IN THE SUPREME COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO. 34/2006

In the matter between

MALUNGISA MAHLALELA	**APPELLANT**
Vs	
THE PRIME MINISTER	**1st RESPONDENT**
THE COMMISONER OF POLICE	**2nd RESPONDENT**
SENIOR SUPERINTENDENT K.S. NDLOVU N.O	**3rd RESPONDENT**
THE ATTORNEY GENERAL	**4th RESPONDENT**

Coram: Steyn JA

Tebbutt JA

Banda JA

For the Appellant: MR. L. MAMBA

For the Respondent: MR. J. MAGAGULA

JUDGMENT

BANDA JA

[1] The appellant, who had been a member of the Royal Swaziland Police Force, was dismissed from the force after being found guilty of disciplinary offences by the Board of officers appointed in terms of Section 13 of the Police Act (the Act). He applied, by motion to the High Court, for review where he sought an order to set aside the decision of the Commissioner of Police who had directed that the appellant should not continue to be a member of the force. That application was dismissed with costs and it is against that judgment that the appellant now appeals to this court.

[2] Section 12 of the Police Act gives power to the Commissioner of Police to institute disciplinary proceedings against an offending officer. It was under Section 12 (2) of the Act that the disciplinary proceedings were instituted against the appellant. Section 12 (2) of the Act provides in the following terms:-

> **"12 (2) Any member of the force below the rank of inspector shall be liable to trial and conviction for any offence against discipline by any senior officer under whose command such member is or any other senior officer deputed thereto by the Commissioner".**

And the proviso to that section states as follows:-

> **"Provided that where it appears to such senior officer that the offence would, by reason of its gravity or by reason of its repetition or for any other reason, be more properly dealt with by a court or a Board, he shall defer his verdict and report the facts to the Commissioner who may either return the report for further enquiry or order the accused to be tried before:-**
>
> > **"(a) a Senior officer; or**
> > **(b) a Board; or**
> > **(c) a Court".**

[3] The appellant was charged with five disciplinary offences. The evidence which

was placed before the court below is that the appellant appeared before a senior officer Superintendent B.M. Ngwenya. A trial of the appellant was commenced before Superintendent Ngwenya but before any evidence was called the appellant informed Superintendent Ngwenya that he wished to be defended and he mentioned the name of the attorney who was to defend him. The appellant then asked for an adjournment of the proceedings to another date to enable his attorney to attend. When adjourning the proceedings Superintendent Ngwenya stated as follows:

> **"Since the defaulter wishes to be defended, I am requesting the Commissioner of Police to appoint a Board to hear his case. Furthermore I have read the charge sheet and I consider that this is a serious matter, which needs to be tried by a Board".**

Under Section 17 of the Act, it is only trials before a Board or a Magistrate's Court where an accused is entitled to be represented by a legal practitioner admitted to practice in the Kingdom. He has no such right in a trial before a senior officer.

[4] Mr. Mamba, for the appellant has submitted that it was wrong for Superintendent Ngwenya to stop the proceedings before him and that he should have heard evidence first before he could defer his verdict. He contended that the provisions of Section 12 (2) are clear and unambiguous and that the use of the word "shall" connotes peremptoriness of the provision. He, argued therefore, that disciplinary proceedings, against an officer of the rank of the appellant before a senior officer, must reach the stage of a verdict before the proceedings can be deferred; that the appellant should have been allowed to plead to the charges, evidence given and submissions made. He submitted that it was only after the senior officer had heard evidence could he report the matter to the Commissioner of Police. Mr. Mamba has further contended that because Superintendent Ngwenya did not correctly follow the provisions of Section 12 (2) of the Act, the Commissioner did not have the power to appoint the Board in the absence of a report regularly submitted by a senior officer and that consequently the Board did not have the power to make a recommendation to the Commissioner and that the

latter did not have the power to dismiss the appellant. In other words, Mr. Mamba has submitted that the proceedings of the Board and the order of the Commissioner dismissing the appellant were null and void. Mr. Mamba has submitted that these actions by the Board and the Commissioner constituted a fundamental irregularity because they proceeded from an illegal premise.

[5] It is our considered view that Superintendent Ngwenya properly followed the requirements of the proviso to Section 12 (2) of the Act. Superintendent Ngwenya stated that after reading the charge sheet he found that the offences against the appellant were grave as some of them involved threats to kill senior officers in the police. And since the appellant had intimated his wish to be represented by Counsel, Superintendent Ngwenya concluded that this was a proper case which should be reported to the Commissioner. The elements which must be satisfied before a senior officer defers his verdict were, in our view, present on the facts before Superintendent Ngwenya. He found that the offences were grave.

[6] Mr. Magagula appeared for the respondent and has submitted that there was a full compliance with the provisions of Section 12 (2) of the Act. He has further submitted that the intention of the Legislature, in enacting that provision, was that serious offences should not be tried by a senior officer but that they should either be referred to a court or to a Board appointed by the Commissioner. He has, therefore, asked this court not to interfere with the findings of the lower court.

[7] It is clear to us that the one issue which we have to deal with in this appeal is one of statutory interpretation. As Mr. Magagula correctly submits, the appellant is not complaining about the actual conduct of proceedings or the outcome. He does not complain that he was not afforded a proper hearing nor that the decision taken by the Board is not supported by evidence. He has not complained about the propriety or otherwise of the verdict or sentence.

[8] It is trite law that in interpreting any statute the first point to focus on is to discover the intention of the legislature and in order to do that regard must be had to the language used and in the context in which it is used and must also look at the

whole enactment; words must be given their ordinary meaning in the context in which they are used: **R v Betty Ngwenya (1970 -76) SLR 293 at 294.** Mr. Mamba has submitted that the use of the word "shall" in Section 12 (2) of the Act obliged the senior officer to hold a full trial before he could defer his verdict. In our view it is not always that the word "shall" imports obligation or "peremptoriness", care must be taken in interpreting the word "shall". The meaning to be attached to it will depend on the context in which it is used. The word can be used to imply a mandate or obligation and it can also be used to import permission or direction. For example in a statute which regulated that "Quarter sessions shall be held in April" the word "shall" was interpreted as implying a direction rather than a mandate or obligation; *vide* **Strouds Judicial Dictionary 3rd Edition Vol. 4 at page 2748-49** where it was also held that "all the various statutes as to the time for holding Quarter sessions have always been held directory". There can be no doubt, in our judgment, that the use of the word "shall" in Section 12 (2) of the Act implies direction or permission and does not connote obligation or "peremptoriness" as suggested by Mr. Mamba.

[9] We can also not agree with the Mr. Mamba's further submission that the words "defer his verdict" mean that the disciplinary proceedings must have reached the stage where the senior officer has heard all the evidence and is about to make a finding on that evidence before he can refer the matter to a court or Board. The proviso to Section 12 (2) sets out in specific terms that where it appears to the senior officer concerned that the offence, by reason of its gratuity, "would be more properly dealt with by a court or Board" i.e. rather than by the senior officer he should refer it to such court or Board. He can come to his conclusion at any time that the offence is so grave that he should not try it but that it should "more properly be dealt with by a court or Board". The officer, therefore, should on reaching that conclusion, stop the proceedings before him at whatever stage they may have reached and refer the offence to a court or Board for it to deal with it. By so doing he would, of course, be "putting off or "deferring his verdict" (see **Shorter Oxford Dictionary S.V.** "defer").

[10] If Mr. Mamba's submission were correct, it would lead to an absurd result in

which a senior officer would go through a charade of a trial and to come to a conclusion which he had already made on sight of the evidence; and there is always a presumption against the Legislature intending to produce an absurd result. In this case Superintendent Ngwenya, the senior officer on reading the charge sheet, concluded that some of the offences were serious as they involved threats to kill senior officers. The appellant had also intimated his wish to be defended by an attorney. On that basis Superintendent Ngwenya came to the conclusion that the case was not within his jurisdiction. He was, in our judgment, right on the evidence before him to come to that decision and indeed as Mr. Magagula puts it:

> **"There is no point in the Senior officer continuing with a trial which he knows he is not competent to hear and determine and that cannot have been the intention of the Legislature in making this enactment".**

[11] The issue raised in this appeal was extensively canvassed before this court in the case of **Sidumo Mamba vs Norman Mkhwanazi, Edgar Hillary, Accountant General and Attorney General - Civil Appeal No. 23/2004.**

[12] The issues raised in that case are the same as those raised in the appeal before us. That case was also concerned with the interpretation of Section 12 (2) of the Act. Mr. Mamba argued that Mamba's case is distinguishable from the present case in that in the earlier case an objection was not raised in the lower court whereas it was raised in the present case. We understand Mr. Mamba's difficulty in trying to make the distinction between the two cases. We find that Mamba's case is on all fours on the issue that was raised in it with this appeal and it is neither distinguishable nor was it wrongly decided. We are satisfied and find that the Board was properly seized with the matter before it and the Commissioner of Police properly exercised his power to dismiss the appellant from the force. We are further satisfied that the proceedings before the Board were not premised on an illegal basis and there was, therefore, no fundamental irregularity, in the manner in which its proceedings were conducted, which could vitiate them.

[13] It was held in Mamba's case that, even if it was found that the matter was not considered by a senior officer, the appellant in that case had not been prejudiced.

We would adopt the same finding in this appeal. We find, therefore, that there is no merit in this appeal.

[14] Accordingly the order of the court is that the appeal is dismissed with costs.

R. A. BANDA
JUDGE OF APPEAL

I agree

J.H. STEYN
JUDGE OF APPEAL

I agree

P. H. TEBBUTT
JUDGE OF APPEAL

16 November 2006