CHARITY MADYAMBUDZI
and
SHADRECK MUGABE
versus
DIRECTOR GENERAL N.O
and
DEPUTY DIRECTOR N.O
and
MINISTER RESPONSIBLE FOR NATIONAL SECURITY N.O

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 18 November 2021 and 23 March 2022

**Application for review**

*Ms B Mtetwa* for applicant
*Ms T Tembo* for the respondent

MANYANGADZE J: This is an application for review filed in terms of the then applicable High Court Rules of 1971, Order 33, r 256. It arises out of disciplinary proceedings instituted by the respondents against the applicants sometime in April 2021.

The applicants are members of the Central Intelligence Organisation (CIO). The first applicant holds the rank of Provincial Intelligence Officer. The second applicant holds the rank of Divisional Intelligence Officer. At the material time, they worked in the Material Resource Management Division.

On 5 October 2020, the first applicant was transferred to the Investment Branch and the second applicant to the Security Branch. The applicants allege that the transfers were done unceremoniously. The move was taken after they had raised queries on finance and procurement procedures within the Material Resource Management Division. It appeared some unethical and corrupt practices were being carried out unchecked.

The applicants allege that after they sought clarification on their redeployment, misconduct charges were levelled against them. They were charged with misconduct in terms of the CIO Code of Conduct. The charges were *disobeying a lawful instruction and absenting themselves from duty*

*without leave.* They were served with suspension orders on 15 April 2021. The suspension was on half salary. The suspension orders also served as charge sheets for the misconduct allegations.

On 18 May 2021, the applicants were served with a notification to attend a disciplinary hearing, referred to as a Convening Order within the CIO. The disciplinary hearing was scheduled for 9 June 2021.

On the scheduled date, the applicants, through their legal practitioner, raised a number of preliminary issues. The Disciplinary Committee adjourned the hearing to 7 July 2021 for a ruling on the points *in limine*. When the Committee reconvened, it was advised that the applicants had filed an application for review in the High Court. Thus the disciplinary proceedings were aborted. The applicants instead pursued the review application filed in this court.

The grounds for review are stated as follows:

> "1. The disciplinary proceedings instituted against the 1st and 2nd Applicants are grossly irregular in that the 21 day period within which the disciplinary proceedings ought to have been instituted lapsed before the Respondents commenced disciplinary proceedings against the 1st and 2nd Applicants.
> 2. The suspension orders against the 1st and 2nd Applicants are grossly irregular in that the 1st and 2nd Applicants were suspended on half salary when such is not provided for in the Code of Conduct"

Both parties raised the following points *in limine*.

Applicant

1. The deponent to the opposing affidavit had no authority to depose to the affidavit.

Respondents

1. The applicants seek an incompetent relief being a declaratur in an application for review.
2. The application for review was prematurely filed, in that the issues raised therein were yet to be determined by the Disciplinary Committee.

Although either party may raise points *in limine*, ordinarily, such points are taken by the respondent(s). If the point is validly taken, it often results in the matter being struck off the roll without delving into the merits thereof. The preliminary point therefore must be of a nature that is capable of disposing of the matter.

In my view, the second preliminary point taken by the respondents' raises a fundamental question, which ought to be resolved first. It is the question of whether or not the application for review, *in the first place*, is properly before the court. It is a question which the court itself may

have raised *mero motu*, had the parties not done so. From the papers filed of record, a consideration of this issue is warranted.

As already indicated, the applicants raised preliminary points before the Disciplinary Committee, and went on to file the present application before that Committee made a ruling on the preliminary points. From submissions made on behalf of the applicants during the hearing of this matter, the preliminary points raised included the issues raised in the review application. The Disciplinary Committee had in fact adjourned, by consent of the parties, to consider the preliminary points and come up with a ruling. This was not to be, as the applicants then rushed to this court with an application for review.

It is this conduct on the part of the applicants that has led the respondents to aver that the application for review was prematurely brought before this court.

The court drew the attention of Mrs *Mtetwa*, counsel for the applicants, to paragraph 6.17 of the respondents'opposing affidavit, the portion referenced "Ad para 7.5." This paragraph outlines what transpired between the applicants and the Disciplinary Committee. I can do no better than cite it *in extenso*, as it has a material hearing on the point under consideration. It reads:

> "On 8 June 2021 the Applicants in a document from their Legal Practitioners dated 8 June 2021 and served on the Respondents after working hours on the same day, raised some Preliminary issues regarding the disciplinary hearing set for the 9th of June 2021. Among other issues the Applicants challenged the composition of the Disciplinary Committee. On the 9th of June 2021 when the disciplinary hearing commenced, the Applicants made an application on the same preliminary issues and then sought the Committee's response. Thus, on this particular day, the Committee only responded to and made a ruling with regards to the composition of the Disciplinary Committee and both parties agreed to adjourn the proceedings to 7 July 2021, the date when the Committee was to respond and make a ruling on the outstanding preliminary issues. On the 7th of July 2021 when the parties gathered to commence the proceedings, before the Committee had responded or made a ruling on the outstanding preliminary issues, the Applicants through their legal representatives advised the Committee that they had already filed an application for review in the High Court. Thus the Committee was never given the opportunity to respond to the preliminary issues and make a ruling before an application for review was filed in the High Court."

This passage clearly indicates that the Disciplinary Committee was seized with the issues in respect of which the applicants came to this court on review. The applicants did so before the Diciplinary Committee handed down its ruling, after having agreed to wait for the ruling. Significantly, the applicants do not dispute that this is in fact what happened.

Mrs *Mtetwa's* explanation for this conduct was an attempt to separate what was done by the Director General, the (first respondent) from what was done by the Disciplinary Committee. She contended that the two processes were different and should not be mixed up. She averred that the issue of the illegality of the disciplinary proceedings was raised before the Disciplinary Committee for record purposes only. She also averred that this would indicate that the applicants had not waived their rights in respect of the impugned suspension from duty.

This argument suggests that the issue was raised as a formality, only for noting by the Disciplinary Committee, and not for adjudication. I find this assertion rather astounding. Litigants do not appear before a tribunal and raise issues merely for its noting. Issues are raised for the tribunal's determination. This contradicts an averment counsel made shortly afterwards, that the issue was raised;

> "so that the Disciplinary Committee would look into the question of whether or not it had proper suspending documents"

Clearly the issue of the legality or validity of the suspension, was raised before the Disciplinary Committee, together with other issues, *for the Disciplinary Committee's determination*. That explains the adjournment for a ruling, by consent of both parties. Before the ruling was handed down, the instant application was then filed.

In my view, this is a classical instance of prematurely approaching this court for relief. It abrogates the fundamental principle that parties must exhaust domestic remedies before approaching the courts for relief. This is especially so in relation to labour disputes, where dispute resolution mechanisms are often available at the workplace level. The dispute between the parties is essentially a labour dispute, and they must defer to this well-established principle.

Among the leading cases on that principle is that *of Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S). GUBBAY CJ stated, at 249 C-F:

> "In *Tutani* v *Minister of Labour and Others* 1987 (2) ZLR 88(H) at 95 D, Mutambanengwe J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and secondly,where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach was applied by SMITH J in *Musandu v Chairperson Cresta lodge Disciplinary Committee* HH 115/94 (not reported and was referred to with approval by MALABA J in *Moyo v Forestry Commission* 1996(1) ZLR 173(H) at 191 D – 192 B. I respectfully endorse it."

In *Nokuthula Moyo v Norman Gwindingwi N.O and Another* HB 168/11, MATHONSI J (as he then was) noted that domestic remedies in that case were those remedies and procedures that are set out in the code of conduct as being available to an aggrieved party to pursue. In this regard, the judge stated;

> "In a line of cases, this court has determined that it will be very slow to exercise its general review powers jurisdiction in a situation where a litigant has not exhausted domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach."

The learned judge then went on to make reference to a number of High Court decisions in which the same point was highlighted. These include *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH 115/94, *Tuso v City of Harare*, 2004 (1) ZLR (1) (H), *Chanora v Reserve Bank of Zimbabwe* 2006 (1) ZLR 525(H), *Tutan v Minister of Labour and Others* 1987 (2) ZLR 88(H).

*In casu*, no reasonable explanation has been advanced for abandoning the proceedings before the workplace Disciplinary Committee. As already indicated, the hearing had commenced, and had been adjourned for determination of the preliminary points the applicants had raised for that Committee's determination.

If these were criminal proceedings, the conduct of the applicants would be akin to that of an accused person seeking a review of unterminated proceedings commenced in an inferior court or tribunal. A case where this principle was underscored is that of *Constable Jani v ZRP Officer in Charge Mamina and Others* HH 550/15.

After examining the High Court's statutory powers of review provided for in Part IV of the High Court of Zimbabwe Act [*Chapter 7.06*] CHIGUMBA J noted that these powers are extensive, and can be exercised at any stage of criminal proceedings pending before an inferor court. However, the High Court will only exercise its review powers of unterminated proceedings in exceptional cases, where grave injustice might otherwise result.

When the respondent drew the court's attention to this case, the applicant contended that it is inapplicable *in casu*, as the instant application does not involve unterminated proceedings.

As already indicted, the proceedings in the tribunal *a quo* were abandoned after they had been adjourned for determination of issues raised by the applicants. The issues raised involved, among others, those brought before this court for review. It is not clear why the applicants

abandoned those proceedings before the Disciplinary Committee handed down its decision on the issues they had raised.

In my view, the conduct of workplace disciplinary proceedings would be thrown into disarray if these can be abandoned in midstream, on the basis that this court has wide ranging powers of review. The applicants have not demonstrated any justification for adopting that course of action. In the circumstances, I find that the point that the application for review has been brought to this court prematurely has merit and must be upheld. Since this point is dispositive of the matter, it renders it unnecessary to consider the other preliminary points. The proper course of action is to order that the application be struck off the roll, and the matter be remitted to the Disciplinary Committee for continuation of the proceedings that had been commenced before it.

**In the result, it is ordered that;**

1. **The application for review be and is hereby struck off the roll.**
2. **The matter be and is hereby remitted to the Disciplinary Committee for continuation of the proceedings that had been commenced before it.**
3. **The applicants' bear the respondents' costs**

*Mtetwa and Nyambirai*, Applicants' Legal Practitioners
*Civil Division of the Attorney General's Office*, Respondents' Legal Practitioners