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THE HIGH COURT OF SWAZILAND

MUSA GWEBU

Applicant

And

MANZINI CITY COUNCIL

Respondent

Civil Case No. 2802/2002

Coram	S.B. MAPHALALA – J
For the Applicant	MR. SIMELANE
For the Respondent	ADVOCATE P. FLYNN (Instructed by Zwane, Kubheka and Associates)

JUDGMENT

(30/06/2003)

Relief sought

The Applicant seeks an order reviewing and setting aside the proceedings and acts leading to his dismissal by the Respondent.

The Applicant also seeks an order of re-instatement and payment of arrear salary.

The founding affidavit of the Applicant is filed in support thereto. Pertinent annexures are also filed viz annexure "A", "B", "C1", "C2", "D", "E", "F", "G" and "H" being letters of correspondence and various notices. The Respondent has joined issue with the Applicant and the answering affidavit of the Town Clerk of the Respondent is filed in opposition thereto. Pertinent annexures are also filed viz, annexure "CF1" and "CF2" being notice of disciplinary hearing and charge sheet preferred against the Applicant; and disciplinary hearing report, respectively.

The background

The facts giving rise to this dispute are as follows: The Applicant was appointed on or about 1st May 1980 by the Respondent to the post of Building Inspector. The Respondent is a local authority duly established in terms of the Urban Government Act, 1969 with offices at the Manzini City Council premises on Ngwane and Nkoseluhlaza streets, Manzini.

On or about 28th February 2002, the Respondent represented by its city planner, a Mrs. E.N. Wamukoya addressed and delivered to the Applicant a memorandum (annexure "A") giving the Applicant two days within to respond by way of giving a written report or explanation. This memorandum precipitated a series of events leading to the issuance by the same author of annexure "A", annexures "C1" and "C2" purporting to be a notice of a disciplinary enquiry in terms of the staff standing orders of officers. The Applicant takes the view that the said notification did not conform to the requirements of regulations 21 or paragraph 6 (2), 6 (3), 6 (4), 6 (5), 6 (6) or 6 (7) of the staff standing orders for officers and was therefore irregular. The Respondent on the other hand responded that it did not proceed with the disciplinary hearing in terms of notice "C1" and "C2" (see page 28 of the Book of Pleadings – AD paragraph 8 and 9).

According to the Applicant annexures "C1" and "C2" simply described as **dishonest,** the simple and mere **"act of stamping plan on Lot 1003 Ngwane Park reference 87/93 with council approval stamps and signing it when you knew it had not gone through the council's approval process".** From the charge as formulated according to the Applicant, it is difficult if not impossible to understand what factual allegations justify the conclusion of **dishonesty.** The Respondent countered that Applicant was represented at the hearing by a member of the staff association and at no stage was it suggested that the charge was vague or that the Applicant did not understand the charge. The Applicant pleaded guilty to the charge and the minutes of the disciplinary hearing show that this was repeated by his representative in his summary. The charge made it very clear that dishonesty was being alleged.

Thereafter, it appears from the papers that a disciplinary enquiry was held. The Applicant challenges the procedure adopted by this enquiry. He contended that in the circumstances all the provisions of the staff standing orders which purports to deal with breaches of discipline, the regulation, manner of the inquiries into conduct, dismissal and termination of appointment were irregularity promulgated and *ultra vires* including any action which purportedly taken in terms thereof. He argued further that therefore it is clear that the proceedings which led to his dismissal and the various actions or acts taken by or and on behalf of the Respondent were irregular and the court was asked to review and set aside the said proceedings and reinstate him in his office as the building inspector of the Respondent. The Respondent's answer is that, it is significant that Applicant contends that the court should review the decision because of an alleged failure to comply with the standing orders while he alleges in the same breath that the same orders are *ultra vires.*

The above therefore are the factual issues in capsule form in this matter. The court then heard submissions for and against the application.

The Applicant's case.

Mr. Simelane filed very comprehensive Heads of Argument for which I am most grateful. The thrust of his submissions is premised on the *dicta* in the case ***Estate Geekie vs Union Government and another 1948 (2) S.A. 494 (N)*** at *502 – 3* where Milne AJ stated the following:

> "If...a tribunal whether as a consequence of misconstruing its powers or otherwise, does something which it is not empowered to do, or fails to do something which it is obliged to do, it simply acts *ultra vires*, that is, in a manner not contemplated by the legislative and, if challenged, (its decision) may be set aside".

The court was further referred to the cases of ***Johannesburg Consolidated Investments vs Johannesburg Town Council 1903 T.S. 111*** at *115*, ***Shidiack vs Union Government 1912 A.D. 575*** at *583*, ***Troake vs Salisbury Bookmakers Licensing Committee and another 1972 (2) S.A. 40 RAD*** at *43*, ***Agricultural Supply Association (Pty) Ltd vs Minister of Agriculture 1970 (4) 65 (T) at 70 – 1*** and ***G.M. Cockram, Administrative Law.***

It is contended on behalf of the Applicant that the non-denial by the Respondent of the allegations made in paragraph 5 to 9 of the founding affidavit is clear that the Respondent disregarded all the express provisions of the staff regulations and or staff standing orders and therefore committed such gross irregularities that this court can and should interfere.

Taking one of the irregularities by way of an example, it is contended in this regard that in giving the Applicant less than two days within which to give a written report or an explanation not only offends against the express provisions of the statute and disregards the Applicant's rights but this conduct on the part of the Respondent also fails to give the Applicant the necessary and sufficient notice of the disciplinary charges against him for the purpose of affording him the proper and sufficient opportunity to defend himself offends against the rules of natural justice implied into such proceedings by the Act and its subsidiary legislation as contemplated thereby.

Mr. Simelane argued at great length that both staff regulations and staff standing orders, both of which are promulgated as subsidiary or delegated legislation on the basis of Section 51 of the Urban Government Act have the same status as the **"implied provisions"** of the enabling statute (i.e. The Act), referred to by Beadle CJ in ***Troake vs Salisbury Bookmakers Licensing Committee*** case *(supra)*. Further support for this submission can be found in the defination section of the Act where **"act"** is defined as including **"regulations made under this Act"**. Furthermore that the staff regulations contained in the Act are applicable to a council notwithstanding that they apparently on a **prima facie** reading to be confined to Boards (or Town Management Board) because Section 128 (1) of the Act expressly provides that a Board area and a Town Management Act, 4/1964 (in terms of the prior Act) are deemed to be municipalities and Town Councils respectively established under the 1969 Act (the present Act) and the reference to the office of Secretary is deemed to be the office of Town Clerk.

It further contended, on behalf of the Applicant that the Board area and the Boards referred to in the Urban Government Staff Regulation, 1968 itself having promulgated prior to the coming into force of the present Act refers to those Boards which already had been established prior to the promulgation of the present Act, in terms of the Town Management Act, 14/1964 and such Boards as are referred to in the Staff Regulations are deemed to be municipalities and Town Councils respectively. According to Section 128 (c) of the Act legislation (including the staff standing orders) made under the previous legislation is deemed to have been made under the present Act, which deems Boards and Board areas to be municipalities and Town Councils respectively.

However, it is contended that whether the court finds that the staff standing orders apply in this case rather than the staff regulations, the outcome cannot be different mainly because both the standing orders and the regulations are not only similar in all material respects relevant to this application but they are also both a form of delegated legislation having their source in Section 51 of the Act and that extent can be said to be implied provisions of the rules of natural justice can be said to be implied provisions of an enabling act, which does not even make any express reference to a hearing.

Paragraph 12 – 19 of the founding affidavit bring to the fore allegations which establish that there **"no evidence at all before the Respondent to support a finding of dishonesty and it is further concluded that such a finding is so unreasonable that it can only be explained by bias, arbitrariness or a complete failure by the Respondent to apply its mind to the matter".** It is contended in this regard that the aforementioned allegations in paragraph 12 – 19 of the founding affidavit, if not controverted as in the present case establish a reviewable irregularity entitling the court to intervene and set aside the disciplinary proceedings and to support this contention the court was referred to the cases of ***Clairwood Motor Transport Co. Ltd vs Pillai and others 1958 (4) S.A. 245 (N) at 253 – 4*** (*per* Kennedy J); ***Northwest Townships (Pty) Ltd vs The Administrator, Transvaal 1975 (4) S.A. 1 (T)*** at page *8* and the case of ***National Transport Commission and another vs Chetty's Motor Transport (Pty) Ltd 1972 (3) S.A. 726 AD*** at *735*. The Respondent is required to file a helpful affidavit consisting not merely of a mere *ipse dixit* of a bare denial of the allegations. To support this proposition *Mr. Simelane* again cited an array of South African decided cases including the celebrated case of ***Room Hire Co. (Pty) Ltd vs Jeppe Street mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)*** at *1165* dealing with bare denials in application proceedings stated the principle applicable as follows:

> "While it may well be, once a genuine dispute of fact has been shown to exist, that a Respondent should not be compelled to set out his full evidence in his replying affidavits, **a bare denial of applicant's material averments cannot be regarded as sufficient to defeat Applicant's right to secure relief by motion proceedings in appropriate cases".**

Similarly Millin J in ***Hansa vs Dinbro Trust (Pty) Ltd 1949 (2) S.A. 513 (T)*** at *517*,laid the principle and proper approach as follows:

> "I feel sure that these remarks of ***Dowling J in R Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd*** were not intended to govern all cases, still less to lay down as an absolute rule that where proceedings are brought by way of application for relief which, at common law, ought to be asked for by *rauw actie*, the Respondent who gets the Applicant's affidavit is entitled simply to make a series of denials without offering any evidential reply to the allegations in the petition".

Finally, *Mr. Simelane* submitted that it is important to note that paragraphs 11, 14 and 25 are not denied and all this present irregularities which clearly indicate that there was no proper trial or enquiry in accordance with what the relevant regulations or staff standing orders as read with Section 51 of the Act contemplated, namely:

a) The vagueness of the charge – see paragraph 11 of the founding affidavit.
b) The denial of the right of appeal to which the Applicant was clearly entitled.
c) The failure to consider the uncontroverted evidence that Applicant stated during the hearing to the effect that the Applicant did not notice the plan was written both **restaurant** and **bar** and that the words may have been inserted after he had stamped the plan.

The Respondent's case.

Mr. Flynn appearing for the Respondent advanced equally forceful arguments *au contraire*. His opening salvo was that in so far as the Applicant seeks to challenge the merits of the disciplinary committee, the court will not interfere merely because the decision was one which it would not have arrived at. The court was referred to cases of ***Loxton vs Kenhardt L.L.B. 1942 AD 272*** at ***314; Rama vs Western Rent Board, Johannesburg 1954 (1) S.A. 1651 (T)*** and that of ***Schoch No. and others vs Bhettay and others 1974 (4) S.A. 860 (A)*** at ***866 E – F*** to support this proposition.

Mr. Flynn contended that a court on review is concerned with irregularities or illegalities which result in *"a failure of justice"*. The mere possibility of prejudice is insufficient. To buttress this point *Mr. Flynn* drew my attention to the cases of ***Davies vs Chairman, Committee of the J.S.E. 1991 (4) S.A. 43; Jockey Club of South Africa and others vs Feldman 1942 A.D. 340 at 359;*** and that of ***Larson and others vs Northern Zululand Rural Licensing Board 1943 N.P.D. 40.***

It is the Respondent's view that there was substantial compliance with the staff standing orders and in so far as paragraph 6 (1) and 6 (2) may not have been strictly complied with, this did not prejudice the Applicant. The hearing report fully considers the documentary and oral evidence and therefore not unfair or unreasonable.

On the issue of whether in *casu* the court is dealing with staff standing orders or staff regulations. *Mr. Flynn* argued at great length in this regard. His main contention in this regard is that this is merely an academic exercise in the present case. *Mr. Flynn* gave an analysis of the staff standing orders *vis a vis* staff regulations and concluded that in *casu* it is the standing order which applies and I must say that I am inclined to agree with Mr. Flynn in this regard. It would appear to me that there is no substantial difference between the staff standing orders and the staff regulations. If one has recourse to the Act the staff regulations apply to Boards and the staff standing orders were promulgated for the Manzini and Mbabane City Councils. Section 112 of the 1969 Act specifically provides for Boards. This has nothing to do with the "saving provisions" in the 1964 Act. The Act also provides for city councils as well. One therefore logically has staff regulations which refer to Boards. In 1969 the Minister responsible by Notice in the Gazette established Boards. On the 25th July 1969 the Manzini and Mbabane City Council were established in terms of Section 5 and 6 of the Act. What therefore, applies to City Councils are staff standing orders. In terms of Section 51 (2) the council is empowered to make staff standing orders.

It is my considered view, in this regard that there is no basis at all to hold the view that the staff standing orders are *ultra vires.*

The court's analysis and conclusion thereon.

I have considered very carefully all the submissions advanced for and against the application. I have already ruled that making a distinction between staff standing orders and staff regulations is now an academic debate because there is no substantial difference between them. It is further of much significance that Applicant contends that the court

should review the decision because of an alleged failure to comply with the standing orders while he alleges in the same breath that the same orders are *ultra vires*. My view in this regard is that further comment on this aspect of the matter will not advance the case either way. For purposes of this judgment I hold that standing orders apply.

It would appear to me from the reading of the Applicant's founding affidavit that the Applicant in the main seeks to challenge the merits of the findings of the disciplinary committee. This is reflected in paragraphs 11 to 19 of the founding affidavit. The said paragraphs read as follows in *extenso:*

> "11. From the charge as formulated it is difficult if not impossible to understand what factual allegations justify the conclusion of **dishonesty**, and I am advised that it may well be that the charge is vague and embarrassing;
>
> 12 Surely the dishonesty cannot rest on the fact that I stamped the plan and or that the plan had not been approved because as I stated in the memorandum which is annexure "G" hereto and at the hearing, I had authority as the Respondent's Building Inspector to stamp plans which have already been approved by council. Indeed, council acts on my advise and recommendations on whether to approve building plans in the city. Indeed, this is the practice, as I previously stated during the hearing and in the memorandum. The practice is that once a building plan is approved by council, the Building Inspector indicates such approval by a stamp on the plan. This procedure cannot be disputed and was indeed not disputed at the hearing.
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> 13 Further the Building plan had been approved by council, long time back. The owner of the plan approached my office requesting another stamped copy because he needed to present same to the bank, the original plan having been defaced. This again happens in the ordinary course of business at the Respondent's undertaking and on receiving such requests we stamp the plan. All we have to do is to ascertain that the plan similar to the one approved by council.
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> 14 I further made it clear during the hearing that whereas the original plan was written **restaurant only**, the plan which was presented to me during the hearing and prior to the hearing by the Respondent's City Planner was written **"restaurant and bar"**. Further as I mentioned during the hearing, at the time I stamped the plan I did not notice that it was written both restaurant and bar. I really do not recall if the words **"and bar"** appeared on the face of the plan when I stamped the plan. As far as I am concerned the words may have been inserted after I had stamped the plan and this I stated at the hearing even

though it does not appear to have been accurately recorded in minutes prepared by the Respondent.

15 Strangely the fact that the plan was written both **restaurant and bar** apparently came to the notice of the Respondent when this fact was drawn to the attention of the Respondent by the Building Appeals Tribunal which was apparently hearing an appeal by the owner of the plan and land, who was complaining that council had declined to approve his plan for both **restaurant and bar**. It seems to me that the owner himself was not aware that the plan was written **restaurant and bar** if he considered it necessary to appeal to the Appeal's tribunal.

16 In any event the Respondent's complaint as reflected in the charge sheet made no reference to the words **restaurant and bar** on the face of the plan.

17 In the circumstances I further aver that there was neither evidence nor were there factual allegations from the charge as formulated to support a conclusion of **dishonesty.**

18 The charge as formulated was to the extent that it did not disclose a basis for **dishonesty** was irregular.

19 It is further averred that the Respondent's finding by the Respondent in annexure "D" that the offences of a **dishonest act** as alleged were proven constitute an irregularity in the proceeding in as much as there was no **evidence at all** before the Respondent council to support such a finding. Indeed such a finding is so unreasonable on the evidence led at the hearing, that it can only be explained on the basis of bias, arbitrariness or a complete failure by the Respondent's council to apply its mind to the matter".

In law the court will not interfere merely because that the decision was one which it would not have arrived at. (***Rama vs Western Rent Board, Johannesburg*** *(supra)*; ***Schoch No. and others vs Bhettany and others*** *(supra)*.

In review proceedings a court is concerned with irregularities or illegalities which result in "a failure of justice" the mere possibility of prejudice is insufficient (see ***Davis vs Chairman Committee of J.S.E. 1991 (4) S.A. 43; Jockey Club of South Africa and others vs Feldman*** *(supra)* and ***Larson and others vs Northern Zululand Rural Licensing Board*** *(supra)*.

I find that there was substantial compliance with the staff standing orders and in so far as paragraph 6 (1) and 6 (2) may not have been strictly complied with, that this did not prejudice the Applicant. The hearing report fully considers the documentary and oral

evidence and was therefore not unfair or unreasonable. The Applicant is charged and he stated in reply that he made a mistake. He stamped and allowed a developer to have a **bar** where the council has not given permission for such. He is tested in the enquiry which found his explanation unacceptable and that he acted **"dishonesty"**. He pleaded guilty before the enquiry and he was duly represented by a member of the staff association one Augustine Dlamini throughout the proceedings.

All in all I find that in so far as paragraph 6.1 and 6.2 were not complied with the Applicant was in no way prejudiced. A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been "a failure of justice". A mere possibility of prejudice not of a serious nature will not justify interference by a superior court (see ***Davis vs Chairman, Committee of the J.S.E*** *(supra)* at page ***48 E – G***).

In the result, the application is dismissed with costs including costs of counsel.

S.B. MAPHALALA

JUDGE