



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 977/94

In the matter between:

OBED MATHENDELE NXUMALO

Applicant

and

THE ATTORNEY GENERAL

1st Respondent

THE MINISTRY OF EDUCATION

2nd Respondent

THE TEACHING SERVICE COMMISSION

3rd Respondent

CORAM:

Hull, C.J.

FOR THE APPLICANT

Mr. Dladla

FOR THE RESPONDENTS

Mr. J. Maseko

Judgment

(23/2/95)

By this application Mr. Nxumalo, who is a schoolteacher and was in 1989 the headmaster of the Galile Primary School in Shiselweni, seeks to have set aside a decision made by the Teaching Service Commission in January 1991 suspending his salary and, he alleges, by implication dismissing him from the teaching service, and an order directing the Commission to reinstate him within the service.

In the alternative, as his notice of motion is expressed, he seeks the same relief against the Ministry of Education.

From his founding affidavit, it appears that in January 1989, there was an election for a School Committee for Galile Primary School. Mr.

Nxumalo has alleged that the election was irregular because Article 3.2.1 of the final constitution of school committees required that at least five members of a school committee are to be parents of children attending at the school at the time of the election, whereas only two of the members elected in the 1989 Galile election were so qualified.

The respondents here have not denied this, although the members of the School Committee concerned are not parties to the present application, so that this present decision is not binding on them at all.

In any event, it appears that Mr. Nxumalo reported the matter to the Regional Education Officer's representative, the school committee became aware of his misgivings, and in consequence relations between the committee members and the headmaster deteriorated.

Mr. Nxumalo says that while he was on sick leave, building funds were collected and used contrary to proper accounting procedures, and that when he returned he therefore refused an instruction to issue receipts because the money was unaccounted for.

Then, he says, the school committee arranged with the Regional Education Officer that he should be transferred by way of an exchange with the headmistress of Phumelele Primary School with effect from 29th January 1991, which he refused to do. His reason was that it was too far from his home. He did, however, indicate his willingness to accept a transfer to St. Anselm Primary School if a vacancy arose. This seems evident from Annexure B to his founding affidavit. Strictly speaking, it is not proved by the founding affidavit. Paragraph 6 of the affidavit, which deals with these matters, was drafted imperfectly, and then amended imperfectly at the hearing. However I do not think that the point is controversial at all.

Although it is his case that the Galile School Committee arranged this transfer, it is evident from Annexure A to the founding affidavit that the Teaching Service Commission effected the transfer. The Commission did not respond to his letter (i.e. Annexure B which was addressed to the Commission.) When the Galile Primary School reopened in January 1991, he found that he had been replaced by the former headmistress of

Phumelela Primary School. In other words the transfer, in that respect, had been carried into effect.

He says that there was a subsequent meeting in the Ministry of Education at which he was persuaded to accept the transfer and that he subsequently sought the assistance of his Union. Then he says, there was a further meeting with the Ministry when he was "again forced" to accept the transfer without being given an opportunity to present his case. In May 1991 he was informed of an alternative transfer to another school which, in his words, he "failed to honour" because it was inconvenient. He says that in August of that year he was "again ordered to leave" or to transfer to Phumelela Primary School. Still aggrieved, he asked his union to pursue the matter further. A vacancy arose in a school that did suit him. The union informed him in November 1991 that the Commission would look into it.

The matter dragged on. Eventually in May 1994 he received a letter that had been written on 12th April of that year. This informed him that the Commission had "suspended his salary" in 1991 under "section" 14(1) of the Teaching Service Regulations 1983 for his failure to comply with its order transferring him to Phumelela Primary School.

In paragraph 15 of his founding affidavit, he asserts that he was not afforded a fair proper and just hearing; and that "the decision" was not communicated to him until he received the letter of 12th April 1994; that the transfer was contrary to the practice of offering a teacher two choices; that it was a ploy by the Galile School Committee; and that "if it was purely a disciplinary measure" it contravened regulations 15 and 16 of the Teaching Service Regulations 1983.

In response, the Ministry and the Commission do not admit that the school committee was involved in the decision to transfer him. In their answering affidavit, it is said by a Mr. Pat Muir, the Executive Secretary of the Commission, that the transfer was made by the Commission under "Circular No 1/1984" on administrative grounds and that the Commission had full authority to do so. It is denied that Mr. Nxumalo was ever refused "a fair hearing".

Mr. Nxumalo's founding affidavit is unsatisfactory. It is a solemn document and he did sign it on oath, but I regret to say that I am inclined to think that he was ill-advised. It was obviously prepared by his legal adviser at the time who had a professional duty to draft it adequately and, in my view, to ensure that it reflected accurately Mr. Nxumalo's assertions and to advise him adequately on the significance of swearing to such a document.

I do not find it easy at all to believe that this was done.

The document is drafted badly. I do not propose to take the time to go into the reasons why. Some errors were corrected at the hearing, Crown Counsel raising no objection. From the preceding narrative it should be evident that there are other unsatisfactory features about it. In particular, no attempt has really been made at all to explain why, having in his own affidavit admitted to agreeing - twice - to the transfer in issue, he nevertheless was somehow justified in not proceeding on it. More seriously, it appears to me that the applicant procured urgency by assertions of fact that are less than complete. It is apparent that he was aware that he had ceased to receive his salary well before he came to this court claiming that his family's plight was suddenly precarious, as he does on paragraph 16 of his affidavit - for urgency in my view implies, at least in the present case, a sudden crisis.

I am constrained to say that I think that his legal adviser is in fact open to criticism whether or not I am correct in inferring that Mr. Nxumalo - a former headmaster - did not fully understand the gravity of the affidavit. His lawyer, with respect, should not have asked him to sign the document in the form in which it was presented to this court. The facility to adduce evidence in written form confers obvious advantages - and thus responsibilities - on deponents, and also on their legal advisers. They are to be prepared fastidiously.

All of this, I am afraid, is compounded by the way in which the applicant's claim was in the event argued at the hearing. The argument was not easy to follow. It came down to an assertion that the transfer was contrary to the rules and regulations relating to

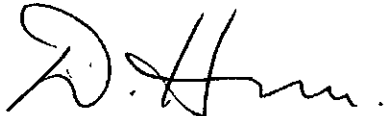
school committees and that the applicant was not obliged to comply with it.

On that submission, Mr. Maseko for the Crown responded simply that the evidence showed that it had been effected by the Commission under "section" 14(1) of the regulations.

In reply, counsel who at the hearing appeared to contend that Mr. Maseko was reopening issues raised by the Crown in an earlier notice of exception which was not pursued, but that is a misconception.

Mr. Nxumalo bears the burden, on his own papers, of making out a case why this court should by way of review grant him the relief sought. On his own papers, he has failed to do so. Mr. Maseko bears no burden of making out a positive defence.

The application is accordingly dismissed by discharging the rule; the costs must follow the event.



DAVID HULL
CHIEF JUSTICE