IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 28/2017

In the matter between:

SIFISO SIBANDZE APPELLANT

V.

THE PRIME MINISTER OF SWAZILAND FIRST RESPONDENT

THE NATIONAL COMMISSIONER OF POLICE SECOND RESPONDENT

THE ATTORNEY GENERAL THIRD RESPONDENT

Neutral citation: *Sifiso Sibandze v The Prime Minister of Swaziland and Two Others (28/2017) [2018] SZHC 3 (2018)*

Coram: **M.C.B. MAPHALALA, CJ**
S. P. DLAMINI, JA
M. J. DLAMINI, JA

Heard : 13 MARCH, 2018

Delivered : 18 APRIL, 2018

SUMMARY

Civil Appeal – dismissal of the appellant as a police officer in terms of section 29 (e) of the Police Act No. 29 of 1957 pursuant to a recommendation by a Police Board established by the Police Commissioner in terms of section 22 of the Police Act; the decision for a dismissal was confirmed by the Minister of Police on appeal – the basis of the dismissal was that the police officer had been convicted by the Magistrate's Court for drunken driving, an offence in terms of section 91 (1) as read with section 122 (2) of the Road Traffic Act No. 6 of 2007;

Appellant sought to review the decisions of the Commissioner of Police and Minister of Police on the following basis: (i) that the Police Board did not adhere to the procedure laid down in section 13 (2) of the Police Act; (2) that the Minister of Police merely endorsed the decision of the Commissioner of Police without giving appellant the opportunity to make representations; (3) that the Minister of Police did not give reasons for his decision - ***court a quo*** **dismissed the application and endorsed the decision of the Commissioner of Police and Minister of Police to terminate the services of the appellant on the basis that when it comes to procedural matters, administrative tribunals are masters of**

their own house, and, that they are not bound by strict procedural rules;

On appeal held that the Police Board is bound to adhere to the procedure laid down in section 13 (2) of the Police Act, and, that the Act does not provide for a reverse onus;

Held further that the test applicable in determining the guilt of a police officer charged under the Act is proof beyond reasonable doubt;

Held further that the Rules of Natural Justice and in particular the *audi alteram partem* requires that the dismissed police officer should be allowed to make representations before the Police Board as well as the Minister of Police; and, that the Commissioner of Police as well as the Minister of Police are obliged to give written reasons for their decisions;

Accordingly, the appeal is upheld, and, the proceedings before the Police Board as well as the decisions of the Police Commissioner and Minister of Police are reviewed and set aside. It is further ordered that the appellant should be reinstated into the Police Service and further

paid his arrear salary from the date of dismissal. The second respondent is directed to pay costs of suit on the ordinary scale.

JUDGMENT

JUSTICE M. C. B. MAPHALALA, CJ:

[1] The appellant was employed as a police officer on the 1st December, 2009. He was dismissed from the police service on the 28th February, 2014 by the second respondent pursuant to a recommendation by the Police Board in terms of section 22 of the Police Act;[1] this decision was confirmed on appeal by the first respondent on the 4th August, 2015.

[2] It is common cause that the appellant was convicted by the Mbabane Magistrate's Court on the 9th December, 2013 for drunken driving, which is an offence in terms of section 9 (1) as read with section 122 (2) of the Road Traffic Act.[2] He was sentenced to pay a fine of

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[1] No. 29 of 1957 as amended
[2] No. 6 of 2007

E1, 500-00 (One Thousand Five Hundred Emalangeni) or five months imprisonment. He paid the fine, and, he was subsequently released on the same day.

[3] Pursuant to the criminal proceedings at the Magistrate's Court, the second respondent established a Police Board in terms of section 13 of the Police Act, which provides the following:

> **"13. (1) If the Commissioner is of the opinion that a charge is properly cognisable 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 think fit.**
>
> **(2) The Board shall conform as far as possible with the rules of procedure and evidence obtaining in**
>
> **Magistrate's Courts, and shall administer the oath or affirmation to any witness appearing before it."**

[4] It is not in dispute that when the appellant appeared before the Police Board on the 5th February, 2014, he was asked to show cause why he should not be dismissed from the Police Service pursuant to his conviction for drunken driving by the Magistrate's Court; the appellant was not asked to plead and no evidence was tendered by the second respondent. This presupposes that a decision had already been taken to dismiss the appellant on the basis of his conviction by the Magistrate's Court.

[5] His Lordship Justice M. C. B. Maphalala J, as he then was, in the case of Christopher Vilakazi v. The Prime Minister and Three Others[3] dealt with the import of the provisions of section 13 (2) of the Police Act; he had this to say:

> **"30. Subsection (2) makes it clear that the procedure prescribed for disciplinary proceedings of Junior Police Officers below the rank of Police Inspector is the 'rules of procedure and evidence obtaining in Magistrate's Courts'. It is common cause that persons charged with statutory**

[3] High Court Civil Case No. 464/2009 at para 30

> **offences at the Magistrate's Court are only convicted if the prosecution proves the commission of the offence beyond reasonable doubt, and, the witnesses for the prosecution are examined, cross-examined and where necessary, they are re-examined. This is done over and above the compliance with the Rules of Natural Justice as well as the provisions of the Constitution particularly sections 21 and 33 dealing with the right of a fair hearing and the right to administrative justice."**

[6] Justice Ebrahim JA in Dallas Dlamini and Another v. Commissioner of Police[4] had this to say with regard to disciplinary proceedings of Police Officers in terms of section 13 of the Police Act:

> **"I will begin by looking at the requirements imposed by section 13. In my view, where a member of the police force is being charged whether before a senior officer, a board or a magistrate, the proceedings are criminal in nature. The consequence of the proceedings can be a conviction and**

[4] Civil Appeal Case No. 39/2014 at para 10 and 11

sentence. The Act itself uses the words 'conviction', "convicted", 'sentence' and "sentenced" (see ss20, 21 and 22). These words are associated with criminal proceedings, not with civil ones. The proceedings are not simply industrial relations disputes. They are akin to courts martial, in respect of members of the armed forces. That being so, the burden of proof is the criminal one: the prosecution must prove the accused's guilt beyond reasonable doubt. Similarly, the "the rules of procedure and evidence obtaining in the magistrates court" must, as far as possible, be applied. As rightly pointed out in the appellant's heads of argument, this provision is peremptory.

It follows that the learned acting Judge erred in holding that the board was an administrative body, free to decide and adopt its own procedure and that proof on the balance of probabilities was sufficient."

[7] The Police Act does not make provision for a reverse onus; hence, the Police Board was not entitled to disregard the procedure laid down in

section 13 (2) of the Police Act. It is trite law in this jurisdiction that a reverse onus provision violates the rights of an accused to a fair trial, and, in particular the presumption of innocence as well as the right to remain silent and not compelled to give evidence incriminating oneself; the exception is where it is shown that the application of the reverse onus is reasonable in an open and democratic society.[5]

[8] His Lordship Justice M. C. B. Maphalala CJ in Sifiso Nsibande v. Director of Public Prosecutions in re: Rex v. Polycarp D. Dlamini and Four Others,[6] sitting in a full bench of the Supreme Court had this to say:

> **"29. The Crown conceded during the criminal trial, in the *court a quo,* that the appellant was charged solely on the basis of the presumption, and, that there was no evidence linking the appellant with the commission of the offences charged. Generally, an accused person is**

[5] Emmanuel Dumisani Hleta v. Swaziland Revenue Authority (22/15) 2016 SZHC 22 para 25 and 26

[6] Criminal Appeal Case No. 32/2017 at para 29 - 32

entitled to be discharged at the close of the Crown's case if there is no evidence upon which a reasonable man might convict in the absence of self-incrimination when called to his defence. It is trite that an accused person should not be prosecuted when there is no evidence upon which he might be convicted in the absence of self-incrimination; the Common law requires that there should be reasonable and probable cause to believe that an accused is guilty of an offence before a prosecution is initiated.[7]

30. **The fundamental principle underlying the criminal justice system is that the Crown bears the onus of establishing the guilt of the accused beyond reasonable doubt. It is the Crown that initiates the prosecution of the accused; hence, it should establish the guilt of the accused beyond reasonable doubt. Where the Crown lacks the requisite evidence against**

[7] Beckenstrater v. Rottcher and Another 1955 (1) SA 129 AD at 135 C

the accused, it should not initiate the criminal prosecution.

31. **The advent of constitutional justice requires that every accused person has the right to a fair trial which incorporates the presumption of innocence and the right to silence which entails the right against self-incrimination. An accused faces grave social and personal consequences including social stigma, ostracism from the community as well as loss of personal liberty. The right to a fair trial is specially entrenched in the Constitution[8], and, it is one of the rights that are prohibited from derogations[9] even during the state of public emergency.[10]**

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[8] Section 246 of the Constitution

[9] Section 38 of the Constitution

[10] Section 37 of the Constitution

32. **The advent of statutory presumptions violates not only the right to a fair trial but the presumption of innocence as well as the right against self-incrimination. The danger inherent in statutory presumptions is that it allows for the conviction of accused persons in the face of the existence of a reasonable doubt that the accused committed the offence charged. Where the Crown fails to adduce evidence of the commission of the offence beyond reasonable doubt, the Crown secures the conviction of the accused by resorting to the reverse onus. Statutory presumptions violate the right to a fair trial by calling upon the accused to establish their innocence on a balance of probability that they did not commit the offences charged; hence, the possibility exists for a conviction despite the existence of a reasonable doubt.**

33. **The Constitution of Swaziland endorses the reverse**

> **onus[11] as a limitation to the presumption of innocence. It is well-settled in this country that a reverse onus or a statutory presumption is enforceable only to the extent that it is reasonable, and, it is confined to deal with a prevalent offence which has become a source of national concern."[12]**

[9] Davies JA in R. v. Ndlovu[13] affirmed the fundamental principle underlying the criminal justice system as reflected in the maxim '*in favorem vitae, libertatis et innocentia omnia presumuntirias'* as follows:

> **". . . . In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all the averments necessary to establish his guilt.**

[11] Section 21 (13) (a)

[12] Emmanuel Hleta v. Swaziland Revenue Authority (supra) at para 25 and 26

[13] 1945 AD 369 at 386

Consequently, on a charge of murder, it must prove not only the killing, but that the killing was unlawful and intentional. It can discharge the onus either by direct evidence or by the proof of facts from which a necessary inference may be drawn. One such fact, from which (together with all other facts) such an inference may be drawn, is the lack of an acceptable explanation, if on a review of all the evidence, whether led by the Crown or by the accused, the jury are in doubt whether the killing was unlawful or intentional, the accused is entitled to the benefit of the doubt. That doubt must be one which reasonable men would entertain on all the evidence; the jury should not speculate on the possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence. The only exceptions to the above rules, as to the onus being on the Crown in all criminal cases to prove the unlawfulness of the act and the guilty intent of the accused, and of his being entitled to the benefit of any reasonable doubt thereon, are in regard to intention, the defence of insanity, and, in

regard to both unlawfulness and intention, offences where the onus of proof is placed on the accused by the wording of a statute."

[10] The second respondent dismissed the appellant in terms of section 29 (e) of the Police Act pursuant to a recommendation by the Board for a summary dismissal. This is a contradiction in terms because a dismissal pursuant to a recommendation by a Police Board is provided in section 29 (d) of the Police Act. However, I will deal with this contradiction below. Section 29 (e) of the Police Act provides for a dismissal pursuant to a conviction of an offence other than an offence under the Police Act or its regulations.

[11] The dismissal was with effect from the 28th February, 2014. No reasons were given by the second respondent for the dismissal. The second respondent is not obliged by law to dismiss a police officer pursuant to a recommendation by the Police Board in terms of section 29 (e) of the Police Act or upon the conviction of the police officer for an offence other than one under the Act or regulations made under the Act. Accordingly, it is not enough for the second

respondent to rely on the provisions of section 29 (e) or section 29 (d) for the dismissal of a police officer. It must be apparent from the letter of dismissal that he has perused the record, considered and applied his mind to the evidence adduced before the Police Board, and, that he is satisfied not only that the evidence proves the commission of the offence but that the procedure adopted was lawful; the reasons for the dismissal must be clearly stated. The importance of giving reasons is to assist the aggrieved party in deciding whether or not he has prospects of success on appeal to the Minister of Police, and, further formulate grounds of appeal in the event he decides to lodge an appeal.

[12] It is not in dispute that the appellant subsequently appealed the decision of the second respondent to the first respondent on the 5th March, 2014. The first respondent did not hear the appeal until the 21st May, 2015. It is important to mention that during the hearing, the first respondent did not deal with the substantive grounds of appeal; however, he asked the following questions which had no bearing to the grounds of appeal: Firstly, if the appellant was reinstated, would it not appear that he was acting against the second respondent.

Secondly, does the appellant have knowledge of the Road Traffic Act of 2007. Thirdly, has the appellant stopped drinking pursuant to his conviction at the Magistrate's Court?

[13] After asking the three questions the first respondent excused the appellant without giving him the opportunity to make representations on the grounds of appeal. On the 4th August, 2015 the first respondent sent a short response to the appellant allegedly confirming the decision of the second respondent to dismiss the appellant:

> **'After listening to your appeal and the responses you gave during the meeting I had with you on the 21st May, 2015 in my office and after reading all the correspondence given to me pertaining your case, I regret to inform you that my decision is the same as that of the National Commissioner of Police, which is a dismissal from the Police Service'.**

[14] Subsequently, the appellant made a written request to the second respondent asking for the reasons for the summary dismissal in accordance with section 33 (2) of the Constitution. A similar request

was made to the first respondent for written reasons for confirming his summary dismissal and further dismissing his appeal. He disclosed his desire to challenge the summary dismissal by way of review proceedings at the High Court.

[15] Section 21 of the Constitution deals with the Right to a Fair Hearing, and, it provides the following:

> **"(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.**
>
> **(2) A person who is charged with a criminal offence shall be:**
>
> > **(a) presumed to be innocent until the person is proved or has pleaded guilty;**

. . . .

(10) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

[16] Section 33 of the Constitution provides as follows:

“33. (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in

respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."

[17] It is apparent from the evidence that the first respondent did not conduct a hearing to determine the appeal. The Rules of Natural Justice, also referred to as the rules of procedural fairness were not followed. The Rules of Natural Justice comprise the *'audi alteram partem'*, meaning hear, the other side as well as *'nemo iudex in sua causa'*, meaning that no one should be a judge in his or her own cause. Strictly speaking the Rules of Natural Justice entail that there should be a fair hearing by an impartial decision-maker. It is against this background that the Constitution calls for the establishment of a Police Service Commission to deal with disciplinary proceedings of police officers in line with *"nemo iudex in sua causa"*.[14] It should not be forgotten that currently, the Commissioner of Police indicts police

[14] Section 189 of the Constitution

officers, decides whether they will appear before a senior officer, the Court or a board, receives a recommendation on the hearing and then decides the sanction.

[18] For the present purposes it is the '*audi alteram rule*' that was infringed on the basis that the first respondent did not invite the appellant to make representations and motivate the appeal. The appellant was only asked to respond to three verbal questions which had no bearing to the grounds of appeal. The importance of the *audi alteram partem* rule cannot be overemphasized; it affords an aggrieved person the opportunity to participate in the decision that will affect him by influencing the outcome of that decision. The participation of aggrieved persons in the process of decision-making constitutes a safeguard that not only signals respect for the dignity and worth of the participants but it improves the quality and rationality of administrative decision-making and further enhance its legitimacy.

[19] His Lordship Goldstone J in Janse Van Rensburg NO v. Minister of Trade and Industry NO[15] had this to say:

[15] 2001 (1) SA 29 CC at para 24

"24. . . . . In doing so it must be appreciated that one of the enduring characteristics of procedural fairness is its flexibility. The application of procedural fairness must be considered with regard to the facts and circumstances of each case. In modern States it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important and are reflected in the Bill of Rights. Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner."

[20] It is of critical importance not to overlook that the appellant was not legally represented before the Police Board as well as the Minister of Police. The quality of his representations, legal arguments and

submissions before the Police Board and Minister of Police could not be of a high standard. In addition, the quality of his grounds of appeal could not be of high standard as though he was an admitted attorney; this observation applies equally to the appellant's conduct of the criminal proceedings at the Magistrate's Court on a charge of drunken driving where he merely pleaded guilty because he wanted to get over with the matter without considering the implications and far-reaching consequences of the plea. Law as does science is the art of experts who undergo university training over many years to qualify as Lawyers, Attorneys and Advocates.

[21] It is not in dispute that the appellant and his friends were having a braai, and, the police officers found him moving a friend's motor vehicle at a parking lot which was blocking traffic; he was not per se driving the motor vehicle on a public road. The Police Act does stipulate the various punishments that could be imposed depending on the seriousness of the offence charged.[16]

Section 18 provides the following:

[16] Section 18 of the Police Act as amended

"18. A member of the Force, other than a senior officer to whom section 12 (1) applies, who is guilty of an offence against discipline shall be liable to any one or more of the following punishments:

(a) Where disciplinary proceedings are conducted by a senior officer:

(i) against a subordinate officer, such subordinate officer shall be liable to admonition: reprimand, severe reprimand, or a fine not exceeding one hundred Emalangeni;

(ii) against a non-commissioned officer, such

non-commissioned officer shall be liable to admonition, reprimand or a fine not exceeding fifty Emalangeni: and,

(iii) against a member belonging to other ranks, such member shall be liable to admonition, reprimand or severe reprimand, a fine not exceeding thirty Emalangeni, confinement to Police lines for a period not exceeding fourteen days with or without punishment drill, extra guards, fatigues or other duty in addition to normal duty or to extra guards, fatigues or other duties.

(b) Where disciplinary proceedings are conducted by a Board, the member shall be liable to admonition; reprimand; severe reprimand or a fine not exceeding two hundred Emalangeni."

[22] The appellant was off-duty as already stated above and not driving the motor vehicle on a public road but just parking it properly and assisting a friend; hence, a punishment outlined in section 18 (b) would have been appropriate such as admonition, reprimand or payment of a fine. There is no legal basis for the Police Board to recommend the dismissal of the appellant in view of the circumstances of this case; the fact that the appellant had been convicted by the Magistrate's Court does not suffice. He was merely convicted upon his plea and no evidence beyond reasonable doubt was led at the Magistrate's Court to prove that the appellant had exceeded the maximum limit of consumption allowed for a driver. Similarly, there is no legal basis for a dismissal of the appellant by the second respondent in the circumstances of this case.

[23] The second respondent dismissed the appellant in terms of section 29 (e) of the Police Act which empowers him to dismiss a police officer on conviction of an offence other than an offence under the Act. It is apparent from the dismissal that it is based on the appellant's conviction at the Magistrate's Court, and, the second respondent stated that he was acting in terms of his powers in section 29 (e) of the Police Act. What boggles the mind is that the second respondent had established the Police Board in terms of section 13 (2) of the Police Act to conduct a hearing. Part of the letter of dismissal states that he is acting in terms of a recommendation by the Police Board; such a dismissal is provided in terms of section 29 (d) of the Police Act. In addition the punishment meted to the appellant was severe when considering what the Justice Ebrahim JA said in Dallas Busani Dlamini and Another v. Commissioner of Police[17], when he had this to say:

"14. The appellants were not represented at the Board proceedings. Although they were policemen who should have had at least some rudimentary knowledge of and

[17] Supra at para 14

experience in court proceedings, this does not convert them into lawyers. Too much weight should not be attached to their failure to cross-examine either on a specific point or at all. As was said by Beadle CJ in S. V. Mutimhodyo 1973 (1) RLR 76 (A) at 80 A – C:

> **'I want to repeat again what this court has said on a number of occasions, that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to understand clearly all the intricacies of court procedure, it is very wrong for a trial court to hold against such an accused mistakes he might make such a failure to cross-examine; to hold against him, for instance, the fact that he has not cross-examined on a particular issue because one would have expected a skilled lawyer to have done so. It is the court's duty to assist unrepresented accused of this description in their defence and not to take technical points against them**

because of mistakes the accused might make in procedure.' "

[24] Khumalo J in Sefularo v. President of Bophuthatswana and Another,[18] emphasized the importance of the *audi alteram partem* rule as follows:

> **"The *audi alteram partem* rule is a principle of natural justice which promotes fairness by requiring persons exercising statutory powers which affect the rights or property of others to be afforded a hearing before the exercise of such powers. It has existed from antiquity and is today the cornerstone of the administrative laws of all civilised countries. In John v. Rees and Others v. Davis and Others; Rees and Another v. John (1970) Ch 345 (1969) Z All ER 274 at 400 and 307 (All ER), it is said that:**

> > **'The laws of God and man both gave the party an opportunity to make his defence, if he has any. I**

[18] 1994 (3) SA 80 at 82 General Division of the High Court

remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence'.

. . . .

In Smith v Attorney-General, Bophuthatswana 1984 (1) SA 196 (B) Hiemstra CJ stated at 201 H – 202 A:

'The *maxim audi alteram partem* is deeply embedded in administrative and judicial procedures and is always presumed to be implied. It can however, where it is not entrenched, be excluded by the legislature expressly or by necessary implication'.

In Publications Control v. Central News Agency Ltd 1970 (3) SA 479 (A) at 488 H – 489 Rumpff JA, as he then was, said the following:

‘It is, of course, firmly established in our law that when a statute gives judicial or quasi-judicial powers to affect prejudicially the right of a person or property, there is a presumption, in the absence of an express provision to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected should be given an opportunity to defend himself or of being heard. If, however, on a proper construction of the statute, it appears that the legislature did not intend the person affected to have the right of being heard, the implied right will be held to be excluded’.”

[25] The decision of Justice Khumalo in Sefularo v. President of Bophuthatswana was subsequently confirmed on appeal in the case of President of Bophuthatswana and Another v. Sefularo[19] by Stewart CJ delivering the unanimous judgment of the court. However, I should mention that in this jurisdiction any legislation which seeks to exclude

[19] 1994 (4) SA 96 Bophuthatswana Appellate Division (B AD)

the principle of *audi alteram partem* would be unconstitutional and unenforceable in light of the Bill of Rights enshrined in the Constitution. In particular section 21 of the Constitution provides for the right to a fair hearing which encompasses the presumption of innocence as well as the right to legal representation in defending oneself. Section 21 (1) of the Constitution provides the following:

> **"21 (1) In the determination of civil rights and obligations or any criminal charge, a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law".**

[26] His Lordship M. C. B. Maphalala JA, as he then was, in John Roland Rudd v. Rex,[20] delivered a unanimous judgment of the Supreme Court of Swaziland. In that case the *court a quo* had cancelled the appellant's bail in his absence at the instance of his surety. The appellant was further not given an opportunity to make

[20] Criminal Appeal Case No. 26/2012 at para 19 and 20

representations in court. His bail was cancelled and his surety discharged. The appellant advanced two grounds of appeal: Firstly, that the *court a quo* erred in law when cancelling the bail and discharging the surety without giving the appellant an opportunity to be heard in accordance with the principle of *audi alteram partem*. Secondly, that the *court a quo* erred in law in cancelling the bail in the absence of the appellant in violation of section 96 (19) (a) and (i) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

His Lordship Justice M. C. B. Maphalala JA, as he then was, had this to say:

> **"19. . . . . The *court a quo* was obliged to hear the appellant before cancelling his bail and discharging the surety in accordance with the principle of Natural Justice, the *audi alteram partem;* literally, it means hear the other party. It is implicit in this principle that no person shall be condemned, punished or have any of his legal rights compromised by a court of law without being heard.**

20. The Supreme Court of India in the case of Lema Nath Pandly v. State of U. P. Air 2009 SC 2375 explained the principles in the following terms:

> **'6. Natural justice is another name for common sense justice. Rules of Natural Justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideas and human values. The administration of justice is to be freed from the narrow and restricted consideration which is usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.**

7. The expression 'natural justice' and legal justice do not present a water-tight classification. It is the substance of justice which is secured by both and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatically pedantry or logical prevarication. It supplies the omission of a formulated law as Lord Buckmaster said; no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

8. . . . . . These principles are well-settled. The first and foremost principle is what is commonly known as *audi alteram partem.* It says that no one should be condemned unheard. Notice is the first limb of this

principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the Magna Carta. The classic exposition of Sir Edward Coke of Natural

Justice requires to 'vacate, interrogate and adjudicate'. In the celebrated case of Copper v. Wandworth Board of Works (1863) 143 ER 414), the principle was thus stated:

> **'Even God did not pass a sentence upon Adam, before he was called upon to make his defence; Adam, says God, Where art thou? Hast thou not eaten of the tree whereof I commanded thee that shouldest not eat'.**

9. **Since then the principle has been chiselled, honed and refined enriching its content. Judicial treatment has added light and luminosity to the concepts, like polishing a diamond.**

10. Principles of Natural Justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary proceedings that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

[27] The appellant lodged an application in the *court a quo* seeking the following orders: Firstly, reviewing, correcting and setting aside the decision of the first respondent dated 4th August, 2015. Secondly, that the appellant should be reinstated to the Police Service. Thirdly, directing the respondent to pay the appellant his salary arrears calculated from 28th February, 2014 to date of reinstatement.

[28] The *court a quo* made an error of law when it held that the Police Board or any administrative tribunals are masters of their own house,

and not bound by strict procedural rules that obtain in a court of law. As mentioned in the preceding paragraphs, the Police Board was established in terms of section 13 of the Police Act which expressly provides for the procedure to be followed, which is similar to that of a court of law.

[29] Notwithstanding the conviction by the Magistrate's Court, the appellant was legally entitled to a hearing by the Police Board in accordance with section 13 of the Police Act as well as the principle of *audi alteram partem.* The Police Act doesn't anticipate the application of the reverse onus during the hearing conducted in terms of section 13 of the Police Act.

This matter is distinguishable from the case of The Chairman, Civil Service Commission v. Isaac M. F. Dlamini[21] quoted by Counsel for the respondents where the procedure for a disciplinary hearing was not provided. In that matter His Lordship Mamba AJA quoted with approval his earlier decision in the matter of Nkosinathi Magagula v.

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[21] Industrial Court of Appeal Case No. 14/2015

The Commissioner of Police[22] which in my respectful view was wrongly decided on the basis that the procedure laid down in section 13 of the Police Act was not followed. The Learned Judge had this to say:-

> **'It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board,**

[22] 96/2011 at para 30

the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word."

[30] His Lordship Justice M. D. Mamba AJA sitting with Justice M. C. B. Maphalala CJ and Justice M. Dlamini AJA, in the matter of The Chairman, Civil Service Commission v. Isaac M. Dlamini was correct when he held as follows:

> **"9. . . . a hearing is always a must or pre-requisite where the decision to be taken would adversely affect or impact on the rights of a person to the dispute or decision-making process. This principle is grounded on the notion of natural justice or procedural fairness, namely, that a person may not be condemned before he is given the opportunity to be heard on the issue under consideration."**

[31] Justice A. M. Ebrahim JA sitting with Justice M. C. B. Maphalala JA, as he then was, and Justice B. J. Odoki JA in Dallas Busani Dlamini

and Another v. Commissioner of Police:[23] had this to say:

> **"8. . . . in terms of section 13 (2) of the Police Act, the proceedings before a board 'shall conform as far as possible with the rules of procedure and evidence obtaining in the Magistrate's Court'.**
>
> **. . . .**
>
> **10. I will begin by looking at the requirements imposed by section 13. In my view, where a member of the Police force is being charged, whether before a senior officer, a board or a Magistrate, the proceedings are criminal in nature. The consequence of the proceedings can be a conviction and sentence. The Act itself uses the words 'conviction', 'convicted', 'sentence' and 'sentenced' (see ss 20, 21 and 22). These words are associated with criminal proceedings, not with civil ones. The proceedings are**

[23] Supra at para 8, 10 and 11

not simply industrial relations disputes. They are akin to courts martial, in respect of members of the armed forces. That being so, the burden of proof is the criminal one: the prosecution must prove the accused's guilt beyond reasonable doubt. Similarly, the 'the rules of procedure and evidence obtaining in the Magistrate's Court must, as far as possible, be applied. As rightly pointed out in the appellant's heads of argument, this provision is peremptory.

11. It follows that the learned Acting Judge erred in holding that the board was an administrative body, free to decide and adopt its own procedure and that proof on the balance of probabilities was sufficient."

[32] In Christopher Vilakazi v. The Prime Minster and Three Others,[24] His Lordship Justice M. C. B. Maphalala J, as he then was, had this to say:

[24] Supra at para 34 and 36

“34. His Lordship Tebbutt JA who delivered the unanimous decision of the Supreme Court of Swaziland in the case of Takhona Dlamini v. The President of the Industrial Court and Another Appeal Case No. 23/1997 quoted with approval the judgment of Corbett JA in the case of Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd 1988 (3) SA 132 at 152 A – D where the following was stated:

> **‘Broadly, in order to establish review grounds, it must show that the President failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice. . . . Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or malafide or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper purpose; or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the President**

was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated . . . .'

. . . .

36. In conclusion His Lordship Justice Tebbutt JA, at paid 11, stated that the common law grounds set out in the Johannesburg Stock Exchange case (supra) are not exhaustive; he stated that an error of law may also give rise to a good ground for review."

[33] It is common cause that the appellant lodged an appeal pursuant to the decision of the *court a quo.* The grounds of appeal are as follows: Firstly, that the *court a quo* erred in law in finding that administrative tribunals are masters of their own house, and, that they are not bound by strict procedural rules that obtain in a court of law yet section 13 (2) of the Police Act of 1957 provides that they shall adhere to rules of procedure and evidence obtaining in Magistrate's Courts. I have dealt extensively with this issue in the preceding paragraphs. Suffice to say

that in disciplinary proceedings where the Commissioner of Police has established a board in terms of section 13 (1) of the Police Act to conduct a hearing, the procedure that has to be followed is laid down in section 13 (2) of the Police Act; hence, the board is not free to decide and adopt its own procedure; and, the test required is that evidence beyond reasonable doubt has to be established to prove the Commission of the offence.

[34] The second ground of appeal is that the *court a quo* erred by failing to find that it was an irregularity that the board denied the appellant his right to a fair hearing, and, in so doing imposed on him a reverse onus. The appellant has cited the case of Musa Joburg Shongwe v. The Commissioner of Police and Another,[25] where the appellant, a police officer, was recommended for dismissal by a Police Board established in terms of section 13 of the Police Act. The appellant had been convicted by the Magistrates Court for assault and sentenced to six months imprisonment. The conviction was confirmed on appeal by the High Court, and, the sentence was reduced to six hundred days and wholly suspended.

[25] Supra

[35] In the matter of Musa Joburg Shongwe, the board confronted the appellant with a reverse onus to show cause why he should not be dismissed pursuant to his conviction at the Magistrate's Court. Subsequently, he was dismissed by the Police Commissioner in terms of section 29 (e) of the Police Act. His Lordship Justice Jacobus Annadale ACJ reviewed and set aside the dismissal of the appellant on the basis that he was not given a fair hearing by the board in accordance with the Rules of Natural Justice, and, in particular the *audi alteram partem.* The Court noted that the hearing by the board was tainted with serious irregularities which rendered the hearing a nullity. I have dealt with the implications of a reverse onus in the preceding paragraphs. Suffice to say that a reverse onus violates the right to a fair hearing by calling upon the accused to establish his innocence on a balance of probability that he did not commit the offence. In disciplinary proceedings involving the police service, section 13 sets out the procedure to be followed during the hearing and failure to comply therewith constitutes a serious irregularity which renders the hearing a nullity.

[36] The third ground of appeal was that the Commissioner of Police committed a serious irregularity by failing to furnish reasons for his decision notwithstanding a request to do so in accordance with section 33 of the Constitution. This Constitutional provision states that a person appearing before an administrative authority has a right to be heard and to be treated justly and fairly in accordance with the law and the principles of Natural Justice. Furthermore, it provides that the person has a right to review the decision of the administrative authority in court if he feels aggrieved. Similarly, he has a right to be given reasons in writing for the decision of that authority. Failure to comply with the provisions of section 33 of the Constitution constitutes a serious irregularity which renders the conduct and decision of the administrative authority reviewable, and ultimately to be set aside.

[37] It is apparent from the evidence that the Police Board committed a serious irregularity when it confronted the appellant with a reverse onus to show cause why he should not be dismissed from the Police Service pursuant to his conviction for drunken driving by the Magistrate's Court. The board failed to follow the procedure laid

down in section 13 (2) of the Police Act to conduct the hearing and 'conform as far as possible with the rules of procedure and evidence obtaining in Magistrate's Courts, and to further administer the oath and affirmation to any witness appearing before it'.

[38] Furthermore, the Commissioner of Police as well as the Minister of Police failed to give reasons for their decisions despite a written request to do so. Similarly, the Minister of Police failed to conduct a proper appeal hearing by giving the appellant the opportunity to make representations, motivate and support his grounds of appeal; the appellant was merely asked three questions which were irrelevant and had no bearing to the grounds of appeal. It is not in dispute that the Minister of Police did not read the record of proceedings before confirming the decision of the Commissioner of Police, neither did he consider and apply his mind to the grounds of appeal before him.

[39] Accordingly, the Court makes the following order:

(a) The decisions of the first and second respondents dismissing the appellant from the Police Service on the

26th February, 2014 and 4th August, 2015 respectively are reviewed, corrected and set aside.

(b) The appellant is reinstated to the Police Service, and, the first and second respondents are directed to comply with this order from the date of dismissal.

(c) The first and second respondents are directed to pay the appellant his arrear salary from the date of dismissal being the 26th February, 2014 to the date of this judgment.

(d) The second respondent is directed to pay costs of suit to the appellant on the ordinary scale.

For Appellant : Meluleki Ndlangamandla
M. N. K. Ndlangamandla Attorneys

For Respondents : Noluthando Xaba – Crown Counsel
Attorney General's Chambers

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

S. P. DLAMINI, JA

MINORITY JUDGMENT

JUSTICE M. J. DLAMINI JA

Summary: *Administrative law – judicial review – Police Board – exercise of statutory power – audi alteram partem – fair hearing – section 29(e) of Police Act, 1957 – scope of subsection – No re-hearing of the offence – Applicant called to show cause why he should not be dismissed – nature of the proceedings - reasons for decision by public functionary.*

[1] This is a minority judgment of an appeal against the judgment of the High Court, per Mamba J, dismissing with costs applicant's (the appellant herein) application for an order reviewing and setting aside the 1st respondent's decision dated 4th August 2015 and replacing it with an order reinstating the applicant to the Police Service and the payment of applicant's salary arrears by 2nd respondent and costs.

[2] In his *founding* affidavit applicant states, *inter alia*: *"9. The decisions which are a subject matter of this review are dated 26th February 2014 and 4th August 2015 as set out in the letters annexed hereto marked A and B. Their effect was to terminate my employment relationship with the Police Service with effect from 28th February*

2014…” It will be noted, however, that the decisions referred to as the basis for the review are the decisions of 2nd and 1st respondents respectively. But not much is said about 2nd respondent other than alleged irregularities by the board in conducting the hearing. True enough, the decision is that of 2nd respondent since the board only recommends. On close scrutiny, however, the so-called irregularities evaporate into thin air.

[3] Applicant filed his amended grounds of appeal on 23rd June 2017, followed by heads of argument on 26th June 2017. The grounds of appeal are as follows –

> “1. The court *a quo* erred in law in finding that administrative tribunals are masters of their own house and that they are not bound by strict procedural rules that obtain in a court of law….” (Notwithstanding section 13(2) of the Police Act 1957).
>
> “2. The court *a quo* erred in law by finding that in administrative tribunals substantive fairness is the rule of

the game, whereas procedural fairness…" (ground incomplete).

"3. The court *a quo* erred in law by finding no irregularity in the manner in which the board denied the appellant his right to a fair hearing and in so doing imposed on him 'reverse onus' contrary to the judgment of ***Musa Joburg Shongwe v Commissioner of Police and Another*** (1302/2001).

"4. The court *a quo* erred in fact by finding that the 1st respondent took into account relevant consideration and applied his mind to the matter, despite failure to furnish reasons for his decision of 4th August 2015 even upon request in terms of section 33 of the Constitution".

[4] I take it that since the reasons for 1st respondent's decision have since been furnished, the fourth ground of appeal should no longer feature in this appeal one way or the other. The appeal did not consider nor was

the point raised by the parties, whether the matter should be returned to the court *a quo* now that reasons have been furnished by

1st respondent, following an order issued by this Court. When the order requiring 1st respondent to file his reasons was made the appeal was "postponed to a date to be arranged with the Registrar of the Supreme Court after consultations". The implication is that the appeal would be reinstated at the instance of the appellant after the reasons of

1st respondent had been served to the parties. The reasons were filed with the Registrar timeously on 21st August 2017 and the appeal was thereafter enrolled for this first session of 2018. The parties had enough time to amend or supplement their documents. However, it does not appear that applicant ever asked for and filed amended grounds of appeal and heads of argument. Be that as it may, and for whatever it is worth, we shall consider the fourth ground as presented by applicant bearing in mind that 1st respondent has a legitimate expectation that his expanded reasons will be considered as ordered by this Court. It should further be noted that even though the order of court also directed 2nd respondent to file his reasons for terminating the appellant's services, as per section 33(2) of the Constitution, the grounds of appeal do not require anything from the 2nd respondent.

[5] The fifth ground of appeal reads –

> **"The Honourable Court *a quo* erred in law in finding that the administrative tribunal and the 1st respondent were justified by criminal conviction to disregard the *audi alteram partem* rule in dismissing the appellant".** (The 6th and final ground was on costs).

I must confess having difficulty in quite understanding this ground of appeal as I cannot find in the judgment *a quo* an order or decision as alleged by applicant. In my view the learned trial Judge did not make such a ruling. If applicant is by this 5th ground referring to where the trial Judge speaks of administrative bodies being masters of their own house, then as I explain below, I do not understand the trial Judge to be saying that the *audi alteram partem* rule should be disregarded or applied at the whim of the board. The obligation to follow the rules of natural justice is relative to the specific circumstances of a case. To say therefore that the board is not obliged to apply the *audi* rule is only relative.

[6] At the hearing *a quo* applicant had anchored the review on the decision of 1st respondent and the proceeding before the board. One should state further that under para 4 of his *heads* of argument, while referring to his appeal to the 1st respondent, applicant also says: *"…It is worth mentioning that this was not an appeal in the strict sense as the appellant in his letter was inter alia complaining about the procedure that was followed by the Police Board in arriving to their recommendation of a dismissal"*. The reasoning of the applicant is difficult to follow. If the appeal was not an appeal in the strict sense, what was it and in terms of which rule or procedure? Clearly, however, in neither the provisional notice of appeal nor the amended grounds of appeal did the applicant formally complain about anything done by the 2nd respondent. The propriety or otherwise of confirming the recommendation of the board by 2nd respondent was never made an issue for determination by this Court or the court *a quo*. Applicant's grievance was always either with the board itself or 1st respondent on whom the buck stops as minister responsible for police affairs.

[7] Applicant under the same para 4 of his *heads* of argument says that he also had some issues or complaints to raise at the board such as that he pleaded guilty before the magistrate's court in order to expedite the process of the end of the matter (and not that he was in fact guilty), and that the board should have heard him and made its own finding and not rely on the decision of the magistrate and that he was not allowed to mitigate before the board. Thus, argued appellant's counsel: *"So my lord, what we are complaining about is the procedural unfairness which occurred from the inception of the matter in the initial disciplinary hearing whereby … the police board failed to give a fair hearing to the applicant and … he was simply called upon to show cause why he should not be dismissed. There was no charge sheet … he was not given an opportunity to plead, he was not given the evidence preferred against him, … and he was also not given an opportunity to call witnesses or even cross-examine the Initiator"*. It was also counsel's argument that the board was supposed to conduct the hearing in terms of s13 (2) of the Act. The applicant, however, is mistaken in that evidence should have been led before the board to prove his guilt. The line of argument adopted by applicant ignores the fact that the hearing was in terms of s 29(e) of

the Act and not section 13 (2). The hearing under this paragraph (e) was precisely for mitigation, which in fact applicant did, looking at his written and oral submissions, ignoring any irrelevant aspects. It will be realized, however, that applicant never asked to call witnesses on his behalf nor to cross-examine the Initiator, if there was one. The board was not obliged to bring witnesses. That applicant was not successful in avoiding the punishment of dismissal can hardly be an issue for review in the absence of any substantial procedural irregularity.

[8] In ***Musa Joburg Shongwe v Commissioner of Police***, Civil Case No. 1302/01, I cannot find anything wrong with the requirement that applicant had to 'show cause' why his service as a police constable should not be terminated following his conviction. With respect, I do not see any *reverse onus* in the calling of applicant to 'show cause'. I take it that the expression 'show cause' is not used in any special or technical sense other than that the person referred to is invited to explain in his own interest or favour why he should not be discharged from the Service. Applicant has to bear some onus relatively speaking

to defend himself against dismissal. This is very much the essence of the *audi* rule. When the hearing is based on applicant's conviction, there is no absolute necessity for witnesses to be brought by the board. Applicant may bring own witnesses if so motivated. Applicant's counsel was clearly mistaken when he submitted that the board should have proceeded as does a magistrate's court in criminal proceedings, with a charge sheet, pleading by 'accused', calling of witnesses, etc. It is not, in my opinion, required by s. 29(e) that the board should introduce extraneous evidence or information in conducting the hearing. It could easily be enough for the board to say to the police constable: "Constable X, you were convicted by the magistrate's court for such and such offence; please, tell this board why you should not be dismissed from the Service". If applicant indicates failure to properly understand the purpose of the meeting, then the board would be obliged to explain further. And if further evidence is introduced, then the witnesses would have to be open to cross-examination by the applicant. Surely before the board there is no absolute need for any further incriminating evidence. What *incriminates* the applicant at the disciplinary hearing under section 29(e) is the conviction that hangs

over his head like the Sword of Damocles! However, even then, the incrimination is only nominal.

[9] Another of applicant's arguments on appeal is based on what he calls 'reverse onus', contrary to section 13(2) and the maxim 'he who alleges must prove'. Applicant is arguing from a wrong premise. We have already pointed out that the hearing was not in terms of any part of s13 of the Act. Under the provisions of section 29(e) the board has nothing to *allege* except to present applicant with the terms of reference and call upon him to say what he wants to say: which is what the board in fact did. It is usual for a convicted person to be called upon to mitigate. There is nothing un-procedural in that: there is no reversal of onus in that. The convicted person is not supposed to plead and be retried during mitigation. The convicted individual is not supposed to be led or spoon-fed in what to say in mitigation of punishment as applicant seems to be saying here. In para 7.1 of his *heads* of argument applicant states: *"…. In casu the cause of concern is that, the appellant was simply called upon to fight dismissal from word go without any evidence being adduced against him, he was not*

allowed to plead nor was he advised of his verdict. The court a quo however in its judgment sees no irregularity by the board against the appellant", (sic). I see no irregularity either.

[10] At para 11.5.1 of the *founding* affidavit, applicant states: *"I was further not invited to make submissions in mitigation before the dismissal sanction was meted out to me on 26th February 2014"*. This submission is also ill-conceived. For applicant had come before the board on 5th February, 2014 precisely to make submissions in mitigation of dismissal by explaining why he should not be dismissed after being convicted for drunken driving. It seems to me that applicant is only clutching at straws for he further says: *"I believe, in terms of principles of natural justice, one has to know a case which he faces …"* Applicant had never complained before the board not being aware of what he had been called for. At any rate, the case - if case at all – that applicant was facing before the board was sufficiently stated in the ***Terms of Reference***, served on him sometime around end of January, 2014, in these words: "… ***The sole reason for this hearing is to establish why 6046 Const. S.M. Sibandze should not be dismissed from the Police Service in terms***

of section 29 (e) of the Police act 29 / 1957 as amended by Act 5/1987, following his conviction by the Magistrate Court for contravening section 91(1) as read with section 122(2) of the Road Traffic Act, 2007". In a manner of speaking, this was the 'charge sheet', if such was necessary as applicant argues. For his own information, applicant would have known the magistrate's judgment on his conviction.

[11] On his first appearance for the hearing, the board wanted to know whether applicant had been served with the convening order, to which applicant answered in the affirmative:

Board: *When were you served?*

***Respondent**:* *I was served during the month of January 2014 and I am not sure of the date and not told of the date to appear before the board.*

Board: *How come you know that you are to appear?*

Respondent: *It appeared that on 01/02/14 I saw an incoming message in my work station talking about me appearing before the board today …*

Board: *Do you understand the contents of the memorandum and why the board has been established by the National Commissioner of Police?*

Respondent: *Yes, Sir*

Board: *You have a right to legal representation. Are you legally represented?*

Respondent: *No, Sir. I will represent and submit my submissions myself.*

Board: *You have a right to submit your submissions to the board in a written report or orally or both. Which do you prefer?*

Respondent: *I have prepared a report which I will read and submit to the board and also I will add a verbal submission.*

Board: *You may read your submissions; the board will on time and again ask you to clarify any ambiguous statements".*

[12] Applicant then read his submissions and was thereafter asked a few questions. Applicant did not query the adequacy or otherwise of the *Terms of Reference.* On the contrary, at the hearing, the applicant had firmly stated that he understood the purpose for his appearance before the board. Applicant had then not demanded to be shown the trial magistrate's record. Even at the review proceedings, applicant did not say why he needed to have had or seen the magistrate's record or how it would have assisted him during the hearing before the board. Applicant did not deny having been convicted by the magistrate for the alleged offence. It is not necessary to speculate what the board would have said when confronted with the demand for the said court record. In my view, in light of the section in terms of which the proceeding was conducted, I cannot see how the record could have assisted the applicant at the board hearing. Applicant knew what the record contained as he must have been present on the day of the

judgment. The board made its findings and recommendations to the commissioner. Applicant had mitigated the sentence. Why should he mitigate twice before the same board?

[13] The questions which applicant, in para 11.8 of his *founding* affidavit, says he was asked by 1st respondent on appeal do not in any way advance his cause. In para **11.8** of the said affidavit applicant explains what happened when he came to present his appeal before 1st respondent as follows –

"The 1st respondent as chairman of the appeal simply asked the following questions without dealing with my grounds of appeal or having recourse to the initial hearing record:

1. If he re-instate me will it not be as if he is acting against the 2nd respondent?

2. Do I have knowledge or information of what is it that is provided for in the Road Traffic Act of 2007?

3. Have I stopped drinking what I was convicted for at the Magistrate's court?"

These questions are truly awkward; it is as if the applicant is asking himself.

[14] In para 16 of his *answering* affidavit – an answer to applicant's 11.8 - 1st respondent curtly states:

"I deny that the grounds of appeal of the applicant were never considered. I take all relevant considerations of the matter before arriving at a decision".

1st respondent does not answer the specific issues raised by applicant. However, in his *replying* affidavit, at para 11, applicant states as follows, in response to 1st respondent's para 16 (and 17):

"The allegations contained herein are denied, 1st respondent is put to strict proof thereof. I refer this honourable court to ***the record of***

proceedings *of the appeal hearing, I was never afforded an opportunity to substantiate the grounds of my appeal".*

The *record of proceedings* is ten pages; while the Minutes of proceedings before the 1st respondent is a single page (p 92) of the *Record.* The two documents were filed by respondent's counsel without any number or mark. The record before the board is signed by the board members, but the single page 92 is not signed by anybody: its heading reads: **"Minutes of the Hearing of Appeal against Dismissal of Constable Sifiso Sibandze EX 6046 on 21 May 2015".** What is palpably clear on the face of the Minutes is that they bear no reference whatsoever to the contents of applicant's para 11.8. In other words, the Minutes of the appeal proceedings do not support the applicant as to the questions applicant was supposedly asked by 1st respondent. The Minutes have not been challenged by applicant as in any way inaccurate. Applicant's para 11.8 must, in my opinion, be rejected.

[15] In para 11.9 of his *founding* affidavit applicant refers to unanswered correspondence requesting reasons for the decision confirming 2nd respondent's dismissal of applicant. 1st respondent answers under para 17 of *answering* affidavit and denies the contents of para 11.9 and

continues: "*I confirmed the decision of the 2nd respondent having considered the reasons for dismissing applicant by the 2nd respondent and also having heard applicant's reasons for lodging the appeal and the record of his previous hearing as well as the general; behavior expected from a police officer*". In para 13, 1st respondent also denies that "*he simply aligned himself with 2nd respondent's decision which … was simply a rubberstamp of the criminal conviction*". He further denies any irregularities in the 2nd respondent's dismissal of applicant and in para 19, 1st respondent states as follows:

> ***"… The Police Service is a disciplined force and by the nature of their duty Police Officers are regarded to be always on duty. Police officers' conduct is expected to portray expectations of a disciplined force. Police officers are Law Enforcers as a result must be exemplary to the members of the public. I further re-iterate the contents of paragraph 11.9 above".***

This was in response in part to applicant's assertion that the offence had been committed while he was off-duty. 1st respondent concludes by submitting that applicant had "*dismally failed to show any form of*

irregularity conducted by the 1st and 2nd respondents on the disciplinary enquiry and appeal hearing".

[16] In his *replying* affidavit applicant lists the following as 'irregularities' committed by the board during his appearance before it and that these irregularities have not been denied by the respondents, namely –

"4.1 that the Police Board which I appeared before was not divulged to me prior to my appearance before it;

4.2 that I was only called upon to state why I should not be dismissed, not that I was being given a fair disciplinary hearing which was to determine whether I was guilty or not and for thereafter met out a fair sanction; (sic)

4.3 that no evidence was submitted and no witness was paraded to establish a case against me;

4.4 that I was never at any point before the dismissal sanction advised whether I was found guilty or not and on what basis;

4.5 that I was dismissed for a non-work-related misconduct or traffic offence which occurred while I was off duty on a weekend".

In my opinion and, no doubt, the opinion of the learned trial Judge, none of the foregoing so-called irregularities carry any weight. A large part of what applicant says is contradicted by his replies to the board as shown above. We have already said that the nature, purpose and focus of the disciplinary hearing was the issue of whether the sanction of dismissal or a lesser punishment or none at all should be imposed on the applicant. It seems to me the applicant misconstrued the purpose of the hearing. In my view that applicant was called to state why he should not be dismissed sums up the whole purpose of the hearing in terms of section 29(e). And that the offences were not work-related was not relevant having regard to the nature of applicant's work as a member of the Police Service.

[17] In his subsequent reasons for confirming the decision of the 2nd respondent, the 1st respondent refers to his letter, "dated 4 August 2014", and continues:

“<u>Procedural Fairness</u>”

1. *The decision of the National Commissioner was procedurally fair. The National Commissioner did not dismiss Mr. Sibandze merely because he was convicted. The National Commissioner constituted a Board of officers to conduct a disciplinary hearing. Mr. Sibandze was afforded an opportunity to make representations on his own behalf before the decision was taken, as to why he should not be dismissed following his conviction.*

2. *I am satisfied that the Board of officers convened by the Commissioner did not simply confirm that Mr. Sibandze was convicted. The disciplinary hearing gave Mr. Sibandze an opportunity to contest the Magistrate. Mr. Sibandze did not explain to the Board of officers why his conviction was wrong following his own plea of guilty*.

Severity of sentence

3. *I find that the sanction of dismissal was not severe in the circumstances of the case. Mr. Sibandze was a repeat offender who had been given an opportunity to mend his ways.*

Board 'rubberstamping' the Criminal Court

4. *I am satisfied that the Board read the record of the criminal proceedings in Mr Sibandze's trial. Given that Mr Sibandze did not explain why the conviction was wrong, the Board was correct to find him guilty of misconduct*.

Refusal of mitigation

5. *I am satisfied from the record that the Board took into account Mr Sibandze's personal circumstances, his length of service, the gravity of the offence for which he was convicted and the nature of the functions discharged by the Police Force. Drunken driving is a serious offence. In this case Mr Sibandze*

was convicted of this offence for a second time. The Royal Swaziland Police as a disciplined Force entrusted with the responsibility of preventing crime and apprehending offenders cannot afford to have multiple offenders in its rank.

6. *I am satisfied that the Board and the National Commissioner weighed the seriousness of the offence, the fact that Mr. Sibandze was a repeat offender and the disciplined nature of the Police Service against Mr. Sibandze's personal circumstances. The Board and the National Commissioner found that Mr. Sibandze's personal circumstances did not outweigh the other circumstances I have referred to above.*

7. *I could find no reason to interfere with the Board's recommendation of dismissal and the Commissioner accepting the recommendation.*

8. *In conclusion, I find that the dismissal of Mr. Sibandze was both procedurally and substantively fair. Mr. Sibandze's appeal must therefore fail".*

[18] As pointed out above, the 1st respondent's reasons for confirming the dismissal - filed before this Court on 21/8/17 - were not placed before the trial Judge. What was before the trial Judge is what may be called an abridged version of 1st respondent's decision, and it must be on the basis of that initial letter dismissing the appeal that the learned trial Judge dismissed the review application. The letter of dismissal dated 4th August **2014**, reads as follows:

"Dismissal from Police Service: Yourself

Dear Mr. Sibandze,

> ***After listening to your appeal and the responses you gave during the meeting I had with you on the 21 May 2015 in my office and after* reading *all the correspondence given to me pertaining your case, I regret to inform you that my decision is the same as that of the National Commissioner of Police, which is a dismissal from the Police Service.***
>
> ***Yours faithfully."***

[19] As the learned trial Judge had said in ***Christopher Vilakati v The Prime Minister and Others*** [2012]SZHC 105, para [14] that it must be apparent from the letter of dismissal that the dismissing authority has perused the record and considered the evidence adduced before the board and that it is satisfied not only that the evidence proves the commission of the offence but that the procedure adopted was lawful, the 1st respondent's letter *in casu* does, *mutatis mutandis*, capture the essence of what the learned trial Judge said was necessary to find in the letter of dismissal or *in casu* in the letter confirming the dismissal. I agree with para [22] of ***Vilakati's*** case. In terms of section 29(e) it is the 2nd respondent who dismisses and not the 1st respondent. The cases of ***Christopher Vilakati*** and ***Dallas Busani Dlamini and Another v Commissioner of Police*** [2014] SZSC 63 are not really helpful in the present case since they are not based on section 29(e) of the Act. They are accordingly distinguishable.

[20] Section 11 of the Act provides for the promulgation of regulations for, *inter alia* - *"(e) the procedure at disciplinary trials held under Part III of this Act, the penalties to be imposed and the attendance of*

witnesses thereat;" Indeed, regulations were duly passed under the Act covering, among other things, the matter of discipline within the Service. Section 12 deals with 'disciplinary offences' and, *inter alia*, authorizes in the case of a member of the Service below the rank of inspector – as in the present case – the senior officer deputed by the commissioner to handle the member's discipline to recommend to the commissioner the setting up of a disciplinary board "*where it appears to the senior officer that the offence would, by reason of its gravity or by reason of its repetition or for any other reason, …*", better be tried by a court or board. It would appear therefore that the decision to set up the disciplinary board *in casu* was in consideration of the provisions of s12 (2), that is, the *gravity* of the offence and/or its *repetition*. Either of the two grounds would justify the commissioner establishing the board. And section 18 provides that where a member of the applicant's rank is guilty of discipline under the Act that member *"shall be liable to any one or more of the following punishments –(b)…admonition, reprimand, severe reprimand or a fine not exceeding two hundred Emalangeni",* where the disciplinary proceeding was conducted by a board. We have already pointed out that in the present case the proceeding before the board was not

concerned with *"trial and conviction for any offence against discipline"* in terms of section 13.

[21] Section 13(2) is really concerned with a trial or inquiry by the board. Nevertheless, where the board is concerned as *in casu* with a hearing for the purpose of determining the proper sentence or punishment, the board would still be bound to *conform as far as possible* with the "rules of procedure and evidence obtaining in a magistrate's court". The provision is worded in peremptory terms but it is watered down by the qualifier. Seemingly, however, the applicant ignores the qualifying phrase *as far as possible.* Due attention to this phrase effectively puts paid to the applicant's entire argument. The board is not obliged to conform for the sake of conformity even in proceedings under section 13 where the constable is *charged* with some disciplinary misconduct. It is, however, not free to act as it pleases. But under section 29(e) where the proceedings are not exactly accusatory conformity as required by section 13(2) is even less pronounced – not by the free choice of the board but by the practical exigencies of the proceeding. But, specifically, for the hearing *in casu*,

what would be the "rules of procedure and evidence" applicable which the board did not apply? The procedure and evidence referred to by the applicant as should have been followed, in my view, would not be suitable to follow in a case such as the hearing before the board under section 29(e). Only general principles of fair hearing may be contended for by the applicant - principles which in my opinion were observed *in casu.*

[22] By calling upon applicant to *'show cause'*, his counsel argues that the board's decision became tainted with irregularities as the board *"took into account irrelevant considerations in reaching the arbitrary and capricious decision …"*; and that the *"Prime Minister came in only to rubber-stamp or confirm the decision which emanated from the decision of the police board …"* – a decision which was flawed. Counsel then adds that the Prime Minister *"failed to apply his mind"* in order to see the *"irregularities which came with the matter from the initial hearing …"*. It is also the applicant's contention that *"the board should have made its own findings on what actually transpired and not distinctly bind itself on proceedings in court …"*. It is,

however, not clear what counsel means by the board binding itself on the proceedings in court. The board was entitled under the operative provision to proceed on the basis of the conviction, which is the starting point and point of departure in the disciplinary hearing under section 29(e).

[23] In the ***Musa Joburg Shongwe*** case (supra), the applicant complained that he was dismissed from the Police Service in terms of section 29(e) without a fair hearing contrary to the rules of natural justice in that the commissioner did not exercise his discretion under the section *"judiciously and fairly"* and did not give the applicant *"an opportunity to make representations*". The commissioner denied applicant's claim, professing to have *"carefully considered the matter"*. Of the disciplinary hearing, the learned trial Judge, Annandale ACJ, as he then was, states at p 3: *"Quite clearly the only focus was on the appeals against the conviction and sentence of the police constable and the outcome thereof …. All that is recorded about the purported 'hearing' is that the applicant was confronted with his conviction and sentence and was then burdened with a*

reverse onus", in terms of which onus, applicant had to "*show cause* why [his] service should not be terminated in terms of section 29(e)". According to the learned trial Judge the hearing in that case did not pass muster.

[24] Looking at 1st respondent's letter of 4th August 2014 effectively dismissing applicant's appeal, can it fairly be said anything more by way of reasons was required? It should not be forgotten that the Police Board is not a court of law or judicial tribunal with all the force of section 13 of the Act. The board remains an administrative body or quasi-judicial tribunal carrying out administrative functions. Wade and Forsyth write[26]**:**

"The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions. Nevertheless, there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many

[26] **Administrative Law,** Tenth Edition (2009) at p 436

> decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others". See also ***R v Home Secretary*** *ex p.* ***Doody*** [1994] 1 AC 531 at 564E; [1993] 3 All ER 92(HL).

I agree with the respondents in para 18 of their *heads* that procedural fairness is variable and flexible, depending on the facts and circumstances of each case. To that end, Lord Mustill in ***Ex parte Doody*** *(p 106d-h)* is very persuasive. In every situation where natural justice is indicated, the question must be asked: What does fairness require in the present case? It is then said that fairness is an 'intuitive judgment' whose principles are not to be applied by 'rote identically in every situation' but must be informed by the context of the decision and the language of the statute implicated.

[25] It has also been reasoned that an administrative authority may be unable to show that it has acted lawfully unless it explains itself by giving reasons for its decision. In that regard, Wade and Forsyth (p 439) have proclaimed: *"The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, …"* Accordingly, the learned authors also observe (p 437): *"Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully"*. The foregoing English common law position is, however, no longer our position; but it helps clarify the rationale behind and informing the need for reasons to be given for any action or decision adversely affecting the rights or interests of other persons. In our jurisdiction, the requirement for administrative bodies to observe principles of fundamental justice or fairness and to

give reasons for their decisions is provided under section 33 of the Constitution. Lord Brown has explained (Wade and Forsyth, pp

439-440):

"The reasons for decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. ***Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.*** **The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn.** ***The reasons need refer only to the main issues in the dispute, not to every material consideration*** **… Decision letters must be read in a straightforward manner, recognizing that they**

are addressed to parties well aware of the issues involved and the arguments advanced[27]". [My emphases]

[26] It will be realized that in his letter of 4th August 2015, 1st respondent does not just write: "You are dismissed", or "I confirm your dismissal", or "Your appeal is dismissed". 1st respondent goes further than that: he says that he has listened to applicant's appeal and has read all the correspondence given to him (that is, the record of proceedings), and that his decision is dismissal of the appeal. In my opinion, the said letter of the 4th should have sufficed for 1st respondent's decision rejecting the appeal. The review *a quo* was heard without the 'reasons' being furnished by 1st respondent. This Court, however, ordered 1st respondent to furnish reasons for his decision. But it is said he must reflect what he heard, what he read and what he took into account in coming to his decision. The adequacy of these issues are of course matters of degree. So, the reasons were filed, but applicant still pursued his appeal without amending or supplementing his papers. Were the 'reasons' then really required? Wade and Forsyth, no doubt, provide a healthy and welcome

[27] **South Bucks District Council v Porter (No 2)** [2004] UKHL 33; [2004] 1 WLR 1953, para. 26

exposition for reasons to be given even by administrative tribunals such as the Police Board *in casu*. The learned authors are worth repeating: "… *[A]n administrative authority may be unable to show that it has acted lawfully unless it explains itself*". In my opinion, the 1st respondent adequately explained himself in the decision he made in the manner explained by Lord Brown and Lord Mustill.

[27] In his *heads*, para 6, applicant states, in part: "*The appellant therefore was justified to raise some of the procedural issues which he did in his appeal which however he was not granted the opportunity by the 1st respondent to address him on as it more fully appears in the Minutes of the internal appeal hearing at page 92 of the Record of Proceedings* …" The applicant *is* truly disingenuous. The Minutes on page 92 of the Record has six short paragraphs. None of these paragraphs bears any testimony to what applicant is saying. Relevantly, the Minutes, in para 3, refer to the Prime Minister asking applicant if 2nd respondent warned police officers about drink driving to which applicant answered in the affirmative; in para 4 the Prime Minister asked if applicant still drinks, to which applicant agreed but that he had reduced the amount of alcohol. In para 5 applicant was

asked what he was appealing for, to which applicant requested the Prime Minister to *"review his dismissal verdict because he thought it was a harsh verdict and that he has since learnt a lesson from his mistake and was ready to reform and perform better by correcting his behavior"*. In para 6 applicant was told that he would *"receive a written verdict immediately His Excellency has considered the submissions made by [applicant] and the record of the previous hearings"*. No reference on the Minutes of applicant raising any procedural issues which he was not granted the opportunity by the 1st respondent to address him on. This alleged refusal is also contained in para 11 of applicant's *replying* affidavit. Seemingly, the applicant is saying because what he alleges is not in the Minutes, it means that that was not granted. The correct approach however must be that applicant could not have been denied what he did not ask. Applicant's allegation in this regard must be rejected as spurious. Applicant has not disputed the correctness of the minutes.

[28] 1st respondent's formal reasons strengthened his decision against applicant. As may be expected, it is not a perfect document. For instance, it refers to the disciplinary hearing giving applicant

opportunity to contest the magistrate and for applicant to explain why his conviction was wrong following his guilty plea. Or that the board was correct to find applicant 'guilty of misconduct'. Even if an irrelevant question or two was asked of applicant, that should not, by itself and nothing more, invalidate the decision. It seems, however, that 1st respondent was reacting to applicant's specific grounds of appeal dated 5th March 2014. Accordingly, 1st respondent's reasons cannot seriously be faulted as evincing any misdirection on his part leading to taking into account irrelevant considerations or failing to apply his mind to the issue before him. In any case, applicant has not articulated serious misdirection or irrelevant considerations or the specific manner in which 1st respondent failed to apply his mind in coming to his decision. That can only be shown by reference to the reasons for the decision. On the contrary, 1st respondent has explained what he took into account in reaching his decision, and that he did not simply rubberstamp the decision of the board as applicant contends. That 1st respondent applied his mind is also reflected in his reference to the expectation the public has in the work of a police officer. And furthermore, 1st respondent describes himself as having listened to applicant's submission and being satisfied with the information

presented to him and the decision or recommendation arrived at by the board and the 2nd respondent and that the procedure followed was correct. No doubt the respondents considered that the drinking was a serious mischief that hamstrung any applicant's long-term aspirations as a police officer.

[29] As it has often been said: one swallow does not make a summer. A wrong or inept question here and there in hearing the appeal should not be unduly enlarged and made the *ratio* for the decision. In my respectful opinion, the issue should not turn so much on what questions were asked of the applicant but whether applicant was allowed fair opportunity to present his case or appeal and the reasons given for the decision. It is then for applicant to spell out in what specific way or manner he was prevented from presenting his case; and the reasons given by the decision-maker may also be scrutinized to see if they lend any support to applicant's claim. It was not for the respondents to ask applicant leading questions which would mitigate his punishment. It was for the applicant to lead the hearing by explaining and showing why he should not be dismissed. The question why he should not be dismissed was at all times before the

applicant and the board and 1st respondent on appeal. Applicant did not have to be reminded why he was before the Board or the

1st respondent; it was for him to take the initiative once allowed to appear and lead the deliberations, unless otherwise stopped. It is for applicant to clearly explain how and by who he was stopped or prevented in making his submissions. In terms of section 29 (e) of the Act, it was dismissal that the applicant had to contend with before the board and 1st respondent. The respondents were accordingly correct in para 9 of their *heads* to submit that the "applicant has misconceived the nature of the proceedings before the Board".

[30] Applicant was given a hearing by the board as well as by

1st respondent. Applicant's complaint about not being given a hearing is clearly based on the misconception that the board was supposed to rehear, as it were, the drunken driving charge which the magistrate had disposed of. In my opinion, section 29(e) does not anticipate a rehearing or retrial of the offence. Section 29(e) allows the board to accept the conviction as a done deal and use it for punishment by dismissal if mitigation is unsuccessful. I can also find nothing wrong

in the procedure for mitigation taking the form of calling upon applicant to show cause why he should not be dismissed or put slightly differently, why applicant should be retained in the Police Service, having regard to his past convictions. As already explained and as I see it, section 13 of the Act is inapplicable and likewise the rules of procedure and evidence therein indicated. Section 29(e) does not envisage a rehearing. Russell LJ says: *"We can see no justification in law for the argument that the plaintiff was entitled as a matter of legal right to a complete rehearing with witnesses and discovery of documents and the reasons for and the evidence leading to that assessment. Nor can we see any reason why it should, in effect, not say: 'This is the assessment. You know what is set out in the academic report signed by the academic registrar because it was sent to you some while ago. Now tell us what the reasons are why you should remain in the college and complete your course'. In substance, this is what it did do. Its duty was to be fair. It was fair"*[28]. Russell LJ goes on to describe as 'fallacious' and 'unfounded in point of law'

[28] In ***Herring v Templeman & Others***, infra, f.n. 5 The plaintiff had his studies discontinued at Christ Church College, Canterbury, England, for poor performance. He alleged the dismissal breached rules of natural justice.

plaintiff's argument that he was entitled to a full legal trial. And so is applicant's argument in this case fallacious and unfounded.

[31] In light of what I have already said about the nature and purpose of the hearing, I also find nothing wrong or irregular in the procedure the board followed or the decision of the learned trial judge. And the learned trial Judge was correct in para [11] where he says: *"The purpose of the enquiry by or before the Board was for the Board to determine what sanction or penalty, if any, over and above that meted out by the court, could be imposed by the police service in terms of the Act. The applicant was fully aware of this fact and he made his submissions or representations to the Board specifically tailored towards this end"*. The learned trial Judge then refers to paras 4 and 7 of applicant's written submission to the board which he says reflect "words in mitigation". There was no 'reverse onus' at the hearing before the board, so long as section 29(e) is the framework. Calling upon the applicant to *show cause why he should not be dismissed* or 'to fight dismissal from the word go' is not tantamount to reversing the onus. The case of ***Dallas Busani Dlamini*** is distinguishable. *In*

casu applicant was not *charged* before or *convicted* by the board. Applicant had already been convicted by the court for an offence with the possibility of being dismissed. It was this possibility of a dismissal that applicant had to contend with before the board. Paragraph 29(e) gives the commissioner the power to dismiss. To exercise that power fairly, the commissioner sets up a board to hear the applicant and make a recommendation to the commissioner. The board is not set up in terms of section 13 of the Act. The commissioner is not bound to accept the recommendation. The recommendation comes with a report of what happened at the hearing. In deciding whether to accept or not accept the recommendation the commissioner looks at and considers the report. The similar procedure will be followed by the Prime Minister in the event of an appeal. Neither the commissioner nor the Prime Minister is expected to look outside the report presented except, in the case of the Prime Minister, as might be required by the grounds of appeal.

[32] Wade and Forsyth (at p.420) write: *"The requirements of natural justice must depend on the circumstances of the case, the nature of the*

inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth". And Lord Bridge in ***Lloyd v McMahon*** [1987] 1 All ER 1118 (HL) at p1161d-e writes:

"My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".

It is my considered view that *in casu* the board did observe the rules of natural justice as required by the 'kind of decision it had to make' and the statutory framework under which the board was established and functioned.

[33] In para [14] of his judgment the learned trial Judge *a quo* had occasion to observe as follows: *"… [Applicant] did not complain of any irregularity in the proceedings in the inquiry before the lower tribunal. It must be noted further that when it comes to procedural matters,* ***administrative tribunals are masters of their own house.*** *They are not bound by strict procedural rules that obtain in a court of law.* ***Substantive fairness is the rule of the game****"*. (My emphases). In my opinion, the learned trial Judge was correct and justified in so expressing himself. Premising his argument in terms of the procedure in a magistrate's court, as prescribed by section 13 of the Act, as the applicant has done here, where does one begin or end in complying with the said procedure in a magistrate's court. Cases are different. No identical procedure would be followed in every case coming before a magistrate's court or before the board as Lord Lane CJ observed in ***R v Commission for Racial Equality,*** *ex parte* ***Cottrell***

and Rothon [1980] 3 All ER 265 (QBD) at 271d: *"It seems to me there are degrees of judicial hearing, and those degrees run from the borders of pure administration to the borders of full hearing of a criminal cause in the Crown Court. It does not profit one to try to pigeon-hole the particular set of circumstances either into the administrative pigeon-hole or into the judicial pigeon-hole. Each case will inevitably differ, and one must ask oneself what is the basic nature of the proceeding which was going on here".* It is correct therefore that an administrative tribunal such as the board *in casu* can only realistically aim at achieving substantive fairness in its proceedings. That is what the Police Board could be expected to do in a hearing under section 29(e). That is what the Police Board did in the instant case. We are not told that there were witnesses called by the board which applicant was refused to cross-examine or that he was denied to call his own witnesses when he so requested.

[34] When Lord Denning MR referred to an administrative tribunal being the 'master of its own procedure', he was specifically referring to an 'investigating body'. The Master of the Rolls said [29]:

> **"… In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion, … In all these cases it has been held that the investigating body is under a duty to act fairly; *but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it.* The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and afforded a fair opportunity of answering it. The investigating body is, however, *the master of its own procedure*. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail**

[29] **R v Race Relations Board** ex p. **Selvarajan** [1976] 1 All ER 12 (CA) at 18j – 19d

of the case against a man. ***Suffice it if the broad grounds are given*****. It need not name the informants.** ***It can give the substance only*****. Moreover, it need not do everything itself... But, in the end,** ***the investigating body itself must come to its own decisions*** **and** ***make its own report*****”.** (My emphases).

[35] It not being engaged in a *trial*-type hearing, it is enough that broadly and substantively speaking the board complied with rules of natural justice in the sense of fair hearing as far as applicant was called upon to explain himself why he should not be dismissed and allowed the opportunity to respond thereto. I find nothing wrong with the board being described as *‘master of its own house’*, subject only to substantive fairness in dealing with its business. Being *‘master of its own procedure’* or *‘house’* does not mean that substantive fair hearing is thrown to the wind. That could not have been the meaning of Lord Denning MR and Russell LJ. The procedure followed is then determined largely by the nature and specific circumstances and legal framework of the particular hearing. The rules of natural justice are not to be followed merely for their own sake. In ***Herring v***

Templeman & Others, Russell LJ says, of a university college: *"The governing body is master of its own procedure. Its members are not judges in a court of law, nor are they legal arbitrators. They are entitled to such flexibility in their procedure as they think the particular case under consideration requires.... It was right in saying that the plaintiff must have an opportunity of showing why he should not be allowed to complete his course*[30]*"*.

[36] In ***R v Gaming Board*** ex parte ***Benaim and Khaida*** [1970] 2 All ER 528 (CA), it was argued for the board that it did not have to observe rules of natural justice any more than any other executive body. Lord Denning MR responded: *"I cannot accept this view. I think that the board are bound to observe rules of natural justice. The question is: What are those rules? It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter; … At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in* ***Ridge v Baldwin*** *[1963] 2 All ER 66 (HL). At another*

[30] [1973] 3 All ER 569 (CA) at 587g

time it was said that the principles do not apply to the grant or revocation of licences. That, too, is wrong….; so let us sheer away from these distinctions and consider the task of the board and what they should do". In casu, the board was only called upon to hear applicant in mitigation of dismissal.

[37] So, Lord Denning MR is telling us to avoid the once popular practice of classifying or categorizing administrative functionaries. What we should consider is the subject matter of the proceeding and what the functionary is supposed to do. Thus, whether the administrative body may be described as judicial, quasi-judicial, administrative or purely administrative that does not answer the question whether that body is bound or the extent to which it is bound to observe rules of natural justice in any given situation. The determining or guiding factor is whether in discharging its function the body affects adversely the rights of persons whoever they may be. In this regard Lord Diplock says: *"Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as*

they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."[31] In this regard, it should be borne in mind that the principles of natural justice are not hard and fast rules or written on tablets of stone; as it has been said 'natural justice is but fairness writ large and judicially' or simply 'fair play in action'. In the absence of provision to the contrary the test becomes whether the public or administrative body has acted fairly towards the complainant. (See also ***Administrator, Transvaal v Traub 1989 (4) SA 731 (A***)

[38] *In casu*, I have no doubt that even without section 13 of the Act, the board would ordinarily be bound to observe rules of natural justice and deal fairly with the applicant. The issue, however, is whether by having to determine the appropriate punishment in terms of

section 29(e), the board was involved in making a decision that adversely affects any right or liberty of the applicant so as to observe the *audi* rule. Applicant did not challenge the board for acting in

[31] ***R v Commission for Racial Equality*** ex p. Hillingdon LBC [1982] AC 779, [1982] QB 276

terms of section 29(e). In my opinion, in all that the board had to do in terms of s 29(e) affecting applicant, the board observed the rules of natural justice and dealt with applicant fairly in the circumstances and duly observed the *audi* rule. None of the criticisms or complaints raised by applicant against the board detract from this observation. The trial Judge was correct in holding that an administrative body like the police board, as a quasi-judicial tribunal, cannot be subjected to the strict procedural rules which apply in a court of law. And that is so notwithstanding the provisions of section 13 of the Police Act. Further, the board did not deny applicant any of his procedural or substantive rights in the disciplinary hearing, including applicant's right to fair hearing. On p 87 of the Record of proceedings reflecting what happened at the hearing before the board, it is written and nothing supports applicant:

Board: *If you feel still you have not exhausted all you want to tell this board, you may add orally and also it will be taken down in writing as additional submissions and forwarded to the National Commissioner of Police.*

Respondent: *I would like to add to what I have submitted in writing.*

Board: *You may continue.*

Respondent: *I would like to notify the National Commissioner of Police …*

Board: *Thank you officer the board has received your written …"*

[39] The 1st and 2nd respondents are laymen and not legally qualified. The Police Board itself is not a panel of judges or lawyers. Their understanding of the law and principles of natural justice can only be elementary. The very notion *'hear the other party'*, popularly referred to as the '*audi alteram partem*' rule is not always fully understood even by many a legal practitioner. It is not unusual that the outer fringes of the rule escape the attention of the decision-maker. Sometimes even judges of long standing on the Bench have been found guilty of sitting in a matter in which they had a disqualifying interest. We should not therefore be overly hawk-eyed with

proceedings of an administrative body like the police board or the 1st respondent. *In casu* the proceedings before the board 2nd and 1st respondents do pass muster, in my respectful opinion. In casu, from beginning to the end, the board acted fairly and did not deny applicant any of his rights relevant to the proceeding before the board. A parting note from Sachs LJ in **Re Pergamon Press Ltd** [1970] 3 All ER 535 at 541j: *"… it seems to me, as well as to Lord Denning MR, very clear that in the conduct of the proceedings there must be displayed that measure of natural justice which Lord Reid in Ridge v Baldwin [1963] 2 All ER 66 at 71, described as 'insusceptible of exact definition but what a reasonable man would regard as fair procedure in particular circumstances'. To come to that conclusion it is, as recent decisions have shown not necessary to label the proceedings 'judicial', 'quasi-judicial', 'administrative', or investigatory; it is the characteristics of the proceedings that matter; not the precise compartment or compartments into which they fall - …"*

[40] Even assuming that some irregularity was committed by one or more of the respondents, including the board, in the circumstances of this

case – a case of a repeat offender in the Police Service, a *Disciplined Force* – it does not appear to me that any serious prejudice was suffered by the applicant to justify this Court's intervention in the decision of the learned trial Judge as Nicholas AJA says[32]: ***"Moreover, the Court will not interfere on review with the decision of a purely administrative or quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice; Rajah and Rajah (Pty) Ltd and Others v Ventersdorp Municipality & Others* 1961 (4) SA 402(A) at 407-8".** Any possible prejudice suffered by applicant does not, in my view, outweigh the long-term advantages of maintaining a disciplined force.

[41] I have dealt with this appeal substantially as presented by applicant and even assumed here and there that the board was established in terms of section 13 of the Act, which is not correct in light of the record of proceeding before the board. I have already referred to the fact that the board was established by the 2nd respondent under

[32] ***National Union of Textile Workers v Textile Workers Ind. Union*** 1988 (1) SA 925 (A) at 940B

section 33 of the Constitution. I have pointed out that even if the board was established under section 13 it was not acting under that section in the present matter, having regard to section 29(e). It is not explained why section 33 was used to set up the board, but it seems to me that 2nd respondent may have been justified by motivation and desire to be seen to be acting fairly towards applicant. As already explained, establishing the board under section 13 would have landed the respondents in the same murky pit that applicant has been dragging the proceedings into since the beginning. The limitation with a section 13 board is that it must deal with offences under the Act only. Finally, of course, the appeal must stand or fall in terms of proceedings under section 29(e) of the Police Act.

[42] In the result it is my considered opinion that the appeal cannot succeed and is dismissed. I make no order as to costs as the matter seems criminal or quasi-criminal.

MJ DLAMINI JA