Judgment No. HH 16/2003 Case No. HC 153/99

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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- Q Can you start by giving us a brief outline of what your functions are in that office.

A Yes ... The (sic) answering your question, I am actually in the assessment department. What we do in assessment department our job is to calculate files of both war victims and state service, that is people who are injured during the course of their duties.

- Q Do you know a person called Ndengwa?
- A Yes, Sir
- Q How do you know him?
- A Actually he was introduced to me by my uncle in Marondera that was I think it was September, August somewhere around there.

Q Can you give us more details of how he came to be introduced to you by your uncle.

A Actually what happened is I had gone to see my uncle who is actually a businessman in Marondera. He is my uncle because he is my wife's uncle."

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This extract further amplified the nature of the investigations in respect of Mr

Muchenje. A name of a person allegedly "assisted" by Mr Muchenje. For his part Mr

Muchenje explained how he became involved with the said Ndengwa. It is apparent

that the respondents were not amused by Mr Muchenje's admissions before the

Commission. In consequence thereof Mr Muchenje was, on 31 December 1997,

suspended from duty. The letter of suspension was signed by the second respondent,

Mrs Madzorera, the Principal Establishment Officer, for the first respondent. At that

stage Mr Muchenje did not challenge Mrs Madzorera's authority to do so. Part of the

letter of suspension reads as follows –

"When you appeared before the Commission of Inquiry into the administration of the War Victims Compensation, certain allegations of corruption were levelled against you"

Mr Muchenje received the letter and signed for is on 2 January 1998. On 11

June 1998 the first respondent, through the second respondent, preferred a charged 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 reinstatment 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

first respondent subsequently based the dismissal.

As alluded to above, the misconduct charge is based on contravention 4(3)(a)

- (b)

11IBMBIO COMIBMDOS

- "12. Making or offering or accepting or receiving a bribe, gift or any other favour in connection with the discharge of duty ...
- 23 Any act or omission which is inconsistent with or prejudicial to the discharge of official duties, including the abuse of authority."

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1. Are the charges of misconduct fatally defective?

Like a charge in a criminal trial, the charge of misconduct, *in casu*, is intended, to inform the accused employee, in clear and unmistakable language, what the allegation is. The charge of misconduct must be set out in such a manner and with such particulars as may be reasonably sufficient to inform the accused employee of the nature of the misconduct, that is, of the material facts constituting the misconduct. The accused employee is entitled to demand that he be informed with precision, or at least with a reasonable degree of clarity of the case he has to meet at disciplinary inquiry. Even if particulars should have been given in the charge of misconduct but were not, this failure will seldom, in itself, be fatal to the inquiry proceedings if the accused employee has not been prejudiced in his case before the inquiry. While every effort should be made by those charging misconduct charges to ensure that misconduct charges contain all the essential averments, lack of precision in or omissions from the misconduct charge do not necessarily invalidate the charge of misconduct. The test for fatal defectiveness is one of prejudice. The prejudice must relate accused employee's right to reply to the misconduct charge. If his right to reply to the misconduct charge is not prejudiced there is no prejudice. In this regard I refer to the English case of Kandav Government of Malaya AC 322 where Lord DENNINGcommented as follows:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."

In the Chairman of the Public Service Commission and Anotherv

Marumahoko 1992(1) ZLR 304 (S) McNALLYJA stated (page 309B-E) -

"The particulars of the charges should have been more clearly related to the paragraphs allegedly contravened. Thus it would have made the nature of the accusations clearer if it had been alleged, for example, that the officer was guilty of "abuse of authority in contravention of paragraph 24 alternatively behaviour likely to bring the Public Service into disrespect in contravention of paragraph 7 in that he wrongfully (or in contravention of written/tacit instructions) used his position as Senior Administrative Officer in the CMED to acquire direct ..." 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 & Anotherv 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 on explanation that although he did him a favour, he did not do in exchange of money i.e. bribery. The allegation is 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 2ndrespondent 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 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 <u>principal establishment officer</u>; 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.

Civil Division of the Attorney-General's Office respondents' legal practitioners