IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 482/06

In the matter between:

JOHN BONGWE	**APPLICANT**
AND	
THE SECRETARY OF	
THE CIVIL SERVICE BOARD	**RESPONDENT**

CORAM	**MAMBA AJ**
FOR APPLICANT	**MR. M. MABILA**
FOR RESPONDENT	**MR. J. MAGAGULA**

JUDGEMENT

24th FEBRUARY, 2006

[1] At the beginning of this hearing counsel informed me that it had been agreed between them that the Chairman of the Civil Service Board be cited as the respondent instead of the Secretary of the said Board. The agreed amendment was accordingly made and the point in limine raised by the respondent's Attorney fell away. Any reference to the respondent herein refers to the Chairman and not the Secretary of the Civil Service Board.

[2] The applicant is an employee of the Government of Swaziland under the Ministry of Public Works and Transport. He is the Director of the Road Transportation Board.

[3] It is common cause that at all times material hereto the applicant was out on bail pending trial on a charge of murder.

[4] The Civil Service Board is a statutory Board entrusted and empowered with the right to hire

or employ, promote and or dismiss or discipline civil servants. It is empowered to administer, monitor and or look after the welfare of civil servants in their work environment. Amongst such powers and functions of the Board is to look into and make any disciplinary hearings or enquiries against any civil servant and make or issue rulings of its findings thereon. Such rulings may include dismissals, suspensions and so on.

[5] It is again common cause that on the 31st day of January, 2006 the applicant was not at work; probably on leave, and his Principal Secretary Mr Evart Madlopha (hereinafter referred to as Madlopha.) instructed Winile Vilakati, the applicant's secretary to telephone the applicant and invite him to be at the Civil Service Boards' offices at 10,00 a.m. the next day. Winile did so but did not tell the applicant why he had to be at the Civil Service Board's Offices. This prompted the applicant later that day, that is to say the 31st day of January, 2006, to telephone and enquire from Madlopha why he was to be at the Civil Service Board's Offices at the appointed time. The reply from Madlopha was that "he was not aware but thought it was in respect of my murder charge ...and went on to mention that he had been summoned as well...".

[6] The applicant complied with the instructions of Madlopha. At the offices he again asked Madlopha who found him already there, as to why he had been called and the answer from Madlopha was the same as he had given the previous day.

[7] Another matter that is common cause is the fact that first to be called into the meeting of the Board was Madlopha whilst the applicant remained away from the meeting until after about 30 minutes later when he was called in. The applicant says, and this is not common cause, after a few introductory remarks by the respondent, the respondent "then told me that ... they had not summoned me for a trial but to inform me of the requirements of the law in cases like mine [the murder charge] that required that I be suspended on one half pay since I had been charged and that they (board) had taken a decision to effect it due to public pressure and it was not their wish."' This statement by the respondent was. according to the applicant, echoed by one Almon Mbingo, a member of the board - and that was the end of the meeting between the board and the respondent.

[8] In response the respondent has refuted these allegations and has stated that both Madlopha and applicant "were invited by the civil service board on the 1st day of February, 2006 wherein the suspension of the applicant was deliberated upon. Applicant was present at the meeting and was afforded the opportunity to make his own representations." In support of this averments the respondent has referred to annexure AG1. AG1 calls itself a CIVIL SERVICE BOARD PAPER in respect of file CSB/8367. The first page thereof is typed and the second page is handwritten.

[9] The first page records that the Attorney General has advised that the applicant be suspended from duty in terms of regulation 39 of the Civil Service Board (General Regulations) pending finalisation of the pending criminal case against him. It records further that "the Attorney General advises that before the board takes such disciplinary measure. Mr Bongwe should be given a hearing in conformity with the rules of natural justice".

[10] Page 2 of AG1 is the decision of the Board and states that "after the meeting with the Principal Secretary at the Ministry of Works and Transport and thereafter with Mr JMV Bongwe concerning this matter, the Board approved the suspension of Mr Bongwe from the performance of his official duties as Director of the Road Transport Board with effect from today, the 1st February, 2006 pending the court's decision on the charge laid against him. During the suspension period. Mr Bongwe will receive half of his monthly salary." No other record relating to the said proceedings was filed in court. I shall return to this later.

[11] From the above averments and from what was submitted in court both parties accept that the Board was obliged to follow the rules of natural justice in the process of effecting or ordering the suspension of the applicant and also of suspending one half of his pay.

[12] It was argued on behalf of the respondent that there is a real dispute of fact with regards to whether or not the applicant was afforded a hearing by and before the board. This dispute of fact is irresoluble on the papers as they stand. Because of this dispute, it was argued, this application must be dismissed with costs.

[13] One of the facets or components of the rules of natural justice is that no man should be condemned before he has been given the opportunity to defend himself or in whatever way plead his cause. This is the audi alteram partem rule. What is required of the decision maker is that in order for him to arrive at a fair and balanced decision, especially where the decision adversely affects the rights of an individual, he must give or afford both sides the opportunity to adequately present their side of the issue.

[14] **LAWRENCE BAXTER,** in his book **ADMINISTRATIVE LAW AT PAGE 543 - 544** states that "what is required, in essence, is that the administrative agency should act fairly in affording the affected individual the opportunity of a fair hearing. ...There are two fundamental requirements to which an affected individual is entitled; notice of the intended action; and a proper opportunity to be heard. ...An opportunity to be heard presupposses adequate notice of intended administrative action. Whether this is required by statute or not, an affected party must be given adequate notice of the possibility that an administrative action may be taken against him."

[15] Adequate notice relates to both the specifics and or details of the complaint and proper opportunity within which to prepare oneself for the pending action. At page 545 Baxter continues; "for the hearing itself to be a fair one, the notice of the impending action should also specify the salient factors motivating the proposed action. Without these, the affected individual can not hope to prepare his objections adequately."

[16] In the case of **HEATHER DALE FARMS (PTY) LTD** vs **DEPUTY MINISTER OF AGRICULTURE, 1980 (3) SA 476 (T) at 486 COLEMAN J.** after stating that the required information to comply with this rule need not be as would obtain in a judicial trial, stated that "he need not be given an oral hearing, or allowed representation by an attorney or counsel, he need not be given an opportunity to cross-examine, and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed), a mere presence of giving the person concerned a hearing would clearly not be a compliance with the rule. ...The person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his

representations, secondly he must be put in position of such information as would render his right to make representations a real, and not illusory one.
[17] The applicant was obviously aware of the criminal charges against him. He was. however, not aware of what action the Board intended taking against him until he was told when he appeared before the Board.

[18] It has been argued by the respondent that, accepting that no prior notice was given to the applicant, he is a Senior Government official and must be deemed to have been aware of the fact that by him merely facing a charge so serious as that of murder, he was liable to be interdicted from work by the board. It has been argued further that by failing to object that he had not been given prior and adequate notice of the intended action against him, he had waived his right to complain. The answer to this submission is. one may only waive a right he is fully aware of. Applicant's seniority in the civil service does not, in my opinion endow him with such knowledge of either the relevant law or what the Board intended doing about him following his murder charge.

[19] Even assuming in the respondent's favour that there was a hearing and that the applicant participated in such hearing. I am of the considered view that the information given to him at the hearing as to what he had been called for and or what the meeting was all about, was no notification at all.

[20] In the case of **JABULANI NXUMALO vs CITY COUNCIL OF MBABANE AND 2 OTHERS case no. 1939/2003 (unreported)** dealing with a similar point Shabangu AJ at page 10 had this to say: "In my view, sufficient and proper notice includes notice of the proceedings which enables the accused person an opportunity to prepare his case and presentation thereof before the tribunal. It is in light of these that the failure of the second respondent to properly inform the applicant, in the letter of 21^{s1} July, 2003 of_the nature and purpose of the meeting to which he was being invited was an irregularity to the extent that it cannot be said that the applicant had notice of the proceedings. This absence of an indication as to the nature of the meeting to which the applicant was being invited is a factor which was clearly calculated to prejudice the applicant in the preparation for and presentation of his case."

[21] The other disturbing thing about this matter is the contents of AGl.

[22] There is the statement that the Attorney General advised the Board to suspend the applicant. This advise or suggestion or instruction was obviously made by the Attorney General before any inquiry involving the participation of the applicant was made. In effect the Attorney General told the Board "suspend him but before doing so conduct a moot hearing or enquiry". That the decision to suspend the applicant was taken before he could be called to a meeting with or hearing before the board, seems to be supported by the decision of the board to the effect that the board "approved the suspension" of the applicant. This further lends credence to the applicant's statement that there was no hearing or enquiry conducted but that he was merely told of his suspension by the respondent. Even assuming, there was a hearing before the Board, the board was really going through the motions. It was perfunctory or a sham.

[23] Whilst I am not in a position to state that the Board was merely acting on the dictation of the Attorney General, the Attorney General had no power to advise the board on what the result or outcome of the inquiry should be. To give advise to the board on how to conduct the inquiry, namely to observe the rules of natural justice, the Attorney General was perfectly entitled to do and his advise is commendable.

[24] The respondent also sought to have this application dismissed because of the absence of the record of the proceedings by the board. The respondent argued that the applicant had failed to call for the record from the respondent and because of this this was not a review as contemplated in rule 53 of the rules of court. This issue was also dealt with in **JABULANI'S** case (supra) where the court ruled that the absence of the record of proceedings was not an irregularity. There the court stated that the object of rule 53 (1) (b) was aimed at operating in favour of the applicant in enabling him to know the full and true reasons of the decision under review. That being the case the applicant was at liberty to waive the benefits and or rights conferred upon him by the rule. The court concluded by saying that "it is clear from the above therefore that the absence of the record can not provide the

basis for saying that the applicant has insofar as he has not asked for the record to be dispatched to the Registrar of this court, failed to comply with the requirements of the rule in such a way as to be disentitled to the relief he seeks. In any event it is in the nature of review proceedings that an applicant for review does not come to court upon a record of the proceedings he wishes to have set aside, and is not bound by the record because he is entitled to place the irregularities he complains of on affidavit." Indeed some tribunals whose proceedings and decisions may be the subject of a review by this court may not keep records of their proceedings. This objection must therefore fail.

In the result the following order is made;

1. The applicant's suspension is declared invalid or a nullity and is set aside.
2. The respondent is ordered to pay the costs of this application.

MAMBA AJ