



# IN THE HIGH COURT OF SWAZILAND

## JUDGMENT

**HELD AT MBABANE**

**Case No. 1866/16**

**In the matter between:**

**ABRAHAM MUSA KUDE DLAMINI**

**APPLICANT**

**AND**

**NATIONAL COMMISSIONER OF POLICE**

**1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>nd</sup> RESPONDENT**

**Neutral citation: Abraham Musa Kude Dlamini v. National  
Commissioner of Police & Another (1866/16) [2017]  
SZHC 282 2017 (14<sup>th</sup> November, 2017)**

**CORAM J.S MAGAGULA J**

**HEARD: 27<sup>th</sup>/10/ 2017 and 23/11/17**

**DELIVERED: 14/11/2017**

***Summary: Application to expunge record of previous convictions – no law providing for such – whether court can grant such application in absence of law providing for such.***

## JUDGMENT

[1] This is an application in which the applicant seeks an order in the following terms:

- “1. Directing the 1<sup>st</sup> Respondent to expunge and/or delete from its records of previous convicts, the name of the Applicant;**
- 2. Directing the 1<sup>st</sup> Respondent to issue a Police clearance to the Applicant as soon as it is served with the court order;**
- 3. Costs of suit in case of opposition**
- 4. Further and/or alternative relief.”**

[2] The application is supported by a founding affidavit deposed to by the applicant himself. Applicant states *inter alia* that he is an adult Swazi male person of Lomshiyo area near Ntfontjeni in the Hhohho District. He is presently working for Anglo – American in the Limpopo province of the Republic of South Africa. He has been in that country since the year 1999.

[3] The Applicant further, states that during 1986 he was convicted by the Swazi Court sitting in Piggs Peak and sentenced to three (3) lashes for stealing sweets from a shop in the same town. At that time he was a scholar doing Form 1 at Mhlatane High School in Piggs Peak. At that time, more than thirty (30) years ago, he was twenty (20) years of age.

- [4] The Applicant does not recall the case number but he remembers that before the sentence was handed down, his finger prints were taken by an officer under the 1<sup>st</sup> Respondent for record purposes. It is Applicant's evidence that since then he has never been arrested, charged or convicted of any offence either in Swaziland or South Africa where he is currently working.
- [5] Applicant also states in his affidavit that since his conviction and taking of his finger prints his chances of a better life in society have been quashed as the finger prints continue to haunt him. This is despite the fact that he was convicted of a minor offence more than thirty (30) years ago. Whenever he approaches the 1<sup>st</sup> Respondent for a Police clearance he is told that he cannot be given such due to the finger prints that were taken when he was convicted and which are still in the Police records.
- [6] Applicant contends that although he served his sentence a long time ago, he is now being subjected to double punishment since the alleged inability of the 1<sup>st</sup> Respondent to issue a Police Clearance to him has caused him to lose many opportunities to better his life. Applicant cites as examples of lost opportunities his inability to secure a public driving permit, inability to be considered for promotion at his place of employment and his inability to obtain South African Citizenship although he has long qualified to obtain such. He cannot apply for any of these since a Police clearance is one of the documents required when

one lodges any of these applications. The applicant further submits that the retention of the finger prints in the police records for an offence committed more than 30 years ago has necessarily subjected him to untold suffering since he has long reformed and he now simply wants to go on with his life.

[7] The application is opposed by the 1<sup>st</sup> Respondent. From the answering affidavit of 2193 superintended Eshmond Shongwe, it appears to me that the gravamen of the opposition is two fold. Firstly, the 1<sup>st</sup> Respondent maintains that the taking of fingerprints of convicts is provided for in law and it is therefore a lawful exercise. Secondly the 1<sup>st</sup> Respondent maintains that there is no law providing for the deletion of fingerprints records held by the police.

The other point which was also much canvassed by Mr.K Nxumalo who appeared for the 1<sup>st</sup> Respondent is that an order directing that the finger prints of the Applicant be deleted from the criminal record would open flood gates for more convicts to approach this court for a similar remedy.

I must point out straight away that I find no merit in this latter point. In my view the courts cannot refrain from granting what they consider to be appropriate and lawful remedies merely because there is fear that more people will come seeking similar orders. That cannot constitute a lawful reason for dismissing an application.

[8] On the point that the taking of fingerprints is provided for by law I was referred to Section 342 (1) of the Criminal Procedure and Evidence Act which provides in part as follows:

*“ Any police officer may take or cause to be taken ....the fingerprints, palm prints or footprints of any person arrested upon any charge punishable with imprisonment ....”*

Section 342 (3) of the same Act gives the courts authority to order the taking of fingerprints of offenders upon conviction.

I do not think that this point advances Respondents’ case anywhere as I did not understand the applicant to be contending that the taking of fingerprints was unlawful. All the applicant is saying is that it is unjust to deny him a police clearance simply because he committed some minor offence thirty years ago and has never been found to be on the wrong side of the law since then. I accordingly find no merit on this point either.

[9] On the point that there is no law providing for the deletion of finger prints forming part of criminal records, I think that is precisely the reason the applicant had to approach this court. In other jurisdictions parliament has enacted laws providing for the rehabilitation of offenders which leads to the expunging of all records of previous convictions from the criminal records after certain criteria has been fulfilled. The Jamaican Parliament has for instance enacted **“THE CRIMINAL RECORD**

**(REHABILITATION OF OFFENDERS) ACT”** of 1988 which provides for the expunging of previous convictions after the lapse of a certain period of time after serving of sentence. The said Act establishes a Board to which applications for rehabilitation may be made and which, upon receipt of an application, conducts its own investigations. Thereafter the Board can grant or refuse an application for rehabilitation depending on the outcome of its investigations. The longest rehabilitation period is ten years in that country.


Section 25 of the Jamaican Act provides:

***“ A rehabilitated person shall, in relation to any expunged conviction for all purposes in law, be deemed to be a person who has never been charged with, prosecuted for, convicted of or sentenced for, the offence to which that conviction relates.”***

[11] Needless to say, we do not have an Act similar to the said Jamaican Act in our law. In my view however that does not mean that this court should simply shrug its shoulders and sent away deserving applicants without remedy. This court has unlimited jurisdiction and it ought to provide a remedy in all instances save where it is specifically prohibited by law. I therefore find no merit in the contention that this court cannot assist the Applicant since there is no law providing for the expunging of finger prints.

[11] I take particular note that the factual basis upon which relief is claimed in *casu* is not disputed by the Respondents. They do not deny that he was convicted of a minor offence some thirty years ago and was sentenced to whipping. This means that he actually served the sentence more than thirty years ago. He has never been charged or convicted of any offence since then. In my view the Applicant has manifestly made out a case for the orders sought and I accordingly make the following order:

1. The 1<sup>st</sup> Respondent be and is hereby directed to expunge and/or delete the name of the applicant from its record of previous convicts;
2. The 1<sup>st</sup> Respondent be and is hereby directed to issue a Police Clearance to the Applicant upon service on himself or his office of this order;
3. The Respondents are to pay the costs of this application to the Applicant.



J.S MAGAGULA J

**For the Applicant: Mr.P.Dlamini**

**For the Respondents: Mr K. Nxumalo**