



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.39/2014

In the matter between:

DALLAS BUSANI DLAMINI

AND ANOTHER

VS

COMMISSIONER OF POLICE

Appellants

Respondent

Neutral citation: *Dallas Busani Dlamini & Another vs The Commissioner of Police (39/2014) [2014] SZSC 68 (3 December 2014)*

Coram: A.M. Ebrahim JA
M.C.B. Maphalala JA
Dr. B.J. Odoki JA

Heard: 18 November 2014

Delivered: 3 December 2014

Summary: *Civil procedure - review proceedings of the dismissal of police officers - Rules of natural justice not followed - decision reviewable - proceedings*

criminal in nature and test applicable for conviction is proof beyond reasonable doubt.

JUDGMENT

EBRAHIM JA:

[1] This appeal is against the decision of **Simelane AJ**, who dismissed an application brought by the appellants for review of the decision of the Commissioner dismissing them from the Police Force. The decision to dismiss them followed their conviction by a board of officers constituted in terms of the **Police Act No.29 of 1957**. They had been charged before the board with 12 counts under the Schedule of Offences framed under Regulation 20(1) of the Police Regulations 1957 as read with section 12(2) of the Police Act. On four of the charges they were charged jointly; each appellant was charged individually with a further four counts. These charges all related to allegedly unauthorised drugs raids, theft of the dagga that was seized during the raids, and falsification of the relevant registers. To these charges both the appellants (who were not legally represented) pleaded not guilty.

[2] No issue seems to have been made of the fact that a joint trial took place where the charges against each appellant were not the same.

[3] After a lengthy trial, both appellants were convicted of three of the four offences with which they were jointly charged. Of the remaining four counts on which the first appellant was charged individually, he was acquitted. The second appellant was convicted of three out of the four offences with which he was charged individually.

[4] The prosecutor argued that the required standard of proof was the civil standard - proof on the balance of probabilities. He suggested that this was in effect a labour case where the civil standard of proof applies. It appears (page 222 of the record) that the board accepted this argument and reached their conclusions on the balance of probabilities. Much was made in the board's judgment of the appellants' failure to fully cross-examine the prosecution witnesses.

[5] The appellants were sentenced to a fine of E200 each of the counts and the board informed the appellants that a

recommendation would be made to the Commissioner that they be dismissed from the police service.

[6] They brought the proceedings on review, seeking orders to the following effect:

(1) Setting aside the Commissioner's decision to dismiss them from the police force;

(2) Finding that the Commissioner's decision was **ultra vires** the Act;

(3) Setting aside the proceedings of the board.

[7] In elaboration of the application, they averred that much of the evidence before the board was either inadmissible (being hearsay) or inadequate (on identification). They argued that under the Act only the responsible Minister (the Prime Minister) could effect a dismissal, not the Commissioner.

[8] They also pointed out, **inter alia**, that in terms of section 13(2) of the Police Act, the proceedings before a board "shall conform as far as possible with the rules of procedure and evidence obtaining in the magistrates court."

[9] The learned acting Judge dismissed the application for review. His reasons for so doing can be summarised thus:

- (a) The reference in section 22 of the Act to “the Minister” was an error, when the Act was amended, the word “Minister” was changed elsewhere to “Commissioner” and section 22 should be read as though that change had been made.
- (b) Where evidence is not challenged, it “remains truthful.”
- (c) On the issue of hearsay evidence being accepted, this evidence was not challenged.
- (d) The proceedings before the board were quasi-judicial; the board was free to decide and adopt its own procedure, provided that the principles of natural justice were followed.
- (e) The burden of proof was that applicable in civil cases.
- (f) There were no irregularities or illegalities in the manner in which the board conducted the disciplinary proceedings.

[10] I will begin by looking at the requirements imposed by section 13. In my view, where a member of the police force is being charged – whether before a senior officer, a board or a magistrate – the proceedings are criminal in nature. The consequence of the proceedings can be a conviction and sentence. The Act itself uses the words “conviction”, “convicted”, “sentence” and “sentenced” (see ss20, 21 and 22). These words are associated with criminal proceedings, not with civil ones. The proceedings are not simply industrial relations disputes. They are akin to courts martial, in respect of members of the armed forces. That being so, the burden of proof is the criminal one: the prosecution must prove the accused’s guilt beyond reasonable doubt. Similarly, the “the rules of procedure and evidence obtaining in the magistrates court” must, as far as possible, be applied. As rightly pointed out in the appellant’s heads of argument, this provision is peremptory.

[11] It follows that the learned acting Judge erred in holding that the board was an administrative body, free to decide and

adopt its own procedure and that proof on the balance of probabilities was sufficient.

[12] On the question of the allegedly hearsay evidence, the board, and the court **a quo**, seemed to take the line that, because the appellants did not challenge the hearsay evidence, that evidence had to be accepted. With respect, this cannot be correct. Hearsay evidence is generally speaking inadmissible. The only way in which what was stated in such evidence could become admissible would be if the accused were to make a formal admission that the facts stated were correct.

[13] On the proposition that, because particular evidence was not challenged in cross-examination, it “remains truthful”, my view is that this approach is wrong. The evidence itself must be admissible, to begin with; it must also be reliable. The normal cautions must be observed before accepting the evidence. The mere fact that it is not challenged does not thereby make unreliable evidence reliable or inadmissible evidence admissible.

[14] The appellants were not represented at the board proceedings. Although they were policemen, who should have had at least some rudimentary knowledge of and experience in court proceedings, this does not convert them into lawyers. Too much weight should not be attached to their failure to cross-examine either on a specific point or at all. As was said by **Beadle CJ** in **S v Mutimhodyo 1973(1) RLR 76 (A)** at 80A-C:

“I want to repeat again what this court has said on a number of occasions, that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to understand clearly all the intricacies of court procedure, it is very wrong for a trial court to hold against such an accused mistakes he might make such a failure to cross-examine; to hold against him, for instance, the fact that he has not cross-examined on a particular issue because one would have expected a skilled lawyer to have done so. It is the court’s duty to assist unrepresented accused of this description in their defence and not to take technical points against them because of mistakes the accused might make in procedure.”

[15] I turn now to examine the argument that the word “Minister” in section 22 should be read as “Commissioner”. It certainly would have made sense if the word had been changed when the Act was amended, but we have to take the Act as it stands. As rightly pointed out by **Dunn J** in **Mathenjwa v Commissioner of Police, Case No.1006/91 (HC)**, cited by the learned acting Judge, such an interpretation “would place section 22 in keeping with the general approach of the Act regarding disciplinary proceedings.” But does this allow the court to depart from the so-called “golden rule” of interpretation of statutes, that words should be given their plain and ordinary meaning, unless to do so would result in absurdity or defeat the intention of the legislature? I do not think so. It may well be that the draftsmen erred by omitting to change “Minister” to “Commissioner” in section 22. But we do not know this to be so; it is possible that this omission was, for some reason, deliberate. It results, not in absurdity, but in unanomaly and a rather ponderous procedure.

For these reasons, I consider that the learned acting Judge should have set aside the dismissal and set aside the proceedings of the board. Accordingly, I allow the appeal, with costs.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE :

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I AGREE :

DR. B.J. ODOKI
JUSTICE OF APPEAL

FOR THE APPELLANTS : MR. S. JELE

FOR THE CROWN : MS. T. SIMELANE