IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 38/2015

In the matter between:

JOHN BOY MATSEBULA **Appellant**

and

THE CHAIRMAN, CIVIL SERVICE COMMISSION **First Respondent**

THE PRINCIPAL SECRETARY, MINISTRY OF WORKS AND TRANSPORT **Second Respondent**

THE ATTORNEY GENERAL **Third Respondent**

THE PRESIDING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND **Fourth Respondent**

Neutral citation	:	John Boy Matsebula and The Chairman, Civil Service Commission and 3 Others (38/2015) [2015] SZSC 01 (09 DECEMBER 2015)
Coram	:	HLOPHE AJA, CLOETE AJA and MANZINI AJA
For the Appellant	:	S. C. Dlamini
For the Respondents	:	F. Magagula
Heard	:	11 NOVEMBER 2015
Delivered	:	09 DECEMBER 2015

Summary **:** ***Review proceedings against decision of administrative body – Common Law Grounds – Absence of grave irregularity or illegality – Test is whether Accused given opportunity to state his defence and influence the decision of the administrative body.***

JUDGMENT

CLOETE -AJA

PRELIMINARY

[1] Respondents had filed an Application to postpone the Appeal to the next session of this Court in order to await the outcome of a Judgment of the High Court of Swaziland dealing with subject matter which, in their view, would have had a bearing on this matter if this matter were referred back to the Industrial Court. Counsel for the Respondents abandoned the Application and no Order for costs was made.

BACKGROUND IN BRIEF

[2] 1. The Appellant was employed by the Civil Service Commission ("CSC") as a public servant in 1976 and was attached to the Ministry of Public Works and Transport.

2. During November 2011, the CSC dismissed the Appellant after disciplinary procedures had been launched against him by CSC.

3. The Appellant reported his dismissal to the Conciliation, Mediation and Arbitration Commission ("CMAC") and on 30 July 2012 CMAC issued a Certificate of Unresolved Dispute.

4. As is apparent from the record, Appellant chose not to follow his rights in instituting proceedings for unfair dismissal in the Industrial Court, but instead, for reasons best known to him, he chose to approach the Industrial Court to review the disciplinary proceedings instituted against him by CSC under Industrial Court Case No. 487/13.

5. On 20 June 2014 the Industrial Court delivered a reasoned and detailed Judgment in the matter and dismissed the Appellant's prayer for reviewing and setting aside the decision of CSC.

6. Having failed at that level, the Appellant then brought a further review Application to the High Court of Swaziland in High Court Case No. 849/2014 praying that the Order of the Industrial Court be reviewed and corrected or set aside.

7. On 30 June 2015 the High Court delivered a reasoned and detailed Judgment in the matter and dismissed the Appellant's prayer for reviewing and setting aside the decision of the Industrial Court with costs.

8. On 30 July 2015 the Appellant lodged an Appeal with this Court appealing the Judgment of the High Court and that is the matter which is before us.

APPELLANTS GROUNDS OF APPEAL TO THIS COURT

[3] 1. *The learned Judge erred by disregarding the evidence that Vusi Musa Dlamini gave evidence before the Civil Service Commission in the absence of the Appellant and his legal representative*

*2. The learned Judge erred by **[not]** holding that the failure to hold departmental investigation was an irregularity that vitiated the proceedings.*

3. *The learned Judge erred by not appreciating that when the Appellant averred that no evidence had been led against him at the Civil Service Commission hearing he did not mean that there was a total dearth of evidence and that Appellant also meant that the evidence taken as a whole was not reasonably capable of supporting the finding of the aforesaid Commission.*

ARGUMENT BY COUNSEL FOR APPELLANT

[4] 1. As regards the first ground, Counsel persisted with the argument that one Vusi Musa Dlamini had in fact given evidence against the Appellant before the CSC in the absence of both himself and his legal representative at the time and that the Industrial Court erred by

disregarding this fact and contended that this was a valid ground of Appeal.

2. As regard the second ground of Appeal, Counsel referred the Court to various regulations which he described as being mandatory procedures because of the use of the word "shall" in each instance, which needed to be followed by CSC and in the absence of CSC following such procedures such was an irregularity that vitiated the proceedings. The references were to the regulations below;

2.1 Regulation 41of the Public Service Act 16/1973 lays downs that;

> *"if a head of department receives a report alleging the misconduct of an officer he shall cause a departmental preliminary investigation to be made in order to establish the facts of the matter so that he may decide whether he should prefer formal charges of misconduct against the officer"*

2.2 Regulation 42 of the Public Service Act 16/1973 lays down that:

1 "if the head of department considers formal charges of misconduct should be preferred against an officer he shall in consultation with the deputy Attorney-General prepare the charges setting out the misconduct alleged;

2 *The head of department shall transmit the formal charges to the officer, and call upon him to state in writing within a reasonable specified time any grounds upon which he wishes to reply to exculpate himself;*

3 *The officer shall be warned by the head of department that anything he states in writing may be used as evidence in subsequent disciplinary proceedings"*

2.3 General Order A. 927 is headed Disciplinary Proceedings Formal Inquiry Required and provides;

"If following a departmental preliminary investigation in terms of General Order A 925 (1), A Head of Department or Authorised Officer is of the opinion that the misconduct alleged, if proved, is serious enough to warrant the implication of any one of the disciplinary punishments set out in General Order A. 925 (2) he shall institute a formal inquiry to establish the facts of the case"

2.4 The Constitution of the Kingdom of Swaziland Act, 2005 provides in Section 33:

"(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a

right to apply to a Court of law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of the authority".

3. As regards the third head of Appeal, Counsel attempted to overcome the fact that the Appellant had averred that no evidence had been led against him at CSC level by alleging that what the Appellant meant was that whilst evidence had been led against him, such evidence was not relevant and as such reasonably capable of supporting the finding of CSC.

ARGUMENT BY COUNSEL FOR RESPONDENTS

[5] 1. That this matter related to review proceedings in terms of Section 19 (5) of the Industrial Relations Act which provides that *"a decision or order of the Court or arbitration shall, at the request of any interested party be subject to review by the High Court on the grounds permissible at common law."*

2. That at common law the grounds upon which the proceedings of an inferior Court such as the Industrial Court can be reviewed are different from those on which decision of public bodies are reviewable and fall under the first species of review identified in ***Johannesburg Consolidated Investments Company Limited v. Johannesburg Town Council*** *1903 TS 111 at 114:*

"...if we examine the scope of this word as it occurs in our Statutes and has been interpreted by our practice, it will be found that the same expression is capable of three distinct and separate meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings."

3. Accordingly the only grounds upon which the proceedings of the Industrial Court can be brought under review in the High Court are in respect of grave irregularities or illegalities.

4. Lord Brightman in the well-known case of Chief Constable of the **North Wales vs Evans** [1982] 3 All ER 141 and 154 stated that *'Judicial review is concerned, not with the decision, but with the decision-making process'* Evans was cited with approval by our Court in **Nhlabatsi vs National Court President Shiselweni District and Another** [2009] SZHC 120.

5. The grounds of review that the Appellant relied upon at the Industrial Court were that the hearing was procedurally unfair in that he was not given any notice of the charges against him, that he was denied an opportunity of securing representation, the Statutory provisions governing preliminary inquiries in terms of the regulations referred to above were not followed and that no evidence was lead against him during the hearing before CSC.

6. That the Judgment of the Industrial Court delivered on 20 June 2014 after hearing evidence, found that:

6.1 The Appellant had been given notice of the allegations against him;

6.2 He was given the opportunity of securing representation during the CSC disciplinary hearing;

6.3 The strict non-compliance with the rules relating to internal investigations was not a reviewable irregularity because it did not result in serious prejudice to the Appellant;

6.4 That after hearing oral evidence the Court made a factual finding that there was evidence led against the Appellant before CSC.

7. The Appellant raised similar grounds in the High Court and that Court agreed with the Judgment of the Industrial Court in all respects.

8. As regards the first ground in these proceedings, it was never the Appellant's ground of review in the Industrial Court that it was a reviewable irregularity for Vusi Musa Dlamini to give evidence in his absence as the case which the Respondents had to meet in that Court was that there was no evidence led against the Appellant. In point of fact the evidence before the Industrial Court was that the Appellant was present when Vusi Musa Dlamini testified before CSC and it was his representative who was absent. However the Appellant's

representative cross-examined Dlamini at the hearing on the evidence Dlamini gave in the representative's absence.

9. As regards the second ground, procedural fairness requires that an employee must be given a fair opportunity to influence the decision whether he should be dismissed and that the person taking the decision should be impartial and does not require that an employer strictly complies with pre-hearing formalities and as such that the strict non-compliance with regulations 41 and 42 above did not result in a failure of justice.

10. The third ground of Appeal is devoid of merit in that the Appellant's case at Industrial Court level was that there was no evidence against him and what the Appellant is now saying is that there was evidence but it was irrelevant or insufficient.

FINDINGS OF THIS COURT

[6] 1. This is an Appeal against review proceedings relating to the decision of CSC to terminate the employment of the Appellant as a result of charges formulated and instituted against him and in that regard:

1.1 As is set out in Johannesburg Consolidated, referred to above, review in inferior Courts should only be brought in respect of grave irregularities or illegalities occurring during the course of such proceedings and as was held in ***Avril Elizabeth Home for the Mentally Handicapped v Commission for***

Conciliation Mediation & Arbitration And Others *(2006) 27 ILJ 1644 (LC),* all that is required for procedural fairness in a pre-dismissal inquiry is that the employee is given an opportunity to contest the allegations against him.

1.2 In the Industrial Court Judgment, the Court found that Vusi Musa Dlamini did give evidence during the disciplinary hearing of the Appellant in the presence of the Appellant and in the absence of his representative but that the representative of the Appellant, Mr Quinton Dlamini, subsequently cross-examined Vusi Musa Dlamini on the evidence given in his absence. (Page 60 of the Record).

1.3 In addition, the Appellant, in the cross-examination of Isaiah Mthetwa, admitted that Mthetwa did in fact testify during the CSC hearing although he later recanted for unknown reasons (Page 62 of the Record).

1.4 Accordingly this Court agrees with both the Industrial Court and the High Court that evidence was in fact led against the Appellant at CSC and as such the first ground of Appeal must fail as there is no proof that the allegations of the Appellant constituted any grave irregularity or illegality.

2. As regards the second ground of Appeal;

2.1 This Court was referred to the various regulations quoted above and which were dealt with by both the Industrial Court and the High Court in some detail in their judgments.

2.2 The argument of Counsel for the Appellant was that the use of the word "shall" in the regulations quoted meant that all of the provisions in such regulations were mandatory and non-compliance would vitiate the proceedings. Counsel for the Respondents referred this Court to the Judgment of this Court in the matter of ***Malungisa Mahlalela vs The Prime Minister And Others*** *in Civil Appeal No. 34/2006* where, at paragraph 8 the Court found that *"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."*

2.3 We are of the view that such regulations as have been referred to give directions to CSC in dealing with matters of this nature. It is after all not a Court of law where strict compliance with legislation and regulations would be required.

2.4 We further agree with the Judge in the *Court a quo* who in turn agreed with the Judge in the Industrial Court when he held:

> *"The Court also found that even if the rules relating to internal investigations may not have been followed to the letter, there was no serious prejudice that was suffered by the Applicant entitling the Court to interfere as the Applicant did get the opportunity to answer to the charges preferred against him when he appeared before the Civil Service Commission."*

2.5 We accordingly believe that the Appellant had a fair opportunity to state his defence and the opportunity to influence the decision of CSC.

2.6 We are further of the view that the provisions of Section 33 of the Constitution have been satisfied in that the Appellant was treated fairly and that no injustice resulted from the proceedings and accordingly this ground too must fail.

3 As regards the third ground, as argued by Counsel for the Respondents, there is no merit at all to this ground. The truth is that in the Industrial Court, the case of the Appellant was that there was no evidence led against him. He by his own admission admitted that at least Mthetwa had given evidence against him and the conduct of his representative was clearly found to have included the cross-examination of Dlamini at the CSC hearing. Accordingly this ground must also fail.

[7] It is incumbent on this Court to add that it is unfortunate that the Appellant chose to follow the very expensive route he has chosen as he had, and probably still has, the right to pursue his purported claim for unfair dismissal within the well founded structure of the Industrial Court.

[8] Accordingly this Appeal is dismissed with costs.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

N. J. HLOPHE
ACTING JUSTICE OF APPEAL

I agree

M.J. MANZINI
ACTING JUSTICE OF APPEAL