HB 241/16
HC 3416/12
X REF HC 3431/12

FRANCIS MOYO

Versus

COMMISSIONER GENERAL OF POLICE N.O.

And

SUPERITENDENT NYAMAROPA N.O.

And

CO-MINISTER OF HOME AFFAIRS N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 3 JUNE & 29 SEPTEMBER 2016

Opposed Application

B. Sengweni for the applicant
L. Musika for the respondents

TAKUVA J: This is an application for review in which the grounds have not been put in a concise and precise manner. The order sought is couched as follows:

> "1. That the proceedings of the trial held up to the 23rd of March 2012 by the 2nd respondent subsequently confirmed by the 1s respondent be and are hereby set aside.
> 2. That the confirmation by the 1st respondent of the decision initially made by his single officer be set aside.
> 3. That the convening of the Board of Inquiry (suitability) by the 1st respondent against applicant before finalisation of this review application be deemed unlawful.
> 4. The conviction of applicant under paragraphs 27, 35 and 34 of the schedule to the Police Act Chapter 11:10 be and is hereby quashed."

The facts are that the applicant is a constable in the Zimbabwe Republic Police. He appeared before a police disciplinary trial facing three counts of contravening paragraphs 27, 34 and 35 of the Schedule to the Police Act. In count 1, he was alleged to have solicited or accepted

a bribe. Count 2 relates to an allegation that he acted in an unbecoming or disorderly manner and in count 3 the averment was that applicant omitted or neglected to perform any duty or performed a duty in an improper manner. The detailed facts of what applicant is alleged to have done are not relevant for purposes of this application, suffice to state that at the end of the trial on 28 February 2012 applicant was found guilty in respect of the 3 counts. He was dissatisfied and informed the trial officer that he intended to note on appeal to the 1st respondent.

Applicant requested for a record of proceedings to enable him to prepare grounds of appeal. Instead of furnishing this record, the 2nd respondent refused to grant applicant access to the record and ordered applicant's immediate detention at Mkwasine Police Station. The following day, applicant was on 2nd respondent's instructions whisked away to ZRP Fairbridge where he commenced serving the 14 days imprisonment. Meanwhile applicant's legal practitioner filed a notice of appeal without perusing the record of proceedings. He subsequently filed an urgent chamber application under cover of case number HC 5404/12 for applicant's release since he had filed this notice of appeal within the stipulated 7 days. The order was granted and he was released after serving a term of 6 days imprisonment.

Applicant's erstwhile legal practitioners addressed a letter to the 2nd respondent on the 26th March 2012. The full letter reads as follows:

> "… We have been instructed to act on behalf of Cst Moyo. Please note our interest. We write to advise that we have been instructed to follow the matter up and make an appeal on his behalf. In fact we have been advised that a notice of appeal was given soon after trial. We kindly advise that we are here to file the notice and grounds of appeal.
>
> However to enable us to file comprehensive grounds of appeal to the Commissioner General and review proceedings in the High Court we require a record of proceedings. To achieve this end we kindly request your good officers to furnish us with the record of proceedings timeously so that we deliver the grounds before the expiration of seven days.
>
> Please note that this is the right of a member to have a copy of record of proceedings so that he prepares his appeal and review proceedings thoroughly and to test the correctness of the procedure adopted.

The appeal is against both conviction and sentence."

The 2nd respondent's reply is in the following terms:

"1. …
2. We received your correspondence pertaining your appointment by above member to represent him in lodging an appeal against both conviction and sentence, to the Commissioner General of Police.
3. Be advised that the record of proceedings will not be released to you are this is an internal disciplinary matter.
4. The appellant will assist you with his notes of the trial as he was in attendance throughout the proceedings …" (my emphasis)

The letter is dated 2 April 2012 and signed by the 2nd respondent. Upon receipt of the letter applicant's legal practitioners took the matter to the 1st respondent by letter dated 15th May 2012. The letter states:

> "Please find enclosed herein notice and grounds of appeal in the matter that were filed and issued by the Chiredzi District Clerk on 29 March 2012 who promised to transmit same to the Headquarters. Further, take notice that we requested a record of proceedings from the District Clerk and the trial officer Superintendent Nyamaropa who refused with it on wrong legal conception as his letter to us depicts.
>
> We would like to advise that we do not want to proceed in the manner we did in the Sgt Largest Tsumba against Dispol Mbare District." (my emphasis)

The first respondent did not reply but proceeded to dismiss the appeal on a technicality on 28 August 2012. Aggrieved, applicant filed this application on the 5th of October 2012 on a litany of grounds, the bulk of which are irrelevant and inappropriate in an application for review. His legal practitioner properly conceded that the only valid ground is the denial of access to the record of proceedings by the 2nd respondent. He amended the prayer to align it to the sole ground for review.

The issue *in casu* is whether or not the *audi alterum partem* principle was adhered to. Put differently, did 2nd respondent's refusal to supply applicant with the record of proceedings

amount to a violation of applicant's right to procedural fairness? What is procedurally fair must be determined in the light of the whole of the circumstances.

The *audi* principle was described by MILNE JA in the *South African Roads Board* v *Johannesburg City Council* SA 1 (A) as being;

> "… a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary."

It should be noted that the duty to act fairly, however, is concerned only with the manner in which decisions are taken; it does not relate to whether the decision itself is fair or not. What the duty to act fairly demands of the public official or body concerned was succinctly stated by LORD MUSTIL in *Doodly* v *Secretary of State for the Home Department and Other Appeals* [1993] 3 ALLER 92 (HL) as follows:

> "What does fairness require in the present case? My Lords, I think it is unnecessary to refer by name or to quote from, any of the often cited authorities which the courts have explained what is essentially an intuitive judgment. They are far too well known. From this, I derive the following.
>
> (1) Where an act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
> (2) The standards of fairness are not immutable. They may change with the passage of time both in the general and in their application to decisions of a particular type.
> (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.
> (4) An essential feature of the context is the statute which creates the discretion as regards both its language and the shape of the legal and administrative system within which the decision is taken.
> (5) Fairness will very often require that a person who may be adversely affected by the decision <u>will have an opportunity to make representations</u> on his own behalf either before the decision is taken with a view to producing a favourable result, <u>or after it is taken, with a view to procuring its modification, or both.</u>

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he be informed of the gist of the case which he has to answer." (my emphasis)

In *Rwodzi* v *Chegutu Municipality* HH-86-03, MAVHANGIRA J (as she then was) stated one of the minimum requirements of a fair hearing as;

"… the employee is entitled to be informed of the reasons for a decision". (my emphasis)

Also, in terms of section 35 (1) of the Police Act Chapter 11:10, the proceedings must be as close as possible to those in the Magistrates' Court. The section states;

"35 (1) The proceedings before or at any trial by a board of officials or an officer in terms of this Act, shall as near as may be, be the same as those prescribed for criminal cases in the court of Zimbabwe."

In the Magistrates' Courts accused persons are not denied access to court records where they will be applying for review or appealing. Quite evidently, the denial of access to the record of proceedings by 2nd respondent violates section 35 (1) of the Police Act. Such violation amounts to a gross irregularity in the proceedings. In this regard I associate myself with SMALBERGER JA's remarks in *Administrator Transvaal, Ors* v *Theletsane and Ors* 1991 (2) SA 192 (A) at 206C – D. The learned judge of appeal stated that;

"What the *audi* rule calls for is a fair hearing. Fairness is often an elusive concept; to determine its existence within a given act or set of circumstances is not always an easy task. No specific all encompassing test can be laid down for determining whether a hearing is fair – everything will depend upon the circumstances of the particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair; there must be notice of the contemplated action and a proper opportunity to be heard". (my emphasis)

In casu, it cannot be said that the 1st and 2nd respondents allowed the applicant the right to be heard fairly. The 1st respondent was notified of the irregularity prior to the determination of the appeal but did not rectify the anomaly. As regards the 2nd respondent, he specifically

declined to give applicant the record of proceedings. This is common cause. It goes without saying that 1st respondent as the Commander of the Police Service is duty bound to ensure that rights of all members are protected. Whenever it appears that these rights are infringed, he should take corrective measures to rectify the anomaly. The 1st respondent was supposed to direct the 2nd respondent to serve the applicant with a copy of the record of proceedings. Instead, he dismissed the appeal despite that he was aware applicant had not had sight of the record of proceedings.

In my view, 2nd respondent by denying applicant the record of proceedings, and 1st respondent by omitting to direct that the applicant be served with the record of proceedings, suffocated the applicant's right to be heard. The applicant was not afforded adequate facilities by the 2nd respondent. Consequently, it cannot be denied that the applicant was fighting against the State which had access to the record which he did not have. It follows therefore that the State was more equipped than the applicant.

It was contended by applicant's legal practitioner that proceedings before the 2nd respondent should be set aside because the 2nd respondent was clearly biased against the applicant. I do not agree for the simple reason that the bias manifested itself after conviction. However, the same cannot be said about proceedings before the 1st respondent in that these proceedings were tainted by the apparent irregularity.

As regards costs, *Mr Sengweni* urged me to make a finding that 2nd respondent acted out of malice and therefore grant an order of costs against him on attorney and client scale. I am not persuaded by this argument for the reason that from the record, it appears that 2nd respondent acted out of ignorance. I say so because if he knew of the correct position of the law, he would not have displayed his ignorance in writing. However, I should sound a warning to trial officers that they should seek proper legal advice from their legal division when in doubt. Failure to conduct proceedings in a procedurally fair and reasonable manner might expose them to an order of costs especially where there is malice.

For these reasons, I make the following order;

(1) The decision of the 1st respondent be and is hereby set aside;
(2) The respondents be and are hereby ordered to serve applicant with the record of proceedings within 14 days of the granting of this order;
(3) The applicant be and is hereby ordered to file a notice of appeal and grounds thereof within 14 days of receipt of the record of proceedings;
(4) The convening of a board of inquiry be and is hereby stayed until the determination of the appeal by the 1st respondent;
(5) Each party to bear its own costs.

Sengweni Legal Practice, applicant's legal practitioners
Prosecutor General's Office, respondents' legal practitioners