IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 1140/2016

In the matter between

FANA BALATE DLAMINI	**Applicant**
and	
DUMISA R. MAZIBUKO N.O.	**1st Respondent**
ATTORNEY GENERAL	**2nd Respondent**

Neutral citation: *Fana Balate Dlamini v Dumisa R. Mazibuko N.O. and Another* (1140/2016) [2016] SZHC 121 (13 July 2016)

Coram: **MAMBA J**

Heard: **11 July, 2016**

Reasons handed down: **13 July, 2016**

[1] *Practice and procedure – peace binding inquiry in terms of s341 of the Criminal Procedure and Evidence Act 67/1938 – administrative or quasi – judicial and not a trial.*

[2] *Practice and Procedure – in the course of a peace binding enquiry magistrate ordering the applicant to return stove and restore electricity power supply to the complainant's house. No sworn statement made before magistrate by complainant. Applicant not afforded chance to state his side of the story to the magistrate before restoration order is made. This grossly irregular and unlawful.*

[3] Criminal Law and Procedure – following failure to comply with order in a peace binding enquiry – applicant charged with contempt of court. Applicant not given opportunity to present his defence and summarily convicted and sentenced to a prison term of seven days. Thereafter applicant was arbitrarily released from prison after two days by the magistrate. Conviction, sentence, incarceration and release of the applicant grossly irregular and set aside.

[1] 'Power tends to Corrupt and Absolute power corrupts absolutely'. These are the opening words in *Nqobile Dlamini v Director of Public Prosecutions and 2 others (421/13) [2014] SZHC 11 (17 February 2014),* wherein the presiding officer dragged into his court what was in essence a purely private matter between him and the applicant (his victim) and treated as a case of contempt of court. These words are apt in these proceedings.

[2] By notice of motion dated 29 June 2016, the applicant applied or sought inter alia, the following orders:

> '3. Reviewing and setting aside the decision of the 1st respondent issued on 28 June 2016.
>
> ALTERNATIVELY
>
> 4. Admitting the applicant to bail pending Review of the decision of the 1st respondent issued on 28 June 2016.

5. Directing the Clerk of Court for the Siteki/Siphofaneni Magistrate's Court to furnish the above Court with the record of the proceedings in the said Peace Binding Enquiry, if any, resulting to the Charge for Contempt of Court.

6. Costs of suit.'

[3] The notice of application, together with the supporting affidavit by the applicant was duly served on the respondents on 30 June 2016 and the matter was set down for hearing on 01 July 2016. The necessary certificate of urgency was also filed with the said papers.

[4] In support of his application, the applicant stated the following facts which have not be disputed by the respondents:

4.1 On 09 June 2016 he was summoned by members of the Royal Swaziland Police Service stationed at Siphofaneni Police Station and told to come to the said station to answer a complaint or peace binding charge that had been filed against him by his estranged wife.

He obliged and upon arrival at the police station, he was ushered into an office where he found the first respondent.

4.2 The first respondent informed him that he had received a complaint from the applicant's wife that the applicant had removed a

refrigerator and disconnected the electricity power supply to the said wife's house.

4.3 The applicant tried to explain himself to the first respondent who, however, would hear none of his version of what had happened and why such had occurred. The first respondent ordered the applicant to immediately restore the electricity supply and the refrigerator to the said house. The encounter with the first respondent came to an end abruptly on that note.

4.4 After considering the matter, and no doubt after receiving advice thereon, on 13 June 2016 the applicant requested the police at Siphofaneni Police Station to furnish him with a copy of the proceedings of the 09 June 2016 before the first respondent. The Police were unable to give him the said copy but referred him to the Clerk of Court at Siteki. He duly approached the said clerk on 16th June 2016. The clerk of court had no such record and was also not present during the proceedings at Siphofaneni on 09 June 2016.

4.5 The applicant stated that he needed or wanted the record in order to either appeal the decision by the magistrate or seek a rescission thereof. Having failed to get a copy of the record of the proceedings, the applicant was unable to do either of these things. He also did not comply with the magistrate's order issued against him on 9 June 2016.

4.6 On 28 June 2016, Police officers from Siphofaneni Police Station arrested applicant at his home for contempt of court. He was again taken to the said magistrate who was at the said Police station. Again, the first respondent would not listen or hear any explanation from the applicant for his failure to comply with the order of 09 June 2016. He summarily found him guilty of contempt of court and sentenced him to a period of seven (7) days of incarceration.

[5] The above facts as stated by the applicant have not been denied by any of the respondents. They are, therefore true or correct for purposes of these proceedings.

[6] It is also common cause that when the matter first served before me on 01 July 2016, the applicant had already been released from custody by the first respondent. He was either released on 29 or 30 June 2016 and no explanation was given to him why he was being released before he could serve the full term of his incarceration.

[7] When the matter first served before me on 01 July 2016, Counsel for the respondent indicated that the application was being opposed by the respondent. The matter was then postponed till 07 July 2016 to enable

Counsel for the respondents to take further counsel or instructions thereon.

[8] On 07 July 2016 Counsel for the respondents indicated to the court that she wished to hand in her heads of argument from the bar without filing any affidavit or such papers in opposition to the application. After the court pointed out to Counsel that the court would then have to determine the application on the basis that what is stated herein by the applicant is true or correct, counsel successfully applied for a further postponement of the case to the 11th day of July 2016, in order for her to reconsider the respondents' position on the matter. She was, however, of the firm or considered view that the first respondent had acted properly in both the peace binding enquiry and contempt of court proceedings. There was also, nothing improper or irregular in the subsequent release of the applicant by the first respondent, she said.

[9] A peace binding enquiry is regulated or governed by section 341 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). In *Zwelakhe Nhleko v Magistrate Sebenzile Ndlela N.O. (448/12) [2012] SZHC 197 (23 March 2012)* I had occasion to state as follows:

> '[9] Section 341 of the Criminal Procedure and Evidence Act provides as follows:

‘(1) If a complainant on oath is made to a magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, such magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.

(2) The magistrate shall thereupon enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and may order the person against whom the complaint is made to give recognisances with or without sureties in an amount not exceeding fifty rand for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.

(3) The Magistrate may, upon the enquiry, order the person against whom the complaint is made or the

complainant to pay the costs of and incidental to such enquiry.'

[10] In performing his duties or functions under the above section, a magistrate does not sit as, either a civil or criminal court. It is more of an administrative function whose aim or objective is to keep or maintain peace in general. The proceedings are not a trial but an inquiry based on the complaint by the person who has initiated such inquiry. Although the complaint may reveal a crime which has been committed, the Magistrate may not return a verdict of guilt. The crown is not a party to the proceedings either. Dealing with a similarly worded section the Court in *R v Limbada , 1953 (2) SA 368 (N) at 370C – D*, where the Magistrate had stated that an inquiry of this nature was purely an administrative matter or a quasi-judicial one and therefore no criminal appeal could be filed against his decision, **Broome JP** held that '…The machinery created by sec. 387 of Act 31/1917 is designed primarily to prevent the commission of an offence rather than to deal with an offence already committed. A similar jurisdiction has been exercised by Magistrates in England from very early times. Its origin is

not clear. One view is that it depends upon a statute of Edward III, passed some 600 years ago. Another view is that it is a Common Law jurisdiction which was in existence from an even earlier date. But however that may be, the jurisdiction rests, in South Africa, upon the clear statutory basis of sec. 387.'

And dismissing the appellant's argument, the learned JP stated that '…I feel it incumbent upon me to say that it did not leave me with any impression that the Magistrate was wrong in his finding.'

[11] It is also noted that the person against whom a complaint is made, is summonsed to appear before a magistrate once such complaint is made on oath. The summons is preceded by the sworn statement and not the other way round. In the present matter this was not the case. Rather, an unsworn statement was made to a police officer and this was the basis upon which the applicant was called upon to attend court. I am mindful of course that the submitted record indicates that both parties made their presentations under oath when both appeared before the first respondent on 13th February, 2012. This, however, does not detract from the letter and spirit of the relevant provisions of the Act.

[12] In terms of rule 53 (1) (b) of this court, the official or functionary whose decision is sought to be reviewed, corrected or set aside is not only restricted to sending the record of the proceedings and reasons for his decision to the Registrar of this Court; but he is at large to include such reasons or information as he may desire to give or make, which is relevant to a just conclusion of the matter. This rule is a procedural one.'

[10] From the foregoing, it is abundantly plain to me that what the Learned Magistrate did on 09 June 2016 was not a peace binding enquiry. There was no record. There was no sworn statement before him having been made by the applicant's estranged wife. There was further, no enquiry at all inasmuch as the applicant was not heard on the issue or complaint against him. Even if the applicant had admitted having done what he was accused of having done or committed, he was still at liberty and indeed had a right to explain himself or justify his actions if he desired to do so. The first respondent had no right to summarily issue the order he made without affording the applicant the opportunity to be heard thereon. This was no peace binding enquiry at all and the resultant order was equally no order at all. It was null and void *ab origine*.

[11] Again, when the applicant appeared before the first respondent on the charge of contempt of court, the applicant had a right to be heard before a verdict on his conduct could be rendered. He was not heard at all. He was summarily convicted and sentenced. This again was grossly irregular and a violation of the rules of natural justice; that no man may be condemned without him having been afforded the chance to present his defence before the Court.

[12] A further disturbing feature or aspect of this case is the arbitrary nature or manner in which the Learned Magistrate subsequently ordered the release of the applicant from custody. Whether this occurred after the Learned Magistrate had been served with the papers herein or before that event, is inconsequential or of no moment. Having sentenced the applicant to a term of seven days of imprisonment, the magistrate had no jurisdiction in law to rescind that order and order the release of the applicant from custody. If at all he realised that he had erred in the first place in convicting the applicant, he ought to have immediately petitioned this Court to correct his error. The actions of the first respondent herein demonstrate a wantom disregard of court procedure. It was arbitrary and a near abuse of power; thus the warning in paragraph 1 above.

[13] On the issue of costs, the applicant urged this Court to grant such costs against both respondents. After careful consideration, and I must say not without any hesitation, I am of the view that the first respondent has to be given the benefit of the doubt. He must have thought he was properly using his powers qua magistrate in doing all that he did. He was of course in serious error. A judicial officer is generally immune from liability for acts of commission or omission committed by him or her in the performance of his or her judicial function. However, I find no reason why the second respondent (Swaziland Government) should escape an adverse order for costs. This is particularly so because notwithstanding the many glaring irregularities in what the first respondent did, the matter had to be postponed on two occasions on account of the second respondent insisting that there was nothing wrong or irregular that was committed by the first respondent. That stance was, to say the least, startling or baffling.

[14] For the foregoing, I made the following order:

(a) The decision of 1st Respondent issued on the 28th June 2016 is hereby reviewed and set aside.

(b) The 2nd Respondent is to pay the costs of suit.

MAMBA J

For the Applicant: **Mr M. V. Nxumalo**

For the Respondents: **Ms T. Motsa**