TOVERENGWA MAREGA (2)
versus
THE COMMISSIONER GENERAL OF PRISONS
and
THE TRIAL OFFICER

HIGH COURT OF ZIMBABAWE
TAGU J
HARARE, 3 February and 8 March 2017

OPPOSED APPLICATION

A Mugiya, for applicant
J Mumbengegwi, for respondents

TAGU J: This is an application for review in terms of Order 33 Rule 256 of the High Court Rules 1971 against the decision of the first respondent dated 8th December 2015. The background to the application is that the applicant was charged for contravening s 3 (25) of the Prisons (Staff) (discipline) Regulations 1984, "using personal violence to any person." He was convicted by the second respondent and sentenced to pay a fine of US$50. On 10 December 2015 the applicant received a radio in the form of correspondence from the first respondent to the effect that he had been dismissed from the Prison and Correctional Services. Previously the applicant had been charged on the same allegations and was convicted at Harare Magistrates Court. He appealed against that conviction to the High Court and was subsequently acquitted. He has now approached this court with the present application for an order to quash and set aside the decision by the first respondent to dismiss him from the Prison and Correctional Services on the current conviction. He firstly, implored the court to determine whether the dismissal of the applicant from the force by the first respondent was justified. Secondly, whether the *audi alteram partem* principle was complied with when a decision was made to discharge him, and thirdly whether the applicant had a right to be furnished with written reasons for his dismissal.

The application is opposed by the respondents.

At the hearing of the matter the applicant's counsel took two points *in limine*. The first point was that there was no opposing affidavit in this matter because the opposing affidavit filed by the first respondent was not dated. Secondly, the same affidavit was commissioned by the lawyer to the deponent contrary to the Provisions of *The Civil Practice of the Superior Courts in South Africa* 3rd ed, Hebstein and Van Winsen at p 443 where it is stated that:

> "an affidavit should be sworn to before a commissioner of oaths who is independent of the office in which it was drawn. The court will not admit affidavits sworn to before an attorney or employer or partner of an attorney acting for the deponent or a person having an interest in such affidavit."

The counsel for the respondents submitted that the opposing affidavit was indeed dated and was at a loss as to why the counsel for the applicant submitted that the opposing affidavit was not dated. The court is equally at a loss why the counsel for the applicant made such an application. A perusal of the affidavit reveals that the commissioner of oaths did not put the date by pen but indeed put his date stamp which shows that the affidavit was commissioned on 23 February 2016. In my view that date stamp suffices and the first point *in limine* is dismissed.

On the second point the counsel for the respondents submitted that the officer who commissioned the affidavit had no interest in the matter since he did so in terms of para (2) of the Justices of Peace and Commissioners of Oaths (General) Regulations 1998 as a mere civil servant who was appointed to commission documents. He argued that according to the Schedule to these Regulations cited above the commissioned affidavit deposed to by the respondents has an exemption and it reads as follows:

> "2. Affidavits attested by a member of the Public Service where:
>
> (a) his only interest in the affidavit arises and of the performance of his duties in the Public Service; and
> (b) the primary interest in the affidavit is that of the State."

I agree with the counsel for the respondents that the affidavit deposed to by the respondents is valid as it was commissioned by a member of the Public Service whose primary interest in the affidavit is that of the State. The second point *in limine* is dismissed.

ON THE MERITS

The applicant is seeking this Honourable Court to determine the following:

(1) whether the dismissal of the applicant is justified

(2) whether the *audi alteram partem* principle was complied with
(3) whether the applicant has a right to be furnished with written reasons for dismissal.

WHETHER THE DISMISSAL OF THE APPLICANT IS JUSTIFIED?

In *casu* the applicant was dismissed from the employ of the Zimbabwe Prisons and Correctional Services in terms of s 17 (a) of the Prisons [Staff] (Appointment and Discharge (Regulations, 1968 which provides that:

> "a member may be discharged from service if he commits any offence against discipline"

This followed the applicant's conviction by a disciplinary committee on allegations of assaulting another member of staff. From the papers the applicant had a litany of reprimands and previous convictions for contravening various sections of the Prisons Regulations and had demonstrated unwillingness to reform. In the circumstances the dismissal of the applicant was inevitable and justified.

WHETHER THE AUDI ALTERAM PARTEM PRINCIPLE WAS COMPLIED WITH

The applicant appeared before the second respondent that is, the trial officer. He was convicted by the second respondent. Before his sentence was imposed he must have been asked to tender his submissions in mitigation. The trial officer then sentenced the applicant and referred the record of proceedings to the first respondent who is the disciplinary authority. The first respondent confirmed the conviction but altered the sentence from a fine to dismissal. The applicant avers that before being dismissed from the service he must have been asked to make submissions. This was not done. What the applicant failed to appreciate is that in terms of the Regulations the first respondent as the disciplinary authority has the power upon receipt of the record of proceedings, to reprimand, suspend, reduce in rank, or alter the sentence and order a discharge of a member without asking for submissions from the member. The *audi alteram partem* principle does not apply at this stage.

WHETHER THE APPLICANT HAS A RIGHT TO BE FURNISHED WITH WRITTEN REASONS

When altering the sentence the first respondent may or may not give reasons. With regard to the issue of failure to give reasons by the disciplinary authority I refer to the case of *Ncube* v *Hamadziripi* 1996 (2) ZLR 404 (H) at p 404A where it was held that:

> "…It is not a reviewable irregularity for the presiding officer to fail to give reasons for his decision when he hands down his decision. It suffices for him to provide reasons when the interested party asks for the reasons."

In *casu* the applicant did not ask for the reasons and was not given. If he had done so his remedy is to apply to this court for the reasons if the administrative authority had refused to do so. In my view the applicant had not exhausted the internal remedies as specified by the Regulations before approaching this court. In the final analysis I find that the application lacks merit and must be dismissed.

In the result it is ordered that:

1. The application is dismissed.
2. The applicant is ordered to pay costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners