FRANK VUTABWAROVA

versus

THE CHAIRMAN, BOARD OF ENQUIRY

and

THE DIRECTOR ADMINISTRATION IN

THE PRESIDENT’S DEPARTMENT

and

THE DIRECTOR GENERAL IN THE

PRESIDENT’S DEPARTMENT

and

THE CENTRAL INTELLIGENCE ORGANISATION

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 19 March 2012 & 16 March 2012

*T. Deme,* for the plaintiff

*E. Chivasa,* for the respondent

MTSHIYA J: This is a review application wherein the following relief is sought:-

“1. The decision of the first respondent recommending the demotion of the

 applicant to a lower rank in the employ of the fourth respondent is unlawful

 and of no force and effect.

 2. That the decision of the third respondent in discharging applicant from the

 employ of fourth respondent is unlawful, invalid and of no force and effect.

 3. That the applicant be reinstated in the employ of the forth respondent on full

 pay and benefits with effect from the date of dismissal.

 4. That fourth respondent pays the costs of this application.”

 The applicant was employed as a District Intelligence Officer by the fourth respondent with effect from 9 March 1988.

 On 17 June 2006 the applicant was arrested by the Criminal Investigation Department Law and Order section of Mashonaland West on a charge of theft of thirty two (32) tones of copper wire belonging to Zalawi Transport of Zambia.

On 8 September 2006, the applicant was suspended from duty because of the alleged offence.

 On 25 January 2007 a Board of Inquiry (the Board) was convened to determine the applicant’s acts of misconduct. The convening order signed by the chairman of the Board, Mr L. Mafurirano, read, in part, as follows:

**“71637L DIVISIONAL INTELLIGENCE OFFICER F. VUTABWAROVA**, you are hereby notified that in terms of Public Service (Disciplinary) Regulations of 200, a Board of Inquiry has been convened to inquire into your contravention of Para(s) 6 and 24 of the First Schedule which states that:-

**Para 24: “Any act or omission which is inconsistent with or prejudicial to the discharge of official duties, including the abuse of authority.”**

The Board will assemble in the 9th Floor Boardroom, Chaminuka Building on Tuesday, 10 April, 2007 at 1030 hours. You will be required to report at the 9th Floor Reception at least 15 minutes prior to the commencement of the Board.

The Board will consist of the following:-

 **MR L. MAFURIRANO - CHAIRMAN**

**MR B. NYIKAYARAMBA - MEMBER**

**MR T. TACHIVEYI - MEMBER**

**MR H. MUDOTA - SECRETARY**

The inquiry will be based upon the allegation that on 18 June, 2006 following police investigations into the hijacking of a truck belonging to Zalawi Transport Company of Zambia, which was laden with 34 tonnes of copper cathodes, the truck and its cargo (the copper cathodes) were found at your Tivaton Farm in Chegutu with the copper cathodes off-loaded allegedly on your instructions.

You were thus allegedly actively or by association and with common purpose, involved in the hijacking of the said truck and the copper cathodes; and/or,

You provided a safe haven for the said stolen truck and copper cathodes at your said Tivaton Farm, and/or,

You failed to report the theft of the truck and the copper cathodes or the presence of the said truck and the said copper cathodes at your farm to the police or to your immediate superiors, knowing fully well or suspecting that same could have been stolen.

The afore-referred to acts or omissions especially by a member of this organisation constitute a serious act of misconduct.”

It is important to note from the outset that the above convening order was made “in terms of the Public Service (Disciplinary) Regulations 2000.”

After a number of delays the Board met on 16 April 2007 and 30 July 2007.

The applicant was, at both hearings of the Board, represented by Advocate L Mazonde who pointed out that it was not competent for the fourth respondent to use the Public Service Regulations since the Public Service Act [*Cap 16:04*] as read with the Constitution expressly excludes the fourth respondent from the Public Service.

The Board, however, argued that “it was competent for the fourth respondent to use the Public Service Regulations as the adoption of the Regulations was not prohibited by any law.” The Board went further to say the contract between the fourth respondent and the applicant allowed for the use of the Regulations. Indeed para 2 of the applicant’s contract of employment made reference to the Public Service Regulations.

On 3 August 2007 the Board submitted its report to the fourth respondent with the following recommendations:

“1. VUTABWAROVA’s suspension should be lifted, with effect from the date

 these recommendations are approved.

 2. VUTABWAROVA should forfeit salary lost during his suspension.

 3. VUTABWAROVA should be demoted to the rank of ASIO, with effect from

 the date these recommendations are approved. Furthermore, he should be

 re-deployed to another Branch at the discretion of the Disciplinary Authority

 (read: Director General).

 4. VUTABWAROVA should be served with a **FINAL WARNING.**”

 On 16 September 2008 the third respondent did not accept the Board’s recommendations but ruled that the applicant be discharged from the service of the fourth respondent. The third respondent’s decision was communicated to the applicant on 27 October 2008 through a letter authored by the second respondent. The letter, addressed to the applicant by the second respondent read as follows:

 “1. Your attention is drawn to the above matter.

 2. Please be advised that as a result of the Disciplinary Board of Inquiry you

 attended, the Director General has approved of your discharge from the

 Organisation with effect from 16 September, 2008.

 3. To this end, you are being directed to surrender all Government property in

 your possession, to this Headquarters, as soon as you see this letter.

4. Be guided accordingly, please.”

 The applicant received the above letter on 19 November 2008 and on 25 November 2008 he filed this application.

 The applicant’s grounds of review are listed as follows:-

 “1. The Board of Inquiry as convened to determine alleged acts of misconduct

 committed by applicant had no jurisdiction in law to sit to determine the

 alleged acts of misconduct.

 2. The applicant did not receive a fair hearing before the Board Chaired by first

 respondent in that the Board was biased against him.

 3. The recommendations of the first respondent as well as that of the third

 respondent are unlawful and of no force and effect.”

 The applicant then prayed for an order:-

“(a) Declaring that the decision of first respondent recommending the

 demotion of the applicant to a lower rank in the employ of the fourth

 respondent is unlawful and of no force or effect.

(b) An Order that the decision of the third respondent in discharging applicant

 from the employ of the fourth respondent is unlawful, invalid and of no

 force and effect.”

 I believe that a determination on whether or not the Board could competently use the Public Service Regulations to deal with the applicant’s alleged Acts of misconduct, will dispose of the matter. I believe that is what the first ground of review seeks to do. The question therefore is: Could the Board, no matter how established or constituted, sit to determine an allegation of misconduct, on the part of the applicant, placed before it in terms of the Public Service Regulations?

 Mr Chivasa, for the respondents correctly conceded that the Public Service Regulations did not apply to the applicant and were therefore not available for use by the Board. He further informed the court that the relevant authorities were in the process of formulating regulations for use by the fourth respondent.

 I believe it would indeed help for the fourth respondent to formulate its own regulations because even the Labour (National Employment Code of Conduct) Regulations, 2006 do not apply to the fourth respondent. Section 3(3) of the Labour Act [*Cap 28:01*] (‘the Act’) provides as follows:

“**Section 3 Application of Act**

1. …………….
2. …………….
3. This Act shall not apply to or in respect of
4. Members of a disciplinary force of the state; or
5. ……………..
6. ……………..”

Section 2 of the Act defines ‘disciplined force’ as follows:-

“disciplined force” means –

1. A military, air or naval force
2. A police force
3. A prison service
4. Persons employed in the President’s Office on security duties.”(my own underlining)

Clearly, the applicant, being employed in the President’s Office on security duties, belongs to the disciplined forces and is therefore not covered by the regulations gazetted in terms of the Labour Act. The National Employment Code of Conduct is therefore also not available for use by the fourth respondent. There is therefore need for the fourth respondent to formulate and gazette its own employment regulations. If the fourth respondent wants to adopt the Public Service Regulations or the National Employment Code of Conduct, there must be a law that says so.

Mr Chivasa’s concession, as I have indicated above, was in line with the law.

Section 14 (e) of the Public Service Act [*Cap 16:04*] (‘the Act’) provides as follows:

“Subject to s 113 of the Constitution, the Public Service shall consist of all persons

in the service of the State , other than –

1. – (d)
2. Members of any organization established in the President’s Office for the protection of national security;”

 The relevant part of s 113 (1) of the Constitution, reads as follows:

 “’Public Service’ means the service of the State but does not include –

1. - ( c)….;
2. Service which this Constitution or an Act of Parliament provides shall not form part of the Public Service.”

In *Ricky Nelson Mawere and David Nyabando* v *The Central Intelligence* *Organisation* (SC) 30/07, where similar facts existed, SANDURA JA, after taking into account the above provisions of the law ruled as follows:-

 “It is, therefore, clear beyond any doubt that the applicants, being members of the C.I.O., were not part of the Public Service and were not governed by the Act and the regulations. Accordingly, the disciplinary procedure set out in the Regulations did not apply to them.

Consequently, the Board set up by the C.I.O., purportedly in terms of the Regulations, was not covered by the expression “other adjudicating authority established by law” in s 18(9) of the Constitution, as it was not set up in terms of any law governing the members of the C.I.O..”

The Supreme Court also considered the effect of para 2 of the applicant’s contract of employment which, as in *casu*, read as follows:-

“2. Your conditions of service are in general aligned to the provisions of the

 following legislation:

1. – f. ….;

g. Public Service (Officer) (Discharge and Misconduct) Regulations,

 1979, published in Statutory Instrument 561 of 1979 (now replaced by

 the Public service Regulations, 2000, published in Statutory Instrument

 1 of 2000).”

SANDURA JA then went further to say:-

“In my view, the effect of the above provision was that the C.I.O. and the applicants agreed that the disciplinary procedure applicable to the applicants would, to a large extent, be the same as or similar to the disciplinary procedure set out in the Regulations for the members of the Public Service.

However, that did not mean that s 14(e) of the Act had been amended and that the employment contract had made the applicants part of the Public Service. That could only have been done by means of an Act of parliament.”

I have deliberately quoted SANDURA JA’s judgment at length in order to demonstrate that the legal issue raised by the applicant relating to the applicability of the Public Service Regulations to the fourth respondent and indeed to him as an employee of the fourth respondent has already been decided by the Supreme Court.

 The ruling in Mawere, *supra*, applies with equal force to this case. The Public Service Regulations were not available to the fourth respondent and therefore the Board’s proceedings were outside the law. The fourth respondent could not establish the Board in terms of regulations which did not apply to it. The proceedings were therefore clearly a nullity in law. Accordingly and because the proceedings were a nullity, I am disabled from considering the other grounds of review raised in this application apart from nullifying the Board’s decision and the fourth respondent’s final ruling.

 Given the foregoing and the concession by counsel for the respondents, I rule in favour of the applicant.

 I therefore order as follows:-

 1. The decision of the third respondent in discharging the applicant from the

 employ of the fourth respondent be and is hereby declared unlawful,

 and of no force and effect.

 2. The decision of the first respondent recommending the demotion of the

 applicant to a lower rank in the employ of the fourth respondent be and is

 hereby declared unlawful and of no force and effect.

 3. The applicant be reinstated in the employ of the fourth respondent on full

 pay and benefits with effect from the date of dismissal, and failing

 reinstatement the respondents shall pay the applicant agreed damages for loss

 of employment; and

 4. The fourth respondent shall pay the costs of this application.

*Messrs Chibune & Associates*, Applicant’s legal practitioners

*The Attorney General- Civil Division*, defendant’s legal practitioners