IN THE HIGH COURT OP SWAZILAND

HELD AT MBABANE CASE NO. 2810/08

In the matter between:

ERIC ZIKALALA APPLICANT

and

THE COMMISSIONER OF CORRECTIONAL SERVICES 1ST RESPONDENT
THE ATTORNEY GENERAL CHAIRMAN OF THE CIVIL SERVICE COMMISSION 2ND RESPONDENT

3rd RESPONDENT

CORAM

FOR THE APPLICANT MR. M. MKHWANAZI OF MKHWANAZI ATTORNEYS IN ASSOCIATION WITH S.M. MNGOMEZULU

FOR THE RESPONDENT MR. M. VILAKATI OF ATTORNEY GENERAL'S CHAMBERS.

Q.M. MABUZA -J

JUDGMENT 26/03/09

Mabuza J

[1] The Applicant seeks an order reviewing and setting aside the decision of the 1st Respondent dismissing him from his job as a warder and to reinstate him. He seeks costs of the application and further and alternative relief.

[2] The Applicant was employed by the 1st Respondent as a warder during 1996. On the 24th May 2004 he was convicted of culpable homicide. He was sentenced to a fine of E5,000.00 or three years imprisonment. He paid the fine and was released from custody on the 25 May 2004. He waited at home to be called to a disciplinary hearing but he was never called nor was there a disciplinary hearing. Instead he was called by the 1st Respondent sometime during 2005 and informed that his services were terminated because of his conviction. I am puzzled as to why he did not return to work after his release from custody. His return to work would have set the disciplinary hearing into motion.

[3] The 1st Respondent in his answering affidavit states that a conviction for an offence involving the use of violence is considered to be a disciplinary offence prejudicial to good order and discipline or likely to bring discredit to the service. He states that he appointed a board of three officers to inquire into the disciplinary offence committed by the Applicant. He further states that the Applicant appeared before a board of officers comprising of S.J. Fakudze, S.K. Nkambule and M.V. Simelane on the 24th September 2004. He states that the Applicant did not refute the evidence on the strength of which he was convicted. The board accordingly accepted it and made a recommendation to him that the Applicant be dismissed. He accepted the

recommendation and dismissed the Applicant with effect from the date of his criminal conviction.

[4] Mr. Mkhwanazi during submissions conceded that the 1st Respondent had the power to discipline the Applicant and not the 3rd Respondent as the Applicant's rank is below that of Chief Officer. Mr. Mkhwanazi restricted his arguments to the issue of whether or not the Applicant was afforded a fair hearing prior to his dismissal.

[5] It is not clear if at all a disciplinary hearing did take place. The Applicant says that he was called after July 2005 and informed that his services had been terminated. The 1st Respondent says that a disciplinary hearing took place on the 24th September 2004. As Mr. Mkhwanazi conceded that the 1st Respondent had the power to discipline the Applicant the issue as to whether the hearing took place before or after the promulgation of the Constitution is moot.

[6] The salient issues to be determined therefore are:

- Did a disciplinary hearing take place?
- If it did was the Applicant afforded a fair hearing prior to his dismissal?

Consequently, no order is sought against the 3rd Respondent. Mr. Vilakati argued that being so costs should be awarded to the 3rd Respondent. I think not. The 3rd Respondent was not put out of pocket in any way. The 3rd Respondent did not file any opposing papers.

Did the disciplinary hearing take place?

[7] A careful reading of paragraph 14 and 15 of the 1st Respondent's answering affidavit suggests that there was no hearing. It states:

> **"For this reason I appointed a board of three officers to inquire into the disciplinary offence committed by the Applicant. The applicant appeared before the board of officers (S.J. Fakudze, S.K. Nkambule and M.V. Simelane) on 24 September 2004. The applicant did not refute the evidence on the strength of which he was convicted.**
>
> **The board accordingly accepted it and made a recommendation, to me, that the applicant be dismissed."**

[8] It is clear to me that the Applicant was called merely to be informed that because of his criminal conviction he could no longer be employed by the Correctional Services. The termination was ***fait accompli.*** There was no formal hearing as is legitimately expected and which occurs in all environments of the work place.

[9] If there was a hearing was it fair?

Unfortunately no record of the proceedings was filed in order to inform the court that a hearing actually took place.

[10] Had there been a disciplinary hearing there would be a record which would contain the following information:

> A charge sheet, the plea thereto, a list of witnesses their recorded evidence in chief cross-examination by the Applicant or his attorney, a summary of the evidence and the decision arrived at by the board of

officers. There would be a formal communication by the board of officers to the Applicant of its decision and recommendation to the Commissioner with a directive with regard to an appeal. There would be evidence of a notice of appeal, the hearing thereof and the decision taken on appeal.

[11] Mr. Vilakati submitted that it is the Applicant who has to file the record. I hold the view that each case must be decided upon its on peculiar circumstances. In this case it would have been difficult for the Applicant to compile a record. He is junior. As his services had already been terminated it would have been difficult to access any information from the 1st Respondent in order to compile a record. It is difficult enough even while employed let alone when he is no longer employed as is the case here. The converse is true, if the 1st Respondent had nothing to hide it would have been most anxious to assist the court come to an informed decision by filing a record or availing it the court all the information it has with regard to this matter.

[12] A further submission made by Mr. Vilakati is that the application has been brought after an unreasonably long time. People have different financial statuses. Not everyone is wealthy enough to employ the services of an attorney at will and convenience.

[13] This case illustrates very clearly the injustice that can occur when other officers try other officers. The board of officers have no idea about:

- Employment laws;
- Labour laws;

- Human resource issues;
- Rules of natural justice; and
- Most recently fundamental rights and the rule of law set out in the constitution.

[14] This case further illustrates that there is a need to set up impartial and independent bodies to hear disciplinary matter involving officers below the rank of chief officer. It is impermissible to be a judge in your own cause and to be the prosecutor judge and jury. Otherwise equality before the law and the common law right to a fair hearing is highly compromised.

Costs

[15] It is obvious to me that the Applicant has suffered much hardship because of an indifferent arbitrary attitude exhibited by the 1st Respondent. Perhaps it is sheer lack of knowing that it has to conduct a formal hearing no matter what the circumstances. Whatever the reason it is a fact that the Applicant has taken the brunt end of the stick. This injustice must come to an end.

[16] The application is granted with costs.

O.M MABUZA -J