Judgment No. HB 56/2003
Case No. HC 2112/2002

DENFORD CHIPUNZA

Versus

NATIONAL SOCIAL SECURITY AUTHORITY

And

THE CHAIRPERSON, NATIONAL SOCIAL SECURITY AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 28 FEBRUARY & 24 APRIL 2003

C Moyo for the applicant
I Chagonda for the respondents

Application for Review

CHEDA J: On 23 August 2002 applicant filed an application for review which was opposed on 26 September 2002. The following relief was sought:-

"It is ordered that:

1. Both the decisions of the Disciplinary Committee and the Appeals Hearing Committee be and are hereby set-aside.
2. The applicant be and is hereby re-instated into the employ of NSSA without any loss of benefits.
3. 1st respondent pay the costs of this suit."

Applicant is the employee of the 1st respondent a statutory body operating under the laws of Zimbabwe. Second respondent is the Chairperson of the 1st respondent's Appeals Committee. Applicant brings this matter on review for an order setting aside the decision by the 2nd respondent dismissing him from employment of 1st respondent. The allegations against him are that on 6 March 2002 applicant breached certain sections of the registered code of conduct by inviting other employees to participate on an unlawful collective job action.

During the relevant period he was the Chairperson of the Workers' Committee. A hearing was conducted on 2 April 2002 before a Disciplinary Hearing Committee of 1st respondent which was chaired by Mr Bhebhe who was the only witness. A decision to dismiss applicant was reached and was therefore dismissed on the basis that he was involved in an illegal industrial action. He was aggrieved by this decision and appealed to the Appeals Committee in terms of the code of conduct.

The appeal was heard and their decision which dismissed his appeal was made on 14 June 2002 and he was notified of the said decision on 24 July 2002. He then filed this application for review on 23 August 2002. His grounds for review are that:

1. there was lack of quorum at the appeals hearing; and
2. the decision of the Appeals Committee was based on the inaccurate minutes.

Mr Chagonda for respondents attached this application on the basis that:

1. the review proceedings did not comply with order 33 of the High Court rules.
2. The grounds for review stated by applicant are not proper grounds for review in terms of the High Court Act except for one ground which refers to bias.
3. There was a proper quorum.
4. Applicant should have exhausted all the domestic remedies before approaching this court.

Mr Chagonda raised a point *in limine* being that this application was made out of time as it should have been made within 8 weeks. The question is whether it is 8 weeks from the date of the hearing of the Disciplinary Hearing Committee or that of the Appeals Committee.

I find that this application pertains to the decision of the Appeals Committee which was held on 14 June 2002 and applicant had knowledge of it on 24 July 2002. There is no evidence that applicant had knowledge of the Appeal Committee's

decision prior to that date. I therefore find that the application was made within the period of 8 weeks.

Mr Chagonda further argued that applicant should not have brought this matter to this court before exhausting all the domestic remedies available to him. He further argued that applicant should have taken his grievances further by noting an appeal with the Labour Relations Tribunal.

This position is in fact the correct legal position. However, this is a general rule whose exception is that a litigant can only depart from this procedure unless there are good and sufficient reasons for doing so. This indeed is the legal position. See *Girjac Services P/L* v *Mudzingwa* 1999(1) ZLR 243 (5); *Tutani* v *Min of Labour & Ors* 1987 (2) ZLR 88 (H) at 95 D; *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191 D-192 B which I fully associate myself.

It should however be observed that this matter is about review proceedings, more particularly whether or not this court should exercise its inherent jurisdiction to hear a matter where domestic remedies have not been exhausted. The discretion which this court has must of course be exercised judicially. In *Chikange and another* v *Peterhouse* 1999 (2) ZLR 329 (S) the Supreme Court quoting with approval *Girjac Services P/L supra* confirmed the correct legal position that domestic tribunals should not be by-passed without good reason. My understanding of this approach, if I am correct, is that the court's jurisdiction is not ousted simply on the basis that the code of conduct which provides certain procedures which an aggrieved party should follow before approaching the courts is not followed. Not only, does a code of conduct lack such power but the legislative power as well, see *Goluba* v *Oosthuizen and another*

1955 (3) SA 1 and *Msomi* v *Abrahams and Ano* 1981 (2) SA 256 at 261 A where PAGE J remarked –

> "The mere fact that a statute provides extra-judicial remedy in the form of a domestic appeal or similar mechanism which would afford the aggrieved party adequate relief does not give rise to such a necessary implication; in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for review by the courts. Bearing in mind that there is always a presumption against a statute being construed so as to oust the jurisdiction of the court completely – see Main Line Transport v Durban Local Road Transportation Board (1) SA 65 (D) at 73H."

In the present case the code of conduct gives the aggrieved party channels to be followed in respect of an appeal and not review. These proceedings are for review. What I should look at is whether or not there are any grounds for review. *Mr Chagonda* attacked applicant's grounds for review as being not proper grounds except for only two being bias and irregularities.

At the Disciplinary Committee hearing Mr Bhebhe was the only witness and was thus an interested party. It is this hearing which produced minutes which turned out not to have been a true reflection of the proceedings. The fact that the minutes were clearly doctored, coupled with the fact that Mr Bhebhe was the only witness, is in my view an indication that the Disciplinary Hearing Committee was biased against applicant. Members of the Disciplinary Hearing Committee endorsed on the minutes certain remarks which remarks are a clear disapproval of what is supposed to have taken place but their concerns seem to have been ignored by this committee as they proceeded to use them at the Appeals Committee hearing. This should not have been done bearing in mind that the minutes of this hearing were pregnant with serious material errors and as such could not possibly be passed as a true record of proceedings of that meeting.

Second respondent's letter clearly shows a pre-disposition against applicant this is buttressed by the fact that Mr Bhebhe had an interest in the matter. Most importantly the fact that the respondents based their allegations against applicant on what they termed an unlawful meeting – which meeting had in fact been authorised speaks volumes of double standards which were being applied by respondents.

A past relationship with the affected individual particularly where such relationship has been sour has to be viewed with suspicion more so if the party to that relationship is the sole witness. In the present case the minutes do not present a true picture of what took place hence queries were being raised regarding the authenticity of such minutes. In *Leopard Rock Hotel Co. P/L and another* v *Walenn Construction P/L* 1994 (1) ZLR 255 (5) at 270B-C KORSAH JA quoted Russell on *Arbitration* 12Ed at page 110 wherein the learned author stated:

> "There is universal agreement among jurists of all countries that it is of first importance that judicial tribunals should be honest, impartial and disinterested … As a practical matter, interest is the most important case, and as interest is always a question of fact usually determined on a sound basis of common sense, precedents are not of great assistance …"

I fully endorse these sentiments. The question which ought to be asked is did applicant have reasonable fear that the people he was appearing before where biased against him? I find that he had. Mr Bhebhe indeed had an interest in the matter at hand, but that alone is not enough to warrant his disqualification but it cannot be wholly ignored. This fact in my view must be viewed in totality with other relevant factors if any. In the present case, the factor which sticks out like a sore thumb is that other members of the disciplinary hearing raised concerns about the minutes but their concerns seem to have fallen on deaf ears. In light of the facts before this court I can safely say that applicant indeed had reasonable apprehension about the attitude of

committee members before whom he was appearing. There was indeed an anomally. Despite this anomaly, 2nd respondent ignored these sentiments pretending that all was above board. As these facts are before the court, they cannot be ignored at all as they are necessary in the determination of this matter.

In view of this, I find that applicant had a good reason why he by-passed the Labour Relations Tribunal because both the Disciplinary Hearing and Appeals Committee reveal bias and irregularities which can not be left as they are as they will result in unfairness to applicant.

Again as pointed out above the legislature or code of conduct does not oust the jurisdiction of this court and this court has an inherent discretion to review this matter.

In light of the above it is ordered as follows:

1. Both the decisions of the Disciplinary Committee and Appeals Hearing Committee be and are hereby set aside.
2. The applicant be and is hereby re-instated into the employ of National Social Security Authority without any loss of benefits.
3. First respondent pay the costs of this suit.

Messrs Majoko & Majoko applicant's legal practitioners
Atherstone & Cook respondent's legal practitioners