

HC 6072/01
CLEVER TSIKWA
and
CRISPEN BEREWERE
and
MILTON SERIMA
and
WALTER CHIKWANHA
versus
PUBLIC SERVICE COMMISSION
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
DIRECTOR SALARY SERVICE BUREAU

Opposed Application

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 17 October, 2001 and 23 January, 2002

CHINHENGO J: The applicants are all judicial officers in the Public Service of Zimbabwe. They have brought the same case to this Court. They also seek the same relief. The respondents are the applicants' employer, the Public Service Commission ("PSC"), the Minister of Justice LPA ("the Minister") and the Director of the Salary Service Bureau ("SSB").

The applicants were employed by the PSC as magisterial assistants from about 3 February 1997. On or about 15 December 1997 they took the oath of office of magistrate which is prescribed by Section 9 of the Magistrates Court Act Cap 7:10 ("the Act"). Upon taking the oath of office of magistrate they commenced to perform all the duties and functions of magistrates as provided in the Act. To become a magistrate a person must be qualified to hold that public office. He may have obtained a law degree or he may have undergone and passed a magisterial training course conducted by the Judicial College of Zimbabwe. The entry qualifications are different and the PSC has recognised that difference by paying those magistrates who hold a law degree more than those who were appointed by virtue of having completed the training course conducted by the Judicial College of Zimbabwe. Before a person is appointed to the office of magistrate he or she may be appointed to the office of magisterial assistant as a first step. An appointment as a magisterial assistant does not entitle the holder of that position to perform the duties of a magistrate. The remuneration paid by the PSC to a magisterial assistant is lower than that paid to a magistrate.

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The applicants' remuneration was not altered or adjusted or increased upon their taking office as magistrates. They continued to receive the remuneration paid to them as magisterial assistants.

The PSC has in place certain regulations on the Appointment, Performance, Advancement, Regrading, Promotion and Training Procedures of Magistrates and Law Officers. They are contained in a document REF/B/C/12/97 issued by the PSC and attached to the founding affidavit as Annexure "A" (hereinafter called "the regulations".) It is important to understand what these regulations provide in respect of magistrates. In part A of the regulations, it is provided that -

"All appointments to entry level posts throughout the Service shall be approved by the Head of Ministry who may delegate his/her authority to Heads of Department, and copies of documents of all such appointments submitted to the Public Service Commission for records. All appointments to the service shall be effective with approved candidates listed from the employment registers compiled by the Public Service Commission".

It seems to me that the appointment of a person to the entry level post is made either by the Head of Ministry or by the Head of Department and submitted to the PSC. The appointment becomes effective only upon the appointee's name being listed in an employment register maintained by the PSC. The entry level post for a magistrate is that of magisterial assistant. In certain instances the person may be directly appointed as a magistrate without having been appointed as a magisterial assistant. The regulations provides for a first performance based advancement through various grades or levels in the magistracy. From the entry level position of magisterial assistant an appointee will, on meeting certain criteria be advanced to the grade of magistrate, senior magistrate, provincial magistrate and regional magistrate. The criteria stipulated in the regulation are that -

- "(i) has completed three (3) years in the service in the case of a non-degreed magisterial assistant and two years in the service in the case of a graduate appointed without a Masters' degree or one year in the case of a graduate with a Masters' degree or an LLB degree.
- (ii) has shown exceptional work performance i.e. rating 4 or 5 consecutively in two years.

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- (iii) (not relevant)
- (iv) is recommended for performance advancement by the Ministerial Performance Management Board..."

Within the magisterial grade, an appointee may be advanced to a higher grade which will entitle him or her to receive a higher remuneration as a magistrate.

The regulations also set the criteria for advancement to the higher grades in the magistracy i.e. the grades of senior, provincial and regional magistrate.

After their appointment to hold the office of magistrate, the applicants' remuneration was not increased to reflect that they were no longer magisterial assistants but actual magistrates. They were also not advanced through the same grade of magisterial assistants so as to become entitled to a higher salary. It does not appear that the regulations make any provision for advancement with the grade of magisterial assistant but such advancement would seem to take place on the basis of length of service.

In May 2000 the PSC suspended all advancements within the Public Service. This suspension also affected the applicants so that despite there having become eligible for advancement, it was no longer possible for them to be advanced.

In this application the applicants contend that they should have been paid the salary of a magistrate from the time that they took the oath of office of magistrate and that they should not have continued to receive, as they did, the salary paid to them, as magisterial assistants. They also contend that the suspension of all advancements in the Public Service should not have affected them because when the suspension came into effect in May 2000, they had become due for advancement in February 2000 and they had in fact been recommended for advancement. They contend that the suspension should not have operated retrospectively so as to stop their advancement. These are the reasons for which the applicants seek the order that the regulations be set aside as being *ultra vires* the Act, that it be declared that the applicants become magistrates and therefore entitled to the salary and all the benefits of that office as from the date on which they took the oath of office. In the alternative they sought an order that it be declared that the suspension of all advancement operated prospectively only with the result that the applicants became magistrates from February or March as the case may be. The alternative relief fell away because at the hearing of this matter, the applicants were advanced to the grade of magistrate with effect from the dates which they had stipulated in the relief they sought in the alternative. The issue for determination in this application is two fold - whether the applicants became magistrates from the date on which they took the oath of office and whether they became entitled as from that date to the salary and benefits payable to magistrates.

The PSC and the Minister took seemingly divergent positions in this matter. In an affidavit deposed to by the Chairman of the PSC Mr Nzuwah, the PSC professed

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ignorance about the applicants employment and about the fact that the applicants took the oath of office of magistrate on 15 December 1997. This was rather surprising because the PSC is the employer. Mr Nzuwah went further to state that as far as the PSC was concerned -

"The applicants were not appointed as magistrates in terms of the relevant regulations cited in paragraph 9 of applicant one's founding affidavit. Such appointments therefore are null and void."

The Minister on the other hand admitted that the applicants were employees of the PSC.

The PSC and the Minister both contended that the applicants could only become magistrates after completing three years in the service as magisterial assistants as provided in the regulations. The Minister was much more explicit in this regard. He stated in paragraph 6 of his affidavit that -

"...it is denied that taking an oath confers magisterial status on Magisterial Assistants. The oath confers power on Applicants and others in their category to sit on the bench, preside over cases - civil and criminal - and perform other functions which relate to the oath they will have taken. The oath enables those in authority over applicants and others in their category, to properly assess the suitability of Applicants and their counterparts, for advancement to the grade of magistrate".

In so far as the Minister was concerned the oath which the applicants took enabled them to sit on the bench and try cases in order for them to be assessed for the purpose of being advanced to the grade of magistrate and as such their status remained unaltered particularly in respect of their salary and other conditions of service.

The crisp question for determination would appear to be whether a person becomes a magistrate by virtue of an appointment by the PSC as such or by virtue of having taken the oath of office of magistrate. The Act in s 2, defines a "magistrate" as -

"any person who has been appointed to hold magisterial office in terms of this Act".

Section 7(1) of the Act provides that -

"Subject to subsection (40 of section 75 of the Constitution, the Public

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Service Commission may appoint any person to hold magisterial office".

The Act makes further relevant provisions in respect of magistrates. In terms of s 7(2) of the Act the PSC is empowered to appoint from persons holding magisterial office persons to be senior magistrates and s 7(3) provides for the appointment from the ranks of senior magistrates, persons to hold the office of Chief Magistrate, deputy Chief Magistrate, regional magistrate and provincial magistrate.

Section 8(3) of the Act provides that a magistrate may exercise the powers and jurisdiction conferred upon him by the Act or by an other enactment in any province. The jurisdiction of a magistrate's court is prescribed in Part II (civil jurisdiction) and in Part IV (criminal jurisdiction).

Section 9 of the Act provides that -

"A magistrate on appointment in terms of subsection (1) of section seven should, before exercising any of the functions of his office, in open court take the following oath...".

It seems to me that the scheme under the Act is that for any person to hold the office of magistrate he has to satisfy two things. First he has to be appointed by the PSC in terms of s 7(1) of the Act. Second he has to take the oath of office required and prescribed by s 9 of the Act.

The word "appoint" was interpreted in *Gohlke * Schneider v Westies Minerale BPK 1970 (2) SA 685 (A)* at 690 B-D where TROLLIP JA said -

"According to the Oxford English Dictionary the meaning of "appoint" in the sense relevant here is 'to determine authoritatively, prescribe, decree, ordain' and specially in regard to office 'to ordain or nominate a person to an office... (or) to be an official'. In that context 'nominate', I think, means 'to appoint (a person) by name to hold some office or discharge some duty' rather than 'to propose, or formally enter, (one) as a proper person or candidate for election' which is also given another meaning of 'nominate' in that Dictionary. The Standard Dictionary, too, defines 'appoint' as 'to designate, fix upon or select as being the person or subject for some position, object or the like : as to appoint to postmaster'. Thus in my view, the ordinary meaning of 'appoint a director' is not merely to nominate or propose a person for appointment as a director but to effect his appointment as such".

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I accept the meaning ascribed to the word "appoint" in the case I have just cited. When the PSC appoints a magistrate it is not merely proposing the appointee for appointment but it, in effect, appoints such person as a magistrate. The power to appoint a magistrate is clearly reposed in the PSC. The PSV may in terms of s 27(1) of the Public Service Act Cap delegate any of its functions. In respect of magistrates the PSC delegated the function of appointment to the Head of Ministry as provided in the regulations the relevant part of which I have quoted earlier in this judgment. The two stages to becoming a magistrate are therefore (i) appointment by the PSC or a delegated authority and (ii) the taking of the oath of office of magistrate.

A magistrate is appointed to preside over a court of a magistrate (s 6 of the Act) and his powers and jurisdiction are prescribed by the Act. I do not think that it is possible, let alone desirable that any person may take the oath of office of a magistrate, preside over a court of a magistrate and exercise the powers and jurisdiction conferred on him by the Act without being duly appointed as such. In my view the applicants were appointed as magistrates and hence they took the magisterial oath of office. From what I have said hereinbefore they were appointed by the Head of Ministry, as authorised and provided in the regulations and they then took the oath of office. They were magistrates as defined in the Act from the date on which they took the oath.

The determination that the applicants were duly appointed as magistrates and become such upon taking the oath does not, in my view, resolve the question of the remuneration they were entitled to receive. There is, as I have already observed, only one ground for differentiating on their appointment the remuneration payable to magistrates in terms of the regulations. It is whether the person holds a law degree or he has passed the magisterial training course only. If he falls in the latter category he becomes entitled to a lower salary than a person who falls in the former category. His remuneration cannot, even under the regulations be the same as that of a magisterial assistant. As at 1 July 1998 the salary scale for a magisterial assistant was -

"\$74 460 x \$1 920 to \$78 300 x \$1 896 to \$83 988 x \$2 376 to \$88 740 *per annum*".

Whilst that of a magistrate was -

"\$91 128 x \$2 388 to \$93 516 x \$936 to \$94 452 x \$3 312 to \$104 388 *per annum*".

This meant that a person appointed as a magisterial assistant would receive the remuneration specified for that office during the three years period before appointment as a magistrate. On appointment as a magistrate he would be entitled

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to receive the salary specified for that office the minimum or starting remuneration being \$91 128 *per annum* as at 1 July 1998. The performance of judicial functions as a magistrate is such an important task that the person who performs it cannot do so unless he is duly appointed as such. His duties, powers and jurisdiction are clearly and specifically spelt out in the Act. The could not have been left to conjecture. Parliament was careful to provide in legislation the magistrate's duties, functions and jurisdiction. It could never have been in Parliament's contemplation that the Ministry of Justice, Legal & Parliamentary Affairs could administer the oath of office any person other than a person who was duly appointed as such. I have not been able to establish exactly how the applicants' predicament arose or what the Ministry's reasons were for failing to ensure that the applicants were correctly remunerated. I do not see any divergence between the regulations and the Act. The regulations provide for the appointment of a person to the post of magisterial assistant. A magisterial assistant in the position in which the applicants were, being non-degreed, remains in that position for three years but would during that period be entitled subject to the criteria set by the PSC, to salary advancements through the scales I have already noted. A degreed magisterial assistant who does not possess a Masters' degree or an LLB degree remains a magisterial assistant for 2 years.

It seems to me that the Minister (in reality the Head of Ministry) acted precipitously and appointed the applicants to the post of magistrate to which they would have been appointed only after completing three years as magisterial assistants. In terms of the regulations the Head of Ministry may approve the direct appointment of persons to the grade of magistrate (see Part A (b) to (c) at p. 8 of the papers). From the action of the Ministry it may be inferred that the applicants' appointment were a kind of direct appointment to the office of magistrate.

I do not believe that there is any conflict between the regulations and the Act. I believe on the contrary that there was a confusion in the first respondent's Ministry. There was a complete failure to understand or appreciate the provisions of the regulations. If the Ministry had wanted time to assess the suitability of the applicants for appointment as magistrates, it only needed to have wanted for three years before requiring the applicants to perform the functions of a magistrate. The regulations to my mind are not in disharmony with the Act. It is there implementation which brought about what would now appear to be a disharmony between the Act and the regulations. The fault lies entirely with the Minister's officials, in particular the Head of Ministry who failed to implement the regulations according to their intentment. I would not find that the regulations are *ultra vires* the Act or that they should be set aside but I would find that the applicants are entitled to the relief prayed for in paragraph (b) to (e) of the draft order.

I must point out that in my view this application is really concerned with the principle of equal pay for like work. I have already mentioned that s 6 of the Act provides that every court of a magistrate shall be presided over by a magistrate. The powers, duties and jurisdiction of a magistrate are clearly spelt out in the Act. There must be a minimum remuneration for a person who is appointed to hold the responsibilities of a magistrate. That remuneration as at 1 July 1998 was \$91 128 *per annum*. This was therefore the basic pay for a magistrate. The regulations

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prescribed the salary bracket for a magistrate. The only differentiation, which is reasonable in all the circumstances is that based on qualifications.

A non-degreed magistrate may, subject to a minimum scale of salary for all magistrates, be paid a lower salary than that of a degreed magistrate or a magistrate with a higher qualification. The like work concept which requires that person who do like work should be paid the same focuses on the make up of the job whilst the differentiation I have alluded to is based on the concept of genuine material differences of the persons appointed as magistrates. LAWTON LJ in *Clay Cross (Quarry Services) Ltd v Fletcher* [1979] 1 CR 1 at 9 (reported in Bowers on Employment Law at p 70-71 said of the concept of genuine material difference -

"---(it) embraces what appertains to her in her job, such as the qualifications she brought to it, the length of time she has been in it, the skill she has acquired, the responsibilities she has undertaken, and where and under what conditions she has to do it".

To me this principle provides the only basis in the circumstances of this case to differentiate the salaries payable to magistrates.

It would appear therefore that the person solely responsible for the failure to pay the magistrate what was due to them is the second respondent's Ministry. The PSC regulations were quite in order. For reasons only known to the second respondent's Ministry, the applicants were appointed as magistrates before they had been in the service of the State for three years as stipulated in the regulations. The reasons could have had something to do with a shortage of magisterial staff or with the appointees; clear suitability for appointment. But since they were appointed they became entitled to the remuneration that was paid to the magistrates subject only to the application of the principle of genuine material differences between person appointed to hold that public office. My order of costs will reflect my finding that the Minister or his officials were solely responsible for the confusion which arose and resulted in this suit.

It is therefore ordered that -

1. The applicants were appointed to hold the office of magistrate and became magistrates with effect from the date on which each one of them took the oath of office in terms of s 9 of the Magistrates Court Act Cap. 7:10.
2. The first respondent be and is hereby ordered to pay to each applicant that salary paid to a magistrate as provided in its regulations with effect from the date mentioned in paragraph 1 for each applicant.

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3. The second respondent shall pay the costs of this application.

Mtombeni Mukwasha & Associates , applicants' legal practitioners