

ROBERT KUDAKWASHE MUSARA
versus
PUBLIC SERVICE COMMISSION
MINISTRY OF FOREIGN AFFAIRS

Applicant

1st Respondent
2nd Respondent

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 20 May 2004 and 24 November 2004

Opposed Court Application

Mr *T. Biti*, for applicant
Mr *Jena*, for the respondents

KAMOCHA J: The 1st respondent hereinafter called "the Commission" employed the applicant - "Musara" with effect from 24 January 1985. On 1 November 1985 he was seconded to the Ministry of Foreign Affairs. Musara had performed various tasks in the Ministry of Foreign affairs and had been posted out as a diplomat to Botswana and Russia.

At the beginning of July 2001, he was posted on an assignment to the Russian Federation based at the Zimbabwe Embassy in Moscow. He was engaged as Counsellor.

Following his posting he had re-located his family to Russia and his children had started attending school in Moscow. But on 6 March 2002 Musara was recalled with instructions that he reported at head Office on 8 March 2002. Musara protested the transfer by letter dated 10 March 2002. He also requested for the reasons for his immediate transfer so that he could respond to them. No response was given by his employers let alone any reasons.

Instead the Commission addressed a minute to Musara on 5 June 2002 giving him notice of its intention to retire him in terms of section 18(4)(e)(ii) of the Public Service regulations, 2000 which empowers for the Commission to retire a member owing to the reduction in or adjustment of the organization of the Ministry or other division of the Public Service.

It further notified him that in terms of section 18(5)(I) and (ii) of the said regulations he was entitled to make representations in writing for its consideration before it made a decision in the matter.

Pursuant to the above notice Musara requested for further particulars by letter dated 2 July 2002. He also questioned the motive and *bona fides* of the intended re-organization and adjustment. The further particulars requested were these:

- a) What is the purpose of the reduction or adjustment in terms of section 18(3)(ii)? Is it for instance, the fact that there is no more work to be provided or that there are not sufficient funds to pay employees?
- b) Is the afore said adjustment an exercise in the Public Service or an exercise targeted at a department of the Ministry of Foreign Affairs per se?
- c) What is the general criteria the Public Service Commission is using to select those to be retired?
- d) On what basis was I specifically targeted given that my peers on the same grading have not been targeted?"

The Commission replied to the request for further particulars in generalized terms instead of addressing the above specific issues raised by Musara. It stated that it had noted that as part of his representation he had questioned the rationale of the restructuring exercise. It advised that the restructuring and re-organisation was an on-going exercise which had an impact on the staff levels of any organization. It alleged that all ministries and departments were under going that change.

The Commission advised that whenever the restructuring exercise was carried out various individuals would be effected at different stages. The exercise affected other people in the past but it turned out to be Musara's turn this time around.

On receipt of the Commission's letter Musara immediately pointed out that the letter had failed to answer the critical issues and matters of principle raised in his request for further particulars and further indicated that it would not be possible for him to make meaningful representations relating to the intended retirement. He stressed the need for the Commission to fully address and supply the further

particulars sought since he felt that his sudden withdrawal from Moscow and the intended retirement were based on subjective grounds.

The Commission seemed to be content with its earlier reply made in general terms and instead of supplying the requested particulars it addressed a letter to Musara on 2 October 2002 informing him of its approval to retire him from the Service in terms of section 18(4)(e)(ii) of the Public Service Regulations 2000 with effect from after duty on 4 October 2002.

Faced with the termination of his employment Musara filed this application seeking an order of this court in the following terms:

"It is ordered that -

- 1) Within ten (10) days from the date of delivery of this order at the offices of the second respondent comply (sic) with the provisions of section 54(4)(a)(i), (sic) failure of which the applicant's withdrawal from Moscow effected by way of letter dated the 6th of March 2002, be and is hereby set aside;
- 2) The first respondent's termination of applicant's contract of employment effected by way of letter dated the 2nd of October 2002 be and is hereby set aside;
- 3) That first respondent pays applicant's salaries and benefits thereon from the date of dismissal to the date of reinstatement;
- 4) That the respondents jointly and severally, each paying (sic) the other to be absolved, pay costs of suit."

The Commission contended that in its notice of posting of 2 April 2001 no mention of a specific period of posting was mentioned. Such details were to be included in the Foreign Service Contract/Agreement which was to follow later. In Clause 19 thereof the Foreign Service contract provides that:- "The Public Service Commission may terminate the contract before the expiry of the period stipulated herein and recall the member back to Zimbabwe".

Musara was recalled before he even got the opportunity to sign the said agreement. No specific period for his posting had been stipulated at the time of his withdrawal. If he had had the opportunity to sign it his posting would still have been subject to the provision that he could be recalled back home before the expiry of the period specified in the contract.

It, therefore, seems to me that the second respondent was within its rights to recall Musara back home. Musara was quite familiar with the contract document which is standard one signed by all officers who are posted to foreign missions. He had signed it before, for instance, when he was posted to Botswana. He therefore must have been aware that he could be recalled back home at any time. Since I have found that the Commission was within its rights to recall Musara from Moscow there would be therefore, no justification for setting aside that withdrawal.

As regards the retirement of the applicant the Commission is enjoined with the power to retire its members in terms of the provisions of section 18(4)(e)(ii) of the Public Service Regulations Statutory Instrument 1 of year 2000 - "the regulations". The section provides as follows:-

"18(4)(e)(ii)

Subject to these regulations, the Commission may require a confirmed member to retire - (e) owing to

(i)

(ii) The reduction in or adjustment of the organization of a Ministry or other division of the Public Service".

However such member has, in terms of section 18(5) a right to -

(a) be given notice of the intention to retire him; and

(b) be afforded opportunity to be heard concerning the intention to retire him.

Section 18(5) reads:

"A member whom it is intended to retire in terms of subsection (2)(3) or (4) shall -

(i) be given notice of such intention by his Head of Ministry or Department; and

(ii) be afforded an opportunity to make representations in writing concerning such intention to the Commission, which shall consider such representation before deciding on whether or not to retire the member". (Emphasis added)

These provisions of the regulation are peremptory. The Commission has no discretion in the matter. It must notify a confirmed member of its intention to retire him, as happened *in casu*. It also ought to consider the member's written representations before deciding on whether or not to retire the member.

In casu, when Musara was notified of the Commission's intention to retire him he requested for further particulars. He did so because he strongly believed that the intention to retire him was based purely on subjective grounds. He asserted that the Commission's actions were nothing but subjective victimization on what he suspected to be nebulous political grounds. Further he made the point that there was no reduction or adjustment of the Ministry. That assertion by the applicant was not controverted and despite challenge none of the respondents attempted to provide details relating to the reduction or adjustment of the Ministry. What sticks out like a sore thumb is the absence of evidence of the reduction or adjustment.

The respondents argued that since applicant was afforded the right to be heard but he chose to question the rationale of the restructuring and re-organization of the Ministry the Commission was therefore entitled to decide the issue of retiring him and proceeded to retire him. The respondents, however, did not deny that applicant was not supplied with the further particulars he requested. They further argued that while there may be guidelines laid down on how to retire a member the Commission cannot be forced to exercise its discretion in a particular way.

That, with respect, is not the point the applicant is making. What Musara is simply saying is that the Commission went on to decide his case before considering his representation which he would have made in writing if the respondents had supplied the particulars requested. It is now common ground that the respondents did not supply the relevant further particulars. Applicant could not make any meaningful representations without them. He was therefore denied the right to be heard in breach of the provisions of section 18(5)(ii) of the regulations.

The commission is a public body which should act within the confines of the rules of natural justice. It should insist on procedural compliance and rules of fairness to avoid arbitrariness. *In casu* it ought to have ensured that the relevant further particulars were supplied. It should not have made a decision before

receipt of the applicant's written representations. It denied him the right to be heard resulting in the decision to retire him not being proper.

In the result I would issue the following order.

It is ordered that -

1. The first respondent's termination of applicant's contract of employment effected by way of letter dated 2 October 2002 be and is hereby set aside;
2. First respondent pay applicant's salaries and benefits thereon from the date of dismissal to the date of reinstatement; and
3. The respondents jointly and severally, one pay the other to be absolved, pay costs of suit.

Messrs Honey and Blanckenberg, applicant's legal practitioners

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