THE HIGH COURT OF SWAZILAND

Civil Case No.755/00

In the matter between;

JABULANI B. SIMELANE And **Applicant**

THE COMMISSIONER OF POLICE THE CIVIL SERVICE BOARD THE ACCOUNTANT -GENERAL THE ATTORNEY-GENERAL THE RIGHT HON. PRIME MINISTER

1st Respondent 2nd Respondent 3rd Respondent 4th Respondent 5th Respondent

CORAM **MASUKU J.**

For the Applicant For the Respondents

Ms. M. da Silva Mr. V.D. Dlamini

JUDGEMENT 6th July, 2004

History of and key events in the matter

This matter has ricocheted to me. At the initial hearing, the Applicant sought an Order in the following terms: -

(1) Directing the First and Second Respondents to re-instate and/or employ the Applicant as a police officer.

(2) Setting aside the decision of the First Respondent dismissing the Applicant from the Police Service as of no legal force and effect.

(3) Directing that Applicant be paid his full salary with effect from November, 1997 to date.

(4) Costs of the application.

After listening to written and oral submissions made on behalf of the parties at that hearing, I declined to pronounce upon the validity of the Applicant's dismissal because I was of the view that he had failed to exhaust the local remedies provided by the Police Act No.29 of 1957. In particular, Section 30 provides that a member of the Force who has been dismissed in terms of provisions of Section 29 (b), (c), (d) or (e) or (f) may lodge an appeal against the 1st Respondent's decision to the Minister i.e. the Prime Minister. It was after realising that the Applicant had jumped the gun that he was ordered to exhaust the statutory remedies available.

The Applicant, in line with the judgement, appealed to the Prime Minister as directed. The Prime Minister, in his wisdom, dismissed the appeal and confirmed the Commissioner's decision, by letter dated 22nd March, 2004. The Applicant, in addition to the relief sought as set out above, further seeks an Order setting aside the Prime Minister's decision stated above. In the fresh Notice of Motion, he prays for the following relief:-

(5) Directing the First, Second and Fifth Respondent to reinstate the Applicant as a member of the Royal Swaziland Police Force.

(6) Reviewing and setting aside the decision of the Fifth Respondent confirming the decision of the First Respondent in dismissing the Applicant from the Royal Swaziland Police Force as a Police Officer.

(7) Directing the Third Respondent to pay Applicant his full salary with effect from November 1997 to date.

(8) Directing the first and firth Respondents to pay costs of suit.

5. Further and/or alternative relief.

It is worth pointing out that in the Affidavit, accompanying the Notice of Motion, the Applicant alleges that he was never called upon to appear before the Prime Minister in order to place his side of the story, before the Prime Minister took the decision to confirm the decision of the Commissioner of Police, dismissing him, the Applicant. He submits that the principle *"audi atteram partem "* was not observed by the Prime Minister.

The Respondents were served with the new application on the 14th May 2004, but notwithstanding service, they did not oppose the application and took the decision not to file opposing papers. It must therefor be borne in mind that the Applicant's allegations of fact stand and must be accepted as uncontroverted.

In the judgement I handed down on the 27th November, 2002, I closely examined statutory enactments relevant to this case and interpreted them in line with precedent from this Court. I therefor consider it tautologous to once again revisit the background and the issues raised. For a full compendium of the relevant issues, it is advisable that this judgement is read *in tandem* with that dated 27th November, referred to above. I will venture into the detail necessary to place this matter in its proper historical context and to the extent that I deem necessary or expedient.

Background

The Applicant, a Police Officer had been engaged as such in August 1989. In November, 1997, he left the country for KwaZulu, Natal, where he stayed for many months, purportedly as a result of an undisclosed sickness, which according to him, required the expertise of a traditional doctor. On his return, purportedly after recovery, and on an unspecified date, he was arrested on suspicion of the theft of a motor vehicle. The trial culminated in his acquittal on the said charge, on the 5lh July, 1999.

The acquittal did not mark the end of his misery as he was thereafter called upon to answer to disciplinary charges relating to absenteeism by a Disciplinary Board constituted in terms of Section 12 of the Act. That Board found him guilty of the said offence and imposed a sentence on him as follows: - E50.00 fine and the forfeiture of the salary due to him in respect of the period during which he was absent from work.

The 1st Respondent was apparently unhappy with the sentence meted out by the Board and he7in a memorandum dated 6th December, 1999, purported to dismiss the Applicant from the Force in accordance with the provisions of Section 29 (d) read with Section 22 of the Act.

Validity of Applicant's dismissal-the law applicable

The crisp legal question, which this Court is now called upon to answer, is whether the 1st Respondent is at large to issue a dismissal in the absence of such recommendation from the Disciplinary Board as constituted in terms of Section 12 of the Act.

It is necessary, in returning an answer on this question to have regard to the applicable Sections of the Act and to the various letters annexed to the papers. Section 29 (d), under which the 1st Respondent purported to Act provides the following: -

> *"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 i f he is recommended for dismissal from the Force under Section 22* (Emphasis my own).

Section 22, which is referred to in Section 29 (d), on the other hand, reads as follows: -

> *"Upon conviction by a Senior Officer, a Board or a magistrate's court, such officer Board or court may, in addition to or lieu of any regulations made thereunder, recommend to the Minister 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. "*

I interpolate to state that the use of the word "Minister", occurring above is a misnomer and resulted from an error when the Section in question underwent ah amendment. Properly construed, the word should have read "Commissioner".

In support of this view, I cite with approval the judgement of Dunn J. in THEMBELA MATHENJWA VS THE COMMISSIONER OF POLICE AND ANOTHER HIGH COURT CASE NO. 1006/91 (unreported), where the learned Judge reasoned as follows: -

> *"// is clear that section 22 creates some confusion in the disciplinary and appeals procedure provided for under the Act but that does not in my view, affect the clear provisions of Section 29 (d). The representative of the Attorney-General pointed out that there had been an omission in the Police (Amendment) Act No.5/1987 in which the word "Minister" in section 20 was replaced with the word "Commissioner". It was pointed out that a similar replacement should have been made under section 22, in the amendment. The explanation given would place section 22 in keeping with the general approach of the Act regarding disciplinary proceedings; the powers of the Commissioner and the right to appeal to the Prime Minister. It would to be irregular for the Prime Minister to be vested with the power to act on a recommendation under Section 22 and at the same time exercise the powers of appeal set out under Section 30. "*

I entirely agree with the reasoning and conclusions of the learned Judge above. Similarly, Sapire C.J. agreed with the above reasoning in SHADRACK DLAMINI VS COMMISSIONER OF POLICE AND ANOTHER CIVIL CASE NO.2044/98

(unreported).

Once this aspect is cleared and set in its proper perspective, it is clear that the Applicant, who was in the rank of Constable at the time, was of a rank below inspector and for that reason, the provisions of both Section 22 and 29 (d) applied to him. A plain reading of both sections shows indubitably that where the Commissioner decides to dismiss an officer from the Force, he can only do so on the recommendation of a senior officer, Board or Magistrate's Court, as the case may be, who heard the disciplinary case. The Commissioner may therefor not dismiss in the absence of that recommendation, which becomes the *sine qua non* for him

exercising the power to dismiss. Both Counsel agreed with this conclusion regard had to the clear and unambiguous provisions referred to above.

These are the views I expressed in the earlier judgement and they are buttressed by Dunn J's sentiments expressed in the THEMBELA MATHENJWA case *(supra)* at page 5, where the learned Judge held the following: -

> *"Section 29 (d) can and must be read as conferring a clear power on the Commissioner to act where he has knowledge of a recommendation made under Section 22. In acting under Section 29 (d) the Commissioner does so independently of whatever powers may be conferred on the Prime Minister under Section 22 ".* (my own underlining)

Coming to the Board's ruling on sentence, it reads as follows from the record of proceedings; -

"SENTENCE WITH BRIEF REASONS".

Defaulter is sentenced to a fine of E50.00. This is subject to review by the Commissioner of Police. Although the defaulter is a first offender but what he did was extremely serious. He disappeared from work for a period of 10 months following his involvement in a criminal offence which resulted in his escape from Police at Lavumisa border post in November 1997.

RECOMMENDATIONS:

The Board recommends that the defaulter's salary for a period of his absence be forfeited to Government... Defaulter informed that sentence is subject to review by Commissioner of Police. The Commissioner of Police may consider a dismissal of the defaulter if he so decides to do so in terms of Section 22 of the Police and Public Act 29/1957."

It is abundantly clear that the Board considered the seriousness of the Applicant's absenteeism and also considered that he was a first offender and meted a sentence that they deemed proper i.e. E50.00 fine and forfeiture of the salary. There was clearly no recommendation made by them to the Commissioner to dismiss the Applicant from the Force.

To the extent that the Board advised him that the Commissioner may on review issue a dismissal, they were clearly incorrect for the clear and unequivocal wording of the Act states that the Commissioner may dismiss on the basis of a recommendation from them or from persons similarly placed. He may not, subject to the views and observations I made in the earlier judgement, unilaterally dismiss an officer from the Force in the absence of a recommendation, regardless of how strongly he feels about or views the transgression or misdemeanour by the officer.

The matrix of the evidence clearly points to the absence of a recommendation and Mr Dlamini could not successfully argue otherwise. At page 2 of the earlier judgement, I came to the following view: -

> *"The Commissioner in my view may not dismiss an officer under the provisions of Section 29(d) in the absence of a recommendation by the Board. If he does so, it is my view that his decision would properly be regarded ultra vires and liable to be set aside.*
> "

Such must be the fate of the 1st Respondent's decision be *in casu.* It is clear, from the papers later filed that the Applicant, after the judgement of the 27th November, 2002, did appeal to the Prime Minister in terms of the Act and further sought condonation for the late filing of the appeal. The notice of appeal is unfortunately undated.

In the grounds of appeal, the Applicant submitted that the 1st Respondent's decision to dismiss was irregular as it was not made pursuant to the recommendation alluded to above. A copy of the judgement appears to have been placed before the Prime Minister, to assist him in his consideration and final decision of the appeal.

By letter dated 22nd March, 2004, the Prime Minister, who must be taken to have granted the condonation by necessary implication, communicated his decision on the appeal to the Applicant. He proceeded to state as follows: -

> "The documents relating to the disciplinary hearing, including the record of the hearing, and the grounds of the appeal, were forwarded for a decision by myself

as envisaged under Section 21 of the Police and Public Order Act No.29 of 1957.

After due consideration of the offence you were found guilty of the evidence led against you at the hearing your submission and all other necessary factors, I have reached the following conclusion:

(i) That both the verdict and punishment are fair and proper; and

(ii) That there are no sufficient grounds or reasons for me to interfere with the verdict and punishment

In the circumstances, your appeal is dismissed and both the verdict and punishment upheld.

Yours faithfully,

A.T. DLAMINI

PRIME MINISTER"

The Prime Minister does not appear to have addressed the complaint raised by the Applicant, in his decision i.e. that the Commissioner acted *ultra vires* the provisions of Section 22 read with 29 (d) in dismissing the Applicant. It would appear therefor in my view that the Prime Minister's decision does not in any way change the fact that the Commissioner of Police, contrary to the clear and unambiguous provisions of the Sections mentioned above, dismissed the Applicant in the absence of the requisite recommendation. For that reason, I am of the view that the decisions of both the Commissioner of Police as confirmed by the Prime Minister are *ultra vires* and cannot be allowed to stand in the face of the clear and unambiguous provisions as aforestated.

Audi alteram partem Rule

As it is evident from the Applicant's new affidavit, he alleges that he was never afforded an opportunity to present his case to the Prime Minister, contrary to the *audi alteram partem maxim,* which forms part of our law. This allegation, as observed earlier, was not challenged by the Respondent.

In his letter, dismissing the appeal, which was quoted in full above, it is clear that save for the filing the Applicant's grounds of appeal, the Applicant was not given an opportunity to make oral and/or written submissions for the consideration of the Prime Minister, before the latter came to the decision, which I may add, required the most anxious consideration and full information and arguments, in view of its far reaching implications on the Applicant as an employee. It is also doubtful whether the Commissioner himself did make any representations to the Prime Minister. If he did, clearly, these were not brought to the Applicant for his attention and response.

The right to be heard, although not expressly stated in legislative enactments, is implied. The fact that there is no express requirement for the Prime Minister in the Act, to receive oral and/or written submissions from the parties, including the Commissioner, must in no way be construed to mean that the only information that the Prime Minister must have at his disposal, in deciding on the appeal is that listed in Section 21 (3), namely, the record of proceedings and the appealing officer's grounds of appeal. It certainly does not mean that a hearing, whether oral or written or a hybrid of the above, is thereby dispensed with. A hearing, in the context I have stated above, constitutes an integral and indispensable part of the process. For that reason, the absence of a hearing renders the decision liable to be set aside.

I can, in this regard, do no better than to refer to unreported judgement in SWAZILAND FEDERATION OF TRADE UNIONS VS THE PRESIDENT OF THE INDUSTRIAL COURT OF SWAZILAND AND ANOTHER APPEAL CASE NO**.11**/97, where the Appeal Court stated the following trenchant remarks at page 10 of the judgement:-

> *'The audi alteram partem principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient time upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18'h century English Judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time (see De Smith: Judicial Review o f Administrative Action p. J56; Chief Constable. Pietermaritzbuni vs Ishin {1908} 29 NLR 338 at 341).*

> *Embraced in the principle is also the ride that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them. (See Wiechers: Administratiefreg 2nd edn. P. 237).*

It is clear that the manner in which the matter was conducted on review was not consonant with the principles of natural justice, particularly the *audi alteram partem.* It is also on this ground that the decision of the Prime Minister, however well meaning it was, cannot be allowed to stand.

In view of the foregoing, I grant the Applicant the relief as prayed for in 1, 2, 3 and 4 of the Notice of Motion.

Regarding prayer 3, I am of the view that it would be unfair and unconscionable for this Court to order the Respondents to pay the Applicant his salary in relation to the time when he was absent from duty and without authority. It would set a bad precedent if the Court would follow that course. The Order for the forfeiture of the salary (which was in any event not earned), meted by the Disciplinary Board must in my view stand, as its validity was not challenged. If it can be sustained on no other premise, then it should succeed on the principle of "no work no pay". The payment of the Applicant's salary must therefor be ordered to run retroactively to the date of his purported dismissal by the Commissioner of Police on the 6th December, 1999. Prayer 3 is therefor altered to extent that the salary must be calculated with effect from December, 1999.

For the avoidance of doubt, this judgement must not be construed as a licence by the Courts or a shield to erring officers or be seen as condonation of, connivance and an endorsement of unscrupulous activities of officers in the Force. The contrary, rather is true. The nature, duration and effect of the Applicant's absenteeism *in casu* was clearly serious and would understandably irk any reasonable employer and would possibly lead to the employer, after acting in terms of the law, dismissing the errant employee. The crux of this judgement however, is this - in issuing a dismissal, which may be held to be justifiable *in casu,* the strictures prescribing the conditions precedent thereto must be followed to the letter. The nature, seriousness, duration and effect on discipline of the absenteeism or whatever other

serious infraction it is, must not, jaundice the view of the relevant authorities and cause them to "act in complete oblivion of legal requirements set by our Parliament. The Courts must, in such instances, ensure that the Legislative solicitudes and intent apparent from the Lawgiver's choice of language is given full and undivided effect.

I interpolate to mention *en passant* that the observations and directions given in the judgement dated 17th November, 2002, do not appear to have been considered and used to resolve the quandary by the Respondents, and they, in the circumstances, must have no one to blame. The blame must lie at their respective doors.

T.S. MASUKU
JUDGE