

**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/84/2013**

In the matter between:

**STEPHEN THABO**

**APPLICANT**

**And**

**MOHATLANE SKILLS TRAINING CENTRE** **1<sup>ST</sup> RESPONDENT**

**THE SCHOOL BOARD – MOHATLANE SKILLS  
TRAINING CENTRE** **2<sup>ND</sup> RESPONDENT**

**THE SECRETARIAT – ANGLICAN CHURCH  
OF LESOTHO** **3<sup>RD</sup> RESPONDENT**

**THE TEACHING SERVICE COMMISSION** **4<sup>TH</sup> RESPONDENT**

**MINISTRY OF EDUCATION AND TRAINING** **5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL** **6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Coram** : Honourable Acting Justice E.F.M. Makara  
**Dates of Hearing** : 27 November, 2013  
**Date of Judgment** : 31 January, 2014

## **Summary**

*Applicant in the main seeking for a declaratory order setting aside a decision which according to him demoted him from the position of a Principal of the 1<sup>st</sup> Respondent to that of a teacher, that he be reinstated to the position of a Principal and remunerated to cover the period of the purported demotion – The appointment having been done by the then Acting Principal of the Centre on behalf of the 2<sup>nd</sup> Respondent – The latter subsequently charged the applicant for work inefficiency, lack of accountability and embezzlement of the funds for the Centre resolved that the initial recommendation for him to be appointed by the 3<sup>rd</sup> Respondent be withdrawn and for the Commission to accept the proposal. The Commission endorsed the request. The Court finding that the applicant had a legitimate expectation that he would be considered for the promotion and, therefore, that the 2<sup>nd</sup> Respondent should have given him a hearing before deciding to withdraw its recommendation and the same applied to the 3<sup>rd</sup> Respondent – However, the court declining to order that he be reinstated to the position of a Principal because he hadn't as yet been elevated to the office by the 3<sup>rd</sup> Respondent – The Applicant could have appropriately prayed for the **restoration of the status quo ante**. The application dismissed without any order on costs.*

### CITED CASES

**Supreme Furnitures (PTY) Ltd v LH Molapo 1995 -1996 LLR & LB 377**

**Nkoebe v Attorney General & Others 2000 -2004 LAC 295**

**Lek v Estate Agents Board 1978 (3) SA 160**

**Tse'lisso Pitso v Ellerines Furniture (Pty) Ltd LC 64/ 07**

**Russel v Duke of Norford [1949] 1**

**Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999**

**CIV /APN/ 291/ 04 St. Patrick High School v The Teaching Service Commission**

**CIV/ APN/ 517/11 Thaanyane Ntlenyane v Principal Secretary Ministry of Health and Another**

### STATUTES

**Education Act 2010**

**Labour Code Order No. 24 of 1966**

**Electricity Act No. 7 of 1969**

## **MAKARA A.J**

### **Introduction**

[1] This is a case in which the applicant had introduced motion proceedings against the respondents asking the court to make an order in the following terms:

1. Directing the 4<sup>th</sup> Respondent to dispatch the record and/or minutes of proceedings that lead to the Applicant's demotion for the position of principal, to the Registrar of this Honourable Court within fourteen (14) days hereof;
2. Directing and ordering that the proceedings and decision that lead to the Applicant's demotion from the position of principal be reviewed, corrected and set aside;
3. Directing and ordering the Respondents to reinstate the Applicant to his position of principal of the 1<sup>st</sup> Respondent;
4. Directing and ordering the Respondents to pay Applicant's salary from the date of the purported demotion to the date of reinstatement;
5. Interdicting and restraining the Respondents from interfering with the Applicant's position without the due process of the law;
6. Directing and ordering the Respondents to pay costs hereof only in the event of their opposition hereto;
7. Granting Applicant further and/or alternative relief.

[2] The respondents respectively filed their intention to oppose. This notwithstanding, it was only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents who filed their answering affidavits. Thus, the contestation was left between the latter and the applicant.

### **The Background Common Facts**

[3] The facts which have triggered this litigation are basically of a common cause nature between the parties. This unfolds that the

applicant is employed by the 4<sup>th</sup> respondent as a substantive teacher and at present he is deployed with the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondent is a board of the 1<sup>st</sup> respondent entrusted with the administration of the its affairs. The Centre belongs to the Anglican Church of Lesotho and is in that capacity administered by the 3<sup>rd</sup> respondent. The 4<sup>th</sup> respondent is a statutory entity<sup>1</sup>.The 5<sup>th</sup> and the 6<sup>th</sup> respondents have contextually been nominally cited by virtue of the inclusion of the 4<sup>th</sup> respondent in the matter.

**[4]** Whilst the applicant was a teacher at the institution, during the year 2012, applied for appointment as its Principal and was advised by the Acting Principal Mrs Nthabiseng Letsoela that his application has been successful. He has exhibited that by having annexed a letter to that effect and is marked ST1. Its relevant content reads, *“May we inform you that your application for position of principal was successful and you are expected to start here with us as soon as possible.”* It was on the strength of the letter that according to him he became the Principal with an apparent understanding that the Board would, subsequently, recommend him to the 4<sup>th</sup> respondent for his formal appointment.

**[5]** There transpires to be a harmony that the said letter had been executed by the Acting Principal Secretary on behalf of the 2<sup>nd</sup> respondent. A testimony of this is a 4<sup>th</sup> respondent’s correspondence dated the 11<sup>th</sup> September, 2012 which was

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<sup>1</sup> The employment, confirmations, transfers discipline etc. of the teachers.

addressed to the Board. It is *inter alia* recorded therein that the Board's request for the withdrawal of its earlier recommendation that the applicant be appointed as a Principal of the 1<sup>st</sup> respondent under a Performance Contract has been approved. This is indicative that the Board had sanctioned the letter written to him by the Acting Principal about his appointment as a Principal. It has on the same note not been contested that in consequence of his receipt of the letter, he was introduced to the members of the staff of the 1<sup>st</sup> respondent as its new principal.

[6] The impression which the Court gathers from the papers before it, is that a common understanding had prevailed between the applicant, the 1<sup>st</sup> and the 2<sup>nd</sup> respondent that by operation of the **Education Act 2010** which is the key legislative instrument in the matter, the Teaching Service Commission (TSC) is the sole repository of the powers to appoint a teacher who would be paid by the Government to any substantive position within the Teaching Service.<sup>2</sup> Thus, there was a logical appreciation between the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent that the applicant remained a 'Principal designate' or ordinarily speaking *an Acting Principal* of the 1<sup>st</sup> respondent pending the decision of the 4<sup>th</sup> respondent to uphold the recommendation of the 2<sup>nd</sup> respondent that he be elevated from a substantive position as a teacher to that of Principal of the Centre. Hence the expectation by the applicant, the 1<sup>st</sup> and the 2<sup>nd</sup> respondents that the TSC would in due cause sanction a conclusion

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<sup>2</sup> S 59 of the Education Act 2010 the functions of the Commission are to appoint, promote, demote, discipline and remove from office teachers whose salaries are paid by the Government.

of a *5 year Performance Appraisal Contract* between the concerned parties. Its conceived main term would be the appointment of the applicant as a Principal of the School.

[7] The developments assumed a new turn which culminated into this proceedings. These originated from a sudden change of attitude by the 2<sup>nd</sup> respondent in that it later resolved to withdraw from the Commission its earlier recommendation for him to be promoted to the status of a Principal of the 1<sup>st</sup> respondent and sought for the endorsement of that resolution. The Commission ultimately approved the withdrawal.

[8] After the endorsement of the withdrawal by the Commission, the applicant had on or about the 14<sup>th</sup> November 2012, received a letter in which the 2<sup>nd</sup> respondent directed him to relinquish the principality and revert to the position of a teacher. It in conclusion detailed him to commence with the handing over processes which also included finances. It emerges from the papers that the stability of the applicant's principality had been shaken by some disharmony of relations between himself and some other teachers and by the Board's perception that he was mismanaging the financial affairs of the School. These were apparently aggravated by the Board's experiencing of frustration as a result of what it considered as the insubordination of the applicant in that he was persistently ignoring its instructions to account for his suspicious management of the finances.

[9] It is part of the agreed facts that notwithstanding the commonness of the basic facts between the parties, the applicant's simple and straightforward complaint is that **the 2<sup>nd</sup> respondent hadn't given him a hearing before it decided to forward its request to the Commission to have its initial recommendation for him to be confirmed as a principal withdrawn.**

### **The Standing Issue(s)**

[10] The basic factual landscape projects in essence one simple controversy which has assumed a legal nature. This is whether the 2<sup>nd</sup> respondent has in the circumstances of this case, committed an infringement against the Common Law right of the applicant as a person to have been heard before it resolved to forward its said request to the Commission. This could incidentally be extended to question if the Commission itself hadn't perpetuated the transgression by just endorsing the request for the withdrawal of the recommendation which was obviously favourable to the applicant without hearing him. The Court doesn't perceive any factual based issue in this case.

[11] A further rather legal issue which had emerged as a *point in limine* was the one introduced by the respondents in the form of the question on the jurisdiction of the Court in the matter. The background contention being that the case fell within the province of the Labour Law since it had to do with the labour dispute and,

therefore, that it should have been brought before the Labour Court.

### **The Arguments Advanced**

[12] A foundation of the argument advanced by Adv Khatala in pursuit of the sustenance of the prayers for the applicant, was that the decision for the withdrawal of the recommendation for the applicant to be appointed by the 4<sup>th</sup> respondent as a principal, had been unprocedurally arrived at. This was attributed to the charge that this was done without having accorded him the Common Law *audi alteram partem* procedural right. It was maintained that the 2<sup>nd</sup> respondent should, in the circumstances of the case, have given the applicant a hearing before forwarding to the 4<sup>th</sup> respondent a request seeking for the endorsement of the withdrawal.

[13] The proposition presented was that there are two fundamental requirements to which an affected individual is entitled to, that is notice of the intended action and a proper opportunity to be heard. It is, however, regrettable that there has been no illustration of the statement to render it clearly and comprehensibly articulated. The cases which appear in the heads possibly in an attempt to support the position have been left hanging without a clear indication of their significance in the matter and thereby leaving a research to be mounted by the Court or for it to make sense concerning their relevancy. The cases are **Supreme Furnitures (PTY) Ltd v LH Molapo 1995 -1996 LLR & LB 377** and **Nkoebe v Attorney General & Others 2000**



**-2004 LAC 295.** Be that as it may, the Counsel for the respondent has succinctly captured the fact that the *audi alteram partem principle* is a dimension of *Natural Justice* and that it *inter alia* details that no man shall be condemned unheard and that this right can only be dispensed with where a Statute sanctions an exception in clear terms.

[14] At the conclusion of the arguments it has been submitted with emphasis that the defect in the decision lies in the procedure followed towards it. This in a nutshell being that the applicant hadn't been given a fair hearing before the decision to have the recommendation withdrawn was reached.

[15] The respondents initially responded by raising a legal *point in limine* that the Court had no jurisdiction to hear the matter. They contended so on the reasoning that the case should have been brought before the Labour Court since it is founded upon a labour dispute. The Court was, for guidance, referred to **S 225 (2) of the Labour Code Order No. 24 of 1966** and to the case of **Tse'lisho Pitso v Ellerines Furniture (Pty) Ltd LC 64/ 07**. It was basically directed in this cases that that this Court had no jurisdiction over the labour dispute related cases since the Labour Court has been specially created to hear them.

[16] In traversing the merits, the respondents commenced their case by advising that they were not in law obliged to have given the

applicant a fair hearing. This was anchored on the explanation that the applicant had been appointed to the acting principal ship by the Acting Principal who had preceded him in that office. Their position was that his predecessor who was also an Acting principal lacked the credentials to have made such an appointment. The impression radiated is that resultantly the applicant never legally speaking held the post and, therefore, had no legitimate claim to complain that that he hadn't been accorded a fair hearing pertaining to that station. It has, in the same logic, been cautioned that the applicant hasn't averred that he was elevated to the substantive office of the Principal of the 1<sup>st</sup> respondent.

[17] It was emphasised by the Counsel for the respondents that the 1<sup>st</sup> respondent was in law only qualified to make a recommendation to the 4<sup>th</sup> respondent for the appointment of the applicant as the principal. The point made being that the enabling legislation has bestowed upon the Commission exclusively, the authority to appoint teachers to various posts within the hierarchy of the teaching profession. In the instant case, it was warned that this Statutory Body hadn't assigned the applicant the status of a principal.

### **The Court Findings and Decision**

[18] It is clear from the Act that the 2<sup>nd</sup> respondent could only forward a recommendation to the 4<sup>th</sup> respondent to be appointed as the Principal of the 2<sup>nd</sup> respondent and to correspondingly advise

otherwise under the deserving circumstances. The fact that the applicant knew about the recommendation made in his favour is, in the absence of any provision to the contrary, indicative that he had pending its upholding assumed an acting position as a Principal. This is reinforced by the available evidence that he had immediately been assigned the responsibilities of a Principal and that he had discharged them. It is appreciable that he had in consequence of the recommendation developed a legitimate expectation that he could be appointed a principal by the Commission. This doesn't in any manner, whatsoever, suggest that the Commission was under any obligation to have appointed him since it has an exclusive power to discretionarily decide the matter.

[19] Notwithstanding the appointing authority of the 4<sup>th</sup> respondent and the recommendation powers of the 2<sup>nd</sup> respondent, the applicant who at the material time had a legitimate expectation to be considered for the appointment, qualified for a *fair hearing* by the 2<sup>nd</sup> respondent before it resolved to forward its withdrawal of the earlier decision that the applicant be promoted to a substantive position of a Principal. This obtains regardless of the merits or demerits of the accusations which the Board might be entertaining against him. The contemplated hearing should have in clear terms called upon the applicant to show cause (if any) why the recommendation to have him made a Principal cannot in consideration of the accusations levelled be withdrawn.

[20] The view that the applicant had a right to have been heard or the *audi alteram partem* is supported by the Administrative Law Common Law literature and the constitutionally inspired by case law decisions within the jurisdiction and abroad. The concept has as a Common Law principle has been comprehensibly explained in the following classical and rather poetic expression:

If you are a man who leads, listen calmly to the speech of one who pleads;  
don't stop him from purging his body of that which he planned to tell.  
A man in distress wants to pour out his heart more than that his case be won.  
About him who stops a plea one says: "Why does he reject it"?  
Not all one pleads for can be granted, but a good hearing soothes the heart.<sup>3</sup>

Voet describes the *audi alteram partem* rule of natural law to rest on the highest equity least a person be condemned unheard.<sup>4</sup>

[21] The *audi alteram rule* has been held to be a procedural requirement in *quasi judicial sittings* since the verdict thereof may adversely affect the existing or the prospective rights of the person who is being tried thereat or investigated. The rights at stake could relate to the status, remuneration or the legitimate expectation of the concerned person. The procedure is recognisably in rhythm with the fair trial rights under **sec 12 of the Constitution** is instrumental for the upholding of human dignity. It has in the same vein been regarded as **a value process system which does not only**

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<sup>3</sup> Instruction of Ptahhotep, from the 6<sup>th</sup> Dynasty (2300 – 2150 BC), referred to in Lawrence Baxter, **Administrative Law** Kenwyn : Juta 1984 p 539.

<sup>4</sup> Voet 2.4.1( Gane's translations) referred to in Lawrence Baxter op cit p 537.

**ensure that the substantive and the procedural prescriptions are adhered to, but that at the end of the day there is objectivity and the exclusion of arbitrariness.**

[22] However, salutary is the *audi alteram partem* principle, it is not absolute. Its application is circumscribed by the circumstances and the legislative imperatives. In the former instance, Tucker L J elucidated this legal position in **Russel v Duke of Norford [1949] 1 All ER 109** in these terms:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

[23] The legislative limitation was illustrated by the Court of Appeal in **Lesotho Electricity Corporation v Moshoeshoe LAC 1995 - 1999**. Here it was held that **S 26 (4) of the Electricity Act No. 7 of 1969 read in conjunction with S 31 (1) (a) (vii) of same**, empowered the Appellant to do the disconnection without according hearing to anyone where there has been a tempering with the supply system. The picture projected is simply that the Common Law procedure had been statutorily excluded to avert a potential electricity danger which could be occasioned by the tempering.

[24] In the instant case, the applicant is found to have legitimately developed a *legitimate expectation* that the Commission would consider the recommendation forwarded to it by the Board that he be substantively appointed as a Principal. The Board was, therefore,

procedurally obliged to have accorded him a hearing before reaching a decision to forward to the Commission a recommendation to the contrary. This should have been adhered to regardless of the latest developments which the Board could have attributed to his work performance. Even if his representations couldn't change its attitude, there must be recognition that they had been considered and that the decision was arrived at on the informed and objective reasoning but not simply arbitrarily.

[25] There are no noticeable circumstances which could justify a departure from the *audi alteram partem* principle in this case. The Court is so far, not aware of any provision in the Education Act or any other legislation in which its application has been expressively or by necessary implication been excluded. This has been considered particularly where an adverse decision is being contemplated against a teacher or any person employed under its auspices.

[26] As an *obiter* the Court observes that the Commission itself should have realized that as a repository of the powers to have accepted the recommendation for the elevation of the applicant and incidentally to take a decision on its proposed withdrawal, it should also have accorded him the hearing. This is being stated well conscientious that the acceptance of the withdrawal was done by one Commissioner and not by the Commission itself. The Court had not been referred to any provision in the Act which authorises any Commissioner to decide any matter on behalf of the Commission.

This could obtain where the law empowers the Commission to entrust its member with the execution of a specified assignment provided that there would be evidence of that special delegation.

[27] The fact is that the applicant hadn't yet been appointed as a Principal by the Commission in the exercise of the powers vested upon it under Sec. 59 of the Act. His signing of the relevant papers with the 2<sup>nd</sup> respondent didn't *per se* make him a Principal but at best a prospective one subject to the appointment by the commission itself. He had in the interim period, technically held the fort as a Principal or acted in that capacity. The subject concerning the signing of the acting service pending the appointment by the qualifying authority has been interrogated in **CIV /APN/ 291/ 04 St. Patrick High School v The Teaching Service Commission** where the signing *per se* was held not to have amounted to the appointment to the substantive position. The same has been reiterated in **CIV/ APN/ 517/11 Thaanyane Ntlenyane v Principal Secretary Ministry of Health and Another**. This is self explanatory that he cannot resultantly successfully pray that he be reinstated to the post of a Principal of the 1<sup>st</sup> respondent since he hadn't yet been crowned by the Commission to become one.

[28] It cannot be concluded that the applicant had been demoted from the post of a Principal for the reasons already advanced. This further complicates the granting of his prayer for a finding that he

has been demoted and the rest of the relieves which are connected with it.

[29] It appears incomprehensible that the applicant hasn't in the alternative prayed for the restoration of the *status quo ante* so that he would, in the event that he fails to obtain an order reinstating him to the position of a principal revert to the one which he held before the storm. The stated violation of his *audi alteram partem rule* should have been exploited for the *restoration of the status quo ante* and logically for the commensurate Court interventions.

[30] In the premises, the application fails. There is no order on costs.

**E.F.M. MAKARA  
ACTING JUDGE**

**For the Applicant** : Adv. Shale Instructed by K.M.T.  
Thabane Attorneys.  
**For the Respondent** : Adv Molapo Instructed by  
Attorneys V.M. Mokaloba & Co.