IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1404/17

In the matter between:

PATRICK MOOI DLAMINI	**APPLICANT**
And	
COMMISSIONER ANTI-CORRUPTION COMMISSION	**1ST RESPONDENT**
ATTORNEY GENERAL	**2ND RESPONDENT**

Neutral Citation:	*Patrick Mooi Dlamini vs. Commissioner Anti-Corruption Commission and Another (1404/17) [2018] SZHC (168) 26th July 2018*
Coram:	**M.Dlamini J, Mlangeni J and Fakudze J.**
Judgment:	**Mlangeni J.**
Heard:	**3rd July 2018**
Delivered:	**26th July 2018**

Summary: *Constitutional Law – whether Section 8 (3) of The Prevention of Corruption Act No. 3 of 2006 is in conflict with Section 187 (1) of the Constitution.*

Section 8 (3) of the Prevention of Corruption Act No.3 of 2006 empowers the Commissioner to dismiss an officer, and Section 187 (1) of the Constitution empowers the Civil Service Commission with disciplinary authority over public officers.

Applicant seeking to restrain his employer, the Anti-Corruption Commission, from proceeding with intended disciplinary proceedings, alleging that the right institution to discipline him is the Civil Service Commission; further seeking to strike down Section 8 (3) of the Anti-Corruption Commission Act on the basis that it is inconsistent with Section 187 (1) of the Constitution.

Held: *On the basis of the principle of avoidance, the matter is capable of being resolved without dealing with the constitutional issue.*

Held, further: *The importance and repeated occurrence of this type of dispute in this country warrants a departure from the principle of avoidance.*

Held, further: *There is no conflict between Section 187 (1) of the Constitution and Section 8 (3) of the Prevention of Corruption Act 2006.*

Application dismissed with no order for costs.

JUDGMENT

THE FACTS

[1] The Applicant was employed by the First Respondent on or about the 23rd April 2009 as an Investigator. At paragraph 8 of his founding Affidavit[1] he specifically states that his engagement by the First Respondent was on a permanent basis. In September 2015 he was promoted to the position of Senior Investigator, which position he hold to date.

[1] Page 7 of the Book of Pleadings.

[2] It is common cause that the First Respondent has sourced some of its employees from different Government departments, notably the Police. Prior to recruitment by the First Respondent, the Applicant was a Police Officer. Those who were recruited from Government departments were either on secondment or on permanent basis. The Applicant is in the latter category.

[3] On the 11th September 2017 the Applicant was served by his employer with a letter inviting him to attend a disciplinary hearing, which was to take place on the 21st September 2017. It is common cause that the intended disciplinary hearing is, according to the First Respondent, sanctioned by Section 8 (3) of the PREVENTION OF CORRUPTION ACT NO.3 OF 2006. This section is in the following terms:-

> "**The Commissioner may, subject to the relevant applicable law, terminate the appointment of an officer of the Commission if the Commissioner is satisfied that it is in the interest of the Commission to terminate such appointment and the Commissioner shall give reasons for such termination."**

[4] It deserves a passing comment that the charges that have been preferred against the Applicant are of a serious nature[2]. It is the invitation to a disciplinary hearing and the charges of misconduct that have precipitated the present application.

THE LEGAL BASIS OF THE APPLICATION

[5] The Applicant makes the following averments in his founding affidavit:-

> **"I wish to state that the First Respondent does not have the power to exercise disciplinary powers over myself as I am a civil servant governed by Section 187 of the Constitution. This section vests all powers and duties to**

[2] See pages 14-16 of the Book.

hear me onto the Civil Service Commission and is frame (sic) in a peremptory language which offers no exception into the rule".

[6] Section 187(1) of The Constitution of this country is in the following terms:-

> **"Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments and confirmation of appointments), promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission".**

[7] The understanding of the Applicant is clearly that he is not subject to the disciplinary authority of his employer, the First Respondent, but is subject to the disciplinary authority of the Civil Service Commission. It is on this basis that he moved the present application in which he seeks an interdict restraining the First Respondent from proceeding with the intended hearing. He also prays for other related and ancillary orders. I set out his main prayers below:-

> **"1. ……..**
>
> **2. Setting aside the decision of the First Respondent inviting the Applicant into a disciplinary hearing …… as irregular, unauthorized and unlawful….".**
>
> **3. Declaring that Section 8 of the Prevention of Corruption Act of 2006 to be unconstitutional as it conflicts head on with section 187 of the Constitution in so far as it purports disciplinary powers.**

4. Interdicting the First Respondent from proceeding with the proposed disciplinary hearing pending final determination of this application."

[8] There are other prayers relating to punitive costs and the engagement of counsel, which are of no relevance to a determination of the application. Suffice to mention that it is settled in this jurisdiction that an order for costs is not ordinarily made in matters that raise a constitutional issue or issues, and this is one such matter.

[9] In essence the Applicant's case is that there is a conflict between Section 187 (1) of the Constitution and Section 8 (3) of the Prevention of Corruption Act No. 3 of 2006 (the ACC Act), hence the latter, being sub-ordinate to the Constitution, has to be declared unconstitutional and struck down.

[10] Before I get to the Constitutional issue that is raised by the Applicant I observe that it is unfortunate that the Applicant, who has stated unequivocally in his papers that he in an employee of the First Respondent, has the temerity to argue that his employer has no authority of discipline over him, and that he would rather be disciplined by a different entity that has nothing to do with his day-to-day duties, his welfare, his salary and other related matters. In this jurisdiction and elsewhere it is well settled that matters of discipline of employees are the sole prerogative of the employer[3]. During legal arguments in the matter I mentioned that it is conceivable that had the Applicant been summoned to appear before the Civil Service Commission on the charges of misconduct he might have raised a similar objection and argued that he is subject to the disciplinary authority of his employer, the First Respondent. Such a situation is highly undesirable in the workplace and can lead to absolute anarchy.

[3] ZWANE v EZULWINI MUNICIPALITY & OTHERS (30/2014) [2014] SZHC 33, 14TH August 2014; RUDOLPH v MANANGA COLLEGE & ANOTHER (94/2007) [2007] SZIC, 17,30th April 2007.

[11] The confirmatory Affidavit of Sipho Mathews Mthethwa[4] puts the position of the Applicant beyond doubt. He states that he was recruited to the First Respondent at the same time with Applicant. He further states that in a meeting that was chaired by the then chairman of the Civil Service Commission, the late Mntonzima Dlamini, prior to their assumption of duties at the First Respondent, their new status was made abundantly clear to them. They were specifically informed by the then chairman that they were **"no longer part of the Civil Service Commission. The chairman further remarked and/or clarified that by accepting the employment by the Anti-Corruption Commission, issues that pertained to our employment was (sic) now going to be dealt with between the Commissioner of the Anti-Corruption Commission and us. He further elaborated that issues pertaining to our remuneration, promotions, discipline and termination of our services was now vested on the Commissioner of the Anti-Corruption Commission[5]."**

[12] The Applicant has not denied these averments. He did not file a reply. He has, however, accepted promotion by the same employer that he now argues has no power of discipline over him.

[13] It appears to me that there is ample material in the pleadings upon which the matter can be decided without reference to the Constitution, in that the Applicant has in all respects accepted the authority of the First Respondent over him, which includes daily reporting, remuneration, promotion and welfare. He cannot, therefore be allowed to approbate and reprobate at the same time.

[14] While on this aspect I need to briefly comment on the contents of annexure **"SMM1"** which is at pages 50-51 of the book of pleadings. It is a copy of a letter of offer of employment which was written by the

[4] At pages 44-46 of the Book.
[5] At para 5, page 45 of the Book.

First Respondent, the current employer, to the Applicant dated 23rd April 2009. Paragraph 3 of the said letter is in the following terms:-

> **"<u>BASIC PAY</u>**
>
> **As earlier on indicated, the staff of the Anti-Corruption Commission belongs to Civil Service and such, remunerated and governed by Establishment Circular Number 5 of 2008 and Government General Orders, respectively. In this regard your position is graded D5 and will attract a monthly basic salary of E14, 337-75".**

The letter was signed by the then Commissioner, the late Justice H.M. Mtegha.

[15] I am commenting on this letter only because it came up during legal arguments in the matter. The Applicant's case is not at all based on this letter.

15.1 First of all, the context of this letter is as clear as a crystal. It relates to the applicable salary grade of the Applicant upon engagement by the First Respondent. It cannot be gainsaid that the Applicant draws his salary from central treasury, and that he was employed on the basis of a salary grade that is determined by the Government[6]. That is all that the paragraph stands for, and to give it a wider meaning cannot be achieved without doing violence to its true context.

15.2 Secondly, the paragraph is made up of words which are the choice of the late Justice Mtegha. He was human and, like all of us, fallible. Assuming that the words import something more

[6] See Applicant's salary advice slip at p17.

than what I perceive – and I do not think that they do – his choice of words does not determine what the true position of the law is. That is what this court has been called upon to do, and will proceed to do so.

[16] There is yet another angle from which this matter can be interrogated. This is in the context of the ACC Act read together with the labour laws of this country.

[17] Section 8 (3) of the ACC Act confers upon the Commissioner the power and authority to **"terminate the appointment of an officer of the Commission".** I observe, needlessly, that the Applicant is an officer of the Commission. It follows, therefore, that in terms of the sub-section his services can be terminated by the Commissioner. It is well-settled and has become axiomatic that termination of the services of an employee can only be a culmination of processes that are well – entrenched in labour relations. An employee may not be dismissed without due process.

[18] For purposes of these proceedings it should suffice to make reference to the statutory basis for the due process referred to above. Section 35(2) of the Employment Act 1980 states that:-

> **"No employer shall terminate the services of an employee unfairly".**

And at Section 36 the law-maker has specified a number of instances that constitute fair reasons for the termination of an employee's services. It has been held that this extensive list is by no means exhaustive; that there may well be other circumstances that amount to fair reasons for terminating employment. The circumstances that are specified in Section 36 include bad conduct or poor work performance, dishonesty or violence, damage to buildings, machinery or tools, endangering the safety of the undertaking or of other employees,

etcetera. The point being made here is that these circumstances can only be proved through due process, which process must start with a proper notice, followed by a hearing – with or without legal representation as the terms of employment or collective agreement may provide.

[19] Again, the Industrial Relations Act 2000, as amended, establishes machinery and procedure for resolving disputes in the workplace. This is in Part VIII. Unresolved disputes may lead to litigation in the labour courts.

[20] The point that I am making here is that there is no room for terminating the services of an employee without due process, without a hearing properly constituted. So clearly, Section 8 (3) of the ACC Act must be read within the context of the labour laws, the result of which is that the employer who has the authority to dismiss may do so only through due process, which includes disciplinary proceedings. Any other way to understand this would lead to an absurdity. It is, in my view, absurd to argue that an employer who has the authority to dismiss, does not have the authority to institute due process as required by our labour laws.

[21] In his heads of argument the Applicant repeatedly makes the point that the First Respondent has not stated in its papers that the purpose of the hearing is to terminate the Applicant's services, and because this has not been done the intended hearing is *ipso facto* illegal, in that it does not answer to the specific reference to **"terminate"** as provided in Section 8(3) of the ACC Act. This argument is not only casuistic and parochial but it is self-defeating as well. It is self-defeating in the sense that an advance declaration of intent to dismiss the Applicant would be highly challengeable on the ground that it demonstrates that the outcome is pre-determined, a fait accompli as it were. And this same Applicant would object to it on that basis.

[22] On the basis of the above the Applicant's case for an interdict is unsustainable. Neither has he made out a case for setting aside the First Respondent's decision to institute the disciplinary proceedings against him.

THE PRINCIPLE OF AVOIDANCE

[23] From the aforegoing discourse it appears to us that the dispute between the parties can effectively be decided without reference to the constitutional provision, on the basis of the principle of avoidance. In terms of this principle if a dispute between litigants can be effectively resolved on the basis of some other rule or principle, resort to constitutional provisions must be avoided. This principle is embraced by many jurisdictions, including ours. Hlophe J., writing for the full bench of the High Court in BONGANI GUMEDZE v THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION AND OTHERS[7] expressed the position in the following manner:-

> **"……..where a matter can be decided on a different point other than the constitutional one, there may be no need to decide the latter one."**

In the above-quoted judgment there is reference to many judgments, including the leading South African Case of ZANTSI v COUNCIL OF STATE, CISKEI AND OTHERS[8].

[24] In the case of SEKOATI AND OTHERS v PRESIDENT OF THE COURT MARTIAL AND OTHERS[9] the Full Bench of the Lesotho Court of Appeal stated the position in the following terms:-

[7] (525/2009) [2017] SZHC 180, 25TH August 2017 at page 23, para 29.
[8] 1995 (4) SA 6115 CC.
[9] [2000] LRC 511(Les C.A.) at p522.

"……the general approach in constitutional matters (is) that a court will not determine a case on a constitutional basis if it is properly capable of being appropriately adjudicated on other basis."

In this same judgment the Learned Judges, on the rationality behind this principle, noted the salutary rule of practice that courts should decide no more than what is absolutely necessary for the decision of a case, and further that **"Constitutional Law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time."**

[25] But then in this jurisdiction, since the advent of the constitution in the year 2005, legal issues such as the one in this matter have arisen in respect of the disciplinary authority of some organs of state that are created by the Constitution. This emanates from constitutional provisions that recognise and sanction the creation of service commissions. Section 193 (3) of the Constitution is in the following terms:-

"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."

This has arisen in respect of the Police, the Correctional Institution and now the Anti –Corruption Commission. It is our view, therefore, that the importance and repeated occurrence of the subject overrides the principle of avoidance, and that the constitutional issue as raised must be addressed squarely and conclusively, for the guidance of all those who may be in a position similar to that of the Applicant.

THE CONSTITUTIONAL ISSUE

[26] As stated earlier on in this judgment, the Applicant's case is that there is a conflict between Section 187 (1) of the Constitution and Section 8 (3) of the ACC Act, and for that reason the latter must be struck down. This position is predicated upon Section 2 (1) of the Constitution, which makes it **"the supreme law of Swaziland",** and that any law that is inconsistent with it is, to the extent of the inconsistency, void. The position of the Respondent is that there is no such conflict.

[27] Section 8(3) of the Prevention of Corruption Act confers upon the Commissioner the power and authority to terminate the appointment of an officer of the Commission. The Applicant, being an officer of the Commission, can be dismissed by the Commissioner in terms of this sub-section. According to the Applicant this provision is in conflict with Section 187 (1) of the Constitution which vests the power of discipline of **"public officers"** upon the Civil Service Commission. It is his assertion that he, being a public officer, is subject to the disciplinary jurisdiction of the Civil Service Commission, not the Anti-Corruption Commission.

[28] In the simplest terms, the legal position is this: the Constitution, being the supreme law, can impose limitations upon the scope of its application, and does so by making itself **"subject to"** other law, which may be an ordinary statute or even subordinate legislation. On the other hand, any other law or ordinary legislation cannot impose a limitation upon a constitutional provision. When the constitutional provision is subject to some other law, the result of that is that the other law becomes dominant within the specified sphere. Mr. Vilakati, for the state, usefully referred the court to the case of STATE v MARWANE[10] wherein Miller J.A. eloquently said the following[11]:-

[10] 1982(3) SA 717 (A).
[11] At p 745.

"The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what is subordinate or subservient; that to which a provision is 'subject' is dominant – in the case of conflict it prevails over that which is subject to it. Certainly in the field of legislation, the phrase has a clear and accepted connotation. When the legislature wishes to convey that that which is now enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible with a specified other enactment, it very frequently, if not invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

[29] The above exposition was cited with approval in the Lesotho Court of Appeal case of SEKOATI AND OTHERS v PRESIDENT OF THE COURT MARTIAL AND OTHERS[12] and embraced by the Constitutional Court of South Africa in the case of EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA[13].

[30] I mention, needlessly, that the decisions referred to above are highly persuasive in this jurisdiction.

[31] The relevant wording of Section 187 (1) is this:-

"Subject to the provision of this constitution or any other law…..'.

[32] From the preceding analysis, it is clear that the Constitution has sanctioned the dominance of **"any other law"** in respect of the appointment and termination of public officers. I have already observed that the Applicant is a public officer, hence his appointment and termination may be sanctioned by some other law. Public office is defined in Section 261 of the Constitution as **"any office of**

[12] [2000] 4 LRC 511 (Les C.A.) at p 522.
[13] 1995 (4) SA 877 CC at p904.

emolument in the public service". This definition is subject to Section 254 which specifically includes some categories of personnel and specifically excludes others. Those who are excluded are the following – the President or Deputy President of Senate, Speaker or Deputy Speaker of the House, Minister, Deputy Minister, Senator, Member of Commission established by the Constitution. The Applicant is not one of those that are outside the category of public officer in that although he is an employee of a Commission he is not a Commissioner. He is therefore clearly a public officer. For the avoidance of doubt I repeat that the result of the aforegoing is that his employment and termination has been made (by the Constitution) the subject of **"any other law"**, and the other law, in this case, is the Prevention of Corruption Act No.3 of 2006.

[33] Law is defined in Section 261 of the Constitution as including **"any instruments having the force of law and any unwritten rule of law" –** a very wide spectrum indeed, so wide as to include unwritten rules of law which, as we know, would need to be proved as a fact[14]. This must clearly include statutes, subordinate legislation, regulations etcetera. The Applicant's counsel, Mr. K. Msibi, has submitted that the only class of law to which the Constitution has subjected itself, per Section 187 (1), are decrees and proclamations. He went on and on about how the 1973 decree and other proclamations are still law in this country – the reason, according to him, being that they were not expressly repealed. This debate is for another day, but in my respectful view it is, in this context, nothing short of redherring or scraping the barrel.

[14] VAN BREDA v JACOBS, 1921 AD 330.

[34] On the basis of the above we have come to the conclusion that there is no conflict between Section 187 (1) of the Constitution and Section 8 (3) of the Prevention of Corruption Act No.3 of 2006. There is therefore no merit in the Applicant's case, and the application is accordingly dismissed with no order as to costs. In the result, the Applicant is subject to the disciplinary authority of his employer, the First Respondent.

_____

MLANGENI J.

I agree:_____

M. DLAMINI J.

I agree: _____

FAKUDZE J.

For the Applicant: Mr. P.K. Msibi

For the Respondent: Mr. M. Vilakati, appearing with Ms. B. Shabalala