



IN THE HIGH COURT OF ESOWATINI

JUDGMENT

In the matter Between:

Case No.1307/2021

SABELO SIMELANE

Applicant

And

THE NATIONAL COMMISSIONER OF POLICE

1st Respondent

THE CHAIRMAN OF THE CIVIL SERVICE

COMMISSION

2nd Respondent

SENIOR SUPERINTENDED SEMEON MAMBA

3rd Respondent

THE ATTORNEY GENERAL N.O.

4th Respondent

Neutral citation

Sabelo Simelane v The National Commissioner of Police and Others (1307/2021) [2021] SZHC 153

Coram

M. Dlamini J

Heard

7th September, 2021

Delivered

16th September, 2021

.from tlte entire reading of subsection (5), it is clear that the inte1pretation at paragraph 12 herein does not consider the last wording in the subsection, namely, "subject to any delegation of that responsibility." It remains for me therefore to import this wording of the enactment in the quest to finding out the powers of the pt respondent with regard to discip/ina,y procedures. [14]

Bearing in mind that the section establishing the Service and the office of the pt respondent and under section 189(5) a delegation by the Commission of its functions and powers is provided for, section 181(1) of the Constitution is therefore applicable. [16]

From section 11(5)(e) above it is clear that the Commission has already delegated powers of taking "preliminmy inJJestigation or disciplil1a,11 enquil:v against any officer" as the section does not read, 'shall delegate' but "delegates. [18]

Turning to the Commission at hand, it is elem· that its powers and jimctions are subject to a "limitation" defined under section 189(3) and (5) of the same enactment (Constitution). This limitation is to the effect that the pt respondent is enjoined with disciplinary powers of the Sen,ice. The rationale for this position prescribed by both the Constitution and the enabling Act is that the pt respondent is at the apex of a service that is expected to maintain peace and order in the countJ:11. To subject him to any limitation in so far as disciplinary powers are concerned would be a mocke1:v of his powers to

"command" and superintend (control) the Service endowed upon him

by the same section 189(3) of the Constitution. [20]

Summary: The applicant's bone of contention is that following the dispensation of the 2005 Constitution (Constitution) and the promulgation of 2018 Police Service Act, the 1st respondent's disciplinary powers now vests in the Police Service Commission (the Commission). In *contra*, the respondents submit that there is no need to re-invent the wheel as case law settled the matter by pointing out that both enactments retained the disciplinary powers to the 1st respondents.

The Parties

- [1] The applicant described himself as an adult liSwati male and a police officer stationed at Mankayane region of Manzini.
- [2] The pt respondent is appointed in terms of section 189(4) of the 2005 Constitution read together with Section 4(2) of the Police Service Act No.22 of 2018 Act (the enabling Act). The 2nd responded is a Commission established in terms of Section 186 of the Constitution. The 3rd respondent is the Chair of the impugned disciplinary tribunal.

The applicant's case

- [3] The applicant has contended that about August 2020 he was charged with a number of offences emanating from the Act. **He** then pleaded:

"5.7. I humbly state that it is unclear to me to where the First Respondent derives authority to establish the tribunal. A closer look at the charges it appears they fall under the

ambit of Part V of the Act. The administrative boards therein have no power to discipline Police Officers in view of section 189(5) of the Constitution and Section 23 of the Act. "

"6. DISCIPLINARY TRIBUNAL UNLAWFUL AT IT IS INCONSISTENT WITH THE CONSTITUTION AND THE ACT

I am advised and verily believe that the disciplinary tribunal appointed by the second Respondent is unlawful and inconsistent with sections 189(5), 173(4) read with section 176(1) and 178 of the Constitution as read together with section 267(a) (iii) as well as section 17 of the Act which creates a sector commission to deal with disciplinary proceedings against police officers like myself" ¹

[4] He concluded:

"I am advised and verily believe that the promulgation of the Act ushered in a new era in the disciplinary regime of Police Officers. The Act is section 17 thereto establishes a Sector Service Commission in terms of section 189(5) of the Constitution. Therefore, as it stands and presently, the First Respondent has no authority in law to institute disciplinary proceedings against any Police Officer including myself." ²

¹ Page 15 paragraph 5.7, 6 of the book of pleadings

² Page 16 paragraph 6.1 of the book of pleadings

Respondents' answer

Points in limine

- [5] Although the respondents raised a *point in limine* challenging urgency, by reason of respondents consenting to the grant of a *rule nisi* and both Counsel agreeing on filling time frame, the *point in limine* fell off. The respondents also raised other points of law, such as non-joinder and failure to satisfy the requirements of a declaratory order in their answering affidavit. However, same were not pursued on the hearing date.

Merits

- [6] On the merits, the respondents referred this court to an authority where the issue raised by applicant was decided. The upshot of respondents' submission was that section 189 (4) of the Constitution and section 17(1) of the enabling Act did not change anything in so far as the powers of the 1st respondent to discipline his subordinates were concerned. The 1st respondent had full authority to institute and hold disciplinary proceedings and hearings.

Issue

- [7] The question for determination is crisp. Does the 1st respondent have powers to institute disciplinary actions either himself or by delegation to a tribunal instituted by him against his subordinates?

Adjudication

[8] The first point of call on the issue serving before me is the Constitution. Both Counsel referred this court to section 189(3). For purposes of clarity, it is apposite to cite the entire section as it reads:

"(1) The Royal Swaziland Police Service shall be responsible for preserving the peace, for prevention and detection of crime and the apprehension of offenders. "

"(2) The Police Service shall have and exercise such other powers and functions as may be prescribed. "

"(3) Subject to any lawful superior orders, the command and overall superintendence of the Police Service shall vest in the Commissioner of Police who shall also be responsible for the administration and discipline of the Police Service. "

"(4) The power to appoint a person to hold or act in the office of Commissioner of Police (including that of Deputy Commissioner of Police) and the power to discipline and remove from office that person shall vest in the King acting on the advice of the minister responsible for the Police Service and the recommendation of the appropriate service commission or similar body. "

"(5) Subsection (4) does not apply in respect of officers below the rank of Deputy Commissioner of Police who, pending

*the formal establishment of a sector service commission to any delegation of that responsibility."*³

[9] I must, from the onset, point out that in navigating the powers of the 1st respondent, it is pertinent that an assessment of the functions of the Police Service (Service) be examined. This is because whatever 1st respondent's powers, they have a bearing on the purpose of the Service. The legislators, aware of this position, wisely commenced by defining the functions of the Service. Subsection (1) prescribes the core function of the Service. No doubt, it is to maintain peace and security in the Kingdom. Subsection (2) provides that there shall be other expressed functions of the Service.

[10] Turning to subsection (3), first and foremost, it is difficult to gainsay that the wording of subsection (3) viz., "*the command and overall superintendence*" are forceful and selective words at the instance of the legislature. These words, "*the command and overall superintendence*" of the Service vest in the 1st respondent translates into that the 1st respondent is the man at the helm of the Service. 1st respondent is mandated to drive and control the Service. The preceding words, again at the instance of the writers of the Constitution, "*who shall also be responsible for the administration and discipline*" of the Service are therefore not surprising by reason that they are a natural consequence of the power to "*command*" the Service. Of course, his powers are subject, according to the same subsection, to lawful superior orders,

³ Section 189 of Constitution

namely, those above him, presumably the line minister who is the Prime Minister or the appointing authority described in subsection (4).

[11] Subsection (4) is about the appointment, discipline and removal from office of both 1st respondent and his deputy or those acting in their capacities. Such powers lie with the Crown on the advice of the Prime Minister and recommendations of the Police Service Commission.

[12] Then there is subsection (5) who at a cursory reading seems to somehow create a confusion. The confusion emanates from the reason that subsection (4) does not deal only with the appointment of the position of the 1st respondent, his deputy or those acting but also with disciplinary and removal from office as well. Subsection (5) reads that officers occupying any rank below that of the Deputy Commissioner shall not be appointed, disciplined or removed from office by the Crown as is the case with the 1st respondent, his deputy or those acting in such capacities. They are to be appointed, disciplined and removed from their offices, with the advent of the Police Service Commission, by such Commission. This is the subsection relied upon by the applicant *in casu*. This leads me to the following question.

Does section 189(5) of the Constitution remove the disciplinary powers of 1st respondent vested in him by the same section 189(3)?

[13] In order to attend to the above poser, it is apposite to regurgitate section 189(5). It is as follows:

"Subsection (4) does not apply in respect of officers below the rank of Deputy Commissioner of Police who, pending the formal establishment of a sector service commission or similar body, shall continue being the responsibility of the Civil Service Commission, subject to any delegation of that responsibility.

[14] Now, from the entire reading of subsection (5), it is clear that the interpretation at paragraph 12 herein does not consider the last wording in the subsection, namely, *"subject to any delegation of that responsibility."* It remains for me therefore to import this wording of the enactment in the quest to finding out the powers of the 1st respondent with regard to disciplinary procedures.

[15] Before turning to the enabling Act of the Commission, I must look at the Part that deals with the sector service commission in the Constitution. As correctly referred to by the applicant's Counsel, the sector service commission is established in terms of Part 1, section 173(1) of the Constitution. Section 176(1) refers to the functions of the Commission as being appointments, promotion, transfers, and selection of candidates for appointment, confirmation and termination of appointments, disciplinary control and removal from office officers in the public service such as the applicant. However, there is section 181(1) which addresses delegation of the functions of the Commission. It reads:

"Except as may be specified in this Constitution or any other law, nothing in this Constitution shall be construed as preventing a

service commission from delegating any of its powers or functions to a principal secretary or head of department, or any other person or body of persons or line managers in respect of certain grades or ranks of officers. "

[16] Bearing in mind that the section establishing the Service and the office of the 1st respondent and under section 189(5) a delegation by the Commission of its functions and powers is provided for, section 181(1) of the Constitution is therefore applicable. Section 181(2) prescribes that a proper framework for regulating the delegated functions must be put in place where a delegation has been implemented. The next question is whether the Commission has delegated its disciplinary powers to the 1st respondent and whether there is such framework.

[17] Section 11(5) of the enabling Act reads:

"For purposes of this Act and for proper administration of the Police Service the Commission delegates to the National Commissioner the power to-

- (a) *recruit, appoint, train or promote any fit and proper person to be a member of the Police Service below the rank of inspector;*

- (b) *subject to the Constitution, select candidates for promotion by the Commission to the rank of Inspector and above but below the rank of Deputy National Commissioner;*

- (c) *select and appoint any fit and proper person who possesses special skill and experience to perform a specific duty or task under such terms and conditions as may be approved by the Commission;*
- (d) *transfer or post police officers from one duty station to another and within sections or departments; and*
- (e) *take preliminary investigation or disciplinary inquiry against a1111 officer on disciplinary offences, breaches of regulations, instructions or orders including failure to observe working hours. "*⁴ (my emphasis)

[18] From section 11(5)(e) above it is clear that the Commission has already delegated powers of taking "*preliminary investigation or disciplinary enquiry against any officer*" as the section does not read, 'shall delegate' but "*delegates*". Glaring however, from this section is that the delegated power to dismiss or terminate services by the 1st respondent is missing. This prompts one to interpret section 11(5)(e) to the effect that the 1st respondent's powers are limited to holding disciplinary enquiries and not taking disciplinary actions. However, this interpretation falls short at section 45 which empowers the 1st

⁴ Section 11(5) of the Police Service Act

respondent to terminate services of his officers for disciplinary offences. In other words, disciplinary inquiries must be read to include disciplinary actions. To add weight to this interpretation, if the legislature intended the disciplinary powers of the 1st respondent to be confined to inquiries, it would not have first authored, "*take preliminary investigation*" first before saying "*take disciplinary inquiries.*" The repetition is not superfluous. It would further have not prescribed that the 1st respondent has power to dismiss or terminate the services of an officer who is found guilty of a disciplinary offence as it did under section 45(1) of the enabling Act.

[19] Section 185 of the Constitution states:

"This Part applies subject to any express limitation or enlargement to all service commission or similar bodies established under this Constitution or any other law. "

[20] "*This part*" refers to Part 1 which deals with sector service commission. Turning to the Commission at hand, it is clear that its powers and functions are subject to a "*limitation*" defined under section 189(3) and (5) of the same enactment (Constitution). This limitation is to the effect that the 1st respondent is enjoined with disciplinary powers of the Service. The rationale for this position prescribed by both the Constitution and the enabling Act is that the 1st respondent is at the apex of a service that is expected to maintain peace and order in the country. To subject him to any limitation in so far as disciplinary powers are concerned would be a mockery of his powers to "*command*" and superintend (control) the Service endowed upon him by the same

section 189(3) of the Constitution. In the result, I agree with the outcome and not the reasoning in the case of **Sibusiso Patric Shongwe v the National Commissioner of Police and Others**⁵. With the greatest of due respect, it would be folly of the drafters of the Constitution to mention all the sector service commission. There are no contradictions in section 189(3) and (5) of the Constitution as demonstrated above.

[21] Is there a framework in terms of section 181(2) of the Constitution? Certainly, as the enabling Act is infested with provisions on how the 1st respondent is to exercise such delegated powers.

[22] In the final analysis, I enter as follows:

[22.1] Applicant's application is dismissed;

[22.2] No order as to costs.

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M.DLAMINI

For applicant

S. Nhlabatsi from Motsa Mavuso Attorneys

For respondents

M. Mashinini from The Attorney General's Chambers

⁵Case No. 1898/19 (HC)