HB 372/17
HC 417/17

CONSTABLE F. CHENGETA

Versus

THE BOARD PRESIDENT
(CHIEF SUPERITENDENT E. WILSON)

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 23 JUNE & 30 NOVEMBER 2017

Opposed Application

*N. Mugiya*for the applicant
L. Musika for the respondents

TAKUVA J: The applicant, an ex-constable in the Zimbabwe Republic Police appeared before a single officer on 18 December 2015 facing a charge of contravening paragraph 34 of the Schedule to the Police Act [Chapter 11:10] i.e "Omitting or neglecting to perform any duty or performing any duty in an improper manner." He was convicted and sentenced to a term of imprisonment.

Aggrieved, he unsuccessfully appealed against both conviction and sentence to the 2nd respondent. On 24 November 2016 pursuant to his appeal's dismissal, he was served with a convening order for a board of inquiry: suitability in terms of section 50 of the Police Act. The hearing was set for the 1st of December 2017 and the applicant attended in person. He applied for a postponement on the grounds that his legal practitioner was engaged in the High Court at Harare. Despite advising the 1st respondent that the lawyer had sent an e-mail which applicant was supposed to retrieve and show 1st respondent, the latter dismissed the application and ordered that the hearing proceed. The applicant tried to have the hearing adjourned for some time to allow him time to obtain all the documents from his lawyer. This again was denied. The hearing then proceeded and the Board recommended that applicant be dismissed from the Police Service.

Acting on the Board's recommendations, the 2nd respondent discharged the applicant from the Police Service on the 15th December 2016. Dissatisfied, applicant filed this application on 14 February 2017 seeking the following relief:

"1. The Board of Suitability proceedings presided over by the 11st respondent against the applicant be and is hereby set aside.
2. The decision by the 2nd respondent to discharge applicant from the Regular Force acting on the recommendation of the Board of Suitability conducted by the 1st respondent be and is hereby set aside.
3. The mater be and is hereby remitted to the 2nd respondent to convene a different Board of Suitability which will allow applicant his constitutional right to legal representation.
4. The respondents to pay costs of suit on attorney and client scale."

Both respondents opposed the application. In his opposing affidavit the 1st respondent argued that the matter was not properly before the court in that the application was filed outside the 8 week period required in terms of r259 of this court's rules. Secondly, that the board was properly constituted in terms of the Police (Trials and Boards of Inquiry) Regs, 1965. Thirdly, that applicant was not denied the right to legal representation as no communication was made to him in respect of a postponement on the grounds that his legal practitioner was committed in the High Court. Further, it was contended that "no application was made by the applicant for an adjournment for whatever reason."

The 2nd respondent's opposition also raised the issue of the impropriety of the application for review. Secondly, it was argued that the board's proceedings are not irregular because the Board was properly constituted with senior and experienced officers. Therefore, so the argument went the proceedings by the 1st respondent as well as the resultant decision that the 2nd respondent made are proper at law.

The issues in this application are the following:

(a) Whether or not this application is properly before the court
(b) Whether or not applicant was deprived of his right to legal representation

(c) Whether or not proceedings presided over by the 1st respondent are procedurally grossly irregular and the resultant discharge of applicant from the police service ought to be set aside.

I now turn to the 1st issue

o33 r259 provides as follows:

"Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred".

Another rule that is relevant in the computation of time is r4A which provides:

"Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number or days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

In the present case, the applicant was served with the radio message for discharge on the 16th day of December 2016 and he filed this application on 14 February 2017. According to my calculation, taking into account the above rules, the application was filed within the *dies induciae*. Consequently it is properly before me. I therefore dismiss the point *in limine*.

On the merits, section 27 (1) of the High Court Act (Chapter 7:06) provides that:

"Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
(a) …
(b) …
(c) gross irregularity in the proceedings or the decision."

In casu, the applicant relies on gross irregularity in the proceedings in that he was denied legal representation by the board chairman who ignored his plea for a postponement to enable his legal practitioner who was engaged in the High Court to attend. It is common cause that the proceedings went on without the participation of the legal practitioner.

The Law

The right to legal representation is enshrined in section 69 (4) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which states;

> "(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."

In *Nhari* vs *Public Service Commission* 1999 (1) ZLR 513 (5) GUBBAY CJ (as he then was) held that:

> "The appellant had an absolute right to procure legal representation. It was not a question of the magistrate having a discretion whether to permit it. His discretion turned on the grant or refusal of the postponement sought. However, a refusal arising from an injudicious exercise of that discretion would constitute a denial of the right to legal representation. It is … a matter of considerable importance, both in the interests and administration of justice, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court or after adjudicating authority established by law should be accorded every opportunity of putting his or her case clearly and succinctly to such body. Almost invariably that function can only be performed properly when it is presented by a person trained and experienced in law … <u>if the absolute right to procure legal representation is to have any meaning and significance, it must embrace the right to be afforded a reasonable opportunity to secure it. A refusal of that opportunity, where requested, constituted a denial of the right to a fair hearing guaranteed under subsection (7) and (9) section 18 …</u> Notwithstanding the convenience which would have been suffered by all save the appellant, I have not the slightest doubt that the refusal of the postponement constituted sufficiently improper exercise by the magistrate of his discretion to warrant interference." (my emphasis)

In the present matter, the board president had the discretion to grant or refuse the request made by applicant for the proceedings to be postponed to enable the applicant to secure the attendance of his legal practitioner. The real issue for determination is whether or not the president declined applicant's request for a postponement. If he did, did he do so injudiciously? I say these are the real issues because 1st respondent in his opposing affidavit denies ever entertaining an application for a postponement. Paragraph 5 thereof reads partly as follows:

> "This is denied. No application was made by the applicant for an adjournment for whatever reason." (my emphasis)

Earlier, in the same affidavit, 1st respondent had stated in paragraph 4;

> "… I did not deny the applicant his right to legal representation. No communication was made to me seeking a postponement on the grounds that the applicant's legal practitioner was committed in the High Court. When the applicant appeared before the board, he did not produce any document seeking a postponement." (my emphasis)

What is portrayed by the 1st respondent's contention is that applicant appeared before the board as a "self actor" and did not apply for a postponement. Surprisingly, 1st respondent's heads of argument show a completely different scenario. In par 4.2 it is stated:

> "4.2 … Applicant had indicated from the time he was served with the board papers that he would like to be represented. On the day the lawyer did not turn up and did not communicate at all. …
> 4.3 *In casu*, the lawyer failed to avail himself on the court date. There was no reasonable explanation as to why he did not attend. There was no attempt to seek for a postponement. Applicant only told the court that there was communication through his e-mail address which he had failed to access to present before the court from his lawyer." (my emphasis)

That there are glaring contradictions and inconsistencies in the respondent's case is beyond doubt. In the 1st place an impression is created that applicant appeared before the board like a lamb to the slaughter, not mentioning anything about a postponement on the grounds of the non availability of his legal practitioner. Yet on the other hand, we are told of the e-mail that he wanted to produce to prove that his lawyer was not available on that day and that even if this e-mail had been produced the postponement would not have been granted. So the question becomes, what really happened when applicant appeared before the Board?

Naturally, one would turn to the record of proceedings for an answer to this dispute of fact. Surprisingly in this case, the record is silent on whether or not such an inquiry was conducted by the board. In fact it shows the following exchange;

> "State: Do you have a lawyer or defaulter friend?

Defaulter: No I will represent myself." See page 38 of the record.

What I find baffling is that despite the board's knowledge from the papers before it that the applicant had elected to be represented by a lawyer, no questions were put to establish the reason for his absence. In fact the record of proceedings supports the initial position adopted by the 1st respondent, namely that there was never an application for a postponement for "whatever reason". Quite clearly, this version is not supported by probabilities in that the applicant would not suddenly say he was representing himself without at the same time giving reasons for that. I must also point out that the record of proceedings is replete with incoherent answers which throws doubt to its authenticity and accuracy. In my view the applicant's version supported by the 1st respondent's latter version reflects the truth of what happened, namely that applicant applied for a postponement on the grounds that his legal practitioner was engaged in the High Court and that application was dismissed.

This takes me to the second issue of whether or not the board president exercised his discretion properly when he dismissed the application. In order to answer this question one looks to the reasons for the decision. Unfortunately, *in casu* the president shot himself in the foot by denying that he ever dealt with such an application in circumstances where the evidence and probabilities show otherwise. The 1st respondent cannot be allowed to approbate and reprobate at the same time. Either he dealt and disposed of the application, or it was never an issue before him. What is crystal clear however is that the applicant appeared in person. The admission by the 1st respondent in his heads of argument that an e-mail was mentioned by the applicant corroborates applicant's evidence that he indeed applied for a postponement, otherwise why would it be relevant? Also 1st respondent's submission that a postponement cannot be granted on the basis of an e-mail is telling in my view. It shows that 1st respondent dismissed the application off-hand because according to him that procedure was wrong.

Further justification for dismissing the application is to be found in 1st respondent's contention that another lawyer from the firm should have come and applied for a postponement. The fallacy of this argument is that it presupposes that it would be incompetent for the applicant

to apply for a postponement in person. The 1st respondent should have allowed the applicant to produce the e-mail and its attachments if any before dismissing the application. In that regard the 1st respondent prematurely and improperly dismissed the application thereby denying the applicant the right to be legally represented. This amounts to a failure to afford the applicant a fair hearing which is a gross irregularity in the proceedings. See *Chanakira* v *Zimbabwe Post (Pvt) Ltd* HH 110/16.

Whether or not the 1st respondent's record of proceedings is in shambles and was compiled selectively

As indicated above, the record does not show that a request for a postponement was made by the applicant. This is surprising because even assuming the applicant had not raised it, which is highly improbable, the president of the board had a duty to ascertain the position in view of the fact that the papers before him indicted that the applicant had elected to be legally represented. Why did he ignore such a critical aspect of the proceedings. If he inquired why is the record silent on that inquiry. Also, the record does not show that an e-mail was mentioned at all. Whichever way one looks at it, this record is grossly deficient in substantial and material respects to the extent that the deficiency constitutes gross irregularity in the proceedings.

In this regard, I find GUBBAY JA's comments in *S* v *Davy* 1988 (1) ZLR 386 (SC) at 393C-E very instructive. He stated:

> "Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R* v *Sikhumba* 1955 (3) SA 125 (E) at 128E-F; *S* v *K* 1974 (3) SA 857 (C) at 858H. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction. See also *S* v *Mataruse* HH-219-03." (my emphasis)

Fundamentally, the record of proceedings *in casu* was doctored and therefore inaccurate and unreliable as a measure of whether or not justice was done.

Accordingly, it is ordered that:

1. The Board of Suitability proceedings presided over by the 1st Respondent against the Applicant be and is hereby set aside.
2. The decision by the 2nd Respondent to discharge Applicant from the Regular Force acting on the recommendation of the Board of Suitability conducted by the 1st Respondent be and is hereby set aside.
3. The matter be and is hereby remitted to the 2nd Respondent to convene a different Board of Suitability which will allow Applicant his constitutional right to legal representation.
4. The Respondents to pay costs of suit on an ordinary scale.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Attorney General's Office, Civil Division, respondents' legal practitioners