

SYDNEY MICHAEL MUCHENJE

Versus

**THE SECRETARY FOR PUBLIC SERVICE,
LABOUR AND SOCIAL WELFARE**

And

JUDITH MADZORERA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
HARARE 30 MAY 2002 AND 12 March 2003

Applicant in person
Ms S Njerere for the respondents

NDOU J: applicant, hereinafter referred to as Mr Muchenje, was employed as a Senior Pensions Clerk in the Pensions Office in the ministry of Public Service, Labour and Social Welfare. The first respondent is the Secretary for Public Service, Labour and Social Welfare, and in that capacity, also the administrative head, Accounting Officer and Disciplinary Authority of the said Ministry. In 1997, there were problems identified in the administration of the war victims compensation. The magnitude of the problems were such that His Excellency the President of Zimbabwe had to intervene. Such intervention was in the form of a Commission of Inquiry into the administration of the War Victims Compensation Act [Chapter 11:16] chaired by CHIDYAUSIKU (as he then was). The chairman subpoenaed Mr Muchenje in the following terms:

“You are hereby summoned to appear before the Commission of Inquiry into the administration of the War Victims Compensation, appointed by the President to inquire into the conduct of the officers responsible for the assessment and payment of compensation under the War Victims Compensation Act [Chapter 11:16] ... the conduct and management of the

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levelled against you ...”

Mr Muchenje received the letter and signed for it on 2 January 1998. On 11 June 1998 the first respondent, through the second respondent, preferred a charge of misconduct against Mr Muchenje in the following terms –

“You, Mr S Muchenje are hereby charged with misconduct in terms of section 4(3)(a) of the Public Service (Disciplinary) regulations 1992 as defined in paragraphs 12 and 23 of the Second Schedule (Section 2) of the same regulations.

Count 1 – Making or offering a favour in connection with the discharge of duty.

Count 2 – Any act or omission which is inconsistent with or prejudicial to the discharge of official duties.

Particulars of offence

It is alleged that you, Mr S. Muchenje in your capacity as a Senior Pensions Clerk I in the assessment section at Pensions Office during the course of executing your official duties, practised favouritism/nepotism in that you assisted a number of people in fast tracking their claims. In terms of the regulations quoted above, you are therefore called upon to state in writing within fourteen days of receipt of this minute whether you deny or admit the charge ...”

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On 3 July 1998 Mr Muchenje received and signed for the charge. On 7 July 1998 Mr Muchenje responded to the allegations contained in the charge. He, once more, did not challenge the authority of Mrs Madzorera to act on behalf of first respondent. He responded as follows –

“Your letter dated 11 June 1998 refers.

Through the Chidyausiku Commission, I admitted having helped a few people in having their claims processed faster because they had approached me through people I know with their difficult problems. The only person whose problems I recall is Ndengwa, who happened to be the person who lied to the Commission that he had paid me some money. This convict approached me through my uncle in Marondera that he was in financial problems. His reasons were that:

- His children were chased away from school because he had not paid school fees.
After sympathising with him that is when I had his claim, which was already in the office, processed. These are therefore my reasons why I

offered my assistance.”

The next relevant thing only occurred in September 1999. Mr Muchenje on the said date filed an application for review. Strictly speaking the said application was not properly before the learned judge as there was no condonation sought and obtained as the review was for a matter that had occurred between January and June 1998. So by September 1999 the period within which review proceedings could be filed had expired. Be that as it may, Mr Muchenje was granted an order for his reinstatement and setting aside his suspension and misconduct charges preferred against him. Mr Muchenje seems very fortunate as he was granted an order reviewing and setting aside of partially completed proceedings. With respect I doubt that he was lawfully entitled to such a relief. Be that as it may, the latter judgment was rescinded on 8 June 2001 save that it was ordered by consent that the suspension of Mr

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Muchenje was unlawful from 1 April 1998 to 18 September 1999 and that Mr Muchenje was entitled to payment of his full salary and benefits for the period of the unlawful suspension by the first respondent. This then brings us to these proceedings.

For the record, when the misconduct charge was preferred against Mr Muchenje, some of his colleagues, Motsi, Maumbe, Mhembere and Msiska faced similar fate.

These four had their case successfully reviewed. In fact they obtained their order by consent. Mr Muchenje contends that he is in similar position as these erstwhile colleagues. On face value he appears to have a point. But on closer scrutiny is clear that that is not the case. A distinguishing factor in the other cases is that the other persons all contested the specificity of the allegations. Mr Muchenje did not do that, he responded to the allegations, providing details in his response on which the

I do not want to be thought that I am proposing the above formulation of the charge. That is not my function. What I am saying is that a charge so formulated

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would be clearer. I made the point before (*Public Service Commission & Another v*

Tsomondo 1988(1) ZLR 427 (S) at 440F) that –

“... if an officer is given a right to reply to an allegation of misconduct ... he is entitled to be informed of the allegation against him in a fashion sufficiently detailed to enable him to make a meaningful reply.”

In casu, the charges of misconduct were two. Firstly, “making or offering a favour in connection with the discharge of duty. This charge was formulated under paragraph 12 of the Second Schedule which is quoted in full above. From this charge, as amplified by the “Particulars of offence” contained therein, Mr Muchenje was made aware of the case which was made against him. This gave him a fair opportunity to correct or contradict the charge. Indeed in his reply he seemed to appreciate that the case against him arose from his testimony before the Commission of Inquiry and the testimony of one Ndengwa before the same Commission. In his reply he made reference to an admission he had earlier on made to the Commission that he had helped a few people in having their claims processed faster because they had approached me through people I knew ...” This amounts to an admission of all the essential elements of the misconduct allegation in count 1. The charge, as particularised, was not misleading or flawed in any respects. Ideally more detail would have made it clearer, but there is no doubt that Mr Muchenje understood the nature of the allegation against him. Even on the aspect of Ndengwa he proffered an explanation that although he did him a favour, he did not do in exchange of money i.e. bribery. The allegation in count 1 does not in any way allege that Mr Muchenje received bribes. It would still be an act of misconduct even if he assisted Ndengwa

because he knew him through an uncle in Marondera. The fact remains that he

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extended favours to persons he knew in connection with the discharge of duty. In terms of paragraph 12 (*supra*) this amounts to an act of misconduct. Mr Muchenje practised favouritism/nepotism by assisting people whom “he knew” in fast tracking their claims. Whether Mr Muchenje received money in exchange or not does not touch on the question of his guilt or otherwise. It merely affects his blameworthiness for purposes of punishment.

Count 2, should, in my view, have been charged in the alternative. In his reply

it is also evident that he tried to explain his act which was inconsistent with or prejudicial to the discharge of his official duties. There was sufficient particularity in the second allegation. In the circumstances, I find that the charges of misconduct preferred against Mr Muchenje were not defective.

2. Mandate of Mrs Madzorera to act on behalf of the first respondent

Right from the start, it has to be highlighted that some disciplinary functions may, at any time, be assigned to any other person by the head of department, head of Ministry or the Public Service Commission – see section 28(1)(d) of the Regulations. Any person upon whom disciplinary functions are conferred or to whom they are assigned in terms of the Regulations may, at any time delegate those functions to any other person – see section 28(1)(b) of the Regulations. The proviso to this subsection gives instances where disciplinary functions cannot be assigned or delegated. *In casu*, we are dealing with disciplinary functions as provided for in section 4(3) of the Regulations. These are not covered in the proviso so they may be assigned or delegated. The only issue for determination then being whether these disciplinary functions were, in fact, assigned or delegated to Mrs Madzorera. It is common cause that when the applicant received the charges he did not challenge Mrs Madzorera’s capacity to prefer the charges. In fact when he responded to the charges he addressed his minute to first respondent for the attention of Mrs Madzorera. Mrs Madzorera is the Deputy Secretary, Finance and Administration and Ministry’s Principal Establishment Officer. This was confirmed by the Permanent Secretary in the Ministry Mr L C Museka in his affidavit in the following terms –

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“The 2nd respondent Mrs J Madzorera is the Ministry’s Principal Establishment Officer and as such it is within her portfolio to deal with disciplinary cases.”

The applicant submits that as she was not the Deputy Secretary responsible for pensions she was not the appropriate Deputy Secretary to deal with him. It seems to me that the applicant misses the point. The respondent’s case is that all disciplinary matters in the Ministry are the domain of the Deputy Secretary, Administration and Finance. Disciplinary functions fall under administration. Administration falls under

Mrs Madzorera in the Ministry. In terms of section 4(3) the charges of misconduct may be preferred by either “the head of office, head of Department, head of Ministry or the Commission.” *Ex facie*, Mrs Madzorera is neither of the above. But, when

one looks at the definitions in section 2 the head of department is defined as follows –

“head of department means –

- (a) where a Ministry is divided into provinces, the provincial officer; or
- (b) the principal establishment officer; or
- (c) ...” (my emphasis)

With this in mind there can be no doubt that Mrs Madzorera, as the Principal Establishment Officer, had the requisite powers to prefer misconduct charges against Mr Muchenje. She is, *ex facie*, the most appropriate to do so as it is within her portfolio to deal with disciplinary matters.

In light of my findings on the above two issues, the application must fail in its totality. I accordingly dismiss the application with costs.