C OF A (CIV)/13/04
CIV/APN/308/01

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

PASCALIS RAMONE APPELLANT

and

TEACHING SERVICE COMMISSION FIRST RESPONDENT
MASERU HIGH SCHOOL BOARD SECOND RESPONDENT
THE ATTORNEY- GENERAL THIRD RESPONDENT

Held at Maseru

15 and 20 October 2004

CORAM:

RAMODIBEDI, J.A.
PLEWMAN, J.A.
MELUNSKY, J.A.

Summary

Education Act No.10 of 1995 – Application for re-instatement of appellant as temporary teacher for minimum period of five years – based on alleged agreement with interviewing committee – appellant not entitled to relief as:

1. *Alleged agreement in conflict with written contract of appointment;*

2. *Interviewing committee had no authority to enter into the alleged agreement; and*

3. *Respondents' denial of agreement raised a genuine and* ***bona fide*** *dispute of fact.*
Appeal dismissed.

JUDGMENT

MELUNSKY, J.A.

[1] The appellant applied on motion in the High Court for an order –

1. Declaring his "purported retirement" as a temporary teacher to be *null* and *void;*

2. Ordering the first and second respondents to retain him in his teaching post at the Maseru High School for a period of five years, alternatively, to pay him his salary for the aforesaid period; and

3. Directing the first and second respondents to pay his costs.

[2] The matter came before Monapathi J. in the High Court. He dismissed the application with costs. It is against this order that the appellant now appeals.

[3] The Appellant is a qualified and experienced school teacher. The first respondent is the Teaching Service Commission ("the Commission"),

a body established pursuant to section 144 (2) of the Constitution of Lesotho. The second respondent is the Maseru High School Board ("the School Board"), a school board having the powers and functions contained in the Education Act No.10 of 1995 ("the Act"). It has been duly constituted to supervise, manage and run the Maseru High School ("the School"). Although not stated explicitly in the Act, it seems to be clear that the School is a Government School in terms of section 4 (a) of the Act. The third respondent is the Attorney- General.

[4] According to his founding affidavit (which is his only affidavit as there is no replying affidavit), the appellant advanced the following case: that on 1 July 1999 he was appointed as an assistant teacher at the School on a temporary basis; that the appointment was made by the School Board; that before his appointment the committee which conducted the interview ("the interviewing committee") and the appellant agreed that he would be appointed for a minimum period of five years; and that his contract was terminated prematurely with effect from 30 June 2001, three years before the minimum period had elapsed.

[5] The Commission and the Attorney–General contend that the appellant was in fact appointed by the Commission and not the School Board; that the interviewing committee had no legal right or power to agree to his appointment for a period of five years (while not admitting that such agreement was concluded); and that the contract of employment was properly terminated by the Commission with effect from 30 June 2001 on one month's notice in terms of clause 4 of his contract of

employment, which the Commission was entitled to do. (see paras 8 and 9 below).

[6] Mr Lelimo, who deposed to an affidavit on behalf of the School Board, was also the secretary of the interviewing committee. He denied that there was an agreement between the appellant and the committee to the effect that the appellant would hold his position for any minimum period. His evidence appears to be borne out by the minutes of the meeting at which the appellant was appointed.

[7] What is undisputed is the fact that the appellant was appointed as a temporary teacher pursuant to a written agreement ("the contract"). ***Ex facie*** the document, the contract was concluded between the appellant and the "Board of Governors of Maseru High School", represented by Makalo Theko and this, perhaps, is why the appellant alleged that his appointment was made by the School Board. While employed as a temporary teacher, the appellant's salary was paid by the Government. This being the case, it was only the Commission which could appoint him or remove him from office. This follows from sections 42 and 59 of the Act. What, then, are we to make of the terms of the contract? According to the affidavit of the Commissioner's secretary, Mr Semethe, a school board has the power to recommend the appointment of a teacher to the Commission and the contract was

> "based on a specimen contract of employment which has to be modified to bring it in line with (the Act)".

Therefore, according to Mr Semethe, the appellant was in fact appointed by the Commission. At first glance there seems to be an unbridgeable chasm between the terms of the unmodified "specimen" contract and the circumstances under which the Commission came to appoint the appellant. But what appears to have happened, in fact, is that the contract document was regarded by the Commission as a recommendation and that the Commission accepted its terms by authorizing the payment of the appellant's salary. But more importantly the appellant's counsel, in argument on appeal, accepted that the Commission – and not the School Board – had appointed his client. Had the Commission not done so, the appellant would have been compelled to accept that his appointment was invalid and of no force and effect, in which event the very foundation of his claims would have collapsed.

[8] Clause 4 of the contract under which the appellant was appointed provided that it might be terminated by either party

"at any time on one month's notice or payment of one month's salary in lieu of notice."

What the appellant seeks to do is to rely upon an oral prior agreement which conflicts with clause 4 of the writing. This he cannot do. In this regard it is only necessary to refer to the following remarks of **Corbett JA** in **Johnston v Leal** 1980 (3) SA 927 (A) 943B:

> "It is clear to me that the aim and effect of (the parol evidence or integration) rule is to prevent a party to a contract which has been intergrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract."

[9] The present appeal goes even further. Although the appellant relies on the affidavit of Mr Mahase, the chairperson of the interviewing committee, in support of his contention that a minimum term of five years was agreed upon, he has no answer to the respondent's argument that the interviewing committee had no power or authority to enter into such an agreement. As the Commission is the only body that could have appointed the appellant, it is the only body with the power to agree upon the terms of his appointment. What is more, a court which is faced with a conflict of fact in motion proceedings will act in accordance with the well – known rule in **Plascon- Evans Paints Ltd** v **Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 H-I. In this matter Mr Lelimo's denial of the appellant's contentions raises a real and *bona fide* dispute of fact. His statements have not even been contradicted in a replying affidavit. Finally, his allegations are the more probable: for it is unlikely that any authority would have appointed a temporary teacher, who was already past the retirement age, for a minimum period of five years.

[10] For the many reasons given there is no substance in the appellant's contentions. On 10 April 2001 the Commission gave the appellant written notice that it had decided to retire him with effect from 30 June 2001. This served as proper notice of termination of the contract in terms of clause 4.

The appellant is not entitled to the relief claimed and the appeal is dismissed with costs.

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MELUNSKY, J.A.

I agree _____
RAMODIBEDI, J.A.

I agree _____
PLEWMAN, J.A.

Mr. Khauoe : For Appellant

Mr Putsoane : For 1st & 3rd Respondents

Mr Fosa : For 2nd Respondent