IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.: 25/2019

In the matter between

MESHACK MAKHUBU **1ST Applicant**

SCHOOL COMMITTEE OF ENHLANGANISWENI

HIGH SCHOOL **2ND Applicat**

AND

REGIONAL EDUCATION OFFICER FOR

HHOHHO REGION **1st Respondent**

THE ATTORNEY GENERAL **2nd Respondent**

Neutral Citation: *Meshack Makhubu & Another* Vs *Regional Education Officer Hhohho & Another (25/2019) [2019] SZHC 39 (1st March 2019)*

Coram: Hlophe J.

For the Applicant: Mr L. Dlamini

For the Respondent: Mr S. Dlamini

Date Heard: 31 January 2019

Date Judgement Delivered: 1st March 2019

Summary

Civil Procedure –Application proceedings – First Respondent terminates applicant's chairmanship and membership of 2nd Applicant – Applicant allegedly failed to attend at least three meetings of the school committee of Enhlanganisweni High School – Whether First Respondent entitled to terminate the First Applicant's Chairmanship and Membership of Second Applicant in terms of the Constitution governing school committees in Eswatini.

Various points in limine which include lack of urgency, alleged misjoinder of the Second Applicant and non-joinder of other members of the School Committee and the school administration raised – A further point raised on the alleged lack off locus standi by the second applicant, the school committee.

Order declaring the First Respondent's decision relieving the First Applicant of his duties unlawful sought – Whether First Respondent had such power in terms of the School Committee's Constitution, including in terms of any other applicable law.

Order reviewing and setting aside the First Respondent's decision aforesaid sought – Whether there was any legal foundation for the decision concerned – Whether or not the decision complained of was ultra viries the applicable constitution – Whether applicant given a hearing resulting in the decision impugned – Effect of a decision taken what varies the applicable constitution – Effect of non-observance of a right to a hearing in law.

JUDGMENT

Introduction

[1] The applicants instituted these proceedings under a certificate of urgency seeking primarily two orders which were an order declaring the decision of the First Respondent relieving the First Applicant off his duties as a Chairman and Member of the School Committee of a school known as Enhlanganisweni High School to have not been sanctioned by law. The other order sought was one reviewing and setting aside the decision of the First Respondent relieving the First Applicant off his duties as a Chairman and Member of the School Committee of the school known as Enhlanganisweni High School.

[2] It is common cause that although the First Applicant had been elected as the Chairman of the school committee of the above mentioned school, his status as such is for different reason considered terminated. Whereas the First Applicant contends that same was terminated when the First Respondent wrote a letter to him confirming that his status was considered terminated; the latter contends that it automatically got terminated when the First Respondent failed to attend at least three meetings of the school committee.

The First Respondent's letter either terminating the First Applicant's membership of the Second Applicant or confirming the automatic termination of the applicant's membership was written on the 24th December 2018.

[3] Whatever the position, that is whether the First Applicant had his Chairmanship terminated by the First Respondent or whether the latter merely confirmed the termination of his membership, it is clear that before the issuing of the letter cconcerned, the First Applicant considered himself the Chairman and member of the School Committee of Enhlanganisweni High School and that he only viewed it as terminated after the said letter had stated the position referred to above. There is therefore no doubt in my mind that whatever one can say, the reality is that the effective termination of the First Applicant's Chairmanship and membership of the school committee came about as a result of the said letter. This is how I will approach the matter going forward, therefore.

[4] Contending that the First Respondent had no power in law to terminate his Chairmanship or even membership of the aforesaid school committee and

therefore that the termination of his membership aforesaid was not lawfully done, the First Applicant instituted the current proceedings seeking the reliefs referred to above together with costs.

[5] Before raising the defence referred to above, the Respondent raised several points in limine. These included a contention that the matter was not urgent in so far as whatever urgency there may have been was allegedly that of the First applicant's own making. It was contended as well that the second applicant had no locus standi injudicio and that it had not sanctioned the proceedings on its behalf in so far as there was no resolution by it emanating from a properly constituted meeting. A further point was to the effect that the Second Applicant was misjoined in the proceedings as it had no apparent interest in them, which suggested that its joinder was done for purpose of abuse of the status of that party. Lastly, the contention went as that there was non-joinder of some interested parties who included the headteacher of the Enhlanganisweni High School as well as the other individual members of the school committee of Enhlanganisweni High School.

A. URGENCY

[6] With regards the point taken on the lack of urgency, it cannot be disputed that the proceedings were instituted on the 16th January 2019 with the Respondent's answering affidavit having been filed on the 22nd January 2018, which was itself filed as a sequel to certain points in limine having been raised on notice to the Respondent on the 17th January 2019. The Replying Affidavit was itself filed on the 25th January 2019.

[7] The point being made here is that this court refused to grant an interim order suspending the effect of the decision by the First Respondent on the ground that it struggled to understand why that should have been granted there and then without the merits of the matter having been made. It instead directed that the matter, without an interim effect having been granted was to be postponed to the 25th January 2019 for argument. The matter was however postponed on that subsequent date for hearing on the 31st January 2019, when it proceeded.

[8] By the time the matter was heard all the papers that needed to be filed were already before court. This rendered the point on urgency academic. I was convinced that whatever lack of urgency there may have been at the institution of the proceedings in court, such could not outweigh the importance of the matter on the overall. It was agreed therefore that the point on urgency would, for that reason, not be pursued, particularly because there was obvious prejudice the Respondents had suffered owing to the institution of the proceedings in that manner.

B. Second Applicant Had No Locus Standi In Judicio.

[9] The other point raised was that the second applicant had no locus standi in Judicio. This, it was argued, was because the said applicant had no legal personality as it was neither a creature of statute nor could it be said to be having its own natural personality. In so far as there was reliance on the affidavits of some members of the school committee to support the proceedings by the second applicant, those members, it was argued, should have brought the proceedings in their own names and not cite the name of the Second Applicant given that such amounted to an abuse of the court process.

[10] A point extending from this one, was the argument that there was, in terms of the papers themselves, no deponent on to a founding affidavit on behalf of the second applicant as a party independent of the First Respondent. Those members of the second applicant who filed papers appeared to have done so in their own personal capacities including the first applicant who filed his affidavit as a party of his own and not in a representative capacity to the Second Applicant as a legal person.

[11] I cannot agree with the Respondents that the Second Applicant as an entity has no locus standi in Judicio. It is a body that is established by a constitution of its own and it takes decision's which impact on other people ever so frequently as an entity. I am certain that if it has no locus standi in Judicio because its establishing document accords it no such a right; it certainly does have locus standi in terms of what has come to be known as a universitas. I say this because it interacts with members of the public as a body quite frequently where it takes decisions affecting such members. It would be anomalous in my view for such a body to then escape liability

where it was otherwise meant to be liable, on the grounds that its establishing documents have locus standi in judicio.

[12] The Respondents have a point through on locus standi not having been established from the point of there having been no one to depose to an affidavit on behalf of the said entity together with there having not been established a clear interest on behalf of the said applicant. From what one sees in the pleadings it is clear that the person who has an interest in the proceedings is the First Applicant and not the Second Applicant as an entity of its own. It seems to me that the second applicant's involvement in these proceedings was more an abuse of the court's process by the First Applicant who apparently needed somebody to shore him or support his otherwise weak cause. See in this regard the **Mbongiseni Cyprian Shabanguy & 2 Others V Election And Boundaries Commission & 8 Others Civil Case No.805/2018,** judgement.

[13] It is clear that I should uphold this point by the First Respondent and direct that the second applicant's locus standi has not been established both from the point that no person deposed to any papers whilst acting on its behalf and

also because no interest on its behalf can be shown to be likely to be adversely affected in the possible outcome of the matter. The Second Applicant is therefore declared not a party in these proceedings and that it should not have been joined.

[14] A further point taken was to the effect that in so far as the second applicant was made a party to the proceedings, there was no resolution confirming that a decision had been taken in that regard. Owing to the view I have taken of the matter including the fact that what prima facie amounted to a resolution was annexed to the Replying Affidavit, I think there is no value in me deciding this point in the peculiar circumstances of the matter. It suffices that the position of our law is settled that in a matter where an entity is a proper party, the proceedings will not be dismissed merely because no resolution was annexed to the Founding Affidavit if same is subsequently annexed to the Replying Affidavit provided that it is a genuine resolution. See in this regard **Winnie Muir V Siboniso C. Dlamini, High Court Case No. 1531/2004**.

C. Misjoinder Of The Second Applicant

[15] It was further argued that the second applicant was misjoined as an applicant – when it should have been joined as a Respondent. The argument was that the said applicant had no apparent interest in the matter as an applicant to have been joined as an applicant. From the papers filed of record, the argument went, it was apparent that only individual members of the Second Applicant had filed their own individual affidavits in support of the First Applicant as a party. In fact as they did so, it was argued further, none of all those who filed affidavits claimed to have done so on behalf of the Second Applicant as an entity nor did anyone show that he did so as a proper applicant.

[16] This point was followed by the point that there was no resolution filed by the Second Applicant as an entity. In response to this point the First applicant contended that the second applicant was not a company which was obliged to file a resolution as proof of its entitlement to act in any given sitting. The Second Applicant, it was further argued, was a school committee which did not require a resolution.

[17] It seems to me that there is lots of merit in what the respondents are contending on this point. I agree that there has not been established any apparent interest by the second applicant as an entity in these proceedings. The second applicant as an entity has been done no apparent wrong and none has been shown by the First Applicant. The person whose membership of the second applicant had been terminated was the first applicant and that is the party who was legally entitled to institute proceedings against the First Respondent for his own alleged short prejudice, which whether true or false are matters for the merits.

[18] I agree that in law whether or not a party has an interest in proceedings, the answer lies on whether or not the impugned decision can be carried into effect without adversely affecting that particular party. See in this regard the case of **Amalgamated Engineering Union V Minister of Labour 1949 (3) SA 631 at 637**. In that case the position was captured as follows:

> *"If a party has a direct and substantial interest in the order the Court might make in the 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."

See also" ***South African (PTY) LTD and Another Vs ABSA Bank Limited [2017] ZASCA 78 (30 May 2016)***

[19] I am of the view that neither the decision reached by the First Respondent terminating or announcing the termination of the First Applicant's Chairmanship or membership of the Second Applicant nor the one this court may reach in these proceedings can be said to adversely affect the Second Applicant. I am therefore convinced that the inclusion of the second applicant as a party in these proceedings is merely an abuse of the court process if not of the second applicant itself as an entity. I cannot possibly see how it would be prejudised by not being cited and the possible order I issue was being executed: See also **Gordon V Department of Health Kwazulu – Natal [2008] ZASCA 99; 2008 (6) SA 522 SCA**, where it was held that if an order or judgment cannot be sustained without prejudising the interest of a certain third party, then that third party has an interest in the and must be joined.

[20] On the contention that there was no resolution or that the resolution revealed in the Replying Affidavit is not an appropriate one, I have the following to say. At first, whereas there was initially no resolution annexed to the Founding Affidavit, there was eventually one annexed to the Replying Affidavit. The position is long settled in this jurisdiction that where a resolution may not have been annexed to a Founding Affidavit, it is competent to annex same in a replying affidavit if its absence is being challenged or demanded. The case of **Winnie Muir V Siboniso C. Dlamini, Swaziland High Court Case (Supra)** is authority for this proposition.

[21] In so far as it is contended that the affidavit so annexed herein is not a proper one allegedly because it did not result from a proper meeting of the second applicant, I am of the view that it does not take the matter anywhere for me to decide it at this point firstly because it is a dispute of fact that may require oral evidence to determine and secondly because it is no longer of any use in the matter as I have already concluded that the joining of the second applicant as a party was a misjoinder. It would therefore serve no immediate purpose whether the resolution as annexed to the Replying Affidavit was a proper one or not. The principle of our law is that a court of law should not

determine academic points, particularly points that take a matter nowhere as they are said to be bruturn fulinery.

D. Non - joinder Of Other Interested Parties In The Proceedings.

[22] It was further argued by the Respondents that the Applicant failed to join parties that should have been joined as such in the proceedings. These parties were allegedly the Head teacher of the Enhlanganisweni High School who doubled up as a Secretary to the School Committee. A similar argument was made of the Principal Secretary in the Ministry of Education as also not having been joined. These alleged short comings, it was prayed, necessitated that the application be dismissed.

[23] I have just dealt with what the test on whether or not to join a party in proceedings is, including my have made a reference to the appropriate cases including the **Amalgamated Engineering Union V Minister of Labour 1949 (3) SA 631 at 637** and that of **Gordon V Department of Health Kwazulu – Natal [2008] ZASCA 99; 2008 (6) SA 522 (SCA)**. The test there in having been set out is whether or not there was anything that would prejudise the party in question if the order or judgement sought was being

executed. I again do not see how both the Head teacher of the concerned school together with the Principal Secretary in the Ministry of Education would be prejudiced if the order or judgement was being carried into effect. If this is the case, it means that the Judgement in this matter can be carried into effect without prejudising the two and therefore that they do not have an interest in the matter and therefore that the matter should be proceeded with.

[24] It also merits mention that the Respondent's argument was that if indeed there was a non-joinder of the two, then the application should be dismissed. My understanding of the legal position is that even if I had found that the two had not been joined it would not have followed that the matter be dismissed. Firstly it is a discretionary matter whether the court could order a dismissal of the proceedings and secondly, a dismissal is usually viewed as a drastic step as the common relief is to post pone the proceedings and order that the party not joined be so joined. See in this regard the case of **Commissioner of Police and Another V Mkhondvo Aaron Maseko Civil Appeal Case No.3/2011**.

E. The Application Before Court Was Defective.

[25] The Respondents argued further that the application before court was defective because, there was allegedly no proceedings by the First Respondent resulting in the termination of the First Applicant as the Chairman of the School Committee in question. As I understand it this point seeks to suggest that there was no decision taken by the First Respondent to terminate the applicant's membership of the Second Respondent so much so that a review would not be appropriate as a remedy.

[26] In so far as it cannot be denied that there was a decision taken by the First Respondent which had an effect on the First Applicant's continued Chairmanship or Membership of the School Committee in question. I find it difficult to fathom this point fully. It may actually be that in the deeper analysis of the matters work against the First Respondent in the merits of the matter in the sense that it could indicate that the decision in question, in so far as it had the effect of terminating the applicant's membership or chairmanship of the school committee was handed improperly or arbitrarily without there having been proceedings to establish the propriety or otherwise of same.

[27] Whatever the Respondents sought to suggest, one thing is certain to me namely, that the First Respondent took a decision which adversely affected the applicant in so far as it ensured that his considering himself as the chairman of the second applicant was up. I therefore find no merit in the Respondents contention that a review was non - suited. I have no doubt the First Respondent was exercising administrative power which in terms of both the Common Law and Section 33 of the constitution of this country he could be challenged on review for the manner he sought to exercise it.

[28] Closely related to the foregoing point is the contention by the Respondents that the application was defective in so far as there was no compliance with Rule 53 of the Rules of this Honourable Court and therefore that it should be dismissed on that point alone. The part of Rule 53 said to have not been complied with so as to necessitate that the application be dismissed was argued to be Rule 53 (1) (a) and (b). The sub rules in question require that where proceedings are moved challenging on review the decision of an administrative officer or authority such as in the present case, those proceedings should call upon such an officer or authority to show cause why such a decision or proceedings under challenge should not be reviewed and corrected or set aside and also for that administrative authority to dispatch a

record of the proceedings being challenged to the Registrar of this Court. A lot was said about such a record not having been dispatched to the extent of even expressing a doubt it does exist, if not indicating this indirectly.

[29] It is true that the applicant is bound to follow Rule 53 in review proceedings. I however think that it would be taking it too far to say that simply because a party who institutes review proceedings would not have used the same phraseology as that used in the rule, he would be non – suited to institute review proceedings by the Court. I think that would be too dogmatic a view to take and that such a view does not accord with what was stated in such cases as **Shell oil Swaziland (PTY) LTD V. Motor World (PTY) LTD T/A Sir Motors Civil Appeal No. 23/2006** as well as in **Savannah N. Sandanezwe V GD1 Concepts and Project Management (PTY) LTD Case No. 905/2009 [2011] SZHC 92 (25 March 2011).**

[30] In the latter case the modern legal approach to matters was expressed as follows:

> *"Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of*

technicalities. The rationale behind this trend is that justice can only be done if the substance of a matter is considered. Reliance on technicalities tend to render justice grotesque and has the dangerous potential of occasioning a miscarriage of justice."

[31] As regards the unavailability of a record, it was argued that since there was no record in the matter (which led to none being filed therefore) it meant that no review proceedings could be entertained. I again think this is not what the rule was designed for. I have no hesitation it was meant to ensure that in situations where there was in existence a record, same should be filed within a certain period to enhance the review hearing and not to frustrate it. Further where an arbitrary decision or one that called for it to be reviewed, could not have been so reviewed simply because there would have been no record. A determinant on whether or not a decision is reviewable is not realistically whether there does exist a record than it is whether there are in law grounds for review such as the decision being ultra vires or having been taken arbitrarily to mention but a few. The absence of a record, where that is not so germaine in the sense that there was in reality none kept because none could be kept, would not suggest that a matter is not reviewable. To seek to

have review proceedings dismissed in such circumstances would be tantamount to placing emphasis on form rather than substance in a matter. It was in observation of this state of affairs when Van de Heever J.A. commented as follows in **Andile Nkosi V The Attorney General, Appeal Case No. 51/99 at page 7**:

> "*Rules governing procedure such as rules of Court, are not made to enable lawyers representing the parties to a dispute without advancing the resolution of the dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined within a reasonable time, and enabling the courts, as a consequence to organize their administration as quickly effectively and fairly as possible."*

[32] I am therefore of the view that a review cannot fail simply because where a decision requiring it to be reviewed has been taken; without a record being kept, then such a review should fail. If the decision complained of was taken without a record being kept, such will not prevent that decision from being reviewed. To reason otherwise would be a recipe for disaster which cannot be tolerated at the level of the development in our jurisprudence.

[33] It was also argued that there were no grounds for review advanced by the applicant. As I understand the matter, the contention at the heart of it is that the decision by the First Respondent was taken by a person who had no power to take such a decision and that the manner of taking same was arbitrary.

[34] If I am correct in that understanding, it is obvious that it cannot be correct to say that there are no grounds for a review. It the contention is that a decision was taken by a person or officer with no power to take same, then that decision was ultra vires the enabling statute or law or regulations. Similarly where the contention is that the decision being challenged was taken arbitrarily, it simply means that such a decision was taken without observing objective or established procedure such as a failure to observe the rules of natural justice and also that there was no basis for such a decision.

[35] I therefore cannot uphold the point raised on the contention that the application was defective in the sense that there was either no record in place; that there was no compliance with rule 53 of the rules of this court

and lastly that there were allegedly no grounds for review. The point raised to incorporate this heads can therefore not succeed and falls to be dismissed.

F.In the Merits

[36] Whereas I have found that the Second Applicant had no discernible interest in the proceedings which necessarily means that its citation in the proceedings was merely a misjoinder, the same thing cannot be said of the First Applicant. I am convinced that none of the points raised (including those upheld) can or should lead to a dismissal of the application in the circumstances of the matter. This invariably means that I should deal with the merits vis-à-vis the First Applicant.

[37] From what is said in the papers, it seems to me that the issue for consideration is whether or not the First Respondent had the power to terminate the First Applicant's membership or chairmanship of the second applicant as an entity of its own as well as whether the decision terminating the First Applicant's Chairmanship and membership of the Second Applicant was taken properly, that is whether a fair procedure was observed and if not, whether there was a basis for such a decision.

[38] I am aware that before deciding these questions, I first need to decide if the First Respondent ever terminated the First Applicant's Chairmanship or membership of the Second Applicant which is the School Committee of Enhlanganisweni High School. It cannot be in dispute that whereas the First Applicant's case is that the First Respondent did terminate his chairmanship or membership of the aforesaid school committee by means of the letter dated the 24th December 2018 and written in Siswati, the First Respondent contended otherwise. The latter argued that she never terminated the chairmanship or membership of the First Applicant in the Second Respondent. She argued further that the First Applicant's said membership or chairmanship of the Second Applicant was automatically terminated when the latter failed to attend three consecutive meetings of the Second Respondent, as demanded by the Constitution of School Committees of this country. The First Respondent it was argued, merely confirmed that the First Applicant had his said chairmanship or membership of the Second Applicant automatically terminated when he failed to attend the said meetings.

[39] It is certain that before the letter in question was issued by the First Respondent, the First Applicant considered himself a member and chairman of the Second Applicant. Hein fact ceased considering himself as such after receipt of the letter in question. Some members of the Second Applicant who supported the institution of the proceedings by the First Applicant saw the matter in that light as well. In fact if the First Respondent's contention is to be believed; she would not have communicated what she did to the First Applicant per the letter of the 24th December 2018, annexure "MM2", to the application.

[40] I agree with the First Applicant that whatever other interpretation the First Respondent gave to the letter she wrote on the 24th December 2012, it cannot be denied that it had the effect of communicating a decision by the First Respondent to terminate the First Applicant's membership or chairmanship of the Second Applicant. If that is the case as I have found it is, the next question is whether the First Respondent had the power in law to terminate the membership or chairmanship of the First Applicant in the Second Applicant and later on whether such a decision was taken procedurally correct and for valid reasons.

[41] The question of one's Chairmanship or Membership of the School Committee concerned is governed by the Constitution of the School Committees of Eswatini, which it was not in dispute, is a document governing all school committees in this country.

[42] According to the said constitution, members of a school committee including its chairman, are elected in terms of clause 4. Of significance is that the REO has a role to play in the said election, as the chairperson of the meeting that results in the election aforesaid. The term of office of the school committee including that of the chairman is three years. As covered in clause 5 of the said constitution. The members of the school committee cannot serve in it for more than two consecutive terms.

[43] According to clause 7.1.2. the chairperson has the specific power to convene school committee and parents' meetings through the secretary who is described in the constitution as the principal of that particular school. At least once a term, the chairperson is empowered in terms of clause 9.2.1. to call a meeting of the committee whilst acting in consultation with the

Secretary (the Principal). The Chairperson would be obliged to call a meeting following a written request b three members of the committee according to clause 9.2.2.

[44] According to clause 9.2.6, any member who fails to attend three consecutive meetings without good reasons acceptable to the committee shall be regarded as having vacated his/her seat from the committee, and his/her place shall be filled by cooption. Given its significance in the matter we are about herein, I am of the view that this particular clause merits a comment. Before any member of the committee, which I take to include a chairperson of the school committee, can be taken to have vacated his seat through his failure to attend three consecutive meetings, I am convinced that should be because there are no good reasons acceptable to the school committee. Two things emerge; it is not just every failure to attend three consecutive meetings that would result in a member being taken to have vacated his or her seat. It should be without good reasons acceptable to the committee. Invariably, it should first be ascertained whether the reasons for the failure to attend are good and acceptable to the committee.

[45] The structure entitled to assess whether the reasons are good or acceptable is the School Committee itself. In a nutshell this suggests that there should be an inquiry by the school committee itself to try and establish whether the reasons for the failure to attend are good and acceptable to the committee. It seems to me that where this inquiry has not been done then there is a shortcoming on whether the reasons for the failure to attend were good and acceptable to the committee which is a conclusion to be reached after an inquiry. This is the glaring shortcoming in the present matter.

[46] The letter effectively communicating the termination of the First Applicant's membership of the School Committee or its chairmanship says nothing about such an inquiry let alone its finding on whether the reasons for the termination were good and acceptable to the Committee. It should be remembered that even the inquiry itself by the committee would have to be fair by affording the person whose conduct was being inquired into a fair hearing.

[47] The letter in question further shows the REO as the person who terminated the First Applicant's membership when in actual fact that power resided

with the committee itself. On this ground alone the decision by the REO cannot stand as it was taken contrary to the enabling instrument which means that it was ultra vires.

[48] The system introduced by the Constitution seems self-regulatory to me. This can be seen from the fact that if the Chairperson failed or refused to call a meeting of the school committee, the Secretary is entitled to call one after consulting the Vice Chairperson. Furthermore anything that renders the school committee inactive should be communicated to the REO in writing by the Secretary. The Respondents cannot be heard to be saying that there was no remedy if the Chairman was not calling meetings. In that case the meetings could have been called by the Secretary in consultation with the Vice Chairperson.

[49] It comes out clear upon reading the constitution that it is for the School Committee following an inquiry at a meeting called in terms of the Constitution to assess the reasons for the failure by one of their own including the Chairman, to take a decision to terminate that members membership or chairmanship for a failure to attend three consecutive

meetings, which it can only do upon being satisfied that his failure to atted was not for a good reason acceptable to it. This excludes the REO whose only power is to consider whether or not that particular committee is functional or not. According to clause 12.1 of the constitution, if a committee fails to perform its duties in line with the constitution, the REO has the power to dissolve that school committee, This dissolution will only be lawful if it comes after the REO shall have issued or given that committee three written warnings.

[50] It is clear that the REO did not follow the constitution in purporting to terminate the First Applicant's membership or chairmanship of the Committee. Clearly the decision of REO terminating the First Applicant's Chairmanship cannot stand and it should therefore be reviewed corrected and set aside on the basis that it was taken outside the provisions of the constitution and also on the grounds that it was taken by a structure or officer who had no power to take do so.

[51] There is also the issue of the decision complained of having been taken without a fair hearing having been given to the First Applicant. This was all

the more necessary because the decision was taken by an administrative officer compelled to observe such a fair hearing in law.

[52] The need to hear the person due to be affected by a prejudicial decision taken or due to be taken by a quasi judicial body or an officer exercising administrative power has been a subject of numerous decisions or judgements of our courts, including this court and the Supreme Court. It has been traced back to such cases as Doctor Bentley's case in English Law cited as R V **University of Cambridge (1723) 1 STR 557**. In that case, a Judge of the time, noted the significance of the right to be heard before a prejudicial decision was taken, a principle also known as the audi alteram partem rule. See the book by **H.W.R.Wade: Administrative Law, Sixth Edition, Claredon Press, Oxford Page 499 to 500**.

[53] It was then observed that even God himself enquired from the Biblical Adam, why he had eaten the fruit he had been warned not to eat, before meting out an appropriate punishment to him. There was thus entrenched the need to hear a party against whom a prejudicial decision was meant to be taken, which had to be a procedural requirement as opposed to a substantive

one. What this means in a nutshell is that the guilt (no matter how apparent it may be), of the person being tried or disciplined counts for little at that stage. A long line of judgements including in this jurisdiction have been pronounced by the courts in this regard. See in this regard **Sandzile Khoza and Others V The Vice Chancellor of the University of Swaziland and Others High Court Case no of 1992**; **The Swaziland Federation of Trade Unions And Others V The President of the Industrial Court and Others Court of Appeal Case No. 11/97 [1998] SZSC8 (1 January 1998)** as well as **Sikhatsi Dlamini and Others Vs The Minister for Housing And Urban Development - 2008** to mention a few.

[54] The applicable principle as captured in **Administrator Transvaal V Traube 1989 ZASCA 90 or 1989 (4) All SA.924 (AD)** was captured as follows:

> *"When a statute empowers a Public Officer to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter) unless the statute expressly or by implication indicates the contrary."*

See also **Administrator Transvaal And Another V Zenzile And Others 1991 (1) SA 21**. As well as **Sikhatsi Dlamini And Others V The Minister for Housing And Urban Development and Others / 2008**.

[55] The point being made here is that even at common law, where the exercise of administrative power or authority is likely to result in a prejudicial decision being reached, against a person, that person has a right to be heard. Courts have tended to upset those decision reached by an administrative authority which, whilst prejudicial against a person were taken without such a person being heard.

[56] This position has been elevated further given that it has since been enshrined in the Constitution of the Kingdom of Eswatini, in terms of section 33. That section provides as follows:-

> "*33(1) A person appearing before any administrative authority has a right to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a*

Court of Law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.

[57] In so far as it cannot be denied that the First Applicant was not heard at all when the decision effectively terminating his membership or chairmanship of the Second Applicant was taken, it cannot possibly be in dispute that the said decision was taken contrary to the provisions of section 33 (1) of the constitution of the Kingdom of Eswatini and was to that extent unconstitutional therefore.

[58] The failure to hear the First Applicant before a prejudicial decision was taken against him was no doubt a failure to observe the audi alteram pattern principle, which was interpreted in the following words in the judgement in **Swaziland Federation of Trade Unions Vs President of The Industrial Court of Swaziland And Another (11/97) [1998] SZSC 8 (01 January 1998); at paragraph 10**:-

"The audi alteram pattern principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th Century English judge to be a principle of devine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time. (See ***De Smith: Judicial Review of Administrative Action P.156; Chief Constable, Pietermaritzburg V Ishini [1908] 29 NLR 338 at 341)***. *Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possible prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them, (See Weichers: Admininistratiefreg 2nd edn. P237."*

[59] It cannot be disputed that the decision by the First Respondent to effectively terminate the First Applicant's membership and chairmanship of the Second applicant was in violation of that party's right to a fair hearing and was the manifestation of a failure to observe the audi alteram partern principle towards the first applicant.

[60] Commenting on the fate of a decision taken without observation of the audi alteram partern principle; the then Swaziland Court of Appeal had the following to say at paragraph 17 of **The Swaziland Federation of Trade Unions VS President of The Industrial Court of Swaziland And Another (Supra) Judgement**:

> *"A clear violation of natural justice will, in every instance, vitiate an order and no room for judicial discretion as to whether to set it aside can, in such instances exist."*
> *(underlining is mine)*

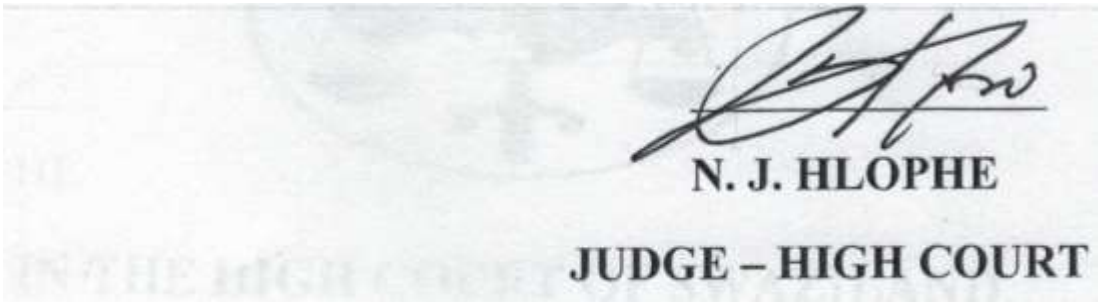
[61] The Court of Appeal went on to take an excerpt from Baxter Administrative Law at 540, where the position is captured in the following terms :-

"The principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration their enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored. The policy of the courts was crisply stated by Lord Wright in 1943:-

> *" If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."* *See* ***General Medical Council V Spackman, [1943] AC 627, 644-645)*** *(underlining added)*

[62] It is clear that for the forgoing reasons the decision by the First Respondent effectively terminating the First Applicant's Chairmanship and membership of the Second Applicant cannot stand and it is hereby set aside.

[63] Taking into account the fact that the First Applicant was shown to have rendered the school and the school committee disfunctional while insisting on certain demands which forced the First Respondent to terminate his Chairmanship and Membership of the school committee, I will order that each party bears its own costs.



N. J. HLOPHE

JUDGE – HIGH COURT