REPORTABLE ZLR (43)

Judgment No. S.C. 71/99
Civil Appeal No. 231/98

ELIUD SPENCER NHARI v PUBLIC SERVICE COMMISSION

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, MAY 31 & JUNE 14, 1999

H Zhou, for the appellant

J Zindi, for the respondent

GUBBAY CJ: Over eighteen years ago the appellant entered the service of the Department of Immigration. He rose steadily through the ranks and during 1991 gained appointment as Deputy Chief Immigration Officer. However, in 1995 his promising career suffered a setback. In that year he was suspected by the Chief Immigration Officer of having committed several acts of misconduct in the course of his duties.

On 10 January 1996 the appellant was relieved of his post as Deputy Chief Immigration Officer and transferred to National Archives upon the authorisation of the Secretary for Home Affairs. He was told that the move was necessary in order to facilitate further probing by the committee of investigations into the allegations of misconduct. These were that the appellant had:

(a) failed to obey lawful instructions by making unilateral decisions, instead of holding meetings with other members of the immigration control committee;

(b) engaged in the operation of an immigration consultancy business without permission to do so;

(c) facilitated the unlawful stay, and conduct of business in Zimbabwe, by certain foreign persons;

(d) issued instructions contrary to the decision of the Chief Immigration Officer; and

(e) misled a foreigner on his eligibility to acquire immovable property in Zimbabwe.

Six months later the appellant was informed in a letter dated 1 July 1996 that the respondent had directed, pursuant to s 7(1), as read with s 17, of the Public Service (Disciplinary) Regulations 1992, (SI 65 of 1992), that an inquiry was to be convened for the purpose of making a finding on issues of fact relating to his alleged misconduct, which thereafter would be referred to the Commission for determination. The inquiry was to be chaired by a provincial magistrate. The dates when and the venue where the inquiry was to be held were to be advised in due course.

The appellant engaged a legal practitioner to represent him at the pending inquiry. On 15 January 1997 a Ms M, whom it was the appellant had

consulted, indicated that 20 and 21 February 1997, the dates suggested for the hearing, were acceptable. As these days did not suit the availability of the member of the Public Service who had been assigned the task of presenting the evidence at the inquiry, others had to be found.

On 14 February 1997 the respondent wrote to inform the appellant that the inquiry had been set down for 3 to 6 March 1997. Attached to the letter was a copy of the twenty framed charges of misconduct the appellant was to face, together with the names of twelve persons it was proposed to call as witnesses - the list not to be taken as exhaustive. These papers were received by the appellant on 17 February 1997.

The appellant responded in writing to the charges. In respect of each, wrongdoing was denied. He sought an opportunity to examine the documents pertaining to eight of the counts. This was afforded him on Thursday, 27 February 1997.

On that very day Ms M wrote to the appellant pointing out that as he had failed to deposit sufficient funds to cover the fees of counsel by 25 February 1997, she had renounced agency to represent him. The appellant had in fact paid an amount in excess of $3 000.

The appellant was anxious to procure other legal representation. On the afternoon of Friday, 28 February 1997 he went to the offices of the legal practitioner, Mr B; not having made an appointment, Mr B was unable to see him.

The appellant returned early the following Monday morning before the hour the inquiry was due to commence, and revealed his predicament to Mr B. The latter told the appellant that he was prepared to represent him if he were able to obtain a postponement of the hearing. He said that due to pressing and heavy commitments he would only be available in about two months time.

I should indicate that the affidavit deposed to by Mr B differed somewhat from the appellant's version. His recollection, admittedly not absolutely certain, was that he spoke to the appellant on the Friday afternoon, and not on the Monday morning, and gave the advice recounted by the appellant. It seems to me more likely that the appellant is correct. Being intimately involved in the forthcoming inquiry he had a sounder basis for accurate recall than did Mr B. Be this as it may, it was undoubtedly the appellant's continuing intention to obtain legal representation. To that end he took steps to secure it as soon as he learned that his erstwhile legal practitioner was no longer prepared to act.

At the commencement of the inquiry on 3 March 1997 the appellant, in accordance with Mr B's advice, applied for a postponement. He informed the provincial magistrate appointed to conduct the inquiry that Mr B, whom he had engaged that morning to represent him, was unable to appear and required time to study the charges and the documents in order to prepare a proper defence. He gave as the explanation for Ms M's absence that the present dates of set down were unsuitable to her. That, of course, was untrue. Understandably the appellant was anxious to avoid any fault he thought might be attributed to him for having failed to provide sufficient funding.

The application was strenuously opposed by the member assigned to lead the evidence at the inquiry. He pointed out that a number of witnesses had come at their own expense from as far away as Vumba, and that obviously a postponement would be to their inconvenience. He added that the appellant had received the detailed charges on 17 February 1997 and had been allowed adequate time to prepare his defence and obtain legal representation. All documents had been made available for his inspection.

The provincial magistrate rejected the application. He held that the reason advanced that Mr B needed time to study the documents was not *bona fide* because the appellant had already prepared his defence. Secondly, he expressed the view that the appellant had been given ample opportunity to seek legal representation; the non-appearance of a legal practitioner being due entirely to the appellant's dilatoriness. Accordingly, he ordered the inquiry to proceed.

The appellant remained in attendance. Three witnesses were called to testify and were questioned by the appellant. On the second day of the hearing, however, the appellant informed the provincial magistrate that, acting on the advice of Mr B, he was withdrawing from the inquiry. It then continued in his absence. Ultimately, the finding made was that on all but two counts the appellant had misconducted himself. Thereafter the respondent, having scrutinised the finding, took the decision to discharge the appellant from the Public Service.

The conduct of the inquiry was brought on review to the High Court. The appellant sought an order setting aside the determination by the respondent that

he be discharged. The ground relied upon was that the refusal to postpone the inquiry effectively denied the appellant the right, accorded under s 14(2) of the Public Service (Disciplinary) Regulations, to be represented by a legal practitioner.

The application was dismissed with costs by DEVITTIE J in a judgment now reported, under the same names, in 1998 (1) ZLR 574 (H). The learned judge recognised that it lay within the discretion of the provincial magistrate to order the inquiry to proceed in the absence of the appellant's legal practitioner, Mr B. He went on to hold at 583 C-D that:-

> "The applicant gave no satisfactory explanation as to why he had done nothing to secure legal representation, after 12 February 1998 (1997) when he had parted ways with his lawyer. The reason he gave for doing so is hardly convincing, namely, that it was because of problems in securing a trial date. His assertion that he had received the documents at a late stage and needed time for his practitioner to peruse these was rejected because he had prepared his defence in some detail. In these circumstances I am unable to say that the presiding officer acted upon any wrong principle. Clearly, there were substantial reasons for refusing the application."

It was not correct that the appellant and Ms M had parted company on 12 February 1997. It was only on 27 February 1997 that the letter was sent to the appellant advising that services had been terminated. The appellant's reaction was immediately to seek to engage Mr B. True, the appellant gave a false reason for Ms M's withdrawal of representation; yet at all times he regarded the employment of a legal practitioner to appear on his behalf as imperative. After all, for a person of the appellant's years of service and seniority in the Department of Immigration, the consequences of being discharged, both financial and upon his standing in the community, would be very serious. The fact that he had succeeded in submitting a statement of defence before 3 March 1997 was of no relevance to the merits of the

application for a postponement. He was not minded to appear unrepresented. Once Ms M withdrew it became virtually impossible for any other legal practitioner to be able to prepare in time the appellant's defence to the twenty charges, even if free to appear at such short notice. In any event Mr B was the appellant's choice of counsel; and he was unavailable. Moreover, the situation was not one in which the appellant had previously requested an opportunity to postpone the hearing to obtain legal representation and had wasted that opportunity.

In the circumstances, the criticisms that the appellant had been dilatory and that it was not surprising that there was no legal practitioner from Mr B's firm to represent him, were not, in my opinion, valid.

The appellant, of course, had an absolute right to procure legal representation. It was not a question of the provincial magistrate having a discretion whether to permit it. His discretion hinged solely on the grant or refusal of the postponement sought. See *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398; *S v Nqula* 1974 (1) SA 801 (E) at 804H. However, a refusal arising from an injudicious exercise of that discretion would constitute a denial of the right to legal representation.

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 repeat the words of JUSTICE SUTHERLAND, of the United States Supreme Court, in *Powell v Alabama* 287 US (1927):-

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with 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 have 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 (CA) at 79a per LORD DENNING M.R.

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 subss (2) and (9) of s 18 of the Constitution of Zimbabwe.

In *Wheeler and Ors v Attorney-General* 1998 (2) ZLR 305 (S) reference was made to the cases of *S v Dangatye* 1994 (2) SACR 1 (A) and *S v Solo*

1995 (5) BCLR 587 (E). Each illustrated the length to which a court should be prepared to go in order to accommodate an accused seeking a postponement of the trial in order to obtain the services of a legal representative. Accepting that approach as manifestly just I ventured to suggest, at 311 B-D, that:-

> "(It) is only in exceptional circumstances that a court would be justified in refusing a postponement of the trial to an accused who wanted to engage a legal representative at his own expense; or whose chosen legal representative was absent for good reason. But where the application for the postponement is obviously vexatious or frivolous, or where the accused is guilty of either gross negligence in failing timeously to engage the services of a legal representative of his choice or of a deliberate tactic to unreasonably delay the trial, he cannot complain that his constitutional rights are infringed if the trial is ordered to commence. See *R v Second* 1969 (2) RLR 285 (AD) at 287I."

In casu, and notwithstanding the inconvenience which would have been suffered by all except the appellant, I have not the slightest doubt that the refusal of the postponement constituted a sufficiently improper exercise by the provincial magistrate of his discretion as to warrant interference.

Before concluding I deem it opportune to indicate that I share the opinion of the learned judge that where a postponement ought to have been granted, the refusal of it amounts to a fatal irregularity in procedure, obviating the need of the court of review or appeal to have regard to the merits of the matter. Put differently, where there has been a violation of a constitutional right appropriate redress must be granted whether or not prejudice is shown to have existed (see *supra* at 581E). Of course, in reality, however formidable the merits may appear to be, it remains impossible to assess with certainty what effect a properly conducted defence could have had on the eventual result. Hence the possibility of prejudice in the refusal to

grant a postponement can never be discounted. See *Ndanozonke and Anor v Nel N.O. and Anor* 1971 (3) SA 217 (E) at 221H; *S v Shabangu* 1976 (3) SA 555 (A) at 558F.

Thus, for the reasons mentioned, I am in respectful disagreement with the conclusions reached by the learned judge. I would, accordingly allow the appeal with costs and alter the order of the court *a quo* to read:

"1. The application is allowed with costs.

2. The determination of the respondent discharging the appellant from service is set aside.

3. The charges of misconduct brought against the applicant are remitted for rehearing *de novo* by a different provincial magistrate."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners