CRISPEN CHIREMBA
versus
SUPERINTENDANT CHIROODZA
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 November 2017 & 22 March 2018

Opposed Application

T Tabana, for the applicant
E Mukucha, for the 2nd & 3rd respondents

MANGOTA J: Our jurisdiction is anchored upon the adversarial system of justice delivery. The system has invariably two parties to it. These are the plaintiff and the defendant in a civil suit, the applicant and the respondent in motion proceedings and the state and the accused in a criminal trial.

A person who is not satisfied with the decision of the court *a quo* has every right to appeal or review the same. In appealing or reviewing the decision, he must cite the other party as the respondent. He, at times, cites the judicial officer whose decision he is appealing or reviewing. Citing the judicial officer has two advantages to it. The first is that the judicial officer is made aware of the fact that his decision is being appealed or reviewed. The second is that the citation affords him an opportunity to make comments upon, or to clarify, some aspects of his judgment for the benefit of the reviewing, or the appeal, court.

A judicial officer who decides a case which is the subject of review or appeal can never be cited as a substitute for the party in whose favour he ruled in the proceedings of the court *a quo*.

Such a citation is not only undesirable. It is also procedurally improper. It is improper for a party which is appealing or reviewing the decision of the judicial officer to compel the latter to defend his decision.

The remarks which I was at pains to make in the foregoing paragraphs of this judgment are characteristic of the current application. This was an application for review in which the applicant appeared before the first respondent as a party. The first respondent heard his case in his capacity as a *quasi* – judicial officer.

The persons who dealt with the case of the applicant comprised:

a) superintendent D Chiroodza, the first respondent *in casu.* He heard the case in his capacity as the trial officer.
b) the parties to the case were the State and the applicant. Each of them was legally represented.
c) Assistant Inspector G Chiripanyanga appeared for the State. He prosecuted the applicant.
d) a Mr O Marwa of Rubaya and Chatambudza Legal Practitioners appeared for the applicant. He was his defence counsel.

The trial commenced on 20 December 2016. The applicant was charged with contravening paragraph 35 of the Police Act [*Chapter 11:10*] ("the Act") as read with ss 29 and 34 of the Act as amended by the Criminal Penalties Act No. 22 of 2001. The State's allegations were that, on or about 7 December 2016 and at Harare, he, being a duly attested member of the police force, did wrongfully and unlawfully access and abuse documents of limited circulation to senior officers of the Zimbabwe Republic Police. It was alleged that he used the documents to file a court application for an interdict in an attempt to bar the police commissioner-general from transferring the administrative role of the Police Association from ZRP Harare Province to Police General Headquarters.

When the abovementioned charge was put to the applicant, he pleaded not guilty to the same. His plea set the stage for his trial. This followed, as closely as possible, all the stages of a criminal trial in which the State is *dominus litis.*

The prosecutor led evidence from his two witnesses, each in turn. The applicant's legal practitioner cross-examined the State witnesses, each in turn. Having led evidence from the two witnesses, the prosecutor closed his case.

The applicant's legal practitioner applied for discharge of his client at the close of the state case. He based his application on the allegation that the evidence which the state had led did not establish a *prima facie* case against the applicant.

The prosecutor successfully opposed the application for discharge of the applicant whom the trial officer put on his defence.

The applicant's legal practitioner led the applicant's evidence-in-chief. The prosecutor cross-examined him after which the applicant closed his case.

The trial officer delivered judgment. He convicted the applicant. He was advised that the applicant did not have any previous convictions. He invited the applicant to state his mitigatory circumstances. When the applicant completed giving his mitigation, he passed sentence on him.

It is important to mention that prior to the leading of evidence by the state and during the course of the trial, the applicant made a number of applications. He, at the initial stage of the hearing, applied that the trial officer should recuse himself. The prosecutor opposed the application as a result of which the trial officer ruled that he would continue to hear the case. The applicant, it has already been stated, applied for his discharge at the close of the case for the state. The prosecutor, once again, opposed the application as a result of which the trial officer ruled that the applicant should be put on his defence.

The rulings which the trial officer made during the trial of the applicant precipitated the current application for review. The complaint was that the trial officer was biased against the applicant. It was alleged that the bias was evident from the manner that the trial officer discharged his duties as a judicial officer.

In applying as he did, the applicant was aware that the first respondent heard his case in his capacity as a judicial officer. He was alive to the fact that the first respondent was not a party to the court *a quo*'s proceedings. He was also aware that the relevant party to those proceedings was the state which was represented by the prosecutor in the case. He was, in short, very clear in his mind that the prosecutor played a very important role in his prosecution, conviction and sentence. He also knew that it was not the first respondent, but the state, who/which preferred the charge against him.

Notwithstanding his clear and unambiguous knowledge in the abovementioned regard, he, for his unstated reasons, made up his mind to leave the prosecutor out of equation altogether. He,

in other words, decided not to cite the state as the substantive respondent to his application for review. He gave no reason for the position which he took in the mentioned regard.

By leaving out the state or the prosecutor from his application, he, no doubt deprived the reviewing court of the benefit of hearing, from the prosecutor's perceptive, if what he alleged against then first respondent was, or was not, warranted. He also deprived the state of the opportunity to be heard in so far as his application for review was concerned.

It was procedurally wrong for the applicant to have cited the first respondent as the substantive party to his application for review. He turned him into a party to the proceedings when he was not such. He compelled him to descend into the arena and to defend his decision. He took advantage of his erroneous citation of the parties to the review application and proceeded to criticize the first respondent for, he alleged, having shown bias against him and in favour of the state. What he stated in the first paragraph of his heads of argument brings out in a clear and lucid manner what he intended to achieve when he alleged that the first respondent was biased against. He said:

> "… the fact that the first respondent has decided to stand in opposition to this application makes it a total irregularity, more so if one considers that the application is based on allegations of his bias."

The applicant cannot approbate and reprobate. He placed the first respondent into a very invidious position when he cited him as a substantive party to his application. When the first respondent opposed the same, he criticized him for having done so. One wonders what he intended the first respondent to have done under the stated set of circumstances.

It stands to logic and good reason that the applicant expected the first respondent not to have opposed his application for review so that it would remain unopposed and, in that way, he would have had the reviewing court rule in his favour with little, if any, difficulty. He referred to the opposition which the first respondent filed as having been irregular. He refused to acknowledge, as he should have done, that his citation of the first respondent as a substantive party and in substitution of the state which he should have cited was more irregular than the first respondent's opposition to the application for review.

The first respondent had no option but to oppose the application. He had been thrown at the deep end of the scale.

The party which had the opportunity to properly oppose the application was the state or the prosecutor representing the State. That party had been left out of the equation completely and for no apparent reason for that matter.

The applicant gave no reason at all for having cited the second respondent as a party to his application for review. The second respondent was not a party to the proceedings of the court *a quo*. The draft order which he moved the court to grant to him made no mention of the second respondent at all. It had everything which related to the first respondent who had presided over his case in his capacity as a *quasi*-judicial officer.

The applicant's citation of the parties in his application for review was quite telling. He left out a critical player, the prosecutor, who dealt with him during the hearing of his case. He, paradoxically, included in the application the second respondent who was not a party to the court *a quo*'s proceedings. He also turned the trial officer into a party to his application for review when he should not have done so at all.

The impropriety of citing the judicial officer who heard and determined a party's case in an application for review, or in an appeal, can hardly be overemphasized. I have already made a statement on that matter in the first portion of this judgment. My remarks find support from a number of decided case authorities. Amongst them is that of *Senior Minister of National Affairs, Employment Creation and Co-operatives* v *Joram Mupambirei & Ors,* SC 182/94 which related to a dispute between two factions of a co-operative society. The Minister, sitting as a *quasi*-judicial officer, had ruled in favour of one faction and the losing faction had reviewed his decision with the Administrative Court which had ruled against the decision of the Minister. The Minister appealed the decision of the Administrative Court. The Supreme Court dismissed the appeal and, in doing so, it gave the example of a magistrate who decides upon a matter which, on appeal, the High Court upset and said:

> "… it would be improper for a magistrate who is upset on appeal by the High Court to appeal that decision to this court. To allow him to do so would be to allow him to defend his own decision … which is not permissible."

In *Joram Mupambirei & Ors* v *Zvarivadza and Ors,* SC 94/96 the Supreme Court had the occasion to deal with the above-mentioned case, but this time from the perspective of one of the factions. KORSAH JA brought out the position of the Minister in a clear and succinct manner. The learned judge remarked as follows:

> "The Minister as an arbiter in the proceedings, is firstly, not a party to the dispute, and, secondly, is not adversely affected by the quasi-judicial findings he makes. He ought not to have been made the substantive party in proceedings where his own decision was being challenged …." (emphasis added)

The remarks which MCNALLY JA made in *Blue Ribbon Foods Ltd* v *Dube NO & Anor,* 1993 (2) ZLR 146 at 150 B cannot go unmentioned. He made them in regard to matters of the present nature. He said:

> "In review proceedings, where allegations of procedural impropriety or bias are commonly made (those being the common grounds which justify review) the presiding officer whose conduct is in question may, if he wishes, file an affidavit to clarify such matters as he may wish to clarify. And in a proper, though I would think exceptional, case he may be represented by counsel. But only on that issue. It is not for him to enter into the merits of the case or to defend his decision. That is the function of counsel for the respondent employer or the respondent employee, as the case may be." (emphasis added).

Leopard Rock Hotel (Pvt) Ltd v *Wallen Construction (Pvt) Ltd*, 1994 (1) ZLR 255 (S) at 279 B-F to which the applicant referred the court supports the review which I hold of the matter more than it advances the applicant's cause. It reads:

> "…., in circumstances, such as these, an arbitrator, umpire judge or other adjudicating body has one of two choices.
>
> The first is that he could file an affidavit setting out facts which he considers may be of assistance to the court. So long as such facts are stated colourlessly, no one could object, but if the affidavit should err plainly in support of one of the parties it might expose the adjudicator to the odium of the court.
>
> It is most undesirable that any arbiter or other adjudicator of a dispute should appear to be rendering assistance to one of the contestants to the dispute before him. For the other party is likely to gain the impression that the arbiter and his adversary are conspiring against him. And such an impression would reinforce his belief that the arbiter is biased against him. See the remarks of MCNALLY J in *Blue Ribbon Foods Ltd* v *Dube No & Anor*, 1993 (2) ZLR 146 (S) at 148.
>
> When the arbiter makes common cause with one of the parties in such proceedings
> any façade of justice is shattered; the arbiter is seen to have descended into the arena with the possible consequential blurring of his vision by the dust of battle. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation.
>
> The second choice of the arbitrator or umpire when served with notice of motion for his removal, or to set aside his award, is to take no action and abide by the court 's decision."

In this application, it is evident that the applicant did not afford the first respondent the option which the court enunciated in the *Leopard Rock* case. He compelled him to descend into the arena so that he remained clouded with the dust of his battle with the State. He blurred the

vision of the first respondent so that he would have sufficient material to criticize him as he did in his application for review.

It is pertinent to advise all those who are in the position of the applicant [i.e. appellants and applicants for review], to make every effort to cite relevant parties when they appeal or review decisions of the court *a quo*. They are exhorted to leave judicial officers out of the equation or to only cite those as a way of informing them that their decisions are being appealed or reviewed. Judicial officers are not, and will never be, substantive parties to proceedings which are being appealed or reviewed.

In *casu*, the applicant cited the wrong parties. That rendered his application fatally defective. It was incurably bad. It could not stand.

The application is, accordingly, dismissed with costs.

Rubaya & Chatambudza, applicant's legal practitioners
Civil Division of the Attorney General's Office, 2nd & 3rd respondents' legal practitioners