IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 39/2014

In the matter between:

THE COMMISSIONER OF POLICE	**1st Applicant**
THE ATTORNEY GENERAL	**2nd Applicant**

And

DALLAS BUSANI DLAMINI	**1stRespondent**
STANLEY SIFISO VILANE	**2ndRespondent**
HIS LORDSHIP JUSTICE A.M. EBRAHIM J.A N.O	**3rd Respondent**
HIS LORDSHIP JUSTICE M.C.B. MAPHALALA J. A N. O	**4th Respondent**
HIS LORDSHIP JUSTICE DR. B.J ODOKI J.A N.O	**5th Respondent**

Neutral Citation: *The Commissioner of Police & Another v Dallas Busani Dlamini & 4 Others (39/2014)* [2015] SZSC 39 (29 July 2015)

Coram: S.B. MAPHALALA AJA, Q.M. MABUZA AJA, M.D. MAMBA AJA, R. CLOETE AJA and S.A. NKOSI AJA

Heard: 07July 2015

Delivered: 29 July 2015

SUMMARY

Review proceedings - Grounds for review of Supreme Court Judgment must be exceptional - Faulty rule of procedure constitutes such a ground - Standard of proof in Police Disciplinary procedures based on criminal charges confirmed to be "beyond a reasonable doubt" - Legislature erred when amending Police Act of 1957 by not substituting the word "Minister" in Section 22 with the word "Commissioner" resulting in absurd situation relating to the right of dismissal in the Police Force by the Commissioner - Matter referred back to High Court for determination of compensation.

JUDGMENT

S. A. NKOSI, AJA

[1] The 1st Applicant seeks to review and/or set aside the judgment of this court awarded in favour of the 1st and 2nd Respondents on the 3rd December 2014 on two grounds;

(a) that this court erred by finding that Section 13 (2) of the Police Act, 1957; "requires that proof be beyond reasonable doubt for an officer to be found guilty of an offence terms in of the Police Act, and;

(b) that this court erred in finding that; "the National Commissioner of Police does not have the power to dismiss an officer below the rank of an inspector"

In this case I shall not go into the facts which are clearly articulated in Civil Appeal No. 39/2014. It is the judgment in this case that the National Commissioner of Police seeks to overturn by coming back to this Court by way of review in terms of the aforesaid prayers (a) and (b) above.

[2] It is evident from the aforegoing that this court is being asked to exercise its inherent jurisdiction to review its own decision in terms of Section 148 (2) of the Constitutional which reads:-

> **"The Supreme Court may review any decision made by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or Rules of Court".**

[3] The basis upon which the Applicant seeks to review the decision of this court is encapsuled in the Founding Affidavit of the Applicant. In essence the Applicant states that the court made two errors of judgment in terms of the two aforementioned prayers as appear in the Notice of Motion. In my view, the law governing the power of this court to revisit its own decision with the object of either confirming or setting aside the same is derived in the first instance from the court's already existing inherent jurisdiction. This common law position has been strengthened or reinforced by the promulgation of Section 148 (2) of the constitution of the Kingdom of Swaziland.

[4] The power of this court to review its own decision is predicated on the old Roman *exception rei judicatae* as espoused in ***Betram v Wood (1893) 10 SC 172.*** The doctrine of res judicatae's salient features are that, as a matter of broad principle, once a matter has been adjudged, effect must be

given to that final judgment. In the ***Betram Case***, the Supreme Court of the Cape of Good Hope at page 180 observed;

> **"The meaning of the rule is that the authority of <u>res judicata</u> includes a presumption that the judgment upon any claim submitted to a competent court is corrected and this presumption being <u>juris et de jure</u> excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once. On the other hand, a presumption of this nature, unless carefully circumscribed, is capable of producing great hardship or even positive injustice to individuals. It is in order to prevent such injustice that the Roman law laid down the exact conditions giving rise to the <u>exceptio rei judicatae</u>"**

[5] It is thus competent to rationalize Section 148 (2) as an exception to the *res judicatae* doctrine. The section must as of necessity be applied with caution as it goes against the underlying principle that the court must prevent the recapitulation of the same action and must always endeavour to put a limit to needless litigation. It must ensure that certainty is maintained in cases which have been decided by the courts. Therefore where any cause of action has been prosecuted to finality between the same parties, any attempt by one party to bring the matter to the court on the same cause of action should not be permitted. "The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent

proceedings" per **Herbstein and Van Winsen The Civil Practice Of The High Courts And The Supreme Court Of Appeal Of South Africa, 5th ed, Vol 1, 2012 at page 610 footnote 149.** See ***National Sorgum Breweries v International Liquor Distributors 2001 (2) SA 232 (SCA)***, ***African Farms and Townships v Cape Town Municipality 1963 (2) SA 555 (A)***

However the principle must be applied in a manner which delimits and prevents hardship and actual injustice to a party.

[6] Having said that it's without doubt that the Constitutional provision on review, i.e., Section 148 (2), constitutes a vital statutory departure from the doctrine of *res judicata*. There is substantial authority to the effect that the doctrine must not be applied rigidly as if it were an entrenched and unyielding rule in all circumstances. In ***Smith v Porritt and Others 2008 (6) SA 303 (SCA) at paragraph 10 Scott JA*** gave an outline of the gist of the exception to the *res judicata* doctrine;

> **"The ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common – law requirements that the relief claimed and the cause of action be the same…in both the case in question and the earlier judgment …Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis…Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by de Villiers CJ as long ago as 1893 in Betram…unless carefully circumscribed [the defence of res judicata] is capable of producing great**

hardship and even positive injustice to individuals".(As quoted by THERON AJ in the case of Thembekile Molaudzi v The State [2015] ZACC 20at para 23)".

[7] From the foregoing the position is that the doctrine of *res judicata* must for all intents and purposes be upheld unless there is a very real likelihood that a litigant will be denied access to the courts and the net result will be an injustice to that litigant. See ***Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517***, and also see ***Kommisaries van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (SCA).***

[8] In the case of ***Molaudzi, Theron AJ*** explores the theme of exceptions to the *res judicata* as represented in other jurisdictions. His research is highly instructive and worth noting as this court seeks to develop its own jurisprudence on the *exeptio res judicata*:-

"In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel. In rare instances the court may reconsider its own previous judgments. In Pinochet, the House of Lords observed:-

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this house. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.

However, it should be made clear that the house will not reopen any appeal save in circumstances where, through no fault of a party, he has been subjected to an unfair procedure. Where an

order has been made by the house in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

Lower courts have later made similar findings. In Taylor, the civil division of the Court of Appeal held that:-

> **The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations.**

After Taylor, the Civil Procedure rules were adapted to explicitly provide for the reopening of "a final determination".

In Singapore, the Court of Appeal distinguishes between its powers regarding criminal and civil appeals. With regard to criminal appeals it appears to consider itself a creature of statute and not equipped with the power to revisit any final criminal decisions. In respect of civil matters, it finds that it has inherent jurisdiction to achieve a variety of results. This distinction has been criticised as artificial and without basis.

In India, article 137 of the Constitution provides:-

Subject to the provisions of any law made by Parliament or any rules made under auricle 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

The Supreme Court of India has held that this power is reserved for the correction of serious injustice. It is for the correction of a mistake, not to

substitute a view. The ordinary position is that a judgment is final and cannot be revisited. The power to review is statutory. It can be exercised when there is a patent and obvious error of fact or law in the judgment. The injustice must be apparent and should not admit contradictory opinions.

> **The general thrust is that <u>re judicata</u> is usually recognized in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognize that this cannot be absolute. This is because "[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience"**

[9] The constitutional provision that empowers this court to review decisions made by this very court is very similar to that of India. The Indian experience is instructive and provides this court with sufficient reason to adopt similar guidelines for the invocation of Section 148 (2). This court has inherent jurisdiction which anyhow has always cloaked the court with the power to invoke the *exeptio res judicata* as a common law principle. The statutory jurisdiction to revisit its own decisions under the constitution is merely an extension of the court's inherent jurisdiction. It is thus clear that in order for the court to exercise the statutory jurisdiction it must exercise similar caution so as not to open the gates to a flood of proceedings which are by their nature appeals disguised as reviews. The constitutional provision certainly was not promulgated to

allow litigants to have limitless opportunities of re-opening cases which have been adjudicated to a finality.

[10] It is therefore imperative that the law be laid down to reflect current and burgeoning legal theory and practice. The statutory power to review must be exercised when there is a patent and obvious error of fact or law. In the judgment ***A.T. Sharma v A.P. Sharma A.J.R 1979 SC 1047*** the Supreme Court of India held:-

> **"It is true there is nothing in article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be provoked by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits" (M/s Northern Indian Caterers (India) Ltd v Lt Governor of Delhi AIR 1980 SC 674)".**

[11] In *casu* the Applicant's contention is that thus the Court erred in contending, firstly, that the standard of proof required by law for charges under the Schedule of Offences framed under Regulation 20 (1) of the Police Regulations 1957, to be proven before the Police Board, must be

that of the criminal law i.e., the standard applicable is that the prosecution must prove the guilt of the accused beyond reasonable doubt. The argument advanced by the Applicant's Counsel was to the effect that in fact the court should have found that, in such cases, the standard of proof must be that of civil law, i.e., based on a balance of probabilities.

[12] Secondly, Counsel for the Applicants contends that, when examining the issue of interpreting the word "Minister" in terms of Section 22 of the Police Act 1957, the court should have taken into account that there was an omission to replace that word "Minister" with that of "National Commissioner of Police". The effect would then be that the Board's recommendation of dismissal from the Police Force would be made to the National Commissioner and not the Minister responsible for the Police Force, i.e., the Prime Minister.

[13] In Civil Case No. 39/2014 these two issues were dealt with by Ebrahim JA. The standard of proof, after a careful consideration of the wording of the Police Act, the Judge stipulates at paragraph 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, 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".**

[14] It seems to me that in so far as the matter of the standard of proof is concerned the Applicant has not made out a case for review. There is no apparent error of law that appears ex facie the judgment or the record. The finding by Ebrahim JA was based on the merits of the appeal. The articulation of the rationale behind the finding that the Police Act, 1957 is itself worded in such a manner that the Police Board can be associated with armed force courts martial, is sound. More so if Sections 20 and 21 of the Constitution are to be applied.

[15] There is a glaring lacuna in the law pertaining to the disciplinary process as currently regulated by the Police Act, 1957. It is imperative that the Minister responsible for the Police Force, as a matter of urgency, seek to amend the Police Act, 1957, with respect to disciplinary procedures.

[16] Such amendment must seek to conform as much as possible to the dictates of Section 20 of the Constitution. This could very well entail

measures to set up a proper modern tribunal that can exercise some independence but still apply the Police Act in such manner that the National Commissioner of Police could have control over the Force and be able to discipline his officers appropriately. Issues pertaining to procedure would be brought up to date and in line with a modern code of conduct and disciplinary procedures of similar Police forces in the Commonwealth and other nations.

[17] It is indeed a cyclic argument to say that Section 13 (2) of the Police Act 1957 stipulates that:-

> **"The Board shall conform as far as possible with the rules of procedure and evidence obtaining in the Magistrate's Court…"**

and still maintain that, when officers are charged with what clearly are criminal offences by their nature requiring proof of commission of such offences beyond reasonable doubt [as per the Magistrates Court procedures and rules of evidence], the civil law standard of a balance or a preponderance of probabilities applies. This certainly cannot be the case.

[18] I tend to disagree with the finding in the case of ***The Prime Minister Of Swaziland & Others v Christopher Vilakati & 3 Others [2014] SZSC 47*** where a full bench of this court found that:

> **"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".**

The court, with due respect, did not in that case give reasons as to why a charge of theft of a motor vehicle [as was the charge in that case]was not one that could be categorized as criminal. To my understanding theft of a motor vehicle is a criminal offence. Had the court paused and applied the rules of procedure and evidence as applied in a Magistrate's Court, it certainly would have found that a Magistrate would have applied the criminal standard of proof, the officer having been charged with the crime of theft.

[19] As regards the second ground for review, I can only state that it is inconceivable as to how the court came to the conclusion that it is to the Minister that the Board recommends issues of dismissal from the Police Force.

[20] Counsel for the Applicant rightfully, in my view, argued that it would indeed be absurd for the recommendation for dismissal to be submitted to the Minister under Section 22 of the Police Act 1957. However, as the contention proceeds, Section 29(d) of the Police Act 1957 empowers only the Commissioner to:-

"dismiss such member if he is recommended for dismissal from the Force under Section 22."

[21] The proper construction of Section 22 is that the Legislature when amending the Police Act 1957 did omit by error to amend the word "Minister" in that section and replace it with the word "Commissioner". It would certainly not be logical to say that the recommendation goes to the Minister who is under obligation in terms of section 30 to have transmitted to him any appeal lodged by an officer dismissed by the Commissioner in terms of Section 29.

[22] I am in agreement that there is a solid basis for review of the finding of the Court in so far as prayer 4 as per the Notice of Motion is concerned. There is a patent error of law and fact in the judgment under review. Their justices, with due respect, should have seen the risibility and illogicality of the insistence that the word in the Act, i.e., "Minister" should be given its plain and ordinary even if this leads to an "anormally or rather ponderous procedure." With respect to retain the word "Minister" as being intended so by the Legislature would lead to absurdity and very well defeat the intention of the Legislature.

[23] However, in so far as the review succeeds on the point of interpretation, how does the fact that the Court was correct insofar as adjudging that the standard of proof is that of a criminal charge; being proof of the commission of the offence beyond reasonable doubt.

[24] It seems that the first ground of review, having fallen away and the second ground succeeding does not affect the final outcome of the judgment of the Court by Ebrahim J.A. It may be that the Commissioner, as per this ruling, does have the power to dismiss an officer below the rank of Inspector in terms of Section 22 as read together with Section 23.

[25] However the point still remains that in terms of the law the wrong standard of proof was utilized by the Board in finding that the 1st and 2nd Respondents be recommended for dismissal. For this reason I consider that this Court cannot allow the dismissal of the 1st and 2nd Respondents to stand as it was premised on a faulty rule of procedure as it were. It would certainly be intolerable to the parties for the Court to order that the matter revert to the Board to proceed de novo on the applicable standard of proof. Too much water has flowed under the bridge, so as to say. The end result is that a just and equitable final decision must be given by this Court. In review proceedings the court may go beyond the prayers

sought by the Applicant and issue a ruling that it acceptable morally to the society at large.

[26] It is up to the Court *a quo* to find a suitable remedy of compensating the first and second Respondents as it is clear from the record that the Applicant cannot work with the two officers any longer.

[27] This Court cannot however order the Applicant to pay the first and second Respondents salaries from the date of discharge to today's date. It was submitted that this would be paying them for services which were not performed. I agree.

I thus make the following orders:

1. That the matter is referred back to the High Court for a determination of compensation to be paid by the Applicants to the 1st and 2nd Respondents in terms of the law.

2. That the issue of costs be determined by the High Court taking into consideration that the second ground for review has succeeded.

S. A. NKOSI
ACTING JUSTICE OF APPEAL

I Agree

S. B. MAPHALALA
ACTING JUSTICE OF APPEAL

I Agree

Q. M. MABUZA

ACTING JUSTICE OF APPEAL

I Agree

M. D. MAMBA
ACTING JUSTICE OF APPEAL

I Agree

R. CLOETE
ACTING JUSTICE OF APPEAL

For the Applicant: Attorney General

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