IN THE HIGH COURT OF ESWATINI

JUDGMENT

Civil Case No. 993 /17

In the matter between:

JOSEPH MAMBA	APPLICANT
And	
THE CHAIRMAN OF THE CIVIL SERVICE BOARD	1st Respondent
THE NATIONAL COMMISSIONER OF POLICE	2nd Respondent
SUPERINTENDENT D MSIBI	3rd Respondent
THE PRIME MINISTER OF THE KINDOM	
OF SWAZILAND / MINISTER OF POLICE	4th Respondent
THE ATTORNEY GENERAL	5th Respondent[1]

[1]Consolidated with two similar Applications under Case Nos. 1017/2017; 1196/2017 wherein the parties are respectively: *Bheka Magagula v Chairman of Civil Service Commission, Commissioner of Correctional Services and Others; Sabelo Dlamini v Commissioner of Correctional Services, Senior Superintendent Kenneth Dlamini NO, Superintendent Hezekiel Nhlengethwa NO, Ass Superintendent Douglas Metfula NO, Ass Chief officer Sakhile Khoza, Attorney-General*.

Neutral citation: *Joseph Mamba v The Chairman of the Civil Service Commission and 5 Others (993/2017; Bheka Magagula v Chairman of the Civil Service Commission (1017/2017); Sabelo Dlamini v The Chairman of the Civil Service Commission (1196/2017) [2018] SZHC 190*

Summary: *Constitutional law: Application for the declaration of certain parts of legislation as inconsistent with the Constitution and therefore invalid, of no force or effect; declaration of disciplinary boards established in terms of the said legislation to hear disciplinary matters of the Applicants, unconstitutional.*

Constitutional law: Application for an order compelling the respondents to establish service commissions for Police and Correctional Services sector to, among other functions, conduct disciplinary hearing of the Applicants.

Constitutional interpretation: whether certain provisions of the Police Act, Prisons and the Public Service Order 1973 concerning discipline of the respective officers below the rank of Deputy Commissioner are inconsistent with the Constitution.

Constitutional interpretation: Whether the provisions of sections 172, 173, 176 make the establishment of service commissions for the public service mandatory

Constitutional interpretation: Whether the provisions of section 189(5) and 190(5) of the Constitution, read together with sections 172, 173, 176 and 267(a)(iii) convey in mandatory terms a meaning that the police and correctional services are entitled in principle to have their relevant affairs including disciplinary hearings to be conducted by service commissions or similar bodies in terms of the Constitutions.

Constitutional interpretation: What is the effect of section 39 of the Constitution vis-a-vis section 38 thereof concerning the fundament right of the applicants to a fair hearing – Held the Constitution does not oblige the Respondents to establish service commissions or similar bodies for the Police and Correctional Service - Held: the constitutional provisions on establishment of service commissions are permissive as opposed to peremptory. Held: that the Applications are misguided in Constitutional interpretation of section 267(a)iii on time limit for establishing new service commissions. Held: by virtue of section 39 of the Constitution the impugned provisions of the Police and Prisons Act are exempted from compliance with the provisions of Chapter III of the Constitution. Held: The Applications are dismissed with no order as to costs.

Coram: Fakudze, Maphanga Tshabalala JJ.

For the 1st and 2nd Applicants: Mr. S Nhlabatsi

For the 3rd Applicant : Mr. L Dramamine
For the Respondents : Mr. M Vilakati

Heard on: 25 September 2017
Delivered on: 03 October 2018

JUDGMENT

INTRODUCTION

[1] This judgment pertains to three applications, separately launched by three Applicants under certificates of urgency. The Applicants are facing disciplinary actions by their respective superiors in the police[2] and correctional services.[3] Interim orders were issued by the High Court prior to the sitting of the full bench, staying disciplinary proceedings against the Applicants pending finalization of their applications. Due to similarities of issues to be determined the three applications were consolidated. The applications raise constitutional issues and were therefore heard before the full bench of the High Court.

[2] The main Applicant Joseph Mamba in Case No. 993/17.
[3] 2nd and 3rd Applicants in Case Nos 1017/17 and 1196/17 respectively.

[2] The Applicants are, for convenience referred to respectively as 1st, 2nd, and 3rd Applicants,[4] or collectively as Applicants. Reference to Respondents is reference to the Respondents in the three Cases collectively. Reference may also be made where necessary, to a particular specified Respondent. To avoid prolixity and unnecessary repetition in submissions and arguments, counsels for the Applicants agreed that Mr. Nhlabatsi, appearing for the 1st and 2nd Applicants should present the main arguments for all the Applicants and that counsel for the 3rd Applicant, Mr. L Dlamini to present supplementary submissions. The parties[5] were unanimous that the court should decide the three applications simultaneously in one judgment.

THE FACTS

Case No.993/2017[6]

[3] The 1st Applicant[7] was on the 2nd August 2017 served with 5 disciplinary charges for alleged violation of Police Regulation 29 of 1957 read with Police Act of 1957. It is not necessary to set out particulars of the charges faced by the 1st Applicant except to state that they involve alleged violations of provisions

[4] Joseph Mamba, Bheka Magagula and Sabelo Dlamini, respectively.
[5] Including counsel for the Respondents.
[6] Joseph Mamba v Chairman of the Civil Service Board & Others.
[7] Joseph Mamba

of the Police Regulations made under the Police Act of 1954. Relevant prayers or orders sought by the 1st Applicant[8] set out in the Notice of Motion can be summarized thus:

1) Dispensing with the rules relating to time limits, forms and manner of service and hearing the matter as urgent in terms of Rule 6(25).

2) Condoning the Applicant's non-compliance with the court Rules.

3) Stopping the disciplinary hearing until the matter is heard and finalized.

4) Declaring the appointment of disciplinary board as unlawful, null and *void ab initio* on the ground that it is inconsistent with the Constitution

5) Granting an order directing the 1st and 3rd Respondents to establish a sector service commission for the police service to deal with disciplinary matters.

6) Declaring section 13 of the Police Act of 1957 to be unconstitutional, null and void.

7) Declaring section 11(1) and (2) of the Civil Service Order of 1973 to be inconsistent with sections 189(5), 267(a)(iii) of the Constitution and therefore null and void.

8) Issue *rule nisi* to operate with immediate effect in terms of prayer 3 (interim stoppage of disciplinary proceedings)

9) Issue an interim order calling upon the Respondents to show cause on a return date why orders in terms of prayer 4, 5, 6 and 7 should not be made final.

9.2 Costs of suit against the Respondents

[8] Joseph Mamba.

10) Further and/or alternative relief.

Case numbers 1017/17 & 1196/17[9]

[4] The 2nd Applicant,[10] and the 3rd Applicant[11] are both Correctional Services Warders. They separately and respectively face disciplinary charges for alleged contravention of the provisions of Prisons (Disciplinary) Offences Regulations of 1965. Their respective hearings are set to proceed before disciplinary boards established in terms of the Prisons Act of 1964 and the regulations made thereunder.

[5] The two correctional officers (separately represented in these proceedings), are challenging constitutionality of the disciplinary tribunals set up to entertain their respective disciplinary cases. The orders they seek are, *inter alia:*

1) Declaring section 21 of the Prisons Act of 1964 to be inconsistent with section 190(5) read with section 267(a)(iii) of the Constitution.
2) Directing the respondents to establish a Service Commission for the Correctional Services**.**

The Applicants' case

[6] Cases for the three Applicants[12] are based on the premise that disciplinary proceedings brought against them cannot lawfully be heard by disciplinary bodies established in terms of the

[9] Respectively relating to 2nd and 3rd Respondents (Bheka Magagula and Sabelo Dlamini).
[10] Bheka Magagula.
[11] Sabelo Dlamini.
[12] The 1st, 2nd, and 3rd Applicants.

Police and Prisons Acts, respectively, arguing that the Constitution abolished the disciplinary regime provided and conducted under the said pieces of legislation. They contend that the current disciplinary regime is inconsistent with the Constitution,[13] and that the Respondents have a duty to set up the relevant service commissions to entertain their matters. The Applicants cite a number of provisions of the Constitution, which they submit are mandatory and obligatory on the establishment of service commissions to deal with discipline and other matters affecting them. They submit, for instance, that sections 189(5), 190(5) read in conjunction with sections 267(a)(iii), 178, as well as 21 and 33 of the Constitution are intended, *inter alia,* to afford them a right to a fair hearing before an impartial disciplinary body, which the Applicants contend is the sector service commission. The applicants argue further that establishment of the said service commissions is long overdue. This is in view of section 267(a)(iii) which they allege sets the time limit of six months from the effective date of the Constitution as the period within which the authorities were required to establish the said commissions.

[7] The court is asked to make a finding that sections 189(5) and 190(5) of the Constitution, read together with section 267(a)(iii)) have introduced sector Service Commissions and vested them with all disciplinary powers in respect of police

[13] The Constitution Act No. 1 of 2005.

and correctional officers below the ranks of the Deputy Commissioner. It is not in dispute by both parties[14] that sections 189(5) and 190(5) provide that disciplinary control and other matters in respect of police and correctional officers below the ranks of Deputy Commissioner shall, pending the formal establishment of a sector service commission or similar body, continue to be the responsibility of the Civil Service Commission, subject to any delegation of responsibility.

The Applicants contend that the legality of internal disciplinary boards provided by the Police and Prisons Acts ceased at the end of six months period counted from the date of coming into effect of the constitution. This the Applicants assert is in terms of Section 267, which reads thus:

"267

The first appointments to the following offices shall be made within six months after the commencement of this constitution *-*

(a) The chairmen and other members of -

(i) The citizenship Board

(ii) The Judicial Service Commission

(iii) The Various Service Commissions

(iv) The Land Management Board

(v) The Mineral Management Board

(vi) Parliamentary Service Board

(b) The Chairman and members of the council of Chiefs." [Emphasis is supplied.]

[14] The Applicants and the Respondents.

[8] The Applicants place heavy reliance on the phrase "*various service commissions"* found at paragraph (iii) of section 267 in support of their case. The Applicants interpret the meaning of **various service commissions** and argue that the phrase actually refers to any other service commissions contemplated by the Constitution[15] that are not listed in section 267. The Applicants submit that the contemplated service commissions include Police and Correctional service commissions referred to in and by virtue of sections 189(5) and 190(5). The Applicants argue further that on the strength of the opening part of paragraph (iii),[16] a sector service commission for police and correctional services ought to have been established six months after the coming into effect of the Constitution.

[9] The Applicants submit that the reading of the constitution in sections 189 (5), 190 (5), 173 (1), 178 together with 267 (a) (iii) convey a meaning in support of the establishment of sector service commissions for Police and Correctional services respectively. The Applicants highlight in their submissions that Section 178[17] vests in a service commission utmost independence in the performance of its functions and exercise

[15] See section 172.
[16] Which reads, "*The first appointments to the following offices shall be made within six months after the commencement of this Constitution*"
[17] Of the Constitution.

of its powers. They submit that they are entitled in their disciplinary proceedings to the same independent body as provided by the Constitution. Section 178 reads:

"178.

In the performance of its functions under this Constitution, a service commission shall be independent of and not subject to any Ministerial or political influence and this independence shall be an aspect of the exercise of any delegated powers or functions of the Civil Service Commission or any other service commission or similar body." [Emphasis added].

[10] The Applicants referred this court to the Supreme Court judgment in the ***Prime Minister v MPD Supplies (Pty) Ltd & others***[18] as authority for the preposition that the disciplinary tribunals set up to try the applicants may not exercise powers that they legally and constitutionally do not have. They argue that the principle of supremacy of the constitution and section 2 of the 2005 Constitution dictate that any law inconsistent with the Constitution is void to the extent of inconsistency. In pursuit of this argument the applicants submit that provisions of the Police and the Prisons Acts which provide for the establishment of the disciplinary tribunals set up for their cases, should be set aside to the extent of their inconsistency with the provisions of section 267 and 173 of the Constitution. They further submit that the two Acts[19] must be adapted to the provisions of constitution in order for the disciplinary

[18] (464/09) [2012] SZHC 105 (30 April).
[19] Police and Prisons Acts.

process to comply with the Constitution. The applicants refer in this regard to the provisions of Section 268 of the constitution:

> *"268 (1) The existing law, after the commencement of this constitution, shall as far as possible be constructed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this constitution.*
>
> *(2) For the purposes of this Section, the expression "existing law" means written and unwritten law including customary law of Swaziland as existing immediately before the commencement of this Constitution, including any Act of Parliament or subordinate legislation enacted or made before that date which is to come into force on or after that date."* [Emphasis supplied]

[11] The Applicants concede that in the absence of a police or correctional services sector service commission they, by virtue of the provisions of sections 189(5) and 190(5) are subject to discipline under the old disciplinary regime stipulated by the Police and Prisons legislation. They argue however as stated in earlier paragraphs that the period of transition from the old disciplinary regime to the new regime is limited by section 267(a)(iii) to six months from the commencement of the constitution, which period they submit has long expired.

[12] The Applicants submit that the establishment of sector service commissions for the Police and Correctional Services is entrenched in the Constitution. They submit that their

interpretation of the constitutional provisions mentioned above[20] finds support in the High Court's judgment of ***Vilakati v The Prime Minister & 3 others,***[21] *wherein* the court made observations that there was an *"urgent need to establish the Police Service Commission in order to realize the objectives of the right to a fair hearing envisaged in Sections 21 and 33 of the constitution."*[22] The court, however, recognizes in the same judgment, the proviso to section 189(5) to the effect that pending establishment of the Police Service Commission the *status quo* applies. The court also referred to Section 193(3) as confirmation of applicability of the status quo. Section 193(3) provides thus:

> *"193 (1)....*
>
> *(2).....*
>
> *(3) For the avoidance of any doubt, in any case in which this section or this constitution does not apply the power to appoint, promote, transfer, or discipline or dismiss public officers* ***shall pending the establishment of the appropriate service commission or similar body continue to vest where it vests at the commencement of this constitution."*** (Emphasis supplied.)

[13] The Applicants assert that the Respondents are in default of constitutional compliance on two fronts – that the Respondents failed to establish the said service commissions within six months as anticipated by section

[20] Sections 173(3)(4), 189(5), 190(5), 267(a)(iii)
[21] 464/09 [2012] SZHC 105 (30 April 2012).

[22] At paragraph [25].

267(a)(iii);[23] and further failed to facilitate recruitment of members of these commissions as required by section 173(3) and (4). The latter section is for clarity quoted in full:

"173 (1) There ***shall be independent and impartial service commissions*** *established in terms of this constitution or any other law for the better management and exercise of certain powers and functions regulating the public service or any part or aspect of the public service.*

(2) A Service Commission shall consist of not less than three and not more than five members one of whom shall be appointed a chairman.

(3) ***Members of a Service Commission shall be appointed*** *by the King on the recommendation or a line Minister or any other authority as may be provided in this constitution or any other law."*

(4) In making the recommendations to the King for the appointment of a member of a service commission the line Minister ***shall*** *proceed in a competitive, transparent and open manner…."*

[Emphasis supplied].

Respondents Case

[14] The Respondents are represented in the three consolidated applications by a three-member legal team from the Attorney General's Chambers led by Mr. M Vilakati. The Respondents' three-pronged opposing contentions can be summarized as follows:

[23] The Constitution.

1) The provisions of the Constitution in Sections 189(5), 190(5) read together with sections 173 and 267(a)(iii) do not make it mandatory for the executive to establish sector service commissions (or similar bodies) for the Police and Correctional Services or any other sectors. The constitutional provisions are permissive on the issue;

2) On the Applicants' interpretation of section 267(a)(iii) to the effect that appointments of office bearers to service commissions for police and correctional services had a compulsory timeline of six months after commencement of the Constitution: That the six months' time frame relates to staffing of commissions in existence at the commencement of the Constitution.

3) The impugned provisions of the Police and the Prisons Acts, and the Civil Service Order are not inconsistent with the constitution, and as a corollary the applicants' rights to appear before independent tribunals or to a fair hearing are not infringed.

[15] The Respondents argue that the decision to establish any sector service commission in terms of section 172 is discretionary and lies solely with the executive arm of government. This, the Respondents state, is clear from the permissive language of section 172(2) and (3). The Respondents expressed concern that acceding to the application for an order compelling establishment of a service commission would amount to undue interference by the court with the executive exercise of its constitutional discretionary powers. I am unable to agree with the argument that suggests that the executive may or not decide to implement and bring to fruition the constitutional provisions that clearly state that the public service shall be governed through sector service

commissions. The executive's discretionary powers, in my view, relate to how the commissions are to be structured. It is also clear from reading of the relevant section,[24] that the executive had six months from commencement of the Constitution, within which period to decide on the structure and shape of the commissions, and to make appointments of chairmen and members of the commissions.

[16] The Respondents' contention is that appointment of "*chairmen and other members of the various Service Commissions"* referred to in 267(a)(iii) should be understood to relate to commissions existing at the commencement of the Constitutions in exclusion of commissions yet to be established. The Respondents deny therefore that the set limit of six months[25] for operationalization of sector service commissions or similar bodies is universal. This narrow interpretation of section 267(a)(iii) is not only unconvincing but counsel for the Respondents cited no support for it. The Constitution, neither in this Chapter nor elsewhere defines "*the various Service Commissions*" as reference to existing commissions in exclusion to commissions yet to be formed. The ordinary meaning of the words used in section 267(a)(iii) is applicable for its interpretation. There is no justification for the interpretation assigned by the Respondents. It is logical

[24] Section 267(a)(iii).
[25] From the date of commencement of the Constitution.

that the ambit of section 267(a)(iii) would cover commissions or similar bodies for Police and Correctional Services anticipated in Sections 189(5) and 190(5) of the Constitution. Does this mean that the executive is in default of setting up appropriate bodies required by the Constitution to deal with matters affecting the Applicants, which include the conduct of disciplinary proceedings? This question and others are dealt with later in this judgment.

[17] The Respondents argue that the constitution excludes the applicants from protections for a fair hearing before an independent and impartial adjudicating tribunal provided under the Constitution,[26] further that the right to administrative justice[27] is not applicable to the Applicants by virtue of section 39(3) of the Constitution. The Respondents submit that the effect of the provisions of section 39(3) read with subsection (6) thereof, is that the provisions of the Police and the Prisons' Acts, shall not, in so far as they relate to the Applicants, be held to be inconsistent with or in contravention of any of the provisions of Chapter III of the Constitution, with the exception of three sections.[28] Section 39(3) and the relevant parts of subsection (6) read as follows:

"39

[26] See section 21(1)
[27] See section 33(1),
[28]Sections 15, 17 or 18.

(1)….

(2)….

(3) ***In relation to a person who is a member of a disciplined force*** *of Swaziland,* ***nothing*** *contained in or done under the authority of* ***the disciplinary law of that force*** *shall be held to be* ***inconsistent with or in contravention*** *of any of the provisions* ***of this Chapter*** *other than sections 15, 17, or 18."*

(4)….

(5)….

(6) In this Chapter, unless the context otherwise requires -

"Contravention" in relation to any requirement, includes a ***failure to comply with that requirement****, and cognate expressions shall be construed accordingly;*

"disciplinary law" means ***law regulating the discipline*** *of any* ***disciplined force;***

"disciplined force" means -
(a) …….
(b)the Swaziland Royal Police Service;
(c)the Swaziland Correctional Services.

"Member" in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline. [Emphasis is supplied]

[18] The Respondents submit that Section 39(3) exempts the impugned provisions of the Police and Prisons Acts from compliance with the provisions of Chapter III, save for the specified sections 15, 17 and 18. The impugned section 13 and 21 of the Police Act and section 11 of the Prisons Act are

defined under section 39(6)[29] as disciplinary laws. The Respondents submit that by virtue of section 39(3) the rights encompassing equality before the law, fair hearing before an independent and impartial adjudicating tribunal, which form the basis of the Applicants' attack against the existing disciplinary legal framework, are not applicable to the Applicants, and that the relief sought is not available to them.

[19] The Applicants submit in reply that despite the provisions of section 39(3,) their Chapter III rights to a fair hearing before independent and impartial tribunal are protected from abrogation by section 38 and therefore maintained. Section 38 is titled *Prohibition of certain derogations,* and reads:

> *"38* ***notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:***
>
> *(a) life,* ***equality before the law*** *and security of person;*
> *(b)* ***the right to fair hearing;***
> *(c) freedom from slavery or servitude;*
> *(d) the right to an order to an order in terms of section 35(1); and*
> *(e) freedom from torture, cruel or inhuman degrading treatment or punishment."* [Emphasis is added].

Analysis and findings

[29] Of the Constitution.

[20] The constitutional challenge by the Applicants is mounted on three main grounds. They can be summarized as follows:

1) The failure of the Respondents to comply with the provisions of the Constitution in that they have not established service commissions for police and correctional services. And therefore, an order should issue compelling the establishment of the commissions.

2) Provisions of the legislation establishing disciplinary bodies[30] are inconsistent with the constitutional provisions for fair hearing and administrative justice. And therefore, seeking an order declaring those provisions unconstitutional, null and void.

3) Disciplinary boards constituted in terms of the said legislation[31] are unconstitutional and therefore seek an order declaring the boards unconstitutional.

[21] The last two grounds of attack are centered on the alleged inconsistencies of the provisions of three pieces of legislation (the Police and Prisons Acts, and the Civil Service Order), with the provisions of the constitution relating to individual rights to a fair hearing before an independent adjudicating authority. At least four main issues for determination stand out, and are formulated thus:

1) Whether or not the constitution makes it mandatory for the Respondents to establish sector service commissions for Police and Correctional services;

[30] The provisions of Police and Correctional Services Act, regulations made under them, and the Civil Service Order of 1973.
[31] Ibid.

2) Whether or not the Applicants' rights to a fair hearing are infringed by the status quo concerning the disciplinary legal framework;

3) The impact of section 39(3) on the Applicants' right to a fair hearing;

4) Whether the legislation complained of[32] and the disciplinary boards established under them are unconstitutional, or whether it is legally permissible to declare them unconstitutional.

[22] The task for the court is to interpret the relevant sections of the Constitution relied on by the parties. In dealing with the parties' very divergent constructions of some of these provisions I am alive to the correct approach to decide no more than what is absolutely necessary for the decision of this case. The Namibian Appeal Court in the case of ***Kauesa v Minister of Home Affairs***,[33] per Dambutshena AJA cautioned, *inter alia* that constitutional law must be developed cautiously, judiciously and pragmatically in order for it to withstand the test of time.

[23] This court also has the significant task to pronounce itself on the apparent tension between section 39(3) and the other

[32] Sections 21, 33, and 11, respectively, of the Police Act 1954, Prisons Act of 1964 and the Civil Service Order of 1973.
[33] Referred to in Sekoati's case. Supra.

clauses of Constitution,[34] concerning the fundamental rights to a fair hearing and the concomitant right to administrative justice that the Applicants seek to enforce. The parties have quoted in support of their respective arguments, various provisions of the Constitution. These include, sections 14(2),[35] 35(1),[36] 38(b),[37] 39,[38] 173(4),[39] 176(1),[40] 178,[41] 187,[42] 189(5),[43] 190(5),[44] 267.[45]

[24] It is a general principle of constitutional interpretation to read the constitution as a whole. See the Supreme Court judgment in ***Mhlanga and Another v Commissioner of Police and 3 others***.[46] The constitution is not an ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be

[34] In particular section 38(b).
[35] Respect, upholding and enforcement of the fundamental rights and freedoms under the Bill of Rights.
[36] The right to seek redress before the High Court for infringement or threat of infringement of rights.
[37] Prohibition of derogation from enjoyment of the right to a fair hearing.
[38] Saving clauses and interpretation.
[39] Establishment of independent impartial service commissions and the criteria for appointments thereto.
[40] Functions and powers of service commissions.
[41] Independence of service commissions from ministerial/political influence in the performance of duties.
[42] Vesting of appointments...dismissal and disciplinary control of public officers in the Civil Service Commission.
[43] Pending the establishment of a sector service commission, the Civil Service Commission shall subject to the power to delegate continue to bear the responsibility for police officers below the rank of Deputy Commissioner.
[44] Pending the establishment of a sector service commission, the Civil Service Commission shall subject to power to delegate, continue to bear the responsibility for Correctional service officers below the rank of Deputy Commissioner.
[45] First appointments to the listed offices to be made within six months after the commencement of the Constitution.
[46] Civ Case No. 12/2008.

enacted. The constitution defines the powers of the different organs of state, and the fundamental rights of every person that must be respected in the exercise of power. These assertions were made by the South African Constitutional Court in ***S v Makwanyane***[47] referred to by the Lesotho Court of Appeal in ***Sekoati v President of the Court Marshal & others.***[48] The court therein highlights the distinct nature of the constitution from an ordinary statute, hence sometimes, the need for different interpretation approaches between them.

Whether the establishment of service commissions is mandatory or discretionary

[25] The Constitution pronounces under Part I of Chapter X at section 172(1) in mandatory terms that the Public Service of the Kingdom shall be administered through service commissions or similar bodies. That the said pronouncement is mandatory is evident from the use of the word *shall*. It is provided in section 176(1) that the functions of service commissions include, inter alia, *"disciplinary control and removal from office of officers within the public service or a sector of the public service."*[49] It is also provided that the

[47] (1995) ZACC
[48][2000] 4 LRC at p.512.
[49] Section 176(1).

public service may be divided into sectoral units.[50] Further that each sectoral unit may have a separate service commission.[51] The use of the word "***may***" in both subsections (2) and (3) of section 176 lends support to the obvious conclusion that the Constitution leaves it to the discretion of the responsible authority to decide on the structuring and configuration of such commissions across the public service. Such decisions entail structuring the public service into sectoral units that are suitable for purpose. This provision leaves it to the discretion of the implementing authority whether to create unitary or separate service commissions for particular sectoral units, and other pertinent considerations. It is not in dispute that at the commencement of the Constitution there were commissions in existence which the constitution accommodates through transitional clauses. It is also not in dispute that the Constitution specifically created new commissions, and that some new commissions are envisaged to be created. These facts were admitted on both sides during arguments.

Section 172(2) and (3) provide as follows:

"172 (1) The Public Service of Swaziland ***shall*** *be administered through service commissions or similar bodies established under this constitution or any other law.*

(2) The Public Service ***may be divided into sectoral units for ease of management and quick delivery.***

[50] Section 172(2).
[51] Section 172(3).

(3) Each sectoral unit ***may have a separate service commission****."*

[Emphasis is added.]

[26] The text of Section 173 is quoted at paragraph [13] of this judgment. A recap of subsection (1) thereof is apposite:

"There ***shall be independent and impartial service commissions*** *established in terms of this constitution or any other law for the better management and exercise of certain powers and functions regulating the public service or any part or aspect of the public service.* [Emphasis is added].

[27] The answer to the inquiry whether the Constitution makes establishment of service commissions obligatory is to be found in the text of the constitution itself. Respect for the language of the constitution as a legal instrument is paramount. In the words of Kentridge AJ "*…if the language used by the lawgiver is ignored in favor of general resort to 'values' the result is not interpretation but divination."*[52] The reading of sections 172 and 173 support the view that sector service commissions and their subsets, (service commissions) are a mandatory feature of the public service. Sections 189(5) and 190(5), which specifically, respectively anticipate service commissions or similar bodies for Police and Correctional Services, to deal with discipline, among other issues, for officers below the rank of Deputy Commissioner, echo this.

[52] State v Zuma [1995] ILRC145 at 156.

[28] It is an inescapable conclusion, in my considered view, that sections 172(1) and 173 provide in straightforward mandatory terms for the establishment of service commissions for the administration of the public service, for the better management and exercise of certain powers and functions regulating the public service. The Respondents argued that there is no provision in the constitution directing that there shall be Police or Correctional Services service Commission. In answer to this the Applicants rely on at least three sections of the Constitution, which ought to be read together to reveal an intention by drafters of the Constitution for establishment of the sector service commissions or similar bodies for these two security services. See sections 189(5) of the constitution.[53] It is one of the cardinal principles of constitutional interpretation that the constitution must be read as a whole, and that its provisions should not be read in isolation.[54] Section 189(5) and 190(5) respectively envisage the establishment of sector service commissions for the Police and Correctional Services. On their own the two provisions do not direct that the commissions shall be established. The relevant phrase in paragraph (5) of section 189 is:

[53] Which relates to the Police Service. It corresponds almost verbatim with section 190(5) which relates to Correctional Services.

[54] Sekoati supra. See also Mhlanga's case. Supra.

"(5) *"Subsection (4) does not apply in respect of officers below the rank of Deputy Commissioner of Police who pending the formal establishment of a sector service commission or similar body shall continue being the responsibility of the Civil Service Commission, subject to any delegation of that responsibility..."* [Emphasis supplied]. The underlined phrase communicates acknowledgement and anticipation for establishment of such a commission, but does not amount to an instruction for such a commission to be set up. The key word, in my view is *"pending."* The dictionary definition of the word is *"while waiting for something to happen, or until something happens."*[55] The Constitution categorically provides in this paragraph for maintenance of the status quo until such time that the anticipated structures (commissions) are in place. In the context of disciplinary hearings, the function of the two sections[56] is to manage transition from the pre-constitution structures regarding the said hearings, to the new framework dictated by the Constitution. These sections[57] place no conditions or timeline for the formation of such a commission. This is done in another part of the Constitution. Sections 189(5) and 190(5) should not be read in isolation, but together with other parts of the Constitution. The two provisions when read together with section 267(a)(iii), a clear picture immerges that the state was afforded a six months' timeframe from the coming into effect of the Constitution to implement the establishment of service

[55] Wehmeier S (ed.) Oxford Advanced Learner's Dictionary of Current English, 6th edition at p861.
[56] Sections 189(5) and 190(5).
[57] Sections189(5) and 190(5).

commissions for the public service of which the Police and Correctional services are an integral part.

[29] There is credence in the Applicants' argument that section 267(a)(iii) dictates the time limit of six months from the effective date of the Constitution, for appointments of office bearers, in particular the chairpersons and other members of the service commissions. This applies to commissions or similar bodies anticipated by sections 189(5), 190(5) and 172. There is also credence in the contention that the *various service commissions* referred to in paragraph (a)(iii) of section 267 relate to commissions that predated the Constitution. However, there is no justification or rationale for holding that this is in exclusion of new commissions established or envisaged to be established post commencement of the Constitution. I find no justification for limiting the scope of section 267(a)(iii) in the manner suggested by counsel for the Respondents. There is no such limitation apparent in section 267. The ordinary meaning of the words and language of the section should be respected. It is my considered view that the logical and ordinary meaning of the phrase, *various service commissions* refers to all commissions decreed by section 172 and confirmed by section 173, regardless of whether in existence at the commencement of the constitution or those yet to be formed post the commencement of the Constitution.

[30] It must be noted that the permissive terms of section 172(2) and (3) respectively, relate only to the nature and configuration desired for the service commissions and the sectoral units. The discretion provided for the design and structure of the sector service commissions in no way waters down the obligatory provisions of the preceding subsection (1). The court in ***Vilakati v The Prime Minister and 3 others***[58] noted that section 172 and 173 of the constitution provide for the establishment of service commissions or similar bodies. The court lamented the need to speed up establishment of the police service commission in order for the Applicants therein to enjoy the rights to a fair hearing conferred by sections 21 and 33 of the Constitution. The Court in that case did not deal with the provisions of 267 and the question of the timeframe did not arise. There is no doubt in my view that establishment of these commissions is not only compulsory, but is overdue in view of the six months' time limit set by section 267.

Whether sections 13 of the Police Act, 21 of the Prison Act and 10 and 11 of the Civil Service Order 1973 are inconsistent with the Constitution.

[58](464/09) [2012] SZHC 105 (30 April 2012).

[31] One of the Applicants' complaint against the status quo and lack of constitutional reform of the disciplinary framework as prescribed by the Constitution is directed against the provisions of the Police Act of 1954, the Prisons Act of 1964 and the Civil Service Order of 1973, which they argue are unconstitutional and must be declared null and void.[59] These provisions are assailed as inconsistent with the Constitution[60] which provides for the new era for disciplinary process and procedure of officers in the Applicant's categories in the respective forces.[61] The Applicants' objection to the continued application of the old unreformed Police and Correctional Services legislative provisions is actually an extension of their contentions dealt with in the preceding paragraphs of this judgment, that the Constitution via sections 189(5), (190) and 267(a)(3), read in conjunction with other parts of the Constitution, dictates in mandatory terms the establishment of service commissions within a fixed period of 6 months, to govern disciplinary control and other employment affairs of the Applicants.

[32] The Applicants argue that the failure to set up the said service commissions and the continued subjection of the Applicants to disciplinary proceedings under the current legislative

[59] Sections 13 of the police Act, 21 of the Prisons' Act and sections 10 and 11 of the CSO of 1973, respectively.
[60] Firstly, with sections 189(5) and 190(5) read with section 267 (a) (iii), as well as sections 21 and 33.
[61] Police and Correctional services, respectively.

provisions,[62] is a violation of their fundamental rights to a fair hearing by an independent and impartial adjudicating authority.[63] Further that there is perpetual denial of administrative justice, conferred by sections 21 and 33 of the Constitution. The relevant provisions of the ***Police Act*** provide:

> *"13. (1) If the Commissioner is of the opinion that a charge is properly cognizable by a Board of officers, he shall* ***appoint three Senior Officers to constitute such Board*** *and may give such directions as to times and place of hearing as he may thick fit.*
>
> *(2) The Board shall conform as far as possible with the rules of procedure and evidence obtaining in the Magistrate's Courts and shall administer the oath or affirmation to any witness appearing before it".*

Section 21 of the ***Prisons Act*** reads:

> *"21(1) A* ***prison officer conducting an inquiry in accordance with this Act into a disciplinary offence*** *alleged to have been committed by a prison officer may ……."* [Emphasis is added].

[33] Regulation 4 of the Prisons (Disciplinary Offences) Regulations of 1965[64] provides differentiated disciplinary rules and regulations for senior and subordinate officers. For instance the senior officers' alleged acts of misconduct are to be dealt with in accordance with the Public Service Commission (General) Regulations of 1963,[65] while the juniors' shall be

[62] Police Act, Prisons Act and Civil Service Order.
[63] Section 21(1) of the Constitution.
[64] Regulations made under the Prisons Act 1964.
[65] Regulation 4(1).

inquired into by the Director in terms of the Prisons Act.[66] By virtue of section 11 of the Civil Service Order 1963, the provisions of section 10 of the Order are made applicable to persons holding office in the Prison service below the rank of Chief Officer.[67] Further, for the purposes of the said section 11, reference[68] to Royal Swaziland Police Force, inspector, and Commissioner of Police shall be deemed to refer respectively to the Prison Service, Chief Officer and Commissioner of Prisons." The ***Civil Service Order of 1973,*** *section 10* reads as follows:

"10.

In relation to any officer in the Police Force below the rank of inspector, none of the functions imposed on the Civil Service Board under this Order shall apply to the extent to which such functions are by or under the provisions of any law in force in Swaziland exercised by the commissioner of Police or any other officer in the Royal Swaziland Police Force."

[34] The Applicant's grief with the cited provisions of the Police and Prisons Act, and the Civil Service Order (CSO) is understandable from the point of view that these pieces of legislation represent the pre-constitution disciplinary framework which ought to have by now been replaced or reformed in compliance with the dictates of the constitutional provisions referred to in earlier paragraphs. There is weight in the argument that the disciplinary framework under the current legislative provisions is at variance with the protection

[66] Regulation 4(2).
[67] See section 11(1).
[68] In section 10.

of rights provided under the Constitution. This legal framework falls short of ensuring constitutional rights to a fair hearing particularly by an independent impartial tribunal. For instance, section 178 of the Constitution provides for the independence of service commissions in the performance of their functions. It reads, in part:

> *"178.*
>
> *In the performance of its functions…a service commission shall be* ***independent of and not subject to any Ministerial or political influence,*** *and this independence shall be an aspect of exercise of any delegated powers or functions of the Civil Service Commission or any other service commission or similar body."* [Emphasis is supplied]

[35] As stated earlier in this judgment I find it indisputable that the Constitution dictates in peremptory terms, the establishment of service commissions or similar bodies for the administration and management of the public service.[69] And further that the service commissions envisaged by the Constitution were to be put in place within six months from the date of commencement of the Constitution. It cannot be disputed either, that Police and Correctional services are part of the public service. As such they are therefore included for the provision of service commissions or similar bodies. The applicants are in principle entitled to the benefits and efficiencies inherent in the functioning of the commissions as

[69] Section 172(1).

dictated by the Constitution, in particular the independence and impartiality of these bodies in the performance of their functions.[70] It is my finding also that the executive government is mandated to structure the commissions across the public service in a manner that it deems appropriate.[71] Be that as it may, the Constitution under section 39(3) introduces interpretations and exceptions that fundamentally isolate persons governed by the security laws from the general enjoyment of certain specified rights. The extent of the effect of section 39 is considered below.

The effect of section 39(3) and (6) on the rights of Applicants to fair hearing.

[36] The respondents submitted that section 39(3) insulates the police and correctional services legislation from the kind of attack levelled by the applicants. Counter argument of the applicant is that section 38 of the Constitution lists the right to a fair hearing among the rights that shall not be derogated from. The arguments are dealt with separately below.

Whether the provisions of Police and Prisons Acts infringe on the applicants' right to fair hearing.

[70] Per the pronouncement of section 178
[71] Section 172(2(3)).

[37] The Applicants also seek to be expunged certain parts of the Police and Prison's Acts,[72] on the basis that they infringe on their constitutionally guaranteed right to a fair hearing. The provisions under attack are in the case of the 1st Applicant, section 13 of the Police Act. The Applicants submitted that appointment of the disciplinary Board in terms of the two Acts be declared unlawful, and null and void from inception. The provisions of section 13 of the Police Act are set out in the preceding paragraph [32].

[38] One of the grounds advanced against the unlawfulness of the current disciplinary body is that it lacks independence and therefore infringes on the Applicants' guaranteed right to a fair hearing by an independent tribunal. The Applicants cite the provisions of section 38 (b) of the Constitution which provide that "[*N]notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of ……the right to a fair hearing."*

[39] Section 39 is titled *saving clauses and interpretation*. A recap of subsection (3) thereof: *"In relation to a person who is a* ***member of a disciplined force*** *of Swaziland,* ***nothing contained in or done*** *under the authority* ***of disciplinary law of that force shall be held to be***

[72] See paragraph [32] above for relevant texts of the provisions.

inconsistent with or in contravention *of any of the provisions of this Chapter other than sections 15, 17, or18."* [Emphasis is added].

Section 39 was a subject of interpretation by the Supreme Court in ***Mhlanga and others v Attorney General & others***,[73] wherein it was stated that section 39 supersedes all the preceding provisions of Chapter III of the Constitution. The supreme Court noted in that case that the main difficulty faced by the appellants is the wording of subsection (3) which provides that in relation to a person who is a member of a disciplined force, nothing contained in the disciplinary law of that force shall be held to be inconsistent with the other provisions contained in Chapter III of the Constitution. The Supreme Court observed that the appellants before it were admittedly members of the disciplined forces and that the laws they sought to be struck down were in fact disciplinary laws of these forces.

[40] In *casu* the Applicants' legal status and the relief sought per their papers, are on all fours with ***Mhlanga's*** case. The Respondents' arguments and submissions before us that the Applicants' enjoyment of the full rights of fair hearing conferred by section 21 and the right to administrative justice under section 33 are curtailed as a direct consequence of

[73] Supra.

section 39 finds support in the Supreme Court's decision in ***Mhlanga's*** case.

[41] Section 39(6)[74] defines 'disciplinary law' as law regulating the discipline of any disciplined force, and defines 'disciplined force' as, among others, the Swaziland Royal Police Service and the Swaziland Correctional Services. There is no doubt that the impugned section 13 of the Police Act which provides for the procedure constituting the disciplinary Board of police officers in the position of the Applicant falls under the definition of *disciplinary law*. In ***Mhlanga's*** case, the Supreme Court pronounced itself on the import of Section 39 (3) as follows:

"the Bill of Rights serves the purpose of prescribing boundaries and limits within which the rights and freedoms set out in the chapter are to apply."

[42] The Supreme Court recognized section 39(3) as an exception in the Constitution to the guaranteed fundamental rights and freedoms. And that as such its provisions must be given a strict and narrow construction. It noted however, that in the final analysis the courts couldn't give an interpretation to the Constitution which will do violence to its language. The Court

[74] Of the Constitution.

emphasized the importance of the wording of the constitution and the duty of the court to give proper interpretation to its language as it appears in the text. Quoting from decisions of the constitutional courts of Uganda, South Africa and Botswana, the Supreme Court concluded that section 39(3) excludes in specific terms members of the disciplined forces from receiving the benefits set out in the other sections of the Constitution if such benefits are taken away by the disciplinary laws applicable to them. On whether section 39 was in direct conflict with sections 24, 25 and 32 of the Constitution, (which provisions were under consideration in **Mhlanga's case**), The Supreme Court opined that there was no question of a conflict.

[43] The authoritative decision of the Supreme Court in **Mhlanga's** case is that section 39 is recognized as a prescription of *boundaries and limits within which the rights and freedoms set out earlier in the Chapter are to apply.* This leaves no question of the intention of the drafters of the Constitution that the disciplinary laws as defined by section 39 shall not be declared unconstitutional regardless of their content. The only sections of the Constitution excluded from the application of section 39 are sections *15, 17 or 18*. The disciplinary laws[75] are exempt under the circumstances, from complying with the provisions

[75] These include the Police and Prisons Acts and the relevant provisions of the Civil Service Order of 1973.

of Chapter III provisions on rights and guarantees which are the subject matter of this application.

[44] The effect of the Supreme Court's decision which is binding on this court is that the application to declare the specified provisions of the Police Act, Prisons Act and the Civil Service Order as unconstitutional on the ground that these provisions are inconsistent with the Constitution cannot succeed. This is because these are the provisions of disciplinary laws relating to the Applicants who are members of the disciplined forces and as such fall squarely under the prescriptions of section 39(3) and (6). This is the position despite the provisions of section 38 on the prohibition of derogations from *inter alia*, the right to a fair hearing.

[45] Section 38 specifies the right to a fair hearing along with other four classes of rights, as uninfringeable. The Supreme Court in ***Mhlanga's*** case did not consider section 38 or its effect on the provisions of section 39 (3). Nonetheless the analysis and logical conclusions of the Supreme Court indicate that the scope of section 39(3) is not diminished or curtailed by section 38. This is because in constitutional interpretation all the provisions of the constitution must be given effect to. In doing so all the provisions must be harmonized. The seemingly conflicting provisions must be synchronized. The Supreme Court's finding suffices, namely, that the status of section 39(3)(6) is that of a saving clause which sets

parameters and limits within which the rights and freedoms set out in earlier provisions of Chapter III are to apply.

CONCLUSION

[46] From the foregoing analysis, the following findings are made:

1. The Constitution provides in obligatory mandatory terms for establishment of sector service commissions as a system of governance for the public service.

2. The Constitutions gives a discretion to the executive to structure the sector service commissions as it deems appropriate and suitable for achievement of the purpose of the different parts of the public service.

3. The Constitution sets the timeline of six months from the date of coming into effect of the Constitution, as the period within which to establish sector service commissions or similar bodies and to operationalize them within that period, including appointments specifically, of the chairpersons and members of the commissions as provided by the Constitution.

4. The interpretation of sections 189(5) and 190(5) of the Constitution read together with sections 172, 173 and 267 is that service commissions or similar bodies are intended by the Constitution to be established for the police and correctional services for the purpose set out in those provisions.

5. The respondents have failed to comply with the provisions of the Constitution requiring establishment of service commissions **or similar bodies** to deal with disciplinary matters and other matters,

in relation to the Applicants, within six months from the date of coming into effect of the Constitution in terms of sections 189(5), 190(5) read together with 172, 173 and 267(a)(iii) of the Constitution.

6. Section 39(3)(6) exempts provisions of the Police Act and the Prisons Act concerning discipline of the police and correctional service officers, respectively, or anything done in terms of or contained in the said legislation, from compliance with the provisions of Chapter III of the Constitution.[76] Sections 13 of the Police Act, 21 of the Prisons Act and regulations made under them, as well as sections 10 and 11 of the Civil Service Order of 1973, are disciplinary laws in terms of section 39(3) and (6). These laws provide for the establishment of disciplinary boards for the police and correctional service officers. By virtue of section 39(3) these provisions shall not be held to be in contravention of or inconsistent with the provisions of Chapter III of the Constitution.

[47] As a consequence of section 39(3) of the Constitution the relief sought in terms of the prayers in the Notice of Motion[77] cannot succeed, notwithstanding the finding that the state has failed to comply with the Constitutional requirement to establish service commissions or similar bodies within six months from the commencement of the Constitution.

Decision:

[76] With the exception of sections 15, 17 and 18 of the Constitution.
[77] Filed by the 1st Applicant. See Paragraph [3] herein for summary of the prayers.

The application is dismissed, and the *rule nisi* issued by the Court is hereby discharged.

There is no order as to costs**.**

_____

D Tshabalala J

[1] I have read the judgment penned by my sister Justice Tshabalala and agree almost in fullness with the conclusions save in one respect where I am impelled to make the following note. It turns on a matter of construction of the critical provisions of the Constitution on which the applicants have grounded their application.

[2] The relevant facts and issues falling to be determined before us have been set forth comprehensively in Justice Tshabalala's judgment. As already indicated above, barring the one aspect that I deal with briefly here on which I hold a different view, I concur and associate myself fully with the disposition and opinion on the rest of the issues contained in her judgment.

[3] The issue that I seek to deal with in this opinion is whether the constitution makes it mandatory for the Respondents to

establish sector specific service commissions for the Police and Correctional Services. It is germane for the reason that the Applicants, as part of the relief they seek in the application under consideration, have petitioned this court to grant them, *inter alia;*

a) A *declaratur* to the effect that the appointment of the respective disciplinary boards be held unlawful, null and void *ab initio* on the ground that it is inconsistent with the Constitution; and

b) An order directing the 1st and 3rd Respondents to establish a sector specific commission for the Police Service to deal with disciplinary matters.

[4] I am mindful of two considerations. Firstly that the two prayers I have highlighted appear to me interrelated as stemming from essentially the same premise on which the relief is brought; namely that the Constitution has mandated the creation of sector-specific service commissions to deal with disciplinary functions in the two service areas of the Police and Correctional Services. Secondly, that in light of the consolidation of the relatively similar applications affecting the correctional services and separate applicants, the applicants seek that the relief prayed for apply across the range with equal effect.

[5] As regards the applicant's case on the aspect, its nub is that Sections 189 (4), 190(5) as read with Sections 172 and 267 (a) (iii) of the Constitution of Swaziland create an imperative which obliges the Respondents to establish sector service commissions for the Police and Correctional Services; In effect that in terms of these provisions the establishment of these institutional arrangements is now mandatory and overdue. I understand these to be the key provisions on which the relevant prayers under reference are founded. Their wording calls for close scrutiny and careful interpretation. In the judgment of her Ladyship Justice Tshabalala they are fully reproduced but for the sake of ease of reference and at the risk of prolixity I revisit their content.

[6] Sections 172 and 173 appear to be the foremost and principal provisions among the sections that have been cited and relied upon by the Applicants in support of their proposition that the Constitution mandates service commissions. Section 172 reads as follows:

> **172. (1) The Public Service of Swaziland shall be administered through service commissions or similar bodies established under this Constitution or any other law.**
>
> **(2) The public service may be divided into sectoral units for ease of management and quick delivery.**

(3) <u>Each sectoral unit may have a separate service commission</u>.

[7] In materially somewhat similar terms Section 173 reads:

173. (1) There shall be independent and impartial service commissions <u>established in terms of this Constitution</u> or <u>any other law</u> for the better management and exercise of certain powers and functions regulating the public service or any part or aspect of the public service.

(emphasis supplied)

[8] Most importantly and for purposes presently, in the clear and unambiguous language of the section under s 172 (1), the section recognises the established commissions created under the constitution and under any other law. This is a nod to the Civil Service and the Judicial Service Commissions established in terms of Sections 186 and 160 of the Constitution, respectively. In terms of general statute there is an implicit reference to the Teaching Service Commission, which is established in terms of the Teaching Services Act of 1982.

[9] It is also clear from a reading of the rest of the section that in essence it is an enabling provision framed in prospective language envisaging the establishment of appropriate institutional arrangements in regard to the configuration of

service commissions allowing scope inter alia for sector specific units and or service commissions along the same lines.

[10] By sectoral units I surmise the section to such institutional divisions by identified sectors as may be deemed appropriate for the stated purpose of better or efficient administration or management of the service functions. Thus it is envisaged as per Section 172 (3) that within the structure of the sectoral units or divisions may be a need for separate service commissions. The operative word in the section being 'may' suggesting a permissive or enabling intent as opposed to a mandatory or prescriptive precept.

[11] In my view there is nothing in this section that supports the assertion that it mandates the creation of sector commissions as contended by the applicants.

[12] I now turn to Section 267 (a) (iii). It provides:

> **267. The first appointments to the following offices shall be made within six months after the commencement of this Constitution —**
>
> **(a) The chairmen and other members of —**
>
> **(i) the Citizenship Board;**
>
> **(ii) the Judicial Service Commission;**
>
> **(iii) the various Service Commissions;**

(iv) the Land Management Board;

(v) the Mineral Management Board;

(vi) Parliamentary Service Board,

(b) the chairman and members of the Council of Chiefs.

[13] This section must be read in context and with reference to the other sections that have been invoked by the Applicants. Section 276 (a) (iii) falls into the transitional directives dealing with appointments of personnel into the various listed institutions within the prescribed time frame. Nothing in the section could be read as suggesting there should be separate service commissions for the service cadres in question. The phrase the ' various service commissions' must be read to mean those service commissions as are established under the constitution or any other law. To suggest otherwise as the applicant's contend would be doing violence to the clear language of the provision.

[14] The Applicants have made much capital of the provisions of Sections 189(4) and 190 (5) of the Constitution. They contend those subsections must be construed as envisaging the appointment of sector commissions in respect of the two service missions of the Police and Correctional institutions. I discern a corollary argument that it is implicit in the provisions that such units should be established given the use

of the words 'pending the establishment of a sector commission or similar body'. I fail to find merit in the Applicants argument in light of the wording of the sections concerned. Nothing in these sections suggests the establishment of a separate or a dedicated service commission for the Police nor does the wording support this proposition in any form. It does not follow that a sector service commission would necessarily be a dedicated commission to either of the institutions or corps. This can be discerned from the wording of section 172(2) and (3) whose tenor is, in any event as I have stated earlier, merely enabling or at the very least directory. The subsection envisages such institutional arrangements or permutations as could include division of the broad church of the civil service into divisions or sectoral units. It leaves the options open.

[15] I find traction in the Respondent's submission that, had the framers of the constitution intended to either establish sector service commissions in the respects suggested or to command the creation of these by a separate Act of parliament, then they would have done so in very clear and unequivocal language. Mr. Vilakati who appeared for the Respondents demonstrated an instance where the constitution establishes a service commissions by reference to sections 160 and 186 of the Constitution, in regard to the forming the Civil Service Commission and the Judicial Service Commission. I could not agree more.

[16] The Constitution also contains examples where the framers inserted specific directives for the implementation of policy mandates in clear and precise language. One such provision is in Section 29 (7) as pertains to specific positive legal and institutional reforms for the promotion of the rights of the child as an instance, which readily comes to mind. The provisions that we have been referred to are not of this kind either. They do not take the character of a directive to set up commissions for the Police or the Correctional services. Frankly the Applicants have not been able to point to very cogent basis for the interpretation they seek to place on the disparate provisions they rely on for their case on the point.

[17] It is in my view for the above reasons that the Applicants' prayer for the *mandamus* in terms of the relative relief sought in their Notices of Motion the directing the respondents to establish dedicated service commissions for the Police and Correctional Services respectively, is without merit and therefore must fail.

Maphanga J. _____

Fakudze J. I concur _____