



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 96/2011

In the matter between

NKOSINATHI MAGAGULA

Applicant

and

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent**

Neutral citation: *Nkosinathi Magagula v The Commissioner of Police and Another* (96/11) [2013] SZHC 193 (09th September 2013)

Coram: Mamba J

Heard: 02 August, 2013

Delivered: 09 September, 2013

- [1] Civil Procedure – Application for Review of Administrative decision – not an appeal – Court concerned with the procedural fairness of proceedings or whether or not the administrative body took into account irrelevant considerations or ignored relevant factors.
- [2] Administrative law – Administrative bodies masters of their own house – not expected to adhere to court rules of evidence and procedure.
- [3] Administrative law – Procedural fairness – administrative body keeping evidence away

from applicant accused of filing a forged academic certificate – applicant dismissed without being given evidence against him and not having chance to respond thereto – such not in accordance with procedural fairness or justice – action set aside as irregular.

- [1] By letter dated 10 March, 2008, the applicant applied to join and to be enlisted as a recruit constable within the Royal Swaziland Police Service. He was responding to a public notice that appeared in the Times of Swaziland Newspaper on 05 March 2008, inviting suitable candidates to apply for the said post.
- [2] The said advertisement or public notice listed or stipulated the minimum or basic entry requirements amongst which were the following:
- ‘a. An O’level certificate of education with a minimum of three (3) credits including or plus a pass in English.
- Or
- b. An IGCSE Certificate with a minimum of 3 subjects with a C grade including or plus a minimum of E grade in English.’
- [3] In his letter of application, the applicant stated that he completed his O’level studies in 2003 at Mbabane Central High School and “obtained the following results: English Language – C, Siswati – C, Mathematics – C,

Agriculture – E, Combined Science – C and History – D’. He also stated his reasons for his interest to join the police service. These reasons are not relevant for purposes of this judgment. (This letter appears as AG4 at page 34 of the Book of Pleadings herein.)

- [4] I observe here that in his letter aforesaid there is no indication that the applicant did attach his school leaving certificate thereon. The 1st respondent states that the applicant did so and this is the document entitled General Certificate of Education in the name of Magagula Stanley Nkosinathi of Mbabane Central High School that has been annexed to his papers herein immediately after the Applicant’s Curriculum Vitae at page 36 of the Book of Pleadings. This certificate bears number 03702 and the candidate’s number thereon is SZ442 0027.
- [5] Two years later and based on the above application and supporting documents, the applicant was accepted or recruited into the Royal Swaziland Police Service, after being put on the waiting list with other qualifying candidates.

- [6] By letter dated 01 September, 2010 the first respondent informed the applicant that investigation in his possession established or revealed that the school certificate filed by the applicant when he applied to join the police service was a forgery. The first respondent indicated further that the applicant infact did not meet the entry requirements into the Police service. He then called upon him 'to show cause before a Board of officers why [his] services should not be terminated.' The applicant was advised that he was 'at liberty to tender his submissions in writing, orally or through a legal representative of your choice, at your own cost.'
- [7] The applicant denied the above allegations by the first respondent. He stated that the copy of the certificate he had filed was authentic. He undertook or promised "to produce the original of the certificate he holds and used when applying for recruitment to the Police Service. He made this denial by letter from his attorneys dated 18 October 2010.
- [8] The board promised by the first respondent was duly constituted and the applicant was invited to appear before it at the Matsapha Police College on 12 October, 2010. He did so and was represented by attorney N.M. Manana.

The record of the proceedings by the board on that day have been filed herein as AG1.

[9] According to AG1, the board's terms of reference was "...to establish as to why the appointment of 6456 Const. N.S. Magagula should not be terminated in terms of section 33 of the Constitution of Swaziland Act Number 1 of 2005, following his enlistment with the Royal Swaziland Police Service using a forged O'level certificate to gain employment in the Police Service.'

[10] The modus operandi or "methodology" of the board was to '...receive, record all submissions and or receive any written submissions by the aforesaid respondent or his legal representative concerning the matter. It shall seek clarity through questions where ambiguities are established.'

[11] Counsel for the applicant applied for a postponement of the matter, on the grounds that he had not been served with the charge sheet and therefore the applicant did not know what the charge or charges were against him. It later transpired though that the applicant had been served with the written charge sheet but he had left this at his parental home at KaDvokolwako. Counsel

was given a copy thereof by the board and the matter was postponed to 19 October 2010.

[12] On resumption of the matter on 19 October 2010 Mr Manana informed the board that the applicant had elected to make written submissions to the board and he proceeded to read and explain these to the Board before submitting them to the board. It is not insignificant that the applicant, through his attorney of course, complained that "...no copy of the alleged forged certificate has been exhibited before the board and my client, [and] it is not specifically stated the nature of investigations that were conducted and as to who were members of the investigating team ... but it only states my client's certificate was forged [and] it does not state when as to when the investigations were conducted." The sum total of the applicant's submission was that he is "...entitled to continue with his training in the Police service.'

[13] Following those submissions by counsel for the applicant, the board requested the applicant to produce the original of the school certificate he had filed together with his application to join the police service.

- [14] After about an hour, the applicant who was now accompanied by 2331 Inspector C. Ndlovu submitted a document titled General Certificate of Education in the name of Magagula Nkosinathi of Mbabane Central High School. This is Certificate Number 0000001544 and the candidate's number is SZ4170128. This has been filed as Annexure AG3 by the first respondent.
- [15] Significantly, English is not listed as one of the subjects on which the certificate holder was examined and tested. It also records two credits only; in Siswati and Commerce. Further, it certified that the candidate was examined on these subjects in November 2005.
- [16] The two certificates referred to above are clearly dissimilar. They are not the same.
- [17] This court has not been given the charge sheet or the so-called memorandum that contained the details of the charge against the applicant. What one finds though from the ruling that was made by the board is that "...the board found that in the memorandum reflecting the employers' suspicions that respondent's certificate was forged there were no documents attached thereto in support of the suspicion as reasonable.' However, the board found

as a reasonable suspicion or fact that the applicant had misrepresented his qualifications to the relevant recruiting body and this body had believed such misrepresentation and had, based on such fraudulent misrepresentation recruited the applicant into the police service.

[18] It has to be noted here that the first respondent has also attached AG5, a statement by one Alpheus Themba Dlamini, a Computer System's Analyst who was employed by the Examinations Council of Swaziland at the relevant time. Mr Dlamini in his statement records that after examining the 2003 certificate, (in AG4), and "...having checked the exam number against our computer database, I found that it does not match the name of candidate on the certificate. It also did not match the name of the centre on the certificate. In fact the exam (candidate) number is for a different centre name and candidate name. I also did a name search on Magagula Stanley Nkosinathi at Mbabane Central School to find out if this candidate did attend and sit for GCE O'Level exam at this Centre but could not find anything on this candidate. After having done all the above I then came to the conclusion that the copy of certificate presented to me for authentication is indeed not authentic but is [a forgery].'

[19] As noted above, AG5 is not an affidavit by the maker thereof but a mere statement and it is not indicated anywhere in the papers before me when such statement was recorded by Mr. Dlamini. This statement was also not served or given to the applicant when he was called upon to show cause before the Board or at any time before his dismissal from the Police service.

[20] At the end of its deliberations, the board found the applicant of fraudulently filing a forged academic certificate and thus making a fraudulent misrepresentation to the first respondent. It held further that it was this unlawful misrepresentation that caused the Police service to recruit the applicant into the said service. The board came to the conclusion that the applicant's real academic certificate was the one he had submitted to the board during the enquiry on 19th October, 2010. The board held further that because of the subjects attained or passed by the applicant, as shown in that certificate, the applicant had not met the minimum qualifications required to enlist in the service. The Board thus came to the conclusion, almost inevitable in the circumstances, that but for the applicant's fraudulent misrepresentation, he would not have been admitted into the Police service. The Board recommended that he be dismissed. This recommendation was

accepted by the first respondent and the applicant was dismissed from the police service with effect from 31 December, 2010.

[21] The applicant has applied to this court to have his dismissal from the Police service reviewed and set aside. The applicant's grounds for review are that:

'12. The termination of my services from the police force was grossly unfair and unreasonable in that:

12.1 No disciplinary hearing was conducted against me to prove any misconduct or acts of impropriety against me.

12.2 Being merely asked to write a letter to explain certain things cannot be equated to a right to a fair hearing in that;

12.2.1 One is not allowed to cross-examine the person instituting the allegations and question any evidence presented.

12.2.2 One may not call his own witnesses.

12.2.3 One may not be able to scrutinize any evidence.

12.2.4 It is also not possible to make representations on why my or some of the evidence should be rejected and / or accepted.'

[22] I have already stated above how the enquiry was conducted by the board. The board did not hear any evidence against the applicant. It relied on the

memorandum whose contents have not been disclosed to this court, by the first respondent and no doubt on the statement recorded from Alpheus Dlamini. This statement was, however not disclosed or given to the applicant before or during the course of the enquiry. In short, there was no evidence led against the applicant before the decision to discharge him from the police service was taken. The applicant thus had practically no way of knowing and challenging or disputing whatever evidence there was against him.

[23] Whilst it has to be remembered that the applicant's counsel in the enquiry complained in his written submissions that '...no copy of the alleged forged certificate has been exhibited before the board and my client;' I find it a matter of grave concern that counsel allowed such a procedure or method to be adopted in the enquiry. The board completely ignored a basic rule of adversarial or procedural justice that any person who is accused of wrongdoing must be afforded the opportunity to hear the evidence against him and also be afforded the chance to cross examine the witnesses testifying against him or, even if no witness is called, at least to see the damning evidence and respond thereto. I would have thought that this was a basic precept of procedural justice or fairness. This is particularly the case

where the enquiry or the likely result thereof has dire consequences for the person charged.

[24] I fully accept that a board such as the one under consideration herein may not be expected to conduct its proceedings or deliberations in the same way that one would expect from a court of law, but at least the bare minimum of fairness must be observed. The alleged certificate was not shown or exhibited to the applicant before or during the enquiry. He protested against this to no avail.

[25] The charge against the applicant was very grave or serious. The first respondent intimated as much in his letter wherein he called upon the applicant to show cause. He had to show cause why his employment as a police constable should not be terminated. That, to my mind required a more fundamentally sound and fair procedure to be adopted by the board. Instead, what the board did and with very little demur by the applicant's attorney, a cursory and perfunctory one-sided exercise. Its declared function or "methodology" was to "receive, record all submissions and or receive any written submissions by the aforesaid respondent or his legal representative concerning the matter." (See AG1 at page 25 of the Book of Pleadings).

[26] In the overall circumstances of this case, it can never be overlooked or glossed over, that the applicant filed two different academic certificates. In the one that he hand delivered or submitted during the enquiry on 19 October, 2010 he fell short of the basic entry requirements into the Police service. He insisted that this was his academic certificate and it was authentic. He thus insisted that despite the short comings in his academic achievements, eg no English language and less than three credits, he still wanted that his post in the police service should not be terminated. This argument fatally ignores the serious discrepancies in his handwritten letter of application and the said certificate that he hand delivered to the board relating to the symbols he had attained in his O'level examinations. His certificate tells a different story from his letter. The information he submitted in his letter is similar to that contained in the alleged forged certificate.

[27] However, it is crucially important in this case to remember that this is not an appeal but a review application. This court is not so much concerned with the merits or outcome of the case for or against the applicant. It is

concerned with the procedures and processes that were in place, adopted or employed in dealing with the matter by the board.

[28] The first respondent in his letter to the applicant informed him that the process of requiring him to show cause why his engagement as a police officer should not be terminated was being done in terms of the fundamental rules of justice and section 33(1) of our Constitution. The first respondent is to be commended for this salutary move and explanation.

[29] Section 33(1) of the Constitution provides that:

‘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.’

This is what is generally known as procedural fairness. The duty to treat people fairly. DJ Brown and JM Evans, *Judicial Review of Administrative Action in Canada* at 7 states:

‘The observance of fair procedures is central to the notion of the “just” exercise of power.’

[30] On the nature and content of procedural fairness, I can do no better than quote in *extenso* from the Canadian Supreme Court judgment in *The Board of Education of the Indian Head School Division No. 19 of Saskatchewan v Ronal Gary Knight* [1990] S.C.R 653 by L’ Heureux-Dubé J with Dickson CJ, Wilson, La Forest and Cory JJ concurring:

‘2. Procedural Fairness.

The conclusion that the respondent's employment could be legally terminated without a showing of just cause does not necessarily entail that the procedure involved can be arbitrary. There may be a general right to procedural fairness, autonomous of the operation of any statute, depending on consideration of three factors which have been held by this Court to be determinative of the existence of such a right (*Cardinal v. Director of Kent Institution, supra*). If consideration of these factors in the context of the present appeal leads to the conclusion that the respondent was entitled to procedural fairness, *The Education Act* and, in this case, the terms of the contract of employment, must then be considered to determine whether this entitlement is either limited or excluded entirely. It should be noted at this point that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that

must be exercised according to the rules of administrative law. It is in that context that the employee-employer relationship between the respondent and the appellant Board must be examined, with the result that the analysis must go beyond the contract of employment to encompass arguments of public policy.

Obviously, if either the statute or the contract confers upon the employee a right to procedural fairness, there is no need to consider the factors I have alluded to above in order to determine the existence of a similar general right, such a right becoming redundant. Since, however, I believe that in the case at bar neither the statute nor the contract do accord such a right, I will begin with an analysis of those factors.

A. General Duty of Fairness

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution, supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

(i) *The Nature of the Decision*

There is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions. Such a distinction may have been necessary before the decision of this Court in *Nicholson v. Haldimand-Norfolk Regional Board of*

Commissioners of Police, [1979] 1 S.C.R. 311. Prior to this case, the "duty to act judicially" was thought to apply only to tribunals rendering decisions of a judicial or quasi-judicial nature, to the exclusion of those of an administrative nature. Following *Nicholson*, that distinction became less important and was found to be of little utility since both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice (see *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, *per* Sopinka J. for the majority).

On the other hand, not all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty (see Dussault and Borgeat, *Traité de droit administratif*, t. III, 2nd ed., at p. 370; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 758, *per* Estey J. for the Court). The finality of the decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect (Dussault and Borgeat, *op. cit.*, at p. 372).

In the case at bar, the decision made by the appellant Board was of a final and specific nature, directed as it was at terminating the employment of the respondent. As such, the decision to dismiss could possibly entail the existence of a duty to act fairly on the part of the appellant Board.

(ii) *The Relationship Between the Employer and the Employee*

The second element to be considered is the nature of the relationship between the Board and the respondent. In an oft-cited decision of the House of Lords, *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid classified the possible employment relationship between an employer and an employee into three categories (at pp. 71-72): (i) the master and servant relationship, where there is no duty to act fairly when deciding to terminate the employment; (ii) the office held at pleasure, where no duty to act fairly exists, since the employer can decide to terminate the employment for no other reason than his displeasure; and (iii) the office from which one cannot be removed except for cause, where there exists a duty to act fairly on the part of the employer. These categories are creations of the common law. They can of course be altered by the terms of an employment contract or the governing legislation, with the result that the employment relationship may fall within more than one category (see *Nova Scotia Government Employees Association v. Civil Service Commission of Nova Scotia*, [1981] 1 S.C.R. 211, at p. 222, *per* Laskin C.J. for the majority). Lord Reid did not examine the possible implications of the non-renewal of a fixed-term employment contract, but since it was not alleged in the present appeal that the employment was terminated by non-renewal of the employee's contract, I will not address this question.

In the case at bar, the office held by the respondent was not of a "pure" master and servant type since it encompassed some elements of a public nature....

There may be a clear contractual element to the respondent's employment, which may give the impression that his function is not "purely" statutory; I find, however, that this is not a case of a "pure master and servant" relationship but that it has on the contrary a strong "statutory flavour", so as to be categorized as an

office (Wade, *Administrative Law* (5th ed. 1982), at pp. 498-99; *Malloch v. Aberdeen Corp.*, [1971] 2 All. E.R. 1278 (H.L.), at p. 1294, *per* Lord Wilberforce).

Being an office, the respondent's situation would fall into one of the last two of Lord Reid's categories. As I have already analyzed the employment contract and *The Education Act* with regard to the question of whether the respondent could be dismissed only for cause, and concluded in the negative, the employment relation existing between the respondent and the appellant Board would fall into the second of Lord Reid's category, i.e., an office held at pleasure. I find, however, that this conclusion does not ineluctably lead to the conclusion that the appellant Board was not under a duty to act fairly, as may seem to flow from the judgment of the House of Lord in *Ridge v. Baldwin*, *supra*. Administrative law has evolved in recent years, particularly in the Canadian context, so as to make procedural fairness an essential requirement of an administrative decision to terminate either of the last two classes of employment described by Lord Reid. In *Nicholson*, *supra*, although the employee was found to be dismissable for cause, Laskin C.J., after referring to the three-class system developed by Lord Reid in *Ridge v. Baldwin*, *supra*, expressed some doubts about limiting the duty to act fairly to cases of dismissal for cause, to the exclusion of cases where offices are held at pleasure. He writes for the majority at pp. 322-23:

I would observe here that the old common law rule, deriving much of its force from Crown law, that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders. As de Smith has pointed out in his book *Judicial Review of*

Administrative Action (3rd ed. 1973), at p. 200, "public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his own behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary". [Emphasis added.]

The Chief Justice goes on to quote from a decision of the House of Lords, *Malloch v. Aberdeen Corp.*, [1971] 2 All. E.R. 1278, in which the absence of a right to procedural fairness for those holding office at pleasure was somewhat mitigated, the court concluding that in certain circumstances procedural fairness may be necessarily implied. In that case, teachers were dismissed for refusing to register as required under a new regulation, whose validity they disputed, without being afforded either a hearing or reasons; Lord Wilberforce wrote at p. 1294:

One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void. [Emphasis added.]

There is thus in England no longer an automatic exclusion of the rule of procedural fairness for employment falling into Lord Reid's second class.

The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination (*Nicholson, supra*, at p. 328, *per* Laskin C.J.) One person capable of providing the administrative body with important insights into the situation is the office holder himself. As pointed out by Lord Reid in *Malloch v. Aberdeen Corp., supra*, at p. 1282: "The right of a man to be heard in his own defense is the most elementary protection of all. . . ." To grant such a right to the holder of an office at pleasure would not import into the termination decision the necessity to show just cause, but would only require the administrative body to give the office holder reasons for the dismissal and an opportunity to be heard. I would adopt Wade's reasoning when he writes about offices held at pleasure (*Administrative Law* (5th ed. 1982), at pp. 500-501):

If the officer is subject to some accusation, justice requires that he should be allowed a fair opportunity to defend himself, whatever the terms of his tenure. To deny it to him is to confuse the substance of the decision, which may be based on any reason at all, with the procedure which ought first to be followed for purposes of fairness. It is then an example of the fallacy, already mentioned, that the argument for natural justice is weaker where the discretionary power is wide.

. . .

. . . it would seem right therefore to protect the officer or member against wrongful deprivation of every kind and to accord him the procedural rights without which deprivation is not fair and lawful. Whether he is removable for cause or at pleasure should in principle make no difference. [Emphasis added.]

(See also Molot, "Employment During Good Behaviour or at Pleasure" (1989), 2 *C.J.A.L.P.* 238, at p. 250). The argument to the effect that, since the employer can dismiss his employee for unreasonable or capricious reasons, the giving of an opportunity to participate in the decision-making would be meaningless, is unconvincing. In both the situation of an office held at pleasure and an office from which one can be dismissed only for cause, one of the purposes of the imposition on the administrative body of a duty to act fairly is the same, i.e., enabling the employee to try to change the employer's mind about the dismissal. The value of such an opportunity should not be dependant on the grounds triggering the dismissal.

There is also a wider public policy argument militating in favour of the imposition of a duty to act fairly on administrative bodies making decisions similar to the one impugned in the case at bar. The powers exercised by the appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by the government, should be put only to legitimate use. As opposed to the employment cases dealing with "pure master and servant" relationships, where no delegated statutory powers are involved, the public has an interest in the proper use of delegated power by administrative bodies. In the House of Lords decision of *Malloch v. Aberdeen Corp.*, *supra*, Lord Wilberforce noted this additional rationale underlying the imposition of procedural fairness (at p. 1293):

The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions.

From this perspective, the fact that an office holder could be dismissed for cause or at pleasure would not warrant a distinction with regard to the existence of a duty to act fairly, since in both cases statutory powers are exercised. As pointed out by Wade in the above-quoted passage (at p. 500), dismissal for displeasure should be all the more the object of scrutiny as it is a power of a wider discretionary nature.

In reaching the conclusion that both of Lord Reid's last two classes require an administrative body to act fairly, the necessity of characterizing the employment so that it fits into one or the other of those classes is rendered unnecessary. Not only does this eliminate an "anachronistic" distinction -- to use the words of Laskin C.J. in *Nicholson, supra* -- between offices held at pleasure and offices from which one can only be dismissed with cause, but it also does away with what is in many cases a troublesome task since employment relationships are rarely easily categorized into one or the other class, being usually -- as in the case at bar -- of a mixed nature brought about by the terms of the employment contract or the governing legislation. In my opinion, such a simplification of these principles of administrative law is not only desirable but necessary. Of course, this does not mean that the distinction between offices from which one can be dismissed at pleasure and those from which one must be dismissed for cause becomes obsolete in all respects. In the case of an office held at pleasure, even after the giving of reasons and the granting of a hearing, the employer's mere displeasure is still justification enough to validly terminate the employment.

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of

natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board, the requirements of procedural fairness will be satisfied even if there was no structured “hearing” in the judicial meaning of the word. I would agree with Wade when he writes (Administrative Law (5th ed.), at pp. 482-83):

A ‘hearing’ will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance ‘hear’ them”; . . . [Emphasis added; footnotes omitted.]

Laskin C.J. echoed this view in *Nicholson, supra*, at p. 328, when he stated that the Police Commissioners should have ‘heard’ Nicholson before deciding to terminate his employment, but not implying that there should be a formal hearing. (See also *Cardinal v. Director of Kent Institution, supra*, at p. 659, *per* Le Dain J.) In the same vein, the duty to give reasons need not involve a full and complete disclosure by the administrative body of all of its reasons for dismissing the employee, but rather the communication of the broad grounds revealing the general substance of the reason for dismissal (*Selvarajan v. Race Relations Board*, [1976] 1 All. E.R. 12, at p. 19, *per* Lord Denning M.R.)’

See also the judgment of this court in *David Bhutana Dlamini v The Commissioner of His Majesty's Correctional Services and Another*, Civil Case 470/2008 (unreported, delivered on 27 October 2010).

[31] In the present case the applicant was informed of the case against him and was also served with a memorandum from the first respondent. This court has not been given that memorandum or told of its contents. I can only assume that both sides viewed this memorandum as totally irrelevant for purposes of this review application and thus excluded it herein. Significant in the whole equation though is the fact that there was not a shred of evidence, *viva voce* or otherwise, led against the applicant before the board, despite his denial of the charge against him. The board also indicated in its ruling that the first respondent attached no documents to his memorandum in support of his suspicion that the certificate filed by the applicant was forged. The statement by Alpheus Dlamini was also not given to the applicant and he therefore did not respond thereto before the decision to recommend for his dismissal from the police service and the resultant dismissal were taken. If any evidence at all existed against him, it was kept away or hidden from him. If the evidence consisted of those two academic certificates, the applicant should have been told so and given the chance to respond to it.

[32] This court records and notes that this case is distinguishable from that of *Nonhlanhla Tsabedze v University of Swaziland* Civil Case 3432/10 – where a student who had been wrongly admitted was deregistered. In that case the prospective student was given a proper reason why the decision to admit her was being withdrawn. She did not qualify for such admission and the reasons for the error were fully explained to her. There was no need for an inquiry, as she was not accused of having done anything wrong. The error had been committed by the University. In the instant case the opportunity given to applicant was woefully deficient. It counted for nought or nothing. The purported hearing amounted to no hearing at all as the relevant evidence against the applicant was concealed from him by the board.

[33] It is common cause that at the time of filing the papers herein, the applicant was facing a case of forgery and uttering before the Magistrate's court. This was in relation to or in connection with the certificates in this case. The outcome of that case is, however, irrelevant for purposes of this judgment. I do not wish to express any opinion thereon based on the evidence in this application. In any event, it is unnecessary.

[34] For the foregoing reasons, I hold that the procedure and processes adopted by the Board that conducted the enquiry on the authenticity or otherwise of the academic certificates of the applicant were fundamentally flawed and not in accordance with real and substantial justice and fairness. That decision is hereby set aside with costs to the applicant.

MAMBA J

For the Applicant : **Mr B. S. Dlamini**
For the Respondents : **(Attorney General's Chambers)**