

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 12/2000

In the matter between:

ELIAS V. DLAMINI APPELLANT

AND

PRINCIPAL SECRETARY IN THE MINISTRY

OF AGRICULTURE AND COOPERATIVES 1st RESPONDENT

SWAZILAND GOVERNMENT 2nd RESPONDENT

CORAM: J. BROWDE, J.A.

J.H. STEYN, J.A.

C. E. L. BECK, J.A.

For the Appellant: P.R. DUNSEITH

For the Respondents: M. L. M. MAZIYA

JUDGMENT

Beck J.A.

On the 23 March 1999 the appellant, who is a civil servant employed as Senior Clerical Officer in the Ministry of Agriculture and Co-operatives, was notified in writing by the first respondent, who is the Principal Secretary in the afore-mentioned Ministry, that disciplinary action was being contemplated against the appellant on the strength of allegations of corruption and that pending the outcome of a Departmental Commission of Enquiry the Prime Minister had authorised the first respondent to interdict the appellant in terms of clause 39 of the Civil Service Board (General)

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Regulations, 1963. The first respondent further informed the appellant that during the period of interdiction he would be paid only half of his salary.

In November 1999 the appellant applied to the High Court by way of notice of motion for the following relief:-

1. Waiving the usual requirements of the rules of Court regarding notice and service of application and hearing the matter as one of urgency.
2. Declaring the interdiction of the Applicant by the 1st Respondent from performing his duties as unlawful and null and void ab initio.

3. Reinstating the Applicant to his post of Senior Clerical Officer.
4. That the deduction of the Applicant's salary by half his normal Emoluments be declared unlawful and null and void and that Applicant be refunded all amounts deducted from his salary.
5. Setting aside such interdiction on the grounds that the Applicant had not been afforded a hearing prior to his interdiction and that no disciplinary hearing has been held within a reasonable time.
6. A Rule Nisi do hereby issue calling upon the Respondent to show cause on a date to be determined by this Honourable Court why orders 2, 3 and 4 should not be made final.
7. Costs, but only in the event of this application being opposed.

Various grounds were advanced by the appellant for the relief that he sought. He contended firstly that both the interdiction and the reduction of his salary were unlawful in that nobody other than the Prime Minister, or any Minister specially delegated by the Prime Minister, has the right to interdict, and to reduce the emoluments of a government employee, pursuant to the power to do so that is conferred by section 39 of the Civil Service Board (General) Regulations, 1963,

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whereas it was the first respondent, and not the Prime Minister or a Minister delegated by him to do so, who in fact purported to interdict the appellant and to halve his emoluments.

This contention was rejected in the court a quo. The learned judge who heard the application in the High Court held that section 12 (1) of the Interpretation Act, 1970, empowers the Prime Minister to delegate to any person he chooses such powers as he, the Prime Minister, is lawfully entitled to exercise, and therefore the delegation by the Prime Minister to the first respondent of the powers conferred on the Prime Minister by section 39 of the Civil Service Board (General) Regulation, 1963, was a lawful delegation.

That decision is now challenged by the appellant in this appeal, and if this challenge succeeds it becomes unnecessary to deal with any of the other grounds upon which the appellant unsuccessfully relied for the relief that he sought from the High Court. I turn therefore to consider whether the power to interdict the appellant and to reduce his emoluments was a power that could lawfully have been delegated to the first respondent to exercise.

The starting point is to be found in section 3 (1) of the Civil Service Order No. 16 of 1973. That section reads:-

"3(1) There shall be a Civil Service Board for Swaziland which shall consist of a chairman and not less than four members who shall be appointed by the King on such terms and conditions, including the amount of remuneration payable to them, and for such period as he may deem fit, but subject to this King's Order - in - Council and the Proclamation, the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers are vested in the Prime Minister who may however delegate such functions and duties to an Assistant Minister."

The portion of the above-quoted provision that is of importance to the issue under consideration is that which vests "disciplinary control" of public officers in the Prime Minister, and which empowers the Prime Minister to delegate his functions and duties to an Assistant Minister. The appellation "Assistant Minister" is not statutorily defined and can only be taken to mean any

Minister other than the Prime Minister.

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The interdiction of officers and the reduction of their emoluments during interdiction are powers that are conferred on Ministers by sub-sections (1) and (3) of section 39 of the Civil Service Board (General) Regulations, 1963. That section is contained in Part V of the said Regulations, the heading of which reads "Disciplinary Control and Proceedings".

Sub-sections (1) and (3) of section 39 of the Civil Service Board (General) Regulations, 1963, read as follows:-

"39.(1) If the Minister considers that the interests of the service require that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if disciplinary proceedings are being taken or are about to be taken or if criminal proceedings are being instituted against him.

(3) An officer who is interdicted shall... receive such emoluments, not being less than one half of his normal emoluments as the Minister thinks fit."

Section 2 of these Regulations defines the word "Minister" as follows;

" 'Minister' means the Prime Minister and includes any assistant Minister to whom he has delegated any duties or functions under the Civil Service Order, No.16 of 1973."

It is, I think, clear from the above-quoted statutory provisions that it is only the Prime Minister, or a Minister delegated by him, who may interdict an officer and reduce his emoluments. In the instant case this was not done. The Prime Minister delegated his powers of interdiction and of reducing the appellant's emoluments, not to another Minister, but to the first respondent who is a Principal Secretary, and unless there are other statutory provisions that may be relevant, Mr Dunseith's submission on behalf of the appellant that the interdiction was null and void would seem to be unanswerable. In the court a quo however, reliance was placed, as I have already indicated, on section 12 (1) of the Interpretation Act, 1970, to lend validity to this delegation by the Prime Minister to the first respondent of the Prime Minister's power to interdict the appellant and to halve his salary. Section 12 (1) of the Interpretation Act reads as follows:

" 12. (1) Where by law a Minister is empowered to exercise any powers or perform any duties, he may depute any person by name or the person for the

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time being holding the office designated by him to exercise such powers, other than the power to delegate and the power to make subsidiary laws, or perform such duties on his behalf subject to such conditions, exceptions and qualifications as he may prescribe; and thereupon or from the date specified by him the person so deputed shall have and exercise such powers and perform such duties."

Mr Dunseith submitted that this section in the Interpretation Act cannot be relied upon to enlarge the limited powers of delegation that are accorded to the Prime Minister by section 3 (1) of the Civil Service Order No.16 of 1973 in relation to functions and duties affecting "the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers," these being functions and duties of such importance that the legislature clearly intended that they should be vested only in the Prime Minister, or in a Minister delegated by him.

That submission is, in my view, correct. Moreover it is an accepted principle of statutory interpretation that where there is a conflict between two statutes dealing with the same subject (in this case, the power to delegate) the general rule is that the later statutory provision should prevail (in this case, the Civil Service Order of 1973). This is more particularly so when the earlier provisions are contained in an enactment that is of a general nature and are inconsistent with later provisions that are contained in an enactment of a special nature, (Kellaway: Principles of Legal Interpretation at page 369). In the instant case the provisions of section 12 (1) of the Interpretation Act deal with powers of delegation entrusted not only to a Prime Minister, but also to any Minister, in relation to all his Ministerial functions and duties (save only that of making subsidiary laws), whereas the later provisions of section 3(1) of the Civil Service Order deal with powers of delegation entrusted to a Prime Minister only, and only in relation to certain of his functions and duties that are specified.

For a reason that I shall mention later I pause here to record that when Mr Dunseith came to the end of his argument before us, we had reached the end of the day and the court adjourned to the following morning, when Mr Maziya, who appears for the respondents, commenced his argument. Mr Maziya then advanced an argument in relation to the issue of delegation that had neither been addressed to the court a quo, nor had it been incorporated in his written Heads of Argument that were before us.

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The reason for this was that overnight Mr Maziya had discovered a piece of legislation to which no reference had previously been made.

This piece of legislation is King's Proclamation No. 1 of 1981, section 10 of which is in the following terms:

"10.(1) There shall continue in existence an independent Civil Service Board or similar body established by law which shall be responsible for the recruitment and appointment to, and promotion and discipline of persons in, the civil service.

(2) The Board or such other body shall liaise with all the Ministers in respect of recruitment policy but will be completely independent of and not subject to any ministerial or political influence in the selection of persons for appointment or promotion or in respect of its disciplinary function."

Mr Maziya submits that this section of the King's Proclamation No.1 of 1981 is inconsistent with the whole of section 3 (1) of the Civil Service Order No. 16 of 1973 and, being the later statutory enactment, must prevail. He then submitted further that interdiction, and reduction of emoluments during interdiction, are not embraced within the function of "discipline of persons in the civil service" that is now vested, by the King's Proclamation No.1 of 1981 in the Civil Service Board. If that is so then, so his argument goes, one falls back on section 39 of the Civil Service Board (General) Regulations of 1963, as being the only legislation that pertains to interdiction and reduction of emoluments and therefore, section 3 (1) of the Civil Service Order No. 16 of 1973 no longer being operative, the Prime Minister's power to interdict and to reduce emoluments may be delegated to anyone he chooses in terms of section 12 (1) of the interpretation Act.

In my view the fallacy in this argument lies in the contention that the power to interdict, and that of ordering a reduction of emoluments during interdiction, is power that falls outside the parameters of the power to discipline. I have already emphasised that section 3 (1) of the Civil Service Order No.16 of 1973 vested in the Prime Minister the function, inter alia, of "disciplinary control" of public officers, and that the powers of interdiction and of ordering a reduction in emoluments that is contained in section 39 of the Civil Service Board (General) Regulations, 1963, are to be found

in a part of those Regulations which falls under the heading "Disciplinary Control and

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Proceedings." The power to interdict a public officer is an important and necessary aspect of the power to exercise disciplinary control over officers whose alleged misconduct exposes themselves to being disciplined, and whose continued performance of the duties entrusted to their office carries the risk that proper enquiry into their misconduct may be hampered and/or that the misconduct may continue.

Mr Dunseith found himself unable, in reply, to counter Mr Maziya's submission that section 10 of the King's Proclamation No.1 of 1981 is inconsistent with, and must be taken to have superseded section 3 (1) of the Civil Service Order, 1973, and it seems to me that this is clearly the case. However, he submitted that if interdiction is part of the disciplinary control of public officers that section 3 (1) of the Civil Service Order, 1973, vested in the Prime Minister, and in any Minister whom the Prime Minister may delegate, then the 1981 Proclamation must necessarily be inconsistent with section 39 (1) and (3) of the Civil Service Board (General) Regulations, 1963, as well. I agree that this conclusion must logically follow if interdiction and emolument reduction are, as I hold them to be, aspects of disciplinary control, and therefore of the discipline of persons in the civil service, which function now reposes in the Civil Service Board by reasons of the 1981 Proclamation. It seems to me to be very unlikely that the legislature could have contemplated vesting in the Civil Service Board the power to discipline persons in the civil service while leaving in the hands of Ministers the power to interdict such persons and to reduce their emoluments while under interdiction.

While King's Proclamation No.1 of 1981 has vested in the Civil Service Board, and only in that Board, the power to discipline persons in the civil service, it has omitted to clothe the Civil Service Board with the power to delegate any of its disciplinary powers. The consequence of this is that the interdiction of the appellant in the instant case, and the reduction of his emoluments, must be held to have been invalid and void ab initio. Section 12 (1) of the Interpretation Act can be of no application if the Prime Minister's power to interdict and to reduce emoluments has been ended by vesting in the Civil Service Board the power to discipline, leaving the Prime Minister with nothing to delegate. The situation created by the 1981 Proclamation can, of course, readily be rectified by conferring upon the Civil Service Board the right to delegate

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such functions of disciplinary control as it may be desirable to make capable of being delegated.

In conclusion I consider it advisable to record that the various enactments to which I have referred, and which lead to the conclusion that I have reached, are the only enactments of which we are aware that can have a bearing upon the issue that has fallen for decision in this case. The need for a thorough revision and compilation of the statute law of Swaziland is most necessary, and is pressingly urgent, as the eleventh hour discovery by Mr Maziya of the 1981 Proclamation has demonstrated.

The decision that the interdiction of the appellant, and the reduction of his emoluments, by the first respondent, acting under authority delegated to him by the Prime Minister, is invalid, has rendered it unnecessary to deal with the further submissions by Mr Dunseith concerning the failure by the respondent to observe the natural justice rule of audi alteram partem. Certainly the reduction of the appellant's emoluments without affording him an opportunity of making any representation in that regard was, I consider, indefensible. In this connection I refer to the judgment of this court prepared by my brother Steyn J.A. in the matter of Secretary to Cabinet and Others vs Ben M. Zwane, Civil Appeal 2/2000, which is being delivered contemporaneously

with the judgment in this appeal.

In the result the appeal is allowed with costs, and the order of the court a quo is set aside and the following order is substituted:-

1. The interdiction of the applicant is declared unlawful and null and void ab initio;
2. The reduction of the applicant's salary by half his normal emoluments is declared unlawful and null and void, and the applicant is to be refunded the amounts so deducted.
3. The respondents are ordered to pay the costs of the application.

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C. E. L. BECK J.A.

I agree

J. BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered in open Court on this 13th day of December 2000