HMA 01-25
HMSC 526-23

VICTOR MAFIOSI 2931898V
versus
CCOE MUSHORIWA
(TRIAL OFFICER)
And
COMMISSIONER GENERAL OF PRISONS
AND CORRECTIONAL SERVICES
And
ZIMBABWE PRISONS & CORRECTIONAL SERVICES

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 17 JULY 2024
Judgement delivered: 3 February 2025

Opposed application

N. Mugiya; for the applicant
T Undenge; for the 1st respondent

ZISENGWE J: Up until recently the applicant was a member of the Zimbabwe Prisons and Correctional Services (ZPCS). He was discharged by the Commissioner General of Prisons and Correctional Services, (the second respondent) following disciplinary proceedings conducted under the Prisons (Staff) (Discipline) Regulations, 1984 ('the regulations"). He now brings this application in terms of ss 26 & 27 of the High Court, [*Chapter 7:06*] for a review of that decision. He seeks to have it set aside on the basis that according to him the procedure leading to his discharge was marred by several procedural irregularities. He cites seven grounds of review, namely:

a) The applicant was not given the opportunity to be heard.
b) The respondents failed to give reasons for discharging the applicant from the service.
c) The respondents did not take the trial proceedings as a court of record.

d) The first respondent tried and prosecuted the same matter.
e) The second respondent [changed] the sentence of the first respondent without affording the applicant the opportunity to be heard.
f) Trial proceedings did not conform [with] the provisions of section 69 of the Constitution as read together with section 86 (3) (e) of the Constitution.

The background facts

On 30 November 2020, the applicant was arraigned before the disciplinary board established in terms of s 8 of the regulations ('the board") presided over by the first respondent. He faced allegations of contravening s 3 (22) of the Regulations to wit: "assisting or conniving with any person or prisoner in having o obtaining any prohibited article". The nub of the charge was that the applicant had brought food items into the prison for an inmate named Edson Marovedze. He is said to have done this in connivance with the inmate's sister one Ropafadzo Marovedze.

The record of proceedings appears to show that the applicant pleaded guilty to the charge following which he was questioned by the first respondent. At the conclusion of the trial, he was found guilty. The board recommended punishment in the form of docking half his monthly salary.

The record of proceedings was then transmitted for automatic review to the second respondent. It was then that the original sentence was drastically varied to one of dismissal. According to the Deputy Commissioner General of the ZPCS, Christine Manetswa Manhivi, who deposed to the opposing affidavit on behalf of the second respondent, the main justification for this severe penalty was that the applicant was a repeat offender with five previous convictions. It is common cause that in exercising his review powers the second respondent did not seek the input of the applicant.

Although the applicant enumerated several grounds of review, it is self-evident from his founding affidavit his main grievance, was the fact the he was not given audience by the second respondent before the dismissal penalty was imposed.

He seeks in order in the following terms:

Whereupon after reading documents filed of record and hearing counsel:

1. The trial proceedings against the applicant, his conviction and sentence by respondents be and is hereby set aside.
2. The second and third respondents be and are hereby ordered to re-instate the applicant into Zimbabwe Prisons and Correctional Services within 14 days from the date of this order without loss of salary and benefits.
3. The Respondents are ordered to pay costs of suit on a punitive scale jointly and severely, one paying the others to be absolved.

The application is sternly opposed by the second respondent who denies any procedural impropriety in the conduct of the proceedings. In a word the second respondent avers that the applicant having pleaded guilty to the charge, most of the applicant's complaints regarding the conduct of the proceedings are rendered meritless. Secondly, according to the second respondent the decision to dismiss applicant on review was within the second respondent's powers and no impropriety can be attributed thereto.

The second respondent also raises a single point in *limine* contending as she does that the application is defective in that the applicant failed exhaust internal remedies.

The applicant while disputing the necessity of pursuing domestic remedies in the circumstances of this case also raises a preliminary point of his own. He impugns the validity of the second respondent's opposing affidavit on the basis that it bears a computer-generated date and as such the date on which the deponent took the oath cannot be ascertained. It is to the two preliminary points that I turn.

Alleged failure by the applicant to exhaust domestic remedies

It is second respondent's contention that the application is premature. She claims that the applicant should have exhausted internal remedies first before approaching the courts. It is averred

in this regard that the applicant should have first sought a review with the second respondent in terms of s 21 (3) (4) & (5) Regulations. The said provision reads:

> **21. Sentence of the board**
>
> 1. …[*not relevant*]
>
> (2) The board shall pronounce its recommended sentence to the accused member or to his legal practitioner and shall enter the sentence in the record.
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> (3) The pronouncement of the recommended sentence shall include-
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> (a) a statement that the carrying out of the sentence shall be held in abeyance until the Commissioner has confirmed the recommended sentence; and
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> (b) a notification of *the right of the accused member to submit a statement on review through the board within three working days of the date of the pronouncement*.
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> (4) The statement on review referred to in paragraph (b) of subsection (3) shall not contain any information which may be construed as additional evidence that should have been led during the trial.
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> (5) The record of the trial, together with the statement on review submitted by an accused member, shall be forwarded by the board to the Commissioner within a period of seven days for review in terms of section 22.

The general accepted position is that where domestic remedies are capable of providing effective redress in respect of the complaint, a litigant should exhaust those remedies unless there are good reasons for not doing so. See *Olivine Industries (Pvt) Ltd* v *Gwekwerere* 2005 (2) ZLR 421 (H); *Djordjevic* v *Chairman, Practice Control Committee & Dental Practitioners Council of Zimbabwe* 2009 (2) ZLR (H). Equally settled is the fact that the internal remedy must be one that is capable of providing effective redress and not merely illusory or inadequate. See *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H)

Feltoe G in *A guide to Administrative and Local Government Law* 5th ed has this to say on what course of action to take where an applicant files a review when legislation provides domestic remedies:

> *"In terms of s 7 of the Administrative Justice Act [Chapter 10:28], the court can decline to hear an application, based on an alleged failure to comply with the provisions of the Act, if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before it and it considers that such remedy should first be exhausted. The court can exercise its discretion to hear the*

> *matter, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the officials charged with the authority to determine domestic appeals or reviews must be allowed to do their work before the court intervenes. The Court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference"*

In the present case although the regulations do present a somewhat limited review procedure to an affected member, it does so only to the extent that he is aggrieved by the conduct of proceedings by the Board. It does not deal with what a member needs to do if he is aggrieved by the perceived procedural irregularities purportedly tainting the decision of the Commissioner General. To that extent I do not believe this precludes a member dissatisfied by the conduct of the Commissioner General from approaching this court on review. The applicant's grounds of review consist of an admixture of complaints against both the Board and the Commissioner. In all likelihood, the applicant was least likely to challenge the Board's conclusions had the second respondent not substituted the penalty recommended by the Board with one of dismissal. It is for this reason that the court's discretion in the present matter is best exercised by hearing the dispute despite the apparent failure by the applicant to pursue the limited internal review remedy provided by s 21 (3) (b) of the regulations.

Further I also observe that the second respondent did not pursue this particular point in her heads of argument creating the impression of its abandonment. I accordingly this point *in limine* relating to the alleged failure to exhaust internal remedies is hereby dismissed.

The validity of the second respondent's opposing affidavit

The basic argument by the applicant is that the opposing affidavit is fatally defective in that it was not properly sworn to. The basis being the date on which the oath was administered was typed in or computer generated. The applicant characterises this as a "created oath" which according to him is improper. Reliance was placed in part on the case of *Catherine*

Muvangani v *Newham Financial Services (Pvt) Ltd & 6 Ors* HC 8342/15 and that of *Hiten* v *Barry N.O & 3 Ors* HC 858/22 where the following was said.

> *"The law is that an affidavit must be sworn to before a Commissioner of Oaths, or in this case before a Notary Public. The two must sign in the presence of the other. The fact that the affidavit states that it was signed in Harare, Zimbabwe and notarized outside the country (in South Africa) puts in issue, the authenticity and veracity of the founding affidavit."*

During oral submissions in court further reliance was placed on the case of *Twin castle Resources (Pvt) Ltd* v *Paari Mining Syndicate & Ors* HH-153-21 where the court stated as follows:

> "The main notice of opposition itself was equally said to be defective. Whilst the main notice of opposition bore a stamp by the Commissioner of Oaths, it was silent as to when Luxton Mawanga who swore to the affidavit, had appeared before the Commissioner of Oaths. It merely had *one computer generated date as to when the deponent had signed*. It was therefore argued that effectively there was no notice of opposition before me. Applicant's lawyer Mr Chiuta, drew on the case of *Mike Mandishayika* v *Maria Sithole* HH 798/15 to bolster this point wherein it was stated that:
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> > 'An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. **The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously."** (my italicisation for emphasis)

Firstly, what clearly distinguishes the present case from that of *Hiten* v *Barry (N.O)* (*supra*) is that whereas in the latter case there was obvious evidence that the deponent and the Notary Public were in two separate locations, namely Zimbabwe and South Africa, respectively, when the affidavit in question was deposed to, in the present matter there is no such evidence.

Secondly and perhaps more importantly, unlike the impugned affidavit in the *twin Castles* case, (*supra*) which bore a single date which was also computer generated, the affidavit in *casu* bears two dates. The first being the computer generated one complained about and the second appears on the commissioner of oaths' date stamp. I do not believe that the mere fact that one date stamp is computer generated serves to invalidate the affidavit. That argument would perhaps have carried the day if the dates were different or if the computer -generated date stamp was the only date affixed thereon. Ultimately therefore I find no merit in this objection based on the alleged defectiveness of the second respondent's affidavit.

Both preliminary objections having thus fallen by the wayside the merits of the application will now be considered.

On the merits

The application contains two broad grounds of review. The first set of grounds attack the conduct of the proceedings by the board. The second set relates to the decision of the second respondent (in dismissing the applicant). Each of these will be dealt with in turn.

Attack of the proceedings of the board

Under this rubric, the applicant enumerates several bases which he perceives as shortcomings vitiating the proceedings. First, he claims that his trial by the board was conducted in a "militant" manner as the trial officer arrogated to himself the dual role of both prosecutor and presiding officer. He claims that the prosecutor was reduced to a mere by-stander.

Second, and related to the first, he avers that he was denied the opportunity to give defence outline as the first respondent commenced the proceedings by subjecting him to cross examination in the process depriving the trial prosecutor of his prosecutorial role. He claims that the plea of guilty he tendered was not freely and voluntarily given.

In his opposing affidavit, the second respondent scoffs at allegations of any impropriety in the conduct of the proceedings of the board. In particular she points out that the applicant pleaded guilty to the charge and cannot now purport to turn around and impugn those proceedings.

Contrary to the applicant's assertions, not only dos the record proceedings attached to the application show that he pleaded guilty to the charge but also that pursuant to such plea of guilty the officer presiding over the board questioned him to determine if the plea was a genuine admission of the essential elements of the offence. This was on keeping with ss 54, 5 and 17 of the Regulations. Section 17 reads:

> **"17. Plea of Guilty**
> Where an accused member pleads to an offence, evidence shall be led either to establish that the offence charge was actually committed or to confirm the plea of guilty in a material respect"

There is no need to elicit a defence outline from someone who has pleaded guilty. A defence outline only becomes necessary where the accused denies the charge. Further, there is no basis, *ex-facie*, the record of proceedings remotely suggestive of any coercion on the part of the board to elicit the plea of guilty. Equally absent is any suggestion that the proceedings were conducted in a "militant' manner, whatever that means.

The importation, by the applicant in his heads of argument of procedures under the Police Act is unfortunate. Disciplinary procedures for members of the ZPCS are set out under the Regulations. The questioning by the Presiding officer which the applicant now impugns was merely inquire into the genuineness of the plea and to establish whether all the requisite essential elements of the offence were satisfied. It was by no stretch of the imagination a usurpation of the prosecutorial function. It was squarely a judicial role to inquire into the genuineness of the admission made, a role similar to s 271 (2) (b) of the Criminal Procedure and Evidence Act, *[Chapter 9:07]*.

It must also be pointed out that had the applicant been genuinely aggrieved by the nature of the proceedings by the board, he would have in all probability utilised the review proceedings set out in s 21 (3) of the regulations to challenge the same.

To the extent that the applicant alleges that he was denied the right to be heard by the Board, this contention stands to be dismissed for the same reasons articulated above, namely that he tendered a plea of guilty and was questioned on the genuineness of that guilty plea. The Board was satisfied and accordingly returned a verdict of guilty.

Ultimately therefore the grounds of review attacking the procedure by the Board (grounds a, c and d) lack merit and are hereby dismissed.

Attack on the proceedings of the second respondent

The main ground here relates to the review of the board's decision by the second respondent. It is common cause that when the board's record of proceedings was transmitted to the second respondent for review, the latter proceeded to substitute the sentence recommended by the board (namely the docking of half of applicant's month's salary) with one of dismissal. It is also common cause that in doing so the second respondent did not seek the applicant's input.

The second respondent's role is best understood in the context of the empowering provisions, namely section 21 and 22 of the Regulations. It is critical to observe that the board does not, strictly speaking, *impose* any sentence as such. All it does is to *recommend* what it considers to be an appropriate sentence. That role of imposing a sentence lies squarely with the commissioner.

Section 21of the regulations reads:

> **21. Sentence of the board**
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> (1) Where the board is satisfied, after trial, that the alleged offence against discipline has been committed, it may *recommend* that the offender be punished by –
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> (a) admonition;
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> (b) reprimand
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> (c) severe reprimand
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> (d) extra duties for a period not exceeding seven days;
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> (e) stoppage of pay where there has been absence without leave, or loss by negligence of, or injury to, public or prisoners' property;
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> (f) fine, not exceeding one month's pay;

(g) forfeiture of one or more efficiency badges;
(h) reduction in rank;
(i) dismissal;
(j) the punishment set out in either paragraph (a) or (b) and the punishment set out in paragraph (c);
(k) any two or more of the punishments set out in paragraph (c) to (i);
Provided that, in the case of dismissal, the only further punishments which may be imposed shall be those set out in paragraphs (c) and (f).

(2) The board *shall pronounce its recommended* sentence to the accused member or to his legal practitioner and shall enter the sentence in the record. (my italicisation for emphasis)

What perhaps eluded the applicant was that the role of the board was merely to *recommend* what it deemed to be an appropriate penalty. Such recommendation is subject to confirmation, variation or remission or otherwise by the commissioner. This much is clear from s 22 of the Regulations which reads:

(1) The Commissioner shall review the record of any trial held in terms of these regulations and may confirm, vary or remit any punishment recommended by a board under section 21 and may amend or cancel any recommendation made thereunder.
(2) The decision of the Commissioner, in terms of subsection (1) shall be notified to the board which in turn shall notify the accused member.
(3) Any punishment confirmed by the Commissioner in terms of this section shall have immediate effect notwithstanding the fact that an appeal may subsequently lie to the Public Service Commission.
(4) An appeal against the decision of the Commissioner shall lie to the Public Service Commission which may confirm, vary or remit any such punishment and may act upon any such recommendation as it deems fit:
Provided that no appeal shall lie under this subsection unless notice of intention to appeal has been given to the Commissioner within seven days of his decision being conveyed to the member concerned and the appeal has been lodged with the Commissioner within fourteen days of the date he received the notice of intention to appeal.

While it is correct that the *audi alteram partem* rule is one of the principles of natural justice, it is however clear from the structure of the regulations that the disciplinary procedure under it is *sui generis*.

The record of proceedings shows that the applicant was apprised of his right to submit in terms of subsections 3 (b) and 4 of s 21 of the regulations, a statement on review. He did not. The crisp question that falls for determination is whether the second respondent is obliged to seek the input of an affected member where he or she decides to increase the severity of the penalty recommended by the Board. The wording of the regulations does not appear to provide for such a procedure. Should that have been the intention of the legislature it would have employed as much in plain language.

As far as review is concerned, an affected member has a single opportunity to place any representations before the second respondent, namely by submitting a statement on review through the board within three working days of the date of the pronouncement of the sentence. In my view this entails that the accused member must bear in mind the courses of action open to the second respondent upon submission of the record of proceedings to him before electing not to make any submissions for review, dismissal being one of them.

Having thus failed to utilise this viable opportunity to make representations to the Commissioner, he cannot cry foul when the Commissioner exercised his discretion in the manner he did. The contention, by applicant therefore that he was denied the right to be heard before Commissioner exercised his discretion in terms of section 22 (1) of the Regulation cannot be sustained.

The board, was quite clearly cognisant of the extent of its remit as far as sentence is concerned under the regulations. It was also aware of its duty to apprise the applicant of his right to submit a statement on review. It expressly informed the applicant that the sentence it had imposed was subject to confirmation by the Commissioner General who had the discretion to alter,

or quash such sentence. The applicant's contention that he needed to be allowed an opportunity to make further submission on sentence quite erroneous.

In the event however that the affected member is aggrieved by the severity of the punishment ultimately meted out by the second respondent, the doors are not necessarily shut to him. He still has the right of appeal to the Public Service Commission.

The second leg of the applicant's argument is that the failure by the second respondent to provide reasons for imposing the sentence of dismissal constitutes constituted a fatal irregularity. The applicant however makes the mistake of alleging that it was the first respondent who imposed that sentence. It was Commissioner who did. The first respondent recommended the docking of half his salary.

It is apparent that the applicant did not request for reasons for the punishment ultimately meted out by the Commissioner. He only sprang into action in April 2022 when he wrote to the second respondent through his legal practitioners demanding to know - "*the law which was used to have him dismissed without reasons and without a hearing of any sort*."

The second respondent duly obliged and in a letter dated 25 April 2022 explained not only the circumstance of his conviction of the offence in question, but also the reason for the punishment of dismissal. In paragraph 2 of that letter the second respondent quite clearly explained, that the offence was viewed in a very serious light given that it comprises the security of the affected station. He also pointed out that an officer must never make private arrangement or deal with an inmate not known by the station authorities. Ultimately, he pointed out that the Commissioner General after perusing the record of disciplinary proceedings and after taking into account the seriousness of the office and the fact that the applicant was a repeat offender altered the recommendation of the Board to one of dismissal.

The applicant simply has no leg to stand on. He cannot complain that he was not furnished with the reasons for the decision to dismiss him yet he did not initially request for those reasons. When he did, he was duly supplied with the same.

The entire fabric of the applicant's contention betrays a misapprehension of the structure or mechanism of procedure under the regulations. The applicant labours under the misapprehension of that the Commissioner was obliged to conduct a fresh hearing wherein applicant would actively participate before the former could arrival at what he considered to be an appropriate sentence. That is not how the regulations are structured.

It is futile, I think, for the applicant to seek to impugn the decision of the Commissioner General in acting in a manner authorized him by law. If the applicant was aggrieved by the severity of the punishment meted out by the Commissioner he had the right, within the prescribed time, to lodge an appeal against the same in terms of s 4 of the regulations.

Ultimately, therefore, none of the grounds of review can avail the applicant. Accordingly, the application is hereby dismissed with costs.

Mugiya Law Chambers; applicant's legal practitioners.
Civil Division of the Attorney General's Office; respondents' legal practitioners