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**HC 9627/01**

MUCHAYA CLEOPAS MAWUTA

versus

THE SECRETARY FOR MINISTRY OF FINANCE AND  
ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE

HUNGWE J,

**HARARE, 31<sup>st</sup> January, 2002 and 8 October, 2003**

Opposed Application

Applicant in person

**Mr Musamhanga for the respondent**

HUNGWE J: This is an application for a review of the decision of the respondent discharging applicant from employment on the following general grounds -

- a) the suspension of the applicant and the preferment of charges has no foundation and invalid for want of jurisdiction;
- b) Procedural irregularities constituted by -
  - (i) refusal to furnish particulars of the charge and documents in preparation of a hearing;
  - (ii) leading evidence in the absence of the applicant thereby depriving him of the opportunity to confront his accusers;
  - (iii) defect in the charges,

The events leading to this application can be summarized as follows -

Applicant was employed as a Tax Officer at Harare 1 Tax Office, Harare. On 3 May, 2001 he was served with a letter preferring misconduct charges against him signed by Mr C Pasi then Commissioner of Taxes. A letter suspending him from his official duties was served together with the letter preferring misconduct charges.

On 8 May he wrote back to the Commissioner of Taxes in response as was required of him in terms of the Public Service Regulations Statutory Instrument 1 of 2000. In that

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response he cites in detail the defects in both the procedure adopted and the essence of the charges preferred in order to prepare for a detailed hearing if any were to be convened.

On 6 July, 2001 he was served with a notice of hearing scheduled for 16 July, 2001. On 10th July, 2001 he requested for documents and information necessary for preparing for the hearing. Mrs Shamano of the Human Resources Section on whom the letter was served, refused him the particulars sought on the basis that the particulars sought were "confidential and for the purposes of the State".

On 12 July 2001 he decided to address a letter to the Chairman of the Disciplinary Committee outlining his complaints about the procedures adopted suggesting that when the hearing of the Ministry's case concludes, the matter be postponed to allow him an opportunity to secure legal representation and give instructions to his legal practitioner. He would have audio-taped the proceedings. These suggestions were not responded to in writing.

What then transpired is that at the hearing he asked for permission to tape record the proceedings. This was rejected on the basis that only the Chairman is permitted to record or cause the proceedings to be recorded. He asked for the matter to be postponed so that he secured legal representation. This again was refused.

Proceedings commenced with the charges being read. He was asked to respond to the charge. The response he had written was available to members of the committee who then indicated that they would seek clarifications from him and proceeded.

After he had been questioned by members of the Committee, he was asked to go out of

the room in which the hearing was being held to allow evidence to be led from the

witnesses. He protested this step but complied nonetheless as he was told he would be

allowed to cross-examine the relevant witnesses.

Indeed after six witnesses had given their evidence he was called back. Only two out of six witnesses were recalled to allow him to cross examine them.

After this hearing he was served with a letter dated 19 September, 2001 finding him guilty of all the charges and discharging him from the Public Service with effect from 19 September, 2001.

The application was opposed. In the opposing affidavit Mr Tati Chigudu the then Acting Secretary for Finance, said that the respondent denied most of the specific allegations by the applicant. He maintained that the letter carrying the charges of misconduct was sufficiently detailed to inform the applicant of the nature of the allegations against him. There was no need to tally the charges to the factual allegations as the information was sufficiently within the knowledge of the applicant.

The respondent makes a revealing admission in paragraphs 17, 18 and 19. In these paragraphs respondent admits that -

**(1)** the disciplinary committee at the hearing heard evidence of six witnesses

in the absence of the applicant who they expressly excluded for the

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purpose.

- (2) Out of the six witnesses whose evidence was led in this fashion, only two were called for presentation to the applicant for cross-examination.
- (3) The evidence led in the applicant's absence was never presented to him for his comment.

It was argued on behalf of the respondent that as there was substantial compliance with section 45(2) of S.I. 1 of 2000 the procedural irregularities complained of cannot be held to be fatal to the proceedings.

**Reliance was placed on *Jiah and Others v Public Service Commission & Anor* 1999(1) ZLR 17. That case is distinguishable on the grounds that it dealt with the Public Service (Maintenance of Services) Regulations, S.I. 258 of 1990.**

Section 44 of the Regulations deals with the procedure before and immediately following allegations of misconduct. Where a member is suspended on misconduct, the disciplinary authority shall conduct or cause to be conducted such investigations as may be necessary (ss (1)). On completing investigations, if it is found that an allegation of misconduct should be preferred against the member, the disciplinary authority is obliged to, within seven days after completion of the investigation, inform the member in writing, of the nature of the allegation against him and call upon him to submit a written reply to the allegation within fourteen days. It is also obliged to, within that same period, furnish the member with copies of any material documentary evidence relating to the allegation or afford the member an opportunity to have sight of such evidence whenever possible.

**In terms of Section 44(3) where the disciplinary authority is not the Commission, as is the case here, the authority shall within seven days of receiving**

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**the member's reply determined whether the member has a case to answer, and if it so determines, it shall within the seven days make a report in the form set out in the Fourth Schedule to the Head of Ministry. Where the disciplinary authority is a head of department as here, it shall notify the member in writing and refer the matter to a disciplinary committee for hearing in accordance with section 47 making available to the committee a copy of the report referred to above as well as any relevant documentary evidence relating to the allegation.**

In terms of section 45 within seven days of receiving the documents referred to above, the disciplinary committee shall give no less than seven days notice to the member concerned of the time, date and place of hearing of the allegation of misconduct against him.

Subsection (2) permits the committee to conduct the proceedings without the need to observe the rules of procedure and evidence ordinarily applicable in criminal or civil proceedings provided however that the member is afforded the opportunity to respond to every allegation of misconduct and that substantial justice is done.

Subsection (4) allows the committee to proceed to consider the allegations of misconduct in the absence of the member if the member fails to attend the hearing without a reasonable excuse after having been duly notified.

**It is within the parameters of these two sections (44 & 45) that I have to consider whether the claim to procedural irregularity have been substantiated and if so whether these are fatal to the proceedings.**

**The regulations set a procedural criteria which affords an accused member a fair hearing. This can be inferred from the language used, the terms set for both the authority and the member in terms of time limits, access to evidence prior to the hearing, entitlement by both parties to legal representation and the requirement of notice of hearing being served on the member and that he be present at the hearing. As G Feltoe observes in his book "A Guide to Zimbabwean Administrative Law"**

**3<sup>rd</sup> Ed at p 36 -**

"As it is an oral hearing, it follows that the hearing must take place with the person charged being present to hear all the evidence against him so that he can, if he wishes, seek to controvert it. It would thus be an irregularity if evidence was heard from a witness testifying against the person charged in the absence of the

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latter".

**It is an irregularity for the committee to have excluded applicant from the hearing at the time when six witnesses' evidence was being led. It flies in the face of the spirit of an oral hearing which is the intent and purpose of section 44 and 45. It goes against the grain of what constitutes a fair hearing. It offends one's sense of fairness and justice. It cannot be cured by recalling each witness to afford the applicant an opportunity to cross-examine that witness. Any such cross-examination that follows upon this procedure is a sham and a travesty of justice. The proceedings were flawed by this irregularity.**

The totality of the procedure adopted by the committee was a denial of a fair hearing. It is fatal to the enquiry. The decision arrived at in this manner cannot be allowed to stand.

**I may point out that the disciplinary committee is permitted to make findings of fact and make recommendations based on those facts (section 46 (1)). Yet the disciplinary committee in the case instead of recommending a finding of guilty on the charges to the disciplinary authority as provided in subsection (1) made that determination itself. It does not have such powers. They are vested in the disciplinary authority.**

Applicant sought an order setting aside the proceedings of the disciplinary authority, another order declaring that he be deemed to have been in continuous employment from the time of his suspension and an order directing that he be paid in full his salary bonuses and other benefits up to date.

**As this review concerned itself with the procedural propriety of the hearing,**

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**the court cannot make a finding on the merits. That is the appropriate province of the disciplinary mechanism in the Public Service Commission and the Labour Court. With the recent amendment of the Labour Relations Act, [Chapter 28:01] by the Labour Relations Amendment Act No 17 of 2002 this matter has to be finally determined through the Labour Court.**

In the premises I make the following order -

1. The misconduct proceedings instituted against applicant and the subsequent findings be and are hereby set aside.
2. There with be no order as to costs.

*Applicant in person*

***Civil Divison of the Attorney-General's Office , respondent's legal practitioners***