

**DISCIPLINARY SERVICES COMMISSION and Anor v MERE TUISALOLO NAIVELI**

5 SUPREME COURT — CIVIL JURISDICTION

HANDLEY, BLANCHARD and WEINBERG JJA

21, 24 October 2003

10 [2003] FJSC 14

**Administrative law — powers and duties — special leave to appeal — Commission’s power of dismissal without first holding disciplinary hearing — disciplinary offences of gazetted police officers — dismissal valid — special leave granted — 1990 Constitution s 129(1) — 1998 Constitution s 152(1) — Interpretation Act (Cap 7) s 13 — Penal Code s 111 — Police Act (Cap 85) s 37 — Police Service Commission Regulations Pt VIII, regs 18, 24, 26, 26(1)(a), 27, 28.**

15 Applicants sought special leave to appeal against a judgment of the Court of Appeal dismissing an appeal against a High Court decision ordering the issue of certiorari to quash the Commission’s decision dismissing the late Naiveli from his position as Assistant  
20 Commissioner of Police (Crime) in the Fiji Police Force. The issue was whether the Commission had power to dismiss Naiveli without first holding a disciplinary hearing in accordance with Pt VIII of the Police Service Commission Regulations which deal with disciplinary offences of gazetted (senior) police officers. As Mr Naiveli died subsequently to the Court of Appeal judgment, an order has been made substituting his widow and  
25 executrix as the Respondent to the petition.

**Held** — We agree with the Court of Appeal that Pt VIII of the Regulations did not authorise the Commission to dismiss a gazetted officer without going through a disciplinary proceeding process in accordance with reg 26. However, the Commission possessed the necessary power of removal under s 129(1) of the 1990 Constitution and  
30 properly exercised that power. The dismissal was accordingly valid.

Appeal allowed.

**Cases referred to**

35 *Crowley v Glissan (No 1)* (1905) 2 CLR 402; *Luu v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 304; 157 ALR 213; *Minister for Immigration and Ethnic Affairs v Daniele* (1981) 39 ALR 649; 5 ALD 135; *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209; 4 ALD 575; *Ridley v Secretary, Department of Social Security* (1993) 42 FCR 276; 113 ALR 655; 29 ALD 725, cited.

40 *Department of Social Security v Ridley* (1992) 40 FCR 43; 29 ALD 295; [1992] FCA 646; *General Medical Council v Spackman* [1943] AC 627; 2 All ER 337; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478; 188 ALR 353; [2002] HCA 22; *Ponsami v Dharam Lingam Reddy* Civ App No CBV 1 of 1996; *Prem Singh v Krishna Prasad* Civ App No CBV 0001 of 2002S; *Saffron v Federal Commissioner of Taxation* (1991) 30 FCR 578; 102 ALR 19, considered.

45 *J. J. Udit* for the Petitioners.

*V. Mishra* for the Respondent.

**Handley, Blanchard and Weinberg JJA.**

**Introduction**

50 The Disciplined Services Commission and the State sought special leave to appeal against a judgment of the Court of Appeal dismissing an appeal against a High Court decision ordering the issue of certiorari to quash the Commission’s

decision dismissing the late Beniamino Naiveli from his position as Assistant Commissioner of Police (Crime) in the Fiji Police Force. The issue is whether the Commission had power to dismiss Mr Naiveli without first holding a disciplinary hearing in accordance with Pt VIII of the Police Service Commission Regulations which deal with disciplinary offences of gazetted (that is senior) police officers. The provisions of that part are to be found in an appendix to this judgment. As Mr Naiveli died subsequently to the Court of Appeal judgment, an order has been made substituting his widow and executrix as the Respondent to the petition.

## 10 The history of the case

The case has had a long and tangled history. Mr Naiveli was appointed an Assistant Commissioner (a gazetted officer) in 1989, having served in the Fiji police since 1964. In 1991 he was charged with an offence of Abuse of Office contrary to s 111 of the Penal Code. He was interdicted on half pay. The allegation he faced was that he had employed the services of a police officer and police vehicle in evicting a former owner from a property which he had purchased from a bank at a mortgagee sale. The former owner had been threatened with arrest if she did not vacate. On 12 June 1992 Mr Naiveli was convicted of that offence, given a suspended prison sentence and fined. He appealed his conviction and sentence. The interdiction continued, but now without pay. On 12 August 1994 the Court of Appeal dismissed his appeal.

The Commissioner of Police then reported the conviction to the Commission under reg 24, recommending that Mr Naiveli be dismissed from the police force. The Commission met the next day and, without a formal hearing or giving Mr Naiveli the opportunity to be heard, dismissed him. He petitioned the Supreme Court for leave to appeal against the Court of Appeal's decision and asked the Commission to set aside the dismissal. Upon its declining to do so, he obtained leave from the High Court to issue judicial review of the Commission's decision. In a judgment delivered on 4 August 1995, Scott J quashed the dismissal decision of the Commission on the ground that reg 24 had not yet become operative because, in view of the outstanding petition to the Supreme Court, the criminal proceedings had not been finally concluded, as reg 24 required. The judge commented that the dismissal procedure must commence with a consideration by the Commission of the report under reg 24 and that it must then decide whether a disciplinary inquiry should be held. He said he found it hard to accept the Commission's submission that the disciplinary inquiry and hearing procedure in reg 26 was only necessary in the case of minor offences.

The Commission unsuccessfully appealed Scott J's decision to the Court of Appeal where the argument was confined to a question of costs. In the meantime the Supreme Court refused Mr Naiveli's application for special leave, thus bringing the criminal proceedings to an end.

On 24 November 1997 the Police Commissioner again reported to the Commission under reg 24, recommending that Mr Naiveli be dismissed. Once more he was dismissed by the Commission without either a hearing or a disciplinary inquiry. But in June 1998 the Commission vacated that decision. It said in a letter to his solicitors that he remained interdicted and that it had decided that a disciplinary inquiry was not warranted given his conviction. But it afforded him an opportunity of making written submissions on why he should not be dismissed. Submissions were forthcoming, but on 21 July 1998 the Commission again dismissed Mr Naiveli. A few weeks later it advised Mr Naiveli's legal

counsel that the dismissal was due to the conviction and was made after taking into account both the conviction and the representations made by counsel.

Mr Naiveli then sought leave to issue judicial review proceedings in relation to that decision. Fatiaki J (as he then was) dismissed the application but gave  
5 leave to appeal. He gave his reasons in a judgment of 19 November 1999. After mentioning s 129(1) of the 1990 Constitution (to which reference will be made later in this judgment), he said, relevantly to the present appeal, that he had concluded that reg 24 provided a procedure for dismissal of a gazetted officer without the holding of a disciplinary inquiry. It was, he said, a procedure  
10 independent of reg 26. Upon receipt of the Commission's report under reg 24 the Commission was only required to consider whether the Police Commissioner's recommendation (if any) as to punishment should be confirmed, altered or rejected. It was only on this narrow limited aspect of the matter that the Applicant had a right to be heard. The judge was therefore satisfied that the application for  
15 judicial review was doomed to fail on the merits.

Mr Naiveli appealed to the Court of Appeal against Fatiaki J's dismissal of his leave application. In a judgment delivered on 21 February 2002, the Court of Appeal allowed the appeal and granted Mr Naiveli leave to issue judicial review. It noted the differing views of Scott J and Fatiaki J, saying that there was an  
20 arguable case for review. It suggested to counsel that they immediately apply to Fatiaki J seeking that he reserve the substantive point for consideration by the Court of Appeal by way of case stated on a question of law, namely, whether the Commission had power summarily to dismiss a gazetted police officer who had been convicted of a criminal offence in the absence of a prior disciplinary hearing  
25 in accordance with Pt VIII of the Regulations.

That course was followed expeditiously and a case stated by Fatiaki J. was heard by the Court of Appeal only a few days later. It gave judgment on 1 March 2002. The court noted that Regulation 18 does not provide that the Commission of a criminal offence is itself a disciplinary offence. The Commission of the  
30 criminal offence of abuse of office was not, of itself, a disciplinary offence but the conduct which led to the conviction might fall within one or more of the paragraphs of reg 18, particularly para (30) which speaks of "any other act, conduct, disorder or neglect to the prejudice of good order or discipline". Counsel for the State had failed to identify a disciplinary offence specified in reg  
35 18 for which Mr Naiveli had been dismissed. After traversing several of the regulations, the court said that it could not be in doubt that, although the Commission was given a discretion to decide whether an inquiry would be held, it must institute an inquiry when dismissal was a possible result of the proceedings. Regulation 26 intended that a gazetted officer would not be  
40 dismissed for the Commission of a disciplinary offence without receiving the protection which it provided. "The discretion not to hold an inquiry is conferred on the Commission so that it may deal speedily with those cases which, in its view, although not that of the Commissioner, do not warrant dismissal". The court observed that Mr Naiveli had not received a statement of the charge against  
45 him together with a brief statement of the allegations on which the charge was based, as reg 26(1) requires. Nor was any inquiry held of the type which reg 26 prescribes.

The court considered that neither reg 24 alone, nor when read in conjunction with reg 26, conferred upon the Commission a power to dismiss summarily an  
50 officer who had been convicted of a criminal offence. Regulation 24 merely provided for the making of a report. Regulation 26 conferred a power to dismiss,

but exercised within the structure of the disciplinary proceedings for which reg 25 made provision. The opening words of reg 26 made it plain, the court said, that a gazetted officer might not be dismissed otherwise than through the holding of the disciplinary proceeding specified in reg 26.

5 The court said that reg 24 made it plain that a conviction for a criminal offence would not necessarily result in the institution of disciplinary proceedings. On receipt by the Commission of a report forwarded pursuant to reg 24, the Commission might decide to take no action against the officer or to act under reg 21, reg 27 or reg 26. But it did not have power to discipline an officer outside  
10 those regulations save that, as stated in reg 28, the Commission had a power which enabled it to require an officer to retire in the public interest. In the court's view reg 24 was "a procedural provision and confers no power of summary dismissal upon the Commission". For those reasons the Court answered the question posed for its opinion: No.

15 Fatiaki J made final orders on the judicial review proceedings on 14 March 2002 in accordance with the interpretation given by the Court of Appeal. In order to bring the matter to this court the Commission appealed against those orders to the Court of Appeal which delivered judgment on 14 February 2003. It said that the order made by Fatiaki J had finally determined the rights of the parties in so  
20 far as the proceedings concerned the application for prerogative relief. (There is also a claim in the High Court for compensation or damages which is not the subject of this appeal.) The Court of Appeal said that the grant of prerogative relief accorded with the answer it had given in its judgment of 1 March 2002. As no new issue had been raised in the appeal, the court adhered to the reasons for  
25 judgment delivered on 1 March. It dismissed both the appeal and an application for leave to appeal to the Supreme Court. The latter application has now been renewed by petition to this court for special leave.

### **Whether special leave should be granted**

30 Mr Mishra for the Respondent in his written submissions opposed the application for special leave on several grounds. First, he said that the affidavit supporting the petition did not comply with r 5 of the Supreme Court Rules 1998 in that it did not properly verify the allegations made in the petition. The affidavit had been made by Mere Labati who deposed to being the Secretary of the  
35 Commission, stating that by virtue of her position she was duly authorised to make the affidavit on behalf of the Petitioners, namely the Commission and the state. Counsel said that there was nothing in the rules allowing Ms Labati to swear the affidavit. She had not referred to the existence in her favour of any authority, particularly of a power of attorney from the Commission. There was no  
40 affidavit at all on behalf of the State. It was submitted that the affidavit is the means whereby the contents of the petition "become evidence"; hence the need for proper verification.

Ms Labati did depose that she was the Commission's secretary and that, by virtue of her position, she was duly authorised to make the affidavit on behalf of  
45 the Petitioners. While there may be doubt about her authority to take this step on behalf of the State, there is no reason to think that she lacked authority from the Commission or that she was not in a position on its behalf to confirm its belief in the allegations contained therein. And although the state is also named as a Petitioner, its role in relation to the judicial review portion of the proceeding has  
50 been supportive only and it has made no argument beyond those put forward by the Commission.

The proceeding has of course already been before the lower courts and the petition is simply the instrument by means of which it is sought to take a further step by way of appeal. As this court observed in *Prem Singh v Krishna Prasad* (Civ App No CBV 0001 of 2002S, judgment 25 June 2002), the affidavit  
5 verifying the petition is essentially a formality. The position differs, for example, from what is required by way of proof of authorisation where a proceeding such as a bankruptcy petition is being initiated in the High Court and where accordingly the matters requiring verification may not previously have been  
10 examined by any court. In these circumstances, where there has been substantial compliance with the rules, it would not be appropriate to refuse leave simply on the basis of any minor technical deficiency: see the court's further judgment of 27 June 2002 in *Prem Singh v Krishna Prasad* in which it observed that, by virtue of r 46 of the Supreme Court Rules, the Court of Appeal Rules apply with  
15 necessary modifications to the practice and procedures of this court; and that r 64 of the Court of Appeal Rules provides that noncompliance on the part of an appellant is not to prevent the further prosecution of the appeal if the court considers that the noncompliance was not wilful; and that it may be waived or remedied by amendment or otherwise. Here any noncompliance does not appear to have been wilful and was minor. It is waived.

20 Counsel for the respondent drew attention to the decision of the Supreme Court in *Ponsami v Dharam Lingam Reddy* (Civ App No CBV0001 of 1996, judgment 12 September 1996) in which (at 17) the court affirmed the importance of compliance with the Rules and referred to the dangers of noncompliance. In no way do we minimise what the court said in that case, but the deficiencies in  
25 the presentation of the appeal in *Ponsami* were of a different order of magnitude from any in the present petition.

Then it was said for the respondent that the appeal was brought out of time because, although it was against the Court of Appeal's decision of 14 February 2003 and was within the prescribed 42-day period (r 6(a) of the Supreme Court  
30 Rules), in reality it is the earlier decision of the Court of Appeal of 1 March 2002 which is being challenged.

That is no merit in this point. By virtue of s 122 of the 1998 Constitution this court's jurisdiction is to hear and determine appeals from final judgments of the Court of Appeal. The judgment in which the Court of Appeal answered the  
35 question posed in the case stated was not a final judgment, as that court itself recognised in its judgment of 14 February 2003 when it remarked that Fatiaki J's order for certiorari was a final order. The court clearly regarded its answer as merely a step on the way to that final order, and it was correct to do so. The answers on the case stated were not formally dispositive of the proceeding,  
40 notwithstanding that the orders then made in the High Court were necessarily in accordance with the result of the case stated. It is well established that on an appeal from a final judgment, it is open to an appellant to seek to question any interlocutory or other order which was a step in the procedure leading up to the final judgment: see *Crowley v Glissan (No 1)* (1905) 2 CLR 402; in which the  
45 High Court of Australia followed the established practice of the Privy Council.

The High Court of Australia has recently confirmed that on an appeal from a final order an appellate court can correct any interlocutory order which affected the final result: *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483; 188  
50 ALR 353 at 355; [2002] HCA 22, citing Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed, 1996, pp 79–80, at [170]. Since there is no ability to bring an appeal to this court except from a final order it would be

extraordinary if upon such an appeal an interlocutory decision affecting the final order could not be challenged. The observations of Kirby and Callinan JJ in *Gerlach* (at 496–7), concurring on this point, are worth noting:

5        Suggestions were made in argument that the rule should be confined to cases where the  
interlocutory point in question determined the outcome of the case. Clearly, the point  
will need to be relevant to the disposition of the case for otherwise it will be a futility  
to intervene and no appellate Court would give it credence. However, the rule  
10        permitting adverse interlocutory orders to be contested in an appeal against a final  
judgment should not be narrowly confined. This approach is sanctioned by one and a  
half centuries of judicial practice spanning virtually the entire period since appeal, as a  
creature of statute, became common to our legal system. The principle is also supported  
by many practical considerations. Interlocutory appeals can often cause great injustice  
to parties who are less well resourced than those who pursue them. They can be misused  
15        by those with a “a long purse” to prevent others from securing justice in an early trial  
of the substantive issues. They can lead to a plethora of appeals and further  
interlocutory hearings that needlessly raise the costs and delay the conclusion of  
litigation.

Mr Mishra also opposed a grant of special leave by pointing to the statement of  
the Court of Appeal, in refusing leave, that the issue which it had determined was  
20        not one of public or general importance but concerned the meaning and effect of  
the Police Service Commission Regulations and that the issue was determined on  
the words used in the regulations, not on any principle of general application, and  
that it had arisen from facts relating to the respondent.

But it seemed to us, with respect, that the question of whether or not the  
25        Commission has power summarily to dismiss a senior (gazetted) officer without  
conducting a disciplinary hearing is a question of law which could well affect  
other such officers and, as such, has an importance beyond the particular case.

We were accordingly satisfied that special leave should be granted. The court  
therefore proceeded to hear the substantive appeal.

### 30    **The appeal**

The decision of the Commission dismissing Mr Naiveli to which this appeal  
relates was made on 21 July 1998, some 6 days before the present Constitution  
35        commenced (on 27 July 1998). At the time of the decision the Constitution in  
force was that of 25 July 1990, s 129(1) of which relevantly provided:

Power to make appointments to offices in the Police Force above the rank of Senior  
Inspector (including power to confirm appointments) and to remove and to exercise  
disciplinary control over persons holding or acting in such offices shall vest in the Police  
Service Commission.

40        The Police Service Commission is now known as the Disciplined Services  
Commission. (For the current constitutional provision see s 152(1) of the 1998  
Constitution which is essentially to the same effect so far as concerns the powers  
of the Commission in relation to removal or disciplining of gazetted officers.)

45        The Commission accordingly possessed power both to remove and to exercise  
disciplinary control over gazetted officers. Before considering how that power  
might support the decision to dismiss Mr Naiveli, we deal with the Appellant’s  
argument that, contrary to the view of the Court of Appeal, the Regulations  
permitted a summary dismissal once the Commissioner of Police had made a  
report under reg 24. We are satisfied that the Court of Appeal was correct when  
50        it concluded that the Regulations confer on the Commission no power to dismiss  
a gazetted officer without going through a disciplinary proceeding process in

accordance with reg 26. We are unable to find in Pt VIII of the Regulations any power of dismissal unless that process has been followed. Regulation 24 plainly confers no such power. It involves no more than a preliminary step in a process which may lead to a dismissal (among other possible outcomes). It requires that where criminal proceedings against a gazetted officer have finally concluded and have resulted in a conviction, the Commissioner of Police must report that matter and the report must be forwarded to the Commission for its consideration. The Commissioner of Police may include in his report a recommendation as to punishment but is not obliged to do so. The Commissioner himself has no power to dismiss a gazetted officer on the ground of conviction of a criminal offence. He does have such a power under s 37 of the Police Act (Cap 85) in respect of other police officers, with the concurrence of the Commission, but gazetted officers are specifically excluded under that section.

The only power of dismissal appearing in Pt VIII of the Regulations is in reg 28, which includes dismissal in the list of the punishments which may be ordered by the Commission “as the result of proceedings under this Part”. In that context the word “proceedings” must mean disciplinary proceedings. The word is used in the part only in relation to criminal proceedings, which are obviously not proceedings under Pt VIII, and disciplinary proceedings, which are provided for in reg 26 and 27. There is no other form of proceeding under the part. What occurs under reg 24 — a report which may or may not be accompanied by a recommendation — cannot be considered to be a proceeding. It is at most a step which may precede a proceeding. A summary dismissal without recourse to reg 26 therefore cannot be justified by resort to reg 28.

Mr Mishra referred us to reg 25(2) which provides:

- (2) Where it is proposed to commence disciplinary proceedings against a gazetted officer who has been tried upon a criminal charge arising out of his conduct in a matter which is proposed to be the subject of the disciplinary charges, the draft disciplinary charges shall be sent to the Solicitor-General for his advice as to whether the charges can properly be laid.

Read in isolation that provision might appear to have application where an officer has been convicted and to be inconsistent with the use by the Commissioner of a summary process. But when it is read with para (1) of the same Regulation, it is apparent that it is intended to apply only after an acquittal and to ensure that the officer is not placed in jeopardy of a dismissal or other disciplinary punishment on the charge of which he has been acquitted. That view is confirmed by the heading to the Regulation “Disciplinary action after acquittal on criminal charge”. Section 13 of the Interpretation Act (Cap 7) permits notice to be taken by the court of that heading.

Since authority for the dismissal of Mr Naiveli cannot be found in the Regulations, we return to s 129(1) of the 1990 Constitution. It confers upon the Commission both a power of removal and a power to exercise disciplinary control of gazetted officers. Mr Udit, rightly in our view, accepted that because of the existence of the regulatory regime in Pt VIII, the latter power is restricted. At the least, in the absence of a criminal conviction, it must be exercised in accordance with that part. The Commission must in particular follow the procedures laid down in reg 26. In that context there is to an extent an overlap between regs 24 and 26, the former making it mandatory for the Commissioner to furnish a report where there has been a criminal conviction, whereas

reg 26(1)(a) enables the Commission to form a judgment on whether disciplinary action is warranted. In other cases the Commissioner has a discretion whether to make a report to the Commission.

In our view, the power of removal under s 129(1) authorises both dismissal or  
5 the issuance of a requirement to a gazetted officer that he shall retire from the public service in the public interest.

In so far as the power of removal authorises a dismissal, however, there is no regulatory restriction imposed upon the Commission. The power must be taken to be available to the Commission for use in cases of appropriate gravity but  
10 controlled by ordinary principles of administrative law, including the obligation to act for a proper purpose and to act fairly and reasonably, both substantively and procedurally. In particular, the procedures adopted by the Commission must be in accordance with the principles of natural justice.

There can be no doubt, in our view, that the power of removal from office  
15 conferred by s 129(1) is available where a gazetted officer has been convicted of an offence against the Penal Code. It would be extraordinary if it were not, when a police officer who is not of that rank could be dismissed on that ground (under s 37 of the Police Act). The fact that criminal offending is not directly included in the extensive list of disciplinary offences in reg 18 is also an indication that it  
20 is to be dealt with by a different process.

It was the submission of Mr Mishra that even if the Commission had the necessary power it nevertheless failed to afford Mr Naiveli natural justice because it gave him no opportunity to put forward matters on the basis of which the Commission might have concluded that he had not abused his office.  
25 Mr Mishra did not say what those matters might have been. But whether or not they might have had any substance, we are satisfied that the rules of natural justice did not in these circumstances require that the Commission should examine whether Mr Naiveli had properly been found guilty of abuse of office, merely that he be given an adequate opportunity of putting before it material and  
30 submissions relevant to mitigation — to whether the power of removal should not be exercised notwithstanding the conviction — or suggesting that he be permitted to retire from the force. Where the ground upon which an administrative tribunal has power to act is the existence of a criminal conviction, it is well established that the person who has been convicted may not call  
35 evidence for the purpose of seeking to persuade the tribunal that he was in fact innocent of the offence of which he was convicted by a criminal court.

The leading judgment on this question is the speech of Viscount Simon LC in *General Medical Council v Spackman* [1943] AC 627 at 634–5 (HL); 2 All ER 337 at 338–42. There is a distinction between a case where the statute or  
40 regulation makes a criminal conviction a ground for disciplinary action and a case where conduct is the basis for such action. In the former case the disciplinary action is properly based on the fact of the conviction. The person concerned cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case the decision of the  
45 tribunal, if adverse to the person, must be arrived at after due inquiry by the tribunal, which may involve receiving evidence tendered with a view to showing that the decision of a criminal or civil court was wrong.

This question has been the subject of a number of Australian cases concerning the conduct of administrative tribunals, including *Minister of Immigration and*  
50 *Ethnic affairs v Daniele* [1981] FCA 212;(1981) 39 ALR 649; 5 ALD 135; *Minister for Immigration and Ethnic Affairs v Gungor* [1982] FCA 99;(1982)



42 ALR 209; 4 ALD 575; *Saffron v Commissioner of Taxation (No 2)* [1991] FCA 363;(1991) 30 FCR 578; 102 ALR 19; and *Ridley v Secretary, Department of Social Security* [1993] FCA 213;(1993) 42 FCR 276; 113 ALR 655; 29 ALD 726 (*Ridley*). In *Minh v Minister of Immigration and Multi-cultural Affairs* (1998) 86 FCR 304; 157 ALR 213, Weinberg J adopted a summary of position given in the first instance decision of Hill J in *Ridley* ([1992] FCA 646;(1992) 40 FCR 43 at 50; 29 ALD 295 at 305). Hill J said:

10 The first category was where the decision challenged was itself based on the fact of conviction. In such a case the person seeking to upset the challenged decision could not go behind the fact of conviction and endeavour to show that he was innocent of the charge. In the second category the conviction was a relevant factor but the decision sought to be challenged was not based upon it. In the second category it was open for a person seeking to challenge the decision to go behind the fact of conviction and challenge the essential facts upon which the conviction was based. Commenting upon the distinction Davies J [in *Saffron*] said (at 582):

15 The rationale for the distinction between the two categories is, of course, that in the first of the categories the exercise of the power arises out of, and is founded on, the conviction. The power conferred is not a power to reconsider that matter or the essential facts on which a conviction was based but a power to consider matters of discretion and like consequential matters which flow from the established fact of conviction. When the power is not so founded, then all relevant matters, including the facts on which the conviction was based, are open.

The present case was one falling within the first category. The ground on which the Commission acted under s 129(1), following the report under reg 24, was the fact of the conviction. It would not have been appropriate for the Commission to allow the question of Mr Naiveli's guilt of the charge of abuse of office to be reopened before it. The evidence in question, if it were shown to meet the strict requirements for "fresh evidence", should instead have been put before the courts which heard the conviction appeal. It could not properly be tendered to the Commission for the purpose of contraverting the conviction or the essential facts upon which it had been based. Obviously, therefore, there was no breach of natural justice in the Commission's failure to provide a hearing for that purpose.

30 The Commission did give Mr Naiveli ample opportunity of putting before it matters relevant to whether, as a result of the conviction, he should be dismissed. No complaint is made about that aspect of its processes.

We make one further observation. Mr Naiveli's offending was not only serious but also involved his position as a police officer. It was entirely open to the Commission to take the view that he must be dismissed.

40 In summary, although we agree with the Court of Appeal that Pt VIII of the Regulations did not authorise the Commission to dismiss Mr Naiveli on 21 July 1998 in the manner in which that dismissal occurred, the Commission did possess the necessary power of removal under s 129(1) of the 1990 Constitution and properly exercised that power. The dismissal was accordingly valid.

## 45 Result

We therefore allow the appeal, set aside the High Court's orders and dismiss the application for judicial review.

## Costs

50 However, since the petition to this court provided the means whereby the Commission could obtain clarification of its powers, we made an order at the outset of the hearing that if, as happened, special leave was granted, the

petitioners should bear the respondent's costs of the appeal on a solicitor/client basis, whatever the outcome. The respondent will have costs in this court on that basis. Costs in the High Court and in the Court of Appeal are to be payable by the respondent.

5

**APPENDIX****PART VIII — DISCIPLINE**

## Disciplinary offences

- 10 18. Any gazetted officer who—
- (1) uses traitorous or disloyal words regarding the Sovereign;
  - (2) is disrespectful in word, act or demeanour to any of his superior officers;
  - (3) wilfully disobeys any lawful order;
  - 15 (4) is guilty of drunkenness;
  - (5) drinks intoxicating liquor whilst on duty for which he has been detailed;
  - (6) parades for duty for which he has been detailed, under the influence of liquor;
  - 20 (7) absents himself without leave;
  - (8) neglects or without reasonable excuse refuses to assist in the apprehension of any person whom it is his duty to apprehend, when lawfully ordered to assist;
  - 25 (9) negligently allows any prisoner who is committed to his charge or whom it is his duty to keep or guard, to escape;
  - (10) offers or uses unwarranted violence to or ill treats any person in his custody;
  - (11) is guilty of cowardice;
  - 30 (12) discharges any arms without just cause or orders;
  - (13) without reasonable cause fails to present himself at any parade or for any duty at a time appointed by his superior officer;
  - 35 (14) pawns, sells, loses by neglect, makes away with, wilfully or by neglect damages, or fails to report any damage to, any arms, ammunition, equipment, clothing or any other public property committed to his charge;
  - (15) without due authority parades for or attends any duty out of uniform or dirty or untidy in his person, arms, clothing or equipment;
  - 40 (16) is slovenly, inattentive, uncivil or quarrelsome;
  - (17) without due authority discloses or conveys any information concerning any investigation or other police matters;
  - (18) malingers, feigns, or wilfully produces any disease or infirmity;
  - 45 (19) is guilty of wilful misconduct or wilfully disobeys, whether in hospital or otherwise, any orders, by means of which misconduct or disobedience he produces or aggravates any disease or infirmity or delays its cure;
  - (20) incurs debt beyond his means;
  - 50 (21) knowingly makes any false accusation against any other police officer or any other person;

- (22) in making any complaint against any other police officer or any other person, makes a false statement affecting the character of any such police officer or other person, knowing such statement to be false, or knowingly and wilfully suppresses any material facts;
- 5 (23) makes or signs any false report or statement in any official record or document in circumstances which would indicate that he should be reasonable certain that the same is false;
- 10 (24) except with the prior written permission of the Commissioner engages in any employment or office other than in accordance with his duties as a police officer;
- 15 (25) takes any active part in any political organisation or electoral campaign or engages in any other activity which is likely to interfere with the impartial discharge of his duty as a police officer;
- (26) takes part in any professional sport;
- (27) becomes security for any person or engages in any loan transaction with any person without the prior written permission of the Commissioner;
- 20 (28) if called upon by the Commissioner to furnish a full and true statement of his financial position, fails to do so;
- (29) fails to comply with any of the provisions of the Force Standing Orders; or
- 25 (30) is guilty of any other act, conduct, disorder or neglect to the prejudice of good order or discipline,  
commits an offence against discipline for the purposes of disciplinary proceedings.

#### 30 Interdiction

19. All interdictions and the reasons therefor shall be reported in writing by the Commissioner to the Secretary of the Commission as soon as possible after the interdiction has been made.

#### *Interdiction of gazetted officers*

- 35 20. A gazetted officer interdicted from duty by the Commission, or by the Commissioner where the power of interdiction has been delegated to him, shall not be entitled to receive any salary or any amount in compensation for loss of earnings in respect of a period of interdiction unless the officer is acquitted of any charges in disciplinary or criminal proceedings arising from the circumstances giving rise to the interdiction, and even if the charges in any disciplinary proceedings are not laid until after the conclusion of any criminal proceedings, or unless the Commissioner otherwise directs. (Inserted by Regulations 14th July 40 1976\*.)

45 \* See Legal Notice No 93 of 1976.

#### Letter of Warning

- 50 21. The Commission, the secretary or the Commissioner may, if it is considered that disciplinary proceedings are not justified in respect of any minor act of misconduct by a gazetted officer, issue a letter to such officer warning him that that act of misconduct has been recorded. A

copy of any such letter issued under this Regulation shall be sent to the Secretary of the Commission for attaching to such officer's annual confidential report.

#### Criminal prosecution

- 5 22. Subject to the provisions of reg 23, when a preliminary investigation or an inquiry discloses that an offence against any law may have been committed by a gazetted officer, the Commissioner shall order an investigation and shall take action in accordance with the Force Standing Orders.

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#### No disciplinary action while proceeding is pending

23. Where criminal proceedings are instituted against any gazetted officer, disciplinary proceedings shall not normally be taken until the conclusion of such proceedings and the determination of any appeal therefrom.

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#### Criminal conviction of gazetted officer

24. Where criminal proceedings have finally concluded (including the determination of any appeal) resulting in the conviction of a gazetted officer, the Commissioner shall report the matter, together with his recommendation as to punishment, if any, to the secretary who shall forward the report to the Secretary of the Commission for consideration by the Commission.

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25. (1) A gazetted officer acquitted of a criminal charge in any Court shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent his being dismissed or otherwise punished on any other charge arising from his conduct in the matter, unless the charge raises substantially the same issue as that upon which he has been acquitted.

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- (2) Where it is proposed to commence disciplinary proceedings against a gazetted officer who has been tried upon a criminal charge arising out of his conduct in a matter which it is proposed should be the subject of the disciplinary charges, the draft disciplinary charges shall be sent to the Solicitor-General for his advice as to whether the charges can properly be laid.

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#### Dismissal

26. (1) (a) Where the Commissioner considers that disciplinary proceedings for dismissal should be instituted against a gazetted officer, he shall make a report to the secretary who shall forward such report to the Secretary of the Commission in order that the Commission may decide whether or not a disciplinary inquiry is to be held.

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- (b) Where the Commission decides that a disciplinary inquiry shall be held, the secretary shall forward to the officer a statement of the charge or charges framed against him, together with a brief statement of the allegations on which each charge is based.

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(c) The secretary shall also advise the officer that, if he so wishes, he may state in writing before a date to be specified (which shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself.

5 (2) (a) Unless the statement, if any, of the officer contains an admission of the charges preferred, the secretary shall appoint a Committee of such persons as he shall specify, not being less than three in number, to inquire into the matter.

10 (b) A Committee appointed under subpara (a) shall have the same powers as the Commission to summon and examine any witness whose evidence may be deemed material.

15 (c) The Chairman of every such Committee shall be a judge, a magistrate, legal officer or some other person possessing legal qualifications.

(d) Neither the Commissioner nor any police officer shall be a member of the committee.

20 (e) Where not expressly provided for under these Regulations, the procedure of the Committee in inquiring into any matter referred to it shall be such as the committee may determine.

(3) The Committee shall inform the officer that on a specified day, the charges against him will be investigated by it and that he will be allowed or, if the committee shall so determine, will be required, to appear before it to defend himself.

25 (4) If witnesses are examined by the committee, the officer shall be given an opportunity of being present and putting questions on his own behalf to the witnesses, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

30 (5) The Committee shall, in its discretion, permit the prosecuting party or the officer to be represented by a police officer, or an advocate:

35 Provided that, where the Committee permits such representation to the prosecuting party, it shall permit the officer to be so represented.

(6) If, during the course of the inquiry, grounds for framing additional charges against the officer are disclosed the Committee shall inform the secretary who shall follow the same procedure in framing the additional charges as was adopted in framing the original charges.

40 (7) The Committee, having inquired into the matter, shall forward its report thereon to the Secretary of the Commission accompanied by the record of the charges framed, the evidence led, the defence and all other proceedings relevant to the inquiry.

45 (8) The Commission after considering the report of the Committee, may—

50 (a) if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the secretary for reference to the committee for further investigation, report and later decision of the Commission;

(b) if it is of the opinion that the officer does not deserve to be dismissed,

may impose some lesser penalty; or

(c) decide in relation to dismissal or otherwise.

5 (9) The decision on each charge preferred against the officer shall be communicated to him by the Secretary of the Commission but not the reasons for the decision.

27. (1) Where it is considered necessary to institute disciplinary proceedings for misconduct not warranting dismissal against a gazetted officer, the Commissioner shall make a report to the secretary, who shall forward such report to the Secretary of the Commission.

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25 (2) If, after receiving the report specified in paragraph (1) or a report received under the provisions of sub-paragraph (a) of paragraph (1) of reg 26, the Commission is of the opinion that the misconduct alleged is not serious enough to warrant proceedings for dismissal, the officer shall be informed by the secretary of the charges against him and the officer shall be called upon to state in writing before a day to be specified (which shall allow a reasonable interval for the purpose) his answers to the charge and anything which he desires to urge on his own behalf in the matter. The secretary shall thereafter forward a report on the matter to the Secretary of the Commission, accompanied by the charges, the officer's reply and all other relevant documents:

Provided that such proceedings shall be carried out in such a manner that the officer shall know the whole case against him and shall have an adequate opportunity throughout of making his defence.

#### Punishments

30 28. The following punishments may be ordered as the result of proceedings under this Part:—

- 35  
40 (a) dismissal;  
(b) reduction in rank;  
(c) reduction in salary;  
(d) stoppage of increment;  
(e) deferment of increment;  
(f) suspension of increment;  
(g) severe reprimand or reprimand:

45  
50 Provided that nothing in this paragraph shall limit the power conferred upon the Commission to require a gazetted officer to retire from the public service in the public interest.