IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between: Case No. 368/2013
369/2013

DALLAS BUSANI DLAMINI **1st Applicant**
STANLEY SIFISO VILANE **2nd Applicant**

And

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

Neutral citation: *Dallas Busani Dlamini & Another v The Commissioner of Police & Another (368/2013) 369/2013) [2014] SZHC 200 (8 August 2014)*

Coram	**:**	**Mbuso E. Simelane AJ**
Heard	**:**	**30th June 2014**
Delivered	**:**	**8th August 2014**
For Applicants	**:**	**S. Jele**
For Respondents	**:**	**B. Tsabedze and T. Simelane**

Summary

Review of a police disciplinary hearing – the commissioner of police has power to dismiss – nothing irregular with disciplinary hearing – application dismissed with costs

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JUDGMENT

(2014)

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[1] The Applicants who are former police officers had moved their application separately but during the hearing the matters were consolidated because their cause of action is similar.

[2] Basically the Applicants seek the following prayers;

1. *Reviewing, correcting and/or setting aside the decision of the 1st respondent dismissing Applicant from the public service (Police Force).*

2. *That the decision of the 1st Respondent dismissing Applicant from the public service is ultra vires and is hereby set aside.*

3. *That the disciplinary hearing instituted against the Applicant is ultra vires and unlawful and is hereby set aside.*

4. *That the 1st Respondent show cause why his decision (s) or proceeding (s) should not be reviewed and corrected or set aside.*

5. *Calling upon the 1st Respondent to dispatch, within fourteen days of the receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the Applicant that he has done so.*

[3] Prayer 5 was complied with.

[4] Prayer 2 is premised in that the MINISTER (reference thereto being the PRIME MINISTER) should be the one to dismiss the Applicants and not the Commissioner of Police.

[5] The dismissal of any police officer below the rank of inspector by the Commissioner has to follow a recommendation by the Disciplinary Board constituted in terms of section 12 of the Police Act. Section 29(d) of the Act provides as follows;

> *"29. Subject to section 10 of the Civil Service Order No. 16 of 1973 the Commissioner may, in the case of any member of the Force of or below the rank of inspector, at any time —*
>
> *(d) dismiss such member if he is recommended for dismissal from the Force under section 22;"*

[6] Section 22 referred to in section 29 reads as follows;

> *"22. Upon conviction by a senior officer, a Board or a magistrate's court, such officer, Board or court may, in addition to or in lieu of any of the penalties provided in this Act or any regulations made thereunder, recommend to the* ***Minister*** *that the person convicted be dismissed from the Force or be reduced, in the case of a member of the Force below the rank of inspector but above the rank of constable to a lower or the lowest rank."*

[7] The use of the word **"Minister"** in section 22 is a misnomer in the sense that when section 22 underwent amendment the word "minister" should have read "Commissioner". His Lordship Masuku J, as he then was, ***in Jabulani B. Simelane v The Commissioner of Police and 4 Others Civil Case No. 755/2000 (HC) [Unreported]***, quoting with approval the judgment of Dunn J in ***Thembela Mathenjwa v The Commissioner of Police and Another Civil Case No. 1006/91 (HC) [Unreported]*** held as follows;

> *"It is clear that section 22 creates some confusion in the disciplinary and appeals procedure provided for under the Act but that does not in my view, affect the clear provisions of section 29(d). The representative of the Attorney General pointed out that there had been an omission in the Police (Amendment) Act No. 5/1987 in which the word* ***"Minister"*** *in section 20 was replaced with the word* ***"Commissioner".*** *It was pointed out that a similar replacement should have been made under section 22 in the amendment. The explanation given would place section 22 in keeping with the general approach of the Act regarding disciplinary proceedings; the*

powers of the Commissioner and the right to appeal to the Prime Minister. It would be irregular for the Prime Minister to be vested with the power to act on a recommendation under section 22 and at the same time exercise the powers of appeal set under section 30."

[8] It follows therefore that the Commissioner will only dismiss an officer from the force only on a recommendation of a senior officer, Board or Magistrate's court. The Commissioner may not dismiss in the absence of that recommendation. The recommendation is a *sine qua non* for him to exercise the power to dismiss. In other words, the Commissioner is conferred with the power to dismiss where he has knowledge of the recommendation made under section 22. See ***Jabulani B. Simelane v The Commissioner of Police and Others supra.***

[9] Paragraphs 5 to 8 above were the arguments of Mr. B. Tsabedze for the Respondent. I believe his arguments are correct.

[10] In relation to prayer 3 the Applicants are complaining that the Respondents acted beyond the 6 months provided in the **Constitution of Swaziland Act 2005** in terms of section 194 (4) which provides as follows;

"(4) The matter of a public officer who has been <u>suspended</u> shall be finalised within six months failing which the suspension shall be lifted."

[11] This prayer ought to fail because it is clear from the record and it was confirmed by Mr. S. Jele that the Applicants were not **on suspension** when their hearing was conducted yet the subsection refers to public officers who are under suspension.

[12] The offences are said to have occurred between 6th March 2009 to August 2009 but the hearing started at around January 2010. As above stated that they were not suspended during the intervening period.

REVIEW

[13] The Applicants were found guilty of conducting an unlawful dagga raid at Eluvinjelweni and Ensingweni and failing to hand over the dagga to their relevant police stations.

[14] Mr. Jele attacked the disciplinary hearing in the following front;

1.

That the disciplinary hearing instituted against them is ultra vires and unlawful hence it should be set aside since it was conducted much against the dictates of natural justice, in that inadmissible evidence which was plainly hearsay as alleged by Applicants in their founding affidavits was admitted against them by the Disciplinary Board.

2.

It is submitted that due to the acceptance and/ or admissibility of the insufficient evidence which is otherwise inadmissible by the Disciplinary Board this was a gross irregularity and a mockery to the administration of justice hence the dismissal should be set aside.

3.

It is further submitted that it is a trite principle of our law that a trier of fact should warn him/herself regarding the evidence to be admitted so to avoid convicting (which is dismissal in this case) of innocent accused persons. The presumption of innocence shall always take precedence.

4.

The Applicants have further alleged in their Founding Affidavit that the process of identification by the witnesses was in itself flawed and therefore ought to have been disregarded by the chairman and his board. Allowing such evidence which ought to have been disregarded was an irregularity.

5.

One of the witness stated that a cell phone and car rear lights were used as a source of light since it was dark and there was poor lighting. It is submitted that the witness could not have been able to identify the Applicants since it was dark let alone to mention that a lengthy period has elapsed since the alleged offence have occurred to enable them (witnesses) to identify

Applicants as the officers who were at the scene of the crime (dagga raid). PW10 however, stated that the only light available was from a cell phone. This evidence was contradictory and it should not have been admitted as evidence.

6.

As a general rule, evidence of identity is treated with caution by our courts. The origin of this rule, it is said, is that;

> *'… experience has shown or taught the court that identifying witness do often make genuine mistakes regarding the identification of persons of whom some are even supposedly known to them. Therefore, honesty alone is not enough. In addition, the evidence of the witness, or the witness, himself must be reliable or credible". <u>It is submitted that the evidence of the identifying witness was not credible and reliable hence it ought not to have been admitted.</u> (emphasis ours) . This was stated in* ***REX V Mzwandile Maseko Criminal Case No. 295.10 (High Court Case)*** *See also* ***RV Mzuba James MambA 1979-81 SLR at 155***
> ***S V Mehlape 1963(2) SA29(A) at 32 -33***
> ***R V Mokoena 1958(2) SA 212(J) at 215***
> *Van Den Heever JA as he then was once observed on* ***RV Masemang 1950 (2) SA 488(A) at 493 that;***

‘ the positive assurance with which an honest witness will sometimes swear to the identify of an accused person is in itself no guarantee of the correctness of that evidence.’ It is submitted that the identification of applicants by this witness was mistaken and in actual fact it is not what really happened because the Applicants were at no point in time at the alleged area or ever conducted any dagga raid.’

7.

It is further submitted that the alleged dagga alleged to have been raided in the said areas which is the subject herein was never produced as an exhibit during the disciplinary hearing or rather as evidence to justify commission or was ever recovered from Applicants. It is accordingly submitted therefore, that the evidence of PW4 and PW 9 which is to the effect that Applicants failed to declare dagga is incorrect and misleading since Applicants never engaged in any dagga raid and there was no dagga to declare, hence it should not have been admitted as evidence. Applicants maintain that they were never at any stage at the alleged areas for a dagga raid.”

[15] It is worthy to note that the Applicants at paragraph 12 and 13 of the founding affidavit admit that they never challenged the evidence of PW4 who identified them at the scene at ELUVINJELWENI.

[16] Dallas Busani Dlamini was given a chance to cross examine PW9 and during cross examination the witness maintained that he identified the Applicants as one of the people who took the bags of dagga on the day in question. PW9 further gave evidence that Applicant drew out a gun and pointed it at them.

[17] It is trite law that for any piece of evidence that is unchallenged remains truthful. In essence both Applicants were placed at the scene of the crime.

[18] They were also placed in the scene in the unlawful dagga raid that was conducted at ENSINGWENI as could be seem from paragraph 23 of their founding affidavits. They failed to challenge PW10 who had stated that the only light available was from a cell phone yet PW9 stated that the only light available on the night was from a cell phone and car rear lights.

[19] PW10 was not cross examined about the anomaly in that he did not mention that another light from the rear of the car was available per the evidence of PW9. At page 67 of the record, PW10 gave evidence that when the buyer examined the dagga he was at the rear of the motor vehicle.

[20] The Applicants cannot now seek to re-open their case in this forum.

[21] It was not highlighted to this court the leading questions that were posed by the prosecution hence I cannot comment on same.

[22] In relation to the hearsay evidence complained about, the Commissioner of Police submitted in paragraph 11 of his Answering Affidavit as follows;

"Ad Paragraphs 19 and 20

The Contents of these paragraphs are denied.

11.1 PW13 gave evidence that he was the head of the Drug Unit in the Hhohho region. As part of his duties he was tasked with the responsibility of investigating drug related cases. He was therefore part of the investigators investigating the drugs related offences against the Applicant.

11.2 PW14 gave evidence that he was part of the investigating team appointed by the Commissioner to investigate drug related cases involving police officers. As part of his duties he investigated cases that occurred in areas such as Ensingweni and Eluvinjelweni amongst other areas.

11.3 During their investigations PW13 and PW14 uncovered evidence and interviewed witnesses and complainants who implicated the Applicant in the commission of the offences.

11.4 During cross examination PW14 maintained that the Applicant was involved in the commission of the offences he was charged with. However the Applicant did not refute the evidence of PW13 in cross examination. When asked whether he had questions for the witness he answered that he had no questions for the witness.

[23] The submission by the Commissioner is clearly evident from the record of proceedings.

[24] The Applicants had a right to challenge PW13 and PW14 about their evidence.

[25] Infact the evidence of these two witnesses centred mainly on whether the Applicants were authorised to conduct the dagga raid. The common answer was that they (Applicants) were not authorised to conduct the raid.

[26] The proceedings which the board held during the disciplinary inquiry against the Applicants were quasi-judicial and are covered by the procedure which is set out in ROSE-INNES: JUDICIAL REVIEW OF ADMINISTRATIVE TRIBUNALS at page 160. That passage is also cited in the case of ***DAVIS v Chairman, Committee of JSE 1991 (4) SA 43*** at page 49 and it is in the following terms-

> *"Administrative bodies, generally speaking, and subject to the provisions of the statutes which constitute them, are free to decide and adopt their own procedure, provided such procedures are not calculated to cause inequity or apprehension of bias in those who are subject to their decisions. <u>They are not obliged to adopt methods of oral evidence and examination of witnesses which are necessary for a trial in court.</u> 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."*

[27] I have examined the record of the disciplinary proceedings before the Board and I am satisfied and find that the principles of natural justice were not breached. The charges against the Applicants we clearly set out. The Applicants were told to bring witnesses and any evidence they might require. They were given every opportunity to put their version of the story to the Board and it was considered in their ruling. They were afforded a right to legal representation which they declined.

[28] The dagga could have not been produced as an exhibit during the hearing because the Applicants had not declared same. Infact the standard of bringing evidence in disciplinary hearing is not so high as that found in criminal matters which latter case has to be proven beyond a reasonable doubt. The standard herein is based on a balance of probabilities.

[29] The 1st Respondent in his Ruling said the following;

> *"It is also evident from the record that you were afforded the opportunity to cross examine all the witnesses, which you did on some, and elected not to, on others. At the close of the prosecution's case, you were put to your defence after a prima facie case was proven against you. You, however, failed dismally to lead evidence that would have exonerated you and prove a lawful justification for committing the offences."*

[30] At page 496 of the book **ADMINISTRATIVE LAW** (1996) by Professor Baxter the learned author observed the following:

"When one is called on to Judge whether a decision is unreasonable, the decision might be viewed from various perspectives. For convenience these have been grouped into three categories, and it is under these heads that principles relating to abuse of discretion will be expounded."

[31] The Learned author goes on to list and briefly discuss the categories as being **(i) the basis of the decision (ii) purpose and notice and (iii) effect of the decision.** In so far as these categories are concerned the learned author has this to say;

"(i) ***Basis*** *- If a decision is entirely without foundation it is generally to be one to which no reasonable person could have come. Here there is some over lapping between dialectical and substantive unreasonableness, since there are indications that, while the Courts will set aside administrative decisions which are supported by nothing at all, they will also set aside decisions which are complete non sequitars of the evidence available. Decision will also be set aside where considerations that are deemed relevant have not been taken into account, or where irrelevant considerations have been used to support the decision. (ii)* ***Purpose and motive*** *- It is considered to be unacceptable for a public authority to use its powers dishonestly. Equally unreasonable, though possibly less reprehensible, is the use of powers for purposes that are not contemplated by the enabling legislation. In both cases the decision and the action taken in consequence of it will be set aside (iii)* ***Effect*** *- Reasonable people do not advocate decisions which would lead to harsh, arbitrary, unjust or uncertain consequences. The Courts will*

review administrative acts, particularly subordinate legislation, in light of their effects and, should these be found to be unreasonable, the action will be set aside. These are not rigid categories: the way in which the challenge of unreasonableness is characterized will often depend on the terminology one uses or the perspective one adopts. A perusal of the relevant dicta will reveal a welter of inconsistent terminology, as judges refer to 'mala fides' , 'improper purposes', 'improper motives', ulterior purpose', ulterior motive', 'improper considerations', 'extraneous purposes', 'extraneous considerations' and 'irrelevant considerations'. The reason for this, it is suggested, is that these terms all represent different conceptions of the common theme of unreasonableness".

[32] Based on the foregoing there was neither a gross irregularity nor a clear illegality in the manner in which the Board conducted its disciplinary proceedings against the Applicants.

[33] I therefore, find that the Applicants did not discharge the onus which was on them to show that sufficient grounds existed for this court to review the Board's decision.

[34] In the result the application is dismissed with costs.

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MBUSO E. SIMELANE

ACTING JUDGE