In the High Court of Swaziland

Civ. Case No. 1299/93

In the matter between;

Noel Bonginkosi Nkumane

vs

The Attorney General

The Chairman Civil Service Board

The Civil Service Board

CORAM:	Hull, C.J.
FOR APPLICANT	Mr. Mamba
FOR RESPONDENTS	No appearance

Judgment

(13/10/93)

This is an application for review. According to paragraph (a) of his notice, which is described as a "notice of review" but is in substance a notice of motion by way of review in accordance with sub-rules (1) and (2) of rule 53 of the High Court Rules, Mr. Nkumane seeks an order "that the decision of the Civil Service Board of the 20th July 1993 terminating the applicant's employment shall be reviewed corrected and set aside."

The notice of motion, which is supported by an affidavit (inter alia) from Mr. Nkumane, was served on the Chairman of the Board, on the Board itself and on the Attorney General on 13th September 1993.

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There has been no response at all from any of the respondents. The Chairman has not despatched to the Registrar of the High Court the record of the proceedings which Mr. Nkumane seeks to review. None of the respondents has given notice under sub-rule (5) that he or it intends to oppose the granting of the order sought, or filed any affidavit in answer.

Sub-rule (7) of the rule provides that the provisions of rule 6 as to the set down of applications "and sub-rule (11) thereof" shall mutatis mutandis apply to the set down of review proceedings.

Rule 6 (11), as it now stands, provides that where a respondent does not, on or before the day specified in his notice of application, notify the applicant of his intention to oppose, the applicant may place the matter on the Roll for hearing by giving the Registrar notice of set down not later than two court days before the day assigned by the Registrar or directed by the Chief Justice upon which the application is to be heard. That requirement has to be construed as being modified in the case of a notice of motion for review, I think, because sub - rules (1) and (2) of rule 53 contain no provision corresponding to rule 6 (10) (which requires the applicant in an ordinary inter partes notice of application to state a day on which the application, if not opposed, will be set down.) I do not think the effect of rule 53(7) is to apply rule 6 (10) to notices of motion by way of review. In the result, the requirement in rule 6 (11) that is applicable on unopposed applications for review, in my view, is simply that the notice of set down must be given to the Registrar not later than 2 court days before the date of hearing.

In this instance, the applicant gave notice of set down on Wednesday 6th October and the application was set down on Friday 8th October. That complies, in my view, with rule 6 (11) and in the circumstances there is clearly no prejudice to any of the respondents.

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In Motaung v. Mukhubela and Another NNO 1975 (1) SA 618 (O) at 625-6, M. T. Steyn J. held that in the corresponding South African rule, the requirement for a respondent to deliver the record conferred a benefit on the applicant which he could waive.

In the present instance, Mr. Mamba indicated that he wishes to proceed. It has sometimes been the practice in this court, where a respondent has given notice of his intention to oppose but has not produced a record in compliance with rule 53, to make first an order directing him to do so, and only to proceed in the absence of a record if that order is not complied with. Here, however, there has been no notice of intention to oppose at all. Accordingly, I will proceed on the applicant's papers.

In his own supporting affidavit, Mr. Nkumane has said that he has been employed in the Ministry of Justice since January of 1986, initially as a Clerk of Court. On 1st September 1986 he was promoted to be a Crown Prosecutor and in September of 1992 "to act" as the Senior Crown Prosecutor for Hhohho.

At 3.30 p.m. on 13th July 1993, he received a letter from the Secretary of the Civil Service Board, requiring him under "section 18 of the Public Service Act 1963 (No 34 of 1963)" to appear before the Civil Service Board at 10 o'clock on the following morning. He duly appeared before the Board but asked for a postponement and for leave to be represented at the hearing by an attorney "in terms of Regulation 46 of the Act." He was granted a postponement until 11.30 a.m. on the following morning - i.e 15th July - and he was also given leave to be represented by an attorney.

He has also deposed that what he described as "the charge" against him, which he has attached as Annexure "B" to his affidavit, was only served on him at 11.15 a.m. on 14th July.

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This document, which is a memorandum dated 13th July 1993 and is according to its tenor addressed by the Acting Director of Public Prosecutions to the Chairman of the Civil Service Board, states in its substance as follows:

"DERELICTION OF DUTIES - BONGINKOSI NOEL NKUMANE SENIOR CROWN PROSECUTOR.

1. THE KING VS 1. NTOMBI NZALO
2. THULANI SHIBA
NHLANGANO MAGISTRATE COURT CASE NO. 235/92

"Mr. Bonginkosi Noel Nkumane was the prosecutor in the above mentioned case. The 2 accused had been charged with Robbery and Contravening Section 12 of the Pharmacy Act respectively. In the Robbery, a motor vehicle was allegedly stolen. On 10th February, 1993 the case was heard by Mr. M.L.M. Maziya, Senior Magistrate, at the Nhlangano Magistrate Court.

"Although there was evidence that accused persons were in possession of the said motor vehicle and the Blue Book was a fake, Mr. Nkumane made sure they were acquitted by informing the said Magistrate to acquit them. The Magistrate, on the submissions made by Mr. Nkumane, acquitted and discharged accused.

"2. <u>THE KING VS. EPHRAEM VUSIE DLAMINI - MBABANE MAGISTRATE COURT CASE NO. 166/93</u>

"The abovementioned accused was charged with Contravening Section 84 bis (1) of the Road Traffic Act, No. 6 of 1965. The facts of the case was that the accused failed to give way to His Majesty's Convoy at Lobamba on 27th May, 1993. Accused drove in such a reckless way, the whole convoy (including His Majesty's car) had to take evasive action to avoid collision. Nkumane ought to have charged the accused with the appropriate and more serious offence of negligent driving under the Act but he did not do so.

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"Accused also faced a second count of Contravening Section 116(1) of the Act, in that he drove under the influence of alcohol.

"On 11th June, 1993 the case was tried before Magistrate, Mr. Sabelo Mngomezulu, in the Mbabane Magistrate Court. Mr. Nkumane negligently misplaced the docket but proceeded to prosecute.

"On Count 1 (i.e failing to give way to His Majesty), he led evidence from some officers in the Royal Escort. Although they gave evidence to establish the offence, Nkumane himself submitted to the Magistrate that they should be acquitted and of course, the Magistrate did so.

"On Count 2, Nkumane completely did not lead evidence which led to their acquittal as well.'

"It is clear that Mr. Nkumane would prefer to perform the duties of a defence attorney rather than those of a public prosecutor and I request the Board to give him the opportunity to go into private life and perform those duties."

The applicant , Mr. Nkumane was not able, in the time available to him, to secure the services of his attorney of choice, Mr. C.S. Ntiwane, to appear for him. Consequently he appeared before the Board the following day with Mr. Mamba, an attorney employed by the same firm who has since represented him, in order to seek another postponement.

The Board consisted of the Chairman, three members and the Secretary. The Acting Director of Public Prosecutions was present as well as the applicant and Mr. Mamba.

Mr. Mamba applied for a postponement on the grounds that having regard to the seriousness of the allegations, there had been insufficient time to prepare, and that the attorney involved (i.e. Mr. Ntiwane) was engaged elsewhere.

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The Acting Director objected to this, saying that the matter was urgent. At 11.45 a.m. the Chairman said that the Board wished to reached a decision by 2.00 p.m.

Mr. Mamba then drew attention to the need for the applicant to have access to the court records on which the allegations were based. The Acting Director suggested that he be given half an hour to do so..

Mr. Mamba also questioned the Acting Director's "position on the Board" and pointed out in effect that he could not both sit with the members and be the prosecutor. It is not asserted explicitly in the supporting affidavits that the Acting Director was in fact purporting to sit with the Board, though it is stated that thereafter the Chairman then ordered the applicant and Mr. Mamba to withdraw for 5 minutes during which time the Acting Director remained behind with the members of the Board.

On their return, they were informed by the Chairman that the proceedings were not a trial but an enquiry and that they, i.e. the Board, had asked the Acting Director to assist them, that the applicant and Mr. Mamba would be allowed 30 minutes to read the court records, and that the proceedings would resume at 12.20. The Acting Director then gave him those records. They withdrew, while he remained behind with the Board members.

At paragraph 23, the applicant's affidavit states "The records which we were meant to study in just thirty minute were a hand written 126 page long and hand written 11 page record." I am not sure what that means. However he goes on to say that on their return, Mr. Mamba sought a further postponement on the grounds that the records were bulky and hand written and could not be studied in thirty minutes, and that it was in any case apparent that the applicant would have to call four named witnesses.

The request was refused. The proceedings then went ahead. The Acting Director led four witnesses against the applicant. Notwithstanding Mr. Mamba's objections, he was not permitted to question them fully himself, his cross-examinations being interrupted and stopped by the Chairman.

After the Acting Director had called his witnesses, the Chairman informed the applicant that he would be told of the Board's decision in due course. Thereupon he adjourned the proceedings without affording the applicant any opportunity to reply.

On 21st July, the applicant received from the secretary to the Civil Service Board a letter, annexed at "D" to his affidavit and dated the previous day, in the following terms:

" Dear Sir,

"Following your appearance before the Board on the 14th and 15th instant, the Board noted in the last sentence of the second paragraph of your memorandum reference DPP.1PRO/14/98 dated 7th July, 1993 addressed to the Director of Public Prosecution that both dockets in the matter between Rex V. Ephraem Dumisani Dlamini, case No. 166/93, were handed over to you by Miss Matse before the 11th June, 1993. That this was corroborated by Miss Lindiwe Matse in her evidence on the 15th July, 1993 at the inquiry conducted by the Civil Service Board.

"2. Further, noted in the fourth paragraph referred to in my first paragraph hereof that on the 11th June, 1993 when you were called upon to go to court for this matter you looked for the dockets in your office and inquired from your colleagues but to no avail and that you went to court without the dockets. That this was corroborated by Court Interpreter Mr. Christopher Magagula. Further, that during the trial of the case referred above, you smell of liquor. That this piece of evidence was not challenged.

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"3. Further, that in Staff Performance Appraisal Report for the period from 1st January, 1987 to 31st December, 1987 you in your own hand writing you wrote that one of your duties as a Public Prosecutor was/is "to study the docket before taking the matter to court to establish whether there is sufficient evidence to prosecute".

"4. Further, that though you were first appointed to the Service of the Swaziland Government on the 21st January, 1986 you are still on probation.

"5. Further, that you neglected or omitted to apply for a postponement of the above matter when you well knew that you had no docket before you on the 11th June, 1993 and further, that as a result of your negligence, or omission you failed to call the evidence or Mr. Leornard Dlamini, chemist, who would give evidence to the effect that alcohol content in the accused was 21 grammes per 100 grammes against .1 legal limit.

"6. The Board culminating from the above has directed me to inform you that your probationary appointment will be terminated on the 23rd July, 1993."

The applicant's grounds of complaint about this matter have been set out in paragraphs 30 to 36 of his affidavit, in the following terms:

"30. It is my humble submission that there has been a gross miscarriage of justice in the handling of this matter by Civil Service Board in that the Board disregarded the two basic principles of natural justice Vis nemo judex in re sua and audi altiram partem.

"31. I am advised and I verily believe that a Board like the respondent was a exercising quasi - judicial junction and was obliged to follow the rules of natural justice.

"32. I submit that Mr. Donkoh was a judge in his own cause in the matter in that he being the accuser was, in the words of the Chairman "advising the Civil Service Board" and actually sat in with the members of the civil board whilst they were deliberating over it.

"33. Further, I respectfully submit that I was denied a fair hearing in that:-

(a) I was not given sufficient notice of the hearing;

(b) I was not allowed to be represented by an attorney whom I had fully instructed and thereby refused le representation;

(c) I was effectively denied access to the records in respect of which the charges against me were based;

(d) I was not given the opportunity to cross-examine the witnesses who had testified against me, and most importantly;

(e) I was denied the opportunity to present my version of the case and to call witnesses.

"I respectfully submit that the Civil Service Board actions are so unreasonable and unjust as to be inexplicable except on grounds of ulterior motive and/or mala fides.

"36. I therefore submit that good course exists for the court to set the Board's decision aside."

(Paragraph 36 should, correctly, be numbered 35).

Mr. Nkumane has also annexed, at "C" to his own affidavit, a further affidavit by Mr. Mamba confirming his evidence to the extent that it relates to Mr. Mamba. It seems to me

that this affidavit should strictly stand by itself as an additional supporting affidavit. I will treat it as such. It is, generally, undesirable for counsel to give an affidavit in proceedings in which he appears, though here, in the event, his deposition is not disputed.

The letter of 13th July from the Secretary to the Board to Mr. Nkumane does not state why he is to attend before the Board on the following morning. There is no such Act as the Public Service Act No. 34 of 1963. The letter is apparently intended to refer to regulation 18 of the Civil Service Board (General) Regulations 1963 (34 of 1963). What that regulation provides is that it is a breach of discipline for an officer to fail without reasonable excuse to appear before the Board when notified to do so or to comply with any lawful and proper request of the Board.

The document at "B" of Mr. Nkumane's affidavit, i.e. the copy of the memorandum from the Acting Director to the Chairman dated 13th July, which was handed to Mr. Nkumane in 14th July, is not formally described as a statement of disciplinary charges. It is clear that it contains two complaints against the applicant and it is apparent from his affidavit that he understood that this was what they were. Nevertheless, in passing, I do express the view that a formal statement of a complaint - not necessarily in legal technical terms, but nevertheless in plain language so that the person against whom it is made understands clearly, so that he knows what he has to answer - is always desirable. The last paragraph of the memorandum is also unsatisfactory. Mr. Nkumane was not seeking to go into private practice. If, as he obviously did, the Acting Director meant to allege that he had committed breaches of discipline, he should have said so in plain language.

It is apparent from the letter of 20th July from the Chairman to Mr. Nkumane (at "D" in his affidavit) that the Board reached a finding on at least the second complaint in

the memorandum of 13th July. It was a finding as to the way in which he had conducted his functions as a prosecutor.

It also asserted that the applicant, who had been appointed to the civil service as long ago as 21st January 1986, was still on probation. The decision expressed in the last paragraph of the letter was that his probationary appointment would be terminated on 23rd July 1993.

In some jurisdictions, it is provided by law that persons are to be appointed initially to the civil service on probation, for a specified period, or for a period not exceeding a certain time limit. Commonly, their appointments may be terminated without reason during probation, and decisions must be made within the time limits whether or not to confirm their appointments at the end of their probationary periods.

The position here appears to be somewhat different. I can find no provision in the civil service statutes or in Government General Orders that states specifically that all appointments must be on probation. The relevant statutes and orders contemplate that appointments may be made on probation and they provide for the confirmation (or non-confirmation) of such appointments: (see regulations 30 and 22 (2) (e) of the Civil Service Board (General) Regulations, and General Orders A140 and A141, for example.)

I can find no provision that prescribes the maximum period of probation nor one that authorises the termination without cause of a probationer's appointment. Regulation 30(1) appears to contemplate that probation should be for a specified period. It also sets out in some detail the processes of confirmation, extension of probation and non-confirmation. In particular, in sub-regulations (6) and (7), it affords the probationer the opportunity to make representations if there is a question as to his confirmation. General Orders A140 and A141 also contain similar provisions.

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On the unchallenged evidence here, notwithstanding the final paragraph in the Chairman's letter of 20th July to the applicant, the applicant was not undergoing a process of confirmation or non-confirmation of a probationary appointment. He was being accused specifically of misconduct. Under the regulations, the Board does not make final decisions. It makes decisions to tender advice. Part V of the Regulations deals with disciplinary proceedings. It is provided in regulation 29(1), in Part IV (dealing with termination of appointments), that as a result of disciplinary proceedings taken under Part V, the Board may advise on the termination of the appointment of a probationer.

It appeared to be desirable to clarify at the hearing, of my own motion, Mr. Nkumane's actual status. Accordingly I called him to give further oral evidence. He testified that he had never received a letter, in terms, confirming his appointment in the civil service. It was his understanding that appointments in practice were initially made on probation for two years. He had been promoted once in 1986 and then to the rank of Senior Prosecutor for Hhohho in September of 1992. Although paragraph 5 of his affidavit might be thought to suggest otherwise, he also testified that he was promoted substantively to that rank and not merely in an acting capacity. He said that although he had never received a formal letter of confirmation, he had assumed from this sequence of events, as a matter of course, that he had been confirmed as a permanent officer.

In answer to a question that I put to him, he testified that the letter that he received, appointing him to be Senior Prosecutor for Hhohho, had not been qualified in any way. In other words the appointment had not been expressed to be on probation.

On those facts, I think that the proper inference is that he was not a probationer at the time of the proceedings now

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under review. It is difficult to accept that a person could be on probation for so long. I think it is much more probable that the question of his formal confirmation was simply overlooked, but I would hold on the facts that his appointment to the civil service has been impliedly confirmed, i.e. by his letter of appointment as Senior Prosecutor, or alternatively that he was appointed substantively as Senior Prosecutor without condition that he was in that post initially to be on probation.

But even if that is not so, the Board on the evidence chose to hold a disciplinary inquiry against him and clearly one of formal nature. In doing so, it was bound to comply with certain rules of natural justice. This, in the end, is the substance of Mr. Nkumane's complaint. He says that the way in which the proceedings were carried on was grossly irregular, so that he is entitled to have them set aside this review.

His complaint can be summarised under two heads, namely:

(a) he was denied an opportunity to state his case in answer to the allegations made against him; and

(b) The Acting Director of Public Prosecutions was in the proceedings a judge in his own cause, being the "adviser" to the Board during their deliberations, and in the absence of the applicant or his attorney.

In conducting these disciplinary proceedings in respect of Mr. Nkumane, the Board was clearly bound to give him a fair opportunity in which to be heard. Van Coller V. Administrative Transvaal 1960 (1) SA 110 T.

The courts will insist on the observance of the requirement unless it is expressly or by necessary implication excluded by statute.

The regulations do not exclude it expressly or by necessary implication. On the contrary, in the case of formal disciplinary inquiries, at least, they recognise it in several respects: see Regulations 42 to 46.

The rule requires that the applicant should have been given a reasonable opportunity to prepare for the hearing, that at the hearing he should have been allowed to cross-examine the witnesses who testified against him, and that he should also have been given the opportunity to answer the allegations himself and, if he saw fit to do so, to call witnesses.

On the unchallenged evidence, these requirements were not fulfilled. Initially he was not informed of the nature of the hearing. He was at first given one day's notice of . It was only on the following day, when he appeared before the Board, that he was given the document containing the allegations. He was then only given one further day in which to prepare his case in answer, and on that next day he was denied a further adjournment to be able to study the court records with his counsel. Notwithstanding the requirements of natural justice, and the express provisions of Regulation 45(1), he was interrupted in his cross-examinations of the opposing witnesses. At the end of the case against him, he was denied an opportunity to respond.

In the absence of any kind of response, I am constrained to say that all of this, in respect of proceedings which purported to end in a decision to terminate Mr. Nkumane's services, was unreasonable, unfair and irregular. On the most favourable interpretation to the members of the Board, it discloses a profound lack of understanding of the requirement for fairness in disciplinary proceedings and of the purpose of a disciplinary inquiry. I think one may fairly ask, if they chose to act as they did, what they saw as being the point of the proceedings?

On the evidence before me, I do not think it is demonstrated explicitly that the Acting Director of Public Prosecutions was the adviser to the Board . The Chairman said that he was there to assist the Board. It is open to the Board, in holding a disciplinary inquiry, to appoint someone to present the case against the officer charged.

In that event, however, it is trite that the prosecutor must not be seen to participate, or to appear to participate, with the Board in its deliberations. In this case, on the unchallenged evidence, the Acting Director was allowed to remain with the members of the Board, after they had ordered the applicant and Mr. Mamba to withdraw, while they deliberated on Mr. Nkumane's request for a further postponement and on the submissions made by his counsel as to the functions of the Acting Director. There was also a second occasion on which he was alone with the Board while the proceedings were continuing. Those circumstances were also a serious irregularity which gave rise at the least to a real appearance of partiality, in that the Acting Director appeared at the least to be sitting in deliberation with the Board members in proceedings in which he was already the prosecutor.

For these reasons the application for review succeeds. The decision of the Board is accordingly set aside. Mr. Nkumane asks for costs on the attorney and client scale. Although the irregularities complained of were serious, costs on this scale are not readily granted, and on balance I think that the appropriate course is to award costs on the ordinary scale in his favour against the respondents, which I do.

I make no other order.

DAVID HULL
CHIEF JUSTICE