RHODA MAWADZE
VERSUS
CHIEF SUPREINTENDENT TAWANDA CHIMIKA
AND
THE COMMISSIONER GENERAL ZIMBABWE
CORRECTIONAL SERVICES
AND
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 17 November 2022 & 8 February 2023

Opposed Application for Review

Mr. A, Mugiya for the applicant
Ms, Munatsi -Manyowa for the respondents

BACHI MZAWAZI J: On the 17th of November, 2022, I granted an *ex tempore* judgment in in this contested application for review, in favor of the applicants after hearing arguments from the parties. These are the reasons for judgement following a request by the respondents through the Registrar of the High court. An unopposed application for the condonation of late filing of heads and upliftment of bar by the respondents was successfully granted by this court.

The facts are that, the applicant and another officer, who had been employed by the Prisons Correctional Services as Rations officers were dismissed for contravening numerous sections of the Rules and Regulations governing Prisons officials. Applicant was the Rations officer in-charge sharing her duties with two others. The allegations are that several food rations meant for the allocation and distribution to prison inmates went missing during a period from 1 August 2018 to 12 December 2018 during the applicant's tenure of office.

Her defense was that during that period, she had been allocated double duties which saw her working outside the prison premises most of the time. Further, that several people had access to the food stores during the same period and the premises upon which the food stores were kept was not well secured, had broken window panes and roof. Lastly that there was no proper record keeping and accounting of stocks, their distribution and or handover takeover.

However the disciplinary committee, chaired by the first Respondent, convened for that purpose found them guilty of the two counts proffered and made recommendations for her dismissal.

On the 1st of July 2019 she made an application for Review of the decision of the first respondent to the 2nd respondent in terms of s22(1) of the Prisons Staff discipline Regulations. The 2nd respondent, the Commissioner, upheld the Disciplinary Board findings and dismissed her from the force. After being advised of the decision on the 4th of July 2019, she launched this application for review in terms of order 33 Rule 256 of the 1971 High court Rules, now Rule 62 of the 2021 Rules.

The grounds for review are that the decision by the 1st respondent culminating in her dismissal was grossly irregular as there was no evidence to support the conclusion arrived at. She sought an order quashing and setting aside the decision of the first respondent as well as that for reinstatement, with attendant benefits.

The respondents raised a *point in limine,* that, the applicant jumped the gun by approaching this Court. She ought to have exhausted the internal remedies provided for by the Prisons (Staff) (Discipline) Regulations, 1984, (Statutory Instrument 289 of 1984). She had a remedy in terms of the said statute to appeal to the Public Service Commission, so they claim.

In response, the applicant states that, she is within her rights to approach this court, as in terms of sections 26 and 27 of the High Court Act Chapter,7:06, this court has not only inherent jurisdiction but Statutory authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Therefore, they argue, instead of opting to proceed by the appeals route as correctly pointed out by the respondents, they elected to take the reviews avenue which is also open to them. From their point of view one, only pursues the local remedies if they are effective in their situation.

From the submissions by the parties two issues emerge. Whether or not the applicant was supposed to exhaust internal remedies first before approaching this court for review? Secondly, whether or not the applicant has made a case for judicial review?

The first issue is the technical objection raised by the respondents that, the applicant ought to have exhausted the internal remedies within the Governing laws legal structures first before invoking the jurisdiction of this court.

After the assessment of all the submissions and evidence this court made both a factual and legal finding that, the applicants were justified in not pursuing the general rule of exhausting domestic remedies before approaching the courts for judicial review. Firstly, this court was satisfied that the literal construction of the allegedly violated rules did not make the appeal route mandatory but optional.

In terms of section 22(3) as read with section 22(4) of the Prisons (Staff) (Discipline) Regulations 1984, Statutory Instrument 289 of 1984, any punishment confirmed by the Commissioner shall have immediate effect notwithstanding the fact that, an appeal may subsequently lie to the Public Service Commission. (My emphasis).

The word 'may' is clear and unambiguous therefore, the golden rule of interpretation entails that it be given its literal meaning. The legislature in its wisdom elected to use the word 'may' instead of the pre-emptory 'shall' in the context of an appeal to the Public Service Commission. See, *Tapedza and Others v Zimbabwe Energy Regulatory Authority and Others*, SC30/20, wherein it was noted, that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. See also, *Chegutu Municipality v Manyora* 1996 1 ZLR 262(S), *Mukwereza v Minister of Home Affairs* & *Anor,* 2004, (1) ZLR, 445 (S) and Z*ambezi Gas Zimbabwe Private Limited v N.R, Barber Private Limited* SC 3.20.

Further, in this case, the said regulations and statutory provisions do not oust the judicial review nor did the legislature expressly or impliedly exclude the jurisdiction of this court. See, *Union Government v Fakir* 1923 AD 466. In *Archipelago (Pvt) Ltd v Liquor Licencing Board* 1986(1) ZLR 146(H), *Rent Control Board v SA Breweries Ltd*. 1943 AD 456.

In *Msomi v Abrahams NO & Anor* 1981 (2) SA, it was emphasized that,

> "it is clear that the provision in a statute of an appeal mechanism does not oust the court's review power, and neither does the express exclusion of a right to appeal cut out the power of review."

Secondly, the applicant's circumstances qualified as exceptions to the general rule of the exhaustion of internal remedies before invoking judicial review, given that the applicants had initially ventured the local remedies avenue, by appealing to the Commissioner. The Commissioner General, the next in the chain of command simply rubber stamped and endorsed the same decision by the first respondent without censor. Administrative authorities, in their

hierarchy therefore, displayed lack of responsiveness, one of the key Corporate Governance tenets, enshrined under the Founding Values or Directive Principles of State policy, s3(2)(g) of the Constitution, Amendment Act No 20 of 2013, thereby undermining the applicant's faith in their internal remedies structures. They should have taken the flaws that were highlighted in evidence as a learning curve and a chance to re-evaluate and improve the inefficiencies in the system instead of taking a defensive strategy of penalizing the small fish who brought the whole inefficacies and saga to light.

Of interest is that, the record of proceedings revealed that, the Disciplinary Board relied mainly on evidence from an internal investigating officer, which was not corroborated and was adduced in the midst of criminal investigations and trial, in the face of a plethora of administrative management flaws.

The law says as, a general rule there is need to exhaust the internal dispute resolution procedures within a given legal entity before approaching courts. The need to exhaust internal dispute resolutions, likened to homebrewed or organizational centric solutions first, before seeking judicial review was as observed in *Girjac Services (Private) (Limited v Mudzingwa 1999(1)* ZLR 243(S) at 249, *Moyo vs Forestry Commission 1996(1) ZLR* 173 (H) at 192and *Cargo Carriers (Pvt) Ltd vs Zambezi & Ors* 1996(1) 2LR 613(S) to mention, but a few.

The rationale, being, to avoid forum shopping and to lessen the burden on courts, as extrapolated by, Yvonne Burns, 'Administrative Law Under the 1996 Constitution', (2nd ed) pp 290-292.

However, like every general rule there are exceptions. The factors to be considered in determining whether exceptional circumstances exist to waive the general rule of exhausting domestic remedies first where pronounced in numerous authorities, amongst them, *Nyahuma vs Barclays Bank of Zimbabwe* SC 67/03 *Moyo vs Forestry Commission* 1996(1) 2LR 173 (H) at 192. Cargo Carriers (Pvt) Ltd *vs Zambezi & Ors* 1996(1) 2LR 613(S).

In *Makarudze vs Bungu & Anor vs Bungu* & Ors 2WHHC8/2015 – it was laid out that domestic remedies must confer better , cheaper and effective redress to the complaint. See, *Koyaba vs Minister of Home Affairs, 2010 (4) SA 327 (CCC) at 343 A-B.*.

In the case of, *Movement of Democratic Change & Ors vs Elias Mashavira & Ors SC56/2020,* PATEL JA (as he then was), whilst recognising the general rule in the circumstances of that case, pointed that,

‘’there was no need in invoking domestic remedies that had been both politically and practically undermined.”

See, *Bason v Hugo & Others 2017, ZASCA 192 (01 January 2018).*

In that regard this court concluded that, the *point in limine* had no merit, as the applicant’s situation qualifies as an exception to the general rule of the exhaustion of domestic remedies. Nothing fruitful seem to emerge from appealing to the next office in line, when there was no hope of obtaining a different view. The appeal to the Commissioner did not yield any positive results as it is the office which was supposed to pick the irrationality of the decision in question against the backdrop of the evidence adduced.

On the merits, this review was brought in terms of s26 and 27 of the High Court Act Chapter 7,06. Section 26 of the High Court Act Chapter 7.06, gives the High Court its judicial Review powers over all proceedings and decisions of all inferior courts of justice, tribunals ad administrative authorities within Zimbabwe as enunciated in *Fikilini v Attorney General* 1990 (1) ZLR 105 (S). The same was captured by TAKUVA J, in *C&G Mining Syndicate vs Mugangavar*i & *Ors,* (HC 203/ of 2015), that, section 26 of the High Court gives the High Court inherent jurisdiction to entertain review matters.

Section 27 of the High Court Act, outlines the grounds upon which such matters are brought on review. However, in terms of s27 (1)(c) one of the grounds upon which a litigant can invoke the judicial review procedure which is also the applicant’s main line of attack is, “gross irregularity in the proceedings or the decision”.

In *Muringi vs Air Zimbabwe* 1997(2) 2LR 490 SC it was noted that,

> “In order for a review to succeed it was incumbent upon the Appellant to show not that the decision was irrational in the sense of being outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.”.

The case of, *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 105 (S), highlighted that, administrative action is subject to judicial control in three circumstances,

i. Illegality, that is, where the decision – making authority has presumably made an error in law
ii. Irrationality, where the decision arrived at is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could arrive at it.
iii. The duty to act fairly.

See, *Ndhlovu N.O vs CBZ Bank of Zimbabwe & Anor* SC 27 /2017.

Going by the reasoning in the above case, *Muringi vs Air Zimbabwe*, as juxtaposed to the impugned decision herein, it is notable that the applicant was dismissed on the basis of theft of food rations resulting in the under feeding or supply of prison in-mates food rations. The million- dollar question is, where the charges as framed from the governing sections of regulations, proved, not only beyond reasonable doubt but proved at all. Considering that, these were disciplinary proceedings not criminal the degree of proof is on a balance of probabilities. However, since the procedure in every material respect including the prosecutorial role is akin to criminal proceedings then proof beyond reasonable doubt is in my view, also of essence.

Inevitably, this calls for a brief analysis of the evidence that was placed before the first respondent and his disciplinary hearing team. Without much elaboration, this is the summary of what was adduced from the state witnesses in the proceedings under challenge. There was a glaring revelation of shortfalls, loopholes and weaknesses in their bookkeeping, handover procedures, security, and unrestricted access to food stores were a clear illustration of maladministration or administration in-efficacy and inefficiency.

All the six state witnesses testified to and exposed elements of dereliction of supervisory duties by the first witness who was the officer in-charge. These included the failure to open the requisite, Standing Regulations books, in terms of section 44 of the Standing Rules within the Prisons Correctional Services Department which up to the conclusion of the hearing where not in existence.

The opening and entering of the rations book to the Rations officers and to the kitchen staff regulations where not complied with. The kitchen rations book was opened by an unauthorized kitchen staff member and it disclosed that there where, in most instances no reciprocal signatures of the giver and recipient.

The same applied to the routine stock check of the stores in the storeroom and the attendant books, as well as the actual rations to the prisoners. The allegations covered shortages from the month of August 2018 to December 2018, yet, the monthly reports submitted by the officer in-charge to the Quartermaster did not disclose any shortages. There was lack of constant, review of security mechanisms and the restriction of access to all other individuals save for the applicant and her subordinates. Several other members including the applicant's predecessor in office had keys to the same store room where the bulk of the food stuffs where kept. It was

also not rebutted that there where broken window panes and accessible roof top with missing sheets in the same store room even after an *inspection in loco* held at the request of applicant's defence counsel. It was also not refuted that what brought all the improprieties in relation to prisoners' food was to the fore was the report made by applicant upon the discovery of a break-in in the said store room. She then became the target and victim of a report she had initiated. Even the handover takeover procedures were not observed from the time the applicant assumed the rations post to the time the offences were laid against her.

Applicant's defense was corroborated by several witnesses in that, she had been assigned other duties which took her outside the prisons ration office and that she was off duty when most of the rations were unaccounted for.

It was also not contested that the prison facilities have in place security mechanism to scan everyone who walks in and out of prison premises including high ranking officials. At no given time or point was the applicant found with any food rations. To then conclusively find the applicant guilty of misconducts pertaining to theft of food rations and under feeding inmates is not only perplexing, but in my view, grossly irrational.

In the same vein the court could not help but to take judicial notice that the initial charges preferred to the applicant where changed three quarter way into the hearing, after all the state witnesses had given evidence. At first the defence counsel challenged the propriety of such a procedure but was somehow persuaded otherwise. In the eyes of this court, if charges are changed after evidence has been led, it simply indicates that a conviction could not be sustained on the initially laid charges. To then alter them to tailor the evidence already given without giving the applicant the chance to mount suitable defence is in my view improper. However, since the applicant's legal practitioner did not pursue the issue any further, I need not say more than noting that it all boils down to some of the inefficiencies inherent to some internal resolution mechanisms. In *Affretair (Pvt) Ltd & Anor v MK Airlines Ltd* 1996 (2) ZLR 15 (S), the court noted that the role of the reviewing court over administrative decisions is to act as an umpire to ensure fairness and transparency.

Thus, as has already been interrogated and canvassed, there were a lot of flaws in the food rationing department which were admitted by the key witness called to testify. There was evidence of a break in, which led to the surfacing of all the ration food shortages and the un-procedural record keeping, access to the storeroom, handover procedures and security issues.

The decision convicting the applicant in the face of all the blatant loopholes was not only unsafe but grossly irrational warranting review in terms of section 27 (1)(e) of the High Court Act, Chapter, 7,06.

DISPOSITION,

Accordingly, the court finds that there was no need for applicant to exhaust the internal remedies, as in the circumstances of her case there is a possibility that they could not have provided an effective redress. Further, that the governing regulations accorded them an option to appeal or not to do so. In addition, the same provisions did not oust this court's inherent judicial review jurisdiction where the court is of the view that the impugned administrative decision was grossly irrational and or irregular. The court found the administrative decision grossly irregular and accordingly, dismissed the *point in limine* and upheld the applicant's claim in terms of the draft order sought.

Resultantly,

It is ordered that,

1. The decision handed down by the 1st respondent on the 12th of May 2019 be and is hereby quashed and set aside.
2. The applicant be and is hereby immediately reinstated to her employment without loss of salary.
3. The Respondents to pay cost of suit.

Mugiya & Mucharaga Law Chambers, Applicant's legal Practitioners.
Civil Division of the Attorney General's office, for the Respondents.