IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 2/2015
CIV/APN/177/2013

In the matter between:

TEACHING SERVICE COMMISSION	**1ST APPELLANT**
MINISTRY OF EDUCATION	**2NDAPPELLANT**
THE ATTORNEY GENERAL	**3RDAPPELLANT**

and

MOEKETSI MAKHOBALO	**RESPONDENT**

CORAM: S.N. PEETE, JA
P.T. DAMASEB, AJA
J.Y. MOKGORO, AJA

HEARD : 20 JULY 2015
DELIVERED : 7 AUGUST 2015

SUMMARY

Employee, a teacher, absenting himself from work for long period of time without authorized leave; employer withholding his salary invoking 'no work, no pay' and without affording teacher audi;

whether on facts of case the right to audi ousted; on appeal court finding it did.

JUDGMENT

DAMASEB, AJA:

[1] The crisp issue calling for decision in this appeal is whether the Teaching Service Commission (TSC), a statutory body created by article 144 (2) of the Constitution, can withhold the salary of a teacher without observing the *audi alteram partem* principle, on the ground that the teacher withheld his labour without just cause. In other words, could the TSC (*qua* employer) rely on the principle 'no work, no pay' without following due process of a disciplinary hearing?

[2] The respondent in this appeal (Mr. Moeketsi Makhobalo) sought in the court below, on notice of motion, against his employer, the TSC, (a) a declaration that the employer's withholding of his monthly salary, including arrear salary, from May 2012, was unlawful, and (b) an order restraining and interdicting the employer from withholding his monthly salary 'without the due process of law'. He also sought costs against all the respondents. He succeeded and the High Court made the following order:

1. The 1st respondent's decision to withhold the applicant's salary from May 2012 is declared unlawful;
2. The 1st respondent is directed to pay the applicant's salary including arrears dating back to May 2012;
3. The 1st respondent is restrained from continuing to withhold the applicant's salary without a due process of the law;
4. Costs to follow the even.

Common cause facts

[3] The respondent was employed as a teacher at the Kubake Primary School in the district of Maseru (the school). He took ill sometime in September 2011 and was absent from work. At some point in May 2012 after the respondent took ill and stayed away from work, the TSC begun to withhold his salary. It is common cause that the withholding by the TSC of the respondent's salary was not preceded by any hearing which would have afforded him the opportunity to make representations thereat. Until he commenced the review proceedings the subject of the present appeal, the respondent remained in the employ of the TSC.

Respondent's averments in support of the relief sought

[4] In his founding affidavit the respondent alleged that he became ill 'during or about September 2011' and 'nearly lost' his life. This, he claimed, resulted in his being placed on sick leave at the end of which there developed 'a misunderstanding' between him and the School Board concerning what he characterized as 'medically required check-ups which I had to attend periodically'. According to the respondent, it was this 'misunderstanding' between him and the School Board that actuated the TSC to 'unlawfully' withhold his monthly remuneration commencing in May 2012 until he launched the present proceedings. As is common cause, that action by the TSC was not preceded by a hearing. The respondent maintained that

the admitted failure to afford him a hearing 'was and still is undoubtedly unlawful'. He averred that the TSC persisted in withholding his salary even after the School Board's letter dated 20 January 2013 requested it to reinstate his salary. That letter stated the following in regard to the respondent:

> "The Board of (Kubake Primary School) reports by this letter the presence of [the appellant] at work. The Board has accepted his reporting for duty and places this issue before you and urges you to reconsider your decision to withhold his salary'.

[5] According to the respondent, the TSC had no right to withhold his salary at the time, as he had a 'misunderstanding' with the School Board and that the continued withholding of his salary is made worse since the misunderstanding he had with the School Board had been resolved. He maintains that the TSC's action amounted to 'self-help' which the law does not sanction. He characterized the TSC's conduct as arbitrary, malicious and capricious.

TSC's opposition

[6] The TSC's answer to the respondent's case is threefold: First, it states that it did not act unlawfully as alleged as it only withheld the respondent's salary as *quid pro quo* for his withholding his labour. Second, it accused him of material non-disclosure about the actual reason for its withholding the salary. Third, the TSC put forward factual material at variance with the respondent's foundational allegations which, on the test applicable in motion proceedings, raise material disputes of fact.[1]

[1] Stellenbosch Farmer's Winery vs Stellenvale Winery 1957 (4) SA 234 at 235

[7] I will next set out the TSC's version of events. The version comes from two sources. The first is from an official of the TSC, whilst the second is from the School Board.

The TSC

[8] Mrs 'Mamongoli Tsekoa is the chairperson of the TSC. She alleged that the respondent was on sick leave from September 5, 2011 until December 5, 2011 – a period of three months. She attached a medical report by the medical superintendent which supports her version. *Au contre*, the respondent did not attach any medical report in support of his allegations. The chairperson denied that there was any 'misunderstanding' between the respondent and the School Board. She maintained further that the respondent was absent without leave from May 2011 until January 2013. According to her, the respondent was on authorised sick leave only for the period 5 September 2011 to 5 December 2011. Mrs Tsekoa alleged that the respondent's absence without leave resulted in disciplinary steps being taken against him, a fact, she said, the respondent did not disclose in his founding papers. The chairperson admitted withholding of respondent's salary from May 2012, invoking the common law principle, 'no work, no pay'. In her view, the respondent failed and or neglected to perform any duties and consequently could not and cannot expect to be paid for work he has not performed. Mrs Tsekoa averred that the respondent was not entitled to any prior hearing and that the TSC acted well within its rights to withhold his salary without a hearing.

[9] The TSC chairperson alleged further that the TSC had advised the respondent to return to work so that he could be paid but that he failed to honour his contract by not returning to work until January 2013. Mrs Tsekoa disputed the respondent's version that the School Board had urged the TSC to pay the respondent's salary and relied on the fact that the School Board had in fact taken disciplinary steps against him. What the School Board did, the deponent said, was to request the TSC to reconsider the decision of salary stoppage as the respondent had returned to work pending the outcome of the disciplinary hearing. Mrs Tsekoa also on oath tendered payment of respondent's salary with effect from January 2013, which is when he resumed duty. She however vehemently asserted that the TSC 'cannot pay [respondent's] salary for work not done'. She stated categorically that the respondent had not performed his duties as a teacher since May 2011 and only resumed work in January 2013. According to the chairperson, the respondent could not 'reasonably expect to benefit out of his failure to perform his part of the contract' as this would amount to 'theft of public funds'. Mrs Tsekoa stated that what the TSC did does not amount to 'self-help' and that it was within its rights to withhold respondent's salary.

The School Board

[10] Mrs Masehlomeng Moremoholo is the Principal of the school and also secretary of its School Board. In the first place, she

confirms the chairperson of the TSC's allegations in so far as those relate to her and the School Board. The Principal alleged that the respondent was absent from work without leave from May 2011 and returned to work in September 2011 and reported that he was on sick leave. According to the Principal, the respondent did not return to work after his sick leave ended on 5 December 2011. This resulted in the School Board requesting the TSC to stop respondent's salary and to provide the school with a substitute teacher. According to the Principal, the respondent 'never had any misunderstanding with the School Board regarding his medical check-ups.' She averred that the respondent was reluctant to work when his sick leave ended and only resumed work in January 2013. As a result, she said, the respondent did not render any services to the school for the entire year of 2012.

[11] According to the Principal, the respondent's absenteeism was the reason the school charged him with breach of discipline and made a recommendation to the TSC for his dismissal. As regards the reliance placed by the respondent on the School Board's report to the TSC to reinstate his salary, the Principal stated that she wrote a letter on 30 January 2013 'informing the [TSC] that the [respondent] has reported himself back to work [and]…. requested the Commission to reconsider the decision to stop his salary whilst awaiting the decision of the Commission regarding the disciplinary hearings against the [respondent]'.

Respondent's reply

[12] According to the respondent, the disciplinary hearing was irrelevant as his salary was withheld before it, and that the withholding of his salary was never discussed at the disciplinary hearing. He maintains that the admitted failure to afford him a hearing before his salary was withheld is decisive of this matter. He asserted that the principle 'no work, no pay' only applies after the affected person had been afforded the opportunity to make representations in that regard. He pointed out that the issue for determination is whether or not it was procedurally fair for the TSC to have taken such a drastic and adverse decision without affording him *audi*.

The Judgment of the High Court

[13] The court *a quo* found that the withdrawal of the respondent's salary was reached without the respondent being given a hearing 'with a justification that it was in accordance with a no work no pay common law principle'. The court also found that the respondent's salary was reinstated in January 2013 and that he was allowed to resume teaching. The propriety of that finding remains unchallenged. The court *a quo* narrowed the dispute to two issues which, according to it, fell for decision:

(a) The lawfulness of the TSC's withdrawal of the respondent's salary in the absence of *audi*; and

(b) The respondent's entitlement to being paid his salary for the period of his absence from work.

[14] The High Court held that the respondent had the right to be paid his salary and that same could only be 'disrupted through a lawful intervention by the appropriate authority'. The High Hourt concluded that the only lawful way in which the respondent's salary could be withheld was by affording him a 'prior hearing'.

[15] The High Court took the view that the TSC's decision was quasi-judicial in nature and therefore had to comply with *audi.* Affording the respondent *audi*, the court found, would have made it possible for it to have a 'holistic picture of the relevant and material facts to be considered before reaching a decision'. In short, the court concluded that the TSC took punitive action against the respondent unheard. The high court placed reliance for its conclusion on several judgments of this court: *The Commander of the Lesotho Defence Force, the Minister of Defence and Attorney General v Pakiso Paul Mokuena and Other C of A (civ) No. 12 of 2002; Koatsa v The National University of Lesotho LLRB 1991 – 1998; Matebesi v Director of Immigration and Others LAC (1995 – 1999) 616; Thabo Fuma v Commander Lesotho Defence Force, Minister of Defence and Another Court/C/8/2011.*

[16] The ratio for the High Court's decision appears to me to be this: Where an administrative official exercises a power under a statute which prejudicially affects an individual in her liberty or property rights, such a person is entitled to *audi* unless the statute expressly or by implication excludes *audi.* The learned judge *a quo* was satisfied that, deriving as it did from the Education Act 2010 and the Code of Good Practice 2011 made under that Act, the decision to withhold the respondent's salary was not lawful without him being afforded *audi* – in *esse* that

audi was not expressly or by implication excluded. Crucially, the court concluded that:

> "[A]against the backdrop of the applicants' long illness, the [TSC] should have acted responsibly and humanely by initially somehow seeking to establish his latest health condition. Even if it was found that he had recovered from the illness and that he was irresponsibly absenting himself from work, a disciplinary charge should have been preferred against him in accordance with s.5 of the code which states:-
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> "A teacher who fails to comply with a standard of conduct in this code shall be subjected to disciplinary action in accordance with the notification of the disciplinary code made in part IV."

[17] The applicants challenge the High Court's conclusions in this appeal. The appeal raises squarely the question whether on the facts of this case, *audi* principle applied. They contend that it did not as the respondent did not prove that he tendered teaching services or tendered to do so to be entitled to remuneration. That failure, they contend, had the effect that he did not have a right to a prior hearing. According to the appellants, therefore, *audi* was ousted in the circumstances of this case. The respondent says it was not, notwithstanding his failure to either render services, or to tender same.

Relevant legal framework

[18] The relationship between the appellants and the respondent is, on the one hand, contractual and, on the other, governed by the Education Act, 2010. In so far as it is contractual, the appellants had the duty to remunerate the respondent for his services and to permit him to tender his labour in return for such

remuneration. At common law, the duty to pay, and the commensurate right to remuneration arise, not from the actual performance of work, but from the tendering of service.[2] The corollary to the 'no work, no pay' maxim is, 'no pay, no work'.[3]

[19] Section 57 (1) of the 2010 Act empowers the Minister of Education to promulgate Codes of Good Practice. The Minister, acting in pursuance of s 57 (1), promulgated Codes of Good Practice.[4] Code 3 (1) obligates a teacher to be punctual and to fulfill his or her contractual obligations to the employer until released according to law, to act responsibly and diligently in the discharge of his or her professional duties, and to act in a manner that maintains the honour and dignity of the profession (Vide Code 3 (1) sub-paras (f), (h), (j) and (p)).

[20] Code 3 enjoins that a teacher who fails to comply with a standard of conduct in the Code 'shall be subjected to disciplinary action' in accordance with the Disciplinary Code made in Part IV'. The latter guarantees the teacher a 'fair hearing' and the 'rules of natural justice'.

[21] Gauntlett JA stated as follows in *Matebesi v Director of Immigration and Others* LAC (1995 – 1999) 616 at 62 IJ – 662:

> "Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by

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[2] Johannesburg municipality v O'Sullivan 1923 AD 20
[3] R v Plank & Others (1900) 17 SC 45
[4] Legal Notice no. 64 of 2011

> implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle"

His Lordship went on to add (at 625J):

> "The right to *audi* is, however, infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation.'

[22] *Matebesi* is also authority for the proposition that although *audi* may be a statutory requirement, the particular circumstances of the case may oust *audi* or significantly attenuate its operation. Each case must be considered on its facts. In the present case, we are concerned with the withholding of a salary; not a dismissal[5] - a more drastic sanction. The right to *audi* therefore co-existed with the employer's right at common law not to remunerate the respondent if he did not tender his labour. As the appellants maintain, the respondent is entitled to a salary in arrear in terms of Regulation 29 (1) of the Teaching Service Regulations 2002, lending support to their case that a teacher's right to salary (which would require *audi* if denied) is ousted where there has been failure to render service or to tender same.

[23] The central plank of the appellants' case is that the peculiar circumstances of this case degraded the respondent's right to *audi*. As respondent's counsel conceded during argument, no explanation for the absenteeism was given, either in the founding papers or in reply, yet the absenteeism was woefully prolonged and unexplained. In addition, the respondent failed to heed the

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[5] *Matebesi*, supra at 628 F-G

employer's demand to desist from withholding his labour and to return to work. There is no evidence on the record (the respondent bearing the onus of proof) that he or anyone else on his behalf at any point explained to his employer the reason for not tendering his services for the prolonged period.

[24] I have no cavil with the proposition that the Code of Good Practice made under the Education Act entitles a teacher to *audi* before disciplinary measures can be brought against him or her. But that is not the end of the matter. The question is, do the facts of this case point to the respondent having forfeited the right to a prior hearing?

[25] Counsel for the appellants has cited the following passage from Hoexter[6] (at 362), with which I am in respectful agreement:

> "…. [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness…. An approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant."

[26] As Gauntlett JA recognized in *Matebesi* (albeit in a different statutory context, but relevant all the same) protracted 'absenteeism or desertion' presents a 'practical difficulty' to an employer because it 'undermines the capacity of the employer to investigate the situation properly and expeditiously'. [7]

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[6] Administrative law in South Africa (2012) 2nd Ed.
[7] *Matebesi,* supra at 626 I-J

[27] Counsel for the respondents argued, with great force, that whether or not the respondent was afforded *audi* is neither here nor there and that the relevant inquiry is whether the respondent proved the actual rendering of services or a tender to do so. Counsel took the view that in the absence of such proof, *audi* was irrelevant. I cannot support this reasoning. In circumstances where legislation guarantees a right to *audi* in pursuance of misconduct, it is untenable to argue that failure to tender services will always justify invocation of the principle 'no work, no pay.' I can conceive of a situation where a failure to tender services could not in and of itself justify the employer from withholding a salary: what if the employer was aware that the respondent, as a result of being indisposed due to serious illness, is unable to tender his or her services? Would the employer be acting reasonably and fairly if it said that the fact of the respondent's indisposition was irrelevant? I think not! In my view, a '*de minimis* absence or one which is not culpable' would not *per se* attract the consequences of 'no work, no pay'.[8]

[28] Where a review of administrative action is sought on the basis of denial of *audi,* it is important for the court to have regard to the context in which the decision was taken, and the role of the affected official. Not least because the common law in Lesotho is that the onus rests on the employee to show that he or she had earned the right to a salary. (*Commissioner of Police & another vs Ntlotsoeu* LAC (2005-2006) 156 at para 13; *Makhetha*

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[8] Compare *Matebesi* at 627A-H

& another vs Commissioner of Police & another C of A (CIV) No.2 of 2008 [2009] LCSA A at Para 14).

[29] Rather than constituting an absolute defence to the respondent's claim for arrear salary, the failure to tender services and the common law principle 'no work, no pay', are, in my view, the 'context' against which the court *a quo* ought to have considered the respondent's claim to *audi* based on the Code of Good Practice. Courts must guard against an inflexible and mechanical application of the *audi* principle which, as Hoexter warns, can result in absurd results.

[30] The issue, I am satisfied, is not whether the TSC ought first to have afforded the appellant *audi* before withholding his salary as it did, but whether, on the facts of this case, *audi* was ousted. Such an approach has the merit that the court considers not just the formality of an invitation to make representations, their consideration and then a decision thereon, but the entire circumstances under which the adverse decision was taken.

[31] Can it be said on the facts as I have described, (a) that the TSC acted unfairly in not holding a formal hearing or inviting formal representations from the respondent, (b) that it acted unfairly in withholding his salary?

[32] The established facts, bearing in mind the test in motion proceedings, can be summed up thus: The respondent took off

sick without first seeking permission and when he returned after a period of three months produced a medical certificate in support of his absence from school that was accepted by the school. Thereafter, he again absented himself from work for an extended period of time. He did not with his founding papers furnish any medical report to explain his extended absence from school although he attributed it to medical reasons. His absence from school during that extended period was not countenanced by his school board which brought disciplinary proceedings against him in relation to it. The School Board, in fact, reported the matter to the TSC which in turn urged him to return to school, a fact he did not disclose in his founding papers. He did not return to school and he provided no evidence in his founding papers for the reason why not; or that he ever tendered his services. The TSC and the school were left to arrange a substitute teacher to perform the appellant's responsibilities. In his launching papers the respondent created the impression that his absence from work during the extended period was attributable to a misunderstanding between him and the school board. On the *Plascon-Evans*-test, there was no such misunderstanding and the inference is that his absence was unauthorised, that he was subjected to a disciplinary process and his dismissal recommended - none of which he disclosed in his founding papers. At common law an employee who does not tender services has no right to be paid a salary and, in addition, a teacher's entitlement to pay operates in arrear in terms of the relevant Regulation.

[33] The respondent has not offered any explanation, why he did not tender his services for the period he was not at work and the employer had not prevented him from tendering his labour in return for payment of a salary.

[34] What is particularly telling about this case is the respondent's admitted failure to place any information before court about the circumstances of his absence from work during the relevant period. We know not if it was due to illness or any other sufficient reason which, viewed objectively, made the denial of *audi* unfair. Against that must be seen the appellants' evidence on oath that (a) efforts were made to have the respondent return to work to be able to earn his salary, (b) the detriment to the children from his failure to report for duty, (c) the appointment of a replacement teacher to stand in for the respondent, and (d) no demonstrable effort on the respondent's part to appraise the employer of the true reason why he was unable to report for duty.

[35] In light of the above, I am satisfied that the operation of the right to a hearing was ousted or degraded in respect of the respondent to such extent as to have entitled the appellants not to afford him a hearing before withholding his salary, as they did. The respondent's dogged insistence that he should have been afforded *audi* is, therefore, unsustainable.

The Order

(a) The appeal succeeds, with costs.

(b) The order of the High Court is set aside and substituted for the following order: 'The application is dismissed, with costs.'

P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree

S.N. PEETE

JUSTICE OF APPEAL

I agree

J.Y. MOKGORO

ACTING JUSTICE OF APPEAL

For the Appellant : Adv. Moshoeshoe

For the Respondent : Adv. R. Setlojoane