ALBERT MUGOVE MATAPO
versus
COMMANDER OF THE ZIMBABWE NATIONAL ARMY
and
PRESIDING OFFICER IN THE GENERAL COURT MARTIAL
OF PRIVATE MATAPO
and
DIRECTOR OF PROSECUTIONS
ZIMBABWE NATIONAL ARMY
and
ATTORNEY-GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 20 December 2007 & 20 February 2008

Urgent Chamber Application

Mr *C Warara*, for the applicant
Mr *S Maposa*, for the respondents

HUNGWE J: This matter was placed before me during vacation through the Chamber Book as an Urgent Application one day after the day applicant was due to appear before a court martial convened by first respondent. The court martial did not take place as a result. I directed that the matter be heard on the basis that it was urgent in that on the face of it, the proceedings would amount to a serious violation of the applicant's constitutional rights. A trial by a body which lacked jurisdiction in my view is a serious violation of the right to a fair trial and an assault on the provisions of S 18 (1) of the Constitution of the Republic of Zimbabwe. A further ground for urgency existed in the fact that the termination or continuation of proceedings in that court would depend on the determination of this application. I also directed that the respondents file their respective papers stating their positions with regard to the matter. This was done. The matter was accordingly set down for hearing on 18 December 2007.

Applicant in this matter seeks an order of stay of proceedings against him in the General Courts Martial of the Zimbabwe Defence Forces in the following terms:

"**INTERIM RELIEF GRANTED:-**

Pending determination of this matter the applicant is granted the following relief;

> "1. The respondents be and are hereby barred from proceeding with the Court Martial of the applicant on 7 December 2007 or any date thereafter until this matter is finalised on the return date hereon."

The relief sought in the final order was basically the same as the above save that the applicants sought to attach procedural conditions for the continuation of the trial. In view of that and taking a robust approach to the papers I decided that a final determination of the matter on the merits be made.

Applicant makes the following averments in his founding affidavit. He was arrested by an army officer on 29 May 2007. He explained that he never joined the army although he underwent some form of training under it for three months. He therefore could not be charged under the Defence Act [*Chapter 11:02*]. Despite this explanation the respondents insisted that he be charged for desertion under the said Act. The basis of this submission is that upon joining the Zimbabwe National Army (ZNA) in June 1989 at the School of Infantry as a recruit, he had to undergo a six month training course before he qualifies as a regular member. He did not complete this period as he was selected to undertake a Cadet Selection Course after three months. It would put him in a category from where the ZNA selects its commissioned officers. He completed this course in March 1990. In September 1990 he was asked to either join a new group or resign from the army. He opted to resign. He handed in his letter of resignation to one Major Nyanda in September 1990. He says he surrendered his uniforms and other military equipment to the said Major Nyanda. When he approached the same officer for his terminal benefits he was directed to the Presidential Guard Battalion who would process it for him.

At the Battalion offices he was told to go to his home from where he would be contacted. The army had his then current Chitungwiza home address. He went back to enquire about his benefits and was told to await further communication from the battalion. He did not return there but to his civilian life and resumed a teaching job with the public service. Some 16 years later he was arrested by the army for desertion. He says as he never qualified as a regular member of the ZNA there is no basis for the army to claim jurisdiction over him. He ceased any connection with it in September 1990 when he failed to make the officer cadet grade and resigned.

The respondents filed opposing papers. The respondents raised points in limine objecting to the right of the applicant to approach this court since being a soldier he is barred by s 18 (a) of the Defence Forces (Discipline) Regulations from demanding a right to be tried by a civil court. The answer to the point is simply that as his status is the essence of this application this provision is clearly not applicable where an applicant seeks a declaratur that he is not a soldier and therefore not subject to the Defence Act. The plea to jurisdiction as this is what this will be in the martial court can be raised and tried in that court where a court such as the present is seized with the matter. For the purposes of this application the point in limine is dismissed.

I will refer to the relevant averments from their papers in determining this application. Most of the averments are responses to matters in the applicant's founding affidavit which are not relevant in the determination of the issue before me as I perceive it. From his papers the applicant seeks this court to determine whether the General Courts Martial has jurisdiction over him. Should I decide that it has no such jurisdiction then that is the end of the matter. If I find that it has, then applicant must place most of the issues before that court for its determination. I come to this conclusion on the basis that on the papers there is no factual basis upon which I could be asked to hold that their applicant cannot get a fair trial. I must assume that this is an inherent competence of any tribunal to be fair.

In his opposing affidavit first respondent makes the following averments. Applicant is a member of the ZNA. He was attested into the ZNA on 6 June 1989. There is attached to the opposing papers, as confirmation of the fact, an oath of allegiance and an affirmation of the same. It says:

> "*I Albert Matapo do swear that during the period I am engaged for service or required to serve in the Defence Force, I will be faithful and bear true allegiance to Zimbabwe and observe the laws of Zimbabwe.*"

The Army Commander then states that applicant deserted from duty in 1991 and was placed on an Absent Without Official Leave (AWOL) List until his whereabouts were established upon his arrest by the ZRP on treason charges. As the Commander of the Army, first respondent states that applicant never resigned from the army. Had he done so he would have been eventually ceased with his application for resignation. He would have had to decide whether to authorise it or refuse it in writing depending on the exigencies of the

prevailing situation. At the time of the alleged resignation he is unlikely to have authorised it as the army was engaged in military operations. If he resigned such letter of resignation was never placed before him and therefore he never authorised the application to resign in terms of the relevant regulations which binding the applicant in terms of the Act.

As to whether the applicant is a member of the Army first respondent states that in terms of the Defence Act and the regulations made thereunder, the applicant is a member to which the Defence Act applies.

Defence (Regular Force) (Non-Commissioned Members) Regulations, Statutory Instrument 172 of 1989, are of relevant application in this matter.

In terms of S 2(1) of the regulations "member" means a non-commissioned, officer, soldier or airman attested in the Regular Force, or a regular attested in the Zimbabwe Peoples Militia. S 2(2) of the same regulations states that any other term used in the regulations that is defined in the Act shall be so defined in the regulations. What this means is that the regulations import the definition section of the enabling Act as applicable where the same terms are used. Where an undefined term is used in the regulations but is defined in the Act, that definition applies to the regulations. For example the Act defines a member to include an officer, a non-commissioned officer or soldier of the defence force. Soldier in the Act means any member other than an officer or a non-commissioned officer.

The section dealing with resignation defines "Resignation" in relation to a member means

(a) resignation from employment in the Regular Force in terms of Section 19: or

(b) His ceasing to serve on completion of initial engagement.

There are four classes of engagement, namely

(a) Short service engagement which shall be three years service;

(b) Air Force Technician's engagement which shall be for a period of 10years;

(c) Medium service engagement which is also ten years service; and

(d) Permanent service which shall be that service when a member reaches fifty (50) years of age. (**S 5 of the Regulations**)

Section 6 of the regulations requires a member, upon engagement, to make oath or affirmation in a prescribed manner. Section 19 deals with resignation. It provides the terms under which a member may resign from the force. Sub-section (2) specifically provides that any member may, with the consent of the Commander, resign during his period of

engagement if two conditions are met. Firstly a member must give three months notice in writing to the Commander of his intention to do so, or any shorter period of such notice which the Commander, in the interest of the Defence Forces, considers appropriate. However no such notice shall be given while the member is on vacation leave, on active service or under the order of a superior officer to hold himself in readiness for active service.

The other condition is that a member must discharge all his monetary obligations arising out of his employment with the State and must be certified to have so discharged these before he makes an application for resignation. Once a member fulfils the above conditions, his application is considered and if the Commander is satisfied that resignation will not imperil his forces, and that all outstanding liabilities have been satisfactorily discharged, he approves of the resignation in writing for the applicant. In every case of retirement, resignation, discharge or dismissal, the Commander is enjoined to issue a certificate setting forth the member's name and service number, the length of his service in the Regular Force and his rank at the date of resignation retirement discharge or dismissal. (**S 20 of the Regulations).**

The question then is whether these regulations apply to applicant. The ZNA is a disciplined force. It is the armed force of the republic of Zimbabwe. There are rules and regulations such as there must be to regulate both officers and men who are entrusted with the duty to provide both internal and external security to the general citizens of Zimbabwe. Thus it is mandatory for a member to swear allegiance to Zimbabwe and to the upholding of the laws of Zimbabwe by all officers and men who constitute the Zimbabwe National Army. The force carries out a constitutional mandate in regulating not just its own affairs but that of the public. The resultant peace and security enjoyed by every person in Zimbabwe is a product of hard work by forces of law and order to which the ZNA is no small player. The need for the observance of the rule of law within such an organisation cannot be over-emphasised. Indeed were the ZNA to be otherwise the consequences would be too ghastly to contemplate. The Order of Command is very clear from the Act and the regulations. These bind the smallest unit and most inferior rank as they bind all the officers of the ZNA. This much is clear from the enabling act and the regulations made thereunder. From a reading of the Act and regulations, a recruit of the ZNA is much a member as is the Commander the moment he takes his oath of allegiance. It is not material that he has not undergone this or that training as

that decision is for the Commanding officer to make having inducted the recruit into the Army. In order for one to obtain an honourable disengagement with the ZNA the rules require the member to submit written application to the Commander. That application can only be made if the condition conducive to peace and tranquillity prevail. The Commander is unlikely to consider an application when his force is engaged in combat with enemy forces outside the country or there is a threat of armed insurrection within the jurisdiction. The requirement to submit to him any resignation therefore is reasonable and consistent with the fulfilment of his constitutional obligations as the Commander of the armed forces.

There is an oblique reference to fear of bias from the courts martial. There is no basis for this fear. An unsubstantiated claim such as this cannot be ground to exclude the clear jurisdiction of all matters military from the courts martial. In my view the establishment of courts martial is consistent with similar organisations mandated to discharge the security functions at the national level. Security sensitive material will be preserved if the appropriate courts martial handle matters properly within their domain. There are sufficient statutory provisions to secure the rights of innocent members who find themselves appearing in these courts. In any event the appeal system allow appellant hearing in the Supreme Court should the matter require this to be so.

Applicant was attested in the ZNA in June 1989. He never applied in terms of the rules to resign from the army. He was properly put on the AWOL list and his arrest is in procedural in terms of the applicable regulations. The fact that the arrest comes some 16 years after does not detract from the lawfulness of the arrest. It is a matter which the General Courts Martial would have to address at an appropriate stage in the hearing. There is in my respectful view no basis for the order sought.

Consequently I dismiss the application with costs.

Warara and Associates, legal practitioners for the applicant
Civil Division, Attorney-Generals' Office, legal practitioners for the respondents