IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 345/05**

In the matter between:

SIKELELA MAGAGULA **APPLICANT**

AND

THE COMMISSIONER OF POLICE **1st RESPONDENT**

ATTORNEY GENERAL 2 nd RESPONDENT

CORAM **MAMBA AJ**

FOR THE APPLICANT **MR. MKHWANAZI**

FOR THE RESPONDENTS **MR. KUNENE**

JUDGEMENT

4th AUGUST, 2006

[1] In terms of two Letters or Memoranda one dated the 25[1] day of May 2005 and the other on the 27th June, 2005 the applicant was informed of his dismissal from the Royal Swaziland Police by the 1st respondent. At the time of his dismissal the applicant was ranked as a constable and his police force number was 3393. I shall return to the letter of dismissal of the applicant presently herein.

[2] The applicant was dismissed from the police force following his conviction by a Board of 3 Senior officers appointed by the 1st respondent to hear certain serious internal disciplinary charges against the applicant. This Board was appointed in terms of section 13 (1) of the Police and Public Order Act 29 of 1957 (as amended) (hereinafter referred to as the Act.) The applicant was sentenced by the Board to a fine of E200-00 and a recommendation was made to the 1st respondent that he be sacked from the police force. The trial of the applicant was conducted in terms of section 12 (2) which lays down that;

> "Any member of the Force below the rank of Inspector shall be liable to trial and conviction for any offence against discipline by a Senior officer under whose command such member is or any other Senior officer designated thereto by the Commissioner; ...
>
> 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 ... (b) a Board; ..."

[3] In terms of section 18 (b) of the Act the only sentence that may be imposed by a Board on a conviction under the above circumstances is one or more of the following punishments, namely: "admonition, reprimand, severe reprimand or a fine not exceeding Two Hundred Emalangeni." I pause here to observe that the fine of E200-00 imposed by the Board on the applicant was within the competence of the Board and the applicant as I understand it, is not challenging that. He is,

however, challenging his conviction and was with leave of this court, granted on the 24 February 2006 permitted or allowed to file his notice and grounds of appeal out of time which he claims he did on the 28th day of February, 2006.

[4] This appeal, he says, is pending and the respondents aver that no such notice of appeal was filed with the Board as required by Section 21 (3) of the Act which provides in peremptory terms that the notice of appeal and "grounds thereof shall be lodged within seven days after the conviction with the ...Board who tried the case and it shall be the duty of the ...Board ...forthwith to transmit the record of the proceedings to the Minister," to whom the appeal lies. In this case the relevant Minister is the Prime Minister. The applicant alleges that he served and filed or lodged his notice of appeal and the grounds thereof directly with the Prime Minister. He argues further that there is no prejudice suffered or to be suffered by the respondents by him not lodging his appeal with the Board that tried him but serving it directly on the Prime Minister.

[5] It is not necessary for me in this judgement to express any view on whether the applicant's notice of appeal is valid or not. I observe though that a notice of appeal is, in the main, an act or step in the court or tribunal whose judgement is appealed against and has to be filed with that court or tribunal.

[6] The applicant has applied to this court for an order that pending his appeal he be paid his salary with effect from the month of May 2005 and that the sentence imposed upon him by 1st Respondent be stayed. In support of his application he has relied on the provisions of section 21 (2) which states that;

> "(2) If an appeal has been lodged under Sub-section (1), no sentence shall be carried out until the decision of the Minister is made known."

[7] Applicant argues that "having filed an appeal ...the decision of the 1st respondent dismissing me from the Police force has to be suspended in terms of the Police Act pending the outcome of my appeal...[and] the implementation of the

1st respondent's decision deprives me of my means of livelihood, as I have no source of income."

[8] Implicit in the aforegoing allegation is that since his dismissal from the police force, the applicant has not been paid his wages. It would seem to me prima facie at least that if a notice of appeal and the grounds thereof has been properly or validly filed by the applicant, the execution and or carrying out of the sentence imposed by the 1st respondent on the applicant has to wait until the outcome of that appeal. There is, however, neither rhyme nor reason why such a stay should be with effect from the date on which the applicant was dismissed. Whilst a notice of appeal may be looming or in prospect, the appeal itself does not become pending until and unless such notice is filed. In casu applicant alleges that he filed his notice of appeal on the 28th February, 2006, following an order of this court.

[9] I now return to the two letters of dismissal of the applicant by the 1st respondent.

[10] In the 1st memorandum or letter which is dated the 27th day of June, 2005 the 1st respondent states that the applicant's dismissal is with effect from the 30th day of June, 2005 whilst in the other memorandum or letter dated 25th day of May 2005 the dismissal is said to be with effect from 23rd May 2005. In his opposing affidavit the first respondent has not sought to clarify this apparent inconsistencies or contradictions and has instead muddied the already murky waters by saying "that the exact date on which applicant was dismissed is the 24th March 2005" (per paragraph 4) This assertion is again regrettably not motivated or explained further.

[11] It is the duty of Counsel to guide and assist clients in the preparation and drafting of court documents. Where Counsel is involved in the preparation and presentation of court documents only material that is relevant in the sense that it explains or advances the case in one way or the other should be submitted to court. During preparation of documents, litigants should not be permitted by Counsel to,

as it were, throw everything including the kitchen sink to the court or their opponents.

[12] As stated above, it is common cause, that the Board recommended to the 1st respondent that the applicant be dismissed from the police force and this recommendation was adopted by the 1st respondent. In both letters, the 1st respondent stated that "Following the Board's recommendation, and in the exercise of my powers in terms of section 29 (e) of the Police Act 29/1957, I hereby inform you that you are dismissed from the police service..."

[13] Section 29 provides that;

> "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 -

(a) Terminate the appointment of such a member on probation, if the Commissioner considers that he is unlikely to become an efficient member of the force;

(b)Retire such member on reduction of establishment;

> (c) Retire such member if a Board of Government medical officers appointed by the Director of Medical Services finds that he is mentally or physically unfit for service and that such unfitness is likely to be permanent; …

(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 thereunder; (fjRetire in the public interest any such member who displays an habitual inattention to orders or general competence or fails to obey orders or fails to cooperate with other members of the force or manifests a quarrelsome disposition or want of courage, ability or zeal, although he may not be guilty of a specific offence ..."

[14] It is common cause that the applicant had been charged and was convicted of an offence under the Act. He therefore could not have been dismissed by the 1st

respondent under section 29 (e) as the first respondent says in his two memoranda referred to above. The recommendation for the dismissal of the applicant was made by the Board acting in terms of section 22 of the Act.

[15] Section 22 of the Act also provides that;

> "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 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." (The underlining is mine.)

[16] The general scheme of the Act regarding disciplinary action against police officers below the rank of Inspector, is that the offender is tried by any senior officer under whose command such offender falls or any senior officer designated for that task by the Commissioner or if the offence is a serious one by a Board of 3 Senior officers or by a court. A person aggrieved by a decision of any of these bodies may appeal to the Prime Minister. The Prime Minister is the appellate body. He has the jurisdiction to hear an appeal against the dismissal of a member of the force made by the Commissioner in terms of section 29.

[17] One notes further that as per section 29 of the Act it is the Commissioner and not the Prime Minister who is empowered to order the retirement or dismissal of a member of the force.

[18] Viewed from this perspective, it is clear to me that the word "Minister" as appears in section 22 of the Act should read "Commissioner." It is the only logical interpretation that can be made to give meaning to that section. The Prime Minister deals with appeals only. For instance, if the Prime Minister were to act as a tribunal of first instance to receive and act on recommendations for dismissal of members of the force, such members dismissed by the Prime Minister would

either have no recourse to an appeal or appeal to the very Prime Minister who ordered the dismissal. Either situation or proposition would in my judgement, be absurd.

[19] In the circumstances, the appellant was dismissed by the 1st respondent in terms of Section 29 (d) after receiving the recommendation from the Board that tried the applicant that he be dismissed from the police force.

[20] An appeal against dismissal or involuntary retirement from the force is governed not by section 21 but by section 30 of the Act which I reproduce here in extenso :

> "(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.
>
> 2) 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.
>
> 3) 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. ..."

[21] The non execution or carrying out of the sentence of a convicted police officer referred to in section 21 (2) refers to a sentence other than a sentence of retirement or dismissal from the force. This section refers to a sentence in general

whereas section 30 refers to specific sentences.

[22] Implicit in sub-section (3) of 30 is that where a member of the police force is retired and or sacked from the police, pending his appeal against such decision, he may not be paid any wage as a police pending the determination of his appeal. If the appeal is successful, whatever prejudice he may have suffered in the interim, is mitigated by the fact that the Prime Minister "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."

[23] Notwithstanding the unconrroverted fact that the applicant's notice of appeal was not filed strictly in accordance with the laid down procedure in the Act, I shall for purposes of this judgement only, assume that it is a valid notice of appeal. I make this assumption based ***inter alia*** on the fact that the appeal has already been called before the Prime Minister and no prejudice has been alleged by the respondents to have been suffered by them as a result of the failure by the applicant to follow the laid down procedure for noting an appeal.

[24] The attention of the Attorney General is drawn to my remarks or findings on the provisions of section 22 of the Act. This section clearly needs to be amended.

[25] In the result, the application succeeds in part and it is ordered as follows:

1 .If the applicant has paid the fine of E200-00 imposed on him upon being convicted by the Board, this amount is to be repaid to him, pending the finalisation of his appeal, otherwise the application is dismissed.

2.Each party is to bear its own costs.

MAMBA AJ