

IN THE HIGH COURT OF SWAZILAND

CASE NO.2904/99

In the matter between:

ELIAS V. DLAMTM

APPLICANT

AND

PRINCIPAL SECRETARY - AGRICULTURE

1st RESPONDENT

SWAZILAND GOVERNMENT :

2nd RESPONDENT

CORAM :

MATSEBULA J

FOR THE

APPLICANT :

FOR THE 1st & 2nd

RESPONDENT :

JUDGMENT

The applicant moved a notice of motion under a certificate of urgency for the following relief:

1. Waiving the usual requirements, the rules of court regarding notice and service of application and hearing the matter as one of urgency;
2. Declaring the interdiction of applicant by the first respondent from performing his duties as unlawful and null and void ab initio;
3. Reinstating the applicant to his post as Senior Clerical Officer;
4. That the deduction of the applicant's salary by half his normal emolument be declared unlawful and null and void and that applicant be refunded all amounts deducted from his salary;
5. Setting aside interdiction on the grounds that the applicant had not been afforded a hearing prior to his interdiction and no disciplinary hearing has been held within a reasonable time;

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6. A rule nisi do hereby issue calling by the respondent to show cause on a date to be determined by this Honourable Court why orders 2, 3, and 4 should not be made final;
7. Costs, but only in the event of this application being opposed.

The notice of motion was accompanied by an affidavit deposed to applicant itself. In it applicant states the following inter alia: (I will quote from paragraph 4)

"On the 17th March 1999 the respondent requested authority to interdict me from the Secretary to Cabinet on the allegation that I was implicated in practising unorthodox methods of recruiting certain cadres of employees, A copy of this letter requesting such authority from the Secretary to Cabinet is annexed here, marked "A",

I may just point out at this juncture that no such letter was annexed and in the book of pleadings no such letter exists.

"On the 18th March 1999 the Secretary to Cabinet responded to annexure "A" herein and informed the first respondent that His Excellency the Right Honourable Prime Minister had granted the authority requested by the first respondent. A copy of the letter in response to annexure "A" herein is annexed hereto and marked "B".

Here again no annexure "B" was annexed and in the book of pleadings there is no annexure "B".

"On the 18th March 1999 first respondent informed me through a letter that (See subsection 1) that

disciplinary action was being contemplated against me on the basis of serious allegations of practising unorthodox methods in recruiting certain cadres of employees.

Other matters are under investigations, additional charges may be preferred against me at a later stage.

Pending the outcome of the departmental commission of enquiry His Excellency the Right Honourable Prime Minister had authorised my interdiction in terms of the Civil Service Board Regulations 1963 (39).

That during the period of interdiction I shall be paid 50% of my salary. A copy of the letter aforesaid is annexed hereto and marked "C"

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Again this annexure "C" was not amongst the papers and was not in the book of pleadings.

"I submit that my interdiction in terms of the Civil Service Board Regulations 1963 which was wrongly cited as 34 of 1963 since such Act does not exist was both procedurally defective and ultra vires as well as null and void ad initio for the following reasons:

7.1. I could not lawfully be interdicted by the first respondent notwithstanding the authority and/or order of the Prime Minister's as it clearly appears in annexure "A" and "B" herein;"

I have already said that no such annexures were among the papers.

7.2. "It is only the Prime Minister and/or any Minister to whom he has delegated his authority who can interdict me and certainly not the first respondent;

7.3. It is only the Prime Minister and/or any Minister delegated by him who decides such emolument not being less than one half of my normal emoluments which I should be paid as it is clearly provided for in terms of Clause 39(3) of the Civil Service Board Regulations 1963;

7.4. The Prime Minister has in the circumstances delegated authority and all power to a person who cannot in law carry out the Prime Minister's orders. The instructions which are in the Prime Minister's own handwriting contained in annexure "A" herein and subsequently conveyed to the first respondent in annexure "B" herein are in the circumstances unlawful and as such null and void;

7.5. I also aver that the Prime Minister and the respondents did not afford me a hearing prior to their decision to interdict me. I submit that on this ground alone my interdiction should be set aside. Legal arguments in support thereof shall be made at a hearing of this matter.

I submit further that the fact that the first respondent has not called me to any disciplinary hearing after more than eight months since I was interdicted is unreasonable and amounts to an abuse of power. 8.1. The failure to prosecute me and/or bring the matter to a final conclusion is intended to humiliate me and perpetuate the final embarrassment I find myself in."

Those are the paragraphs that I will deal with so far. I have left other paragraphs which in my view are not relevant to the decision that I am about to make.

First respondent filed an answering affidavit and deponent being a Mr. Nkambule, Principal Secretary in the Ministry of Agriculture and Co-operatives. In its paragraph 7, Mr. Nkambule states the following and I quote: (In paragraph 7 Mr. Nkambule deals with 7.1, 7.2, 7.3, 7.4 of the founding affidavit of the applicant)

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"The contents of this paragraphs are false, wrong conclusions and designed mislead this Honourable Court in that in terms of Section 12(1) of the Interpretation Act 20 of 1970, a Minister if perfectly entitled to delegate any function or duty which ordinarily rests on his shoulders, to anyone of his

choice.

I am verily advised that the word "anyone" is liberal enough to include myself. Therefore the Honourable Prime Minister did not act outside the scope of his authority when he delegated his duty to interdict the applicant herein to me.

I wish to state that further argument will be advanced on my behalf in court as per the requirements of the above-cited regulations 39 read together with Section 12(1) of the Interpretation Act of 1970."

I may just add that indeed Mr. Msibi who appeared for the respondent did advance arguments and I was convinced that the Section 12.1 of the Interpretation Act applied.

"I am further advised that the Prime Minister or anybody so delegated by him has a right to determine the amount of emolument which the person so interdicted should be paid. This right is not amongst other things listed in Section 12.1, which the Minister cannot delegate to anyone else. And as such the expression "express mention of one thing is exclusion of the other" applies fully herein."

I agree with Mr. Msibi on this point and I have consulted the Sections to which reference has been made.

Applicant's affidavit refers to annexures which do not form part of the book of pleadings. This was a very serious and fatal oversight on the part of the applicant. The absence of these annexures caused very serious flaws in the applicant's case.

"Other matters under investigations and additional charges may be preferred against me at a later stage.

Pending the outcome of the departmental commission of inquiry His Excellency the Right Honourable Prime Minister had authorised my interdiction in terms of the Civil Service Board Regulation 1963 Clause 39 hereof."

I will deal in greater detail with the contents of these paragraphs later when dealing with the provisions of the Civil Service Order 1973 and the Interpretation Act 21 of

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1970 and simultaneously deal with ratio decidendi in the cases BEN M. ZWANE AND JOEL LUKHELE CASE NO.113/99 AND 2472/99 respectively:

"It appears to me though that in the above mentioned cases the court's attention was never drawn to the provisions of the Interpretation Act otherwise the Honpurable Chief Justice who gave judgment in those cases cited above would not have given the judgment he did".

The Interpretation Act 21/70 Section 12 provides as follows: "Powers of Ministers to delegate certain powers. (Section 12(1)):

"Where by law a Minister is empowered to exercise any power or perform any duties he may depute any person by name, the person for the time being holding the office designated by Mm to exercise such powers other than the power to delegate and power to make subsidiary laws or perform such duties on his behalf subject to such conditions, sections and qualifications as he may prescribe and thereupon or from the date specified by him the person so deputed shall have and exercise such powers and perform such duties".

To me, this Section is so clear that no amount of interpretation can bring any other meaning either than that the Prime Minister and any Minister has got these powers to delegate and; Prime Minister was perfectly authorised to do so in terms of the section.

In order to avoid contusion one need to read all these different Acts and orders that are interrelated together and one will find some that are in a nature of enabling in order to understand exactly whether the Prime Minister had the authority to delegate. In the light of Section 12(1) of the Interpretation Act

the cases of ZWANE AND LUKHELE page 3 which reads as follows:

"In the case of JOEL LUKHELE the empowerment to interdict is granted to the Prime Minister. This means that it is the Prime Minister alone who has the power and it is in his discretion to consider the facts before exercising the power afforded him in terms of the regulation. This is personal to the individual or board on whom the power is conferred and may not without special provisions be transferred or delegated to any other person or any other officer".

This again is basic to the exercise of the executive power. This paragraph which I have just read cannot be correct in the light of Section 12 of the Interpretation of the statutes. In my opinion the ratio decidendi in the ZWANE AND LUKHELE case was decided without taking into account the provisions of the Interpretation Act.

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For the purpose of my judgment I hold that the Prime Minister is perfectly entitled to delegate. Next I deal with the maxim audi alteram partem pattern. Having found as a fact that the Honourable Prime Minister was perfectly within his right to delegate. I should consider whether the person so delegated should afford the person affected an opportunity to defend himself. In terms of the audi alteram partem rule, any permanent employee in the public service suspended from service pending disciplinary enquiry should be afforded an opportunity to be heard and defend himself. However, the application of this rule of natural justice should take into consideration the merits of each case. According to first respondent's answering affidavit paragraph 10 to 10.1 - 10.6 this is a matter which cannot be dealt with by the first respondent internally only. It involves a report by the Commission of Enquiry which was appointed specifically to investigate very wide-ranging allegations of illegal and criminal activities against the applicant. A report which emanated from a Commission of Enquiry has since been referred to the Director of Public Prosecutions for a decision and advice and it is not clear from the papers before me how far he has gone. The allegations against the applicant were also referred to the Anticorruption Unit. There is also an allegation that the applicant and others as yet unknown individuals operated in a network in committing the alleged activities which are illegal. There is a reference to a confirmatory affidavit by an officer from the Anticorruption Unit which affidavit was unfortunately also not included in the book of pleadings.

In my view, and this is my finding that the application by the applicant should be dismissed with costs, and I am not going to order costs on the attorney and client scale because in my view even though the applicant had not set his mind on the contents of the Interpretation Act it cannot be said this was done deliberately.

J.M. MATSEBULA

JUDGE