IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/245/2020**

In the matter between:

MOTHIBELI KHOJANE **APPLICANT**

AND

THE SCHOOL SECRETARY ACL SCHOOLS	**1st RESPONDENT**
THE SCHOOL GOVERNING BOARD (ST. JAMES HIGH SCHOOL	**2nd RESPONDENT**
THE PRINCIPAL ST JAMES HIGH SCHOOL	**3rd RESPONDENT**
TEACHING SERVICE COMMISSION	**4th RESPONDENT**
TEACHING SERVICE DEPARTMENT	**5th RESPONDENT**
ATTORNEY GENERAL	**6th RESPONDENT**

Neutral Citation: Mothibeli Khojane v The School Secretary ACL Schools and 5 Others (CIV/APN/245/2020) [2021] LSHC 39 (22 MARCH 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **03 MARCH 2021**

DATE OF JUDGMENT: **22 APRIL 2021**

SUMMARY

ADMINISTRATIVE LAW: *Applicant challenging his dismissal on review based on substantial irregularities- the alleged irregularities having been found unfounded, application dismissed with costs.*

ANNOTATIONS:

Books:

Harms ***Civil Procedure in the Superior Courts, Last updated*: February 2019**

Baxter ***Administrative Law*** **(1984, Juta)**

Cora Hoexter ***Administrative Law in South Africa*** **(2007, Juta)**

Legislation:

Education Act 2010

Codes of Good Practice 2011

Cases:

Koyabe and Others v Minister of Home Affairs and Others 2009 (12) BCLR (CC); 2010 (4) SA 327 (CC)

Welkom Village Management Board v Leteno 1958 (1) SA (AD) 490)

Fakie NO v CC II Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

BTR Industries SA (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673

M. M. Security (PTY) Ltd. v Bloemfontein Municipality 1968 (2) SA 6 (O.P.D)

Hlompho Mokone v National Health Training College and Another CIV/APN/283/2018 (unreported) (05th August 2019)

National Transport Commission v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726

Woolworths (Pty) Ltd v CCMA & Others [2011] 32 ILJ2455 (LAC)

[1] This is an application in terms of which the applicant is seeking to review the decision to dismiss him as a teacher following disciplinary hearing in respect of acts of misconduct against the learners. The applicant was dismissed by the 4th respondent on the 01st July 2020. The application was motivated allegedly by the following incidences:

a) That the chairperson of the disciplinary hearing investigated the case before chairing the proceedings contrary to the rules of natural justice in particular the *memo judex in causa sua* rule.

b) The applicant was not given an opportunity to controvert some of the evidence presented against him.

c) The disciplinary hearing was chaired by a person who had no authority to do so.

d) The disciplinary committee did not provide reasons for its decision to recommend his dismissal.

e) The charge sheet did not disclose with particularity how he was alleged to have committed the alleged acts of misconduct; and further that he was not given witness statements in order to allow him to prepare to meet the allegations against him.

f) The witnesses were channelled by the chairperson on what evidence they were called to give against the applicant.

g) The record of the proceedings is incomplete.

[2] This application is opposed, and before pleading over, the respondents raised the points in *limine*, *viz* (i) non-exhaustion of local remedies provided by s. 61(1) of the Education Act 2010 read with s.10 (1) of the Codes of Good Practice 2011, and (ii) misjoinder of the 1st respondent. Before traversing the merits, it is important that I deal with the points in *limine* in the order in which they have been raised.

[3] **Exhaustion of Internal Remedies**

The importance of observing the internal remedies which have been provided for in the empowering statute cannot be over emphasised: It allows for a court's deference to administrative bodies specially equipped to deal with the issues which the court may not necessarily be equally skilly equipped to grappled with. It is only once the earmarked administrative procedures have been exhausted that the court can join the fray to determine whether the decisions were reached within the requisite framework of legal processes, on review (**Koyabe and Others v Minister of Home Affairs and Others 2009 (12) BCLR (CC); 2010 (4) SA 327 (CC) at paras 36 – 37).**

[4] The approach to dealing with an issue being raised against non-exhaustion of local remedies is to have a look at the empowering statute to determine whether it requires that local remedies be exhausted or that it ousts the jurisdiction of the courts of law until internal remedies will have been exhausted. It is important to emphasise that where the challenge pertains to the illegality or irregularity of the decision-making process, the courts' jurisdiction to entertain the matter on review will not be taken as excluded or delayed **(Welkom Village Management Board v Leteno 1958 (1) SA (AD) 490)** at 503 B – D the court said the following:

"It is , I think, clear from the context in which this statement appears that what the learned Judge intended to convey was that the mere existence of a domestic remedy did not conclude the question, since it is in each case necessary to consider all the circumstances in order to determine whether a necessary implication arises that the courts' jurisdiction is either wholly excluded or, at least, deferred until the domestic remedies have been exhausted. So understood, I am in agreement with the learned Judge's above cited statement.

In my judgment, the necessary implication in question can be seldom, if indeed ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which seeks to challenge in the Courts…."

[5] Upon reading of s.61(1) of the Education Act 2010 (the Act) with s. 10 of the Codes of Good Practice 2011(the Codes), I did not find anything in the language used, which ousts or delays the determination by this court of issues raised about the illegalities or fundamental irregularities in the decision-making process. *Prima facie*, the majority of issues raised by the applicant relate to fundamental irregularities in the disciplinary hearing, and those are matters which are inherently justiciable before this court. The Act and the Codes provide for an appeal procedure which in terms or by necessary implication do not exclude or delay this court's jurisdiction to review the decisions of disciplinary committees on account of illegality or fundamental irregularities. I therefore, find that the point was not well taken and is accordingly dismissed.

[6] **Misjoinder**

It is the respondents' contention that there is no order being sought against the 1st respondent, and that for that reason it has been misjoined in these

proceedings. It is common cause that no order was sought against the 1st respondent. And, it is equally trite that only parties who have a direct and substantial interest in the order which the court might issue in the proceedings must be joined. The correct statement of the law in this regard was made by the learned author **Harms *Civil Procedure in the Superior Courts, Last updated*: February 2019 – SI 64 at B10.2 Direct and Substantial Interest,** wherein it was said:

> *"a) If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.*
>
> *b) The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection*
>
> *c) The term 'direct and substantial interest' means an interest in the right, which is the subject-matter of the litigation, and not merely an indirect financial interest in the litigation.*
>
> *d) An academic interest is not sufficient. On the other hand, the joinder of joint wrongdoers as defendants is not necessary, although advisable.*
>
> *e) Likewise, if parties have a liability, which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target.*
>
> *f) A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded*

litigation. This would be the case where the funder exercises a level of control over the litigation or stands to benefit from the litigation."

In the instant matter there is no doubt that no order is sought against the 1st respondent nor can an order of this court not be sustained or carried into effect without prejudicing it. The 1st respondent is therefore, not a necessary party and should not have been joined in these proceedings. I turn to deal with the merits.

[7] **The Merits**

a) **Chairperson of the Disciplinary Committee was Biased**:

It is the applicant's contention that the disciplinary committee's Chairperson had participated in the investigations into allegations against him. However, this contention is disputed by the chairperson who avers that she did not participate in the investigation, but rather: (at para. 6 of the Answering affidavit):

"AD PARA 7 THEREOF (GROUNDS OF REVIEW)

7.1….. The correct set of facts are that as the person in authority in the school, Applicant's head of department reported that there were complaints against the Applicant of sexual harassment to ***wit I had no knowledge of the facts pertaining to such complaint****. I then directed the head of department to engage the disciplinary processes as outlined in the Codes of Good Practice 2011. I did not know or influence the head of department on what route to follow…"(emphasis added)*

[8] Although the chairperson's response would seem to raise a dispute of fact, as a matter of fact the deponent is not being candid with this court, to put it more bluntly, she is being too casual with the truth. It is not true that she did not have knowledge of the circumstances surrounding the applicant

prior to institution of disciplinary proceedings. In fact, when the allegations were relayed to one Mrs. 'Mateboho by the girls, she in turn undertook to "take them to the office." It is common cause the "office" being referred to here, was the School Principal's Office which at the time was occupied, in an acting capacity, by the Chairperson of the disciplinary committee Ms. Thato Koeete. This is common cause as this information emerged during the testimony of witness number 2 (W2) 'Makhotso Nkabi who testified as follows (at p. 160 of the record):

> *"W2: She told me that her friend Tsili was talking with Sir Khojane on the phone. And she said even Pontšo said he was proposing her. Then we meet other girls and go to 'M'e [Mrs] 'Mateboho. When we arrive Mokaba told her what happened in the lab yesterday. She said to us she will take them to the office. Then we were called in the office 9 of us. We told 'M'e [Mrs] Thato everything." (sic)*

[9] It is common cause that Ms. Thato being referred to here is the Chairperson of the disciplinary committee, the deponent to the answering affidavit and the then acting school principal. It is not true that the chairperson did not know about the allegations against the applicant, she was personally apprised by the girls of the allegations against the applicant. Beyond what W2 says about the chairperson's involvement, it is clear that the latter did not participate in the investigations, she being the acting school principal was apprised of the allegations against the applicant by the girls with the help of Mrs. 'Mateboho Morai, who incidentally was the investigator in the matter. These being motion proceedings, the respondent's version of the Chairperson that she did not undertake investigations is to be preferred, given that it cannot be said it is untrue, far-fetched or that it is so clearly untenable that it can be rejected on papers. (**Fakie NO v CC II Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** para.55**).**

[10] In the instant matter, the applicant is not relying on the actual bias of the Chairperson, rather on the appearance of partiality given that she was apprised of the allegations against the applicant before she could chair a disciplinary enquiry into the allegations. In order to succeed to disqualify the chairperson it must be shown that there is an existence of a reasonable suspicion of bias (**BTR Industries SA (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673** pp. 690 – 695B**).** The applicant's case rests on the existence of bias based on the subject matter or prejudice. Prejudice arises in circumstances where the decision-maker has past or present relationship with one of the parties, or based on his/her past activities, or current external commitments, or the manner of conducting the proceedings (**Baxter *Administrative Law* (1984, Juta) at p.564).** In the context of this case it must be borne in mind that the allegations against the applicant were of a serious nature, and naturally, Mrs. Morai being the first teacher to be approached by the girls was bound to apprise the school principal about the allegations. The School Principal being a teacher herself would naturally summon the students to come and relate the allegations to her. She did not investigate the matter but was apprised of the allegations. The investigations were conducted by Mrs. Morai. The question to be answered is whether, for the limited role the chairperson played in hearing the stories of the complainants beforehand, that is enough to give a disqualifying appearance of bias against her?

[11] I do not find the incident under scrutiny to be evidence of appearance of bias. The chairperson did not conduct the investigations, she merely was related the first-hand account of the allegations against the applicant and thereafter earmarked Mrs. Morai to investigate the matters further and to kickstart the disciplinary processes due to the seriousness of the

allegations. It is without doubt that, the chairperson, as the school principal and a teacher, stands *in loco parentis* to the girls, and therefore, has an interest in the disciplinary proceedings against the applicant, but that cannot be elevated to the level of prejudice which disqualifies her from chairing the proceedings. I am fortified int his conclusion by what was said by De Villiers, J in **M. M. Security (PTY) Ltd. v Bloemfontein Municipality 1968 (2) SA 6 (O.P.D)** at p. 12 C – D:

> *"Furthermore, the authorities indicate that a mere general interest in the object to be pursued by a tribunal is not such bias as to disqualify. A Magistrate for instance who subscribes to the S.P.C.A. is not thereby disabled from trying a charge brought by that body for cruelty to a horse. There must be some direct connection with the litigation. There must be facts, not merely of a general nature, but in respect of the member of the tribunal in his relationship with the parties appearing before the tribunal. It is insufficient to establish facts from which, vaguely, a bias may be conjectured …."*

I have already alluded to the uniqueness of the relationship between all the role-players in this case: the case involves a teacher who was accused of sexual misconduct against young girls who happened to be his student; the chairperson of the disciplinary committee, by virtue of her position was bound to have been apprised of such serious allegations- as happened in this case; the school did not have a substantive principal and so, the chairperson who was the applicant's immediate supervisor, in the ordinary scheme of things, had to chair the enquiry. This point is without any merit and is dismissed.

[12] (b) **<u>The Applicant not given an opportunity to cross-examine the witnesses:</u>**

The context in which this allegation arose is that during the proceedings, when one of the witnesses was about to be called in the applicant demanded that he be given her written statement and also requested some minutes' adjournment which was granted. To be precise it was when witness No.3 was about to take the stand. The applicant had all along participated in the proceedings without making a demand for witness statements but this time around he raised a spirited objection to the witnesses being called in without him being given their statements. He threatened that if those statements were not availed to him, he would not partake in the proceedings. He was given minutes adjournment he requested but never came back, and witness No.3 gave evidence in his absence. So, the context in which the applicant could not cross-examine W3 is as described in the preceding lines and is linked to his protest for not being given witness statements. This protest was ill-advised, and he is solely to blame for W3's evidence having gone unchallenged, as will be shown. This court had an occasion to deal with a similar situation in the matter of **Hlompho Mokone v National Health Training College and Another CIV/APN/283/2018 (unreported) (05th August 2019)** wherein it was said, at para 10:

> *"[10] ...[T]he accused in a disciplinary hearing generally, does not have a right to be furnished with documentary or witness statements. It is enough that he is given an adequate opportunity to examine and evaluate the statements or documentary material during the hearing. Of course, there may be circumstances where depending on the complexity or intricacy of material contained in such documentary evidence that it will only be fair to provide the accused with same prior to the hearing, and for purposes of saving time which may be wasted by the accused asking for postponement to fully study such complex documentary evidence."*

[14] And further at para. 11, the court said:

> *"[11] In casu, it is not the applicant's case that he did not understand the charges which were preferred against him. His complaint against the disciplinary panel is that it ruled against his request to be provided with witnesses statements. It will be observed that after the chairman of the panel had ruled against his request, applicant and his counsel walked out of the hearing, and the hearing proceeded in their absence. My considered view is that the applicant did not have a right to be given witness statement. He was sufficiently made aware of the charges against him and for him to insist on being provided with witnesses statements where none existed is quite misguided. No unfairness was occasioned by this …."*

In the instant matter the same conclusion as the one reached above, should be reached. The applicant is to blame for the evidence of W3 going uncontroverted because of his misguided insistence of being provided with non-existent witnesses' statements. The applicant was not entitled to witnesses statements where none existed.

[14] (c) **<u>Committee chaired by person with no authority:</u>**

This point is without merit because though in terms of the Codes, the disciplinary proceedings against the applicant ought to be chaired by his immediate supervisor was also acting as the school principal. The chairperson of the committee had authority to chair the proceedings.

[15] (d) **<u>The decision invalid or irregular for failure to provide reasons:</u>**
The applicant's contention in this regard as appear in para 7.4 of his founding affidavit is couched as follows:

"7.4 The decision is invalid and/or irregular owing to the committee's failure to provide reasons for its decisions. The chairman only held that I am found guilty on the evidence presented without disclosing what findings were made and on which facts and/or evidence. This was actuated by malice."

At common law there is no general duty to give, and the right to reasons for administrative action except in certain defined circumstances, such as reasons for arrest (**Cora Hoexter *Administrative Law in South Africa* (2007, Juta) at p. 419).** However, this notwithstanding, courts are prepared to draw negative inferences from the failure to provide reasons if such a failure is indicative of the existence of a reviewable ground such as illegality (**National Transport Commission v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A)** at 736G). In the instant matter the applicant makes a conclusion that the absence of reasons of indicative of malice on the part of the committee, but that conclusion is not drawn from any evidence other than the absence of reasons itself. It cannot be malicious not give reasons when no such duty to do so exist. The absence of the reasons in and of itself cannot be the basis for inferring malice, such absence of reasons must be adjudged in conjunction with other factors for it to add weight to the inference of malice. In the instant case, malice is deduced solely from the failure to provide reasons without more. Failure to provide reasons. In **National Transport Commission v Chetty's Motor Transport** (ibid) 736G the court said:

"It is apparent from the foregoing that a body such as the Commission, by not giving reasons, runs the risk of an adverse inference being drawn, depending on the circumstances of the case. At the final stage the Court takes into account the papers as a whole, and if an adverse inference can be drawn from the absence of reasons, such inference is weighed together with all the

other factors in totality of the case, in deciding whether there is proof, upon a preponderance of probability, of the arbitrariness, etc., averred against the Commission."

In the result this point is found to be without substance and is dismissed.

[16] (e) **Decision reached invalid and/or unfair for failure of the charge sheet to disclose the full particulars of the charge:**

It is trite that drafting of charges and the conduct of disciplinary proceedings should not be done with the same strictness demanded in criminal proceedings. The correct position of the law as regards particularity of charges in disciplinary hearings was articulated in the matter of **Woolworths (Pty) Ltd v CCMA & Others [2011] 32 ILJ2455 (LAC)** where it was said:

"[32] Unlike in criminal proceedings where it is said that "the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient," the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, is it to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux and Van Niekerk where the learned authors offer a suitable example, with which I agree:

'Employees embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.'"

[17] In the instant matter, when the charges were read to the applicant at the commencement of the proceedings, and when asked by the Chairperson of the Committee whether he understood them, his answer was in the affirmative, and evidence was led. I find it opportunistic for the applicant to be crying foul this late that the charges were not drafted with sufficient particularity to enable him to prepare for trial when he said he understood what charges he was expected to answer. If the charges were not clear he would have said so as he had shown an inclination and fearlessness in raising objections about issues he felt strongly were not in compliance with the requisite legal standards. This point was not well taken and is therefore, dismissed.

[18] (f) **Witnesses channelled by the Chairperson:**

This line of attack against the Chairperson falls to be rejected as well. It must be borne in mind that the complaints against the applicant were laid by his students, who happened to be young girls who would naturally be easily be intimidated by the applicant's robust questioning. So, what the chairperson did was to direct that the witnesses' questioning be done through her, in a way acting as an intermediary between the witnesses and

the applicant in order to soften the blow of the applicant's cross examination. This sort of conduct on the part of the chairperson is commendable and should not be decried. I found the applicant's attack in this regard to be meritless and is therefore dismissed.

[19] (g) The other ground of attack that he was convicted on an incomplete record of proceedings is rejected as unfounded as well because he does not even provide the details of the information he says is missing from the record. He merely makes this wild allegation without any factual grounding.

[20] In the result the following order is made:

(a) The application is dismissed with costs.

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MOKHESI J

For the Applicant:	**ADV. N. NAHA Instructed by Thabane and Co. Attorneys**
For the 1st, 2nd and 3rd Respondents:	**ADV. L. MOLAPO Instructed by C. T. Poopa Attorneys**
For 4th, 5th and 6th Respondents:	**ADV. MAKHOALI from the Attorney General's Chambers**