THE HIGH COURT OF SWAZILAND

BOY W. KUNENE

Applicant

And

SELBY MAGAGULA N.O.

1st Respondent

SECRETARY TO CABINET

2nd Respondent

SWAZILAND GOVERNMENT

3rd Respondent

Civil Case No. 2105/2005

Coram: S.B. MAPHALALA – J

For the Applicant: MR. M. MABILA

For the Respondents: MR. S. KHULUSE

JUDGEMENT

(3rd May 2006)

[1] The Applicant seeks to have the decision of the 1st Respondent reviewed and set-aside on the grounds alleged in paragraph 13 of the Founding affidavit. Paragraph 13 thereof reads as follows:

> **13. The award by the 1st Respondent is arbitral hence it has to be reviewed.**
>
> **13.1. He failed to adhere and/or consider clear set out precedents in such matters despite the same being provided to him**
>
> **13.2. He failed to take into account that the whole suspension was a nullity because it was effected without one being given an opportunity to respond to the same thus breaching the well-entrenched principle of *audi alteram partem.***
>
> **13.3. He failed to take into account that the suspension was effected by someone who did not have authority to do so.**
>
> **13.4. He failed to consider that I have been out of income for a long time while I have eight children who solely depend on me for maintenance and upbringing.**

[2] The 1st Respondent was appointed arbitration to determine an unresolved labour dispute between the Applicant and the Swaziland Government. The matter was referred to the arbitrator by consent of both parties after reaching a deadlock at the conciliation forum. In terms of Section 85 (8) of the Industrial Relations Act No. 1 of 2000 (hereinafter referred to as the "Act") the decision of the arbitration is final and binding of the parties and is non-appealable. This court has jurisdiction to entertain an application to review the decision of the 1st Respondent, but only on grounds permissible at common law as provided for by Section 19 (5) of the Act.

[3] At the commencement of arguments on the merits of the case *Mr. Mabila* for the Applicant advanced a preliminary argument to the effect that none of the three Respondents has filed any opposing and/or answering affidavits and as such the application stands unopposed. The nub of the argument in this regard is that Hlob'sile Ndzimandze who filed an affidavit is not a party to the proceedings and neither has she stated on whose behalf she has filed the affidavit. It was further argued that what should be noted is that the attack is not her authority to dispose to an affidavit (as she does not require such authority) but, being a person who is not party to the proceedings, she ought to have stated which of the three Respondents she has deposed the affidavit for. In this regard the court was referred to a recent decision by Annandale ACJ in the case of *Ndumiso Nhlengetfwa vs Dlamini Mahlalela Attorneys and another - High Court Case No. 4032/2004 (unreported).*

[4] On the merits, it was argued for the Applicant that the 2nd Respondent acted *ultra vires* when suspending the Applicant without pay in that she did not have any authority to dos so as such power vest with the Prime Minister as *per* Civil Service Board (General) Regulations Act No. 34 of 1963. In this regard the court was referred to the case of *Bunnie Patrick*

Mhlanga vs Principal Secretary, Ministry of Public Works and another - Industrial Court Case No. 130/2003 (unreported).

[5] The alternative argument brought forth for the Applicant is that 2nd Respondent had no power, she violated one of the most entrenched and fundamental principles of natural justice in that no man can be condemned without a hearing *(audi alteram partem rule).* In this regard the court was referred to the cases of *Joel Lukhele vs Principal Secretary - Ministry of Agriculture and Co-operatives and another- High Court Case No. 3022/99 (unreported)* and that of *Nonhlanhla Mzileni vs Commissioner of Customs and Excise and two others - Industrial Court Case No. 371/2004 (unreported).* In *casu,* it is common cause that Applicant was never afforded an opportunity to defend himself and neither was he ever summoned to answer to any allegations prior to the suspension.

[6] Before dealing with the arguments on the merits I pause to consider a preliminary point raised by the Applicant that the affidavits by Hlob'sile Ndzimandze should be ignored, as the deponent therein is not a party in these proceedings. It would appear to me that on the authorities cited by Counsel for the Applicant that of *Ndumiso Nhlengetfwa vs Dlamini, Mahlalela (supra)* the affidavit by Hlob'sile Ndzimandze is inadmissible in these proceedings. I say so because the said deponent, being a person who is not a party to the proceedings, she ought to have stated which of three Respondents she has deposed the affidavit for.

[7] Turning to the merits of the application, it was *Mr. Mabila's* submission that in view of the fact that Respondents have not filed any opposition. I ought to grant the order forthwith. However, in view of the importance of the matter it is my considered view that I consider all the legal points advanced by Counsel when the matter was argued.

[8] The argument for the Applicant on the merits I have stated in paragraphs [4] and [5] *supra* the essence of which is that 2nd Respondent acted *ultra vires* when suspending the Applicant without pay in that she did not have the authority to do$ so as such power vests with the *Prime Minister as per Civil Service Board (General) Regulations Act No. 34/1963* and if the court holds that the 2nd Respondent had such power, she violated one of the most entrenched and fundamental principles of natural justice in that no man can be condemned without a hearing *{audi alteram partem rule).* It appears to me that these arguments do not apply to the 1st Respondent but to the 2nd Respondent.

[9] I shall therefore treat the above grounds *ad seriatim* as follows:

i) **Alleged failure to take certain relevant factors into consideration.**

[10] In this regard it is the Applicant's case that the 1st Respondent failed to adhere and/or consider clear set out precedents in such matter despite same being provided to him. In this regard I am in full agreement with the submissions made on behalf of the Respondent evidence was presented before the 1st Respondent and was unchallenged was that the Secretary to Cabinet is the controlling officer at Cabinet offices, and as such he or she is the responsible officer referred to in Section 3 (1) of the Theft and Kindred Offences by Public Officer Order No. 22/1975. The 1st Respondent held the view that since the Secretary to cabinet is the responsible officer, she had the right to effect the suspension of the Applicant upon consultation with the Director of Public Prosecutions in accordance with Section 3 (1) (a) of the Act.

[11] In this respect that there is no evidence to suggest that the 1st Respondent deliberately refused to consider the precedents provided to him. The position is that 1st Respondent honestly misinterpreted the said precedents and the results were an unfortunate error of law. Therefore, an error of law is not a ground for review but one for appeal. *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 940* outlines this proposition as follows:

> **"Where the tribunal directs its mind to legal issues that it is entitled and bound to decide, for example the interpretation of regulations or other rules, a wrong decision in law cannot be said to prevent it from fulfilling its statutory functions or duties, and the court will not interfere with the decision on review unless it was one to which no reasonable person could have come".**

[12] In the Appellate Division case of *Doyle vs Shenker & Co. Ltd 1915 A.D. 233* the court held that:

> **"A *bona fide* misinterpretation or an unintentional overlooking of a provision of a statute does not constitute a gross irregularity and affords no grounds for review".**

[13] Therefore, on the basis of the above-cited decisions and authorities in the present case Applicant has purported to appeal against the findings of the 1st Respondent, notwithstanding that his decision is final and binding and nonappealable. A mistake of law is not an irregularity and is therefore not a ground for review.

ii) **That the 1st Respondent failed to take into account that the suspension of Applicant was effected without him being granted the right to a hearing.**

[14] It appears to me that 1st Respondent did take into account that the suspension was effected without the Applicant being afforded the right to a hearing but was of the view that his (Applicant) continued presence within the workplace prior to the disciplinary hearing or conclusion of the criminal case was going to prejudice the Government. Hence the suspension

prior to the disciplinary hearing.

iii) That 1st Respondent failed to take into account that the suspension was effected by someone who did not have authority to do so.

[15] It would appear to me in this regard that the 1st Respondent committed a mere mistake of law and therefore cannot be called an irregularity in these proceedings. In this regard it appears to me that the present application for review is in the nature of an appeal because the Applicant disagrees with the arbitrator award.

[16] In the result, for the afore-going reasons the application is dismissed and that each party to pay his own costs.

S.B. MAPHALALA
JUDGE