

IN THE HIGH COURT OF SWAZILAND

CASE NO.3456/05

HELD AT MBABANE

In the matter between:

SIKELELA MAGAGULA

APPLICANT

and

COMMISSIONER OF POLICE

1st RESPONDENT

**ATTORNEY GENERAL
RESPONDENT**

2nd

CORAM: Q.M. MABUZA-AJ

FOR APPLICANT: MR. M. MKHWANAZI

FOR RESPONDENTS: MR. DLAMINI

JUDGMENT 24/2/06

(1) The cause of action is set out in the applicant's founding affidavit.

(2) The applicant was employed as a police officer within the Government of Swaziland. He was based at ka-Phunga police station before he was dismissed.

(3) Before his dismissal he was charged with eight counts of general misdemeanor under the Police Act No. 29/1957. These charges appear in Annexure "A" of his founding affidavit.

(4) After the matter was heard he was found guilty and fined the sum of E200.00. This appears in Annexure "B". Annexure "B" is dated 24th March 2005.

(5) The applicant says he tried to appeal but was frustrated by the non-production of the record of the proceedings. The hearing had taken place from the 28th February 2005 to 24th March 2005. He should have lodged an appeal within 7 days from the 24th March 2005. He then lodged an appeal on the 11th April 2005 within 14 days believing that he was still within the time frame within which to lodge an appeal. Someone within the force had advised him that the appeal should be lodged within 14 days of the 24th March 2005.

(6) Before his appeal could be heard, he was dismissed from the police force and even then there are two different dates of dismissal emanating from the Commissioner of Police.

(7) He eventually received the record of the proceedings during the first week of May 2005 long after the last date of appeal had passed.

(8) The respondents attorney Mr. Dlamini raised points of law and did not file answering affidavits. Counsel for the respondent made an application from the bar to strike out No. 1 of his heads of argument. As there was no opposition from the applicant's attorney the court granted this application.

(9) Counsel's submissions were that the applicant should have filed the appeal

within 7 days of the 24th March 2005 and that this court had no jurisdiction to extend the time within which to file applicant's appeal nor the court power to condone the late filing of the appeal by the applicant. The court was referred to the relevant section of the Police Act No. 29/ 1957 which provides that:

Section 21 (1) "Any member of the Force convicted or sentenced by a senior officer, or Board as provided for in section 21 (2) and (3) may appeal to the Minister who may alter, reverse or confirm the conviction or increase, reduce, vary or confirm the sentence.

Section 21 (3) "notice of appeal under subsection (1) together with the grounds thereof shall be lodged within seven days after the conviction with the senior officer, Board or who tried the case and it shall be the duty of the senior officer or Board, as the case may be. forthwith to transmit the record of proceedings to the Minister."

(10) I have to disagree with Mr. Dlamini's submission with regard to the court's lack of jurisdiction from the onset and align myself to Mr. Mkhwanazi's submission on this point.

(11) One of Mr. Dlamini's submissions was that there is no provision in the Police Act 29/1957 that empowers the court to extend the period for lodging the appeal in terms of Section 21. In the absence of such statutory provision the court has no jurisdiction to grant leave in terms of this application.

(12) I would counter this submission by holding that the reverse is equally true that in the absence of such a provision the legislature did not intend to oust the jurisdiction of this Court. If it was Parliament's intention to do so, it would have stated that position in very clear and unambiguous language.

(13) The issue of jurisdiction has been discussed in many cases in this court. I wish

to refer to the case of **Molly Kiwanuka v Samuel Muwanga** Civil Case No. 1506/98 (unreported). In that case Masuku J discussed several cases and texts on the subject of this court's jurisdiction and I wish to adopt these so that there will be no need for me to go over the same old ground.

1. In addition I wish to re-emphasise this court's jurisdiction by referring to section 2 of the High Court Act, 51/ 1954 which states that:

*"The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law **possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.**"*

(15) Having established this court's jurisdiction I turn now to Mr. Dlamini's reference to the case of **Peter Forbes v The Swaziland Government** High Court Case No. 1035/1995 (unreported). The circumstances in that case are different in that it dealt with prescription with regard to legal proceedings against the Government under Act No. 21/ 1972. which is very different to the issue in the present case. In this case the applicant failed to comply with the provisions of the Police Act in that he failed to file his appeal timeously.

(16) The only difficulty that I have is that section 21 (3) of the Police Act provides inter alia that:

"... it shall be the duty of the senior officer, or Board, as the case may be, forthwith to transmit the record of proceedings to the Minister."

(17) It was not the duty of the applicant to transmit the record of the proceedings to the Minister (or Prime Minister as the case may be). In other words he was the

author of his own misfortune while waiting for the record his time ran out. I shall attribute this to general ignorance on the part of the applicant which I shall not hold against him.

(18) The greater portion of the blame for this sorry story must be attributed to the police department for failing to disseminate information about officers rights in such situations.

(19) The charges for instance on Annexure "A" which is the charge sheet gave been inelegantly drawn up. There is duplication of charges. Annexure "B" which embodies the verdict does not disclose any reasons for the verdict. Annexure "B" does not indicate anywhere that the applicant was advised of his rights of appeal and how he should proceed with the appeal. It does not indicate any recommendation for dismissal and yet there are two letters of dismissal both signed by the Commissioner of Police each having its own effective date of dismissal.

(20) The police are classified as essential services and cannot be members of trade unions who are adapt at representing their members in such situations. It is therefore imperative that proceedings such as those the applicant found himself facing should be treated as through the applicant was before a court of law and all the rights attendant thereto be explained clearly to him before during and after a disciplinary hearing. These are the tenets of the right to a fair hearing. I accordingly dismiss the points *in limine* and find for the applicant.

(21) In the circumstances I grant the order as prayed for in terms of the notice of motion namely:

1. Condoning the late filing of the Applicant's appeal against the decision of the Disciplinary Board constituted in terms of Section 13 (1) of the Police Act and directing the Applicant to file his appeal aforesaid within seven (7)

days from the grant of this order.

2. Costs of application.

Q.M. MABUZA-AJ