IN THE HIGH COURT OF SWAZILAND

Civ. Case No.1005/91

In the matter of

MKIZE ELLIOT MHLANGA — 1st Applicant

ENOCK HLATSHWAYO — 2nd Applicant

THEMBA DLAMINI — 3rd Applicant

and

THE ATTORNEY-GENERAL — Respondent

J U D G M E N T

(11/5/93)

Hull, C.J.

By section 21 of the Finance and Audit Act 1967 (Act No.18 of 1967) it is provided (inter alia) as follows:

"If it appears to the Permanent Secretary that any person who is ... a public officer -

"(c) is .... responsible for the loss of any .. stores or other government property;

"and if, within a period specified by the Permanent Secretary, an explanation satisfactory to him is not

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furnished with regard to such.....loss ....., the Permanent Secretary shall surcharge such person the ...loss,... or such lesser amount as the Permanent Secretary may determine".
The Permanent Secretary has power, under section 23, at any time to withdraw a surcharge in respect of which a satisfactory explanation has been received or if it otherwise appears that no surcharge should have been made.

A person who is dissatisfied with a surcharge made against him may, within 21 days after being notified of it, appeal in writing to the appropriate Service Commission under section 24(1). Subsection (2) of that section provides that the commission "acting in its discretion shall determine every appeal and shall make an order thereon accordingly".

Section 24(4) provides as follows:

> "This section shall not be deemed to affect the powers of the High Court to review any proceedings taken under this Part".

In 1987, the differential assembly of a motor vehicle, being the property of the Government, was stolen from the yard of the Water and Sewerage Board in Mbabane. Subsequently, on 8th August, 1991, the applicants in these present proceedings were surcharged in the sums of E3378.77, E500 and E500 respectively in respect of the loss. At all relevant times, they were employees of the Board. The surcharges were imposed by the Principal Secretary in the Ministry of Finance. Under the terms of the surcharges, the applicants were to pay them by monthly instalments, over a period of 10 months in the case of the first applicant and over a period of 6 months in the case of each of the other two.

In October 1991 the applicants commenced these present proceedings on notice of motion for review. They seek to have the surcharges set aside, or reviewed and corrected, on grounds that are set out in paragraphs 12 to 14 of the first applicant's supporting affidavit. These are, in summary, as follows:

(a) As between the applicants, the respective amounts of the surcharges are arbitrary.

(b) In the circumstances of the case, the applicants could not reasonably be held liable for the loss, and the decision was brought about by -

(i) irrelevant considerations, and/or
(ii) bad faith, and/or
(iii) improper exercise of discretion.

(c) For the reasons in (a) above, the decision was ultra vires.

In his founding affidavit (on which the other applicants also rely) the first applicant asserts that he was summoned to attend an enquiry before a board. There he was told that on the information before the board, he was the main suspect and he was called on to show cause why he should not be surcharged the full value of the equipment. He denied liability. He also asserts that the enquiry was not completed at this stage. Thereafter he made his own investigation and obtained information as to who had committed the theft. According to the first applicant, the board met again in or about July 1991 to consider the matter further. At this meeting three names were given to the board and he also informed it that he had two witnesses. These were the other two applicants now before this court.

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They gave evidence, confirming that they had seen the named persons taking the differential.

According to the first applicant, it was after this hearing that the applicants were surcharged by the Principal Secretary on 8th August.

This is not a complete or accurate account of the sequence of events leading to the surcharge. In the way in which the affidavit is expressed, the startling circumstances in which the first applicant claims to have witnessed the theft are also not apparent.

Mr. T.T. Vilane has given an affidavit in answer. He states that he is the chairman of the Losses Committee which carries out inquiries into what he describes as the offences stipulated under the Act. He agrees that there was an inquiry but says that the first applicant appeared before the Losses Committee. He admits that the first applicant was the main suspect and was requested by the Committee to show cause why he should not be surcharged for the loss. He denies that the matter was not concluded at the first meeting. In support of his denial, he produces a document as annexure "R1", which he identifies as a surcharge imposed on 3rd June 1991 on the first applicant alone, for the full amount of the lost item, i.e. E4378.77.
Mr. Vilane goes on in his affidavit to describe what happened subsequently. He explains that the first applicant told the Committee that he had carried out his own investigations and that the Committee met in July of 1991 at that applicant's request, because he wanted to tell the Committee where to find the differential. At that meeting the second and third applicants were called as the first

applicant's witnesses. Afterwards, the first applicant's surcharge was readjusted, downwards, by E1000 and the other two applicants were surcharged E500 each.

The applicants have not filed further affidavits in reply. At the present hearing, both counsel were content with the record as it has been produced here. It is not easy to follow in all respects.

The first document, at pages 1 and 2 of the record, is described as a brief for the Losses Committee. It is undated. Then, in the sequence in which the record is set out, pages 3 to 41 are described as minutes of a meeting with security guards in respect of the loss, apparently in the office of an Assistant Director. It appears that this comprised a panel of 7 persons, including a Mr. Mbhamali as chairman and also including a recorder. This meeting was ostensibly held on 30th June 1991 according to the tenor of page 3, though from page 26 it also appears that it continued on 1st July. Several persons, including all of the applicants, were interviewed. These minutes conclude, on page 41 of the record, with a decision that they should be typed and distributed to "the members of Management" and that there should be a meeting on 2nd July "1987" .

No one has sought to explain the significance of pages 1 - 41 of the record, or to challenge them. It seems to me to be
likely, having regard to the nature of the minute, that despite the date "1991" on page 3 this is a record of proceedings that occurred soon after the loss in June 1987 - i.e. that the reference on page 41 to the year 1987 is correct.

Pages 42 to 56 of the record are described (at page 42) as "Losses Committee's Findings". They are in typescript, but

handwritten notes have been inserted on pages 42, 45, 48, 49 and 51, which indicate that these proceedings took place on 28th May 1991, 18th June 1991, 25th June 1991, 9th July 1991 and 16th July 1991. This part of the record does refer to the fact that on 28th May 1991 the Losses Committee resolved that the first applicant should be surcharged the whole of the loss. Mr. Vilane in paragraph 4 of his affidavit verifies this, i.e. verifies the decision to surcharge the full amount on 28th May. From 18th June onwards, this part of the record(according to its tenor) is concerned with the first applicant's request to be heard further and to call the second and third applicants as witnesses. Again Mr. Vilane verifies this in paragraph 6 of his affidavit. I do not think that the discrepancy in that paragraph, whereby he refers to the second hearing of the Committee as occurring in July only, is significant. As I say, at this hearing, both sides accepted the record and the applicants have not sought to rebut Mr. Vilane's statement that the surcharge inquiry was held before the Losses Committee. I therefore proceed on the basis that pages 42 onwards of the record deal with the surcharge proceedings.

For the Crown, an objection in limine was taken at the outset which, in its notice in terms of rule 6(12)(c) of the Rules of the High Court, is expressed in this way:

> "The applicants' remedy against the decision of the Principal Secretary ..... was to appeal to the appropriate Service Commission in terms of section 24(1) of the Finance and Audit Act 1967. The applicants have failed to exhaust this remedy and consequently this Honourable Court has no jurisdiction to hear and determine this matter."

In the oral submissions, counsel argued that on their

papers, and on the record, the applicants were not alleging procedural irregularities - so that their appropriate remedy was to have appealed rather than to seek a review - and further that having regard to Liassou v Pretoria City Council 1979 3SA 217 (TPD), this Court should hold that it has no jurisdiction by way of review.

I do not consider that the objection in limine can be sustained. In Liassou, the applicant had applied to the Court to review a decision by the Pretoria City Council, under section 35 of the Pretoria Town Planning Scheme (1974), refusing its request to use premises for the purposes of entertainment involving pin ball machines. Section 17(9) of the Scheme stated that an applicant aggrieved by a decision of the Council had a right of appeal. Under section 35, the appeal lay to the Townships Board, and it was common ground that appeals were by way of complete rehearings. The applicant approached the court without having pursued that right of appeal.

In his judgment, at paragraphs E and F on page 219, Preiss J. said:

> "A Court leans against the removal of a person's right to review proceedings of a tribunal in the Supreme Court, or of the postponement of such right until his remedies have been exhausted in the form of appeals to
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> which he is entitled. I agree with Mr. Strauss for the applicant, that the exclusion of the Court's power to entertain a review immediately following upon the alleged irregularity must flow from the express words of the relevant statute or by necessary implication from all the relevant terms."

He then went on to cite the earlier authorities on which he

relied for that conclusion, and in particular the summary of South African law by Holmes J.A. in Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (A) at page 593B, in which that latter judge said:

> "In the present case the correct approach is to enquire whether and to what extent the intention of the Legislature ..... was to oust the Court's jurisdiction pending exhaustion of the statutory remedy of appeal .... There will be an ouster only if that conclusion flows by necessary implication from the particular provisions under consideration and then only to the extent indicated by such necessary implication."

In the present instance, of course, there is no such implication. On the contrary, section 24(4) of the Act expressly reserves the jurisdiction of the High Court on review.

The applicants do allege here (though at this point I make no comments on the merits) issues of arbitrariness, bad faith and jurisdiction. Moreover, although the point is admittedly not raised in their papers, it is apparent from the record - and it was acknowledged by Crown Counsel during the course of this hearing - that as far as the second and third applicants are concerned, there is in reality a question of procedural irregularity. In all the circumstances, and having regard to the unfortunate passage of time, I consider that the Court does have jurisdiction to entertain the application and that I should proceed to do so on the merits.

I should however refer to one other preliminary matter. It is not suggested that the Principal Secretary, who imposed

the surcharges, is not today the proper officer to exercise that power. It was not suggested either that the process that was followed here - i.e. that before he did so, the Losses Committee conducted the inquiries and made the recommendations and findings on which he acted in imposing the surcharges - was by reason that it did so irregular. That has not been in issue in these proceedings. It is not the basis on which they have been brought. I intend accordingly to proceed on the basis that no objection is taken by the applicants in that regard.

The surcharge procedure is statutory. Where it appears to the Principal Secretary that a public officer is (inter alia) responsible for a loss of government property, section 21(1) contemplates that he is to call on the officer to give a satisfactory explanation to him within a period that the Principal Secretary is to specify. If the officer fails to do so within that time, then the Principal Secretary is bound under the section to surcharge him for its value or for such lesser amount as the Principal Secretary shall determine.

A surcharge is not a criminal penalty. I have some reservations about characterising it as a penalty at all. I think that the true purpose of the Act is to protect public assets and revenue by providing a statutory procedure whereby the Government can require an officer who has caused or is responsible for a loss to indemnify the public revenue up to the full amount of the loss. It is a summary remedy - and to that extent a peremptory remedy - in which, once the Principal Secretary comes to the view prima facie that the officer is responsible, that officer then has the burden of giving a satisfactory explanation. The Principal Secretary must have a sufficient basis for his view, however, and he

must afford the officer an opportunity to give an explanation, and he must then consider any explanation so given, before he may exercise the power to surcharge.

As far as the first applicant is concerned, he was called before the Losses Committee on 28th May 1991 to show why he should not be surcharged. It is not in dispute that the differential assembly had been stolen in 1987. Although pages 1 - 42 of the record have not been referred to in the evidence, they have been accepted by both counsel as part of the record. Counsel for the first applicant, in his own submissions on the decision to surcharge, argued that the case against him was based on suspicion. It appears from the record of the proceedings before the Losses Committee that it must had regard to the proceedings described in the earlier part of the record when considering his explanations.

What that part of the record indicates is that the assembly was found to be missing on 22nd June 1987. In the inquiry described on pages 2 to 41 (inclusive) a Mr. Nzima, who was watchman on duty on the previous Saturday, said that when he had taken his lunch break on that day he had asked a friend Mr. Dube to look after the yard. Before he began his lunch, Mr. Dube came to see him to say that the first applicant wanted him at work because he had a message for him. On returning to the yard he found that the first applicant was not there. On inquiry from the storekeeper, he was told that the first applicant had left the yard. A Mr. Simelane said that on the Saturday, the first applicant had asked him to tell the second and third applicants to wait for the first applicant at the gate.

The first applicant was himself interviewed. He said that

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although he did not remember, he thought he came to the yard at about 8 a.m. He said that he told Mr. Simelane to tell Mr. Nzima that he would be going home but as the other man did not see Nzima, he went down and found Dube, and he said that by looking, he could see that he was relieving Nzima. At about 2 p.m. he asked Dube to call Nzima and he waited about one hour for Nzima before leaving. He said that he left to go home to a sick child at about 3 p.m. Mr. Dube denied that Nzima asked him to look after the "workshop" while he was at lunch. He said the first applicant sent him to find Nzima at about 1 p.m.

The second and third applicants were also interviewed on this occasion. The former said he was at the yard with the first applicant on the Saturday from about 11 a.m. to 1 p.m. The third applicant said that he was home on that day.

It is in my view clear from this earlier part of the record that any basis for calling on the first applicant to show cause why he should not be surcharged rested on suspicion alone. He had been present at the yard on the Saturday even though he was not on duty. Mr. Nzima and a Mr. Malinga both suspected that the first applicant had been sent to look for Nzima by way of diversion and told the panel this. Malinga also based his suspicions on previous dishonest activity in which the first applicant was said to have been involved. But it was never established that the assembly was stolen at this time. On any proper view the basis on which it might appear to anybody then that the first applicant was a thief was extremely flimsy.

At the initial inquiry before the Losses Committee on 28th May 1991, some four years later, when it was decided first to surcharge him, the Committee appears only to have been

concerned to hear an explanation from him. In other words it appears to have relied, subject to his explanation, on the earlier record. He clearly was given an opportunity to make an explanation. He appears to have given two explanations as to why he went to the yard on the Saturday. The one was that he was on was on standby and had received an emergency call. He had not mentioned this at the earlier inquiry. The other was that he went to look for somebody whom he could now not remember. He also said in effect that he could not remember the details of the earlier investigation. The Committee appears to have elicited an acknowledgement from him that when he had returned to the yard the differential was missing, but it is by no means clear from the record as to what he was acknowledging in this respect, and he was in any case saying to the Committee that he did not remember events well, four years on.

At the conclusion of the proceedings against the first applicant on 28th May 1991, on the record produced here and on the evidence before me, I do not think that it can be said that there was any reasonable basis on which it could appear to the Losses Committee or in due course, on its report and recommendations, to the Principal Secretary, that the first applicant was responsible for the loss of the differential assembly; and notwithstanding the ambiguity of his reasons, four years later, as to why he went to the yard on the Saturday, I do not consider that in those circumstances the account he himself gave to the Committee can be regarded properly as unsatisfactory. He was contending with suspicion, not with prima facie or even reasonable grounds for thinking that he had been responsible, through dishonesty or carelessness, for the loss of the assembly.

When the Committee later reconvened at his request on 18th June, it was for the purpose of enabling him to show why the surcharge should not be withdrawn on the giving of a satisfactory explanation by him at that stage. Subject of course to the observation that for the reasons given, I do not consider that the occasion for the surcharge had properly arisen, this was in the light of the earlier decision a proper course for the Committee to take, having regard to section 23 of the Act.

At this hearing the first applicant, for the first time, put forward the evidence that I earlier referred to as being of a startling nature. What he now had to say was then he have been to South Africa with his son, to see a witchdoctor. There, when he looked into a mirror, he saw three men (whom I will not refer to by name) taking the differential. The witchdoctor then told him that the second and third applicants could also tell him what they saw. Thereupon he went to see the other applicants who agreed that they had indeed seen these other men taking the assembly. He called both of the other applicants before the committee on 18th June. It may be recalled that they had been interviewed at the enquiry in 1987.

On now being called as witnesses, they both said that they had seen the three men taking the differential. The third applicant explained that they had kept quiet because they had feared for their lives.

The Losses Committee then called the three men who were being accused of the theft. All denied that they had stolen the assembly. The Committee also called Mr. Nzima, apparently because of a suggestion that he had seen them take it. He denied this.

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The first applicant was given the opportunity on 9th July, 1991 to comment further in explanation on the accounts given the first two men who were accused by him of the theft. He then said that he did not blame the Committee for the decision it have taken because he realised he had failed to give an explanation and that the Committee could not rely on the aid of a witchdoctor. He also, for the first time, implicated another employee as the "trainer" of the three men he had accused. Having done so however, he told the Committee that it could do as it wished. In turn, it thanked him and asked him to tell it as soon as he found the differential.

Still later the first applicant was given an opportunity to confront this other employee before the Committee. The other man denied that he had trained anyone to steal.

The second and third applicants were then asked by the Committee to give further statements. They were both questioned as to why they had not reported at the outset that they had seen the differential being taken (i.e. by the three other men who had been accused by them). The second applicant's answer was that he thought the matter was to come to an end. The third said again that he was afraid of being shot.

At the end of the last hearing on 16th July, 1991, the Committee decided that the first applicant's surcharge should be withdrawn and a new one imposed. It also resolved that the second and third applicants should each be surcharged E500.

Thereafter the Principal Secretary imposed surchages on 8th August, 1991 as earlier described.

As fanciful as the first applicant's account of his revelation may have been, it is not to be inferred necessarily from that that he was responsible for the loss of the differential. As those who practise criminal law know well, there may be reasons other than guilt why a person may offer a false explanation, even before a verdict is given. Here the Committee had already reached a conclusion. He was seeking to get it to change its mind. His new explanation could have been that of a man who was not responsible for the loss, and wanted to avoid the surcharge, but had no other basis on which to try to persuade the Committee to alter its decision. Of course there could have been other reasons for the account too. Revelations of the kind described by him have the advantage that, if believed, they will explain not only a delay in offering an account but also (as here) possible contradictions in accounts given at different times. Even this, however, would not necessarily mean that the explanation is that of a guilty person. It might - though I do not suggest that it is so here - be the device of a man who has seen something, previously denied by him, that he now feels forced to disclose.

All of this is, however, in my view, by the way. At the end of a long tale, the fundamental point in favour of the first applicant's case is that there was never was a sufficient basis on which section 21 could properly have been invoked so as to enable the Principal Secretary to call upon him to offer a satisfactory explanation. There was nothing that was in any way sufficient to call for, from him, an explanation. There was nothing on which, on the recommendation of the committee, it could properly have appeared to the Principal Secretary that he was the person who was responsible for the loss.

The position of the second and third applicants is rather different. It is in my view easy to understand why it was eventually decided that they should pay E500 each towards the loss of the differential assembly. By their own accounts they had each seen the assembly being stolen. They had done nothing to prevent this as it occurred, and they had done nothing for a long period of time to report it, despite the opportunities to do so that arose because of extensive inquiries. In the circumstances described by them, every public officer has a responsibility for reporting what has happened. There was in my view something satisfyingly ironic in the fact that they were taken at their word (whatever that was worth) and surcharged for their lack of responsibility. However, as Crown Counsel correctly conceded, the statutory surcharge procedure was not followed at all against them. In those circumstances, though with regret, I have to grant their applications.

Accordingly, the surcharges are set aside. The moneys that have been deducted from the applicants' wages are to be refunded to them. The first applicant is to have his costs on these proceedings, against the respondent. In the circumstances, I decline to make any orders for costs in favour of either of the other applicants.

DAVID HULL
CHIEF JUSTICE