SILAS LUTHINGO RUSVINGO
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 12 MAY AND 30 JUNE 2004

Adv. *H. Simpson*, for the applicant
Mr *T. Biti,* for the respondent

MAVANGIRA J : This is an application for review in which the applicant seeks an order in the following terms:

1. The decision of the Review Board be and is hereby set aside.
2. That the applicant be restored to his former post of Principal Administration Officer (Finance).
3. The respondent pays the costs of suit.

The applicant has been employed by the respondent since 1981 as an Accounting Assistant in the City Treasurer's Department. He rose through the ranks to Principal Administration Officer (Finance).

On 23 November 2000 the Director of Housing and Community Services issued the applicant with a written warning. It is headed "Confidential" and reads:

> "LACK OF COMMITMENT TO DUTY
>
> I refer to the meeting held in my office on 22nd November 2000, and wish to reiterate the concerns raised regarding your apparent lack of commitment to duty.
>
> On the 15th November, 2000 I had to send your junior to attend the Finance Committee Meeting, which you were supposed to attend, because you were not available.

On 20th November, 2000 you were absent from duty for no valid reason. You were asked to attend a pre-meeting on 22nd November, 2000 with me to prepare for the Finance Committee meeting which was to be held the same day. You did not attend that pre-meeting, instead you attended to your private business.
It appeared that when I spoke to you about lack of commitment to your duties, you did not show any remorse. You as a senior person in the department, I expect you to set a good example to your subordinates.

If you do not improve in your work performance, disciplinary action will be taken against you."

On 27 November 2000 and in response thereto, the applicant wrote to the Director of Housing and Community Services in the following terms;

"LACK OF COMMITMENT TO DUTY

Reference is made to your memo dated 23 November 2000 on the above matter and do comment as hereunder:-

1. Your memo, your worship, is a much ado about nothing as per my heads of arguments as detailed below:
2. On 6 October 2000 at about 16 hours I had a minor altercation with Chihoro. At about 14 hours on Tuesday 11 October 2000 Mupambirei as the principal complainant in this matter he, without precedent, hauled me straight before you in utter disregard of the internal grievance handling procedures.
3. Out of the same overzealousness, on Thursday 23 November 2000 at about 9 hours Mupambirei, as the same principal complainant, again hauled me before you and this time on the frivolous allegations that I had not attended a meeting of which I had no advance notice of and again in utter disregard of the internal grievance handling procedures.
4. On Friday 24 November 2000 at about 11 hours, Katize, a member of staff stormed into my office to hand me a letter of severe reprimand. The letter of reprimand was authored by the same principal complainant who is now assuming a dual role of a player and a referee in the same match.
5. The letter of reprimand cited 15, 20 and 22 November 2000 as the dates I committed serious acts of misconduct as hereunder stated.

    a. Misconduct number one is that I failed to attend a

meeting on 15 November 2000 as a result of which, the principal complainant decided to send my deputy to stand in for me. My deputy did not acquit himself well in the meeting much to the chagrin of the principal complainant who is now baying for my blood. And I am saying that according to my time management I was long booked for an interview with CABS Mortgage Department and in any case if I had been present I would have defied your orders to attend such a hastily arranged meeting. You the so called Chefs including the principal complainant are in the painful habit of sitting on council meeting agendas and minutes of previous meetings and then in the very last minute and in the fashion of a confused rural primary school headmaster force march hapless subordinates to attend such meetings and expect the same subordinates to perform miracles. Council meetings are not Kangaroo gatherings and their constitutions must be respected. So for as long as the above scenario subsists, the principal complainant can like a dog, bark and continue doing so when a train is passing by but unfortunately for him the train will never stop.

b. Misconduct number two is that on 20 November 2000 I did not report for duty without good cause. Apart from overzealousness this is an act of a high degree of irrationality on the part of the principal complainant On the day in question I reported for work first thing long before 8 hours and the entries in my vehicle log book and my desk diary not to mention the attendance register are all substantive proof that I reported for work. What the principal complainant fails to appreciate is that Head office is a big place where failure to see me by the principal complainant is a sure case through and through that I was absent from duty. In any case, a cursory check of the attendance register or vehicle log book could have saved the principal complainant the embarrassment of now becoming the principal offender in misleading the directorate.
c. On Thursday 23 November 2000 it is the principal offender's allegation that I failed to attend a meeting of which I had no agenda or minutes of previous meeting. Apart from the reasons cited in paragraph 5(a) above, I suffered a vehicle breakdown as a result of which I reported at Head office around 9 hours. I proceeded to take my child to Arcadia Creche and back only to find daggers out for me in your office and again by none other than the principal offender ably assisted by Chihoro. The pair ranted and raved about my faking vehicle breakdowns when in fact I was attending to private

business, lack of commitment to duty, attitude problem, arrogance, indolence, first commitment to family matters at the expense of my work etc.

It is upon this that the now principal offender ably assisted by Chihoro worked late into the evening drafting a letter of severe reprimand which I was served on Friday 2000 at about 11 hours.

6. Having said all this I now want to consider in minute details the possible motives of the principal offender in his bid to fast track my downfall.

a) The principal offender knows his weakness well ahead of yet another round of interviews for the post of Deputy Director. To make up for his clearly discensible weakness he of late is resorting to overpleasing the master for political gain by targeting unsuspecting rivals for vicious character assassination. A case in point is Munengwa yesterday. Today it is Rusvingo singing the blues. And I know for sure it will soon be so and so. His behaviour in the count down to the interview day is that of a wounded lion which is now extremely dangerous and unpredictable.

b) Again take a look at the timing of the sudden spate of character assassinations all orchestrated by him. It all stinks of a carefully devised diabolic strategy to steal the high paying job at any costs. I have yet to witness better circus than what abounds in the department today.

c) In staff matters, just to mention one, the principal offender wants to sink so low and take over the unreligious authoring of a mere letter of reprimand based on lies and half truths from Katize who could have ably done it.

d) For as long as the heart rather than the mind continues to dominate the actions and deeds of the principal offender, we as a department are fast drifting into the deep end of the pool.

5. In light of the above verifiable revelations your reprimand appears not only
mistimed but misdirected and therefore invalid and of no

force and effect.

6. If it is not public posturing and politicking by the principal offender what else is it.

7. Having said all this your Worship, I now eagerly await your next faltering
Move.

Consequently the applicant was charged under section 18(c) and (h) of the Collective Bargaining Agreement: Harare Municipality Undertaking (General Conditions of Service) S.I. 66 of 1992. The subsections provide:

> "18 the following acts of behaviour by an employee shall constitute misconduct for the purposes of this agreement –
>
> .....
>
> c) repeated gross discourtesy during all working hours towards his colleagues in employment or towards those with whom he transacts the business of the employer;
> .....
>
> h) conduct which is or addiction to habits which are –
> (i) unbecoming to an employee; or
> (ii) inconsistent with the discharge of his duties; or
> (iii) likely to bring the services of the employer into disrepute

An Inquiries Committee hearing was held on 26 July 2001. It was chaired by one Mr Jumburu who was then in grade 9 whilst the applicant was in grade 5. Jumburu was thus a junior to the applicant. He sat with the personal assistant to the Town Clerk, who was in grade 4, that is one grade senior to the applicant.

On 27 August 2001, the Inquiries Committee found the applicant "guilty of contravening clause 18(h)(i) of Statutory Instrument 66 of 1992. It then "recommended that the accused be demoted two grades down (i.e. from Grade 5 to Grade 7) and transferred to another section. He must also be issued with a final warning letter" (record page 37)

On 7 September 2001 the Town Clerk made a report to the Executive Committee to which he attached the minutes of the proceedings of the Inquiries Committee. He recommended therein that in terms of section 141(6)(b)(ii)(c) of the Urban Councils Act, [C*hapter*

29:15](the Act) the applicant be demoted as part of disciplinary action from a salary of $75 292.00 per month (Grade 5) to a salary of $57 416.00 per month (Grade 7) with effect from the date of approval." (page 38 of the record). On 15 October 2001 the Executive Committee considered the report dated 7 September 2001 and circulated by the Director of Housing and Community Services "on the demotion and transfer of an employee of his department as a disciplinary measure." The Executive Committee resolved to recommend as follows:

> "(1) That in terms of section 141(6)(b)(ii)(c) of the urban Councils Act of 1996 [*Chapter 29:15]* the employee named in paragraph 5.1 of the confidential report (7 September 2001) by the Director of Housing and Community Services be demoted from Grade 5 to Grade 7 on the salary scale $586 464 to $629 760 per annum starting on a salary of $629 760 per annum with effect from date of adoption by the Commission.
>
> 2) That subject to the adoption of the recommendation in paragraph (1) above, the employee be issued with a final written warning by the Director of housing and Community Services and he be transferred from the Administration and Finance Division to District Administration as a Revenue Officer on a Personal-to-Holder basis.
>
> 3) That the employee be not eligible for promotion in the Harare City Council for the next two years.

The recommendations of the Executive Committee were forwarded to Council on 3 October 2002. Council confirmed the decision of the Executive Committee and the Review Board.

The applicant's grounds for review are stated as follows:

> "1. The Inquiries Committee was improperly constituted and hence did not provide an atmosphere where the applicant could be afforded fair and substantial justice.
> 2. The decision arrived at on the merits was so grossly unreasonable that it could not have been made by any reasonable person applying his mind to it.
> 3. The penalty imposed was outrageously harsh and defies all logic."

The respondent's counsel submitted *inter alia*, that as the applicant was not suspended, section 141 of the Act is not applicable. The respondent thus acted, not in terms thereof but under the common law which requires, under the tenets of natural justice, that the applicant be heard. Consequently, the composition of the Inquiries Committee cannot be an issue as such was not constituted in terms of the Act. In any event, the Act does not provide for the composition of the Inquiries Committee. Because the Act is not applicable, the respondent was at large as to the nature of proceedings held and the composition of the hearing body. Furthermore, and in any event, the Inquiries Committee in this matter was only a fact finding body which only made recommendations and did not make decisions; hence the fact it was chaired by the applicant's junior is of no consequence or relevance. All that matters is the chairing or hearing officer's competence and fairness. The applicant has not averred that the junior lacked these attributes.

Was the respondent at liberty to disregard the provisions of the Act, in particular section 141? Could the respondent, being a creature of statute, conduct any disciplinary proceedings, as these obviously were, otherwise than in terms of the provisions of the statute that creates it?

Section 141 provides:

"(4) If it appears to a head of department that any employee of the council who is not a senior official has been guilty of such conduct that it is desirable that that employee should not be permitted to carry on his work, he -

a) may suspend the employee from office and require him forthwith to leave his place of work; and
b) shall forthwith notify the town clerk or secretary of the council, as the case may be, in writing of such suspension.

(5) Upon receipt of a notification of suspension in terms of subsection the town clerk or secretary, as the case may be, shall cause the suspension to be reported at the first opportunity to -

a) the executive committee of the council in the case of a municipality; or

b) the council, in any other case.

6) Where an executive committee or a council has received a report of a suspension in terms of subsection (5), the executive committee or the council shall without delay -
a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension; and
b) after considering the results of the inquiry, decide whether or not -
(i) to lift the suspension; or
ii) to do any one or more of the following-
A. reprimand the employee concerned;
B. reduce the salary or any allowance payable to the employee concerned;
C. transfer the employee concerned to another post or grade, the salary of which is less than that received by him at the date of the imposition of the penalty;
D. impose a fine not exceeding three thousand dollars or three months salary, which fine may be recovered by deductions from the salary of the employee concerned;
E. subject to subsection (3) discharge the employee concerned;
and shall inform the employee and his head of department accordingly.

7) Where an employee has been suspended in terms of subsection (4) -
a) his suspension, unless earlier lifted, shall terminate when the council has decided not to discharge him or after six months has elapsed, whichever occurs the sooner;
b) during the period of his suspension he shall not be entitled to his salary or wages in respect of that period, but he may be paid such allowance, not exceeding the amount of his salary or wages, as the council may fix;
c) if he is not subsequently discharged, he shall be entitled to the full amount of his salary or wages and any allowances that would otherwise have been paid to him in respect of the period of his suspension, less any allowance paid to him in terms of paragraph (b).”

It appears to me, on a reading of the above quoted section, that the respondent cannot conduct any inquiry or any disciplinary proceedings otherwise than in accordance with the provisions of the said section. Any inquiry or disciplinary hearing conducted otherwise than in

accordance with or in terms of the section would, in my view, be irregular. The respondent is a creature of statute and is bound by the provisions of the relevant statute. It is not in my view, at liberty to ignore set procedures when it feels like ignoring them and setting up its own unlegislated disciplinary rules and subjecting its employees to such. It would appear to me that the respondent's stance that it was perfectly in order for it to proceed in the manner that it did is an afterthought. The respondent overlooked, possibly inadvertently, the provisions of section 141, when it set the proceedings in motion. Yet the Inquiries Committee, as already stated above, found the applicant guilty of contravening a section of S.I. 66/92 which is binding to both the applicant and the respondent and in imposing the penalty on the applicant, it purported to act in terms of section 141 (6)(b)(ii) C of the Act which provides as follows:

> "(6) Where an executive committee or a council has received a report of a suspension in terms of subsection (5), the executive committee or the council shall without delay -
> a) ……
> b) after considering the results of the inquiry, decide whether or not -
> (i) ……..; or
> ii) to do any one or more of the following -
> A. ……
> B. ……
> C. transfer the employee concerned to another post or grade, the salary of which is less than that received by him at the date of the imposition of the penalty.
> D. ……
> E. ……"

It could not possibly, in my view, have been the intention of the legislature that the respondent would pick and choose which provisions of section 141 which are relevant to a particular situation to follow, which to ignore and when to do either. The respondent cannot be allowed to blow both hot and cold; in one breath arguing that section 141 was and is irrelevant to this matter and in the next purporting to act in terms of the same section in imposing a penalty on the applicant. Furthermore the finding of guilty was in terms of the Collective

Bargaining Agreement.

In my view the respondent was not at large as to the nature of proceedings held and the composition of the hearing body. The statute must guide the respondent. The applicant must therefore succeed in this application.

It is in my view, important, that mention is made herein of the unacceptability of the contents of the letter written by the applicant and which gave rise to this whole matter. Had the respondent followed the proper procedure in this matter, the applicant would have been very fortunate, in my view, to get away with the penalty that was imposed on him. A more severe penalty would have been justified. To express its displeasure in the applicant's own conduct the court will not indulge him with an order for costs as should happen in view of the fact that he has succeeded in this application.

Although the issue of the court's jurisdiction had been raised earlier, before the hearing of this matter, it became clear that it was not a matter for concern in this matter.

In the result it is ordered as follows:

1. That the decision of the Review Board be and is hereby set aside.
2. The applicant be restored to his former post of principal Administration Officer (Finance).
3. That each party bears its own costs.