TALENT CHAPWANYA
and
CHARLES MATUZA
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBAWE (N.O)
and
THE ARMY COMMANDER: ZIMBABWE NATIONAL ARMY (N.O)
and
THE ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
TSANGA J
Harare, 18 December 2018

Chamber application

TSANGA J: This is a chamber application for condonation of late filing of a review application. It is opposed. The applicants were dismissed from the defence forces in 2014 in matters involving sexual abuse of junior cadet officers. The first applicant was acquitted by the court martial but subsequently dismissed by a Board of enquiry. The second applicant who was found guilty, was given a sentence other than dismissal before being dismissed by the suitability board. The first applicant would like to seek a review of his late application is condoned on the basis that following his acquittal by the Court Martial, the Board of Inquiry acted irregularly. He asserts that he should never have been dismissed having been acquitted by the court martial who he says had the power to dismiss him at the time it heard its matter but did not. The second applicant on the other hand, alleges double jeopardy in that he had already been duly punished by a court on the charges of violating the relevant provision of the Defence Act.

In an application of this nature where condonation is sought for late filing of a review the standard factors to be considered in deciding whether or not to condone the late filing of such application is the degree of non- compliance; the explanation for it; and the applicant's prospects of success. As stated in *Simba* v *Say brook (1978) (Pvt) Ltd* HH-57-03 further

factors that have been considered in previous cases, namely the respondent's interest in the finality of the matter, the convenience of the court and the avoidance of unnecessary delay in the administration of justice, can be subsumed under one or other of the first three. See also *Friendship* v *Cargo Carriers Ltd & Anor 2013 (1) ZLR 1 (S); Nyakambangwe* v *Jaggers Trador (Put) Ltd* HH-146-03 for these principles.

Our courts are reluctant to condone late applications for reviews unless there are very compelling reasons to so grant. In *Mambo* v *National Railways of Zimbabwe* & Anor 2003 (1) 347 (H) it was highlighted that:

> "Rule 259 of the High Court Rules requires that an application for review must be filed within eight weeks. The reason is obvious. Where a party wishes to have a decision made by some body reviewed and set aside, that must be done expeditiously. The longer the period that a decision remains unchallenged the more difficult it is to restore the *status quo ante*. Where the delay in filing a review application exceeds six months, the court should refuse to condone the late filing unless there are very compelling reasons. The court will not consider the applicant's prospects of success where the delay in filing the application has been unreasonably long and the reasons proffered for the delay are unacceptable"

The delay and reasons for the delay

In this instance the application was filed in the initial instance in September 2016, nearing two years from the date of dismissal complained about. The delay was inordinate. The explanation for the delay is that the applicants had no resources at the time to hire lawyers and when they did find lawyers in January 2015, a wrong application had been filed in that the appeal to the Supreme Court against the decision of the court martial. In this instance, their complaint was against the dismissal by the Board of Enquiry. When this came to light in 2016, an application for review instead was then lodged with the High Court. This application for condonation is with respect to that pending application. The further delay in placing the matter before a judge had to do with obtaining the transcribed record. The fact that the blame lies with the practitioner does not necessarily mean that an application will be granted, more so when the merits of the case are an issue.

Merits and other considerations

On prospects of success, the issue of nature and character of disciplinary proceedings has been canvassed by our Supreme Court in *S* v *Muridzo* SC 143-87. This case makes it clear that disciplinary proceedings are a matter of internal discipline and are not to be confused with *autre fois* convict or *autre fois* acquit. See also *Assistant Inspector Mbwembwe*

and Ors v The Trial Officer (Superintendent Mkandla & Anor HH 458-17; *Nathan Chilufya v Commissioner General of Police & Ors* HH -89 -10*; Detective Constable Mujabuki* v *Trial Officer Supt Gudo & The Commissioner–General of Police* HB-148-17; *Sangu* v *Comm Gen of Police & Ors* HB-110-16. In these cases police officers similarly sought to query their dismissal after being discharged from the force following disciplinary hearings when they had been equally criminally charged and convicted or acquitted. In essence, the principle that also emerges from these cases is that the functions of internal disciplinary proceedings are different from criminal proceedings in that their aim is to focus on reputation of an institution and the maintenance of public confidence in that institution.

Furthermore, disciplinary proceedings are also permissible in terms of s 278 of the Criminal Code. Section 278 (2) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] provides as follows with regards to members of disciplined forces who include the defence forces, the police and prison services:

> "**278 Relation of criminal to civil or disciplinary proceedings**
> (2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be.
>
> (3) Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings."

There was therefore nothing untoward about the disciplinary proceedings held against the applicants that would justify a review. What the applicants had faced before the court martial were criminal proceedings whose procedure is laid out in s 56 of the Defence Act. Court Martials sit as military courts and are clearly enjoined in s 56 to apply the law in force in criminal proceedings in ordinary courts of law. There is nothing in s 56 that suggests that these were combined civil and criminal proceedings. Section 56 reads as follows:

> "**56 Law to be observed by courts martial**
> Except as is otherwise provided by this Act, the law which shall be observed in the trial of any charge before
> a court martial as to—
> (*a*) the onus of proof; and
> (*b*) the sufficiency or admissibility of evidence; and
> (*c*) the competency, compellability, examination and cross-examination of witnesses; and
> (*d*) any matter of procedure;
> shall be the law in force in criminal proceedings in the civil courts."

The phrase the *"law in force in criminal proceedings in the civil courts"* seems to have created some confusion in the minds of the applicants when they argue that the court martial was free to dismiss them but did not. Court martials sit as military courts and therefore the phrase '*criminal proceedings in the civil courts'* merely seeks to emphasise that the law to be applied in a trial before a court martial is that applied by courts in the ordinary civilian courts. When the applicants appeared before the court martial, there were there for criminal proceedings using the law in force as would be applicable in ordinary criminal proceedings in ordinary criminal courts. They were not there for disciplinary proceedings but for criminal proceedings.

There is no need to delay finality in these proceedings as there are no prospects of success if the application for condonation of late filing of the review were to be granted. It lacks merit

Accordingly:

The application for condonation of late filing of a review is dismissed with costs.

Messrs Kwenda & Chagwiza, applicants' legal practitioners
The Attorney General, respondents' legal practitioners