IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE | Civil Case No. 2691/2007

SIPHO ERIC THWALA

And

THE CIVIL SERVICE COMMISSION — First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS — Second Respondent
THE ATTORNEY GENERAL — Third Respondent

Coram — S.B. MAPHALALA - J
For the Applicant — MR. S. HLOPHE
For the Respondents — MR. M. VILAKATI

JUDGMENT

19th March 2008

[1] Serving before court is an application on Notice for an order that Applicant's suspension and/or interdiction be lifted. That Respondents cause Applicant to be paid his salary for the period he was suspended/interdicted and costs of suit.

[2] In his Founding affidavit the Applicant has related at length the facts of the matter between the parties and has also filed pertinent annexures.

[3] The Respondent through the 3rd Respondent has filed a Notice of intention to oppose and thereafter an Answering affidavit deposed to by the Deputy Attorney General Mr. Mzwandile Fakudze. In the said affidavit points were raised *in limine* as well as the merits of the dispute. The Applicant then filed his replying affidavit in accordance with legal procedure.

[4] In arguments before court both Counsel argued the points *in limine* and the merits of the case. The points *in limine* raised are the following:

AD points *in limine*

1. Locus standi

The Civil Service Commission is not a body corporate with the power to sue and be sued in its own name.

2. <u>Misjoinder</u>

There is no relief sought against the Director of Public Prosecutions and thus the office of the Director of Public Prosecutions should not have been cited in this application. The application of Section 194 of the Constitution of Swaziland has nothing to do with the Director of Public Prosecutions.

[5] In arguments before court both Counsel filed very comprehensive Heads of Arguments for which I am grateful to both Counsel. On the first point that of *locus standi* it is contended for the Applicant that this point has no merit and ought to be dismissed in that the Civil Service Commission is constitutionally established. It is an independent and impartial body and conferred with quasi judicial powers by Section 173 (1) read with Section 186 (2) of the Constitution of the Kingdom of Swaziland. *Prima facie* from the afore-going it is clear that the Civil Service Commission is conferred with the requisite legal standing to institute and defend legal proceedings.

[6] On the other hand, it is contended for the Respondents that 1st and 2nd Respondents should not have been cited. The 1st Respondent is not a body corporate with power to sue and be sued in its own name. The fact that the 1st Respondent is established by the Constitution does not serve to confer it with legal personality. I agree with the Respondents argument in this regard that mere mention of the 1st Respondent in the Constitution does not give it power to sue and be sued in its name.

[7] On the 2nd Respondent it is contended by the Respondent that no relief is sought against the 2nd Respondent. The test for joinder is whether the order(s) sought can be affected without prejudicing the rights of a person who is not party to the proceedings. In this regard the court was referred to the case of *Amalgamated Engineering Union vs Minister of Labour 1949 (3) S.A. 637 (A).*

[8] In this regard I am inclined to agree with the Respondents that in the instant case the Applicant's prayers cannot be sustained without prejudicing the 2nd Respondent's duty to institute and undertake criminal proceedings. Put differently, the relief sought by Applicant has no bearing on the prosecution instituted against him. Therefore, the Director of Public Prosecutions should not have been cited. In the result, this point of law *in limine* succeeds.

[9] Having found that the two points *in limine* succeed I am obliged in law to dismiss the application forthwith. However, in view of the importance of the matter to the Applicant I am inclined to proceed on the merits of the matter to determine the crisp issue as to whether the suspension of a public officer pending the outcome of criminal charges preferred against him falls within the ambit of Section 194 (4) of the Constitution of Swaziland Act No. 001 of 2005. I must further add that my judgment in this regard will be purely *obiter.*

[10] Applicant contends that notwithstanding the fact that he was charged during March 2005 by 2nd Respondent, he has still not been tried. Applicant further contends that he has been suspended and/or interdicted for a period in excess of six months. This fact is expressly admitted by Respondents. The matter of a public officer who has been suspended **shall** be finalized within six months and failure thereof the public officer shall be entitled to have the suspension lifted. That the use of the word "shall" in Section 194 (4) of the Constitution implies that it is mandatory that the suspension be lifted as long as the period of six months has lapsed. The suspending authority is not in any way authorized to exercise a discretion. Whether or not a public officer has been suspended as a result of criminal charges being preferred against him or on account of a disciplinary proceedings being initiated against him is of no moment in the application of Section 194 (4) that the said Section should be read with Section 21 (1) of the Constitution – the right to speedy hearing within a reasonable time. Having regard to the language used in Section 194 (4) read with Section 21 (1) it is abundantly clear that the Applicant's suspension ought to be set aside as a period of six months has expired and his criminal trial has not been finalized.

[11] The Respondents advanced very forceful arguments *au contraire* to the general proposition that the verb "finalized" in Section 194 (4) raises the question. Who should complete the matter of a suspended public officer? The answer is plain enough the duty is cast on the Service Commission that suspended the public officer and not on the Director of Public Prosecution "(DPP)" as suggested by the Applicant. It is contended for the Respondents that if the framers of the Constitution had intended to impose the afore-stated obligation on the Director of Public Prosecutions they would have done so in Section 162 of the Constitution. This Section sets out the powers and duties of the DPP.

[12] It is contended for the Respondents that two jurisdictional facts must be satisfied before Section 194 (4) is implicated. First, there must be a matter for the relevant Service Commission to finalize; and secondly, there must be a suspension of a public officer that has exceeded six months. According to the Respondents the Applicant's case fails at the first hurdle. There is no matter for the Civil Service Commission to finalize. The conclusion of criminal proceedings is a responsibility of various state actors within the criminal justice system and the judiciary itself. A Service Commission can only finalize a matter of a civil servant who has been suspended as a "holding operation" pending disciplinary action.

[13] Having considered the pros and cons of the arguments of the parties I am inclined to agree with the case for the Respondents. Applicant's case is in effect that Section 194 (4) confers suspended public officers with the right to the completion of their trials within six months from date of suspension. Put differently Section 194 (4) qualifies Section 21 (1) being the right to speedy trial only in as far as suspended public officers are concerned.

[14] I agree with the Respondents contention that if the legislature intended to qualify Section 21 (1) it would have done so either in Section 21 itself or in another provision of Chapter III of the Constitution and not in a miscellaneous provision of Chapter X. Applicant's interpretation of Section 194 (4) would lead to absurd results. For instance, suspended public officers would be entitled to "jump the queue" and be tried ahead of awaiting trial prisoners who have been in custody for long periods. It would appear to me on the facts and the argument of the parties that a suspension pending a criminal trial does not fall within the ambit of Section 194 (4) of the Constitution.

[15] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE