

REPORTABLE (6)

DOUGLAS SHUMBAYAONDA
v
**(1) MINISTRY OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS (2) M. RANGA, N.O.**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, FEBRUARY 4, & FEBRUARY 25, 2014**

T. Mpofu, for the appellant

C. Garisenheta, for the respondent

GARWE JA: This is an appeal against the decision of the Labour Court setting aside disciplinary proceedings conducted by a committee constituted by the respondents and directing that the matter be heard *de novo* before a different committee within thirty (30) days or such extended period as may, on good cause shown, be granted, failing which the appellant was to be reinstated without loss of salary and benefits.

The facts of this case are as follows. The appellant was employed by the respondent Ministry as a Public Prosecutor, stationed at Chinhoyi. Following a police trap, the appellant was found with a marked US\$200 note which had allegedly been handed to him by certain accused persons so that he could withdraw a criminal charge levelled against them. Following this development, the appellant was suspended from duty from 20 July, 2010 in terms of the Public Service Regulations, Statutory Instrument 1/2000 (“the Regulations”). The suspension was for a period of three (3) months, that is, until 20 October 2010. By 20 October 2010 the allegation of misconduct levelled against the appellant had not been heard

or determined. On 30 November 2010, well after the initial period of suspension had expired, the Public Service Commission, purporting to act in terms of s 49(3)(b)(ii) of the Regulations, extended the order of suspension for a further period of three months but back dated the commencement of such extension to 21 October 2010. This decision was communicated to the appellant on 8 December 2010. The disciplinary hearing eventually took place on 13 January 2011 following which the appellant was found guilty of soliciting for a bribe and getting a bribe and dismissed from the Public Service. Dissatisfied with the decision of the disciplinary committee the appellant filed an application for review.

In his submissions before the court *a quo* the appellant raised three issues. The first was that at the time the hearing took place the suspension order had lapsed and the attempt by the Public Service Commission to extend the order after it had expired did not validate such order. Therefore the proceedings that followed the irregular extension were a nullity. The second issue was that he had been denied the right to legal representation during the disciplinary hearing and thirdly that continuing with the proceedings in the absence of the appellant's counsel constituted bias. The appellant accordingly urged the court to set aside the proceedings and not remit the matter.

In very terse heads of argument filed in the court *a quo*, the respondents denied that the proceedings were invalid or that the appellant's rights to legal representation had been violated. The respondents also denied the suggestion that the disciplinary committee had exhibited bias towards the appellant.

In its judgment, the court *a quo* noted with some concern the lackadaisical attitude on the part of law officers from the Attorney General in general and their failure, in

this particular case, to file meaningful heads of argument dealing with the issues raised by the appellant in his heads of argument. The court therefore found that there had been no explanation by the respondents on how “something that was already dead was resuscitated”. The court also found that the full facts on the issue of legal representation had not been provided and that it was therefore unclear whether the appellant had been at fault. Lastly the court found the claim of bias to have been “misplaced”, based, as it was, on the allegation that the disciplinary committee had denied the appellant his request for a postponement so that his counsel could be in attendance. The court, whilst not making a definitive finding on the propriety or otherwise of the disciplinary proceedings, was of the view that the appellant could not avoid his dues because of the error of other employees, and relying on the decision of this court in *Air Zimbabwe (Pvt) Ltd vs Chiku Mnensa & Anor* SC 89/04, ordered that the proceedings (not just the suspension) be set aside and that a trial *de novo* takes place before a different committee constituted by the respondents. It is against that order that the appellant now appeals to this Court.

Although in his notice of appeal, the appellant raised three grounds of appeal, in his heads of argument and oral submissions before us, Mr *Mpofu* confined himself to two issues. These are, firstly, whether, after the appellant’s suspension had lapsed, it was competent for the respondents to continue with the disciplinary proceedings and secondly whether, in relying on the decision in *Air Zimbabwe (Pvt) Ltd v Chiku Mnensa & Anor* (supra) and thereafter remitting the matter for a rehearing, the court *a quo* erred in granting relief that had not been sought by either party and in respect of which neither party had been heard. Accordingly, this appeal will be confined to these two issues.

I turn to deal firstly with the order of suspension and whether the disciplinary proceedings that followed were a nullity.

The relevant provisions are to be found in ss 44, 45, 46, 48 and 49 of the Regulations. The sections provide, in the relevant portions, as follows:-

“44. Procedure before and immediately following allegation of misconduct.

- (1) Where a member is suspected of misconduct, the disciplinary authority shall conduct or cause to be conducted such investigations as may be necessary.
- (2) If, on completion of the investigations referred to in subsection (1), it is found that an allegation of misconduct should be preferred against the member, the disciplinary authority shall, within a reasonable time after the completion of the investigation-
 - (a) inform the member, in writing, of the nature of the allegation against him, and call upon him to submit a written reply to the allegation within fourteen days;
 - (b) where, possible, furnish to the member copies of any material documentary evidence, if any, relating to the allegation of misconduct, or afford the member an opportunity of having sight of any such evidence.
- (3) ...
- (4) ...
- (5) ...

45. Hearings before disciplinary committee

- (1) Within seven days of receiving the documents referred to in paragraph (d) of subsection (3) or paragraph (d) of subsection (4) of section 44, the disciplinary committee shall give not less than seven days' notice to the member concerned of the time, date and place of the hearing of the allegation of misconduct against him.
- (2) The hearing shall be conducted without the need to observe the rules of procedure and evidence ordinarily applicable in criminal or civil proceedings, provided, however, that the member concerned is afforded the opportunity to respond to every allegation of misconduct and that substantial justice is done.
- (3) ...
- (4) ...
- (5) ...
- (6) At the conclusion of the hearing or as soon thereafter as possible, the chairman of the disciplinary committee shall submit to the disciplinary authority-
 - (a) a notification in writing of its findings and recommendations thereon, including a recommendation as to the penalty to be

- imposed upon the member where it finds the member guilty of misconduct; and
- (b) the record of the evidence led at the hearing.

46. Determination of allegation of misconduct

- (1) on receiving the documents referred to in subsection (6) of section 45 the disciplinary authority may-
 - (a) ...
 - (b) proceed to determine whether or not the member concerned is guilty of misconduct as alleged.
- (2) ...
- (3) Where the disciplinary authority determines that a member is guilty of misconduct, the disciplinary authority shall-
 - (a) proceed to determine the penalty to be imposed upon the member; and
 - (b) notify the member ... of its determination and the penalty imposed upon the member; and
 - (c) take such consequential measures as may be necessary in the circumstances.
- (4) ...

47. Member convicted of a criminal offence

...

48. Imposition of suspension order

- (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 indecorous behaviour or further instances of misconduct; or
 - (b) seriously impair the proper administration of functioning of the Ministry or department concerned; or
 - (c) occasion prejudice to any moneys or property likely to be handled by the member in the course of his work; or
 - (d) enable the member to hinder or interfere with any investigation or evidence relating to any alleged misconduct; or
 - (e) be undesirable in the public interest or likely to lead to a loss of public confidence in the Public Service.
- (2) Where a suspension order is imposed upon a member-
 - (a) the order shall specify the reasons for such order, the period of suspension and, where possible, the nature of the allegations against the member;
 - (b) disciplinary procedures shall be instituted forthwith in terms of section 44 if they have not already been instituted.
- (3) ...

(4) ...

49. Effect and cancellation of suspension order

- (1) Where a member is suspended from service, he shall-
 - (a) not attend at his place of work or carry out any duty unless directed to do so by the disciplinary authority, in which case he shall carry out such duties as directed.
 - (b) not be entitled to his salary in respect of the period of suspension unless ordered to carry out other duties, in which case he shall continue to receive his salary.
- (2) ...
- (3) A suspension order-
 - (a) may be cancelled at any time by the disciplinary authority;
 - (b) shall be deemed to be cancelled-
 - (i) where the member is found not guilty of misconduct; or
 - (ii) after three months from the date of its imposition if the allegations has not been determined, unless the Commission directs that the order remain in force for such period as it shall specify by written notice to the member.
- (4) ...”

It is apparent, from the above provisions, that the law has prescribed different procedures for preferring charges and suspension from duty. Whilst an order of suspension can only be imposed on a member who is suspected of having committed a misconduct, it is not a requirement that such suspension must be imposed in all cases. Indeed s 48 itself provides that the disciplinary committee may, not must, suspend a member from service. Even then the powers to suspend are not without limitation. A suspension is only warranted in a situation where the continued presence at the workplace of a member is undesirable for the reasons given in s 48(1) of the Regulations. The corollary to this is that it is quite competent for a disciplinary authority to prefer charges of misconduct against a member without simultaneously suspending such member from work. In other words a charge of misconduct stands on its own although a suspension may be imposed taking into account the circumstances surrounding the allegation of misconduct. In the circumstances the submission

by Mr *Mpofu* that once a suspension falls away the entire proceedings also fall away cannot possibly be correct.

Section 49(3) of the Regulations must therefore be understood in this light. An order of suspension in the ordinary course results in the member not being entitled to his salary and prevented from attending at his workplace. It is an order that can have dire implications for the employee. It is for this reason that s 49 obliges the disciplinary authority to determine any allegations of misconduct levelled against a suspended employee within three (3) months from the date of its imposition and, where that does not happen, the order of suspension automatically falls away unless a directive is given by the Commission that it be extended for a further specified period. When the order of suspension falls away, only the suspension falls away, and not the charge that may have given rise to the order of suspension. Clearly the intention of Parliament was not to invalidate the charge giving rise to the suspension but rather the suspension itself. Had the intention been otherwise, s 49(3) would not have referred to a suspension order only but the entire disciplinary proceedings.

It follows from the above that the submission by Mr *Mpofu* that the proceedings in their entirety were deemed to have been cancelled after a period of three (3) months from the date of suspension cannot be correct. To the contrary I am inclined to accept the submission by the respondents that a suspension is not a prerequisite to the holding of disciplinary proceedings and that a disciplinary hearing does not have to take place during the period of suspension. I further accept the respondents' submission that the fact that a suspension has expired cannot prevent the holding of disciplinary proceedings. In this case it is clear that the suspension had expired and that the attempt to extend it by the Commission was null and void as it was executed well after the initial order of suspension had terminated.

At that stage the suspension had been terminated by operation of law. There was therefore no suspension that the Commission could have extended on 30 November 2010.

The fact that the Regulations do not provide any time limits within which an allegation of misconduct must be determined does not mean the State has an unlimited time frame to conclude disciplinary hearings. Any right the State would have to prefer charges of misconduct is subject to s 69 of the new Constitution which provides that every person has the right to a fair, speedy and public hearing within a reasonable time.

The case of *Mugwebi v Seed Co. Ltd & Anor* 2000 (1) ZLR 93(S), heavily relied upon by Mr *Mpofu*, is clearly not applicable to the facts of this case. In the *Mugwebi* case it was held that the suspension of the employee and the subsequent proceedings were null and void. There were two reasons for that finding. In the first instance the employee had been suspended by a marketing manager and not a designated officer in clear breach of the provisions of the Code of Conduct which stipulated that only the designated officer had the power to suspend an employee. Secondly, in the event that the offence warranted dismissal, the designated officer was required to suspend the employee with or without pay, pending his decision on the matter. In other words, once the designated officer preferred a charge warranting dismissal if proved, he had no discretion but to suspend the employee and thereafter to give a decision within fourteen (14) days of receipt of such case.

The facts of this case are different. The Regulations clearly empower the disciplinary authority to not only prefer charges of misconduct but also decide whether a suspension order should be made, the two being separate though related exercises.

The order by the court *a quo* that the entire proceedings be set aside was therefore irregular. It was the suspension that was in issue and the court should have confined itself to setting aside only the suspension. It set aside the disciplinary proceedings in circumstances where it was not empowered to do so. In the exercise of the review powers of this Court, the decision of the court *a quo* must be corrected to make it clear that it was the order of suspension which terminated by operation of s 49(3) of the Regulations.

The second issue that arises in this appeal is whether, in the light of the above finding, the order remitting the matter for a rehearing should stand. In this regard it is important to note that the proceedings continued at the conclusion of which the appellant was found guilty of misconduct and was dismissed. Having found, as this Court has done, that the disciplinary authority had the power to continue hearing the matter notwithstanding the fact that the suspension had terminated, and the decision on the merits not being an issue before this Court, it follows that, in these circumstances, the order remitting the matter for a hearing *de novo* was improper and must also be set aside. The question whether the court *a quo* should have heard the parties on the issue of remittal consequently no longer arises.

On the issue of costs, Mr *Mpofu* advised the court that he is appearing *pro amico* for the appellant and that, in the event the appellant succeeds on appeal, no order of costs is sought. The respondents on the other hand have prayed that the appeal be dismissed with costs. As neither party has been more successful than the other, it seems to me that the most appropriate order in the circumstances would be that there be no order as to costs.

In the result, the following order is made;

1. The judgment of the court *a quo* is set aside and in its place the following is substituted:-

- “1. The order of suspension imposed by the Commission on 30 November 2010 is hereby set aside.
2. For the avoidance of doubt the order of suspension imposed on the applicant on 20 July 2010 terminated on 20 October 2010.
3. The application for review is otherwise dismissed with costs.”

2. There will be no order as to costs.

ZIYAMBI JA:

I agree

HLATSHWAYO JA:

I agree

Mushonga, Mutsvairo and Associates, appellant’s legal practitioners

Attorney-General’s Office, respondent’s legal practitioners