms shall not be made:

- (a) The forms and service provided for in the Rules of the above Honourable Court be dispensed with and the matter be treated as urgent.
- (b) An order declaring applicant's purported termination of his employment as the Principal of St. Patricks High School as indicated in annexure A null and void and of no effect in law.
- (c) Second to sixth respondents be committed to prison for contempt of Court Order in CIV/APN/99/97 granted on the 14th April, 1997 by Mr. Justice G.N. Mofolo.
- (d) First to sixth respondents be ordered to restore the keys to the Principal's office of St. Patricks High School to the possession of the applicant forthwith.
- (e) First to sixth respondents be directed to pay costs of this application jointly and severally on client and attorney scale.

- (f) That applicant be granted further and/or alternative relief.

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That Prayers 1(a) and (d) operate with immediate effect as an interim interdict.”

On the 13th day of January 1998 a Rule Nisi was granted as prayed by my Brother Lehohla J. The matter which is apparently opposed by First to Sixth Respondents only was finally argued before me on the 27th day of February 1998.

Initially the Respondents had raised a point in limine to the effect that this was a labour dispute within the exclusive jurisdiction of the Labour Court. Mr. Mohau for the Respondents did not however feel able to pursue this line of argument and he very properly, in my view, abandoned the points in limine. I consider it to be now settled that the High Court does have jurisdiction in matters such as the instant case.

See Makhutla v Lesotho Agricultural Bank C of A (CIV) No.1 of 1995 (unreported).  
Attorney General v Lesotho Teachers Trade Union & 4 others C of A (CIV) No.29 of 1995 (unreported).

Lucy Lerata & 26 others v Scott Hospital C of A (CIV) No.38/95 (unreported).

It is common cause between the parties that the Applicant has been employed as a teacher and principal of St. Patricks High School since 1986 up to the 31st December, 1997 when his contract of employment was, purportedly terminated by

the First Respondent in writing. The letter of termination in question has been signed by the “Chairman and Manager” of the school namely the Second Respondent. It proves convenient to reproduce this letter Annexure “A” which reads as follows:

“St. Patrick’s High School,  
P.O. Box 406  
Mohale’s Hoek 800  
Lesotho.

29th September, 1997.

Teacher N.L. Motlhokoa,  
St. Patrick’s High School,  
P.O. Box 406,  
Mohale’s Hoek 800,  
Lesotho.

10th Schedule. Statutory Notice to Terminate A Contract on Permanent Terms.

Reg.6 (3)

In terms of the Teaching Service Regulations 1986, the Statutory Notice to terminate the Contract of employment is herewith served you. Your Contract of employment in this School will terminate on the 31st Day of December, 1997.

Supportive reasons for the Notice:

There is an urgent need for a more efficient and suitably qualified Headmaster for a better Administration and good performance of the

School.

Yours faithfully

Rev. P. Phatšoane (Signed)  
Chairman and Manager

- Copies:
1. The Teaching Service Department
  2. The Catholic Schools' Secretariat
  3. The Principal Secretary for Education."

In due course this letter drew the response of the Teaching Service Department in its letter of 17th October 1997 (Annexure B) in the following terms:

“TEACHING SERVICE DEPARTMENT  
PRIVATE BAG A94  
MASERU 100

October 17, 1997

TSD/P/380403

The Chairperson  
St Patrick Management Committee  
P.O. Box 406  
Mohaloes' (sic) Hoek

Dear Sir/Madam

**RE: NOTICE OF TERMINATION - MR. N.L. MOTLHOKOA**

Adverting to your letter of notice of Mr Motlhokoa's termination of

appointment, kindly be advised that the powers to demote/promote or terminate are vested in the Teaching Service Commission. Since it has been your desire to demote Mr. Motlhokoa you would wish to submit your recommendation to the Teaching Service Commission.

**Yours faithfully**

**M.M TSUINYANE**

**Director - TSD**

Copy:       The Educational Secretary  
              Catholic School Secretariat  
              P.O. Box 80  
              Maseru.”

This was followed by a Ministry of Education Circular Annexure “C” signed by the Acting Principal Secretary for Education and Manpower Development dated 29th October 1997 in the following terms:

**“MINISTRY OF EDUCATION CIRCULAR NOTICE NO.22 OF 1997**

MINISTRY OF EDUCATION AND  
MANPOWER DEVELOPMENT  
P.O. BOX 47  
MASERU 100

October 29, 1997

To: Educational Secretaries  
Chairpersons of School Management Boards/Committees

Copies: Senior Education Officers (Districts)  
Secretaries General LAT. And LTTU

Subject: **IMPLEMENTATION OF EDUCATION ACT NO.10 OF 1995**

You are all reminded that according to section 59 of Education Act No.10 of 1995 the power to appoint, promote, demote, discipline, transfer and remove teachers from office is vested in the Teaching Service Commission. But events are such that School Management Boards/Committees continue to serve teachers with notices of termination of appointment instead of bringing charges against them before the Commission.

We hope that after this reminder you will co-operate with us in ensuring that this Act is implemented without further delay.

**P.K. MOTHOLO**

Acting Principal Secretary For Education  
And Manpower Development.”

For completeness, I should add that on the 18th December 1997 the Teaching

Service Commission issued a circular (Annexure “D”) addressed to all school boards and management committees in an obvious attempt to highlight the procedure in employment and/or removal from office of teachers as well as other related matters. That circular reads in part:

“The purpose of this circular is to advise School Boards and Management Committees as to how to get their recommendations for the employment, promotion, demotion, discipline, transfer or removal from office of teachers to the Teaching Service Commission for attention and action.

In terms of the Education Act 1995 as amended, Education Officers and Educational Secretaries\Supervisors of Government Controlled Schools no longer process documents involving the employment, discipline, transfer or removal from office of teachers. Responsibility over these issues lies with the Teaching Service Commission whose offices are within the Teaching Service Department headquarters next to N.T.T.C. and whose postal address is Private Bag A94 Maseru. The Teaching Service Regulations 1986, remain in force so far as they are rendered applicable by the Education Act 1995 as amended, and will be revoked by the new regulations when they are promulgated. This is in accordance with Section 78(2) of the Education Act 1995.

School Boards and Management Committees should direct their recommendations to the Commission. Educational Secretaries, the Supervisor of Controlled Schools and Education Officers in the districts are by copy hereof, requested to use their good offices to



facilitate the expeditious movement of recommendations in their hands to the Commission.

When the Commission has decided on recommendations made, the School Boards and Management Committees concerned will be informed as soon as possible, and teachers invited to sign documents where necessary to give effect to the Commission's decisions. Employment, promotion, demotion or transfer of a teacher will only be effective from the date of the Commission's decisions.

Until the procedure indicated here, and the forms prescribed by the Teaching Service Regulations 1986 are changed by regulations when promulgated, the Commission will expect recommendations from School Boards and Management Committees to be made as indicated below. Schedules referred to hereunder are schedules in the 1986 Regulations.

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## 6. **Termination**

All recommendations for termination of employment contracts should be submitted to the Commission by School Boards and Management Committees. Recommendations for terminations other than by mutual agreement should be accompanied by justification.”

In the light of the foregoing the question that arises for determination in this matter is whether the Respondents had power or authority to terminate the Applicant's contract of employment regardless of the provisions of the Education Act 1995.

As a starting point it is useful to mention that the parties are on common ground that the Education Act 1995 came into operation on the 17th January, 1996 in terms of Section 1 of Legal Notice No.14 of 1996 which changed the original date of the coming into operation of the Act from the 29th December 1995 to the 17th January 1996.

It seems quite clear and significant therefore that at the time of the dismissal of the Applicant the Education Act 1995 was already in operation. Some of the relevant sections of that Act bear scrutiny in the just determination of this matter.

Section 42 of the Act provides that:

- “(1) The power to appoint a teacher and to promote, demote, transfer, discipline or remove from office such a teacher shall vest in the Commission.
- (2) Subsection (1) shall not apply to a teacher whose salary is not paid by the Government.”

Section 144 (2) of the Constitution of Lesotho establishes a Teaching Service Commission “the composition, powers, duties and procedure of which shall be as prescribed by an Act of Parliament.”

Now - According to section 59 of the Education Act 1959 “the functions of the Commission are to appoint, promote, demote, discipline, transfer and remove from office teachers whose salaries are paid by the Government.”

Section 78 (2) provides as follows:

“.....all subsidiary legislation made under the repealed enactments shall be deemed to have been made under this Act and shall continue in force, so far as the same may be rendered (sic) applicable by this Act, until revoked by regulations made under this Act.”

It is common cause between the parties that the Teaching Service Regulations 1986 are still operative in as much as the Teaching Service Regulations under the 1995 Education Act have not yet been made.

This being the position it is legitimate and proper therefore to refer to Regulation 6 (3) of the Teaching Service Regulations 1986 which provides as follows:

“A notice of termination of contract given under this regulation shall not be effective unless the Educational Secretary or Supervisor has indicated to manager concerned in the form set out in the Tenth Schedule that he is satisfied that such notice and the grounds upon which it was based are in order.”

Yet what has happened in this case is that (and again this is common cause)

the notice of termination of Applicant's contract of employment did not follow the procedure set out in this Regulation in as much as the Educational Secretary or Supervisor did not, or has not indicated to the Manager concerned that he is satisfied that such notice and the grounds upon which it was based are in order. This in my view is fatal to Respondents' case and it seems to me that on this ground alone the Applicant is entitled to succeed.

But what is even of more concern to the Court is that Section 59 of the Education Act 1995 has expressly provided in clear, unambiguous terms that the power *inter alia* to remove from office teachers whose salaries are paid by the Government (It is common cause that Applicant was such a teacher) is vested in the Teaching Service Commission and no one else. The respondents are given no such powers anywhere in the Act. I observe, for that matter, that the powers given to the School Boards under Section 23 of the Education Act 1995 do not even include the power to recommend removal (let alone the power to remove itself) from office of a teacher other than a teacher whose salary is paid by the Government. Under this section the powers of the Board are limited to the following namely:

“The School Board shall,

- (a) supervise the school for which it has been constituted;
- (b) be responsible for the management and for the proper and efficient running of the school;
- (c) Recommend to the Educational Secretary or Supervisor as the case may be, the appointment, discipline, transfer,

removal from office of a teacher other than a teacher whose salary is paid by the Government;

- (d) on the advice of the District Education Officer, recommend to the Educational Secretary or Supervisor as the case may be, the promotion or demotion of a teacher other than a teacher whose salary is paid by the Government.”

As earlier stated it is common cause that the Applicant is a teacher whose salary is paid by the Government. It is necessary to emphasise therefore that the Respondents cannot even recommend his removal from office as a teacher. To hold otherwise would definitely run counter to the letter and spirit of the Education Act 1995.

Accordingly I have no hesitation in holding that by addressing the letter of dismissal Annexure “A” to Applicant and thus purportedly terminating his contract of employment the Respondents acted ultra vires his/their powers. What the Respondent/s purported to do was indeed a material breach of the aforesaid Section 59 of the Education Act 1995. Consequently such dismissal is unlawful, null and void ab initio and of no legal force and effect. Indeed I consider that it was an exercise in futility.

It is submitted on behalf of the Respondents that even if Applicant’s employment with St. Patrick’s High School was not lawfully terminated the Court cannot grant prayer I(a) which, so the argument goes, is tantamount to an order of specific performance. I am afraid I cannot accept this argument in the special

circumstances of this case. I need give only two reasons for this view, firstly, as far as this Court is concerned an order for specific performance is always discretionary depending on the circumstances. Such discretion is however a judicial one not to be exercised arbitrarily. Secondly as I see it, prayer 1 (a) does not seek specific performance. It is purely and simply a prayer seeking a declaration that the purported termination of Applicant's employment as the Principal of St. Patrick's High School as indicated in Annexure "A" is null and void and of no effect in law. In this regard the application must be distinguished from the usual type of applications whereby the applicant specifically seeks an order of reinstatement coupled with payment of salary.

As to the Court's discretion in granting a declaration of rights it is necessary to bear in mind the provisions of Section 2(1)(c) of the High Court Act 1978 which provides as follows:

"The High Court of Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have,

- (a) .....
- (b) .....
- (c) in its discretion and at the instance of any interested person, power to inquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination."  
(my underlining).

I have underlined the word discretion to highlight my view that the Court has

a judicial discretion in the matter.

The question whether or not a declaration of rights should be granted in terms of this section must therefore be examined in two stages namely:

- (1) the jurisdictional facts such as the requirement that the applicant must have a direct interest in the matter and a clear right (either existing, future or contingent) or obligation which becomes the object of inquiry, must first be established.
- (2) After the jurisdictional facts have been established the Court must then decide whether on the facts, the case before it is a proper one for the exercise of its discretion.

See Family Benefit Friendly Society v Commissioner For Inland Revenue 1995 (4) S.A. 120 AT 124.

Applying these principles to the instant case I am satisfied that the Applicant has a clear right in the matter and that the Respondents acted ultra vires their powers in terminating his contract of employment for reasons fully set out above.

There is another factor which has weighed heavily in the Court's discretion. It is this. In paragraph 7 of his founding affidavit the Applicant makes the case that in CIV/APN/99/77 he sought and obtained the intervention of this Honourable Court in the following terms:

- (i) Restraining first repondent (sic) from interfering with my exercise of rights as the Principal of St. Patricks High School, and

to me.”

Indeed the order of Court in that regard is Annexure “E” to the proceedings before me.

It is significant that the Respondents have not denied the Applicant’s version in this regard nor do they deny that they have personal knowledge of the said Court Order in as much as it was served upon them. Accordingly, on the principle laid down in Plascon Evans Paints (Pty.) Ltd. V Van Riebeeck Paints (Pty) Ltd.1984 (3) S.A. 623 (A) at 534F-535C I accept the uncontroverted version of the Applicant.

What this then means is that at the time of the Applicant’s purported dismissal the Respondents were already under interdiction from this Court from “interfering with” the Applicant’s exercise of rights as the Principal of St. Patrick’s High School. What is more, at that stage the Respondents had already been ordered to “restore” the office keys to the Applicant. Yet notwithstanding this order the Respondents went ahead and committed the very acts for which they were interdicted from doing. In my view this borders on contempt. There is therefore right in granting the relief sought in order to mark the Court’s displeasure at the defiant attitude of the Respondents in this matter. The point must be made that an order of Court cannot be defied with impunity as the Respondents seem to have done.

Mr. Mda for the Applicant has not, however, insisted on prayer 1 (c) and as a result no argument was addressed to me to establish whether the Respondents had the necessary mens rea in defying the Court Order in the said CIV/APN/99/97.

In sum therefore, I am satisfied that the Applicant has succeeded to make out a case for the relief sought in prayers 1(b) and (d) of the Notice of Motion and



accordingly the application is granted as prayed in those prayers with costs on the ordinary scale against First to Sixth Respondents jointly and severally the one paying the others to be absolved.



**M.M. Ramodibedi**

**JUDGE**

16th March 1998

**For Applicant : Mr. Mda**

**For Respondents : Mr. Mohau**