

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 3638/06

In the matter between:

ISAAC DLAMINI

APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION

1st RESPONDENT

THE CHAIRMAN OF THE JUDICIAL
SERVICE COMMISSION

2nd RESPONDENT

THE JUDICIAL SERVICE COMMISSION TRIBUNAL

3rd RESPONDENT

THE CHAIRMAN OF THE JUDICIAL
SERVICE COMMISSION TRIBUNAL

4th RESPONDENT

THE ATTORNEY GENERAL

5th RESPONDENT

CORAM: S.B. MAPHALALA J

Q.M. MABUZA J

M.D. MAMBA J

FOR APPLICANT : MR. MASINA

FOR RESPONDENTS: MR. M. FAKUDZE (with MR. M. VILAKATI)

JUDGEMENT
3rd OCTOBER, 2008

The court,

[1] The first respondent is the Judicial Service Commission (hereinafter called the Commission), a Constitutional body established in terms of clause 159 of the Constitution of Swaziland Act 001 of 2005 (hereinafter referred to as the Constitution). Prior to coming into force of the Constitution this Commission was established under the Judicial Service Commission Act 13 of 1982 (as amended).

[2] In August 2003, the Applicant was served with a letter requiring him to appear before the 3rd Respondent, a Disciplinary Tribunal set up by the first Respondent to hear and enquire into certain charges of misconduct allegedly committed by the Applicant.

[3] The letter in question required the Applicant to appear before the 3rd Respondent on the 21st September, 2006 and was issued by the secretary to the Commission and was served on the Applicant on the 13th of that month. The secretary referred to was the Principal Secretary of the Ministry of Justice and Constitutional Affairs (hereinafter referred to as the PS). We hasten to add that under the 1982 Act, he was the designated secretary of the Commission.

[4] The founding affidavit of the Applicant is filed with relevant annexures. The Respondents have filed an answering affidavit of one Musa Leon Dlamini who is a member of the first Respondent. The Applicant in turn filed a replying affidavit where he raised a point in limine that Musa Leon Dlamini, who signed the respondents' answering affidavit, lacks the authority to sign the affidavit and therefore the affidavit is invalid. However, when the matter came for arguments, Counsel for the Applicant abandoned this point in limine and therefore no further mention will be made of this point in this judgement.

[5] The facts giving rise to this application are the following; the applicant is employed as a civil servant presently holding the position of Deputy Master

of the High Court and Acting Master of the High Court. He has acted as such since 1st January 2003 to date. He has served the Swaziland Government for 21 years and during this period he held several positions ranging from being a Police Officer, Clerk of Court, Senior Clerk of Court and Acting Registrar of the High Court. 12 years of the 21 years of service has been spent in the Master's Office.

[6] At the hearing before the 3rd Respondent, the Applicant challenged:

- (i) the constitutionality of the involvement and the participation of the PS in the affairs of the first Respondent, and the resultant
- (ii) Constitution or establishment of the tribunal (i.e. the 3rd Respondent).

[7] The Constitution, it is common cause, came into force on the 8th February, 2006.

[8] The Applicant's objection to the participation and involvement of the PS in the business of the commission is that because the PS "is the Chief Executive Officer and warrant holder of [his Ministry] which is the line Ministry of the Commission, is inconsistent with and compromises the independence of the Judicial Service Commission" which independence is laid down in section 159(1) and (3) of the Constitution. Similarly, section 183(1) of the Constitution provides that "every service commission shall set up and maintain a competent and qualified secretariat consisting of a secretary and support staff.

[9] The second ground of objection by the Applicant is that "none of the members currently serving the 1st Respondent qualify or meet the membership requirements" set out in section 159 (2) of the Constitution. Again we hasten to note here that during argument before us Counsel for the Applicant, limited or restricted his argument on two members of the Commission only. (This is discussed at page 52 of the Book of Pleadings and later in this judgement).

[10] Based on the above allegations, the Applicant has applied for an order in the following terms, namely:

"(a) Declaring the 1st Respondent unconstitutionally constituted;

(a) Ordering the dissolution of the 3rd Respondent;

(b) Declaring the 1st Respondent's decision setting up the 3rd Respondent ultra vires of its powers;

(c) Interdicting and restraining both the 1st and 3rd Respondents from hearing and determining Applicants' suspension from work and disciplinary enquiry respectively pending the final determination of this application.

(d) Costs of suit..."

[11] In answer to the above challenges, the respondents have submitted that the first Respondent is lawfully or constitutionally in office and all its members who were appointed under the 1982 Act qualify to be in office. They argue further that section 266 sanctioned their continuation in office when the Constitution came into effect. It is argued further that as the PS was the ex officio secretary of the commission under the 1982 Act, his continuation in office is likewise, sanctioned by section 266. Consequently, it is argued by the Respondents, the setting up or establishment of the 3rd Respondent is also constitutional.

[12] The members of the Commission that were in office in October, 2006 were appointed, it is common cause, on 9th May 2005 under the relevant Act of 1982 (as amended). They were not appointed under the present Constitution.

In terms of the 1982 Act, the members of the Commission were: "the Chief Justice, the Chairman of the Civil Service Board, and three (3) persons appointed by the King, 2 of whom possess such legal qualifications and experience as the King may determine" and this is specifically provided under Section 3(1) of that Act.

[13] The Principal Secretary in the Ministry of Justice and Constitutional Affairs is or was not a member of the Commission. He was its secretary. He performed the secretarial duties of the Commission. See S3 (3) of the

Act. As a non member of the

Commission, he did not, or at least was not empowered in law to be involved in or to participate in the deliberations and decision making of the commission. His was to carry out what the commission instructed him, as its secretary, to do. Whether or not this is what took place in fact, is another matter. But we think it is important to bear this in mind in analyzing the legal issues under consideration herein. One has to separate the "is" from the "ought".

[14] The Commission has argued that it was constituted under the old law and that this was permitted or sanctioned by the Constitution. The Applicant accepts that the Commission is constituted as under the 1982 Act but argues that this is illegal as it is contrary to the provisions of the Constitution in particular section 159 (1) and 183(1) thereof which respectively provide as follows:

"159(1) There shall be an independent Judicial Service Commission for Swaziland, hereinafter in this chapter referred to as the Commission

(2) The Commission shall consist of the following -

- (e) the Chief Justice, who shall be the Chairman;
- (f) two legal practitioners of not less than 7 years practice and in good professional standing to be appointed by the King;
- (g) the Chairman of the Civil Service Commission; and
- (h) two persons appointed by the King.

183(1) Every service commission shall set up and maintain a competent and qualified secretariat consisting of a secretary and support staff as determined by the body responsible for the public service management or any law."

[15] It is common cause that at the relevant time the Commission comprised the Honourable Justice JP Annandale as acting CJ, Musa Leon Dlamini a legal practitioner, the Rt Rev. Adv. P. Mngomezulu and Lomcebo

Dlamini and the Chairman of the Civil Service Board with the PS for Justice and Constitutional Affairs as its Secretary. The Applicant complains or argues that in terms of the (new) Constitution neither Advocate Mngomezulu nor Ms Lomcebo qualify to be members of the Commission because they are not "legal practitioners of not less than seven years practice and in good professional standing." The same challenge was not leveled against Mr Musa Dlamini and we shall assume, without deciding the issue that he fits the bill (he satisfies these requirements). There is, however, no contention that the learned Advocate and Ms Lomcebo Dlamini do not also qualify under those persons appointed by the King under subsection 2 (d) of S159 quoted above. These two persons, both with law qualifications we believe, were not appointed to fill the posts of legal practitioners.

[16] From the above factual situation, it would therefore appear to us, with respect that bar the involvement of the PS in the affairs of the commission, the commission at the material time consisted of

- (i) the Acting Chief Justice,
- (j) the Chairman of the Civil Service Commission (then CSB)
- (k) two persons appointed by the King and
- (d) One legal practitioner "of not less than seven years practice

and in good professional standing - appointed by the King." It was therefore short of one member - a legal practitioner possessing the relevant qualifications and qualities. When the Constitution came into effect these members remained in office or continued to be in office as if appointed in terms of the Constitution. This is in line with the provisions of clause 266(1) of the Constitution which provides that:

"A person who immediately before the commencement of this Constitution held or was acting in any office established by or by virtue of the Constitution then in force, so far as is consistent with the provisions of the Constitution, shall be deemed to have been appointed as from the commencement of this Constitution, to hold or to act in the equivalent office under this Constitution." (we have added the emphasis.)

[17] The continued membership of the commission by Adv. Mngomezulu and Ms Dlamini after the coming into force of the Constitution, is in our judgement not at all inconsistent with the provisions of the Constitution. They both do qualify to be members of the Commission under s 159(1) (d) of the Constitution. Now, does the single vacancy of the legal practitioner referred to above in the composition of the Commission render it unconstitutional?

[18] Section 16 (a) of the Interpretation Act 21 of 1970 provides the answer to this and stipulates that:

"16. Where, by a law, a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless the contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by -

(b) the fact that it is afterwards discovered that there was some defect in the appointment or qualification of a person purporting to be a member thereof;"

[19] From the above, it would therefore seem to us plain that the powers of the commission to perform its duties herein were not affected by the absence of the relevant legal practitioner. To some extent the provisions of s16(a) are supported and or supplemented by section 20 of the same Act which lays down that:

"20. Where, by a law, an act or thing may or is required to be done by more than two persons, a majority of them may do it." We therefore hold that, bar the involvement of the PS, to which we shall revert presently, the Commission was not unconstitutionally constituted at the time material herein.

[20] We have set out above the reasons for challenging the participation and or involvement of the PS in the secretarial affairs of the 1st Respondent and it is not necessary for us to repeat these herein. There can be no doubt that for the reasons stated by the Applicant and those stated by the learned President of the Industrial Court in the case of **NHLANHLA HLATSHWAYO vs THE SWAZILAND GOVERNMENT AND ANOTHER**

(case 398/2006), by failing to set up its secretariat and by allowing the PS to perform its secretarial functions, the Commission has not done its independence and that of the judiciary in general any favours. The independence of the judiciary is the prerequisite for and the cornerstone of an impartial, responsive, transparent and accountable judiciary. This in

(a) a vacancy in the membership thereof;

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turn is an essential element of democracy which our young Constitution espouses and declares Swaziland to be.

[21] The objection on the involvement of the PS as the secretary of the Commission is not, let it be emphasized, based on anything wrong that he has allegedly done, but on his mere involvement in the Commission when he is the Administrative head of the executive arm of Government. His intentions and those of the 1st Respondent may, for all we know, be honourable. But that is not the test. His involvement, as the President stated in HLATSHWAYO'S case (supra) -

"... gives rise to the unfortunate perception that the Judicial Service Commission is dependant on, and subject to the influence of the Ministry of Justice and Constitutional Affairs in the conduct of its affairs, which is not permitted by the Constitution."

Lawrence Baxter in his Book **Administrative Law** (3rd Ed.) at 249, is of the same view as he clearly favours the British position and states that:

"The Secretarial and Administrative services [of tribunals and commissions or boards] are almost always provided by the administrative department to which the tribunal is linked. The statute constituting the tribunal usually prescribes this. In the case of more formal tribunals, such as the Industrial Court, a Registrar is specifically appointed.

Although these arrangements appear to have attracted no criticism in South Africa, it is worth noting that in Britain it has been suggested that they may undermine the impartiality or appearance of impartiality of the tribunal concerned." (Footnotes have been omitted by us.)

In other words, not only must the commission be independent, but it must manifestly be seen to be independent. No Act or thing must be done that would lead to the perception that the Commission is not independent. The PS is not constitutionally competent to perform the secretarial functions of the Commission.

[22] It is interesting to note that although the commission was legally to be independent under the 1982 Act, its secretary was the PS in the Ministry of Justice and Constitutional Affairs. Also, section 90(1) of the Constitution establishes the Elections and Boundaries Commission and says that it shall be independent, however, its secretariat, shall be "provided by the Ministry responsible for elections" (per s 90(14)). The conclusion is therefore inescapable that there was a deliberate or conscious decision by the framers of our Constitution to remove the secretariat of the Commission from the Ministry of Justice.

[23] In view of the above conclusions, is the Applicant entitled to the prayers set out in paragraph 8 above? Other than an order for costs, we think he is not entitled to any of those prayers.

[24] It must be borne in mind that the Secretary of the Commission is not a member of the Commission and the PS is not alleged by the Applicant to have acted as a member of the 1st Respondent. He acted as its secretary and this is the role he performed under the 1982 Act. This is the role that the secretary to the Commission fulfills under the Constitution. There is no allegation in the papers herein

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that the PS was, beyond being the scribe of the Commission, involved in the actual deliberations and decision-making of the Commission. He acts on the directions of the Commission. See s 183(2) (e-f) of the Constitution. Whilst the Commission functions to some extent through its secretariat, it is

different and separate from it. It exists without the secretariat which secretariat is established or set up by the Commission. See article 183 (1) of the Constitution. At the moment the Commission has no secretariat.

[25] In terms of s 266(1) of the Constitution, read with section 16(a) of the Interpretation Act, the Commission is constitutionally in office and constituted. One has to distinguish the three factors in the equation herein, namely; (i) The Commission, the decision-maker;

(ii) The decisions of the Commission and

(iii) The messenger or executor or implementer of the decisions (the PS).

Where the message or decision is valid, as it being within the competence of the decision-maker, it can not be invalidated by it being served or executed by an unqualified messenger, the PS. The decision remains valid and only its execution is invalid. For example, a summons properly issued by the court can not be said to be invalid simply because it has been served by the wrong person. In easy, to declare the decisions of the Commission null and void on the basis that such decisions were executed, implemented or carried out by the wrong person, the PS, would be to throw away the baby with the bath water. If, and insofar as the decision in the **Hlatshwayo** case (supra) holds otherwise, we are with due respect, constrained not to follow it. Prayer (a) thus fails.

[26] Prayers (b) and (c) are intertwined and two-fold but are both premised on the allegation that the Commission is unconstitutionally constituted and in office. We have found these allegations to be incorrect. Clause 160(2) of the Constitution empowers the Commission to carry out disciplinary enquiries in respect of officers within its portfolio and the office of the Acting Master is one such office. So too, these prayers may not be granted.

[27] The Applicant has to some extent succeeded in that he has shown that

the PS is disqualified to act as the secretary to the Commission. Because of this alone we are of the view that although he has not succeeded in the prayers he sought, he is entitled to 50% of the costs of this application.

[28] We wish to further comment *en passant* that the delay in issuing this judgement is highly regretted by this court on account of other urgent matters which clamoured for our attention.

[29] The application is therefore dismissed and the applicant is awarded 50% of the costs of the application.

**S.B. MAPHALALA J
PRINCIPAL JUDGE**

**Q.M. MABUZA
JUDGE**

**M.D. MAMBA
JUDGE**