IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2899/2010

In the matter between:

LWAZI SIBANDZE **Applicant**

And

COMMISSIONER OF POLICE **1st Respondent**
THE ATTORNEY GENERAL **2nd Respondent**

Neutral citation: ***Lwazi Sibandze v Commissioner of Police and Another (2899/2010) [2014] SZHC 107 (12th June 2014)***

Coram: **M. Dlamini J.**

Heard: **15th April, 2014**

Delivered: **12th June, 2014**

Interpretation of Section 2(1) of Limitation of Legal Proceedings against the Government Act 21/1972 – "debt" must be understood in its widest meaning and therefore refers to all claims against government except those outlined under section 3 of the Act; In the interest of justice, any party who intends to raise a point in limine should do so within reasonable time. Where the proceedings are protracted, such point in limine may in certain circumstances be considered as a mere technicality. Utterances: "You failed to be a police officer. No officer can be involved in an armed robbery," cannot be associated with words of dismissal from employment considering the circumstances of the present case.

Summary: The applicant seeks for an order of reinstatement and payment of arrear salary. The respondent is opposed to the grant of the orders on the basis that applicant refused to attend a disciplinary hearing. After arguments, the court referred the matter for oral evidence.

Oral evidence

[1] Applicant on oath informed the court that on Thursday, 1st October, 2009 he was arrested by Manzini Criminal Investigation branch while at Kentucky Fried Chicken, Manzini on the basis of robbery (armed) offence which occurred at Manzini Central. He was upon interrogation taken to Matsapha College where he was residing as a recruit police officer. His dormitory was searched. Two of his superiors were present, namely Mr. Mxolisi Dlamini and Mrs. Mathunjwa. After the search, the two seniors verbally informed him that he was dismissed from work. He was taken back to Manzini Police station on the same day. Mr. Bhembe, head of investigation team repeated the words by his College superiors that he was dismissed from work.

[2] On the next Monday, he applied for bail and was granted. Upon his release, he went home for a rest for two days. On Wednesday he reported at the Police College for work. Upon arrival, Mrs. Mathunjwa informed him that his services had been terminated. To prove this, all his belongings had been collected by his parents upon the instruction of Mrs. Mathunjwa. He was shocked at the news. He then went to Mr. Mxolisi Dlamini and upon enquiry, he informed him that his case was pending before the Commissioner of Police and that he should go home. He stayed at home until he received a correspondence inviting him to report at the College on 30th December 2009. This correspondence indicated that he had absented himself from work. When he reported at the college, he was told to return home as he would receive another correspondence informing him of the date of disciplinary hearing. At this juncture, the applicant testified that he was dissatisfied at the manner the Police were dealing with his matter. He approached his attorney and filed the present application.

[3] Around June 2010, he received another memorandum, calling upon him to appear for disciplinary hearing on 8th August 2010. He also received another one informing him that he had a right to legal representation. He went for a disciplinary hearing with his legal representative on 17th August 2010. He was given a full police uniform and addressed as a police officer. This was, according to applicant, contrary to what he was told prior, that his services were terminated. Throughout the period of disciplinary hearing which completed in March/April, 2011, he was in police uniform. He was finally dismissed in February, 2012.

[4] Velaphi Christopher Sibandze (AW2) was applicant's next witness. On oath, he introduced himself as the father of applicant. He said that applicant was arrested and police proceeded with applicant to his home

where they said they had come to collect applicant's items. He refused to allow them into the house. They threatened to shoot him. They informed him that applicant was dismissed from work. He only believed this when he, together with applicant, went to the bank to cash applicant's salary and did not find any. He later received a call from Mrs. Mathunjwa saying he should come and collect his son's belonging. He enquired as to the reason. He was informed that his son was under arrest and therefore he had lost his job. He then requested his sister to proceed to the college to collect applicant's belongings. He found that most of the clothes were not available.

[5] Annie Dlamini, on behalf of applicant, identified herself as a sister to AW2. She received a call from AW2 to proceed to the college to fetch applicant's belongings.

[6] She was welcomed at the college by Mrs. Mathunjwa. After collecting applicant's items, Mrs. Mathunjwa passed her condolences for applicant losing his job. She left with applicant's clothing and reported to AW2. The applicant closed his case.

[7] In rebuttal respondent called Senior Superintendent Mxolisi Dlamini who, on oath, informed the court that in 2009 he was in charge of the training wing. It was two days before graduation when he learnt that applicant had been arrested in connection with a robbery (armed) case. It was his further evidence that there was no proper communication between him and the investigation team. They searched for applicant as they expected him to come back to the college after granting of bail. They telephoned him to no avail until they wrote a letter to him. This letter informed him that he was

still part of the college until dealt with according to administrative and disciplinary procedures.

[8] It was respondent's testimony that he was not aware of any verbal dismissal communicated to applicant. The respondent closed its defence.

Point in limine

[9] The question for determination is whether:

(i) the matter was properly enrolled following applicant's non compliance with section 2(1) (a) of the **Limitation of Legal Proceedings against Government Act 21/1972** *viz*. failure to make a written demand before institution of legal proceedings;

[10] Section 2(1) (a) of the **Limitation of Legal Proceedings against Government Act 21/1972** (Act) reads:

> "*2 (1) Subject to section 3 no legal proceedings shall be instituted against the Government in respect of any debt -*
>
> *(a) Unless a written demand, claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney-General by delivery or by registered post:*
> *Provided that in the case of debt arising from a delict such demand shall be served within ninety days from the day on which the debt became due."*

[11] Applicant submitted that he was not obliged to comply with the provisions of this Act as "*salary arrears*" was not a debt. Without necessarily making any conclusive determination on the term "*debt*", I do not think the submission by applicant is correct. One quickly infers this position as the

section also refers to delictual claims as a "*debt*". In other words the term "*debt*" should be given its liberal interpretation. In fact salary arrears in the narrow view of the term *"debt"* is a debt as it is a sum due and owing arising from services rendered. Hence, the no work, no pay rule. It appears from the reading of the entire section that the legislature meant any sum owing and due by government irrespective of the cause of action. It is for this reason, upon further reading of the section that the legislature calls upon the party who wishes to recover the debt to state clearly the cause of action upon which the debt arises. In other words, it envisages that there are multiple and diverse instances from which *"debt"* may occur. The interpretation that the term *"debt"* be construed in its wide sense finds support from the *dictum* by his Lordship Searle J in **Leviton & Son v De Klerk's Trustee 1914 CPD 691** at 695 which is as follows:

> *"…and if the word 'debt' be used in the wide sense of obligation, I think that the words may be taken to cover a claim for specific performance."*(underlined, my emphasis)

[12] Further, by stating that "*setting out the particulars of such debt and cause of action from which it (*debt*) arose*," seems to me to suggest as pointed out by the honourable Searle J *supra* that:

> *"…and so this word 'debt' must be taken in that section to cover all classes of judgments"*(underlined, my emphasis)

Under the present legislation "*judgments"* as used by the learned Justice **Searle J** should denote "*actions or claims.*" In summary, all claims against government must go via a letter of demand with the exception, of course, of those claims defined under section 3 of the Act. The wording of section

2(1) of the Act is somehow peremptory in that it specifies "*no legal proceedings shall be instituted against Government in respect of any debt ..unless a written letter of demand…has been served to the Attorney General …"* The result of this interpretation therefore translates into that an application for an order for reinstatement to work and salary arrears ought to have been preceded by a letter of demand at the instance of the applicant by reason that they form a "*debt"* in terms of the Act.

[13] However, that as it may, I was persuaded to deal with the matter on the merits by reason that the applicant instituted proceedings on 23rd July 2010 and the matter was enrolled for hearing before me on 11th February, 2014, although several appearances were made and the matter postponed at the instance of either party before. Owing to the lapse of time, one could safely conclude that the matter had inordinately delayed before hearing. It therefore became prudent, in the interest of administration of justice, to hear the matter on its merits. Had respondents intended the matter to be dismissed on *point in limine*, it is my view that they ought to have set the matter down within reasonable time in order to avoid injustice.

[14] It is my considered view that this protraction in hearing the *point in limine* turned it into a mere technicality and I was therefore persuaded by **Shell Oil Swaziland (Pty) Ltd t/a Sir Motors**:

> *"…the current trend in matters of this sort, which is now well recognised and firmly established, viz. not to allow technical objections to less than perfect procedural aspect to interfere in the expeditious and, if possible, inexpensive decision of cases on their real merits…"*

Their Lordships then cited from **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81(SE)** at **95F-96A**:

> *"The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."*

[15] At any rate, as it was the view of their Lordships in **Shell Oil Swaziland** s*upra*, it would serve no purpose of justice to dismiss the case on this point as the applicant would have simply gone back to file the demand and come back to court as respondents were opposing the matter on its merits as well. Had respondents only come to court to oppose the matter on this procedural aspect of failure to comply with section 2(1) of the Act, and conceded the merits, this would mitigate on costs of suit in favour of respondents.

Issue

[16] The question for determination is whether the utterances by applicant's superiors at College translated into a dismissal?

Determination

[17] Applicant, in his evidence in chief, informed the court as follows:

Applicant's Attorney:	*"What exactly did the two (applicant's seniors) say when they dismissed you?"*
Applicant:	*"Mrs. Mathunjwa said, 'I failed to be a police officer. No officer can be involved in an armed robbery' and Mr. Mxolisi Dlamini seconded him by saying, 'you are right Mrs Mathunjwa, I think you have to call his parents to fetch his belongings."*

[18] In all fairness and by any stretch of imagination, it is my considered view that the words, *"You failed to be a police office. No officer can be involved in an armed robbery*" are by no means equivalent to words of dismissal.

So many interpretations can go into such utterances except for termination of services of employment. One cannot gainsay anything contrary from Senior Superintendent Mxolisi Dlamini as he is said to have stated: *"You are right Mrs. Mathunjwa, I think we should call his parents to collect his belongings."*

[19] If I am wrong in my interpretation, there is another approach to the present case. Firstly, the applicant attested:

> *Applicant's Attorney:* *"You described Mr. Mxolisi as an officer in charge of the training wing section. How would you describe the position of Mrs. Mathunjwa?"*
>
> *Applicant:* *"She was second in charge of the training wing."*

[20] Surely applicant ought to have known that the duo were in charge of training wing and not of the police force. It is trite that when applicant was employed, he received a letter of appointment not from the duo, but from the Commissioner. He ought to have known that it was only the Commissioner who was seized with the jurisdiction to terminate his contract of services. If he took the duo's words serious, he had himself to blame and that is if the utterances by the duo are to be interpreted in favour of applicant.

[21] Secondly, according to applicant's evidence in chief, the sequence of events are that the utterances on dismissal were on the day of his arrest, Thursday, when applicant went with the police to the Police College and after conducting the search in his dormitory. Applicant attested that the utterances by his two superiors resulted in his employment termination. Surprisingly, however, applicant testified:

> "*On the following Monday I applied for bail from the High Court and I was granted the same day on Monday. I went for a rest at home at Luve and on Wednesday I went to report for work at the Police College."*

[22] One wonders therefore as to the basis applicant returned to work after Senior Superintendent and Mrs. Mathunjwa informed him that he was dismissed from work. The only inference that can be drawn from applicant's conduct of returning to work, after his release on bail is that he himself did not consider the utterances by Senior Superintendent Mxolisi Dlamini and Mrs. Mathunjwa to be tantamount to a dismissal. If he did, he would not have gone back to work the following Wednesday.

[23] Thirdly, it was applicant's evidence in chief that on Wednesday:

> "*I went straight to Mr. Mxolisi's office who is in charge of training wing and when I asked him, he said I should go back home and my case was with the Commissioner of Police. I stayed at home until I received a letter on 28th December which wanted me to report at the College on 30th December. In that memo it was stated that I had absented myself from work.*"

He proceeded in chief:

> "*When I reported for duty on 30th December, I was told that I would receive another memo which said I should come for disciplinary hearing."*

Surprisingly he states immediately:

> *"Being unsatisfied by the way I was treated by the police service, through my attorney, I filed an application to the High Court. After the Commissioner saw that there was an application against him, I received another memo stating that I should come for disciplinary hearing on 8th August 2010."*

[24] One wonders again as to the reason for applicant to file the present application when he was informed to go home and await a memorandum

informing him of his hearing date on internal enquiry on the alleged absenteeism. One would have expected applicant to wait for the outcome of the disciplinary hearing instead of jumping the gun and filing the present application. There is no merit in his evidence that the Commissioner invited him for a disciplinary hearing upon being served with the present application because by his own evidence, he was informed on the 30th of December (a date before instituting the present application) that he should await a further letter inviting him to a hearing. Instead of waiting for this letter, he went to his attorney and sued for the present orders.

[25] Applicant's case is further confounded by his own evidence in chief, that is:

> "*On the following Monday, I applied for bail from the High Court and I was granted bail the same day on Monday. I went for a rest at home at Luve and on Wednesday I went to report for work at the Police College*."(my emphasis)

He was cross examined on this:

Defence Attorney:	*"You told the court you proceeded to Mr. Mxolisi Dlamini who told you that your case was with Commissioner of Police on Wednesday?"*
Applicant:	*"Yes."*
Defence Attorney:	*"This was on Wednesday?"*
Applicant:	*"Following week from 1st of October."*

[26] From the above, it is clear that applicant was away from work. Why he decided to abandon work and go "*home for a rest*" as he stated so is not clear again. This leads one therefore not to wonder as to the reason for applicant, upon being informed by Senior Superintendent Dlamini that his matter was with the Commissioner and subsequently that he would be informed of a date of disciplinary hearing, instead of awaiting the

Commissioner's date and outcome, went straight to his attorney to have the present application instituted.

[27] On the basis of the above analysis, I find that the utterances that, "*You failed to be a police officer. No officer can be involved in an armed robbery,"* or *"You are right …I think you have to call his parents to fetch his belongings"*, cannot be associated with words of dismissal from employment, considering the circumstances of the present case.

[28] In the premises, I enter the following orders:

1. Applicant's application is dismissed.
2. Applicant is ordered to pay costs of suit.

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M. DLAMINI
JUDGE

For Applicant : T. N. Sibandze
For Respondents : V. Manana