45/89

Case No. 539/87 - mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THIENADAYALIN MOODLEY	1st Appellant
LENNY JAYALALL	2nd Appellant
RAJANTHRAN KONAR	3rd Appellant
MARIE THERESE ANTOINETTE NAIDOO	4th Appellant
KAVIRAJ SURAJPAL DILRAJ	5th Appellant
EDMUND HAROLD JACOB	6th Appellant
MOONSAMY VIJAYEN ALLEN	7th Appellant
THERESA PALIATHAN	8th Appellant
OSMAN GANY SADECK	9th Appellant
STEPHEN MORRIS DAVID	10th Appellant
THAVANANTHAN PILLAY	11th Appellant

and

THE MINISTER OF EDUCATION AND CULTURE, HOUSE OF DELEGATES	1st Respondent
THE EXECUTIVE DIRECTOR: DEPARTMENT OF EDUCATION AND CULTURE ADMINISTRATION: HOUSE OF DELEGATES	2nd Respondent

CORAM: CORBETT, CJ, HOEXTER, BOTHA, KUMLEBEN et EKSTEEN, JJA

HEARD: 2 March 1989

DELIVERED: 31 March 1989

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

On 17 September 1984 the State President assigned the administration of the Indians Education Act, 61 of 1965 ("the Act") to the Minister of Education and Culture in the House of Delegates ("the Minister"). The Rylands Senior Secondary School in Cape Town ("Rylands school") is a State school for Indians established under sec 3 of the Act. The eleven appellants were teachers at the school. The first nine appellants were teachers on probation; and the tenth and eleventh appellants were temporary teachers.

In December 1985 the services of all the appellants were terminated by written notice. On notice of motion the appellants applied in the Natal Provincial Division (a) for an order setting aside as unlawful the decision terminating their employment as teachers and (b) for an order reinstating the appellants in their former posts at the school on the same

terms .....

terms and conditions of employment as before; such order to operate with retrospective effect to the date on which their services had been terminated. The Minister was cited as the first respondent and the Executive Director in the Department of Education and Culture was cited as the second respondent. The respondents resisted the application. Answering and replying affidavits having been filed, the opposed application came before THIRION, J. The learned Judge dismissed the application with costs, including the costs of two counsel. With leave of THIRION, J the appellants appeal to this Court.

In terms of sec 1 of the Act "Department" means the Administration: House of Delegates. The Act contains detailed provisions governing the discharge from the service of the Department of persons employed full-time in a permanent capacity at State schools. Sec 15(1) of the Act provides, so far as is relevant for present purposes, that:

"Any.....

"Any person (other than an officer) occupying on a full-time basis in a permanent capacity a post included in the establishment of a State school, ... shall, subject to the provisions of subsections (2) and (3), have the right to retire from the service of the Department on attaining the age of 65 years, and shall be so retired on reaching that age."

Subsection (4) of sec 15 reads as follows:-

"(4) Any person referred to in subsection (1) may be discharged from the Department by the Minister -

(a) on account of continued ill-health;

(b) on account of the abolition of his post or a reduction, reorganization or rearrangement of the staff of the school in question;

(c) subject to the provisions of section 18, on account of unfitness for his duties or incapacity to perform them efficiently;

(d) if, for reasons other than those referred to in paragraph (c), his discharge will, in the opinion of the Minister, promote efficiency or economy at the school in question;

(e) subject to the provisions of section 17, on account of misconduct as defined in section 16."

Sec 16 .....

Sec 16 sets forth a very elaborate definition of misconduct. Its introductory sentence states that:-

> "Any person referred to in sub-section (1) of section fifteen shall be guilty of misconduct and be subject to the provisions of section seventeen if -"

and thereupon follow twenty lettered paragraphs each specifying a form of misbehaviour or impropriety on the part of such person. The catalogue of transgressions listed in these paragraphs is a comprehensive one and covers conduct such as the doing of anything which is prejudicial to the administration, discipline or efficiency of any department of the State or a State-aided school (para (b)); negligence or indolence in the discharge of duties (para (d)); the abuse of liquor or drugs (para (j)); being declared insolvent (para (k)); the commission of a criminal offence (para (p)); and absence from duty without leave or valid reason (para (q)).

What.....

What procedure is to be followed in case of misconduct by such a person is prescribed by sec 17 of the Act. Subsec (1) of sec 17 reads:-

> "(1) If any person referred to in section 15(1) is accused of misconduct as defined in section 16, the Director-General may charge him in writing with that misconduct."

Subsections (2) to (29) of sec 17 contain detailed and very extensive procedural provisions governing the making of the charge of misconduct; the admission or denial of such a charge by the person accused; the appointment of persons to inquire into the charge; the evidentiary rules applicable to proceedings at such inquiry; the right to legal representation thereat; the keeping of a record of the proceedings; and an appeal to the Minister against a finding of guilty by the person holding the inquiry and the communication by the Minister of his decision on the appeal to the Director-General

and.....

and to the person appealing.

Sec 18(1) of the Act provides that if the Director-General has reason to presume that any person referred to in sec 15(1) is unfit for or incapable of efficiently performing the duties attached to his post, the Director-General may direct someone to investigate such presumption; and further provides that the latter, having carried out such investigation, shall report thereon in writing to the Director-General. If such report satisfies the Director-General that the subject is so unfit or incapable, the Director-General is bound in terms of subsec (2) to provide the subject with a copy of the report; to inform him that action in terms of subsec (3) is being considered against him; and to invite him to lodge with the Director-General within 21 days in writing any comments he may wish to make. When the Minister, having considered the report and the subject's comments thereon, is satisfied that

the subject is so unfit or incapable of performing such duties subsec (3) requires the Director-General to give the subject notice thereof; and further to notify him (a) that after at least 90 days but not more than one year after such notice a further investigation in regard to such duties will be instituted and (b) that if the subject within 30 days makes a written request therefor to the Director-General the latter will cause such further investigation to be undertaken by a person other than the person who lodged the said report. If, on account of a report from such further investigation, the Minister is of the opinion that the subject is still so unfit or incapable, then in terms of subsec (4) the Minister may summarily discharge him from service or transfer him to another post in the Department, or reduce his salary, or decide that no further action be taken in the matter. (It is unnecessary to indicate what the Minister may do if he considers that since the investigation there has been

an.....

an improvement in the subject's fitness or efficiency.)

Sec 33 of the Act empowers the Minister to make regulations in regard to a large number of matters which are set forth in paragraphs (a) to (r) of that subsection. Subsec 33(1)(g) relates, so far as is presently relevant -

> ".....to the appointment of persons for duty at State schools ..... and the grading, remuneration, promotion, transfer, discharge, discipline, behaviour, powers, duties, hours of attendance, leave privileges and other conditions of service of ..... such persons and persons deemed to be appointed in terms of this Act."

In 1966 the administration of the Act was the responsibility of the Minister of Indian Affairs. On 26 August 1966, and by virtue of the powers vested in him by sec 33(1)(g) of the Act, the Minister of Indian Affairs made certain regulations ("the regulations") affecting the conditions of service of teachers in State and State-aided schools for Indians. Regulation 3 deals with appointments to the

teaching.....

teaching establishment. In subregs 3(1) and (2) provision is made for the appointment of teachers on probation; and in subreg 3(3) for the appointment of teachers on a temporary basis. I quote subregs 3(1), (2) and (3):-

> "3. (1) All appointments to the teaching establishment in a permanent capacity, shall be on probation. The period of probation required under this subregulation shall be not less than one year and not more than three years: Provided that an appointment on probation of less than three years may be extended from time to time with the approval of the Minister: Provided further that the whole period of probation shall in no case exceed three years.
>
> (2) Appointments on probation shall be subject to confirmation by the Minister. An appointment on probation shall not be confirmed unless the Secretary certifies that, during the period of probation or extended period of probation, the holder of the appointment has been diligent in the execution of his duties, that his conduct has been satisfactory and that he is in all respects suitable for a confirmed appointment.
>
> (3) A teacher appointed on a temporary basis

shall .....

shall be classified as a 'temporary assistant' or as a 'locum tenens'. A temporary assistant shall be a teacher who is appointed in a temporary capacity to fill a vacant post. Any other temporary teacher shall be classified as a 'locum tenens'".

Reg 4, which prescribes certain qualifications for appointment, is in the following terms:-

"4. (1) No person shall be appointed permanently whether or not on probation, unless he -

(a) is a South African citizen;

(b) is of good character;

(c) is in the opinion of the Minister, and the Minister has so declared, free of any mental or physical defect, disease or infirmity which would be likely to interfere with the proper performance of his duties or to render necessary his retirement before reaching the pensionable age prescribed by any legislation relating to the retirement of teachers: Provided that a person may be appointed on probation subject to the condition that confirmation of the appointment shall be subject to such declaration being issued: Provided further that such declaration by the Minister shall be made immediately upon

adequate .....

adequate medical proof being furnished to him that such person is free of any mental or physical defect, disease or infirmity which would be likely to interfere with the proper performance of his duties or to render necessary his retirement before reaching the pensionable age;

(d) submits proof of academic and professional qualifications acceptable to the Minister;

(e) submits certificates of birth and health acceptable to the Minister; and

(f) if he is a person who qualified as a teacher after 31st December, 1965, submits a certificate acceptable to the Minister indicating that he is proficient in both official languages.

(2) The Minister may require any person before appointment to a post on the teaching establishment to be examined by a medical officer in the employ of the State or by any other registered medical practitioner."

Reg 9 contains provisions governing the resignation of teachers. Its provisions draw a distinction between three classes of teachers: (i) those whose appointments have been confirmed; (ii) those who are on probation; and (iii) temporary

assistants.....

assistants and locos tenentes. Those portions of reg 9 relevant for present purposes read thus:-

> "9. (1) A teacher whose appointment has been confirmed may terminate his service by giving the Secretary at least three calendar months' notice in writing of his intention to resign .....
>
> (2) A teacher on probation in terms of regulation 3(1) of these regulations, may terminate his services by giving the Secretary a month's notice, in writing, of his intention to resign.....
>
> (3) Subject to the provisions of regulation (5)(1), any temporary assistant or locum tenens may resign by giving the Secretary twenty-four hours' notice, in writing, of his intention to resign."

Reg 10 provides for the termination of the appointment of teachers on probation and of temporary assistants and locos tenentes. It reads:-

> "10. (1) An appointment on probation made under regulation 3(1) of these regulations may be terminated by the Minister before the expiry of the period of probation by giving the holder a calendar month's
>
> notice.....

notice.

(2) The Secretary may terminate the service of a temporary assistant or locum tenens by giving him twenty-four hours' notice."

The background to the application in the Court below may be shortly stated. Together with their founding affidavits the appellants filed an affidavit by Mr Ismail Waja, who has been the principal of Rylands School since 1976. Annexed to Mr Waja's affidavit is an extract from his annual school report for 1985. In the extract he summarises "the unrest situation" in the Western Cape at the time, and the way in which it affected Rylands School. On behalf of the respondents there were filed, inter alia, affidavits by Mr Ebrahim Albertus and Mr I M Vadachia. Mr Albertus was a 74-year old temporary teacher at Rylands school during the unrest; and at the same time Mr Vadachia was acting head of the English department at the school. At the time of his

affidavit.....

affidavit (jurat 24 January 1986) Mr Vadachia was the deputy principal of the Fairbreeze Secondary School. From the affidavits of the aforementioned three deponents a tolerably clear picture emerges of the total disorder and confusion which reigned at Rylands School during the second half of 1985.

The unrest appears to have been general rather than localised, and other schools in the same community were also affected. Pupils organised student rallies on a rotational basis at various schools. Attendance at these rallies ranged from 2 000 to 10 000 pupils. Many teachers accompanied their pupils to these rallies. Much singing and marching was done and many speeches were made. Little or no school work was done. At Rylands School pupils boycotted classes from 26 July 1985 to 29 November 1985, on which latter date the school broke up. The circumstances prevailing were described in Mr Waja's report as ranging -

"..... from.....

> .....from near chaos and violence to one of a controllable boycott situation."

It is clear that the "boycott situation" was "controlled" by the pupils and by them alone. The new teachers who voiced their opposition to the boycott were denounced as collaborators. Most of the teachers at Rylands school appear either to have associated themselves with the boycott or to have assumed a passive role in regard thereto.

During and immediately after the boycott certain senior officials of the Department ("the inspectors") paid a number of visits to Rylands school. In the course of such visits five of the appellants (the first, second, third, fourth and tenth appellants) were questioned by the inspectors. In the founding affidavits each of the aforementioned five appellants gives his or her account of what transpired during such interrogation.

The.....

The first appellant was questioned on 22 August 1985. The inspectors informed him that an informal inquiry into the boycott was being conducted. It was suggested to the first appellant that he had gone to the Cravenby High School with the purpose of disrupting its school programme. The first appellant asked that any charge against him should be put in writing; and that he be afforded a reasonable time within which to answer it. In the ensuing interrogation one of the inspectors (Mr Raiman) said that the first appellant would be given an opportunity of responding to the allegation "at some stage". No such further opportunity was in fact given to him.

The second appellant was interviewed on 4 December 1985. One of the three inspectors (Mr Panday) told the second appellant that in order to consider a request for a transfer made by the second appellant Mr Panday had to know

of what use the second appellant was to the pupils and to Rylands school. In the interrogation which followed, however, Mr Panday appeared to be more interested in the involvement in the school boycott of other teachers, the pupils and outsiders. Panday made notes of what the second appellant said, and he asked the second appellant to read and sign such notes. The second appellant refused to do so. Panday asked the second appellant whether he was prepared to make a statement, to which question the second appellant replies in the negative. Panday concluded the interview by saying that he regretted the second appellant's failure to give his co-operation; and that the second appellant would have much time to reflect upon their discussion.

The third appellant was interroated by the inspectors during December 1985. He gained the impression that they wished him to say something implicating his colleagues in the

school.....

school boycott. The inspectors asked for the third appellant's co-operation in their investigation into the role of the teachers, pupils and others who had played a part in the boycott. The third appellant was reluctant and refused to commit his answers to writing. When the third appellant left at the conclusion of the interview, Panday remarked that "the cookie will crumble."

The fourth appellant was questioned by Messrs Raiman, Panday and Osman on 5 December 1985. They told her that they were on a fact-finding mission in regard to the boycott at Rylands school; and they sought her co-operation. The fourth appellant responded by saying that if she were given time she would give written answers to their questions. The inspectors told her that she would have sufficient time; and that no charge against her had been laid. They asked her to leave and to call in the tenth appellant.

The.....

The tenth appellant was interviewed on three separate occasions. On 22 August 1985 Mr Raiman told him that serious charges relating to the boycott at Rylands school and the general unrest had been made against him. Raiman inquired of the tenth appellant whether he would be prepared to give his answers to questions by way of a sworn statement. The tenth appellant was prepared to answer questions put to him in writing if given a reasonable time and an opportunity of taking legal advice. Raiman, however, "obliged" the tenth appellant to commit to writing the answers so far given by him. On 23 August 1985 Raiman told the tenth appellant that he was not carrying out an investigation and that he wished simply to verify information already in his possession. In response to a question by Raiman the tenth appellant admitted that on 19 August 1985 he had addressed an assembly of Rylands school pupils; but he explained that he

had.....

had done so in order to introduce a history teacher who was about to deliver a history lesson. On 5 December 1985 the tenth appellant was interviewed by Raiman, Panday and Osman. Panday stated that they were on a fact-finding mission in regard to the boycott at Rylands school. Panday asked the tenth appellant whether he was prepared to assist. When the tenth appellant inquired how these facts would be used against him and his colleagues and his pupils, Panday replied that it would depend upon how the Director felt. The tenth appellant then pointed out that Raiman had failed to comply with his earlier request that the charges against him should be reduced to writing; and he reiterated his willingness to answer any questions on condition that he should receive them in writing, and that he be given time to respond thereto. Panday inquired whether this request applied also to the tenth appellant's "professional performance" during the unrest period, to which

question the tenth appellant replied in the affirmative.

No affidavits were deposed to by Mr Raiman or Mr Panday or Mr Osman. The allegations made by the first, second, third, fourth and tenth appellants affecting their respective interrogations at Rylands school during the visits of the inspectors were not traversed in the answering affidavits filed by or on behalf of the respondents. Those allegations therefore stand uncontroverted.

In their affidavits the first and tenth appellants aver that the first respondent's decision to terminate their employment with the Department was actuated by ulterior political considerations, and that the said decision was vitiated by mala fides. In their answering affidavits the respondents deny that the decisions to terminate the services of the appellants were actuated by improper motives or promoted by ulterior considerations. The respondents stress that during the second

half.....

half of 1985 Rylands school suffered a total collapse of discipline and a complete disruption of teaching activities. The respondents aver that in these circumstances order had to be restored, discipline had to be tightened and efficiency promoted. To this end it was decided that the teaching staff at Rylands school had to be restructured by the replacement of certain teachers. Through such reorganisation, so say the respondents, the appellants became redundant.

In his supplementary answering affidavit the first respondent said that when consideration had to be given to whether or not the appointments of the first nine appellants should be confirmed and whether the services of the tenth and eleventh appellants should be retained, the position of each appellant was considered individually. He denied that the termination of the services of the appellants represented a punitive action to discipline them because of any allegations of misconduct.....

misconduct made against them. He stated, inter alia -

> "I emphasise that the termination of the services of the applicants was not effected as a result of allegations of misconduct made against them. In fact, I respectfully submit that this is borne out by the fact that some teachers who had held posts at Rylands Secondary School were transferred or dismissed even though no allegations of misconduct had been made against them. It is conceded, however, that in respect of some of the applicants, information was received which, if proved to be true, would have amounted to misconduct."

The Deputy Director of Personnel Management in the Department of Education and Culture was Mr J A Louw. During December 1985 Mr Louw addressed identically worded letters, on behalf of the Executive Director (the second respondent) to each of the first to the ninth appellants. Each letter read:-

> "I hereby formally give you notice of the termination of your services with the Department of Education and Culture in terms of Regulation 10(1) of the Regulations governing the conditions of teachers in State and

State-Aided Schools for Indians as published in Government Notice No. 1288 dated 26 August 1966, as amended.
Your services will accordingly terminate with effect from 13th January 1986."

Each of the first to the ninth appellants was given a calendar month's notice in terms of reg 10(1). During December 1985 Mr Louw also addressed notices to the tenth and eleventh appellants terminating their services with the Department in terms of reg 10(2) with effect from 1 January 1986. The period of notice was in excess of the 24 hours required by reg 10(2).

In the Court below the appellants attacked the legal validity of the termination of their services on the grounds (1) that the notices sent to them were formally defective; (2) that their dismissals were based on allegations of misconduct but that the procedures prescribed by secs 17 and 18 of the Act had not been observed prior to

their dismissal; (3) that - in the alternative to (2) - the principles of natural justice had been flouted inasmuch as prior to their dismissals the appellants had not been afforded a hearing; and (4) that in any case the decision to terminate their services was vitiated by mala fides. In regard to each of the aforementioned grounds THIRION, J ruled against the appellants. The reasoning of the Court below and the correctness or otherwise of its conclusions must now be examined.

(A) THE VALIDITY OF THE NOTICES TERMINATING THE SERVICES OF THE APPELLANTS:

Reg 10 invests (i) the Minister with the power to terminate an appointment on probation (subreg (1)), and (ii) the "Secretary" with power to terminate the service of a temporary assistant (subreg (2)). Emphasising that all the notices

in.....

in question had been signed by the Deputy-Director on behalf of the second respondent, it was urged that in each case the signatory had lacked the lawful authority to give the notice. In the Act in its original form the word "Secretary" in sec 1 thereof meant the Secretary for Indian Affairs. This definition of "Secretary" was deleted by sec 1 of Act No 100 of 1986. In this connection it was further submitted that there was no evidence before the Court that the position of the second respondent (as Executive Director) was the same as that of "Secretary".

In his judgment on this part of the case THIRION, J pointed out that a distinction had to be drawn between the taking of a decision and the administrative act of notifying the person affected by the decision; and that in the present case the notices did not purport to have been signed by the person who made the decision. The learned Judge observed:-

"It.....

"It would be a sufficient compliance with regulation 10 if the decision to terminate the Applicants' employment was taken by a person competent to do so even though the act of communicating that decision to the Applicants was left to an official acting on the instructions of the person who took the decision. I agree that it has not been shown that the position of Secretary of the Department is the same as that of Executive Director. However, in terms of section 32 of the Act the Minister may assign any power or duty conferred or imposed on him under the Act to the Secretary or any other official in the Department. The Act, in terms of its definitions, includes the Regulations made under the Act. It would therefore be competent for the Minister to assign his powers under regulation 10(1) to the Executive Director (Second Respondent). Although regulation 10(2) confers on the Secretary the power to terminate a temporary assistant's services, this power in my view, is not conferred on the Secretary to the exclusion of any power which the Minister may have to perform the same function. In terms of section 8(2) of the Act the power to discharge any person occupying any post in the establishment of a State school, vests in the Minister and the effect of regulation 10(2) which vests the Secretary with the power to terminate the services of a temporary assistant, is not to divest the Minister of his powers in that regard. This is not a case

of.....

> of a delegation of powers which has the effect of divesting the Minister of any of his powers; rather is it a case of a devolution of powers with the Minister retaining the right to exercise, in any given case, those powers himself."

It seems to me, with respect, that the reasoning in the above-quoted portion of the judgment is sound and correct. In their answering affidavits the first and second respondents averred that the first respondent in fact "delegated" his powers under reg 10 to the second respondent. The correctness of this averment was not put in question by anything said by the appellants, and the Court below, rightly, so I consider, accepted its truth.

The assessment of the facts leading up to the giving of the notices is somewhat befogged by disharmonious statements on the part of the respondents in their affidavits. While the first respondent stated that he it was who decided to terminate the services of the appellants the second respondent

said.....

said that the decision was taken jointly by the two respondents. In my view little turns on this inconsistency; and I find myself in agreement with the following remarks in the judgment of THIRION, J:-

> "..... it remains overwhelmingly probable that, if the decision was not taken by the First Respondent, it was taken by the Second Respondent with the concurrence of the First Respondent. Since either of them would have been competent to take the decision and since the decision was in fact taken by one or other or both of them, it would serve no purpose to have the matter referred for oral evidence on this aspect."

In my judgment the Court a quo correctly concluded that there was no merit in the argument based on the alleged formal invalidity of the notices terminating the employment of the appellants.

(B) THE APPLICABILITY OR OTHERWISE OF SECS 17 AND 18 OF THE ACT:

In.....

In the course of his judgment THIRION, J pointed out that the provisions of secs 15, 16, 17 and 18 of the Act applied only to persons mentioned in sec 15(1), ie persons -

> ".....occupying on a full-time basis in a permanent capacity a post included in the establishment of a State school....."

for Indians; and that temporary assistants did not qualify as such. The learned Judge proceeded to consider whether teachers on probation in terms of reg 3 fell within the class of persons described in sec 15(1). Counsel for the respondents had submitted that teachers on probation did not occupy their posts in a permanent capacity for the reason that their appointments were subject to confirmation by the Minister (subreg 3(2)) and because their services were terminable upon one month's notice (subreg 10(1)). It has already been noticed earlier in this judgment that in terms of subreg 3(1) -

"All.....

> "All appointments to the teaching establishment in a permanent capacity, shall be on probation."

THIRION, J considered that subreg 3(1) was destructive of the respondents' submission; and that from the wording of subreg 3(1) it necessarily followed that teachers on probation were appointed "in a permanent capacity". But such classification, so reasoned the learned Judge, did not entail the further consequence that the services of a teacher on probation could be terminated only under the provisions of the Act:

> "In my view.....the Minister when seeking to terminate in terms of regulation 10(1) the services of a teacher who is on probation in terms of regulation 3, is not confined to the grounds stated in section 15(4) and is not bound to follow the procedure laid down in sections 17 and 18. He may terminate the services of a probationer in terms of regulation 10(1) without assigning any reason for doing so. It would seem to be that a probationer holds his probationary appointment 'at pleasure' within the meaning of that expression

as .....

> as explained in Sachs v Dönges N.O. 1950(2) SA 265 at 297 albeit that his appointment may only be terminated on a calendar month's notice."

Before this Court Mr Gordon, who argued the appeal on behalf of the respondents, submitted that the Court below had erred in regarding the first nine appellants as teachers appointed in a permanent capacity. Counsel for the respondents forcibly contended that as a matter of common sense a permanent appointment and an appointment on probation represent antithetic and irreconcilable concepts. I think that Mr Gordon is right. The word "permanent" indicates a condition which is lasting; "probation", when used in the context of the appointment of a teacher, carries the inescapable connotation of a teacher on trial whose competence and suitability remain yet to be finally determined, and whose selection is subject to approval and confirmation.

In.....

In terms of sec 1 thereof "this Act" includes any regulation. But although regulations have the force of law, they are not drafted by Parliament. It follows that sec 15(1) must be interpreted before reg 3(1) is scrutinised and a meaning is assigned to it. It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation; and to use the latter as an aid to the interpretation of the former. Subreg 3(1) cannot be used to enlarge the meaning of sec 15(1). See: Clinch v Lieb 1939 TPD 118 per SOLOMON, J at 125; Hamilton-Brown v Chief Registrar of Deeds 1968(4) SA 735 (T) per NICHOLAS, J at 737C. It seems to me, with respect, that by the use of the phrase "in a permanent capacity" in sec 15(1) of the Act the plain intention of the legislature was to signify the antipode of the notion "in a temporary capacity."

It.....

It is to be noticed that the Act itself makes no provision for the appointment of teachers on probation. Teachers on probation, whose appointments are subject to the confirmation of the Minister, constitute a category created by the regulations. In the present matter the regulations are marred in a number of respects by undexterous draftmanship. The regulations betray not a little confusion of thought in the mind of the draftsman, and this creates difficulty in interpretation. The distinction between teachers permanently appointed to the establishment and teachers merely on probation is maintained well enough in some of the regulations (as, for example, in reg 9); but this is not the case throughout. The distinction is, in particular, obscured by the words somewhat indiscriminately used in the first sentence of subreg 3(1). When due weight is given to the clear wording of subreg 3(2) it is apparent at once,

so.....

so I consider, that what the draftsman intended to convey by the first sentence of subreg 3(1) was no more than this: that appointment to the teaching establishment in a permanent capacity has to be preceded by an appointment on probation. THIRION, J sought to derive support for his view that the appointment of probationers involved appointment in a permanent capacity by reference to the introductory words of subreg 4(1) -

> "No person shall be appointed permanently whether or not on probation, unless he....."

The learned Judge remarked that this regulation "makes it clear that probationers are nonetheless persons appointed permanently." It seems to me, with respect, that this is not so clear. The meaning assigned to reg 4(1) by the Court below overlooks, I consider, the antithesis mentioned earlier. Subreg 4(1) is no doubt susceptible of the meaning suggested

by.....

by the learned Judge. But when the powerful contrast of ideas between "permanent" and "probation" is steadily borne in mind it is very likely, so I consider, that what the draftsman in truth intended to signify in the opening lines of subreg 4(1) was -

> "No person shall be appointed whether on probation or permanently, unless he....."

Upon a proper interpretation of the regulations read as a whole it appears, in my judgment, that a teacher on probation does not and cannot enjoy a permanent appointment. He holds his post purely at the pleasure of his employer. The fact of his precarious tenure of office places him quite beyond the purview of sec 15(1) - and likewise of secs 16, 17 and 18 - of the Act.

It follows that, although I am constrained to reject THIRION, J's classification of a teacher on probation as a person appointed "in a permanent capacity", I consider (for different reasons) that the learned Judge was correct in his

further.....

further conclusion that the termination of the services of the first nine appellants required no invocation of the provisions of secs 17 and 18 of the Act.

(C) DID THE PRINCIPLES OF NATURAL JUSTICE REQUIRE THE DEPARTMENT TO GIVE THE APPELLANTS A HEARING BEFORE TERMINATING THEIR SERVICES?

It is common cause that before the notices in terms of reg 10 were posted in December 1985 none of the eleven appellants was afforded an opportunity of making representations to anybody in the Department in regard to the termination of his or her services. Both in the Court below and again in this Court it was strenuously contended that in all the circumstances of the instant case the principles of natural justice recognised by our law required an application of the maxim audi alteram partem; and that the first respondent's failure to give the appellants an opportunity of making

representations.....

representations in regard to the contemplated termination of their services rendered their dismissal unlawful.

On this part of the case THIRION, J undertook a comprehensive review of a number of leading decisions in our own Courts as well as in the English Courts. On the facts of the matter the learned Judge was impelled to the conclusion that although the appellants might be unable to assert any right enforceable in private law to resist the termination of their services, the decision to terminate their services was one which profoundly affected their employment. The above proposition is hardly open to challenge, and I would, with some diffidence and with respect to the Department, add only this. As a result of their dismissal the plight of the appellants is an unhappy one which must inevitably excite more than a measure of sympathy. Most of the appellants are young persons who have recently qualified

as.....

as teachers. Since the pressing educational needs of this country are only too well known it is to be hoped that the training and talents of the appellants will not be lost to the teaching profession.

THIRION, J stated his approach to the problem in the following words:-

> "In my view the consequences for the probationers and temporary assistants flowing from a decision under regulation 10 to terminate their employment, are such that the audi alteram partem rule would be implied unless an intention that the operation of the rule should be excluded appears clearly from the provisions of the regulation read in its context in the Regulations and the Act."
>
> (My emphasis.)

Having considered the matter the learned Judge held that before they made their decision under reg 10 the respondents were under no obligation to afford the appellants an opportunity to make representations thereanent. The main features of the case upon which the above finding was based may be

shortly.....

shortly summarised as follows:

(a) The Minister's decision under reg 10 derives from the exercise of a discretion which does not hinge upon an inquiry into or a consideration of facts or circumstances in regard to which there may be a conflict; or upon any particular finding of fact. The Minister has an untrammelled discretion and he is not obliged to disclose the reasons for his decision.

(b) In the case of a teacher whose appointment has been confirmed by the Minister the Act prescribes an elaborate procedure which has to be followed in order to obtain his discharge on the grounds of misconduct; and what constitutes misconduct is exhaustively defined.

On.....

On the other hand, save for reg 10, the regulations provide for no procedure to be followed in terminating the services of a teacher on probation or a temporary assistant. Nor do the regulations limit the grounds upon which their services may be terminated.

(c) The Act entrenches the tenure of a teacher whose appointment has been confirmed. The regulations provide no security of tenure for teachers on probation or temporary assistants.

(d) The manifest object of a system of teachers on probation is to provide a convenient testing period and at the same time to ensure that if for any reason the probationer does

not .....

not prove suitable, his probation may be terminated speedily and in an uncomplicated fashion.

In the past some decisions of our courts have based the audi alteram partem principle upon a statutory implication; while other decisions have viewed the right to be heard rather in the light of a substantive right which is to be enforced unless the particular statute excludes it, expressly or by implication; or unless the existence of exceptional circumstances warrant its non-observance. Although these differences in formulation have been recognised as appertaining to form rather than substance, this Court has recently stated its predilection for the "substantive right" approach. In Attorney-General, Eastern Cape v Blom and Others 1988(4) SA 645(A), CORBETT, JA stated the matter thus (at 662 G/I):

"Logically.....

> "Logically and in principle.....I prefer the approach which holds that in the circumstances postulated, viz a statute empowering a public official to give a decision which may prejudicially affect the property or liberty of an individual, there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the Legislature to exclude such a right. The 'implied incorporation' formulation appears to contemplate an incorporation of the right by implication, followed by the possibility of the exclusion thereof by implication. It is true that, as I understand the position, the incorporation would be based merely on the circumstances postulated above and the exclusion by implication upon a consideration of the statutory enactment as a whole, but nevertheless I find this formulation logically less satisfactory."

From the passage of the judgment of the Court below last quoted it would appear that THIRION, J viewed the problem from the angle of the "implied incorporation" formulation. Suffice it to say, however, that on either formulation of the principle, in my opinion the cumulative effect of the considerations to which the Court a quo called attention,

and.....

and which I have tried to summarise above, is such as to point incontrovertibly to an intention on the part of the Legislation to oust the operation of the audi alteram partem maxim from the Minister's recourse to reg 10.

(D) THE ISSUE OF MALA FIDES:

In regard to this issue there was a dispute of fact. The first and tenth appellants alleged that in terminating their services the first respondent had been actuated by "an ulterior political purpose." The respondents denied this: they said that teachers at Rylands school had to be replaced in a bid to restore order, tighten discipline and promote efficiency. In the Court below counsel for the appellants invited THIRION, J to resolve this dispute by recourse to oral evidence. The application was resisted by the respondents and was refused. Mr Magid, who appeared

for.....

for the appellants, urged upon us that in refusing to refer the dispute to oral evidence the learned Judge had exercised an improper discretion. For the reasons which follow I am unable to accept that submission.

Counsel for the respondents submitted to us that the reasons which prompted the first respondent's decision to terminate the services of the appellants were irrelevant, and in this connection he relied, inter alia, on the decision in Langeni & Others v Minister of Health and Welfare & Others 1988(4) SA 93 (W). That case concerned temporary employees in a Provincial Hospital whose employment was governed partly by statute and regulation and partly by a contract which provided that their employment could be terminated on either side by 24 hours notice. In the course of his judgment (at 101 C/D) GOLDSTONE, J remarked:-

"The person exercising the power of dismissal is

not.....

> not required to have anything against the employee. He may wish to employ someone else or he may wish to reduce the size of the work-force. Surely an employer hires such temporary workers so that he may terminate their employment for good reason or bad or, indeed, for no reason at all. That, in my view, was at all times the precarious nature of this employment....."

In defining the nature of the inquiry on this part of the case THIRION, J cited the decision of this Court in Mustapha & Another v Receiver of Revenue, Lichtenburg 1958(3) SA 343(A), and then proceeded to state:-

> "If it could be shown that the Minister, although professedly exercising his powers under regulation 10 for an authorised purpose, was in fact exercising them for a different and unauthorised purpose and with an ulterior object in mind, his decision would be set aside as unlawful. (Mustapha's case supra at 358).

Mr Gordon contended that the majority judgment of this Court in Mustapha's case, supra, which was delivered by OGILVIE THOMPSON, AJA, did not represent authority for the proposition

formulated.....

formulated by THIRION, J. Counsel for the respondents pointed out that a matter specifically left open by OGILVIE THOMPSON, AJA (at 358 B/C) was the following:-

> "It should, however, be specifically recorded that the present appeal is of course solely concerned with 'permit contracts' under this Act, and that I do not decide that each and every contract, terminable on notice and to which the State or a public officer is a party, may with impunity be terminated by the latter merely by giving the stipulated notice even though such notice be given solely on the ground that the other contracting party is a member of a particular race. That is a wide and important question which was not argued before us and I express no opinion upon it."

(See further the remarks of DAVIS, AJA in Van Eck, N.O. and Van Rensburg, N.O. v Etna Stores 1947(2) SA 984 (A) at 996-1000).

For purposes of the present appeal I shall assume (without deciding) that the test was correctly stated by THIRION, J and that it was open to the appellants to challenge

the validity of the first respondent's decision to dismiss the appellants by seeking to establish that he was actuated by an ulterior and improper motive.

The appellants' argument of mala fides on the part of the first respondent rested on the interrogations to which some of the appellants had been subjected and which are described in the founding affidavits of the first, second, third, fourth and tenth appellants. What transpired during these interrogations has been discussed earlier in this judgment. The effect and significance of that evidence in relation to the charge of mala fides must now be considered. In this connection THIRION, J made the following findings:-

> "What happened at all these interviews or interrogations is that the Applicants refused to answer questions and that their refusal to answer questions either was not well received or else elicited veiled threats of action against the Applicants themselves. In so far as the investigations related to the conduct of particular

Applicants,

Applicants, the investigations were either terminated at a stage when no conclusion was justified or else abandoned as inconclusive."

and later in the judment -

"Only certain of the Applicants were questioned or interrogated. The nature of the matters touched on in the interrogation, if it could be called such, differed widely. The highest that the matter can be put in favour of the Applicants is that.....the tenor of the inspectors' questioning and the remarks made by them in response to these Applicants' refusal to answer questions or divulge information, strongly suggest that the inspectors regarded the attitude adopted by these Applicants with disfavour and might have come to the conclusion that these Applicants were sympathetically inclined towards the pupil protests or even supporters of the protests.

If the inspectors had reported to the Respondents on their interrogations.....these seem to me to be the only findings which they could have conveyed to them because the Applicants who were questioned made no damaging admissions on which any adverse findings could have been based.

In the absence of any denial that the inspectors reported to the Respondents on their interrogation

of.....

> of the Applicants it is a fair inference that they did report."

The above assessment of the purport and implications of the interrogations seems to me to be both accurate and fair. I think that on the probabilities it must further be accepted - as the learned Judge accepted - that the inspectors reported to the respondents on the limited results of the interrogations. It is very likely in such a situation that in arriving at a decision to terminate the services of the appellants the respondents had regard to the political sympathies or affiliations of at least those appellants who had been interrogated.

The question which crisply arises is whether in all the circumstances of the present case, if the respondents did have regard to and were influenced by the political sympathies of any of the appellants, that would constitute an ulterior and improper consideration vitiating the decision to terminate

their.....

their services. Having carefully weighed this question the learned Judge answered it in the negative. His reasons, which seem to me to be unassailable, are the following:-

> "The Respondents were faced with an urgent need to restore discipline and order at a school where over an extended period of time classes had been disrupted and the educational process brought to a halt. It is clear that the teachers at the school had lost control of the pupils and that they were either unable or unwilling to regain control so as to restore order. The unruly conduct of the pupils was clearly politically inspired. The protests involved far wider issues than ordinary pupil grievances.
>
> The Respondents had to determine the question of the ability or willingness of the teachers to restore order at the school. It would not have been irrelevant to that question for the Respondents to have taken into account the political sympathies of the Applicants in so far as they might have had a bearing on the ability or willingness of the Applicants to take positive steps to remedy the situation at the school. If that was the approach of the Respondents, and that is as high as the case can be put for the Applicants, they would not have acted mala fide."

In.....

In cases such as the present the mere allegation of the existence of an ulterior and improper motive on the part of a decision-maker is not enough: Ah Sing v Minister of Interior; Tuling v Minister of Interior 1919 TPD 338 at 342; Jeewa v Dönges NO & Others 1950(3) SA 414 (A) at 423 C/D. THIRION, J based his refusal to hear oral evidence on a finding that the allegation of mala fides was lacking in any factual foundation. In my view a proper analysis of the affidavits filed by the appellants shows that the allegations of mala fides is in truth quite unsubstantiated. It cannot be said, I consider, that in refusing to hear oral evidence in regard to the issue of mala fides the learned Judge failed to exercise a proper discretion.

For.....

For all the aforegoing reasons I conclude that THIRION, J rightly dismissed the application with costs. The appeal is dismissed with costs, including the costs of two counsel.

G G HOEXTER, JA

CORBETT, CJ)
BOTHA, JA) Concur
KUMLEBEN, JA)
EKSTEEN, JA)