IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 618/2016**

In the matter between:

GCINA DERRICK MAZIBUKO Applicant

And

THE COMMISSIONER OF
THE ROYAL SWAZILAND POLICE 1st Respondent
THE ATTORNEY GENERAL 2nd Respondent

Neutral Citation: *Gcina Derrick Mazibuko v The Commissioner of Police & Another (618/2016) [2021] SZHC 170 (28 September 2021)*

CORAM: **MABUZA PJ**

DATE DELIVERED: **28/09/2021**

Summary

The Applicant was a Police Officer whose services were terminated by the National Commissioner of Police. Applicant now seeks and seeks an order reviewing and setting aside his termination and that he be reinstated.

Held: *The Application is granted with costs.*

JUDGMENT

Q.M. MABUZA PJ

Introduction

[1] The Applicant seeks an order in the following terms:-

1. Reviewing and setting aside the Applicant's termination of appointment from the Police Service by the 1st Respondent.

2. Reinstating the Applicant to the Police Service.

3. Directing the 1st Respondent to avail a copy of the record of proceedings leading to the termination of Applicant's appointment from the Police Service with the Registrar of the above Honourable Court within seven days upon receipt of this application.

4. Costs in the event of unsuccessful opposition.

5. Further and/or alternative relief.

[2] The application is opposed by the Respondents.

The Parties

[3] The Applicant is an adult male Swazi of Mpaka area in the District of Lubombo.

[4] The 1st Respondent is the National Commissioner of the Royal Swaziland Police, duly represented by the 2nd Respondent.

[5] The 2nd Respondent is the Attorney General, cited herein in his capacity as the legal representative for all government departments, 4th Floor, Justice Building, Mhlambanyatsi Road, Mbabane in the District of Hhohho.

Background

[6] The cause of action arose from the arrest and charge of the Applicant on the 27th September 2015 for driving under the influence of intoxicating liquor. He was convicted and sentenced to payment of a fine of E4000-00 (Emalangeni Four Thousand) and failing payment to two years imprisonment in respect of Count 1 and E800-00 (Emalangeni Eight Hundred) or six months imprisonment in respect of Count 2.

[7] On the 29th September 2015 he received a memorandum from the 1st Respondent wherein he was called upon to show cause why he should

not be dismissed from his employ as a Police Officer in terms of Section 29 (e) of the Police Act No. 29/1957 as amended by Act No. 5/1987.

[8] The critical portion of the memorandum for purposes of this judgment states:-

"The National Commissioner of Police in adherence to Section 33 of the Constitution of the Kingdom of Swaziland and Rules of Natural Justice, has appointed a Board of Senior Officers to hear your submissions on the above captioned subject matter.

You are hereby called upon to show cause why you should not be dismissed from the Royal Swaziland Police in terms of Section 29 (e) of the Police Act No. 29/1957 as amended by Act No. 5/1987.

You are at liberty to tender your submissions in writing orally or through legal representative of your choice at your own cost."

[9] And Section 29 (3) of the Police Act provides:

[10] The Applicant duly responded to the aforesaid memorandum and elected to make his submission in writing. A copy of these submissions

is annexed to the Founding Affidavit as Annexure “GDM3”. It is undated.

[11] His submissions did not have the outcome that he expected. Instead he received a letter dated 30th December 2015 terminating his appointment with the Police Service. The letter is attached as Annexure “GDM4”. His termination was with effect from 31st December, 2015.

[12] The Applicant states that he was not furnished with a charge sheet nor was he called upon to plead to any charge or to present his case. No charge was preferred against him. He was only called upon to show cause why he should not be dismissed from the Police Service. He was not given a hearing nor given a chance to make his representations.

[13] He further deposed that in “Annexure GDM3” it is alleged that he made submissions to the Board which is false because he only handed in his written response showing cause why he should not be dismissed and he had been advised that they would revert to him. But he was never invited and or called upon to make any representations.

[14] He then instructed his lawyers to challenge the decision to terminate his services which they did by first writing to the 2nd Respondent. The latters response was unsatisfactory and hence the present application.

The Applicant's Case

[15] He states that the decision terminating his appointment by the 1st Respondent is fraught with gross irregularities set out as follows:-

"Firstly, the Respondents failed to give me a hearing which led to my appointment being terminated. It is common cause that I was only invited to show cause why I should not be dismissed which I duly did, hand I been invited to a disciplinary hearing wherein I was facing charges (which was not the case in casu) I would have engaged my attorneys and adequately prepare for my defence to the charges.

I am advised and verily believe that a person appearing before any tribunal must be given a reasonable time in which to gather relevant information and to prepare and put forward his or her representations and must be put in a position as to render his rights to legal representations a real as opposed to an illusory one.

Secondly, the 1st Respondent's Board members failed to consider my report (Annexure "GDM3") and revert to me as to whether it met their

favourable consideration or not so that they may then institute disciplinary proceedings against me. Neither did they allege any purported hearing to be taking place.

I am advised and verily believe that in terms of our Constitution a person appearing before any adjudicating authority must be afforded an opportunity to make representations and if need be cross-examine any person led in evidence and also call any of his or her witnesses if any."

[16] The Applicant in his reply canvassed the issue of a reverse onus being placed upon him to show cause why he should not be dismissed when the accuser was the 1st Respondent who had the onus to prove the Applicant's guilt.

The Respondents' Case

[17] The Respondents raised points of law discussed hereunder at paragraph 27.

[18] The 1st Respondent per the deponent of the Replying Affidavit Isaac Magagula states that subsequent to the writing of Annexure "DMD2" the Applicant appeared in person before the Board of officers that had

been convened by him to preside over the Applicant's matter. Applicant appeared in order to show cause why he should not be dismissed in terms of Section 29 of the Act subsequent to his conviction for drunken driving. He says that the Applicant was informed of his rights to legal representation. He further stated that on 22 August 2014, Applicant had been served with a final warning letter following a conviction of drunken driving and has attached the letter of final warning as Annexure "PO1"

[19] The 1st Respondent further states that a hearing was conducted and has attached a copy of the record of disciplinary proceedings. He denies that the Applicant was not given a fair hearing and that the rules of natural justice were not adhered to. And that the Applicant was advised of his right to legal representation but chose to conduct his own defence.

[20] He further states that the Applicant had been found guilty of an offence by a competent Court and this was against the Section 29 (e) of the Act. It is his further submission that as can be seen from the record, the Applicant had been asked if he had enough time to prepare for the hearing and he answered in the positive. This is more so because the Applicant was informed of the hearing on the 29th

September, 2015 and the hearing was ultimately conducted on 7th December 2015.

[21] In response to the Applicant's concern that the Board of officers failed to inform him of their response to Annexure "GDM3", the 1st Respondent states that he was informed of the recommendation by the Board and of his subsequent dismissal. It was the 1st Respondent's further submission that the Applicant ought to have appealed to the Prime Minister instead of launching the review proceedings. He re-iterated that this was the second time that the Applicant had oppeared before the Disciplinary Board for drunken driving and was found guilty.

[22] He further states that the Applicant preferred to submit written submissions which the Board directed him to read to the Board which he did and elected to conduct his own defence. He submits further that the Applicant is abusing this Court and asks that the application be dismissed with costs.

[23] In his Replying Affidavit, the Applicant maintained his position as espoused in the Founding Affidavit. He submitted that his attendance to show cause did not depart from the fact the proceedings were a

nullity and that his subsequent dismissal was an irregularity which could not be sustainable in law for the reason that it is tantamount to a reverse onus which is not permissible in terms of the law.

[24] He continues to maintain that he was not given a hearing and that he only handed in his report being Annexure "GDM3" and that this failure made the proceedings irregular. It was the Applicant's strong assertion that the Board had already made up its mind to arrive at the decision they did and same is evident from Annexure "PO2". That the contents of Annexure "PO1" have nothing to do with the present proceedings except to cement the fact that the Board had already made up their minds.

[25] He further states that *"I am advised and verily believe that the allegation that I should have approached the Prime Minister for an appeal is without merit because I cannot appeal a decision which was a nullity and/or irregular hence a review is apposite in the circumstances."*

[26] He concludes by saying *"I deny that the Respondents followed the law when terminating my services and submit that their conduct must be*

reviewed and set aside for want of procedure in the conduct of hearings."

[27] The Respondent raised certain points of law namely:

(a) That Attorney B.S. Dlamini could not be commissioner of oaths for the Applicant and still represent him. This issue was put to bed by Attorney Dlamini withdrawing as the Applicant's attorney of record. The point in my view was well taken and the law submitted in respect thereof is commendable.

(b) That the matter was *lis pendens* in that the Applicant had since filed an appeal with the Prime Minister and had technically abandoned the review before this Court. There is no evidence in the Court with respect to this assertion and the Applicant has not confirmed that its so. This point fails.

(c) That the judgment of Sifiso Sibandze relied on heavily by the Applicant and issued by the Supreme Court was distinguishable from the present case in that that matter went on appeal to the Prime Minister who failed to consider the appeal when he had a duty to do so. Hence the Respondents argue that the Applicant should have exhausted local remedies first before resorting to the Courts.

It is argued further by the Respondents that the Sifiso Sibandze judgment was on review. There was no evidence furnished as proof of the pending review. That point fails. The points of law are hereby dismissed.

[28] The Applicant's arguments are briefly that:

(a) The Applicant was called upon to show cause why he should not be dismissed. This constitutes a reverse onus and was held to be unlawful.

(b) Calling the Applicant to show cause why he should not be dismissed does not amount to a charge. It is merely an invitation to make representation so that the employer can decide whether or not to proceed with formal charges, that it, if not satisfied with the written explanation.

(c) In this case, even the written representations from the Applicant do not appear to have been considered by the panel as there is no reference whatsoever mentioned in the recommendation to the Commissioner.

(d) It is for the above reasons that the Supreme Court has held that the Dismissal of the Appellant in that case, just like the dismissal of the Applicant in the present case has infringed upon all known

laws ranging from the common law, the Police Act and the Constitution of the Kingdom of Eswatini.

[29] In support of his submissions the Applicant has cited the case of **Sifiso Sibandze v The Prime Minister of Swaziland and Two Others (28/2017) [2018] SZHC 3 (2018)** because the facts of the present case are on all fours with the Sibandze Case. The Applicant has filed a detailed discussion of the Sibandze Case in order to buttress his submissions. I set out hereunder the similarities that he has identified from the Sibandze case.

[30] In the **Sifiso Sibandze** case, the Appellant, just like in the present case was a Police Officer. The Appellant in this matter was also dismissed from service upon conviction by the Magistrate Court whereupon he was made to pay a fine of E1, 500-00 or spend five months in custody.

[31] Upon conviction by the Magistrates Court, the Appellant, just like in the present matter, was made to appear before a Police Board constituted in terms of Section 13 of the Police Act. The Police Board thereafter recommended to the Commissioner of Police for the dismissal of the Appellant in the same way and after following the same and exact

procedure as was done in the present matter before the Honourable Court.

[32] In the present matter, the 1st Respondent issued a correspondence to the Applicant dated the 29th September 2015 in which the Applicant is called to **"Show cause why you (he) should not be dismissed from duty in the Royal Swaziland Police Service"**

[33] The *"show cause why you should not be dismissed..."* is what the Supreme Court in the *Sibandze judgment* refers to as the **"reverse onus**" and which was held to be unlawful.

[34] In the dealing with the issues which for all intents and purposes are similar to the facts of the present matter, the Supreme Court in the *Sifiso Sibandze judgment* stated as follows:-

"[4] It is not in dispute that when the appellant appeared before the Police Board on the 5th February, 2014, he was asked to show cause why he should not be dismissed from the Police Service pursuant to his conviction for drunken driving by the Magistrates Court; the appellant was not asked to plead and no evidence was tendered by the Second Respondent. This presupposes that a

decision had already been taken to dismiss the appellant on the basis of his conviction by the Magistrates Court."

[35] The Applicant further argues that when an employer writes to an employee and says **"show cause why you should <u>not be dismissed</u>"**, it is clear that a decision to terminate had already been taken in this situation because had it not been so, the employer would, instead have called upon the employee to **"show cause why <u>disciplinary action</u>**" should not be taken against that employee. It is precisely for this reason that the Supreme Court held that the wording of the correspondence clearly indicated or presupposes that a decision to dismiss was taken even before the hearing itself.

[36] In the *Sibandze matter*, the Supreme Court stated that;

"[7] The Police Act does not make provision for a reverse onus; hence the Police Board was not entitled to disregard the procedure laid down in Section 13 (2) of the Police Act. It is trite law in this jurisdiction that a reverse onus provision violates the rights of an accused to a fair trial, and, in particular the presumption of innocence as well as the right to remain silent and not compelled to give evidence incriminating oneself; the exception is where it

is shown that the application of the reverse onus is reasonable in an open and democratic society."

[37] It was further highlighted by the Supreme Court in the *Sibandze judgment* that:-

"[10] The Second Respondent dismissed the Appellant in terms of Section 29 (e) of the Police Act pursuant to a recommendation by a Police Board for a summary dismissal. However, I will deal with this contradiction below. Section 29 (e) of the Police Act provides for a dismissal pursuant to a conviction of an offence other than an offence under the Police Act or regulations.

[11] The dismissal was with effect from the 28th February, 2014. No reasons were given by the Second Respondent for the dismissal. The Second Respondent is not obliged by law to dismiss a Police Officer pursuant to a recommendation by the Police Board in terms of Section 29 (e) of the Police Act or upon the conviction of the Police Officer from an offence other than one under the Act or regulations made under the Act. Accordingly, it is not enough for the Second Respondent to rely on the provisions of Section 29 (e) or Section 29 (d) for the dismissal of a Police Officer. It must be apparent from the record that the letter of dismissal that he has the record, considered and applied his mind to the

evidence adduced before the Police Board, and, that he is satisfied not only that the evidence proves the commission of the offence but that the procedure adopted was lawful; the reasons for the dismissal must be clearly stated. The importance of giving reasons is to assist the aggrieved party in deciding whether or not he has prospects of success on appeal in the event he decides to lodge and appeal."

[38] The Supreme Court carefully analysed the provisions of Sections 21 and 33 of the Constitution and came to the conclusions that the rights of the Appellant were substantially infringed by the Police Board and the National Commissioner of Police just as the rights of the present Applicant have been infringed by the 1st Respondent.

[39] Just like in the case of the present Applicant who was not even on duty when he got arrested and got convicted on the charge of drunken driving, the Supreme Court stated as follows regarding this issue in Sibandze judgment:-

"The Appellant was off-duty as already stated above and not driving the motor vehicle on a public road but just parking it properly and assisting a friend; hence, a punishment outlined in Section 18 (b) would have been appropriate such as admonition, reprimand or

payment of a fine. There is no legal basis for the Police Board to recommend the dismissal of the Appellant in view of the circumstances of the case; the fact that the Appellant had been convicted by the Magistrate Court does not suffice. He was merely convicted upon his plea and no evidence beyond reasonable doubt was led at the Magistrates Court to prove that the Appellant had exceeded the maximum limit of consumption allowed for a driver. Similarly, there is no legal basis for a dismissal of the Appellant by the Second Respondent in the circumstances of this case."

[40] The above principles as enunciated by the Supreme Court find total support in the Government Standing Orders in particular General Order A.911 (1) wherein it is provided that;

"In an officer has been convicted of a criminal offence (except where an admission of guilt has in fact been accepted; or where the Police authorities have been willing to accept such an admission; or where the officer has been merely reprimanded or cautioned by the Judicial officer hearing the case:) he shall be suspended from duty, and shall not receive any emoluments from the date of conviction pending a decision on his case by the Head of Department, and a final decision on the question of the officer's dismissal or other lesser punishment. The Head of Department shall not take a final decision on a case where

an appeal against conviction has been entered, pending the outcome of such an appeal."

[41] In General Order A.911 (2), it is provided that:-

"If an officer has been convicted of a criminal offence, the sentence for which is less severe that that set out in General Order A.911 (3), the Head of Department or Authorised Officer shall consider the proceedings and judgment of the Court, and decide whether, in addition to the order made by the Court, the offence warrants the imposition of one of the disciplinary punishments set out in General Order A.913".

[42] In General Order A.913 (1) it is provided that:

"The following are the disciplinary punishment which may be imposed on an officer by an authorised officer as the result of disciplinary proceedings taken against him/her under this Section of this General Orders:-

(a) Stoppage of an increment

(b) The withholding of an increment

(c) A reprimand."

[43] The Supreme Court was therefore absolutely correct and its judgment is binding to the facts of the present matter.

[44] What the General Orders clearly provide for is that where a Police Officer has been arrested for criminal offence and he proceeds to plead guilty to that offence and the Prosecution accepts his or her plea without leading evidence, that particular offence does not constitute an offence upon which the officer should be disciplined at all. This is because General Order A.911 (1) makes a proviso and/or an exception to those offences where the proceedings have led to the officer pleading guilty and him or her been found guilty on his or her plea without leading evidence. These types of offences are not offences in terms of the Criminal Procedure and Evidence Act in that on accepting a plea, the proper sentence should merely be a sum of E60.00 and nothing more. The imposition of fines of up to E4 000-00 or E800-00 without leading evidence in these types of traffic offences is illegal and improper. It is submitted that the Traffic Act, 2007 must be read together with the Criminal Procedure and Evidence Act.

[45] Even the Respondents were to argue that the provisions of General Order A.911 are not applicable to the facts of the present matter, still General Order A.913 makes the types punishments in such cases clear

and dismissal is not one of such punishments provided for under this order.

[46] In another similar case of **Musa Joburg Shongwe v The Commissioner of Police and Another, Civil Case No. 1302/2001**, the High Court of Eswatini stated the law as follows:-

"The Applicant (a Police Officer) was dismissed under Section 29 (e) of the Police Act, following a recommendation by three senior police officers. As indicated below, it was this "hearing" which was tainted to the extent that it effectively is nullity. The complaint is that the Commissioner acted under his powers to dismiss the Applicant but that the hearing conducted by the three senior police officers he had delegated, was tainted. His delegation of these officers is not in dispute."

[47] The Court proceeded to state that:-

"Secondly, and more important to the outcome of this matter, he [Applicant] was prima facie and factually, from a reading of the record of the hearing, also not afforded a fair opportunity to present his case. He presented no case at all in defence to this possible dismissal."

[48] I agree with the Applicant that the facts in all these matters are precisely the same:

(a) The Applicant was called upon to show cause why he should not be dismissed – This constitutes a reverse onus and was held to be unlawful.

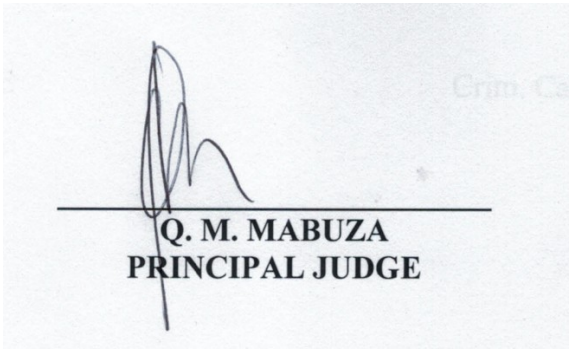
(b) Calling the Applicant to show cause why he should not be dismissed does not amount to a charge. It is merely an invitation to make representation so that the employer can decide whether or not to proceed with formal charges, that is, if not satisfied with the written explanation.

(c) In this case, even the written representation from the Applicant do not appear to have been considered by the panel as there is no reference whatsoever mentioned in the recommendation to the Commissioner.

(d) It is for the above reasons that the Supreme Court has held that the dismissal of the Appellant in that case, just like the dismissal of the Applicant in the present has infringed upon all known laws ranging from the common law, the Police Act and the Constitution of the Kingdom of Eswatini.

[49] I further agree with the Applicant's submissions and the Sifiso Sibandze Case is well cited as indeed it is an all fours with the Applicant's case herein.

[50] In the event I find for the Applicant and the application is granted with costs.



For the Applicant: Mr M. Sibandze

For the 1st & 2nd Respondents: Mr M. Simelane of AG's Chambers