**IN THE HIGH COURT OF SW`AZILAND**

Civil case No: 464/09

In the matter between:

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| **CHRISTOPHER VILAKAZI** | **APPLICANT** |
| **AND** | |
| **PRIME MINISTER** | **FIRST RESPONDENT** |
| **THE COMMISSIONER OF POLICE** | **SECOND RESPONDENT** |
| **SUPT. M.D. DLAMINI** | **THIRD RESPONDENT** |
| **THE ATTORNEY GENERAL** | **FOURTH RESPONDENT** |
| **Coram:** | **M.C.B. MAPHALALA, J** |
| Neutral citation: | *Christopher Vilakati v Prime Minister & 3 Others (464/09) [2012] SZHC 105 (30 April 2012)* |
| For Applicant | Attorney Muzi Simelane |
| For Respondents | Senior Crown Counsel Vusi Kunene |


**Summary**

Civil Procedure – review proceedings of the dismissal of a police officer – Common law grounds of review discussed – Rules of Natural Justice not followed – Section 21 and 33 of Constitution not followed – Disciplinary Board misdirected itself in the absence of evidence of commission of offence by applicant – decision reviewable and set aside.


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**JUDGMENT**
**30 APRIL 2012**

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[1] The applicant sought an order to review and set aside his dismissal from the Swaziland Police Service. He was employed as a police officer in February 1991 until he was dismissed by the second respondent on the 30th August 2007.

[2] He alleged that he bought a motor vehicle from Peace Mabuza, a white Nissan Sentra, in September 2003; the motor vehicle had a South African registration number and, the purchase price was E18,000.00 (Eighteen thousand emalangeni). After a year he sold the motor vehicle to Nkosinathi Dlamini for E16,000.00 (Sixteen thousand emalangeni); three months later Nkosinathi Dlamini told him that the motor vehicle had been confiscated by the police at a roadblock in Matsapha on suspicion that it was stolen. He was further told that the blue book and the registration disc had been forged.

[3] He proceeded to the Manzini Regional Police Headquarters to the offices of the Lukhozi Special Investigating Unit where 2698 Detective Sergeant Nsibandze informed him that according to his investigations, the motor vehicle was stolen. The applicant told him that he had bought the motor vehicle from Peace Mabuza; and Detective Sergeant Nsibandze told him that Peace Mabuza was known to their Police Unit that he was selling stolen cars.

[4] D/Sgt Nsibandze asked him to refund Nkosinathi Dlamini, but he couldn't do so at the time because he was in financial problems. He opted to give him the BMW car that he was driving whilst trying to borrow money from "Green Pastures", a Police Credit Co-operatives and Savings Scheme. However, Nkosinathi Dlamini became upset with him and reported the matter at the Police Headquarters to his brother in-law in-charge of discipline, Senior Supt. Zwane; disciplinary proceedings were subsequently instituted against him, and, he was later dismissed from the police service. It was irregular for Senior Supt. Zwane to involve himself in the dispute to the extent of instituting disciplinary proceedings against the applicant because he is related to Nkosinathi Dlamini.

[5] The applicant argued that the dismissal was unlawful and the charges misplaced because when he bought the car he did not know that it was stolen; and, that his purchase of the car and subsequent sale did not offend the regulations of the Police Service since it was a private transaction. He further argued that he could not have arrested Peace Mabuza when he bought the car because he didn't know that it was stolen; and, that the Special Unit should have done that.

[6] He argued that there was no evidence beyond reasonable doubt either that the motor vehicle was stolen or that when he sold the car to Nkosinathi

Dlamini he intended to defraud him; he argued that he didn't know that the registration documents were falsified, and that it was Peace Mabuza, as seller, who processed the registration of the car.

[7] He also argued that Section 189 (5) as read with Section 176 (1) and 178 of the Constitution deprive the second respondent of the power to discipline him, and, that such power vests in the sector service commission.

[8] It is common cause that the applicant was charged with three counts: first, contravening Item 11 of the Schedule of Offences framed under Regulation 20 (1) of the Police Regulations as read with section 12 (2) of the Police Act 29 of 1957 being the neglect of duty by failing to arrest Mario Masuku and Peace Mabuza during September 2004 whom he found in possession of a stolen motor vehicle, and, that instead, he bought the motor vehicle knowing that it had no registration documents.

[9] The second count relates to contravening item 37 of the Schedule of Offences under Regulation 20 (1) of the Police Regulations as read with Section 12 (2) of the Police Act as being guilty of any of act, conduct which is prejudicial to good order and discipline in that he sold the car knowing that it was stolen, an act prejudicial to good order and discipline.

[10] On the third count he was charged for contravening Item 37 of the Schedule of Offences under Regulation 20 (1) of the Police Regulations as read with Section 12 (2) of the Police Act being guilty of any act, conduct which is prejudicial to good order and discipline in that he obtained E16, 000.00 (Sixteen thousand emalangeni) from Nkosinathi Dlamini by selling him a car knowing that the documents had been falsified and the car was stolen.

[11] The applicant was convicted of the first and third counts relating to the failure to arrest Mario Masuku and Peace Mabuza as well as obtaining E16, 000.00 (Sixteen thousand emalangeni) from Nkosinathi Dlamini for the sale of the car knowing that the documents had been falsified and the car was stolen. Since the Police Disciplinary Board acquitted the applicant for the count relating to the sale of the car knowing it to be stolen, it was logical to acquit him as well on the third count relating to receiving E16, 000.00 (Sixteen thousand emalangeni) from the sale; the two counts constitute one offence arising from "the sale of the car knowing it to be stolen". The splitting of the two counts amount to improper splitting of charges.

[12] The second respondent in a memorandum to the Regional Commander for the Shiselweni Region dated 28th August 2007 dismissed the applicant. He stated that the dismissal was pursuant to a recommendation by the Board,

and, that he was exercising his powers under section 29 (d) of the Police Act.

[13] Section 29 (d) provides, *inter alia*, that the Commissioner of Police may dismiss a police officer below the rank of inspector at any time if he is recommended for dismissal under section 22 of the Police Act; and this section provides, *inter alia*, that the board may recommend to the Minister of Police the dismissal of a convicted police officer. The definition section of the Police Act interprets "Minister" to mean the Prime Minister. It is not in dispute that the Board made the recommendation to the Commissioner of Police, and not to the first respondent.

[14] The Commissioner of Police is not obliged to dismiss pursuant to the recommendation by the Board. It is not enough for him to say that he is dismissing the police officer following the Board's recommendation. It must be apparent from the letter of dismissal that he has perused the record and considered the evidence adduced before the Board and that he is satisfied not only that the evidence proves the commission of the offence but that the procedure adopted was lawful. The letter of dismissal falls short of this requirement and opens the dismissal to judicial review on the basis that he did not apply his mind fully to the evidence before him.

[15] In the Answering Affidavit filed by the first respondent, no evidence has been adduced that the applicant bought the motor vehicle knowing that it was stolen; hence, there is no justification for a finding of a neglect of duty for failing to arrest Peace Mabuza and Mario Masuku. In the Answering Affidavit, they merely state that he should have investigated the status of the car before buying it. This does not establish knowledge on the part of the applicant that he knew that the motor vehicle was stolen.

[16] They concede that the motor vehicle was registered by a motor car dealer and not the applicant. The motor vehicle was subsequently released to a person who claimed ownership of the car before finalisation of the Disciplinary Proceedings; the alleged owner was accompanied by South African and local police. What is interesting is that neither the prosecutor nor the magistrate who issued the order for the release of the car inspected the motor vehicle except being shown papers. The order was issued in chambers, and, neither the applicant, Nkosinathi Dlamini nor Peace Mabuza was in attendance. This is a serious irregularity. Any person claiming the release of a motor vehicle alleged to have been stolen and impounded by the police on suspicion of being stolen should institute motion proceedings in court with Notice to all interested persons; they should be given a hearing and the claimant should prove that he is the owner of the motor vehicle. The presiding officer should inspect the motor

vehicle in order to satisfy himself that it belongs to the claimant with reference to the particulars reflected in the registration documents and on the motor vehicle itself.

[17] It is apparent from the evidence that the applicant was consistent in pleading his innocence throughout the disciplinary proceedings. This was evident during cross-examination by the police prosecutor during the proceedings at pages 94-97 of the Book of Pleadings:

- Question: As far as you were concerned was that car stolen?
- Answer: As far as I know, the car was not stolen.
- Question: Assuming you knew the status of the car being stolen by Mabuza?
- Answer: I would have apprehended them.
- Question: Do you agree with me that you sold the car to Emanuel Dlamini in good faith?
- Answer: Yes
- Question: Did you have those ulterior motives to defraud Dlamini?
- Answer: No, I did not have any intentions of defrauding
- Question: Did Mabuza or those who sold the car to you tell you of the car being stolen?
- Answer: No

- Question: What steps did you take against Mabuza after having heard of the car being stolen?
- Answer: I told Sgt. Nsibandze who was an investigator that I have contacted my lawyers with the intention of demanding back the money from Peace Mabuza.
- Question: Was there any action taken by your lawyers against the said Peace Mabuza?
- Answer: Yes, it is a pending issue.
- Question: Who mounted the registration number SD 339 GV if you know?
- Answer: I do not know, but suspect it was my agents Thembinkosi Maziya and Peace Mabuza.

[18] After his dismissal from the Police Service by the second respondent, the applicant appealed to the First Respondent against his dismissal, and, the appeal was dismissed. However, there is no evidence that a hearing was held to determine the appeal; and, there is no evidence that the applicant or his counsel was present to motivate the appeal in accordance with the Rules of Natural Justice, and in particular, the "*audi alteram partem*". The first respondent was merely handed the written appeal through the second respondent. The dictates of the Constitution as reflected in Section 21 demand of the first respondent to embrace the Rules of Natural Justice in

determining appeals brought by Junior Police Officers by giving them a hearing before deciding their appeals.

[19] Section 21 of the Constitution in dealing with the Right to a Fair Hearing provides the following:

> **"(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.**
>
> **(2) A person who is charged with a criminal offence shall be:**
> **(a) presumed to be innocent until that person is proved or has pleaded guilty;….**
>
> **(10) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

[20] Similarly, section 33 of the Constitution provides for the right to administrative justice, and, it provides the following:

> **"(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including**

**the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.**

**(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."**

[21] It is not in dispute that both the first and second respondents did not give reasons for their decisions. The second respondent merely stated that he was exercising his powers conferred by section 29 (d) of the Police Act following the recommendation for dismissal by the Board. It is incumbent upon the Commissioner of Police to state the basis of his decision with reference to the evidence tendered to the Board; he should not only peruse the record but he should consider and apply his mind to the evidence adduced before coming to his decision; the reasons for the decision must be clearly and concisely stated. Such an approach is intended to assist the aggrieved party in deciding whether or not he has prospects of success on appeal to the Minister of Police; and to formulate the grounds of appeal in the event he decides to lodge an appeal.

[22] Similarly, the first respondent as the Minister of Police should give his reasons in writing for dismissing the appeal; this entails reading the Record as well as considering and applying his mind to the evidence adduced

before the Board. In addition, he must give the applicant a hearing before arriving at his decision in accordance with the Rules of Natural Justice as well as the dictates of section 21 and 33 of the Constitution as alluded in the preceding paragraphs.

[23] The applicant also argued that the second respondent did not have the power to discipline him given the provisions of section 189 (5) as read together with section 176 (1) and 178 of the Constitution; and, that such disciplinary powers vests in the Sector Service Commission. Section 172 and 173 of the Constitution provide for the establishment of Service Commissions. Section 176 (1) provides for their functions which include appointments, promotions, transfers, termination of appointments, disciplinary control and removal from office of officers within the public sector or any sector of the public service.

[24] It is common cause that the Police Service Commission has not yet been established, and, pending its establishment, the current position still applies. Section 193 (3) of the Constitution provides that pending the establishment of the appropriate service commission, the power to appoint, promote, transfer, discipline or dismiss public officers will continue to vest where it vested at the commencement of this Constitution.

[25] It is not in dispute that at the commencement of the Constitution, the power to dismiss and discipline junior police officers below the rank of Police Inspector vested in the Commissioner of Police. Section 12 (2) and 13 of the Police Act provide that any member of the force below the rank of Inspector shall be liable to trial and conviction for any offence against discipline by any senior officer under whose command such police officer is but were the Commissioner is of opinion that the offence is serious, he shall appoint a Board to deal with the matter in accordance with the rules of procedure obtaining in a magistrate's court. There is an urgent need to establish the police service commission in order to realise the objectives of the right to a fair hearing envisaged in section 21 and 33 of the Constitution.

[26] The applicant also argued that the board should have applied the standard of proof applicable in criminal proceedings, that is, proof beyond reasonable doubt because he was charged with a statutory offence. The respondents argued that the standard of proof in disciplinary hearings is that of balance of probabilities since this was not a criminal case. Whatever standard of proof was applied in this case, the result would have been the same since there is no evidence at all that the applicant knew that the motor vehicle was stolen at the time that he bought the motor vehicle;

incidentally, he was acquitted and discharged by the board on the charge of selling the motor vehicle knowing that it was stolen.

[27] The respondents rely on the case of the *Teaching Service Commission and two Others v. Isaiah Dlamini* civil case No. 38/2005 in support of their proposition that the disciplinary proceedings were quasi-judiciary and that the standard of proof should have been "proof on a balance of probabilities". The Supreme Court in that case held that the proceedings which the Teaching Service Commission had to follow are quasi-judicial in nature as applicable in administrative bodies; the court then stated that the correct procedure was set out in the case of *Davies v. Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 at 49 where *Zulman J* quoted with approval the book by Rose-Innes: Judicial Review of Administrative Tribunals at page 160, where the learned author stated the following:

> **"Administrative bodies, generally speaking, and subject to the provisions of the statutes which constitute them, are free to decide and adopt their own procedures, provided such procedures are not calculated to cause inequity or apprehensions of bias in those who are subject to their decisions. They are not obliged to adopt methods of oral evidence and examination of witnesses which are necessary for a trial in a court of law. The rules of natural justice do not therefore**

**compel the holding of an inquiry in the sense of proceedings at which witnesses are called and examined."**

[28] The Supreme Court in the case of the Teaching Service Commission cannot and is not authority for the proposition that in all disciplinary proceedings the standard of proof is on a balance of probabilities. Even the authority relied upon by the respondents state clearly that the overriding factor is the provision of the statute establishing that particular administrative body.

[29] The Police Board is established by section 13 of the Police Act, and, it provides as follows:

**"13. (1) if the Commissioner is of the opinion that a charge is properly cognisable by a Board of officers, he shall appoint three senior officers to constitute such Board and may give directions as to times and place of hearing as he may think fit.**

**(2) The Board shall conform as far as possible with the rules of procedure and evidence obtaining in magistrate's courts, and shall administer the oath or affirmation to any witness appearing before it."**

[30] Subsection (2) makes it clear that the procedure prescribed for disciplinary proceedings of junior police officers below the rank of police inspector is the "rules of procedure and evidence obtaining in magistrate's courts". It is common cause that persons charged with statutory offences at the magistrate's court are only convicted if the prosecution proves the commussion of the offence beyond reasonable doubt, and, the witnesses for the prosecution are examined, cross-examined and where necessary, they are re-examined. This is done over and above the compliance with the Rules of Natural Justice as well as the provisions of the Constitution particularly section 21 and 33 dealing with the right of a fair hearing and the right to administrative justice.

[31] The board convicted the applicant in respect of the first count of failing to arrest Mario Masuku and Peace Mabuza whom he found in possession of a stolen motor vehicle. However, I have already stated that there is no evidence that the applicant knew when he bought the motor vehicle that it was stolen.

[32] The board correctly acquitted and discharged the applicant on the second count relating to selling the motor vehicle knowing that it was stolen because there is no evidence that the applicant knew that the motor vehicle was stolen. However, the board convicted the applicant for obtaining the

purchase price of the motor vehicle after selling it, the allegation being that the applicant misrepresented to Nkosinathi Dlamini that he was selling a car that had genuine documents. As stated in the preceding paragraphs, the second and third counts relating to the sale of the motor vehicle are the same and constitute improper splitting of charges; the board should have also acquitted and discharged the applicant even on the third count.

[33] The decision of the board is reviewable on the following basis: first, that the board committed an error of law when it concluded that there was evidence that the applicant knew that the motor vehicle was stolen; secondly, the board committed an error of law in concluding that the standard of proof to be applied during the police disciplinary proceedings was proof on a balance of probabilities. The board undoubtedly misconceived its functions, took into account irrelevant considerations and ignored relevant ones. The board failed to appreciate the procedure to be followed in terms of section 13 (2) of the Police Act. The decision of the Board was grossly unreasonable in as much as there was no evidence at all that the applicant had knowledge of the status of the motor vehicle when he bought it from Peace Mabuza.

[34] *His Lordship Tebbutt JA* who delivered the unanimous decision of the Supreme Court of Swaziland in the case of *Takhona Dlamini v. The*

*President of the Industrial Court and Another* Appeal case No. 23/1997 quoted with approval the judgment of *Corbett JA* in the case of *Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd* 1988 (3) SA 132 at 152 A-D where the following was stated:

> **"Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice…. Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated…."**

[36] In conclusion *His Lordship Justice Tebbutt JA*, at page 11, stated that the common law grounds set out in the Johannesburg Stock Exchange case (supra) are not exhaustive; he stated that an error of law may also give rise to a good ground for review.

[37] In the circumstances I make the following orders:

(a) The application to review and set aside the decision of the respondents dismissing the applicant as a police officer pursuant to his disciplinary hearing is hereby granted.

(b) The respondents are directed to reinstate the applicant as a police officer forthwith with effect from the date of dismissal on the 30th August 2007.

(c) The respondents are directed to pay the applicant his arrear salary from the date of dismissal on the 30th August 2007.

(d) The second respondent is directed to pay costs of suit to the applicant on the ordinary scale.

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**M.C.B. MAPHALALA**

**JUDGE OF THE HIGH COURT**