

HC 5496/02

E. RWODZI
and
MUNICIPALITY OF CHEGUTU

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 14 May and 4 June 2003

Opposed Application

Mr A.A. *Debwe*, for the applicant
Mr A. *Gijima*, for the respondent

MAVANGIRA J: This is an application for an order setting aside the respondent's decision to dismiss the applicant from employment and reinstating the applicant with full benefits.

The application, being one for review, was filed outside the time limit prescribed by Order 33 Rule 259 of the Rules of the High Court. Application was made for condonation of the late filing of the application there having been a delay of about 23 days. Both the main application and the application for condonation were opposed by the respondent.

The circumstances of this matter are, in my view, such that, should the applicant's complaint, *inter alia*, that the respondent did not observe the rules of natural justice in its handling of the case be substantiated, it would not be necessary for the court to delve any further but to grant the applicant the appropriate relief in the circumstances, such relief relating to both the issue of condonation as well as the main application.

The applicant was employed by the respondent. On 24 March 2002, at around 8.00 p.m., the applicant was served with a notice to attend "an Inquiries Meeting" to be held on 25 March 2002 at 10.30 a.m. The letter also stated: "At the meeting you will be asked to answer charges which resulted in you being sent on forced leave." The charges were not specified in the letter.

On 25 March, the applicant delivered at the respondent's office a letter requesting sufficient time to prepare his defence. He also indicated that he wished to be represented by a legal practitioner at such meeting.

On 26 March 2002 the applicant's erstwhile legal practitioners, Messrs Mangwana, Chirairo and Tivaone wrote to the respondent requesting that a mutually convenient date for the meeting be arranged.

On 10 April 2002 the applicant was served with a letter of dismissal which reads:

"I refer to the invitation sent to you to attend the Inquiries Committee Meeting on the 25th of March 2002. You failed to attend the meeting on the scheduled date and no satisfactory explanation was given. The Inquiries Committee therefore proceeded to determine the matter on (*sic*) your absence. You were found GUILTY of absenting yourself from work for 7 days from 10 to 19th December 2001 without permission, so thus you have been accordingly dismissed from Council employment with effect from 27 March 2002.

Please be advised that Council at its meeting held on the 27th March 2002 RESOLVED to adopt recommendation of the Inquiries Committee [item 72.4.5.iv] to dismiss you from employment with effect from 27 March 2002."

The applicant's complaint is that the *audi alteram partem* principle, one of the two principles of natural justice, was not adhered to by the respondent.

G. Feltoe in *A Guide To Zimbabwean Administrative Law*, Third Edition (1987) deals with the topic of natural justice thus:

"The principles of natural justice embody fundamental notions of procedural fairness and justice. As applied to administrative decisions, these principles seek to ensure that such decisions are only taken after fair and equitable procedures have been adhered to. In essence natural justice tries to guarantee that the parties who will be affected by the decisions receive a fair and unbiased hearing before the administrative tribunals reach their decisions. By required adherence to standards of procedural fairness, not only

is justice seen to be done, but also these principles assist tribunals to reach substantively correct decisions. If the principles are observed, decisions are reached only after the tribunals have been informed of facts relevant to their determinations and decisions are reached on an objective evaluation of the evidence” (at page 23)

One of the requirements of the *audi alteram partem* principle is that a person should be given reasonable notice of an impending hearing. The reasonableness of the amount of notice given in any particular case will depend on factors such as the seriousness and complexity of the case. See *Ford v Law Society of Rhodesia* 1977 (2) RLR 40 (A).

The *audi alteram partem* principle requires that the party or parties involved in the matter should be given the proper opportunity to present their cases before the administrative decision maker decides the case (Feltoe at p 23).

In Riekert's *Basic Employment Law*, Second Edition, the learned author states that procedural fairness is the yardstick against which the employer's pre-dismissal actions are measured. It requires the employer to act judicially before imposing a disciplinary penalty on an employee. He further states that the rules of natural justice require no more than that a domestic tribunal act according to the common-sense precepts of fairness. Of the rules of natural justice, he states that the most important is enshrined in the maxim *audi alteram partem*. The requirements of which include the following.

The hearing must precede the decision. This is meant to ensure that the employee has an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of his accusers before an adverse decision is taken against him.

The hearing must be timeous. This is meant to ensure that the hearing takes place when the facts are still fresh in the minds of the parties and their witnesses. However, where the employee requires time in order to prepare for the hearing or to arrange for representation, he

should be given a reasonable opportunity to do so. In this regard the learned author cites the case of *Trantschweizer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools* (1991) 12 ILJ 1099 (IC) as an example where the dismissal of a senior managerial employee was ruled unfair because, amongst other things, he had been given only 15 minutes notification of the pre-dismissal enquiry.

The employee must be informed of the charge(s) against him. This is meant to meet the need for adequate preparation.

The employee should be present at the hearing. This is meant to achieve fairness. However, if an employee refuses to attend the hearing without good cause or has absconded the employer may be entitled to proceed with a hearing in his absence.

The employee must be permitted representation. Besides giving the employee normal support, this ensures that the scales are tipped less steeply against him. It also ensures that justice is seen to be done.

The presiding officer should be impartial.

In this case, the applicant was served with a notice of hearing at 8.00 p.m., about 14½ hours before the time of the hearing with only about 2½ hours of business or office hours before the hearing. In my view, this cannot, by any stretch of the imagination, be said to be reasonable notice. Further, and to compound it all, the applicant's request for more time to prepare his defence and to arrange for legal representation, which was communicated before the hearing, was disregarded. The respondent thus proceeded to make a determination on the matter without hearing the applicant's version. The applicant was found guilty and the penalty of dismissal was imposed in these circumstances. The charges on which he was found guilty were not specified in the letter inviting him to a hearing. They are stated in the letter advising the applicant of the determination made.

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It is very clear on the facts of this matter that not only was the applicant not heard, he was denied a hearing. He was also denied representation. Equally if not more glaring, is the fact that he was not advised of the charges that he was facing when he was invited for a hearing.

In my view the above indicates a blatant and unconscionable disregard of natural justice principles, which permeates the whole matter with the irresistible consequence that for these very same reasons, not only should condonation for late filing of the application for review be granted, but the relief sought in the application for review itself should also be granted in favour of the applicant.

In the result it is ordered as follows.

IT IS ORDERED:

1. That the application for condonation of the late filing of the application for review be and is hereby granted.
2. That the respondent's decision to dismiss the applicant from employment be and is hereby set aside.
3. That the applicant be and is hereby reinstated with full benefits.
4. The respondent shall pay the costs of suit.

Ashton Ashilly Debwe, applicant's legal practitioners.
Zamchiya Costa, respondent's legal practitioners.