IN THE COURT OF APPEAL OF LESOTHO

C of (CIV) No. 26/04
CIV/APN/291/2004

In the matter between:

The Teaching Service Commission 1st Appellant
Ministry of Education 2nd Appellant
Attorney-General 3rd Appellant

and

St. Patricks High School 1st Respondent
Theresia Letlatsa 2nd Respondent

12, 20 April 2005

CORAM:
Steyn, P
Ramodibedi, JA
Melunsky, JA

Summary

Appeal against a decision of the High Court granting an application ordering the Education Authorities to transfer a teacher – these authorities were parties to an adjudication process which culminated in a deed of settlement which they were obliged to implement – a body upon whom power is conferred has a concomitant duty to exercise that power (when it is obliged to do so) - authorities raising spurious and flawed defence compounded by the attempt to raise on appeal points not canvassed before the High Court – conduct of Education Authorities reprehensible.

JUDGMENT

STEYN, P

[1] In this matter the appellants appeal against an order of the High Court which reads as follows:

"1. First Respondent is directed to give full effect to the Deed of Settlement signed before First Respondent's Adjudicator on 11th July 2003 which is annexure **"NM5"** to the Notice of Motion by

1.1 transferring Second Respondent from Applicant;

1.2 providing Applicant with a replacement teacher upon transfer of Second Respondent;

1.3 Applicant is awarded costs."

[2] Counsel for the appellants conceded that there is only one ground of appeal against this order. It reads as follows:

"The learned judge in the court a quo erred in law in holding that the first appellant herein has a duty to transfer second respondent – teacher".

[3] In its heads of argument the appellants contended that there was no duty placed upon first appellant to transfer teachers. "It only has the power to transfer and not the duty", he averred.

[4] This contention appears to me to be insupportable. Once a body has a power conferred on it, such body has the concomitant

duty to exercise that power when it is obliged to do so. See Baxter: Administrative Law 411–412. Indeed the failure or refusal to exercise a power conferred when such body is lawfully obliged to do so, can be an abuse of power itself. The power in casu arises from the provisions of sec. 59 of the Education Act 1995 which reads as follows:

> "The functions of the Commission are to appoint, promote, demote, discipline, transfer and remove from office teachers whose salaries are paid by the Government".

[5] In the present case, however, it is clear that the duty to transfer the teacher in question (second respondent in the court a quo – "the teacher",) arises from an obligation pursuant to an agreement between the parties in a dispute, achieved under its auspices. The appellants submitted before us, however, that they, and first appellant in particular, were not bound by this agreement. Because of the narrow focus of the ground of appeal cited above only the facts relevant to this issue are summarized below. I will refer throughout to first appellant as the appellant. I will identify the second appellant as the Education Authority(ies) and the third appellant as the Attorney-General.

[6] During August 2001 the school in casu was the subject of student protest of which it appears the teacher was the principal target. When the protest ended schooling resumed. However, the teacher refused or failed to return to work. Several letters calling upon her to do so were sent to her during 2002 by the respondent ("the school"). In August of that year she was warned by the school that her absence – by this time of 12 months' duration – was unacceptable. It pointed out that four letters had been written to her calling on her to report for work, all of which she ignored and that disciplinary steps could well be taken against her.

[7] It was at this point in time that the appellant and the Education Authorities intervened. Purporting to act under a regulation of the Teaching Service Regulations they charged the teacher with misconduct. In a covering letter the teacher was called upon to show cause by the 14th of November 2002 why she should not be removed from office "in terms of section 53 (3) (a) of the Act for desertion".

[8] The teacher's reaction was to institute proceedings in the High Court against the appellant. In addition to suing it, she also cited other parties i.e. the Ministry of Education, the Attorney-General and the School.

[9] On the 11th of June 2003 the teacher and the parties including the appellant and the Education Authorities agreed to a consent order made by the High Court. This order obliged the teacher to respond to the charges preferred against her within 14 days. It also decreed that the appellant was directed to adjudicate upon these charges before the 15th of July 2003. It is not in dispute that the teacher responded and that the matter was adjudicated upon by a Mrs. Maputsoe appointed by the appellant. (Own emphasis).

[10] On the 11th of July the adjudication process was successful inasmuch as a settlement was achieved. Before the adjudicator the following settlement was recorded:

> "BEFORE THE ADJUDICATOR, MRS. MAPUTSOE, ON 11TH JULY 2003.
>
> MR. M. NTLHOKI, Counsel for Complainant
>
> MR. P.T. NTESO, Counsel for Respondent
>
> Parties have agreed as follows:
>
> 1- Complainant withdraws the charges against

Respondent subject to

(a) that Respondent be transferred from St. Patrick's High School to another school;

(b) the employer fills a vacancy at St. Patrick's High School , which arises out of the transfer of Respondent;

(c) Complainant is to attend to all necessary formalities to enable the transfer of Respondent to be effected.

2- Parties request the Adjudicator to make an appropriate recommendation to the Teaching Service Commission" (the first appellant) "to adopt, confirm and ratify the agreement of the parties and thus bring the matter to an amicable finality.

SIGNED AT MASERU ON THIS 11TH DAY OF JULY 2003."

[11] On the 16th of July 2003 an application was made to the appellant by the teacher and the school for her transfer. The application was made on a form prescribed under regulations issued by the appellant to which I will refer below. In answering the question to supply the reason for seeking a transfer, the teacher replied as follows:

"Mutual agreement that brought about the DEED OF SETTLEMENT before the adjudicator at the Teaching Service Commission on the 11/07/2003 as detailed on attached copy."

The deed was duly annexed.

[12] One would have thought that in view of the delays that had already occurred the appellant would, with all deliberate speed, have implemented the settlement achieved under its auspices. Instead of doing so the appellant did nothing. On the 12th of February 2004 the school via its attorneys wrote to the appellant calling upon it to provide the school with a replacement teacher. No reply was received. On the 6th of March the school's attorney wrote again, this time to the Attorney-General requesting him to prevail upon the employer to address the school's concerns. On the 29th March 2004 the appellant replied to the school's letter of the 12th of February – a delay of 8 months. It made the allegation that the school had "made no recommendation regarding the transfer of the teacher". The school responded by pointing out that this was a misconception. It informed the appellant that it had done so and referred appellant to the application it had made on the 16th of July 2003 and attached a second copy of such "recommendation".

[13] On the 18th of May 2004 the appellant invited the school - represented by its chairman and its secretary - to a meeting for consultations regarding the position of the teacher. According to the school's founding affidavit deposed to by its principal, the appellant adopted an uncooperative and confrontational approach to the matter. The relevant averments in the affidavit read as follows:

> "The Chairman of the Board of Management of Applicant and I were then subjected to a stern lecture about the exclusive statutory powers of Applicant to appoint, place, promote and discipline teachers. We were then further lectured about the futility and folly of dragging legal practitioners into matters pertaining to the teaching service and First Respondent. Thereafter we were informed that our inquiries and the lectures had constituted the meeting initially proposed and in the view of First Respondent, we had failed to convince First Respondent on anything concerning the fate of Second Respondent and the need for a replacement teacher at Applicant. We were then ordered to leave First Respondent's premises. We embarrassingly obliged after this humiliation and repaired back to the offices of Applicant's Attorneys for advice and appropriate action. Applicant then subsequently resolved to institute the

present proceedings." (Own emphasis).

[14] These allegations were not denied by the appellant in its answering affidavit. Indeed in the presentation of its response to the school's claim for the relief set out above, the first appellant raised for the first time only one defence, viz that the school had failed to comply with the appellant's rules 2002 and in particular rule 7 (a) – which was issued pursuant to sections 17 and 18 of the Education Act 10 of 1995 and that the form used by the two parties – the teacher and the school - was not the correct one. As the learned judge in the court a quo correctly points out these sections have no application in the present case. These provisions apply to teachers in primary schools and in "respect of teachers other than [teachers] whose salary is paid by the Government." The teacher in casu is not a primary school teacher and her salary is paid by the Government. The High Court in a carefully reasoned judgment referred to the applicable regulations with which the teacher had to comply. The form which the school and the teacher submitted on the 16th of July 2003 and to which the appellant never responded was in fact the correct form. The purported reliance on the rules referred to in its

response was not only spurious but also fatally flawed. (Own emphasis).

[15] The regrettable failure of the appellant and the relevant Education Authorities to perform its statutory duties, is further compounded by the arguments advanced before us on appeal by their counsel for the first time. Counsel for the appellants jettisoned the defence raised in the affidavits and sought to argue that:

> "4.1 In this case it would seem like the duty to transfer second respondent (the teacher) has been placed on the first appellant by the deed of settlement reached by the respondents herein. The question that immediately arises is this, is the first appellant bound by that settlement to which they were never a party?
>
> The answer is in the negative. Clearly this was an agreement between two parties and it cannot be expected to bind the third one. Not only that but the agreement as it is, is against public policy.
>
> 4.2 We are taking (sic) here about a teacher who has not been discharging her functions from August 2001. Instead of an appropriate action being taken against her, the school and the teacher agree that the teacher be transferred to another school. In our submission to transfer somebody like that to

> another school would be wrong.” (Emphasis added for the purpose of identifying matter that is res nova in this Court).

[16] It was unfair and improper for the appellants to raise these contentions for the first time on appeal, (see Malebo v Attorney General C of A (CIV) 5/2003). However, as is apparent from the recital of the facts of this matter, the adjudication process was embarked upon at the instance of the parties involved, including the Ministry of Education and the Attorney-General. Moreover, the appellant was directed to adjudicate upon the dispute and did so. The outcome of the adjudication process was the settlement referred to above, which the Education Authorities in general and the appellant in particular were in the circumstances obliged to implement. At no stage prior to seeking to argue it before us did these Authorities ever repudiate or even question the enforceability of the agreement. They sought to obscure the neglect of their duties behind the formalistic smokescreen of the non-compliance with an irrelevant rule.

[17] The attempts of the school to resolve their dilemma amicably

were either ignored or rebuffed by the appellants. The litigation was conducted irresponsibly by the Authorities. The result was that the relevant authorities through their culpable neglect allowed a situation to develop whereby a teacher's post remained in limbo for a number of years.

[18] The arguments advanced on appeal before us were both irregular and without merit. The High Court was fully justified in granting the orders it did.

[19] For the above reasons the appeal is dismissed with costs.

[20] This Court would request the Attorney-General, who is the pro forma third appellant, to note the contents of the judgments of the High Court and of this Court. We would request him as an officer of this Court also to convey our views and the comments of the court a quo to the relevant Education Authorities.

_____

J.H. STEYN
PRESIDENT

I agree.

_____

M.M. RAMODIBEDI
JUDGE OF APPEAL

I agree.

_____

L. MELUNSKY
JUDGE OF APPEAL

For the Appellants : Mr. R. Motsieloa
For the Respondents : Mr. M. Ntlhoki

MASERU
20 April 2005