

DISTRIBUTABLE (108)

(1) COMMANDER ZIMBABWE NATIONAL ARMY
(2) COMMANDER ZIMBABWE DEFENCE FORCES
(3) MINISTER OF DEFENCE
v
(1) NESTER CHIDEMBO (2) EMMANUEL MASENDEKE

**SUPREME COURT OF ZIMBABWE
MAKARAU JA, GUVAVA JA & MAVANGIRA JA
HARARE: JUNE 04, 2019 & SEPTEMBER 24, 2020**

M. Muradzikwa, for the appellants

N. Mugiya, for the respondents

**Judgment No. SC 117/20
Civil Appeal No. SC 195/18**

1

GUVAVA JA: This is an appeal against the judgment of the High Court sitting at Harare under case number HC 6431/14 and judgment number HH 405/17 handed down on 28 June 2017. The respondents had filed an application for a review of the first appellant's decision in proceedings which led to the dismissal of the first and second respondents. The court *a quo* set aside the dismissal of the second respondent and ordered that he be reinstated to his former position as Lieutenant at the School of Signals.

The facts of this matter maybe summarised as follows. The respondents were employed by the Zimbabwe National Army. The first respondent was initially a member serving on a short term service contract commencing from 1 March 2010 and expiring on 28 February 2013. The first respondent's term of service was later extended to medium

service engagement, seven months before the completion of her short term service. On 28 February 2011, the Army Headquarters published an amendment of the conditions of service for members. The new conditions stipulated that any member who married or fell pregnant during their initial engagement would not have their contract extended at the expiry of the initial engagement.

The first and second respondents had solemnised their marriage in terms of the Marriages Act [*Chapter 5:11*] on 11 February 2011 prior to the amendment. At the time when the marriage was solemnised the first respondent was a Lance Corporal in 4 Ordinance Coy and the second respondent was a Lieutenant at the School of Signals. Around October 2012, the first respondent fell pregnant and she was dismissed from service in terms of s 16 of SI 172 of the 1989 Defence Regular Force (Non Commissioned Members Regulations) (“the Regulations”) in March 2013.

Judgment No. SC 117/20
Civil Appeal No. SC 195/18

2

The second respondent was subsequently discharged from service on 14 July 2014 in terms of s 18(1) of the Defence Act [*Chapter 11:02*] (“the Defence Act”) as read with s 1 (b) of the Defence (Regular Forces) (Officers) Regulations, 1988. He was dismissed after a Board of suitability investigated and found him guilty of making the first respondent pregnant contrary to the above Regulations.

Both the first and second respondents were aggrieved by the decision of the appellants and made an application for review before the High Court. They were of the view that when the amendment was introduced it did not apply to the first respondent as they submitted that she was no longer employed in the initial engagement. At the commencement of the hearing the appellants raised two points *in limine*. It was submitted in respect of the

first point, that the application for review in respect of the first respondent was not properly before the court as it had been filed out of time. It was apparent that the first respondent having been dismissed in March 2013 and the application filed on 6 March 2018, the application was indeed out of time. Accordingly, in respect to the first respondent the court found that she was improperly before the court as her application for review was filed outside the eighth week period in contravention of Order 33 r 259 of the High Court Rules, 1979. No application for condonation had been made by the first respondent. The first respondent therefore whilst accepting that she was out of time, indicated that this issue was only raised at the hearing and she was thus prejudiced. The first respondent's counsel thus applied for leave to file an application for condonation of failure to comply with the rules and a postponement of the matter. The application to allow the first respondent to apply for condonation was granted by consent of the parties. The court *a quo* thereafter directed that the applications of first and second respondent be separated. This in my view is where the court made the first error.

Judgment No. SC 117/20
Civil Appeal No. SC 195/18

3

The court *a quo* postponed the first respondent's application and proceeded to deal with that of the second respondent.

With regards to the second respondent the appellants submitted as their second point *in limine* that he respondent was not properly before the court as he had not exhausted the internal remedies in terms of the Defence Act. It was submitted that in terms of the Defence Act matters of suitability of Defence Force members should be appealed to or reviewed by the Defence Forces Service Commission and that the decision of the Commission is final. It was therefore submitted that as the second respondent had not exhausted the domestic remedies he was non suited.

The court *a quo* was not persuaded by this argument and dismissed the point *in limine* and proceeded to deal with the case on the merits. On the merits of the matter, the application was based on the allegation that the respondent had not been given notice of his discharge, had not been given reasons for the discharge, had not been given an opportunity to make representations to defend himself and finally was convicted on a law that was applied retrospectively to the first respondent as it was not in operation when they got married.

The second respondent averred that as the alteration of the first respondent's terms of service from short service to medium service had been granted, she was no longer serving her initial engagement and could not therefore be bound by the conditions imposed on members serving their initial engagement. He also submitted that the amendment which made it an offence for the first and second respondent to get married and for the first respondent to fall pregnant only came into operation after they were already married and should therefore not have applied to them.

The appellants opposed the application on the basis that the extension of the first respondent's term of service from short term service to medium term service had been an error and that she was still in her initial engagement when she married second respondent and fell pregnant. The amendment thus applied to the first respondent and by extension to the second respondent. The appellants' also argued that the amendment had not been applied retrospectively.

The court *a quo* analysed the Defence Act and the Regulations and found that the first respondent ceased to be a member serving her initial engagement on the date that she

was authorised to alter her class of engagement. In arriving at this conclusion, the court *a quo* had regard to s 8 (2) of the Regulations which provides as follows:

“Where a member’s class of engagement has been changed in terms of sub section (1), the member concerned shall be deemed to have been engaged on the longer period of engagement from the date of his attestation”

The court held that the discharge of the first respondent and consequently that of the second respondent was irregular as the first respondent was no longer bound by the conditions of those serving in their initial engagement. The court *a quo* further found that the second respondent had satisfied the grounds of review and ordered that the proceedings that led to the cancellation of his commission and subsequent discharge from the first appellant be set aside. It further ordered that the second respondent be reinstated to his former position and awarded costs in favour of the second respondent. This, in my view, is where the court *a quo* made the second fundamental error.

Judgment No. SC 117/20
Civil Appeal No. SC 195/18

5

Aggrieved by the decision of the court *a quo*, the appellants noted an appeal to this Court.

It seems to me that the issue that arises in this case is whether the court *a quo* was correct in proceeding to determine the application for review in favour of the second respondent in the absence of the first respondent. From the facts of the matter the case of the second respondent is intrinsically linked to that of the first respondent. One could not determine the issues relating to the second respondent without determining the issues of the first respondent. However, as the application by the first respondent had been separated from that of the second respondent her evidence was thus no longer before the court.

The court *a quo* thus clearly erred and misdirected itself when it separated the review applications of the first and second respondents.

The court *a quo*, made findings of irregularity in relation to the case of first respondent in circumstances where the first respondent was not before the court. I have no doubt that the court *a quo* misdirected itself in this respect.

The court *a quo* in making its determination made the following finding.

“On the 20th of July 2012 the 1st respondent had been granted authority to ‘alter their class of engagement from short service engagement to medium service in terms of s 8 of SI 172 of 1989.’ At that time the first applicant had not fallen pregnant. She only fell pregnant between September and October 2012. It is this pregnancy which resulted in her being dismissed from the ZNA and consequently the second respondent being charged with impregnating her (a member who was still serving her initial engagement.)..... For the avoidance of doubt it was improper to charge the second applicant’s wife and consequently the second applicant for her falling pregnant”

Judgment No. SC 117/20
Civil Appeal No. SC 195/18

6

From the above it is apparent that the court *a quo* in arriving at its decision made factual findings in respect to the first respondent. The court found that the restriction on falling pregnant was only imposed on members who were still serving their initial engagements. It thereafter assessed the evidence and found that the first respondent was no longer serving her initial engagement. The court could not come to this conclusion as the first respondent’s evidence was no longer before the court. It was imperative from the facts of this case for the court to have heard both applications together as the second respondent’s act of misconduct arose from the finding of guilt of the first respondent.

The court *a quo* having found that first respondent was not properly before it ought to have postponed both matters and awaited the application for condonation to be

determined first before proceeding to deal with the review application by the second respondent.

It is trite that where such irregularities occur this Court may *meru moto* invoke its review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] and set aside the decision of the court *a quo* as the grounds of appeal did not raise the above issues. In my view the irregularities highlighted above fall under this category.

With regards to costs, it is my view that as the appellants had not raised this issue and it was only raised by the court, no award of costs should be made in their favour.

Accordingly, I make the following order:

1. The appeal succeeds with no order as to costs.
2. The judgment of the court *a quo* be and is hereby set aside.
3. The matter is remitted to the court *a quo* for a hearing *de novo*, before a different Judge.

Judgment No. SC 117/20
Civil Appeal No. SC 195/18

7

MAKARAU JA: I agree

MAVANGIRA JA: I agree

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

Mugiya and Macharaga Law Chambers, respondents' legal practitioners