

JAMES MUNETSI
versus
PUBLIC SERVICE COMMISSION
and
SECRETARY FOR LOCAL GOVERNMENT
PUBLIC WORKS & NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 12 January 2004 and 16 March 2005

Opposed Application

Mr *T Tivaone*, for the applicant
Mr *E Jena*, for the respondent

HUNGWE J: Applicant a District Administrator for Karoi District seeks an order setting aside the 1st respondent's decision upholding the determination of the 2nd respondent dismissing him from employment with it and an order that he be reinstated forthwith on full salary and other benefits from the date of suspension together with costs.

This application for review arose from the following events:

On 24 October 2002 the Secretary of Local Government Public Works and National Housing ("the Secretary") addressed a letter annexure "A" to the applicant suspending him from duty. This followed an investigation report received from the Mashonaland West Provincial Land Task Force regarding the operations of the Karoi District Land Identification Committee. In the letter of suspension, the Secretary levelled several allegations against the applicant amongst them the following:

1. Applicant failed to dispatch 504 letters of offer to successful applicants for land which the Minister of Lands Agriculture and Rural Resettlement had duly signed and sent to his offices;
2. At Buttervent Farm applicant had allocated himself 350 ha occupied the farm house and displaced 24 beneficiaries without providing the beneficiaries with alternative plots. He had no letter offering him that land.

Applicant was found with an assortment of goods whose origin he could not explain.

3. At Buttervent Lot II farm, he allocated his brother -in-law one M Kadyauta, plot 10 when the latter held no letter of offer of land.

There was found on this plot an assortment of agricultural equipment whose origin he could not explain.

4. He had auctioned the property belonging to the former owner of Zebra Downs in the owners absence and used a bad cheque to purchase equipment at such an auction sale.
5. At Wingate farm in the former owner's absence he had taken two tractors and commandeered them to his Nassau farm using the farm drivers.
6. Applicant prevented new farmers from occupying Sholla Park Farm after corruptly colluding with the farm owner whom he had blackmailed into planting 17 hactares of wheat at his expense.
7. Applicant had used a government vehicle for personal errands whilst he was on leave to the detriment of his office.

In terms of the letter of suspension applicant was not to attend at his work place. The suspension was without pay for the period of its duration which was 3 months reckoned from 25 October 2002. He was entitled to take up other employment upon informing the Secretary. He was not to leave the country without advising the Secretary.

The letter of suspension specifically provided that should his case not be determined by 22 January 2003 he would resume duty the following day.

On 24 December 2002 the applicant was formally charged with misconduct in terms of Section 44(2)(a) of the Public Service Regulations, Statutory Instrument 1 of 2000.

He was charged with contravening sections 2,3,7,9,13 and 21 of the First Schedule to the Regulations, the brief descriptions of which appear in annexure "F". To the charge was attached copies of materials and documentary evidence in respect of the charge. These charges repeat the allegations of misconduct as set out in the letter of suspension and summarised above.

He was invited to submit his written response to these allegations within 14 days of the date of receipt of the letter in terms of Section 44(2) of Regulations. He responded by way of a letter Annexure "H" dated 10 January 2003 addressed to the Secretary. He denied each and every allegation of fact and offered an explanation in rebuttal.

He was invited to attend a hearing on 19 March 2003 but on his legal practitioner's request it be was set down for 1 April 2003.

On the date of hearing, Mr Tivaone, for the applicant, took a point *in limine*. The point was that as there had been no timeous compliance with Section 48(3) of the Regulations, the applicant was entitled to reinstatement without the need of the hearing that was about to commence. He averred that any proceedings which took place would be a nullity as these were premised on an illegal foundation.

The Chairman pointed out to the applicant that his duty was administrative. If they felt it was illegal they could seek such a declaration from this court after the proceedings as they will proceed with the hearing since they had afforded applicant opportunity to present his case and challenge the case against him.

Mr Tivaone took an ill -advised position. He left the hearing together with his client. The committee proceeded to hear the case against applicant in his absence. No less than five witnesses were called. Their evidence was recorded. It is part of the record.

The Disciplinary Committee then found applicant guilty on all six counts. The Committee the recommended that the applicant be discharged from the Public Service in terms of Section 50 of the Regulations and that a surcharge be raised in respect of the unauthorised use of a government motor vehicle. The Secretary approved this recommendation and addressed annexure "A" dated 8 April 2003 to the applicant. Aggrieved by this discharge order applicant then sought a review of the determination terminating his employment by the 1st respondent and addressed the review to the 1st respondent. It confirmed the determination, finding applicant guilty on all six counts and the penalty of discharge from the Public Service. It gave its written reasons to applicant by way of letter dated 28 July 2003.

Aggrieved by this outcome the applicant now asks this court to set aside on review the determination on the general ground that the failure to order his reinstatement after the expiration of three months suspension was illegal and therefore viciated all subsequent proceedings.

Section 27 of the High Court Act [*Chapter:06*] provides the grounds upon which any proceedings or decision of inferior courts, tribunals or administrative decisions may be brought on review as:

- (a) absence of jurisdiction on the party of the court, tribunal or authority concerned;
- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court -or tribunal concerned or on the party of the authority concerned, as the case may be;
- (c) gross irregularity in the proceedings or decision.

It will be clear from the recitation of the facts *in casu* that the ground of review relied upon by the applicant is in essence that the proceedings of the Disciplinary Committee at inquiry were grossly irregular as these were viciated by the disciplinary authority's failure to reinstate applicant after the expiration of the expiration of the statutory period of suspension. Respondents do not dispute the irregularity arising out of failure to either extend the suspension for a fixed period in terms of section 49(3) of the Regulations. It argues that such failure did not viciate the subsequent proceedings as these were a separate event. Consequently the decision to uphold the subsequent findings of guilty and the penalty of dismissal cannot be faulted.

The suspension of a member of the Zimbabwe Public Service is governed by Section 48 of the Regulations aforesaid. Section 48(1) states:

"48(1) A disciplinary authority may at any time, by written notice, suspend from service a member who is suspected of misconduct or is subject to criminal investigation or prosecution if his continued attendance at work or continued performance of his duties or service, as the case may be, would-

- (a) be conducive to unbecoming or undecorous behaviour or further instances of misconduct or;
- (b)
- (c)
- (d)
- (e) be undesirable in the public interest or likely to lead to a loss of public confidence in the Public Service."

From the admitted facts, the disciplinary authority only further extended applicant's suspension until 8 April 2003 by its letter dated 26 February 2003. It is clear that the 1st respondent did not take lightly the secretary's failure to apply for an extension of the period of suspension. The tone of this letter says it all. 1st respondent recognized its duties to comply with the letter of the law. It acknowledges that this was not done. There can not be a suspension in retrospect. Thus by Section 45(3) after 23 January 2003 the applicant's suspension was deemed cancelled. Once cancelled by operation of law, there was nothing to extend on 26

February 2003. Therefore until lawfully dismissed on 8 April 2003, applicant ought to be deemed to have been reinstated. As there was no suspension therefore no bar, he was entitled to his salary and benefits for the period 23 January to 8 April 2003 inclusive.

That is the effect of the failure to observe the statutory obligation to either further suspend, cancel or dismiss.

The failure to adopt one of these courses of action before the expiration of the statutory period of suspension does not on its own viciate the subsequent disciplinary hearing. By storming out of the hearing on the misconstrued view of the law, the applicant waived his right to dispute the evidence called against him, his right to cross-examine witnesses and call his own witnesses. He waived his right to be heard which he had been afforded.

The disciplinary Committee was quite entitled to proceed with the hearing of evidence and determination of the matter. No authority is required for this conclusion. On that basis alone I would dismiss the application for review.

There is a further basis however to dismiss this review application.

This review application seeks the setting aside of a decision of a disciplinary committee set up in terms of the Public Service Regulations. Those regulations provide that where a member is aggrieved by a determination made or penalty imposed by the Commission as a disciplinary authority or by a decision of the Commission on review in terms of Section 51 the member may, within 21 days of being notified of such decision, appeal against the decision, to the Labour Court.

This domestic remedy was available to applicant. He has not exhausted it. Special circumstances must be shown by an applicant who approach this court before exhausting his domestic remedies. See *Girjarc Services (Pvt) Limited v Mudzingwa* 1991(1) ZLR 243 (S) @249D.

This court should be slow to receive such a case as the present one in view of section 89(b) of the Labour Relations Amendment Act, 17 of 2002.

Section 89 (b) of the Labour Relations Act taken together with section 52 of the Regulations indicate that the applicant bears a heavy *onus* to discharge before the court can entertain his application. He has not shown any reason for not appealing the commission's decision dismissing his review application. See also *Nicholas v Fraser Alexander Zimbabwe* 2001 (2) ZLR 272 @ 273 G-274D.

Only when domestic remedies have been demonstrated to be incapable of producing effective redress or inadequate for that purpose; or have been undermined or where an applicant has put forward good cause for by-passing domestic remedies should such a case be entertained.

In the result, the application for review is dismissed with costs.

Mangwana Chirairo & Tivaone, applicant's legal practitioners

Civil Division of the A'G's Office, respondent's legal practitioners