

CIV/T/469/99
IN THE HIGH COURT OF LESOTHO

In the matter between

| | |
|-----------------------------------|---------------|
| LIBE MOLUPE | PLAINTIFF |
| AND | |
| MANAGEMENT COMMITTEE | 1st DEFENDANT |
| OF THE LESOTHO EVANGELICAL CHURCH | |
| LESOTHO EVANGELICAL CHURCH | 2nd DEFENDANT |

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni On the 3rd Day of December, 2001

The plaintiff in this case is a teacher at KUENENG PRIMARY SCHOOL. In his declaration at paragraph 5 he claims that at all material time he was employed as a head-teacher. There is no allegation that there was any form of contract of employment on which plaintiff seeks to rely. There are no particulars as to whether or not such employment was temporary or permanent. Be that as it may.

It is in the common cause that the school where plaintiff is presently a teacher, is under the Management Committee, - the 1st defendant herein. There was a disciplinary action instituted by the Management Committee against this plaintiff in 1994. The plaintiff was found guilty of misconduct in the disciplinary proceeding instituted against him by the 1st defendant. The punishment meted out to him was a demotion from the position of the headteacher to that of ordinary teacher.

In paragraph 6 of his declaration, plaintiff alleges that the 1st defendant maliciously instituted false disciplinary proceedings. There is some kind of impropriety that is being levelled against the 1st defendant in this allegation. According to the defendants' plea, the said disciplinary proceeding were instituted in terms of the law. Before 1995 the Law in force which governed the disciplinary proceedings in respect of the

2

teachers, was THE TEACHING SERVICE Regulations 1986. These regulations were promulgated in terms of the EDUCATION ORDER N0.32 of 1971. This order was still in force in 1994. It was only repealed in 1995, this was immediately after the plaintiff herein was charged and found guilty of misconduct in the disciplinary proceedings instituted against him by the 1st defendant in 1994.

It also appears to be in the common cause that plaintiff successfully appealed against both the finding of misconduct on his part and the penalty of demotion to a lower rank. The said appeal was heard on 16/06/98. The appeal was upheld on 17/06/98 before an adjudicator who was appointed in terms of Section 70 (1) of the new act. i.e. THE EDUCATION ACT NO. 10 OF 1995.

In November, 2000 the plaintiff instituted this present action against the defendants and claims:

- a) Reinstatement as a headteacher of Koeneng Primary school;
- b) Payment of an amount of M43,848.00 being the difference between basic teacher and headteacher salary;
- c) Interest on the amount claimed at the rate of 15% per annum;
- d) Cost of suit;
- e) Further and/or alternative relief.

On behalf of the defendants it is specially pleaded that in terms of THE EDUCATION ACT NO.10 of 1995 as Amended, the decision of the adjudicator is subject to confirmation by the Teaching Service Commission. This impression stems from the choice of words used in describing the functions of the adjudicator in terms of section 71-EDUCATION ACT NO. 10 of 1995. The said section provides as follows:-

"The functions of the adjudicator are to hear and decide on cases referred to him for advice by the Commission" (My underlining). It seems an adjudicator acts in advisory capacity to the Commission. This lends credibility to Mr. Sello's argument that the decision of the adjudicator is not final and justiciable.

Another issue raised on behalf of the defendants is the question relating to the employer of the plaintiff. Although he claims to be employed by the defendants, plaintiff did not allege and prove any form of contract of employment between himself and the defendants. Forster V. Herselman 1982 (4) SA 857 (6).

There are two types of employers for teachers in this Kingdom. There are teachers who are hired and paid by schools privately. In the main, the majority of teachers in the service are appointed by the Teaching Service

Commission. Section 42 points directly at the power of the commission in this respect. It reads as follows;

- 1) The power to appoint a teacher and to demote, transfer, discipline or remove from the 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". (My underlining).

From the reading of this section it is clear that it is very material for the plaintiff to allege and prove that he is employed by the defendants and received his salary from them. He is claiming payment of his salary and the arrears. This claim can only be made against the employer who pays the salary being claimed. The plaintiff in our case does not allege that the defendants pay his salary. He does not claim and prove that the defendants withheld the salary arrears now being claimed.

In support of his claim for an enhanced payment of the salary of the headteacher, plaintiff has annexed copies of his payslips. On the face of those payslips the plaintiff is paid his salary by the Government. His demotion in terms of the law should have been done by the Commission. It can be reversed by the Commission only.

The appeal was heard in terms of the provisions of THE EDUCATION ACT N0.10 OF 1995. The plaintiff did not raise the query then before the adjudicator that the law applicable is the repealed EDUCATION ORDER N0.32 OF 1971. He cannot turn around now and claim that even though the appeal on which he basis his claim, was heard and decided in terms of the new EDUCATION Act, that same Act must not apply now.

The defendants do not pay the plaintiff's salary. They are not in a position to pay the arrears claimed. In this

7

circumstances the special plea must succeed. The plaintiff's claim is therefore dismissed with costs.

K.J.GUNI
JUDGE

For Applicant : T. HLAOLI & CO.
For Defendants: : MOHALEROE, SELLO & CO.,

8