

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 125/96

HELD AT MASERU

IN THE MATTER OF:

SEEISO MOFOKA

APPLICANT

AND

LESOTHO EVANGELICAL CHURCH
SILOE HIGH SCHOOL

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

The applicant is suing the first respondent herein as a result of the refusal by the Educational Secretary responsible for first respondent's schools to approve his contracts of employment with two of the respondent Church's schools. The relief sought by the applicant is found in paragraph 3(3) of his originating application and it is that;

“ the court (should) order Tiheli (Educational Secretary of 1st respondent's Schools) to reinstate applicant in both schools and pay salary as applicant would have earned if appointment had gone through in both schools.”

The concerned schools are Boribeng High School and Seqobela Secondary school. The applicant has, however, annexed only the contract that was proposed to be entered into with Boribeng High School.

Mr. Tiheli on the other hand argued that the church has been wrongly cited as respondent, as he is himself the correct person to have been cited in his capacity as the Secretary of all 1st respondent's schools. He applied at the hearing hereof that he be substituted for the 1st respondent. Whilst not objecting that Mr. Tiheli be joined Mr. Mofoka objected to his substitution for the first respondent. The court is of the view that Mr. Tiheli should, as he has applied, be substituted for the first respondent, because even the relief being sought by the applicant is against him i.e.

the Educational Secretary. There is not the slightest reason why the Church has been cited. In the premises we agree that the Educational Secretary be substituted for the 1st respondent as the respondent.

The second respondent is being sued for allegedly refusing to issue applicant with the certificate of service in terms of section 77(1) of the Labour Code Order 1992(the Code). Mr. Tiheli again applied to be permitted to represent the second respondent, because as he argued, the second respondent is also first respondent's school for which he is responsible as Secretary of 1st respondent's schools. Mr. Mofoka objected to this application on the ground that Mr. Tiheli has not filed an authority to represent. There is no invariable rule that every party appearing before this court should file an authority to represent for such party to be properly represented. Cases requiring the filing of Authority to Represent are those specifically covered under section 28(1)(a) and (b) of the Code. Those are cases of representation by an officer, or employee of a trade union or, of an employers organisation, or a legal practitioner. Clearly the case of the second respondent falls outside the scope of rule 26 of the rules of Court as that rule only refers to persons represented as specified in section 28(1)(a) and (b) of the Code. In the premises we see no reason for refusing Mr. Tiheli's request to represent the second respondent.

Going back now to the case of the first respondent it was Mr. Mofoka's contention that Mr. Tiheli interfered with his appointment by the said two schools contrary to the regulations. He argued that in terms of regulation 82(1)(i) of The School (Supervision and Management) Regulations 1988, the power to appoint and remove teachers is vested in the Board. He argued further that the Educational Secretary has no role in the appointment process as he is not a member of the Board. His role is merely to rubber stamp the decisions of the Board, he contended.

He submitted further that the sixth schedule which prescribes the contract of employment of teachers is ultra vires the Principal legislation namely; the Education Act No. 10 of 1995, to the extent that it seeks to vest powers of approval of the appointment of teachers in the Educational Secretary. He contended further that in effect Mr. Tiheli gave himself those powers whilst he was the Minister of Education, because he knew he would revert to his position of Educational Secretary, as he has indeed done.

It must be pointed out from the onset that the School (Supervision and Management) Regulations do not deal with the appointment of teachers. Regulation 82(1)(i) merely gives the Board the power to “*appoint and remove teachers*” without elaborating how that power will be exercised. The Teaching Service Regulations 1986 are the ones that deal extensively with the appointment, removal and the terms and conditions of service of teachers. These are the same regulations which prescribe the contract form for the employment of teachers.

Our understanding of the relief sought by the applicant is that he wants the court to compel the Educational Secretary to approve his appointment by the two schools. In terms of section 43 of the Education Act 1995;

“The power to appoint, promote, demote, transfer, discipline or remove from office a teacher other than a teacher whose salary is paid by the Government shall vest in the relevant Educational Secretary or relevant Supervisor.”

Regulation 5(4) of the Teaching Service Regulations provide that;

“ A teacher’s contract shall be prepared substantially in the form prescribed in the Sixth or Seventh schedule subject to such modifications as may be necessary in particular circumstances and shall be entered into before the assumption of duty by the teacher.”

The schedule is divided into five sections. Section IV provides for the signatures of a teacher being proposed to be appointed and the Manager. However, the preamble to this section states that :

“ this contract is subject, as appropriate, to the approval of the Educational Secretary or Supervisor in the case of controlled Schools.”

The preamble states in clear and unambiguous terms that the signatures of the Manager and the teacher do not conclude the contract. Mr. Tiheli submitted correctly in our view, that the applicant signed the contract with that clear understanding that until he, as the Educational Secretary had signed the contract, no deal had been struck. That Mr. Tiheli gave himself powers of veto while he was Minister of Education knowing he would revert to the position of Educational Secretary is not an argument that can be taken seriously. It is a wild, baseless allegation bordering as it does, on character assassination.

The allegation that the regulation vesting Educational Secretary with powers of approval of appointment of teachers is ultra vires has not been proved as no section of the Principal legislation was pointed out which disallow such powers being vested in the Educational Secretary. If anything the regulation is unequivocally supported by section 43 of the Act which goes beyond mere approval, but gives the secretary powers of appointment, promotion, demotion, discipline and removal of teachers. We are not persuaded, therefore, that the regulation vesting the Educational Secretary with powers of approval of appointment of teachers is ultra vires or that the Educational Secretary had no authority to interfere with applicant’s appointment as that is clearly provided for by the regulations.

The applicant contended in the alternative that, even if the Educational Secretary had power to block his appointment, it was not fair that he did so without affording

him a hearing. Section 66(4) of the Code which provides for a hearing in cases of termination of contract for misconduct or incapacity applies only to employees as defined in the Code, not prospective employees. Until his contract had been signed by all authorised officers, applicant's employment had not yet gone through and he cannot therefore, claim a right to a hearing as if he was an employee.

As we said the relief being sought by the applicant is that the Educational Secretary be compelled to approve his appointment. In his answer the Educational Secretary submitted in paragraph 2 (b) (i) that;

“this court is not empowered to compel a prospective employer to employ an applicant for employment.”

We are in full agreement with this submission. At common law an employer cannot be compelled to sign on an applicant for employment. The Code has only narrowly varied this common law position and that is in respect of persons who are discriminated against in employment because such persons are members, officers or trustees of a trade union. (see section 196(1) of the Code).

As it can clearly be seen the regulations give the Educational Secretary such a pivotal role in the process of employment of a prospective teacher that it cannot be argued with seriousness that the role of the Educational Secretary is to rubber stamp. Equally incorrect are the allegations that he has no authority to interfere with the process of appointment of the applicant, or that the regulation giving his office powers of veto of appointment is ultra vires.

In his answer to the case of the certificate of employment; Mr. Tiheli contended that; “ *the Principal of Siloe High School is not empowered to issue the certificate sought as she was never the applicant's employer ...*” Section 77(1) of the Code obliges the employer to issue the certificate of service to an employee whom he or she has continuously employed for more than one month. In answer to a question from the court, the applicant stated that he put his request for a certificate of employment to the principal of the second respondent. He has not however, denied Mr. Tiheli's contention that the Principal of Siloe High School is not his employer. For the applicant's claim to be sustainable he ought to have put his request to an appropriate authority. By his own admission he directed his request to a wrong person. There is therefore, clearly no basis for this claim as well. In the premises we are of the view that the applicant's claims against the respondents ought not to succeed and they are accordingly dismissed.

There is no order as to costs.

THUS DONE AT MASERU THIS 31ST DAY OF JULY, 1997.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER

I AGREE

P.K. LEROTHOLI
MEMBER

I AGREE

FOR APPLICANT :
FOR RESPONDENTS:

IN PERSON
MR. TIHELI