IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Case No. 35/2013

In the matter between

THE PRIME MINISTER OF SWAZILAND
AND OTHERS **Applicants**

And

CHRISTOPHER VILAKATI **1st Respondent**
HIS LORDHIP JUSTICE S.A. MOORE J.A. N.O **2nd Respondent**
HIS LORDHIPJUSTICEA.M. EBRAHIM J.A. N.O **3rd Respondent**
HER LADYDHIP JUSTICE E.A. OTA JA N.O **4th Respondent**

Neutral citation: *The Prime Minister of Swaziland and Others v Christopher Vilakati and Others, His Lordship Justice S.A. Moore JA N.O., Justice A.M. Ebrahim JA N.O., Justice E.A. Ota JA N.O. (35/2013)* [2014] SZSC 47 (3 December 2014)

Coram: RAMODIBEDI CJ, EBRAHIM JA, MOORE JA, OTA JA and LEVINSOHN JA

Heard: 5 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary: **Review – Of Supreme Court decision – Section 148 (2) of the Constitution – The High Court granting orders which were not prayed for – The Supreme Court, as the ultimate Court of Appeal has power to correct any manifest injustice caused by an earlier order – Held that this is such a case – Application granted as prayed with costs – The High Court's order set aside with costs.**

JUDGMENT

RAMODIBEDI CJ

[1] The real point of dispute in this matter is short and will not bear any elaboration. This is an application for review in which the applicant prays for an order against the respondents couched in the following terms:-

(1) Reviewing and/or setting aside the judgment granted by the 2nd, 3rd and 4th respondents in this Court delivered on 31 May 2013, confirming the order of the High Court that the

present 1st respondent be reinstated as a police officer forthwith with effect from his date of dismissal.

(2) Reviewing and/or setting aside the judgment granted by the 2nd, 3rd and 4th respondents delivered on 31 May 2013, confirming the order of the High Court that the present 1st respondent be paid all his arrear salaries from the date of his dismissal.

(3) Reviewing and/or setting aside the judgment granted by the 2nd, 3rd and 4th respondents on 31 May 2013, confirming the decision of the High Court that Section 13 (2) of the Police Act required that proof be beyond reasonable doubt for an officer to be found guilty of an offence in terms of the Police Act.

[2] The application for review is brought in terms of Section 148 of the Constitution. This section provides as follows:-

"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court,

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."

[3] Properly construed, this section reaffirms the inherent common law power of this Court, as the ultimate Court of Appeal in this country, to review and correct any manifest injustice caused by an earlier order improperly made. Put differently, there is no relevant statutory limitation on the jurisdiction of this Court in this regard and, therefore, the court's inherent jurisdiction remains unfettered. See, for example, such cases as **Cassell & Co Ltd v Broome (No.2) 1972 AC 1136 (HL); R v Bow Street**

Metropolitan Magistrate and Others *ex parte* Pinochet urgate No. 2 1999 All ER 577 (HL).

[4] Furthermore, there is a fundamental presumption which is well-known. This is that the Legislature did not intend to alter the existing common law more than is necessary. Similarly, there is a presumption against construing a statute so as to oust the jurisdiction of the superior courts in particular. In this regard I draw attention to the following apposite remarks of Solomon CJ in **De Wet v Deetlefs 1928 AD 286** at 290:-

> *"It is a well-recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature."*

[5] I should point out that when the foregoing principles were pointed out to him during argument in this Court, Mr N.D. Jele for the 1st respondent properly conceded, in my view, that this Court does have jurisdiction to correct manifest injustice. In

these circumstances, and having regard to the peculiar facts pertaining to the matter as will become apparent shortly, I hold the firm view that this is such a case.

[6] The material facts in this matter are hardly in dispute. On 30 August 2007, and following his disciplinary hearing on an allegation of a theft of a motor vehicle, the present 1st respondent ("the respondent") who was a police officer was dismissed from the police service.

[7] On 30 April 2012, the High Court reviewed and set aside the decision to dismiss the respondent.

[8] The parties are on common ground that in reviewing and setting aside the respondent's dismissal, the High Court went further and granted orders which were not prayed for. These were recorded as follows:-

"(b) The Respondents are directed to reinstate the Applicant as a police officer forthwith with effect from the date of dismissal on the 30th August 2007;

(c) The respondents are directed to pay the Applicant his arrears of salary from the date of dismissal on the 30th of August 2007."

[9] Those orders have since become the subject of intense litigation between the parties in the course of which this Court has had to deal with the matter at least on two different occasions. It is common cause, however, that on both occasions the Court never dealt with the merits of the matter. What served before the Court was simply the question of condonation and whether or not the applicant's appeal should be reinstated. It is, therefore, the first time that this Court is called upon to determine whether the High Court was correct to grant orders which were not sought or prayed for as set out in the preceding paragraph.

[10] It is of fundamental importance to note that this Court has laid down a salutary principle, which binds all the courts in this

jurisdiction, that a litigant can also not be granted that which he/she has not prayed for in the *lis*. See **Commissioner of Correctional Services v Ntsetselelo Hlatshwako, Civil Appeal No. 67/09; The Commissioner of Police and Another v Mkhondvo Aaron Maseko, Civil Appeal No. 03/2011**; **Sandile Hadebe v Sifiso Khumalo N.O. and Others, Civil Appeal Case No. 25/2012; Umbane Limited v Sofi Dlamini and 3 Others, Civil Appeal No. 13/2013; Bhembe v Bhembe Civil Appeal No. 23/2013; Nxumalo Attorney General, Case No. 50/2013**. The position in Lesotho is similar. See, for example. **Makhetha and Another v Commissioner of Police and Another LAC (2007 – 2008) 122**.

[11] For the avoidance of doubt, it bears repeating the apposite remarks of this Court in the case of **Commissioner of Correctional Services v Ntsetselelo Hlatshwako (supra)** at paragraphs [7] to [8], namely:-

"[7] At the outset it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view incompetent for the court a quo to make the order in the absence of an amendment of the notice of motion. This part of the order was unfair both procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the lis.

[8] The first order setting aside the decision of the Disciplinary Board was incompetent for another reason. This is that the Disciplinary Board was not a party to the proceedings. There was no prayer for that matter reviewing the proceedings of the Disciplinary Board which recommended the respondent's dismissal by the applicant. It is, therefore, inconceivable that the court a quo could grant an order in question in the circumstances."

[12] It is important to stress that the issue of reinstatement has to be canvassed and the background circumstances pertaining to the matter fully investigated before an order may competently be made. Each case must obviously depend on its own peculiar circumstances.

[13] Despite these clear guidelines, painstakenly laid down by this Court, it is astonishing that the court a quo still proceeded to grant orders which were admittedly not prayed for in the *lis*. The manifest injustice contained in those orders is self-evident. Unless this injustice is corrected it means that the applicant is stuck with an unwanted employee in circumstances where employer and employee relations have ostensibly deteriorated for years. Such a course was, in my view, correctly discouraged in the case of **Schierhout v Minister of Justice 1926 AD 99** at 107. Similarly, it means that the applicant now has to foot the bill for payment of the respondent's salary arrears stretching for years now, in circumstances where there is no evidence that he has performed his duties or that he has tendered to perform them. See, **Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All ER 633 (PC)**. I conclude, therefore, that in both situations, which are governed by the impugned orders in the present matter, the respondent's remedy lies in damages. The orders in question are incompetent.

[14] For the sake of completeness, I draw attention to the fact that the respondent has unsurprisingly offered no contest to the relief sought by the applicant in paragraph [1] (3) above relating to the standard of proof required under section 13 (2) of the Police Act. Proof beyond reasonable doubt is the standard of proof applicable to criminal cases. This is not such a case. All that is required under this section is proof on a balance of probabilities. Accordingly, the High Court's order falls to be set aside without any further ado.

[15] In light of all of the foregoing considerations, it follows that the applicant's application stands to succeed. For the avoidance of doubt the following order is made:-

(1) The order of the High Court dated 30 April 2012 directing the present applicant to reinstate the respondent as a police officer forthwith with effect from the date of dismissal on 30 August 2007 is hereby set aside.

(2) The order of the High Court dated 30 April 2012 that the respondent be paid all his salary arrears from the date of his dismissal is hereby set aside.

(3) The order of the High Court dated 30 April 2012 that section 13 (2) of the Police Act requires that proof be beyond reasonable doubt for an officer to be found guilty of an offence in terms of the Act is hereby set aside. All that is required under this section is proof on a balance of probabilities.

(4) The High Court's orders are replaced with the following order:-

"The application is dismissed with costs."

(5) The respondent shall bear the costs of the present application in this Court.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree _____

S.A. MOORE

JUSTICE OF APPEAL

I agree _____

E.A. OTA

JUSTICE OF APPEAL

For Applicants **:** Mr V. Kunene

For 1st Respondent **:** Mr N.D. Jele