EMMANUEL CHIRENGA
versus
DELTA DISTRIBUTION

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 10 March and 7 May, 2003

Mr *Musakana* for applicant
Mr *Gijima* for respondent

SMITH J: This is a review application. In the application itself, not in the founding affidavit, the legal practitioners for the applicant (hereinafter referred to as "Chirenga") have set out, shortly and clearly, the grounds on which he relies and the relief sought. Such strict compliance with Order 33 rule 257 is to be commended. Chirenga was employed by the respondent (hereinafter referred to as "Delta"). He was dismissed with effect from 29 October 2002. He seeks an order setting aside his dismissal and reinstating him on full salary and benefits from the date of his suspension. The grounds on which he relies are -

(a) he was not given adequate notice to attend the disciplinary hearing and to prepare his case;

(b) he was suspended on a charge of fraud but the charge put to him was one involving theft, forgery and uttering and that was the basis of his dismissal;

(c) he was not asked for a statement before he was suspended;

(d) he was not furnished with a charge sheet setting out the charges;

(e) he was denied the right to legal representation;

(f) he was not afforded adequate time to lodge his appeals.

Delta opposes the application. It raised two points *in limine*. Firstly, in terms of Order 33 rule 256, the application should be directed at the person or body who made the decision that is complained of, which is not done in this case. Secondly,

Chirenga has not exhausted his domestic remedies and has not given a reason for not doing so. As regards the merits, Delta submitted as follows. Adequate notice was given to Chirenga to attend the disciplinary hearing and to prepare his case. He was suspended in order to facilitate investigations. He was asked to make a statement and in fact he did so. Likewise, he was furnished with a charge sheet. The code of conduct has no provision for legal representation. Chirenga was afforded adequate time to lodge his appeal. Delta denied that there were any irregularities in the conducting of the disciplinary proceedings. It submitted that the application is frivolous and vexatious and should be dismissed with costs on the higher scale.

Mr *Musakana* made the following submissions. As Delta was the employer of Chirenga, it is only proper that the application is brought against it and not one of the internal disciplinary bodies - see *Savanhu* v *Postmaster-General* 1992(2) ZLR 455 (H). Chirenga is not obliged to exhaust his domestic remedies before turning to this Court for relief - see *Zikiti* v *United Bottlers* 1998(1) ZLR 389 (H) and *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1997(1) ZLR 613 (S). Not only has Chirenga raised the question of procedural irregularities, he has also raised the question of his right to legal representation - see *Vice-Chancellor, University of Zimbabwe & Anor* v *Mutasah & Anor* 1993(1) ZLR 162 (S) and *Marumahoko* v *Chairman , Public Service Commission & Anor* 1991(1) ZLR 27 (H).

Mr *Gijima* argued that Order 33 rule 256 requires that in a review application the applicant must cite the person who made the decision that is being brought under review. In this case, Chirenga is complaining about the decision that was made by the disciplinary committee and that which was made by the General Manager. Both of those should have been cited. Mr *Gijima* also submitted *in limine* that Chirenga was obliged to exhaust his domestic remedies before turning to this Court. He has not

shown that there are special features which should persuade the Court to exercise its discretion in his favour. As regards the merits, Mr *Gijima* submitted that there was nothing irregular in the proceedings held to determine that Chirenga was guilty of misconduct. He was informed of the allegations against him and he had adequate notice to attend the disciplinary hearings. Mr *Gijima* further argued that Delta's Code of Conduct allowed for Chirenga to be represented by a member of the workers committee. There is no mention in the Code of legal representation and therefore the omission gives rise to the inference that no right of representation other than by the workers committee was intended to be conferred - see *Minerals Marketing Corporation of Zimbabwe* v *Mazvimavi* SC-205-95.

Order 33 rule 256 provides as follows -

> "Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected."

In a case such as this, where an employee seeks to bring under review a decision by his employer to dismiss him, it is obvious that his employer must be cited. Where that is not done, his application will fail. Thus in *Sibanda* v *Postmaster-General* HH-263-90 and *Savanhu* v *Postmaster-General*, *supra*, the applications were dismissed because the applicants cited the Postmaster-General as the respondent and not the Posts and Telecommunications Corporation, which was the actual employer of the applicants. I consider that where an employee who has been dismissed wishes to bring under review the decision or proceedings of an employee or a committee consisting of employees of his employer which led to his dismissal, it would be adequate if the employer is cited. It would then be for the employer to ensure that the

actions of the employee or committee have been recorded and explained in his opposing affidavit. The employer can always attach to his founding affidavit any record of proceedings or affidavit from the employee concerned.

The main question for determination is whether the refusal on the part of Delta to permit Chirenga to be legally represented amounted to such a gross irregularity that it necessitates the setting aside of the proceedings. In *City of Mutare* v *Mlamboi,* SC-229-91 the Supreme Court was adjudicating on an appeal from a decision of REYNOLDS J. At p 2 of the cyclostyled judgment GUBBAY CJ said -

> "The learned judge *a quo* upheld the contention raised before him, that the denial of legal representation constituted so gross an infringement of the respondent's fundamental right to be afforded a fair hearing as to warrant judicial intervention without more ado. It has been argued before this Court that he was wrong in that regard".

Unfortunately the court dismissed the appeal for other reasons and so did not rule on the question of whether the determination by REYNOLDS J regarding the refusal to permit legal representation was wrong. The issue of legal representation was considered by ADAM J in *Marumahoko's* case, *supra*. He held that it is inconsistent with the Zimbabwe Constitution when a person is denied legal representation at an inquiry on issues of fact. At p 49 he said -

> "On the right to legal representation, LORD DENNING in *Maynard* v *Osmond* [1977] QB 240 at 252; [1977] All ER 64 (CA) at 79 observed:
> 'On principle, if a man is charged with a serious offence which may have grave consequence for him, he should be entitled to have a qualified lawyer to defend him. Such has been agreed by the government of this country when it adhered to the European Convention on Human Rights. But also, by analogy, it should be the same in most cases when he is charged with a disciplinary offence before a disciplinary tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or to loss of his livelihood; or, worse still, may ruin his character forever.
> I gave the reason in *Pett* v *Greyhound Racing Association Ltd* [1969] 1 QB 125, 132:
> 'If justice is to be done, he ought to have the help of some one to speak for him. And who better than a lawyer who has been trained for the task?'

He should, therefore, be entitled to have a lawyer if he wants one. But, even if he should not be entitled as of right, I should have thought that as a general rule the tribunal should have a discretion in the matter. Legal representation should not be forbidden altogether. The tribunal should have a discretion to permit him to have a lawyer if they think it would assist'".

The decisions of ADAM J were taken on appeal - see *Chairman, Public Service Commission* v *Marumahoko* 1992(1) ZLR 304 (S). At p 314 A-B

MCNALLY JA said -

"First it must be pointed out that the right to legal representation did not arise as an issue in this case, because there was no inquiry. Section 17(2) of the regulations prohibits legal representation at an inquiry. Whether that section is *ultra vires* the Constitution is a matter as to which the Commission may wish to seek legal advice - indeed it would be surprising if it has not already done so in the light of my remarks in *Chairman, Public Service Commission & Others* v *Hall* S-49-89 at p 7 and subsequently the CHIEF JUSTICE's remarks in *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 157-158. A ruling on the matter will not be given in proceedings in which the question does not arise."

MCNALLY JA repeated the remarks referred to above in the *Vice-Chancellor, University of Zimbabwe* case, *supra.* At p 174 B-C he said -

"When the Act was amended so as to omit reference to the right to legal representation, one finds that for eighteen months - and indeed as far as we know the position is still unchanged - the Ordinance remained unattended. It still referred to the student's right to legal representation. Why should we assume, in those circumstances, that the University intended to deprive the students of that right? The intention of the University in this respect is the intention of the Council as expressed through its Ordinances. The Ordinance never changed. Why then assume that the intention changed?

Whether one interprets *in favorem libertatis*, or *contra proferentem*, the result must be the same. One must assume that the Council, recognizing the demands of natural justice, decided against any amendment to the Ordinance, because it did not wish to deprive the students of the right to legal representation, despite the opportunity to do so which was provided by the amendment to the legislation. It was not for the Chairman of the SDC to amend the Ordinance. Nor indeed was it for the Legislature to do so. It was the function of the Council to do so. And it did not do so.

If the Council had wished to amend the Ordinance it could have done so quite simply by deleting s 8.4.6. Whether this court would have upheld that deletion in the light of s 18(9) of the Constitution is another matter. It is not necessary now to decide it because, in my view, the Ordinance still recognises the right to legal representation.

I would simply say that in a series of cases - *Chairman, Public Service Commission* v *Hall* S-49-89; *Metsola* v *Chairman, Public Service Commission*

> *& Anor* 1989 (3) ZLR 147 (S) at 158A; *City of Mutare* v *Mlambo* S-229-91 at pp 5-6; and *Chairman, Public Service Commission & Anor* v *Marumahoko* 1992(1) ZLR 304 at p 314 - this court has suggested, without deciding the point, that there is much to be said for the view that where an individual's career is at stake before a tribunal he may be entitled as of right, by reason of natural justice, to legal representation if he so wishes."

In *Minerals Marketing Corporation of Zimbabwe* v *Mazvimavi* 1995(2) ZLR 353 (S) the Supreme Court dealt with an appeal from a decision of the Labour Relations Tribunal. That Tribunal had declared that during the course of the hearing in question the disciplinary committee of the MMCZ had committed a series of gross irregulations. One of them was the denial of the employee's request to be legally represented before it. Dealing with the particular issue, GUBBAY CJ at p 358F-359 said -

> "Whether or not a denial of legal representation before a tribunal other than a court of law infringes the right of the person affected to a fair hearing is a somewhat open question. See *City of Mutare* v *Mlambo* 1992 (1) ZLR 17 (S) at 21; *Vice-Chancellor, University of Zimbabwe & Anor* v *Mutasah & Anor* 1993 (1) ZLR 162 (S) at 174G-H; Baxter, *Administrative Law* at pp 555-556. But it is one which falls squarely within the purview of the High Court's review powers. This is so even where what is in contention is a failure by that body to exercise a proper discretion in refusing legal representation and not merely the existence of an absolute right to enjoy it. See *Dladla & Ors* v *Admin, Natal &* Ors 1995 (3) SA 769 (N) at 776B-J.
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> In the sphere of employment law, where a disciplinary code governs the conduct of employees, the right to be legally represented at an enquiry is dependent on the provisions of the code itself. See *Dabner* v *SAR&H* 1920 AD 583 at 598; *Cuppan* v *Cape Display Supply Chain Svcs* 1995 (3) SA 175 (D) at 182G-I. It is just as if the employment relationship were regulated under a contract. See *Lamprecht & Anor* v *McNeillie* 1994 (3) SA 665 (A) at 668 B-I.
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> Section 101(3)(f) of the Labour Relations Act mandates that an employment code of conduct must grant to the employee, alleged to be in breach thereof, the right to be heard by the person, committee or authority responsible for its implementation, before any decision is made in the case. The Corporation's code provides that members of staff accused of committing work-related offences may be represented at the disciplinary hearing by the workers' committee. It was common cause that this form of representation was always available to the respondent. But there is no mention in the code of legal representation. The omission, I think, gives rise to the inference that no right to representation, other than by the workers' committee, was intended to be conferred".

The learned Chief Justice then went on to hold that the Tribunal had erred in believing that it was empowered to decide whether the refusal to permit an employee to be legally represented amounted to a violation of the principles of natural justice. However, he did not reach a conclusion as to whether or not a denial of legal representation before a tribunal other than a court of law infringes the right of the person affected to a fair hearing.

The question of legal representation was considered by DIDCOTT J in *Dladla & Ors* v *Administrator, Natal & Ors* 1995 (3) SA 769 (N). At p 775-776 he said -

> "Counsel drew my attention to *Pett* v *Greyhound Racing Association Ltd* [1969] 1 QB 125 (CA) {[1968] 2 All ER 545}, an English case about a licensed trainer of greyhounds who had been denied legal representation at a disciplinary enquiry into his conduct. Lord Denning MR had this to say on that (at 132A-133A {QB} and 549C-I (All ER):
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> > 'Mr Pett is here facing a serious charge…If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry I think that he is entitled not only to appear by himself but also to appoint an agent to act for him….Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man : 'You can ask any questions you like'; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor…Natural justice then requires that he can be defended, if he wishes by counsel or solicitor'.
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> The description given there of the inadequate defences proffered in most cases by laymen fending for themselves is echoed loudly by our local experience. Rarely, what is more, would a fellow employee who was no lawyer do much better. Those remarks of Lord Denning MR have not been accepted in England, according to *Lamprecht and Another* v *McNeillie* 1994 (3) SA 665 (A) at 671I-672B, as authority for the proposition that legal representation must always be countenanced in situations of the sort with which he dealt. But counsel did not cite his judgment, and I have not quoted from it, in support of that proposition, the untenability of which I shall assume for the purposes of my decision. The present aptness of the passage

reproduced by me lies rather in its relevance to the discretion which has on that hypothesis to be exercised, I agree with counsel, once legal representation is neither allowed nor disallowed by any statute, regulations or rules governing the proceedings and the occasion therefore arises for a discretionary decision on the point.

Such occasions were discussed in a second English case to which I was referred, the one of *Enderby Town Football Club Ltd* v *The Football Association Ltd and Another* [1971] 1 Ch 591 (CA) (1971) 1 All ER 215), when Lord Denning MR returned to the subject, stating at 605D-G (Ch) and 218 b-c (All ER):

> 'Is a party who is charged before a domestic tribunal entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure, and if they in the proper exercise of their discretion, decline to allow legal representation, the Courts will not interfere...But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: 'We will never allow anyone to have a lawyer to appear for him'. The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart'.

Reverting to the *Pett* case, and explaining the decision reached in it, he continued at 605H-606B (Ch) and 218 f-g (All ER):

> 'Mr Pett was charged with…a most serious offence carrying severe penalties. He was to be tried by a domestic tribunal. There was nothing in the rules to exclude legal representation, but the tribunal refused to allow it. Their reason was because they never did allow it. This Court thought that that was not a proper exercise of their discretion. Natural justice required that Mr Pett should be defended, if he so wished, by counsel or solicitor…Maybe Mr Pett had no positive right, but it was a case where the tribunal in their discretion ought to have allowed it'.

The *Lamprecht* judgment left open (at 672H-I), the question whether our law took the same general view of the discretion exercisable in the state of affairs thus postulated. That it surely does so is an answer for which support can be derived, however, from *Morali* v *President of the Industrial Court and Others* 1987 (1) SA 130 (C), a matter in which BERMAN J declared at 133 C-D -

> 'The common law…provides, and it is indeed one of the cornerstones of the common law, that a party be afforded a fair opportunity to present his case, which is a facet of the *audi alteram partem* rule, so that while the party appearing before an administrative tribunal has no right to be represented, the tribunal has a discretion to permit this,…a discretion which it will exercise in appropriate cases,…each case being dealt with on its particular merits'".

The learned judge concluded that the tribunal had a discretion to permit legal representation. He went on to say at p 777 A-E -

> "What remains to be considered is whether there was a proper exercise by the officials concerned of the discretion which I therefore believe them to have had when it came to the legal representation of the applicants. The conclusion is inescapable, in my opinion, that nothing of the sort occurred. The jobs and livelihoods of the applicants were at stake. They were handicapped by every disability of laymen which Lord Denning MR had described. Their fate lay in the hands of no independent tribunal, but officials of the very establishment which had charged them with misconduct, officials who would hardly have felt inclined in any strife between them and it to look with sympathy at their side of the story. The disadvantage from which they suffered on that score was then aggravated by the differences of race, culture, language and background that distanced them from the officials, impairing the prospects of shared insights and mutual understanding. Their need for a lawyer to defend them was strong in all those circumstances. Yet, when they were denied the opportunity to have one, such considerations were wholly disregarded. None even entered the minds of the officials, who were preoccupied with their usual practice and oblivious to everything else. In no emergency where a delay in the proceedings could not be brooked, and for no reason that has emerged but conformity for its own sake, they followed the practice unquestioningly and slavishly. They made up their minds to do so, furthermore, without waiting to hear or deigning to care what the applicants or their attorney might have wanted to say about that".

He set aside the dismissals of the employees because there was a failure to exercise a proper discretion to allow the employees legal representation at the disciplinary enquiries.

The views expressed by Lord Denning MR in the *Pett* case, *supra* and by DIDCOTT J apply equally in this country. Employees facing a charge of misconduct which might result in dismissal cannot expect to be calm and rational when appearing before a disciplinary tribunal. Most employees in this country are not highly educated. They cannot be expected to prepare a case to avoid dismissal. They are highly unlikely to be aware of what issues may be raised in mitigation. They are not experienced sufficiently to be able to cross-examine witnesses who testify against them. They are unlikely to be able to assess whether witnesses should be called to help their case. I consider that if an employee who is facing a charge of misconduct

which might lead to his dismissal wishes to have legal representation, and his request is refused, the requirements of the *audi alteram partem* rule would not be met.

In *Nhari* v *Public Service Commission & Anor* 1998 (1) ZLR 574 (H) DEVITTIE J was dealing with a case where the applicant, who was entitled to be legally represented, applied for a postponement of the disciplinary inquiry so that he could obtain legal representation and his application was rejected. At p 578 G he said-

> "The right to legal representation before a tribunal other than a court of law is beyond question".

He then went on to cite the remarks of Lord Denning in *Maynard* v *Osmond* which I have referred to earlier. The learned judge held that the rejection of the application for a postponement had not prejudiced Nhari and so dismissed the application for review. There was an appeal from his decision - *Nhari* v *Public Service Commission* 1999 (1) ZLR 513 (SC). At p 518 B-F GUBBAY CJ said -

> "It is, to my mind, 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 other 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 the law. Indeed, I can do no better than to quote the words of JUSTICE SUTHERLAND, of the United States Supreme Court, in *Powell* v *Alabama* 287 US 45 (1927) at 68-9:
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> > 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'

These *dicta*, although spoken in the context of criminal proceedings, apply with equal force to the position of a person charged with a serious disciplinary offence, one which, if proved, will, as in this case, result in dismissal, the loss of livelihood and ruination of character. See *Maynard* v *Osmond* [1977] 1 All ER 64 (QB) at 70a *per* LORD DENNING MR.

It seems to me that 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, constitutes a denial of the right to a fair hearing guaranteed under subs (2) and (9) of s 18 of the Constitution of Zimbabwe".

Accordingly, for the reasons, set out above, I consider that the dismissal of Chirenga must be set aside. Delta may, of course, institute fresh disciplinary proceedings against Chirenga, if it so wishes but must afford him the right to be legally represented.

It is ordered that -

1. The decision by the respondent to dismiss the applicant is set aside.
2. The applicant be reinstated to his original position with full salary and benefits from the date of suspension.
3. The respondent pay costs of suit.

Mapambure & Associates, legal practitioners for applicant
Gill, Godlonton & Gerrans, legal practitioners for respondent