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HIGH COURT OF SWAZILAND

SHADRACK DLAMINI

Applicant

v

THE COMMISSIONER OF POLICE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Civ. Case No. 2044/98

Coram

Sapire, CJ

For Applicant

Mr. Sgwane

For Respondent

Miss T. Nkwanyana

JUDGMENT

(28/07/99)

The applicant was formerly a policeman employed by the Royal Swazi Police. The respondent is the Commissioner of Police. The Attorney General is also joined as a defendant.

The applicant seeks an order that the decision of the 1st respondent dismissing him from the Royal Swaziland Police Force with effect from the 1st of February 1998 be reviewed, corrected or set aside. Consequent upon this he asks for an order requiring the respondents to pay to the applicant the arrear salary and all other employment benefits that he would have lawfully been entitled to but for the dismissal. He also asks for costs or further or alternative relief.

In the founding affidavit the applicant states that he became a policeman on the 1st November 1983. He was a Constable and stationed at various Police Stations and Police Posts until he was transferred to Matsapha Police College in 1991. There he was attached to the Royal Residences Protection Unit.

He says that on the 5th September 1997 while at Matsapha Police College he was called into the office of the Officer in Charge of his unit and was served with an internal Police Charge sheet by Sub-Inspector Mamba. He attaches a copy of the Charge Sheet which is annexed and marked A1. The applicant says further that when he was served with the charge he was asked whether he wished to be represented by a representative of his choice. He was however, he says, never given notice of the date of the disciplinary hearing.

The next step according to him took place on the 23rd of December 1997 when he was summoned to appear before the Assistant Superintendent G.H. Ngwenya who announced that he was to preside over the matter and that the proceedings were commencing immediately. He was asked whether he has had enough time to prepare for his defence and when he replied on the negative stressing that he had not been given the opportunity of notifying his legal representative about the hearing of the date. The applicant says that despite his protest and objection, the presiding officer ordered that the matter should proceed without the presence of the legal representative since in his opinion he had been given enough time to prepare for his defence.

The matter proceeded and at the conclusion of the hearing he was found guilty and a sentence was passed. A recommendation was also made for his dismissal from the Police Force.

He states that the disciplinary proceedings were irregular, unlawful and contrary to the rules of natural justice because he was never given notice of the date of the disciplinary hearing and this gave rise to his non-representation. He complains that his plea to have the matter postponed was denied. The further complaint is, *"The Presiding Officer, being a senior officer, and he having considered that the proviso to Section 20(2) of the Police Act, 1957 was not applicable in my case, acted ultra vires the provisions of Section 18(3) of the Act by sentencing me to a dismissal."*

Lastly, he says, no recommendation for his dismissal was ever submitted to the Prime Minister as envisaged by the Act.

It is important to note that the relief claimed by the applicant does not include a review of the disciplinary proceedings. The relief, which the applicant seeks, is that the decision of the commissioner dismissing the applicant from the Royal Swaziland Police Force with effect from 6th February 1998 be reviewed, corrected or set aside.

In terms of Rule 53, the Attorney General acting for the respondents filed the record of the proceedings which are headed *"Disciplinary case against 2575 Constable S.M. Dlamini"*.

A perusal of the proceedings shows that the applicant's allegations regarding irregularity thereof and the prejudice to him are largely unfounded. In any event in terms of the prayer in the Notice of Motion I do not have to consider a review thereof.

It appears that the conclusion of the proceedings whether on applicant's or Respondents' version thereof, a recommendation was made that the applicant was to

be dismissed from the Royal Swaziland Police Force. There is a note that the sentence and conviction are subject to review by the Commissioner of Police. This does obviously not apply to the recommendation, who may or may not act thereon.

The respondent's filed and answering affidavit attested to by Assistant Superintendent Terry Fanana Masuku who replied to the founding affidavit, He has attached to the affidavit a Charge Sheet and a certificate of service on which the tribunal acted. This is not the same document as appears attached to the applicant's affidavit. The deponent further says that the applicant was in fact notified of the date of the hearing and he attended the hearing together with his representative. Zulu who is the Station Commander.

What is relevant is that the deponent states that the applicant was recommended for dismissal in terms of Section 20 (2) and dismissed by the Commissioner of Police in terms of Section 29 (d) of the Police Act. The applicant in reply produced further record of proceedings, which took place apparently before those referred to by the respondents. I must confess myself to be at a loss to understand how there could have been two different hearings before two different presiding officers but as I have pointed out the proceedings themselves are not the subject matter of this application.

The only point for decision relates whether the dismissal by the Commissioner of Police of the applicant is in accordance with the terms of the Act.

The legislation in question is the Police and Public Order Act, originally Act 29 of 1957. This Act provides in Section 22 that upon conviction by a Senior Officer, a board or Magistrate Court, such officer, Board or Court may in addition to, or in view of the penalties provided for in this Act or any regulation made thereunder recommend to the Minister that the person convicted be dismissed from the force or be reduced in the case of a member of the force below the rank of inspector but above the rank of constable to a lower or the lowest rank.

In the present case as appears from the record filed a senior officer who conducted the disciplinary enquiry recommended that the applicant be dismissed from the Royal Swaziland Police Force. The record does not say to whom this recommendation was addressed.

Section 20 of the Act requires that the Commissioner must consider the proceedings and may alter, reverse or confirm the conviction or increase, reduce, vary or confirm the sentence. The same section provides that the commissioner may, in addition to any sentence imposed order the reduction of a member below the rank of inspector but above the rank of constable to a lower or to the lowest rank. In terms of this Section no sentence will be carried out until the decision of the Commissioner is made known.

Section 29 of the Act provides that the Commissioner may dismiss a member if he is recommended for dismissal from the Force under Section 22.

The difficulties in this case arise from amendments, which were made to the original act by an amending Act No. 5 of 1987. The amending act, inter alia, substituted "the Commissioner" for "the Minister" in Section 20 and it seems clear that this substitution should properly also have been made in Section 22 but this was not done. This appears to have been an oversight. The interpretation of the act in the light thereof was considered in the matter of *Thembele Mathenjwa vs the Commissioner of Police*¹ In that case Dunn, J in dealing with the problem arising from the wording of the two sections involved subsequent to the amendment said :

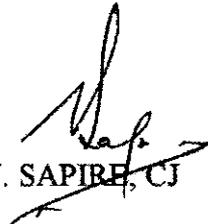
"It was argued on behalf of the applicant that the Prime Minister at a discretion whether or not to act on a recommendation of the Board and that until such time that this discretion was exercised the Commissioner could not act in terms of Section 29(D). I have difficulty in understanding this submission. It is clear that Section 22 creates some confusion in the disciplinary and appeals procedure provided for under the act but that does not in my view affect the clear provisions of Section 29(D). The representative of the Attorney General pointed out that there has been an omission in the Police Amendment Act No. 5 of 1987 in which the word

¹ case no. 1006 of 91.(unreported)

“Minister” in Section 20 was replaced with the word “Commissioner”. It was pointed out that a similar replacement should have been made under Section 22 in the amendment. The explanation given would interpret Section 22 in keeping with the general approach of the act regarding disciplinary proceedings; the powers of the Commissioner and the right of appeal to the Prime Minister. It would be anomalous for the Prime Minister to be vested with the power to act on a recommendation under Section 22 and at the same time to exercise the powers of appeal set out under Section 30. Section 29(d) can and must be read as conferring a clear cut authority on the Commissioner of Police to act where he has knowledge of a recommendation made under Section 22. In acting under Section 29(d) the Commissioner does so independently of whatever powers may be conferred on the Prime Minister under section 22. Any member of the force aggrieved by the decision of the Commissioner can avail himself of the appeal procedure provided for under section 30.”

In view of this precedent, which I do not find to be clearly wrong, and will accordingly follow, there was nothing irregular in the decision of the Commissioner to dismiss the applicant from the Royal Swaziland Police Force and that such dismissal cannot be reviewed, corrected or set aside.

The application is therefore dismissed.


S.W. SAPIRE, CJ