REPORTABLE (44)

ATTORNEY-GENERAL
v
(1) LEOPOLD MUDISI (2) PATROBS DUBE (3) DERECK CHARAMBA (4) MUSEKIWA MBANJE (5) MEHLULI TSHUMA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & PATEL JA
HARARE, MARCH 20 & JULY 28, 2015

C. Mutangadura, for the appellant

B. Mtetwa, for the respondents

PATEL JA: The appellant in this matter is the former Attorney-General of Zimbabwe. On the effective date of the new Constitution, *i.e.* when that Constitution came into force in its entirety, being 22 August 2013, he became the Prosecutor-General, and his former title was reserved for the new Attorney-General, who retained the non-prosecutorial functions of that office.

The respondents are public prosecutors tasked to perform prosecutorial functions at different stations in the country. They were employed as such by the Public Service Commission (the Commission) which, on the aforesaid effective date, was renamed as the Civil Service Commission.

For the purposes of this appeal, I shall refer to the relevant functionaries and authorities by their erstwhile designations. This is both necessary and convenient as the events which form the subject-matter of this appeal occurred in 2011, while the judgment appealed against was handed down on 7 March 2012. Moreover, the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that are relevant to the determination of this appeal have not as yet been realigned to the provisions of the new Constitution and continue to refer to the Attorney-General as the prosecuting authority.

Factual Background

As indicated above, the respondents are employees of the Commission, engaged as law officers or public prosecutors and assigned by the Commission to the Attorney-General's Office. They are all members of the Zimbabwe Law Officers Association (the Association) and were elected as office-bearers of its executive committee in July 2011.

On 18 September 2011, acting under the auspices of the Association, the respondents, together with a majority of their colleagues, resolved to embark on a work stoppage in order to redress their salary related grievances. On 17 October 2011, the appellant wrote to the respondents asking them to respond within 7 days to various allegations of unbecoming conduct not befitting a law officer. The respondents purported to reply to some of the allegations on 24 October 2011 in a letter from the Association. Subsequently, through a letter dated 26 October 2011 from their current lawyers, the respondents indicated that a substantive response would be availed in due course. A day

later, on 27 October 2011, their lawyers wrote to the appellant stating that "*your inquiry [sic] or request has no foundation at law*" and that "*our clients reserve their rights until such time they are lawfully advised of the legal basis upon which the request is made*".

Subsequently, in his letter dated 3 November 2011, the appellant took the position that the respondents had chosen to ignore his request and had therefore admitted all the allegations levelled against them. He then proceeded to state that "*with immediate effect [I] withdraw my authority and power to prosecute conferred upon me under section 76 of the Constitution of Zimbabwe*''. He also referred the respondents "*to your employer for further processing according to law*". Thereafter, his deputies directed the respondents not to carry out their duties as prosecutors, not to deal with any dockets in their offices, to vacate their respective offices and to hand over their office keys. The respondents complied with these instructions under protest and lodged an urgent application in the High Court alleging that the appellant had breached their rights to administrative justice.

Proceedings in the High Court

The appellant raised two points *in limine* before the High Court. The first was that the respondents had no valid cause of action vis-à-vis the Attorney-General's constitutional authority. The second point was that the court lacked jurisdiction over a dispute that was essentially a labour matter. The learned judge dismissed both of these preliminary points. He held that a representative of the Attorney-General could only be dismissed lawfully and following due process. Accordingly, the Attorney-General's

actions could be impugned and set aside by a competent court. He remained autonomous and independent but operating under the law as he was not above the law. As for its jurisdiction, the court held that the withdrawal of prosecutorial powers was essentially not a labour issue inasmuch as its impact would be felt by the general public as well. Moreover, the High Court has the requisite jurisdiction to issue a declarator, whereas this power was beyond the competence of the Labour Court.

As to the merits, the court *a quo* noted that every administrative authority was required, under ss 3 and 5 of the Administrative Justice Act [*Chapter 10:28*], to act lawfully, reasonably and in a fair manner, without any material error of law or fact. The court further noted that under s 11 of the Criminal Procedure and Evidence Act the Attorney-General acts through public prosecutors who represent him and are subject to his instructions. However, the withdrawal of his instructions did not terminate their relationship and they remained employed by the Commission as prosecutors until they were discharged.

The court held that the appellant committed a material error of law by withdrawing his authority to prosecute and referring the respondents to the Commission for further processing according to law. The proper procedure was to suspend the respondents pending a full inquiry, leading either to their discharge from the Commission or their full reinstatement. Accordingly, the letter of 3 November 2011 from the appellant to the respondents as well as all the consequential instructions issued by his deputies were

declared to be null and void and were set aside. The court ordered that the respondents should be restored to their positions without any loss of rights.

With respect to costs, the court found that the respondents had followed the wrong procedure and had wrongly cited the appellant and his deputies in their personal capacities. Therefore, they were not entitled to costs and each party was ordered to bear its own costs.

Grounds of Appeal

The grounds of appeal herein are confined to the declaratory orders of the court *a quo* nullifying the appellant's letter and the consequential instructions. They do not challenge or impugn the decisions of the court pertaining to its jurisdictional competence or the reviewability of the actions of the Attorney-General *qua* administrative authority. Indeed, at the hearing of this matter, Mr *Mutangadura*, for the appellant, unreservedly accepted this inherent power of review vested in the superior courts. I have no doubt that this position is correct and incontrovertible. The only possible qualification is that the courts cannot usurp the functions of the administrative authority and must limit the exercise of their review powers to ensuring that the authority's conduct is legal, rational and procedural, *viz.* in accordance with due process. See *Affretair (Pvt) Ltd & Another* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21-22, and the more recent decision of this Court in *Telecel Zimbabwe (Pvt) Ltd* v *Attorney-General N.O.* SC 1/2014 at pp. 22-23 of the cyclostyled judgment.

The first ground of appeal is that the court *a quo* erred at law in nullifying the appellant's letter withdrawing the delegated prosecutorial authority given to the respondents. The second ground is that the court erred at law in nullifying the decision of the Deputy Attorney-General and the Acting Director of Public Prosecutions to stop the respondents from carrying out their prosecutorial duties and using their offices. The appellant prays that the order of the court *a quo* be set aside and substituted with an order dismissing the application before it with costs.

Relationship between Attorney-General and Public Prosecutors

It is common cause that the respondents, as is the case with all public prosecutors, are appointed by the Commission and not by the Attorney-General. It is the Commission that regulates their terms and conditions of service, including the imposition of disciplinary measures and the termination of their employment. However, insofar as concerns the day-to-day performance of their prosecutorial functions, they are subject to the direction and control of the Attorney-General. In effect, their status is analogous to that of an employee who is engaged by one employer but is temporarily or periodically seconded to another. During the tenure of such secondment, he remains susceptible to discharge by the former but is required to comply and carry out his duties in accordance with such instructions as he may receive from the latter.

It is also common cause that s 76(4) of the former Constitution vests the Attorney-General with the power to prosecute criminal matters throughout Zimbabwe. Additionally, s 76(5) empowers the Attorney-General to delegate his prosecutorial

authority. What is contentious *in casu* is the modality by which he confers that authority and then withdraws the same as may become necessary.

Ms *Mtetwa*, for the respondents, submits that the Attorney-General can only issue public prosecutors with certificates to prosecute but cannot terminate their functions as prosecutors. The issuance of such certificates is effected as a matter of practice rather than as a requirement of the law. Since prosecutors are appointed by the Commission to work within the Attorney-General's Office, the certificates *per se* do not confer any prosecutorial status and therefore their withdrawal does not have any legal consequence. Ms *Mtetwa* further contends, albeit without any affidavit or other evidence to that effect, that none of the respondents ever received individual certificates to prosecute.

Mr *Mutangadura* accepts that the Attorney-General, unlike the Director of Public Prosecutions, is specifically excluded from the Public Service. Thus, he is not a head of department for disciplinary purposes and therefore cannot suspend any miscreant prosecutor. Nevertheless, all prosecutors are delegates of the Attorney-General and that status is specially conferred by certificates to prosecute. He was unable to indicate whether or not the respondents themselves were given such certificates.

Having regard to the relevant provisions of the Criminal Procedure and Evidence Act, I am inclined to agree with the position taken by Mr *Mutangadura*. By virtue of s 11(1) of the Act, all public prosecutors are charged with the duty of

prosecuting in the magistrates courts to which they are attached. Proof of such delegation is ordinarily evidenced by a certificate to prosecute signed and issued by the Attorney-General. This is clearly recognised in s 180(1)(g) of the Act which enables every accused person to challenge the authority of any prosecutor appearing at his trial, by pleading that he has no title to prosecute. It follows that a certificate to prosecute is a legal requirement that extends to all public prosecutors. It constitutes formal evidence of the Attorney-General's delegated authority to prosecute and its withdrawal or expiry carries the legal effect of terminating that authority.

As I have already indicated, s 76(5) of the Constitution empowers the Attorney-General to exercise his prosecutorial functions under s 76(4) "through other persons acting in accordance with his general or specific instructions". This position is replicated in s 11(1) of the Criminal Procedure and Evidence Act which designates public prosecutors as "representatives of the Attorney-General and subject to his instructions". What emerges unequivocally from these provisions is that public prosecutors carry out their prosecutorial duties as delegates of the Attorney-General and in that capacity are subject to his general or specific instructions. To put it differently, the Attorney-General, as the principal repository of prosecutorial authority, is empowered to supervise, direct and instruct every public prosecutor in the performance of his functions and, conversely, the latter is required to obey and comply with every lawful order or instruction given by the former. In the event that a prosecutor fails to carry out his mandate in accordance with any such order or instruction, the Attorney-General is entitled, subject to the dictates of due process, to withdraw the prosecutorial authority delegated to that prosecutor.

This must be so not only as a matter of administrative efficacy but also as a matter of legal principle. In terms of s 114(1a) of the Constitution, every power conferred by the Constitution includes any other powers that are reasonably necessary or incidental to its exercise. Section 24(1) of the Interpretation Act [*Chapter 1:01*] provides to the same effect in relation to every power to do any act or thing conferred upon any person or authority under any enactment. In addition, there is the time honoured common law principle that the power to do or create a particular thing *ipso jure* encompasses and carries with it the power to undo or abolish that thing. In the words of Kotze CJ in *Brown* v *Leyds N.O.* (1897) 4 OR 17 at 39:

> "The general rule is that the same authority, which introduces anything, may also abolish it, and usually in the same manner. *Cuius est instituere eius est abrogare*; and *naturale est quod libet dissolvi eo modo quo ligatur*."

This general proposition was affirmed in *Blankfield* v *Mining Commissioner of Barberton* 1912 TPD 553 at 555 (and by implication on appeal at 558-559); and in *Holden* v *Minister of the Interior* 1952 (1) SA 98 (T) at 101-102.

One final aspect raised by Ms *Mtetwa* concerns the fact that a prosecutor who is divested of his prosecutorial functions can no longer be deployed as a prosecutor. While this may be inevitable, it is a matter that falls outside the Attorney-General's remit and squarely within the purview of the Commission. The latter may opt either to institute disciplinary measures against its officer or redeploy him to such other duties as he may be deemed suitable for and qualified to perform.

The Requirements of Due Process

One of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations. This precept of the common law forms part of the larger duty imposed upon every administrative authority to act legally, rationally and procedurally. See the *Telecel* case (*supra*) at pp. 20-22 of the cyclostyled judgment. That common law duty is now codified in s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*] as the duty to "act lawfully, reasonably and in a fair manner". The obligation to act in a fair manner is further expanded in s 3(2) of the Act to require the giving of "adequate notice of the nature and purpose of the proposed action" and "a reasonable opportunity to make adequate representations" as well as "adequate notice of any right of review or appeal where applicable". It is this statutory duty in particular that the respondents invoked in the court *a quo* to challenge the appellant's actions presently under consideration.

There can be no doubt that the Attorney-General is an administrative authority as defined in s 2 of Act and that he is subject to the requirements of s 3(1)(a) as read with s 3(2). The crisp question for determination *in casu* is whether the appellant complied with those requirements by withdrawing, as he did, the authority to prosecute conferred upon the respondents.

In his first missive to each of the respondents, dated 17 October 2011, the appellant took the view that the respondents had failed to conduct themselves with the decorum and integrity expected of public prosecutors. He proceeded to narrate what he regarded to be their "*indecorous conduct*", as illustrated in various media reports, and demanded an explanation in writing showing cause why he should continue reposing his confidence in them as his representatives practising under his certificate.

In their reply through the Association, on 24 October 2011, the respondents did not address the specific allegations of misconduct against them. Instead, they took a broad brush approach by stating that their grievance was a labour issue relating to salary discrepancies and that they had no control over utterances made in the media. Subsequently, on 26 and 27 October, 2011, their lawyers wrote to the appellant, initially indicating that they would tender their substantive response to each allegation, but then pointedly disputing the legal basis of the appellant's request.

Having been denied any meaningful response, the appellant forwarded his second letter of 3 November 2011 addressed to each of the respondents, in which he concluded that by ignoring his request for a response within 7 days they had admitted all the allegations contained in his earlier letter. He further declared that he could not rely on them as prosecutors and accordingly withdrew their prosecutorial authority with immediate effect.

It is evident from the above correspondence that the respondents had opted, apparently upon advice from their lawyers, to defy the appellant's authority and that he in turn was affronted and chagrined, quite understandably so, by that open display of defiance. It is also clear that an employer, whether under a contract of employment or under a secondment arrangement, has the common law right to summarily dismiss an employee who is insubordinate or wilfully disobedient to the extent of undermining or destroying the very core and substratum of their relationship. See *National Foods Ltd* v *Masukusa* 1994 (1) ZLR 66 (S) at 69. Nevertheless, it seems to me that the appellant reacted with undue haste *in casu* by immediately withdrawing the respondents' prosecutorial mandate. I take this view for the following reasons.

The allegations against the respondents, as captured in the appellant's first letter to them, are essentially twofold: that they incited their colleagues to embark on collective job action and refused to call off the illegal strike; and that they placed key blockers on their office doors to bar other prosecutors from entering the offices. Firstly, all of these allegations were premised on miscellaneous media reports attached to the letter. Secondly, they were directed against the respondents generally and not individually. Finally and more critically, there was no reliable proof of their veracity or any admission by the respondents that they were guilty of the conduct alleged.

In these circumstances, it seems that the appellant took a massive leap from the inchoate letters penned by the respondents and their lawyers to the conclusion that they had admitted all the allegations against them. The appellant made no attempt to

substantiate the allegations or have them investigated by means of disciplinary inquiry, as he could have done by instructing the Director of Public Prosecutions, *qua* head of department, to institute disciplinary proceedings in terms of the applicable Public Service Regulations.

As for the unquestionably insubordinate conduct of the respondents, the appellant was perfectly entitled to withdraw their prosecuting authority as an appropriate and necessary disciplinary measure. However, he could only do so in accordance with the governing tenets of natural justice embodied in s 3 of the Administrative Justice Act. The respondents are professionals engaged in the business of prosecuting criminal cases on behalf of the State. They have a legitimate expectation of continuing to prosecute in that capacity and cannot be deprived of the right to do so without just cause. What the appellant should have done, at the very least, is to write to each of the respondents, identifying with greater particularity the specific allegations levelled against them individually, indicating that their open defiance of his authority justified the withdrawal of their prosecutorial mandate, and warning that he intended to withdraw that mandate unless they were able to persuade him otherwise.

In the event, the unavoidable conclusion is that the appellant acted precipitately and in breach of the requirements of s 3 of the Administrative Justice Act. I take the view that a strict standard of compliance with those requirements was expected of him in his dealings with the respondents, particularly in his capacity as the legal supremo of the Government at the relevant time.

In the result, the unanimous decision of the Court is that the order granted by the High Court cannot be faulted and must be upheld, albeit for reasons that differ to some extent from those expounded by the learned judge *a quo*. As regards costs, I do not think that the appeal launched *in casu* is so hopelessly unmeritorious as to warrant a decision to penalise the appellant with an order for costs. Moreover, the appeal has afforded the opportunity for this Court to clarify certain critical aspects of the relationship between the Attorney-General (now the Prosecutor-General) and his delegates.

It is accordingly ordered that the appeal be and is hereby dismissed with no order as to costs.

MALABA DCJ: I agree.

GARWE JA: I agree.

National Prosecuting Authority, appellant's legal practitioners
Mtetwa & Nyambirayi, respondent's legal practitioners