IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/52/2019**

In the matter between:

'MALECHESA NTHULENYANE **APPLICANT**

VS

PRINCIPAL SECRETARY MINISTRY OF EDUCATION **1st RESPONDENT**

PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE **2nd RESPONDENT**

DIRECTOR OF HUMAN RESOURCE MINISTRY OF EDUCATION **3rd RESPONDENT**

ATTORNEY GENERAL **4th RESPONDENT**

TEACHING SERVICE COMMISSION **5TH RESPONDENT**

Neutral Citation: `Malechesa Nthulenyane v Principal Secretary Ministry of Education and Others (CIV/APN/52/2019) [2021] LSHC 52 (17 JUNE 2021)

SUMMARY

ADMINISTRATIVE LAW: *The propriety of the administrative decision-maker to correct its own decision it perceives to have been taken irregularly or*

unlawfully- Held, the Courts of law are the final arbiters of legality of administrative decision-making process not the administrators themselves.

JUDGMENT

CORAM: **MOKHESI J**
DATE OF HEARING: **29 APRIL 2021**
DATE OF JUDGMENT: **17 JUNE 2021**

ANNOTATIONS

Legislation:

Education Act no.3 of 2010

Teaching Service Regulations 2002

Books:

Du Plessis & Fouche, **2006. A Practical Guide to Labour Law, 9**

A C Basson *et al* **Essential Labour Law 4th ed: A new Combined Edition in one Volume**

Cases:

Oudekraal Estates (Pty) Ltd v City Town 2004 (6) SA 222 (SCA)

Merafong City Local Municipality v Anglo Gold Ashanti Limited [2016] ZACC 35

MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd [2014] ZACC 6: 2014 (3) SA 481 (CC)

Mothobi and Another v The Crown LAC (2009 – 2010) 465

Khumalo and Another v MEC for Education: Kwazulu Natal (CCT10/2013) [2013] ZACC 49; 2014 (3) BCLR 333 (CC): (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC)

Department of Transport and others v Tasima (Pty) Ltd [2016] ZACC 39; 2017 (1) BCLR1 (CC); 2017 (2) SA 622 (CC)

[1] **INTRODUCTION**

This is an application in terms of which the applicant is seeking an order that she be paid arrear salary and other incidental matters. It must be stated that both counsel mischaracterised the nature of this application with the result that authorities cited in support of their respective cases were unhelpful. They argued the matter from the perspective of the contract of employment, but as will be seen, this matter concerns the legal propriety of the administrative decision- maker's decision to correct its own decision it perceives as illegal or having been irregularly taken.

[2] **FACTUAL BACKGROUND**

The applicant is a teacher by profession and is employed as such at the Government school by the name of St. Barnabas High School. What is in contention is when she was employed by the 5th respondent (Teaching Service Commission) and whether she is entitled to salary arrears. The 5th respondent, on the 3rd August 2017, as evidenced by the 5th respondent's minutes of its meeting held on the 18th August 2017 made a decision to employ the applicant as a teacher at St. Barnabas High School with effect from 03rd August 2017 (hereinafter ' the first appointment'). On this latter date, the applicant resumed her duties as expected. The 5th respondent had made the decision to appoint the applicant following the recommendation by the school board. Consequent to her appointment, the applicant continued to render her services for fifteen months without being paid. She was supposed to have been paid at a salary scale 4, entry point 66.

[3] The 5th respondent, at its sitting held on the 26th July 2018 decided to rescind its earlier decision to employ the applicant as a teacher, citing

procedural irregularities in the initial appointment. The minutes of the said meeting regarding the applicant's appointment were couched as follows:

> *"Nthulenyane 'Malechesa – St Barnabas High*
>
> *The Commission noted that it had appointed the above mentioned Teacher at the above mentioned school on the 18/08/2017. The Commission reviewed the appointment and noted that whereas the then prevailing circumstances justified her engagement, the appointment was not effected on grounds that the position was not advertised. The Commission therefore rescinded its decision to employ the Teacher forthwith.*
>
> *Confirmed by the Commission: - Signed*
> *Chairperson*
>
> *Date: 32/07/2018"*

Following the above decision, a contract was subsequently drawn up employing the applicant as a teacher on the 01st November 2018 at the same school. Effectively what the 5th respondent did was to seek to regularise the applicant's supposedly irregular appointment. This time, unlike with the earlier contract, the contract was signed by both the applicant and the relevant functionary in the Teaching Service Department. This notwithstanding, the applicant had not sat on her laurels but had vigorously pursued the matter of unpaid salary with the relevant authorities but to no avail. Her failure to convince the authorities that she was entitled to be paid her arrear salaries culminated in the lodging of the instant matter on the 13th March 2019. The matter was allocated to Peete J. who has since gone on a statutory retirement, hence its re-allocation to me on the 09th November 2020.

[5] This matter is opposed. The respondent had raised a so-called point *in limine* of misjoinder of the Teaching Service Commission. When Adv. Metsing for the applicant appeared before me I directed him to join the Teaching Service Commission as it has a direct and substantial interest in the order this court will ultimately make in this matter. The Teaching Service Commission was accordingly joined after the application for its joinder was moved and went unopposed. Despite being joined, the 5th respondent did not file any additional answering affidavits. As matters stands, the only affidavit filed of record is the answering affidavit of the chief accounting officer in the Ministry of Education – Principal Secretary of the Ministry('PS').

[6] The said answering affidavit of the PS sets the tone for the basis of both the applicant and the respondents' cases. The PS's basically advances the same reasons advanced by the 5Th respondents when it reviewed its decision to employ the applicant as a teacher. It is apposite to reproduce what PS – Dr. Thabiso Lebese says in his answering affidavit at para. 8:

> *"8.3 I assert that after the teacher namely Francis Okyere found the job at the National University of Lesotho, the school, made unlawful arrangement by causing the Applicant to fill the vacancy of the said teacher without the knowledge of the TSC. This was contrary to the fact that wherever there is a vacancy of a teacher, such should be advertised. Subsequent to that, the Commission made the decision to employ the applicant when the position was not been advertised. I aver further that such decision to employ the applicant was unprocedural as it was not in compliance with the Education Act 0f 2010 that every position should be advertised.*
>
> *8.4 On the 26th July 2018, in its sitting, the TSC alerted itself of the irregularities and decided to review and rescind such decision to*

employ the applicant on the justifiable ground that the position was not being advertised. Herein attached is the copy of the minutes of Teaching Service Commission and are marked "TSC1" for ease reference" (sic)

[7] **ISSUES FOR DETERMINATION**

(1) Whether the applicant is entitled to be paid salary arrears starting from the 03rd August 2017 to November 2018.

[8] In order to determine this issue, it must firstly be established whether the 5th respondent has a right to correct its administrative decision it perceives to have been taken irregularly or illegally. But before I do that, I should first clear a certain misconception out of the way, which seemed to have permeated the respondents' thinking. The respondents contend that because, in respect of the first appointment, there was no written and signed contract of employment when the applicant, no contract of employment existed. That is not correct. A contract of employment has been described as:

"….[A] reciprocal contract in terms of which an employee places his services at the disposal of another person or organisation, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee's services. **(Du Plessis & Fouche, 2006. A Practical Guide to Labour Law, 9**

[9] Like any contract, a contract of employment must be entered freely and voluntarily. At common law no formalities are required for conclusion of this type of a contract, however, out of this type of contract, however, out of sheer prudence and for provision of certainty as regards the contractual

terms and other incidental matters, the common practice has been to draw up a contract and to have parties sign for it. This point was made clear by the learned authors A C Basson *et al* **Essential Labour Law 4th ed: A new Combined Edition in one Volume,** at p. 38, where the learned authors say:

> *"It is a common misconception that employment contracts must also be in writing…. Of course, for the sake of clarity and certainty about contractual rights and obligations, it is always prudent to conclude a written employment contract. But there is, generally speaking, no requirement that an employment contract must be in writing to be valid and binding. An oral employment is as binding and valid as a written one…"*

[10] Of Course, a point of departure, despite the general rule that a contract of employment need not be in writing for it to be valid, will always be the legislative provisions governing such an employment, and in our case, it is the Education Act of 2010 (the Act) and Teaching Services Regulations of 2002(Regulations). I have carefully perused these two pieces of legislation and I have found nothing in them which remotely suggests that a contract must be in writing for it to be valid. The only thing I could find is that, the Regulations provides a form an application for a teaching post must comply with, as well as the procedure for lodging same. Also, in terms of Regulation 9 (9) the applicant must be informed of his or her appointment as a teacher in a form set out in schedule 8. This form is signed by Secretary Teaching Service Department and should provide details of the terms of employment. It is then sent to the appointed teacher for his or her acceptance by appending his or her signature that she accepts the appointment. Other than this there is nothing in the Act and Regulations which states that a contract of employment will only be binding and valid

once reduced into writing and signed by the parties. It follows that the argument by the 1st respondent that the applicant's appointment on the 3rd August 2017 was invalid, among others, for not having been reduced into writing and signed by the parties, has to be rejected as ill-conceived.

[11] With this out of the way, I now revert to the topical issue, i.e., whether the 5th respondent has a right in law to correct its perceived irregular or invalid administrative decision to appoint the applicant as a teacher on the 03rd August 2017. It is an established principle out law as espoused in **Oudekraal Estates (Pty) Ltd v City Town 2004 (6) SA 222 (SCA)** at para. 27 **(Oudekraal)** that "an unlawful act can produce legally effective consequences." It first blush, this statement would seem to present a problem or an anomaly as to how an unlawful act can possibly produce legally effective consequences. This was explained in **Merafong City Local Municipality v Anglo Gold Ashanti Limited [2016] ZACC 35 (Merafong)** at para.36, where Cameron J, said:

> *"[36] ....[T] the central conundrum of Oudekraal, that' an unlawful act can produce legally effective consequences' is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it. This leads to a corollary, which this court recognised in Giant Concerts, that an own-interest litigant may be denied standing 'even though the result could be that an unlawful decision stands' ."*

The proper approach to make in these matters was outlined in **Oudekraal** at para.31 where the court said:

> *"[T]he proper inquiry in each case- at least at first- is not whether the initial act was invalid, but rather whether its substantive validity was a necessary precondition for the validity of subsequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."*

The logic is simple, the courts still do recognise that unlawful acts must be declared as such, but that such a declaration must be made in appropriate proceedings for review and not through self-correction by the administrative body. The administrative body cannot just ignore an apparently binding decision it took on the basis that it was invalid. This presumptive or holding position is maintained for rule of law reasons so as to prevent self-help and to avoid anarchical or arbitrary governance. Whether the decision is invalid or not is not a decision to be made by the administrative body itself, but the courts of law through proceedings for judicial review. The principle has been buttressed in **MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd [2014] ZACC 6: 2014 (3) SA 481 (CC) (Kirland).**

[12] In **Merafong**, the court aptly articulated the principle of non-ignorance as follows, at paras. 41 – 42.

> *"[41] The import of **Oudekraal** and **Kirland** was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.*

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully referring to ***Kirland,*** *in* ***Economic Freedom Fighters.*** *He pointed out our constitutional order hinges on the rule of law:*

'No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help.' Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision maybe disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'"

[13] The principles articulated in **Oudekraal** are part of the law in this jurisdiction as it was adopted as such in **Mothobi and Another v The Crown LAC (2009 – 2010) 465** at 472, wherein, Scott, JA said:

"….Various grounds have been advanced to justify this apparent departure from the doctrine of legality. It has been said that by reason of the evidential presumption of validity, the administrative act is presumed to be valid until it is found to be unlawful. The rule has also been justified on the grounds of delay and the need for certainty. Yet another justification is that an invalid administrative act may, notwithstanding is invalidity, serve as the basis of a subsequent valid act because it is the factual existence rather than its invalidity that is the cause of the subsequent act. See Oudekraal Estates (Pty) Ltd v City pf Cape Town,

supra, at 242 C – 243 F paras 27 – 29. But it is also well recognised that in certain circumstances the validity of an administrative act can be challenged not only directly in review proceedings but also indirectly or, as it is sometimes said, collaterally …"

[14] In **Khumalo and Another v MEC for Education: Kwazulu Natal (CCT10/2013) [2013] ZACC 49; 2014 (3) BCLR 333 (CC): (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC),** the court recognised that the state functionaries are entitled seek a judicial review of their own decisions. In that case the MEC (applicant), instead of unilaterally self-correcting, had challenged, in review proceedings, the legality of her department's administrative decisions to promote the respondents. Although the MEC lost the case on certain technical grounds, the case exemplifies the correct approach to challenging an invalid or irregular administrative decision in the employment setting.

[15] In the present case it is common cause that what the respondents are having problem with is the initial decision of the school board to recommend the employment of the applicant. In terms of s.42 of the **Education Act no.3 of 2010**, the power to promote, transfer and to hire teachers reposes in the 5th respondent. The 5th respondent's power to hire a teacher is on recommendation from the school board or management committee acting under Regulation 18 of the **Teaching Service Regulations 2002**, after the post will have been advertised and interviews conducted by the school board. The 1st respondent attacks the applicant's first appointment on the basis that the 5th respondent did not know about the vacancy and that the said vacancy was not advertised. I will assume that the vacancy was not advertised because the applicant did not deal with the averment issuably in her replying affidavit. Granted that the vacancy was not advertised as it

was required by the law, the 5th respondent did act on the recommendation to appoint the applicant. The power of the 5th respondent to appoint the applicant, was however, not dependent on the validity of the decision of the school board to recommend the employment of the applicant but on its factual existence. As already said, the 5th respondent has an exclusive statutory power to hire teachers.

[16] With this in mind, was the 5th respondent correct in ignoring the decision it made on the on the basis of recommendation of the school board merely by reason of the fact that the initial decision was unlawful or irregular? All the above cases demonstrate without a shadow of a doubt that an administrative decision-maker cannot self-correct. The final arbiter of legality being the courts of law, should be the first port of call to challenge the apparently invalid decision. It follows that when the 5th respondent made the decision to correct its earlier decision to appoint the applicant as a Senior Teacher on the 03rd August 2017, it acted contrary to the principles laid out above. In the instant matter, the respondents did not make even the slightest attempt to challenge the decision to appoint the applicant to the post. The 5th respondent behaved as thought it was justified to correct its own decision it perceived to be unlawful; that it was not entitled to do. The 5th respondent's decision to appoint the applicant as a Senior Teacher on the 03rd August 2017 stands until set aside, and it has legal consequences, and those legal consequences are that given that the applicant acted on the strength of the appointment and rendered her services as required, it follows therefore, that she must be paid her arrear salaries for the period she was not remunerated for the services rendered. The applicant worked unpaid for fifteen (15) months.

[17] **REACTIVE CHALLENGE BY THE PUBLIC FUNCTIONARY**

The respondents have raised a point of the applicant's unprocedural appointment in their answering affidavits. The question to be answered, therefore, is whether the court is entitled to consider the respondents' objections to the applicant's appointment in the absence of a counter application seeking to review same. The rights of state organs to mount a reactive or collateral challenge to the lawfulness of the administrative actions is recognised in our law. It may be invoked where circumstances allow for it (see: **Merafong** (supra) at para. 82; **Department of Transport and others v Tasima (Pty) Ltd [2016] ZACC 39; 2017 (1) BCLR1 (CC); 2017 (2) SA 622 (CC)** para. 140). The import of the principles espoused in **Ouderkraal** and **Kirkland** and the right of the public functionaries to mount reactive challenges was articulated in **Merafong**, as follows:

> *"[43] But it is important to note what Kirland did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action indefinitevely effective. It expressly recognised that the Ouderaal principle puts provisional brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that he allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reason, the decision stands*
>
> *[44] Oudekraal and Kirland did not impose an absolute obligation or private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court*

proceedings to challenge an administrative decision, public authorities are obliged to accept it as invalid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.

…….

[55] Nevertheless, our case law offers little support for a rigid doctrinal limitation upon the viability of a reactive challenge. While reactive challenges, in the first instance, and perhaps in origin, protect private citizens from state power, good practice sense and he call of justice indicate that they usefully be employed in a much wider range of circumstances….Reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts."

[18] As the above excerpt tells us, it is not all in situations where a private person or a public functionary will be expected to mount a reversionary challenge to an invalid administrative act. There are situations where the public functionary will be justified to ignore and treat the decision as invalid where the validity of a subsequent act is dependent on the validity of the initial act and not merely on its factual existence. This principle was at play in this jurisdiction in **Mothobi and Another v Crown** (supra) where the Chief Justice had by means of a directive, as an administrator of the court coerced the magistrates to hear a certain application in a situation where their jurisdiction was ousted by the constitutional provision (S. 128(2)) until a constitutional question referred by the magistrate was decided upon. Instead of deciding the question referred to the High Court, the Chief Justice issued a directive coercing the magistrates to hear the matter contrary to the constitutional ouster of the magistrate courts' jurisdiction to hear the matter while the question stood referred to the High Court. The Court of Appeal recognised that the magistrate was entitled to ignore the directive because its jurisdiction depended on the validity of the directive and not merely on the fact of its existence. Had the magistrate

court succumbed to the coercive action of the Chief Justice, he would have acted unconstitutionally.

> *"[15] The effect of the referral in the present case was to deprive the Magistrate's Court of jurisdiction to hear the case against the appellant until such time as a decision had been given by the High Court. This much is clear from S. 128 (2) of the Constitution. Likewise, it is clear that the Chief Justice exercising his administrative powers to regulate the running of the Court is not "High Court" within the meaning of the section. Given the conflict between the directive on the one hand and S. 128 of the Constitution on the other, there can be no basis for presuming the directive to be valid; nor could the acceptance of its validity be justified on the grounds of the need to certainty or the avoidance of delay in making challenge … In my view, therefore, this is a situation where the collateral challenge as to the lawfulness of the directive as permissible and the Magistrate was entitled to ignore the directive in favour of the explicit terms of S. 128 of the Constitution."*

[19] The answer to the question whether the respondents should be allowed to challenge the school board's decision to recommend the appointment of the applicant without launching a counter application for nullifying same, was answered in the negative in **Kirland.** The basis for this approach has been explained as giving the public functionary an opportunity to explain why it could not at the earliest opportunity seek to review the impugned decision. In the present matter the 1st respondent, only contended himself with raising the fact of the applicant's unprocedural appointment in his answering affidavit. Contrary to **Kirland,** there was no counter application filed to set aside the applicant's initial appointment. In the instant case, the 5th respondent took matters into their hands and decided to correct the supposed irregularity, instead of resorting to the courts to pronounce

themselves on the legality of the applicant's appointment. What the 5th respondent did was an act of self-help which should not be countenanced. As seen from the authorities discussed above the 5th respondent was not entitled to do so. The applicant had rendered her services pursuant to this appointment, for fifteen months. The respondents did not challenge the recommendation for her to be appointed, and do, in the absence of a counter application, this court is denied an opportunity to be told by the respondents why they did not challenge their decision for fifteen months and until the applicant had lodged the present application on the 13 March 2019. This long delay ought to have been explained in the counter application in order to give the applicant an opportunity to deal with it. The applicant is still a substantive holder of the same position after being subsequently 'regularized' as such in 2018.

[20] **INTEREST RATE**

The applicant is seeking interest on the amount claimed at the rate of 18.5% p.a. from the 3rd day of August 2017 up to final payment. Conspicuous by its absence from the applicant's papers, is the basis for claiming interest at this rate. It appears to me to be an arbitrary figure other than one which is informed by economic reality. The has been held in **Commissioner of Police and Another v Ntlo-Tšoeu LAC (2005 – 2006)** 156 at 161 E – F) the interest rate applicable in the absence of legislation regulating same, should be the servicing rate provided by the Central Bank over the relevant period, with a minimum of 6%.

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

(a) The 1st respondent is ordered to pay, or cause to be paid, applicant's salary arrears at scale 4 entry point 66 from the 3rd day of August 2017 to 31st day of November 2018.

(b) The 1st respondent is to pay interest, or cause to be paid, on the amount in paragraph (a) above, at the approximate average of the serving rates provided by the Central Bank over the relevant period with a minimum of 6%.

(c) The 1st respondent is ordered to pay costs of the application.

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MOKHESI J

For the Applicant:	**ADV. METSING Instructed by K. D. Mabulu Attorneys**
For the Respondents:	**ADV. MOHLOKI Instructed from the Attorney General's Chambers**