IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Case No. 1302/2001

In the matter between:

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| MUSA JOBURG SHONGWE | Applicant |
| And | |
| THE COMMISSIONER OF POLICE | 1st Respondent |
| THE ATTORNEY GENERAL | 2nd Respondent |
| Coram | J.P. Annandale, ACJ |
| For Applicant | Mr. P.R. Dunseith |
| For Both Respondents: | Ms Mkhwanazi |

JUDGMENT

3 JUNE 2004

This applicant was a Police Officer who was dismissed following his conviction on a charge of assault. He complains that he was dismissed without the benefit of a fair hearing. His attempt at conciliation failed and he now seeks an order to set aside his dismissal. This is opposed by the first respondent.

In his founding affidavit the applicant states that as long ago as November 1991 he was charged with the criminal offence of assault with intent to cause grievous bodily harm. He states that on 20th October 1991 he was convicted in the Magistrate's Court and given a sentence of 6 months imprisonment. There is an obvious inconsistency between this date and the date he was charged, i.e. November 1991. On appeal his conviction was



confirmed and the sentence was altered to 600 days fully suspended. The details of the sentence imposed by the learned Magistrate is also not correct, since he also had the option of paying a fine in the alternative to the term of imprisonment. Be that as it may, he did not serve any term of actual imprisonment.

He continues to state that around November 1991, he was suspended from police duties. He claims that this was orally conveyed to him, a fact denied by the respondent, but without substantiation of the repudiation. From December 1992 until September 2000 he received half of his salary but this ceased as from the date of his dismissal on the 6th October, 2000.
By way of a memorandum from the 1st Respondent dated the 5th October 2000, the applicant was informed that:

"In exercise of the powers conferred upon me by Section 29(e) of the Police Act 29/1957, I wish to inform you that you are dismissed from the force with effect from the 6 October, 2000, following your conviction against you (sic)on a criminal charge of assault G.B.H. by Manzini Magistrate Court on 20th December, 1991."

The first respondent states that this delay was because of the pending appeal to the High Court and not of his doing. He goes on to add that:

"The applicant informed us at the Disciplinary Hearing that he had noted another appeal to the Court of Appeal."

After his dismissal, abortive efforts to lodge a dispute with the Commissioner of Labour were instituted. The appointed conciliator correctly found that the existing legislation precluded him from dealing with the dispute, hence the present application in the High court.

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To a great extent, the matter rests on the assertion that the applicant "...was not afforded a hearing before my (his) dismissal contrary to the rules of natural justice." It is further alleged that the first respondent did not exercise his quasi-judicial function in a reasonable and just manner. The applicant refers to three other instances of convictions of other police officers which did not result in their dismissal. The substance of his complaint is that the Commissioner of Police did not exercise his discretion under section 29(e) of the Police Act judiciously and fairly, and further that the applicant was not given an opportunity to make representations.

The Commissioner denies this, stating that a hearing was indeed held on the 14th and 26th September 2000, in terms of natural justice. He filed a record of these proceedings, which ex-facie the papers indicate that on 14 September the applicant was present and represented by counsel.

It was not claimed that the applicant was present on the latter date. His Counsel was present.
It is from this report, annexure "B" in the application, that it becomes clear why the present application was brought to court. Quite clearly the only focus was on the appeals against the conviction and sentence of the police constable and the outcome thereof. It was common cause that the initial appeal to the High Court was unsuccessful on the merits of the conviction but that the initial sentence was altered on appeal on the 11th November 1999 to result in a fully suspended sentence.

The next point of focus was on a further appeal to the Court of Appeal, which apparently was noted out of time and also the refusal of the former Chief Justice to grant a certificate of leave to appeal due to no prospect of success. This second leg of the "enquiry" was done on the second date, the 26th September 2000, following an adjournment to allow the applicant to obtain proof that the further appeal was indeed pending, which was not the case.

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All that is recorded about the purported "hearing" is that the applicant was confronted with his conviction and sentence and was then burdened with a reverse onus. The record or report reads :-

"Therefore, on the basis of information as shown above, you must show cause (my underlining) why your service should not be terminated in terms of Section 29(e) of the Police Act 29 of 1957."

Section 29 of the Police Act, 1957, provides for the termination, dismissal and retirement of police officers. It reads that:-

"29. Subject to Section 10 of the Civil Service Order No. 16 of 1973 the Commissioner may, in the case of any member of the force of or below the rank of Inspector, at any time –

(d) Dismiss such member if he is recommended for dismissal from the force under Section 22;

(e) Dismiss such member on conviction of an offence other than an offence under this Act or regulations made there under;"

Section 22, which is referred to in Section 29(d), provides for recommendation as to reduction or dismissal of members of the Force as follows:-

"22. Upon conviction by a senior officer, a Board or a Magistrate's court, such officer, Board or court may, in addition to or in lieu of any of the penalties provided in this Act or any regulation made there under, recommend to the Minister (my underlining) that the person convicted be dismissed from the Force or be reduced, in the case of a member of the force below the rank of inspector but above the rank of constable to a lower or the lowest rank."

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Clearly, sections 22 and 29(d) are not applicable to the present matter as the dismissal recommendation is to be made to the Minister and not the Commissioner, also because the rank of the applicant was that of constable.

Section 10 of the Civil Service Order, 1973 (KOIC No. 16 of 1973) to which Section 29 of the Police Act is subject to, provides that:

"10(1) In relation to any officer on the Royal Swazi Police Force below the rank of inspector, none of the functions imposed on the Civil Service Board under this Order shall apply to the extent to which such functions are by or under the provisions of any law in force in Swaziland exercised by the Commissioner of Police or any other officer in the Royal Swaziland Police Force: Provided that in the case of disciplinary proceedings an appeal shall lie to the Civil Service Board against the award by the Commissioner of Police or such officer of the punishment of, dismissal or reduction in rank."

The applicant was dismissed under Section 29(e) of the Police Act, following a recommendation by three senior police officers. As indicated below, it was this "hearing" which was tainted to the extent that it effectively is a nullity. The complaint is that the Commissioner acted under his powers to dismiss the applicant but that the hearing conducted by the three senior police officers he had delegated, was tainted. His delegation of these officers is not in dispute.

The Civil Service Order referred to above provides for an appeal to be heard by the Board, following a decision to dismiss. A distinction has to be drawn between proceedings taken on review and an appeal. In the present matter, the applicant does not appeal against the decision of the Commissioner, which, if he did, would have required of him to first exhaust his domestic remedies. The matter is brought on review, "...the process by which, where a public body has a duty imposed upon it by statute, or is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings

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may be set aside or corrected" (on review). It also "denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before the Supreme Court, in respect of grave irregularities or illegalities occurring during the course of such proceedings." (per Innes, C.J. in Johannesburg Consol. Invest. Co. v Johannesburg Town Council, 1903 T.S. 111). In Barlin v Cape Licensing Court, 1924 A.D. 472 it was further stated that proceedings on review can be brought to interfere with a decision where "its proceedings were conducted so that the applicant did not have a fair hearing."

With the finding of the "enquiry" that they 'failed to find tangible evidence to suggest that this information is correct", relating to whether the further appeal was to be heard in the October-November session of the Court of Appeal, and without having heard any further recorded submissions or representations by or for the applicant as to why he should not be dismissed, the following finding was made.

"Therefore, on the basis of the information, we recommend to the Commissioner to terminate his service in terms of section 29(e) of the Police Act No. 29 of 1957."

It is on the above basis that the first respondent boldly states that the hearing was in terms of natural justice. He states, uncontrovertedly so, that the applicant's conviction followed on his stabbing of an

accused person in custody of the police, "...a criminal offence which constitutes gross misconduct under the Police Act."

The Commissioner further says that upon the recommendation of the senior officers who held the "hearing" he carefully considered the matter and came to the conclusion that it warranted a dismissal.

Thus, this "careful consideration" of the matter, as it was put, was based on and followed the recommendation of the officers who conducted the hearing.

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It is however this very "hearing", which is pivotal in the matter, which has to pass muster.

In the 1st respondent's replying affidavit, further details of the "hearing" come to light. Although it is in dispute as to how his attendance at the Police Headquarters was secured, the applicant was physically present on the first date. It is common cause that he was asked about the outcome of the noted appeal and that he could not prove that a further appeal was indeed due to be heard soon thereafter.

However, he says that he was not made aware that the meeting was a disciplinary enquiry. True or not, the filed record of proceedings substantiates his allegation that he was not heard in respect of whether he should be dismissed or not. Nor was his counsel, the late advocate Thwala. The hearing, ex facie the record, centred on the matter of his appeal and not on whether he should be dismissed. It does not, in my respectful opinion, comply with any reasonable concept of what a disciplinary hearing should be. It was not made clear to the applicant that the purpose of the meeting was to make a recommendation to the Commissioner about his possible dismissal from the Force.

Apart from a cursory inclusion in the record that the constable was burdened with an onus to show why he should not be dismissed, no effect was given to the principle of audi alteram partem and nothing was solicited from the officer in this regard, nor is it recorded that anything further than the appeal issue was ventilated.

Apparently, the applicant was not present on the second date of the "hearing", although his advocate appeared.

The effect of the abovementioned aspects are that the applicant was not given a fair hearing, or at minimum even heard on his pending and imminent dismissal, which resulted from the outcome of the "hearing."

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In his persuasively presented argument in court, Mr. Dunseith referred to Baxter's standard work on Administrative Law at page 543 et seq. where the learned author outlines two fundamental requirements essential to a fair hearing. These are notice of the intended action and a proper opportunity to be heard.

The first of these has been mentioned above, namely whether his attendance followed an oral message or a telex. Either way, there is no indication that this was done timeously and certainly not that he was properly appraised beforehand of the possibility that administrative action was about to be taken against him. He was not informed beforehand of the salient factors motivating the proposed action.

Secondly, and more important to the outcome of this matter, he was prima facie and factually, from a reading of the record of the hearing, also not afforded a fair opportunity to present his case. He presented no case at all in defence to his possible dismissal.

There is no indication that he was given a reasonable time to prepare and put forward his

representations. Nor was he put in possession of such information as would enable him to make his representations real, and not illusionary. (See Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980(3) SA 476(T)).

The report or record of proceedings of the "hearing" gives no indication that it was a fair hearing at all. A commonly referred to principle of a hearing, like the one purportedly held, in respect of the applicant is that:

"They (the tribunal or designated senior police officers) can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

(per Lord Loreburn, L.C. (p.182) in BORD OF EDUCATION v RICE (1911, A.C. 179), referred to in NANABHAY v POTCHEFSTROOM MUNICIPALITY 1929 T.P.D. 483

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The latter decision was referred to by Ms Mkhwanazi in support of her argument that the delegated senior police officers were free to obtain their facts in any manner they chose to. To that extent, she is correct, but the principle goes further - before arriving at their conclusion, they were obliged to give the applicant a fair hearing. It is this which they did not do.

The applicant was not heard on any aspect that relates to the decision they were to make. His understanding was that he was to provide information about his further appeal, which he was unable to do. By all appearances, the outcome of the matter rested exclusively on whether or not the Court of Appeal was still to hear an appeal against the decision of the High Court. It seemingly did not matter whether the applicant had anything to say about his dismissal or even whether this was an issue.

As said, in order to arrive at his own decision, the first respondent placed reliance on the outcome of the "hearing", in respect of which he delegated his powers and which resulted in a recommendation to dismiss the applicant from the Royal Swazi Police.

The decision on whether to dismiss the errant police officer or not is a quasi judicial function which is to be exercised by the Commissioner of Police. In the present case, the applicant was ostensibly afforded a hearing, which for the abovementioned reasons was in fact a nullity but which nevertheless had persuasive value in the ultimate decision, taken under Section 29(e) of the Police Act. The nett effect of this is that the application is to succeed.

A further aspect that was unsuccessfully raised by the respondents is that the applicant has chosen the wrong forum to air his grievance in that he should first have exhausted his domestic remedies. There is no statutory bar to the application. Also, he was deprived of the principles of natural justice from the onset, which tainted the subsequent outcome, and this in turn would also have distorted subsequent domestic procedures. A fundamental consideration is the principle of legality.

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The applicant also had the option to appeal to the Civil Service Board. The fundamentally flawed recommendation by the designated senior police officers would by necessity be the basis on which to proceed and challenge the decision by the Commissioner. Quite understandably, in my view, the applicant rather chose to seek an order on review against his dismissal in the High Court, which forum has the appropriate inherent jurisdiction to entertain his application.

Accordingly, this point also stands to fail.

In the event, the application succeeds and it is ordered that the proceedings and recommendation of Senior Superintendent Dludlu and two others, held on the 14th and 26th September 2000, which resulted in the dismissal of the applicant by the first respondent, be set aside, as is the dismissal itself. It is further ordered that the applicant be placed in the same position as he was prior to the 14th

September 2000 and that the Commissioner of Police remains at liberty to determine the consequences of the applicant's conviction and the subsequent appeal. It remains essential that the applicant be given a fair hearing before any new determination is made.

Costs are ordered to follow the event.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE