SOBUZA GULA-NDEBELE
versus
CHINEMBIRI ENERGY BHUNU N.O.

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 12 November 2009 and 27 January 2010.

OPPOSED APPLICATION

Adv H Zhou for the applicant.
Mrs W R Chingeya for the respondent.

MAKARAU JP: The applicant was the Attorney-General for the Republic of Zimbabwe up to May 2008 when he was removed from that office.. His removal from office was publicly announced by a notice appearing in the Government Gazette of 16 May 2008. Following this, a letter was dispatched to him by the Chief Secretary to the President and Cabinet on 23 May 2008, informing him of the termination of his services as Attorney-General.

Prior to the removal of the applicant from office, the respondent and two other members were appointed to form a tribunal as provided for in section 110 (5) of the Constitution of Zimbabwe to inquire into the question of and make recommendations on the removal of the applicant from office for alleged misbehaviour. The respondent has been cited in this application in his capacity as Chairperson of that tribunal.

It is common cause that the tribunal recommended that the applicant be removed from office and after receiving this recommendation, the President acted on it.

On 14 July 2008, the applicant filed this application, seeking to have reviewed the decision of the tribunal to recommend that he be removed from office for misbehaviour. In attacking the decision of the tribunal, the applicant alleged that it was grossly unreasonable and utterly perverse in its defiance of logic and reason that no tribunal, properly addressing its mind to the facts before it and to the law, and having regard to the evidence before it, could have arrived at such a decision. He further alleged that having regard to the totality of the

report of the report produced by the tribunal and its assessment of the evidence adduced before it, the tribunal was biased against him. He concludes his attack on the decision of the tribunal by alleging that the recommendation made by it to the President arose not only out of bias against him but also as a result of the consideration of improper motives.

The application was opposed.

Firstly in opposing the application, it was contended on behalf of the respondent that the application, which, in terms of Order 33 Rule 259 of the High Court Rules, must be filed within eight weeks of the termination of the proceedings sought to be impugned, was filed out of time.

Secondly, it was further contended that the applicant's application did not comply with the rules of this court in that it did not state on its face the clear and concise grounds upon which the applicant sought to have the proceedings of the tribunal set aside.

Finally, it was contended that the decision of the tribunal was actually the decision of the President in terms of s31K (2) of the Constitution and that being the case, this court has no review jurisdiction over the decision.

At the hearing of the application, the second objection alleging that the applicant's application does not state the grounds of review clearly and concisely on its face was not pursued.

I return to the first point.

It is trite that unless the time is extended by the court for good cause shown, an application for review must be filed within eight weeks of the decision being impugned. The calculation of time for the purposes of the rules is governed by common law. The rule is to include the last day when the event occurred and to exclude the last day. Thus the eight week period is to be reckoned from the date when the applicant was notified of the fact that the proceedings against him had terminated. (See *Nair v Naicker* 1942 TPD 3, at 6ff).

The issue that falls for decision in this matter is the actual date upon which the applicant was notified of the decision to terminate his appointment. The applicant contends that it is the date of the letter from the Chief Secretary to the President and Cabinet whereas the respondent contends that it is the date of the publication of the termination in the Government Gazette.

I have not been advised in argument the legal provision that bears out the contentions of the respondent in this regard. My attention has not been drawn to any provision of the

Constitution or any other law that requires the termination of the appointment of the Attorney-General to be published in the gazette. My own limited research into the matter reveals no such requirement. It would appear to me that the publication of the termination of the applicant's appointment was intended to give notice to the public at large that the applicant was no longer the Attorney –General of the Republic and that the pubic should be guided accordingly perhaps? In my view, publication of the termination of the applicant's appointment could not have been meant to constitute personal notice to the applicant of the fact. Personal notification of the termination of his appointment was effected through the letter of 23 May 2008.

It is my finding that that the operative date upon which the eight weeks that the applicant had to challenge the decision terminating his employment was the date of the letter advising him of such and not the date of the publication of the termination in the Gazette.

He was not out of time in filing the application for review.

Assuming that I have erred in holding that the eight weeks within which the applicant had to file his application for review was reckoned from 23 May 2008 and not from 16 May 2008, I would have condoned the delay by the applicant in this matter. The delay in filing the application was by four days only and the importance of this matter is in my view such that it must be determined on its merits.

I now turn to the final issue in this application.

The respondent has argued that the decision of the tribunal to recommend the termination of the applicant's appointment is actually a decision of the President and one which this court has no jurisdiction to review.

In my view, it is not necessary that I decide the matter on this basis.

At the hearing of the matter, I raised the non- citation of the President as an issue and requested the parties to address me on whether or not such was fatal to the applicant's case. The parties addressed me on this point during the hearing and Advocate Zhou took advantage of my invitation to the parties at the end of the hearing and has since filed additional written submissions on the issue.

The issue that has exercised my mind as a consequence of the non-citation of the President is whether the recommendation of the tribunal, once acted upon, continues to have an independent existence and can be impugned without necessary impugning the action of the President in implementing the recommendation.

I will explain in some detail.

It is common cause that the applicant deliberately chose not to cite the President as a respondent as he is not seeking reinstatement as the Attorney-General of the Republic. He wishes his removal from that office to remain extant. In other words, he does not seek in these proceedings to attack the action of the President in implementing the recommendation of the tribunal. He argues that the process of his removal from office consisted of two separate juristic acts, the inquiry by the tribunal and his actual removal from office by the President. He is thus seeking to impugn the first and not the second. Therein lies my difficulty.

It appears to me that before the tribunal such as the one chaired by the respondent has made its recommendation to the President, its proceedings may competently be set aside on review. I must hasten to qualify that I am not expressing this as a firm position at law as I have not received full argument on the matter nor does the issue specifically arise before me. It however appears to me that like the proceedings of any other quasi- judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, may be set aside before they are concluded and before any recommendation is made. I do not read anything in the Constitution that would have the meaning of ousting the review jurisdiction of this court over the proceedings of a tribunal set up under section 110 of the Constitution.

It further appears to me, following the reasoning above, that even after completing its inquiry but before its recommendation is acted upon, the proceedings and the consequent recommendation of the tribunal can be set aside on review. In both instances, it appears to me that there may be no need to cite the President in review proceedings to set aside the decision of the tribunal. Again I express this view tentatively as the issue does not arise before me. I simply highlight my views in this regard for the purposes of contrasting the position after the President has implemented the recommendation and has taken the action stipulated in the section.

It presents itself clearly to me however that where the recommendation of the tribunal has been implemented as required by the Constitution, then the decision of the tribunal ceases to have any independent status and becomes imbedded in and forms an integral and inseparable part of the action of the President.

Section 110 (3) of the Constitution provides:

"Such person shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under subsection (5) and that

tribunal has advised the President that he ought to be removed from office for inability to discharge his functions or for misbehaviour."

In my view, the literal and grammatical meaning of the section is that the person to whom the section applies can only be removed from office by the President if the President is so advised by the recommendation of the tribunal. Thus, the President does not take any decision in the matter but is enjoined simply to implement the recommendation and advice of the tribunal to that effect. The removal of the Attorney-General from office is thus not a decision that the President can reach *mero motu* or against the recommendation of the tribunal. He cannot act without a recommendation and advice from a tribunal.

My reading of the section suggests that the President is bound by the Constitution to act on the recommendation of the tribunal and once he does that, the removal of the Attorney – General from office becomes the action of the President albeit on the recommendations and advice of the tribunal. The two then become inseparable in my view. While the recommendation and advice can exist on its own before implementation, once implemented, the two become one. On the other hand, the implementation cannot exist on its own without the recommendation and once the recommendation is lawfully set aside, the implementation fails to have a basis in law and becomes unconstitutional.

Viewed from another angle, the converse of the above is in my view is to hold that the President cannot lawfully remove the Attorney-General from office in the absence of a recommendation to that effect. Any such attempt will be unconstitutional and thus unlawful.

It appears to me that the purpose of the section is to protect the Attorney-General from arbitrary removal from office by the President. I cannot envisage a stronger provision protecting the office of the Attorney-Genera from arbitrary decision by the President than this. The section ties down the President and binds him to only act on the recommendations of a tribunal of experts. In my view, to read the section in any other way would be to dilute the protection that the section offers and thus offend against the clear intention of the legislature.

On the basis of the foregoing, I find the argument by the applicant untenable. To separate the proceedings and recommendation of the tribunal from the ultimate act of terminating the appointment of the Attorney-general is in my view to suggest that the President can act without such a recommendation of a duly constituted tribunal of experts as provided for in the Constitution.

It is therefore my finding that the non-citation of the President in this application is fatal to the applicant's application. As indicated above, it is untenable for the applicant to

suggest that he can attack the recommendation of the tribunal only without affecting the act of the President to remove him from office. The act of removing him from office cannot lawfully exist without the requisite recommendation and thus to attack one is of necessity to attack the other. In that regard and to be procedurally correct, the President must be made a party to the proceedings. This court cannot make an order adversely affecting the action of the President without affording him the right to be heard.

In the result, I make the following order:

The application is dismissed with costs.

Gula-Ndebele & Partners, applicant's legal practitioners.
Chingeya Mandizira, respondent's legal practitioners.