

IN THE HIGH COURT OF SWAZILAND

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Cleopas Myeni

v

Ministry of Finance

Case No. 1850/97

Coram S.W. Sapire, A C J

For Plaintiff Mr. N. Dlamini

For Defendant Miss Gama

Judgment

(22/5/98)

The Applicant, is an employee of the Government in the Correctional Services Department. On 14th September 1995 he was in the course of his duties as such, driving a motor car belonging to the government when it was damaged as a result of an accident.

He later received a letter signed on behalf of the Principal Secretary in the Department of Finance. The letter by its heading informed him that it concerned the loss of government property, namely a motor vehicle bearing the number SG 086 PR and that the amount involved was E21 980.41. The letter further informed him that a body styled the " losses committee" had considered the " above quoted loss", in which he was the officer involved. The Applicant was informed that the committee had directed the author of the letter to call upon the Applicant to show cause, why he should not be surcharged for the loss suffered by the government. Lastly he was called upon to attend a meeting of the Losses Committee on a stated date and to bring with him a letter, "wherein you are showing cause why you should not be surcharged"

It is important to notice that this letter immediately put the Applicant at a disadvantage, by informing him that the Committee had considered the matter and was of the view that the Applicant had a case to meet. It placed an onus on him of having to show cause, without informing him of the basis and particulars of the case against him, why he should not be

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subjected to the surcharge. The authority on which the Committee acted was not disclosed nor has this been dealt with in the affidavits which have been filed.

The applicant prepared and delivered to the committee a letter in which he described the circumstances of the accident, which in his view exculpated him for liability for the loss and he ended by disavowing such liability.

The applicant attended the meeting of the committee, where he says he was given an opportunity to explain how the vehicle came to be damaged. He was not questioned, nor was he confronted with any

witnesses whose evidence contradicted his account He was not offered the opportunity of obtaining professional legal advice or assistance. He was never given any details of the amount of E21,980.41 nor the opportunity of questioning whether this represented the true loss of the Government. He was informed that the decision of the Losses Committee would be communicated to him in due course

The Principal Secretary addressed a letter dated 12th February to the Applicant which the latter received, in which was stated that in accordance with Section 21© of the Finance and Audit Act of 1967 the applicant had been surcharged E21,980.41 to be recovered in 96 monthly instalments of E226.80 and a final instalment of E207.61. Copies of the letter went to the Accountant General with instructions to take the appropriate action to recover the amount by deduction from Applicant's salary, to the Auditor General ,and to the Attorney General.

Since then deductions have been made each month from the Applicant's salary. The order that the applicant seeks in these proceedings is that the respondent's be interdicted from making any further deductions and that those deductions made hitherto be repaid to him.

The Government resists the granting of such an order, and basis its opposition on the provisions of Section 21 of the Finance and Audit act, the relevant portions of which are

" Surcharge by Permanent Secretary

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

(a)

(b)

(d) is or was at the time of such employment responsible for any damage to any stores or other Government property;

and if within a period specified by the Permanent Secretary an explanation satisfactory to him is not furnished with regard to such....., damage or destruction as the case may be, the Permanent Secretary shall surcharge such person.....the value of the property destroyed or damaged, as the case may be, or such lesser amount as the

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Permanent Secretary may determine."

The first point to be noted is that the power to surcharge is given to the Permanent Secretary who by definition in the Act is the Permanent Secretary for Finance. The power so vested in him is personal, and the decisions to be made must be made by him applying his own mind to the facts. These are powers, such as they are, are to be exercised personally and may not be delegated, as the act does not confer on him the power to delegate.

This is a case where the maxim delegates delegare non potest, is applicable and the principles have been often stated. See for instance, SA AIRWAYS PILOTS ASSOCIATION AND OTHERS v MINISTER OF TRANSPORT AFFAIRS AND ANOTHER 1988 (1) SA 362 (W) in which the learned judge said

"Apart from the contention that the section in question did not contain any specific delegation authorising the General Manager or Assistant General Manager to take over the Minister's function in relation to the decision and the exercise of his wish to retire an employee on pension, it was also contended that there was no room to attribute an implied authority to delegate the right to make this decision. The general rule in this regard is succinctly set out in Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd 1965

(4) SA 628 (A) at 639C - D, where Botha J A said the following:

'The maxim delegatus delegare non potest is based upon the assumption that, where the Legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.'

The affidavit of the Permanent Secretary, Musa Fakudze, more especially paragraphs 8.1 and 9 thereof, makes it quite clear that the decision to cast liability on the Applicant and to impose the surcharge was that of the committee and not that of the Permanent Secretary. Fakudze on his own evidence did not put his mind to the question of the Applicant's liability, nor to the question of the amount thereof. Neither he nor the committee even considered whether the Applicant should be liable for the whole or part of the amount as is required by the provisions of the section and the applicant's views if any were not canvassed. No other conclusion can be arrived at on the contents of the affidavits filed on behalf of the Government.

Where the alleged liability of the public servant arises out of the loss of or damage to government property, it is the value of the property which is, in terms of the section pertinent.

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In the instant case not one iota of evidence as to the value of the vehicle was before the Permanent Secretary or the committee. No evidence was disclosed to the Applicant, or indeed before the committee, as to the reasonableness of the amount claimed, in relation to the repairs said to have been carried out. The amount of the Applicant's liability was, it seems, fixed with reference to the cost of repair of the vehicle.

The palpable injustice to the Applicant, arises from a misunderstanding of the purpose and ambit of the statutory provision to which I have referred. The section only becomes of application "if it appears to the Permanent Secretary that the public officer is or was responsible for the loss or damage". Before the Permanent Secretary can act under the section he must be in possession of evidence of a determined liability on the part of the public officer concerned, before it can properly be said that it appears to him that the public officer is responsible for the loss or damage. This means that where the evidence is conflicting, or liability is disputed the questions at issue will have to be determined according to law, by an independent tribunal. Only when the public officer has admitted liability, or where a final judgment of a competent court has been given against him can it properly be said that, "it appears to the Permanent Secretary that the public officer is responsible for damage to government property."

The section, properly read, was never intended to bestow judicial authority on the Permanent Secretary, much less on a committee appointed by him. Neither the Permanent Secretary nor the Losses Committee can possibly be seen as being impartial in a dispute between the Government and its servant

This is so notwithstanding the long period over which the misunderstanding has or may have, persisted, and the many occasions when Public Officers may have in the past had their salaries surcharged.

I have not been referred to any decision of the High Court in which the meaning of the section has been considered and I can only assume that the meaning of the section has not hitherto been tested or interpreted by a Judgment of the High Court.

The Permanent Secretary is, in terms of the section quoted, and on a proper reading thereof, authorised and required to impose the surcharge, only in those cases where liability has been established, either by admission or competent adjudication, in order to enforce payment, and to recover the amount of the

agreed or admitted liability and proved loss. The Act vests the Permanent Secretary with the powers to enforce convenient payment of established and ascertained debts of public officers. Any other interpretation leads to great unfairness. It could surely not have been the intention of the legislature to deprive the public offices of the right to defend claims which the Government made on them before the ordinary courts of the land.

The application therefor succeeds and there will be judgment for the applicant with costs.

It is ordered

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a) The respondents are interdicted from deducting any further amounts from the Applicant's salary, pursuant to the surcharge imposed, which surcharge is hereby set aside

b) All amounts deducted from the Applicant's salary are to be repaid forthwith With interest calculated at 9% per annum from the date of each deduction to date of payment.

c) The respondents are to pay the costs of this application

S.W. SAPIRE,

ACTING CHIEF JUSTICE