

WILLIE TAPERA MHISHI
and
THE MEDICAL & DENTAL PRACTITIONERS COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAKUVA J.
HARARE, 18th JULY AND 16 SEPTEMBER, 2013

TAKUVA J. This is an opposed court application. The facts of the matter are as follows;

The applicant is a qualified surgeon practising as such in Harare. He is a registered member of the respondent. On 15 January 2009, applicant lodged a complaint with the respondent against three of its registered medical practitioners. Applicant believed that the medical practitioners he specifically mentioned in his letter of complaint had committed wrongful acts that constituted professional misconduct in terms of the Health Profession Act, Chapter 27:19.

On 23 April 2012, (a period in excess of three years) respondent through its registrar advised the applicant that his complaint had been dismissed. The following day applicant wrote a letter to the respondent requesting reasons for the decision to dismiss his complaint. Respondent advised in its letter dated 2 May 2012 that such reasons will only be availed after 31 July 2012, the date respondent is expected to meet and confirm the minutes of its executive committee meeting held on 12 April 2012. On 16 May 2012, applicant wrote yet another letter insisting that he be given the reasons. Respondent replied on 18 May 2012 indicating its earlier position that the reasons will be released after 31st July 2012.

Applicant then sought the intervention of his lawyers who wrote to the respondent asking for reasons for the respondent's decision to dismiss applicant's complaint. Respondent's reply was that it had referred this letter to its legal practitioners. On 31 May 2012, applicant's legal practitioners wrote to the respondent warning it that if the reasons are not furnished applicant will apply to this court for an order compelling respondent to supply the reasons. When no reasons were furnished applicant then filed this application on 20 June 2012.

In his application, applicant stated two reasons why he required the respondent's reasons, namely;

- (i) That he wanted to exercise his right of appeal, and
- (ii) That he was considering taking respondent's decision on review

Both remedies have certain time limits which must be observed.

The application was opposed on the grounds that it was not properly before me and that applicant was advised that the "decision making processing was still taking place". The opposition is contained in an affidavit sworn to by one Josephine Mwakutuya employed by respondent as its registrar. Respondent prayed for the dismissal of the application with "an order for punitive costs"

Applicant raised two points *in limine*. Firstly, it argued that in terms of s 29(1) of the Health Professions Act [Chapter 27:19] the respondent is a body corporate capable of suing and being sued. In view of the clear requirement that a deponent deposing to an affidavit on behalf of a legal persona must be duly authorised to do so, Josephine Mwakutuya should have filed proof that she was authorised to act in such a manner. Her failure to so prove, creates an anomaly which renders invalid the respondent's opposing affidavit. Reliance was placed on the case of *Pumpkin Construction (Pvt) Ltd v Chikaka 1997 (2) ZLR 430 (H)* at 431 – 431.

The second point *in limine* relates to the fact that either Josephine Mwakutuya or the respondent or both of them tainted their case with perjury. This submission is based on two letters written by Josephine Mwakutuya. The first letter is dated 30 May 2012 while the second is dated 28 June 2012. In the former letter she alleged that the applicant could not be supplied with the reasons for the decision as yet because the executive committee of the respondent responsible for confirming the decision would only convene on 31 July 2012. In the latter, she stated that the executive committee confirmed the decision at its meeting of 29 May 2012.

The argument that, respondent's documents reveal that perjury has been committed arises from the fact that these letters were attached to Mwakutuya's opposing affidavit and that she reproduced their contents in her affidavit.

Respondent's response to these points is firstly that Mwakutuya has authority as an employee of the respondent. Secondly it was denied that the letters can be a basis for a charge of perjury because they are not affidavits.

As regards the first point *in limine*, it is trite that once a party raises an issue whether the deponent to an affidavit has authority to depose to it on behalf of an artificial person, then the other party must place before the court some form of proof that he/she is so authorised. Such proof is normally in the form of resolutions. *In casu*, no such proof was produced. Consequently, I will uphold the point *in limine*.

The second point *in limine* is without merit in my view. While there may have been some inconsistencies in the contents of letters written by Ms Mwakutuya, the suggestion that she is guilty of perjury is unsustainable. This point will therefore be dismissed.

The respondent raised three points *in limine*. Firstly, it was argued that the applicant adopted the wrong procedure in that he should have lodged his complaint with the Health Professions Authority first in terms of s 22 and, 5(f) of [CAP 28:19]. This argument is without substance for the simple reason that a close reading of the relevant sections 5 namely 5.5(f), s 21(1) and s 22 of the Health Professions Act [Chapter 27:10] reveals that applicant could not have competently approached the authority as that role can only be performed by the respondent. The authority cannot *mero meto* intervene to settle a dispute between applicant and respondent. It is the respondent that elected to ignore the internal remedies. Secondly, respondent submitted that applicant should have cited the respondent's chairman. I note that respondent did not plead non-joinder in its notice of opposition see *Mhaka and Anor v Zimbabwe Reinsurance Co. Ltd & Anor. 2002 (1) ZLR 651 (H)*. Such failure is fatal to the respondent's case. Consequently the point is dismissed.

Thirdly, respondent argued that applicant should have exhausted domestic remedies by referring his complaint to the Authority. As pointed out above, the applicant does not have power to invite the Authority's intervention. Quite clearly, this point is meritless and is accordingly dismissed.

On the merits, the applicant's case is simply that he has a statutory right to be informed of the reasons for respondent's decision to dismiss his complaints against some of respondent's members. This right arises from the provisions of s 6(1) of the Administrative Justice Act [Chapter 10:28]. The section states;

- “subject to this Act and any other enactment, any person –
- (a) whose rights, interest of legitimate expectations are materially and adversely affected by any administrative action; or

- (b) who is entitled to apply for relief in terms of section four, and who is aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within –
- (i) the period specified in the relevant enactment; or
 - (ii) in the absence of any such specified period, a reasonable period after a request for such reasons has been made;
- May apply to the High Court for an order compelling the administrative authority to supply reasons.”

In casu, despite respondent’s feeble denials, it is crystal clear that applicant requested for reasons. On one hand, respondent argued that applicant only asked for a “determination” and not “reasons; and yet on the other it argued that applicant was not entitled to reasons. Respondent became aware as far back as 23 May 2012 (if not earlier) that applicant wanted reasons for its decision see page 10 of the record. During the hearing respondent’s counsel submitted that applicant no longer has a cause of action since he was furnished with “Council’s reasons”. The evidence shows that respondent has been dodging this issue for quite some time. This is why Mwakutuya’s letters on the issue do not make sense. In one of the letters dated 30 May 2012, the respondent’s registrar alleged that applicant could not be supplied with reasons for the decision as yet because the Executive Committee of the respondent responsible for confirming the decision, would only convene on 31 July 2012 – see record on page 12. In the second letter date 28 June 2012, the same person wrote that the decision of the Executive Committee had already been confirmed at its meeting of 29 May 2012. Now, this was a day before the first letter was written, meaning that the first letter was a deliberate misrepresentation of the date the Executive Committee would convene to confirm the decision. The question that boggles the mind is in which letter did the registrar indicate the truth. Obviously the two positions are mutually exclusive in that if what is contained in the second letter is the truth, then the first letter was a deliberate misrepresentation of facts.

In my view, it cannot be said that the applicant’s request is frivolous. The complaints he raised relate to the practice of his profession. The respondent dismissed his complaints without giving him the reasons why those complaints were dismissed. The applicant is entitled to know the reasons and the respondent has no legitimate grounds to continue in its delay to furnish the applicant with reasons for its decision.

As regards costs, I am in agreement with applicant's counsel that respondent's conduct warrants an order of costs on a legal practitioner and client scale. This is so because respondent acted dishonestly in my view. Respondent denied that a request for reasons had ever been made to it. It turned out that this was a lie as that request had been made in writing. Also, respondent prevaricated and contradicted itself as regards the reason why it could not supply applicant with reasons.

Finally, respondent's stance on the request for reasons is totally unreasonable in that it put applicant through considerable inconvenience and frustration.

For these reasons, it is ordered;

- (i) that respondent furnishes the reasons for its decision made on 12 April 2012, dismissing applicant's complaints against Dr N. Mawere, Mr F. Lovemore and Mr Govah within 7 days of this order being served on it.
- (ii) Leave be and is hereby granted to applicant's legal practitioners to serve this order through delivery at no 8 Harvey Brown, Milton Park, Harare
- (iii) Respondent pays applicants costs on legal practitioner/client scale.

Dube, Manikai & Hwacha – applicant's legal practitioners

Scanlen & Holderness – respondent's legal practitioners