

THE HIGH COURT OF SWAZILAND

SIDUMO MAMBA

Applicant

And

NORMAN MKHWANAZI

1st Respondent

EDGAR HILLARY

2nd Respondent

ACCOUNTANT GENERAL 3rd

Respondent

ATTORNEY GENERAL

4th Respondent

Coram

For the Applicant For
the Respondents

S.B. MAPHALALA-

MR. M. SIMELANE

MISS S. MASEKO

JUDGMENT

(16/04/2004)

The Applicant has instituted proceedings by way of motion in the Jong form before court for review of disciplinary proceedings which were instituted by the Respondents against him, which proceedings resulted in his dismissal from his employment as a police officer.

The Applicant prays that the decision of the second Respondent dismissing him from being a member of the Royal Swaziland Police Force be reviewed, corrected and set aside.

In prayer 3 he seeks an order that the third Respondent be ordered to pay the Applicant his arrear salary with effect from April, 2001 to February 2003, further at prayer 4 that the 2nd Respondent be ordered to reinstate him to his position as a member of the Royal Swaziland Police Force; and furthermore, he seeks for costs of this application.

In his founding affidavit he details the alleged irregularities committed by the 2nd Respondent. The Respondents have filed their opposing papers in this matter.

He avers that the 1st Respondent in his capacity as Chairman of the Board of Enquiry constituted to conduct a disciplinary enquiry against him, being a Senior Superintendent in the Royal Swaziland Police and stationed at the Lubombo Regional Police Headquarters.

On or about 24th October 2001, he was served with documents which documents purported to be a charge sheet in the face whereof he was charged for an alleged contravention of item 15 of the schedule of offences to the police regulations framed under Section 20 (1) as read with Section 12 (2) of the Police Act. No. 29/1957.

He avers that in spite of the charge having been laid against him on the 24th October 2001, no hearing ever took place until the 9th October 2002, which was about a year later after he had requested his lawyer to communicate with one Inspector Motsa who he knew was supposed to be the Prosecutor in the proceedings, to request an explanation as to why he was being made to sit at home for such a long time without pay.

From paragraph 9 to 18 the Applicant's founding affidavit outlines the sequence of events in this matter and for the sake of completeness, I shall reproduce them hereunder in *extenso*, thus:

9. In spite of the fact that I had presented myself to Inspector Timothy Msmba on or about 12th October 2001, as one who had come back to work after a long illness I could not perform my duties without a uniform which apparently had been removed from my house at Matsapha Police Station during my illness.

10. When I reported back at my station on the said date I was not allowed to resume my duties, but as the said Inspector Timothy Mamba stated under oath during the hearing, he "handed" me over to Mr. Magagula who the Superintendent in charge of the Operational Support Services Unit at the time. During the said inquiry Mr. Mamba stated he does not know what Superintendent Magagula did. I also know nothing as to what he (the said Superintendent Magagula did).

11. In fact at all material times as I worked as a Royal Guard under the Operational Support Services Unit, the most Senior Officer who was in charge of the Royal Guards Unit was one Matsamo Shongwe.

12. I was not tried and or convicted at any stage by the said Matsamo Shongwe in his capacity as the Senior Officer under whose command I was, nor was I even tried or convicted at any stage by Superintendent Magagula who is mentioned above.

13. I am not aware of the circumstances which led to the appointment of the 1st Respondent's Board by the 2nd Respondent former Inspector Timothy Mamba who gave his evidence before the Board after he had retired from the Royal Swaziland Police was unable to say during the hearing how the decision to constitute a Board was reached nor was he able to say what the said Superintendent Magagula did after the former handed (me) my case to the latter.

14. At the commencement of the enquiry I raised through my representative objections to the proceedings which included:

1. That I had a suspicion, which suspicion I considered reasonable of a likelihood of bias by the members of the Board in trying the matter, because my uniform and all personal property had already been removed from the house I occupied in absentia, the fact that I had not received a salary even though I had not been interdicted, the inordinate delay in fixing a date for my trial on this offence, all of which indicated to me that such a total disregard for my rights as a member of the office could be explicable by the fact that both the Board, the Senior Officer under whose command I was based and the 2nd Respondent had already prejudged the outcome of the inquiry.

15. The appropriateness of the proceedings before a board having regard to the fact that I had not been tried and convicted by a Senior Officer as contemplated by the Police Act.

16. That in the circumstances having regard to the reasonable suspicion of a likelihood of bias my proposal was that the alleged offence could be tried more appropriately by a Magistrate.

17. When the aforesaid objections were overruled I stated through my legal representative that my rights to change the proceedings as being irregular were reserved.

18. During the enquiry there was evidence both from myself and from Inspector Timothy Mamba who was called by the Prosecutor to the effect that my health was at the beginning of 2001 not good and that I had complained at various time of numbness and sometimes serious lack of ability to function on my left hand, arm and the whole side, which medically was described to me as a partial stroke. Inspector Mamba also confirmed during the hearing that there were records in my personal file which was under his custody and was administered by him at my duty station at Police College, which showed that I had been attended at various times by various medical Practitioners who had recommended on some occasions that I ought to be excused from work for specified days of periods.

19. There was also evidence at the hearing which was uncontradicted by any evidence at the hearing that in April 2001 I had made arrangements with my colleagues in accordance with accepted practice in my unit for someone to stand in for me and take my place during shift for three days, on which date I had arranged to go to Mozambique as a result of my depreciating health I had to attend. In fact in so far as what I have just stated my evidence was in line with the evidence of the prosecutor's witnesses. There was further uncontradicted evidence on oath by me that on the day I went to Mozambique I suffered a more serious stroke and admitted in hospital whereupon I could neither talk nor do anything for myself and this condition lasted for over (4) months.

20. When I recovered at the beginning of October 2001, I came back home and reported for work on the 12th October 2001, no evidence contradicted this during the enquiry and further this aspect of my evidence was even placed in issue during cross-examination by the prosecutor. Accordingly, there was no evidence upon which the Board could reasonably have come to the conclusion that any absence was without excuse or justification. The Board's conclusion was so grossly unreasonable at that it cannot be explained otherwise than that it said to apply its mind to the issue namely: whether my absence was justified or was excusable. The Board did not even have regard to the fact that whether my absence had a legal excuse or justification was on

the prosecutor. I have not been paid as a member of Swaziland Police as from April 2001 to date/

From these paragraphs the following grounds for review emerge:

21. The Board as constituted did not comply with Section 13 (1) of the Police Act which required that the "Commissioner ...shall appoint three Senior Officers to constitute such Board".
22. There is nowhere in the answering affidavit where it is stated that the Board was set up by the Commissioner;
23. There was no compliance with Section 12 (2) which required that the disciplinary enquiry be conducted by a Senior Officer nor was he called as a witness by the Board, i.e. Matsamo Shongwe;
There is nowhere it is stated that the Senior Officer was of the opinion that the "offence would, by reason of its gravity or by reason of its repetition or nay other reason, be more properly dealt with by a court or a Board".
24. The Commissioner does not have powers to dismiss an officer as such powers lie with the Minister in terms of Section 22. However, in the present case the Board went beyond Section 18 and recommended an order that it did not have. The Commissioner can only consider a sentence in terms of Section 20.
25. The decision to dismiss the Applicant yet he had served in the police force for 13 years and his professional record was not blemished with any disciplinary record is harsh and induces a sense of shock.

I must say though that during argument the first ground was abandoned by *Mr. Simelane* for the Applicant in that the Minutes reflect that there were 3 members.

The opposition as gleaned from the answering affidavit of the Respondent is three fold. Firstly, the Respondent avers that the explanation in paragraph 11 of the answering affidavit is reasonable and sufficiently explained the allegations of bias. The explanation is that the police who were members of the Board were from outside the Police College where Applicant was stationed. There is nothing to show that any member of the Board was involved in the removal of Applicant's belongings.

The second leg of the opposition is that Applicant suffered no prejudice because he was represented by an attorney.

Thirdly, it is contended for the Respondent that the Board took into account all relevant considerations. The Applicant absented himself from duty from the 18* April 2001, and came back on the 12th October 2001. No report was made to his superiors of the cause of his absence. The Applicant absented himself from work without permission nor without approved leave. He said he had been sick but in the absence of a medical report the truthfulness or otherwise of such an allegation cannot be confirmed.

Further, it is contended for the Respondent that the Applicant's salary was stopped on the basis of the no work no pay rule of the common law. He absented himself for about six months without permission and that his uniform and his property were removed from his house for safekeeping since he was no longer staying in the house.

There are a number of issues in this matter and I have divided them into various heads; for ease of address. They are referred *ad seriatum* thus: (1) whether the Board as constituted complied with Section 13 (1) of the Police Act; (2) whether Section 12 (2) of the Police Act was complied with; (3) whether the Commissioner had the power to dismiss an officer as he did in *casu*; (4) whether the Board acted properly in terms of Section 18 in recommending an order that it did, and (5) whether the Commissioner of Police exceeded his power conferred by Section 20 in sentencing the Applicant.

I shall proceed to address these questions sequentially thus;

1. Whether the Board as constituted complied with Section 13 (1) of the Police Act.

As I have mentioned earlier on in the judgment *Mr. Simelane* for the Applicant abandoned this ground for review conceding that the minutes reflect that there were three members. Therefore, I will not address this point any further.

2. Whether Section 12 (2) of the Police Act was complied with.

Section 12 reads in *extenso* as follows:

"Disciplinary offences

12. (1) Any offence against discipline on the part of a senior officer shall be dealt with in accordance with the law relating to public officers (Amended A.5/1987).

(2) Any member of the Force below the rank of Inspector shall be liable to trial and conviction for any offence against discipline by any senior officer under whose command such member is or any other senior officer deputed thereto by the Commissioner: (Amended A.5/1987).

Provided that where it appears to such senior officer that the offence would, by reason of its gravity or by reason of its repetition or for any other reason, be more properly dealt with by a court or a Board, he shall defer his verdict and report the facts to the Commissioner who may either return the report for further enquiry or order the accused to be tried before - (Amended A.5/1987).

26. a senior officer, or

27. a Board; or

28. a court. (Replaced A.5/1987).

(3) If any member while a member of the Force has committed an offence trial under this section and thereafter ceases to be a member of the Force, he shall, unless he has been so tried, be liable to be tried for such offence by any court of competent jurisdiction; (Amended A.5/1987).

Provided that, except in the case of mutiny or desertion, no prosecution shall be commenced after the lapse of three months from the date when such person ceased to be a member of the Force, (my emphasis).

The argument advanced by the Applicant in this regard in that the proviso to Sub-Section 2 as high-lighted above has not been complied with in that nowhere is it stated that the Senior Officer was of the opinion that the "offence would, by reason of its gravity or by reason of its repetition or any other reason, be more properly dealt with by a court or a Board".

The Respondents contends in the answering affidavit of Norman Mkhwanazi who is the Senior Superintendent, stationed at Siteki at the Lubombo Regional Headquarters, that it is true that Applicant was not tried by the officer under whose command he was in terms of Section 12 (2) of the Police Act. He however advanced a reason for this that when he was served with the charge sheet, the Applicant indicated that he wished

to be represented during the trial. That in terms of Section 17 of the aforesaid Act an officer is entitled to representation by a legal practitioner at trial before a Board or a Magistrate's Court not before a Senior Officer.

Further on this point, it is contended that during the course of the proceedings, the Applicant never at any point through his attorney raise any objection to the jurisdiction of the Board.

It would appear to me that the reason advanced above by the Respondent suffices for purposes of Section 12 (2) on two grounds. Firstly, there is no evidence either way that any other Senior Officer was not detailed thereto by the Commissioner; and secondly, the proviso to the Section **provides that a court or Board may hear the matter "by reason of its gravity, or by reason of its repetition or any other reason..."** (my emphasis). In my opinion the "any other reason" may well have been the fact that the Appellant desired to **be** legally represented and for this reason the officer opted to proceed by way of Section 17 of the Act. The said Section provides as follows:

"Representation

At all trials under this Act before a Board of officers or a Magistrate's Court the person accused shall be entitled to be represented by a legal practitioner admitted to practice in Swaziland or, except in the case of an appeal heard as provided in Section 21 (4) by a Senior or subordinate officer approved for the purpose by the Minister".

It is also to be noted that in terms of the Interpretation section of the Act in Section 2 the word "Senior Officer" is defined to mean, the Commissioner, Deputy Commissioner, Assistant Commissioner, Senior Superintendent, Superintendent and Assistant Superintendent of the force. Therefore the deponent to the answering affidavit Senior Superintendent Norman Mkhwanazi is a "Senior Officer" for purposes of the Section.

The record of disciplinary proceeding on the 19th September 2002, at 0930 records, *inter alia* as follows:

"...**Board** members

The President introduced all the members and produced the corresponding order from Commissioner of Police and that they were detailed according to Section 12 (23 of the Police Act 29 of 1957..."

It appears from excerpt reproduced immediately above that Section 12 (2) was complied with in so far as the appointment of the senior officer by the Commissioner as required by the said Section.

In my mind, in *casu* there was no failure of justice occasioned by the Board as constituted in terms of Section 17 of the Act. In the case of *Davies vs Chairman, Committee of the J.S.E. 1991 (4) S.A. 43* the following was laid down: and I quote:

"In law the court will not interfere merely because that the decision was one which it would not have arrived at ... in review proceedings a court is concerned with irregularities which result in a "failure of justice", the mere possibility of prejudice is insufficient".

Furthermore, the Applicant has not shown that the Board had failed to act judicially. The Applicant has not shown the existence of real likelihood of bias (see *de Smith, Constitutional Law and Administrative Law page 583 - 6*).

Therefore on the basis of the above-mentioned reasons the Applicant cannot succeed under this ground for review.

3. Whether the sentence meted out was in accordance with the Act.

As I have stated above this aspect of the matter covers three other issues touching on sentence *viz*, whether the Commissioner had the power to dismiss an officer as he did in *casu*; whether the Board acted properly in terms of Section 18 in recommending the order that it did; and whether the Commissioner of Police exceeded his powers conferred by Section 20 in sentencing the Applicant. It appears to me that the first and last questions relate to the same thing, they both question the power of the Commissioner of Police. I shall proceed to address these questions as one, for convenience.

According to the Applicant at paragraph (e) of his Heads of Argument in the present case the Board went beyond Section 18 when it recommended an order it had no authority to make. At page 16 of the record of the disciplinary hearing the following appears:

"Board

29. The accused is found guilty as charged and fined (E200-00) two hundred emalangeni.
 30. A recommendation for dismissal from the police service to Commissioner of Police".

Section 18 provides as follows:

"Disciplinary punishments

A member of the force, other than a Senior Officer to whom Section 12 (1) applies, who is guilty of an offence against discipline shall be liable to any one or more of the following punishments.

A Where a disciplinary proceedings are conducted by a Senior Officer-

- i) Against a subordinate officer, such subordinate officer shall be liable to admonition; reprimand, severe reprimand, or a fine not exceeding one hundred emalangeni.
 - ii) Against a non-commissioned officer, such non-commissioned officer shall be liable to admonition, reprimand or severe reprimand or a fine not exceeding fifty emalangeni; and
 - iii) Against a member belonging to other ranks, such member shall be liable to admonition, reprimand or severe reprimand, a fine not exceeding thirty emalangeni, confinement to police lines for a period not exceeding fourteen days with or without punishment drill, extra guards, fatigues or other duty in addition to normal duty or to extra guards, fatigues or other duties,
- b) Where disciplinary proceedings are conducted by a Board, the member shall be liable to admonition, reprimand, severe reprimand or a fine not exceeding two hundred emalangeni".

The Applicant on the above-cited Section contends that the matter should have been dealt with in terms of Section 18 (b) and he should have been liable to admonition, reprimand, severe reprimand or a fine not exceeding two hundred Emalangeni. Tied to this contention is the argument that when the Commissioner sentenced the Applicant he did so outside the ambit of Section 20 of the Act.

Section 20 provides as follows:

Consideration of sentence by Commissioner.

31. Any senior officer who sentences any member of the force under this Act or any regulations made thereunder, except when such sentence is one of admonition or of extra guards, fatigues or other duties, shall forthwith transmit the record of proceedings to the Commissioner who may alter, reverse or confirm the conviction, or increase, reduce, vary or confirm the sentence.

32. The Commissioner may, in addition to any sentence imposed, order the reduction of a member below the rank of inspector but above the rank of Constable to a lower or lowest rank.

33. No sentence shall be carried out until the decision of the Commissioner under Sub-section (1) is made known.

It appears to me that in *casu*, more particularly as regards the question of sentence that the Applicant's real grievance is against the result rather than the method of the proceedings by the Respondents.

According to *Herbstein et al The Civil Practice of the Supreme Court of South Africa, 4th ed* at page 932 the reason for bringing proceedings under review or appeal is usually the same, so to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. The learned authors continue to say;

"Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The

giving of a judgment not justified by the evidence would be a matter of appeal and not review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity".

In my considered view, in the present case the Applicant has not discharged his *onus* which rests on him to satisfy the court that good grounds exist to review the conduct complained of.

It is further trite law that where a tribunal directs its mind to legal issues that it is entitled and bound to decide, for example the interpretation of regulations or other rules, a wrong decision in law cannot be said to prevent it from fulfilling its statutory functions or duties, and the court will not interfere with the decision on review unless it was one which no reasonable person could have come, (see *Johannesburg City Council vs Chesterfield House (Pty) Ltd 1952 (3) S.A. 809 (A)* at 825)

In my opinion, the Applicant in *casu* has not exhausted local remedies as required by the law. The Applicant ought to have invoked Section 30 of the Act. The Act provides as follows:

"Appeals against retirement and dismissal.

30 (1) Any member of the Force retired or dismissed under Section 29 (b), (c), (d), (e) or (f) may within seven days after notification to him of the Commissioner's decision, lodge notice of appeal, giving reasons in support of such appeal, with the member of the Force for the time being in command of the district in which he served immediately before his retirement or dismissal.

34. Such notice shall be forwarded to the Commissioner who shall transmit such notice and the record of proceedings to the Minister who may reverse or confirm such retirement or dismissal or subject such member to some lesser penalty not inconsistent with this Act.

35. If the Minister reverses a retirement or dismissal or imposes some lesser penalty, he shall make an order for the payment to such member of the whole, or such portion as the Minister deems fit, of the emoluments which such member would have received if he had not been retired or dismissed. (Amended P. 35/1960)."

On the above I wish to cite a judgment by Masuku J in the case of ***Jabulani B. Simelane vs The Commissioner of Police - Civil Case No. 75572000*** where the learned Judge was dealing with a matter similar to the present case, as follows:

"(ii) Failure to exhaust local remedies

According to Baxter (op cit) at page 720, the right to seek judicial review might be deferred until the complainant has exhausted domestic remedies created in the relevant legislation. In *casu*, this is done under Section 30 (1). It is common cause that the Applicant never availed himself of those. The learned author proceeds to state that in considering this issue, there are two paramount considerations.

36. whether the domestic remedies are capable of proving effective redress in respect of the complaint.

37. whether the alleged unlawfulness has undermined the domestic remedies themselves.

In answering the above, I am of the view that (a) must be answered in the affirmative because if the matter is placed in terms of the appeal procedures, the legality of the Commissioner's decision could be reviewed by the Prime Minister.

In respect of (b) above, there is no suggestion that the proceedings before the Board were in anyway tainted with illegality. On the contrary, the Applicant was represented and his case was fully and fairly heard. There is therefore no basis upon which it can be honestly stated that the unlawfulness complained of has in any way undermined the domestic remedies themselves.

The Applicant is clearly aware that he did not follow the domestic remedies available and as stipulated in the Act and has not applied for condonation for his failure. A party who is in default as is the Applicant should file an application clearly setting out cogent reasons behind his delay and also disclose the grounds upon which the court is urged to exercise its discretion in his favour. In *casu*, it is proper that the Applicant exhausts the local remedies before approaching this court. There is no proper basis in my view upon which this court can entertain the application in the face of Applicant's failure to avail himself of the domestic remedies".

I am in respectful agreement with the views expressed by the learned Judge and further state that the *dicta* propounded therein applies on the facts of the present case.

In the result, the application is dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized 'S' with a horizontal line through it, and a long, sweeping stroke extending to the right.

S.B. MAPHALALA

JUDGE