

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**MAMATHUNYA MOREBOTSANE
JULIA JANE
PULENG POTSANE
ITHABELENG SEHLATSANE
LIEKETSENG SHAABE**

**1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant**

And

**‘MASENTLE HIGH SCHOOL
SCHOOLS BOARD MASENTLE HIGH SCHOOL
CATHOLIC SCHOOLS SECRETARIAT
TEACHING SERVICE COMMISSION
TEACHING SERVICE DEPARTMENT
MINISTRY OF EDUCATION AND TRAINING
ATTORNEY GENERAL
MAGISTRATE COURT MAFETENG**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent**

Summary

Matter before Court on review - Appeal being on challenging the decision but review on challenging the procedure followed in arriving at

the decision. Principle of maintenance of legality adopted-matter set aside on review and substituted by one discharging the rule in the main application and confirming the rule in the counter application with costs.

Annotations

Statutes

Books

Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Edition.

Cases

- 1. Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) S.A. 43.**
- 2. Judicial Service Commission v Chobokoane 2000-2004 LAC 859.**
- 3. National Union of Textile Workers v Textile Workers Industrial Union 1988 (1) S.A. 925.**
- 4. C OF A (CIV) No.21 of 2007**
- 5. Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others 2003 (2) S.A. 385 at 402.**

[1] This is an application for review of the decision by the Magistrate's Court. At the trial stage before the Magistrate, the present applicants had applied for interdict and retaining orders against the present 1st, 2nd, 3rd, 5th and the 6th Respondents.

[2] The Respondents opposed the application and also filed their counter application. The orders that were sought in the main application were in the following terms:

- (a) The rules as to form and notice shall not be dispensed with on account of urgency.
- (b) The 1st to 5th Respondents shall not be restrained and interdicted from entering the 1st applicant's premises and disrupting the meeting scheduled for the 24th August 2012 pending finalization hereof.
- (c) The 1st to 5th Respondent shall not be restricted and interdicted from entering the premises of the 1st Applicant pending finalization of their transfer process and pending finalization hereof.
- (d) The 1st to 5th Respondent shall not be restrained and interdicted from interfering in any manner whatsoever with the affairs of the 1st Applicant pending finalization hereof.
- (e) The 6th Respondent shall not be enjoined and directed to assist us in the enforcement and execution of the order of this Honourable Court in this matter.
- (f) The 1st to 5th Respondent shall not be ordered to pay costs hereof in the event of unsuccessfully opposing their application.
- (g) Further and/or alternative relief.

[3] In the counter Application these were the prayers:-

- (a) Dispensing with the Rules of service due to the urgency of this matter.
- (b) Refraining the Respondents from stopping the Applicants from going to school of the 1st Respondents, ejecting or restraining them from attending any classes or restraining applicants in any manner whatsoever from participating in any of the activities of the school of the 1st Respondent until they have been lawfully transferred from the said school.
- (c) Ordering the Respondents to produce the policy and or any documents authorizing the transfers of the teachers and Applicants including the selection criteria which were used for selection of the applicants for the said transfers of the applicants.
- (d) Declaiming the nomination of the applicants for transfer as procedurally unfair and unlawful.
- (e) Directing Respondents to pay costs of suit in the event of opposing the same.

[4] In his judgment the Magistrate showed that the Respondents may have been right in arguing that in dealing with the issues of

transfers the Applicants never observed the principles of natural justice as were not allowed to make their representations.

[5] The Magistrate could however not deal with that issue as he said the Court had no declaratory powers. Hence why the Magistrate dismissed the counters application.

[6] Both sides clearly spelled out the legal basis for applying for review as opposed to an appeal. Relying on decisions from the following;

- **Davies v Chairman, Committee of the Johannesburg Stock Exchange¹.**
- **Judicial Service Commission (JSC) v Chobokoane².**
- **National Union of Textile Workers v Textile Workers Industrial Union S.A.³**

Counsel for the 1st and 2nd Respondents stated the law in proceedings by way of review that it involves a limited re-hearing of the matter and the question being whether the procedure adopted was formally correct. That review is most appropriate where the real grievance is against the method of trial not the correctness of the decision. What is important will be allegations of injustice or gross irregularity. But in *casu* what is of importance has been that

¹ 1991 (4) S.A. 43

² 2000-2004 LAC 859 at 864

³ 1988 (1) S.A. 925

in the court *a quo* what was aimed at was the maintenance of legality.

- [7] It was thus submitted by the Respondents' side that there has been no allegations of injustice or gross irregularity on the part of the 8th Respondent in this case.
- [8] Applicants on the other hand argued that the procedure that was followed by the 8th Respondent even after regarding the law pertaining to transfers and seeing that the Respondents did not have any legal right to transfer applicants was irregular.
- [9] 8th Respondent in his judgment conceded that the Applicants were not afforded a hearing when the issue of their transfers was considered. As such the principles of natural justice were not observed.
- [10] If the principles of natural justice were observed the Respondents could have, in terms of the **Teaching Services Regulations 2002, section 22** thereof, realized that since it was not in dispute that the Applicants were appointed by the Commission, it was the commission which ought to have authorized their transfers. The other bodies below the commission could only recommend, but also in consultation with the teachers concerned for the sake of transparency.
- [11] There is nowhere in the papers before the Magistrate to have shown the involvement of the commission in the issue of such

transfers which means his manner of approach in that case was irregular.

[12] In the case of **Teaching Service Commission and Others v Learned Judge of Labour Court and Others**⁴ there was a clear elaboration on the distinction between appeal and review. **Steyn P** in his judgment referred to what was said by **Schutz JA in Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others**⁵ in that “appeal is appropriate where litigants contends that a Court came to an incorrect decision whether on the law or on the facts”.

But that “a review is aimed at the maintenance of legality, being a means by which those in authority may be compelled to behave lawfully”.

[13] The true position of the law being that in an appeal, the court is bound by the record of proceedings whereas in review proceedings facts and information not appearing on the record may be placed before the reviewing court. It has been explained by **Herbstein and Van Winsen the Civil Practice of the Supreme Court of South Africa 4th Edition at 932** that “The reason for bringing proceedings under review or appeal is usually the same, is to have the judgment set aside”.

⁴ C of A (CIV) No.21 of 2007

⁵ 2003 (2) S.A. 385 at 401-402

- [14] If therefore the purpose of the review is the maintenance of legality the Magistrate in the maintenance of legality after pronouncing that it was wrong for Applicants not to have been afforded a hearing could have followed the correct procedure of affording them a hearing before coming to a decision to authorize their restraining order and ejection.
- [15] The Magistrate said could not make declaratory but followed the wrong procedure by dealing with the other prayers leaving out some of the prayers.
- [16] The correct procedure would have been to decline to deal with the matter for lack of jurisdiction, but he instead dealt with some aspects and left out that of declaratory.
- [17] True enough matters of restraining orders and interdicts fall within the jurisdiction of the Magistrate's Court, but once there is an issue with the same court, amongst the prayers asked for, which is above the jurisdiction of that court the best procedure is to decline to deal with the matter for want of jurisdiction and not to deal with the matter in a piece meal.
- [18] The papers may have not been elegantly drafted, but as has already been shown above, based on the maintenance of legality the decision by the 8th Respondent is on review set aside and substituted by one discharging the rule in the main and confirming the rule with costs in the counter application.

A.M. HLAJOANE

JUDGE

Delivered on 21st February, 2013.

For Applicants: Mr. Sekonyela

For Respondents: Mr. Shale