

Ex Parte:

23.8.58

THE UNIVERSITY COLLEGE OF FORT HAREO P I N I O N

Professor Z. K. Matthews, has been in the employ of Consultant, The University College of Fort Hare, both in his capacity as a Professor and also for certain periods as the acting principal.

On or about the 5th December, 1956, Professor Matthews was arrested at Fort Hare and he subsequently appeared in Johannesburg at the treason trial preparatory examination. The trial is presently taking place in Pretoria. Immediately after his arrest, application was made for bail in Grahamstown, which was at that time refused, but subsequently he was released on bail in Johannesburg after being in custody for a few days. Following his arrest he appeared at the preparatory examination in Johannesburg and he has been indicted and has recently been appearing at the trial as an accused person in Pretoria.

On the 12th of April, 1957, the Council of the University had reported to it by the Chairman, Dr. T. Alty, the circumstances of the arrest of Professor Matthews and his absence from the College. At a meeting on that date it was resolved that Professor M. H. Giffen should act as principal of the College with a basic salary at the rate of £2,000 per annum with effect from the 5th January, 1956, until the end of the preparatory examination for the treason trials being held at Johannesburg.

The Council agreed that entertainment allowance at the rate of £200 per annum should cease to be paid to Professor/

Professor Matthews as from the 12th April, 1957, and should be paid instead to Professor Giffen as from that date until the end of the preparatory examination.

The Council resolved to grant Professor Z. K. Matthews leave with full pay and allowances (which did not include entertainment allowance) from his duties as acting principal until the end of the preparatory examination.

At a special meeting of the Council, held on the 11th October, 1957, the Chairman, Dr. Alty, reported that Professor Giffen had tendered his resignation as acting principal and had requested that he be relieved of his duties immediately. He, the Chairman, had accepted Professor Giffen's resignation and had asked Professor Matthews to resume duty as acting principal as from 1st October until the Council met on the 11th October. The Council approved the action taken by the Chairman.

The Council then discussed the future arrangements with regard to the acting principalship. After a full debate the Chairman proposed and Mr. Glyn Thomas seconded the motions:

" That the Council recall Professor Z. K. Matthews from leave, which had been granted to him under minute 1777. "

This motion was carried by a majority of votes on ballot.

Professor Matthews thereafter continued to be acting principal with full pay and allowances, including entertainment allowance, until 1st January, 1958, when Mr. H. R. Burrows assumed duty as principal. From that date Professor Matthews has been receiving the pay and emoluments of a Professor and has been in regular performance of his duties until the 30th July, 1958, when he departed for Pretoria to appear at the treason trial.

Doubts have been expressed by members of the Council/

Council, as to whether in view of the provisions of regulation 19 (a) (ix) of Part VI (Leave) of Government Notice No. 671 of the 27th March, 1953, the Council of Consultant has not acted ultra vires in granting Professor Matthews leave on full pay and in allowing him leave of absence on full pay while he is in Pretoria attending the treason trial.

The first question to be considered is whether the regulation 19 (a) (ix) applies to the present case. This regulation reads as follows:-

" 19. (a) Special leave with full pay
may be granted to an employee -
.....

(ix) when he is absent from service
as a result of his arrest on
a criminal charge and he is
subsequently acquitted or the
charge withdrawn, for the
period of detention. "

The University College of Fort Hare is a statutory corporation and as such it functions through its Council. Its powers as a statutory body are limited and prescribed by the statutes which regulate it and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to or consequential upon the things which the legislature in the respective statutes has authorised. See -

Halsbury's Laws of England (3rd Ed.) Vol.
9 para. 129 at pages 62 - 63.
and the authorities there cited.

It follows too, that such powers as are not expressly or impliedly authorised are to be taken to be prohibited.

It seems to me, after careful consideration, that
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the words "for the period of detention" in this regulation, must be construed in a wider sense than "during the period of incarceration or custody". If the words were to be construed narrowly it would lead to the anomalous and absurd consequence that an employee who does not choose to apply for bail but who prefers to remain in Police custody from the time of his arrest or who is refused bail with that consequence, could be granted special leave, whereas one who receives bail could not. This offends against the well known canon of constructions of statutes, that a statute must be interpreted so as to avoid absurdity. See -

Dit Uitleg van Wette, Steyn (2nd Ed.) at Pages 106 and 239, and the authorities there quoted.

The proper approach is to ascertain the intention of the legislature from the words used in the regulation, and then to interpret the regulation in the light of the abovementioned principle as covering those instances or circumstances as are fairly regarded as incidental to or consequential upon the provisions of the regulation. If this is done in the present case then it would seem to me that the legislature was concerned to deal with the case of an employee, who because of arrest on a criminal charge, was not a free agent to attend to and carry out his duties as an employee. His inability to do so springs not merely from the fact of detention upon arrest, but also from the fact that he is required, as an essential condition of bail granted to him, to attend the legal proceedings in due course. His attendance is compulsory at the behest of and in the interests of the State. His failure to attend renders him liable to re-arrest. In truth the position in the ultimate analysis is that at every hearing of the case, that is whenever the Court assembles, he surrenders his bail and is detained during the sitting of the Court. He is obliged to remain/

remain present during such sitting of the Court and I think is then technically "detained" or "in detention". On adjournment of the sitting, he is required to reapply for bail which is in turn surrendered at the next resumed sitting of the Court. It is true that these formalities are usually dispensed with by an application for bail to stand during the trial. This, however, is merely a matter of convenience, and in law the position is really that an accused person is detained during the Court's sitting.

In these circumstances, such an employee is certainly not a free agent. The restriction upon his freedom, even though it does not amount to incarceration, is in my opinion within the ambit of the meaning of the regulation.

In these circumstances it seems to me that the regulation can be acted upon to deal with the case of Professor Matthews.

There is, however, another difficulty, namely, that the regulation can only apply to an employee who subsequently to his arrest is acquitted or has the charge against him withdrawn. The meaning of the regulation in this respect is quite clear and unambiguous. That being so, the Council cannot act thereon until such conditions have been fulfilled. In this case that has not yet happened. It follows that any action which the Council purported to take in the past under this particular regulation is ultra vires. Until such time as Professor Matthews has been acquitted or has had the charge against him withdrawn, the conditions stipulated in this particular regulation have not been fulfilled, and in consequence the Council cannot act thereon, as it has purported to do in the past.

There is no other regulation which is designed

to meet/

to meet the circumstances of this particular case. The de facto position then is that Professor Matthews has been granted leave. It is not "special leave" and cannot be such and, therefore, the leave having been granted erroneously, the provisions of regulation 20 would appear to apply. That provides that if leave is granted in error but in good faith to an employee in excess of the period permissible under the regulations, this shall be deducted from accumulative leave which may subsequently accrue to him. If, therefore, the matter is to be regularised within the framework of the regulations, this can only be done by virtue of the provisions of regulation 20, and therefore such leave will have to be deducted from accumulative leave which may subsequently accrue to Professor Matthews and which might have accrued to him in the past. I do not know whether this is possible or will be possible having regard to the amount of leave which has and can still be accumulated by Professor Matthews. This might well be impossible.

There would, however, appear to be another course open to the Council and in my opinion this would be the better course for them to follow. Thus consideration should be given to applying the provisions of regulation 1 (b). This particular regulation reads as follows:-

" If the circumstances of a case justify a departure from the provisions of this Part, the Council may authorise leave on such terms as the Secretary may approve. "

The case of Professor Matthews is sui generis to a degree which merits a departure from the regulations as envisaged by this particular provisions. There would be prejudice and hardship of the greatest degree to him if the position had to be regularised at the expense of his accumulative/
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mulative leave, even if this were possible. The Council of Consultant cannot leave the matter uncertain pending the result of the trial which Professor Matthews is standing at the present time. Therefore it would seem to me that it would be unfair to await the outcome of the trial before the possibility of applying regulation 19 (a) (ix) can be considered. In all the circumstances, therefore, it would seem to me that the best practical course to adopt would be to depart from the provisions of the regulations in order to meet the case as a special one. It seems to me that the circumstances of the case would justify a departure from the provisions of the regulations within the meaning of regulation 1 (b) mentioned above, and therefore the Council's best course would be to deal with the case in terms of those regulations and to obtain the approval of the Secretary to authorise special leave on terms which would regularise the position.

In answer to the specific questions put to me, therefore, I have to reply as follows:-

- (a) Regulation 19 (a) (ix) of Government Notice No. 671 of 1953, does not apply to the case of Professor Matthews and the granting of leave on full pay to him has been irregular.
- (b) The position created by granting leave bona fide but in error has to be dealt with in terms of regulation 20 and such leave has to be deducted from accumulative leave carried and to be carried by Professor Matthews.
- (c) Consultant is advised to approach the Secretary so as to deal with the case as a special case in terms of regulation 1 (b).
- (d) The circumstances of this case strongly merit the application of the provisions of regulation 1 (b).

(Sgd) J.D.Cloete.

City Chambers,
115, High Street,
GRAHAMSTOWN.

23rd August, 1958.