

RUBEN ZIMONDI

APPLICANT

versus

THE SECRETARY PUBLIC SERVICE COMMISSION and GENERAL COMMISSIONER OF THE PRISONS AND CORRECTIONAL SERVICE and THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS and HIS EXCELLENCY THE PRESIDENT OF ZIMBABWE	1 ST RESPONDENT 2 ND RESPONDENT 3 RD RESPONDENT 4 TH RESPONDENT
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HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 January 2019

Opposed Application

A Mutungura, for the applicant
T Mutomba, for the respondent

MUZENDA J: On the 4th July 2018 the applicant (Ruben Zimondi) filed an application seeking the following relief:

“IT IS ORDERED THAT:

1. It is declared that the discharge of the applicant herein, wherein he held the rank of Superintendent, be and is hereby declared unlawful.
2. The 1st respondent be and is hereby ordered to entertain the applicant’s appeal lodged on 12 February 2015 within twenty one (21) days of this order being granted.
3. The respondents to pay costs of suit jointly and severally, the one paying the other to be absolved.”

Facts

On or about December 2014, the applicant was charged with contravening s 3 (46) of the Prisons (Staff) (Discipline) Regulations 1984. It was alleged that at Mutare Farm senior officers’ Mess, the applicant being a member of the service, did wrongfully and unlawfully uttered despicable words against the first lady Dr Grace Mugabe saying “*Ma problems ese*

arikuitika mumusangano anokonzereswa nembwa inonzi Dr Grace Mugabe asi isu musangano tinouda.” This was against the discipline especially of a commissioned officer.

The disciplinary hearing was conducted in January 2015 in terms of s 10 (1) and (11) of the aforesaid regulations. Applicant was found guilty and discharged from service. He filed an application for review to the Commissioner in terms of s 22 (1) of the Regulations. The Commissioner confirmed the board’s decision and dismissed the application for review. The applicant did not rest, he appealed to the Public Service Commission in terms of s 22 (4). The Public Service Commission refused to entertain the appeal citing lack of jurisdiction and the relevant portion of the letter of 17 March 2015 addressed to applicant’s legal practitioners reads as follows:

“It has been noted that you were engaged as a Commissioned officer at the rank of Superintendent in the Zimbabwe Prisons and Correctional Services. In terms of s 9 (1) (e) of the Prisons Act (Chapter 7:11) the President may reprimand, suspend, reduce rank or discharge any Commissioned officer. The Prisons and Correctional Service does not have the jurisdiction to preside over cases involving Commissioned officers.

This rests your case with us. Please be guided accordingly.”

The applicant genuinely believes that the Public Service Commission has the jurisdiction to entertain the appeal made in terms of s 22 (4) of the 1984 Prison regulations. However up to now the 1st respondent has failed to hear the appeal hence this application.

The application is opposed. In the opposing papers the 1st respondent raises a preliminary point premised upon the citation of 1st respondent. According to the respondents, the 1st respondent does not and has no jurisdiction to determine the applicant’s appeal in her capacity as Secretary of the Public Service Commission. The Public Service Commission, she argues, is a separate legal entity to the Prisons and Correctional Services Commission. The Secretary: Public Service Commission acts as the Secretary to the Prisons and Correctional Services is incorrectly cited as she does not represent the Commission, the applicant ought to have cited the Chairperson to the Prisons and Correctional Services Commission. Further the 1st respondent does not deal with appeals in her official capacity and as such she is incorrectly cited.

On the date of hearing the applicant argued that the point *in limine* was only raised in the opposing affidavit and was not pursued further in 1st respondent’s heads. The 1st respondent admitted that but submitted that a point *in limine* as a question of law can be raised at any time during the hearing of the application. The applicant had urged the Court to

regard the point in limine as having been abandoned which argument was opposed by the 1st respondent. I am with the 1st respondent on this aspect and I ruled that the point *in limine* was indeed a legal point which can be raised at any stage during the application. I allowed the 1st respondent to address the court on the preliminary point. My view was that if the point *in limine* was upheld, it will definitely be capable of disposing of the application.

Mr *Mutomba* for the 1st respondent submitted that the improper citation of a party renders the application void. Mr *Mutomba* cited the matter of *Matida v Chairman, PSC and Anor* 1998 (1) ZLR 507 (H) ADAM J at p 509 G-F had this to say relating to the citation:

“Now that court application, firstly, cites the Chairman of the Public Service Commission as the first respondent. Yet, the annexure to the founding affidavit gives the Public Service Commission as the decision maker. The wrong party has been cited. Rule 256 surely is concerned with the decision or proceedings of the legal persona, be that an inferior court, tribunal, board or officer. This means it is that legal persona whose decision or proceeding has to be reviewed that must be cited and the application must be directed and delivered, in the case of the tribunal or board, to the Chairman of that body. See in this regard *Maxwebo v Chairman, Public Service Commission* HH 125-97 at p 6-7 where SMITH J said:

‘Before concluding, I wish to make an observation on the party cited as respondent. The Chairman of the Public Service Commission was so cited. Although exception was not taken there, I considered that it was improper to cite him as respondent. S 74 of the Constitution establishes the Public Service Commission which consists of the Chairman and not less than two and not more than seven other members. Any findings, rulings or decisions of the Public Service Commission are those of the body and not of the Chairman. Accordingly, the Chairman of the Public Service Commission cannot do anything in the name of the Commission if the majority of members do not agree with him. The distinction is illustrated by the order sought by the applicant. The draft order states that the respondent’s decision to find the applicant guilty of misconduct should be set aside. However, the findings of guilty was not a decision of the respondent. It was a decision of the Public Service Commission. I therefore consider that it was improper to cite the Chairman as respondent. The Public Service Commission should have been cited as the respondent.’ ”

In the case of *City Bolts (Pvt) Ltd v Workers Committee* SC 16/2012, GARWE JA on p.1 of the cyclostyled judgment ruled as follows:

“At the hearing of this matter, it appeared to this court that the respondent, simply cited as “Workers Committee”, was not a legal persona, capable of being sued. Accordingly both counsel were asked to address the court on the matter. Both counsel accepted that the respondent which is a Workers Committee appointed by workers of the appellant company is not a legal persona and cannot therefore be sued.”

The applicant improperly cited the Secretary as the 1st respondent instead of citing the Public Service Commission. That was a fundamental error and the preliminary point finds

favour with this court and accordingly the point in *limine* is upheld and the application is dismissed with costs.

It is so ordered.

Mutungura & Partners, applicant's legal practitioners

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