RICHARD CHINGODZA
versus
MINERALS MARKETING CORPORATION
OF ZIMBABWE
and
MINISTER OF LABOUR & SOCIAL SERVICES N.O
and
THE ATTORNEY GENERAL OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 March 2018 & 19 July 2018

Opposed Application

T Zhuwarara, for the applicant
B Ngwenya, for 1st respondent
B Shava, for the 2nd & 3rd respondents

DUBE J: The applicant brings an application for a declaratory order filed in terms of s 85(1) of the Constitution.

The background to this application is as follows. The applicant was the deputy general manager, finance and administration of the first respondent. Allegations of misconduct were raised against him. He was suspended from employment and disciplinary proceedings instituted in terms s 2.1.9 of the first respondent's code of conduct. He was found guilty and dismissed from the first respondent's employment. He appealed against the dismissal to the Disciplinary Appeals Committee and the appeal was dismissed. He instituted an application for review of the disciplinary proceedings with the Labour Court which was dismissed.

The applicant submitted as follows. At the time that the committee members were appointed, the first respondent did not have a substantive board of directors and the Permanent Secretary for the Ministry of Mines, Professor Gudyanga was the acting chairperson and the only board member contrary to the provisions of the Minerals Marketing Corporation of Zimbabwe Act [*Chapter 21; 04*], hereinafter referred to as the Act. The board was not properly constituted to make decisions in terms of the Act. Prof Gudyanga appointed all the adjudicators

in the disciplinary committee and the appellate body .He was the complainant in the disciplinary hearing and the eventual appeal. He appointed all the adjudicators at all levels in a matter that he had an interest in and was a complainant. This set up allows violation of his constitutional right to a fair trial. The applicant insisted that section 2.1.9 is too wide and lends itself to abuse and is unconstitutional in that it results in an unfair disciplinary hearing.

He submitted that he has a right to have the dispute between him and the applicant adjudicated by an impartial tribunal in terms of s 69(2) of the Constitution which provides for the right of every person to an impartial adjudication of civil rights and obligations. The panel of adjudicators appointed for his disciplinary hearing were appointees of the person who lodged the complaint and comprised of his subordinates at work. As a result, the disciplinary hearing and eventual appeal are tainted on account of the fact that they were born out of an impartial adjudication. Such a scenario is made possible by s 2.1.9 of the respondent's code which is wide is scope and as such open to abuse resulting in him being denied his right to a fair trial. The applicant seeks an order declaring s 2.1.9 of the first respondent's code of conduct constitutionally invalid in that it violates the applicant's right to an impartial arbiter. as enshrined in s 69 (2) as read with s 44 of the Constitution.

The first respondent, [hereinafter referred to as the respondent], opposes the application. The second and third respondents will abide by the decision of the court. The respondent had earlier raised preliminary points which it later abandoned .It conceded that the matter is properly before the court. The court has only been requested to consider the question regarding the fairness of the disciplinary hearings. On the merits, the first respondent refuted that the applicant's constitutional rights to a fair hearing were violated. It submitted that its code of conduct does not violate the right to a fair hearing.

Section 46 of the Constitution implores on a court interpreting the bill of rights, to take account of international law and treaties and conventions to which Zimbabwe is a party. The right to be tried by an independent and impartial tribunal is found in article 14(1) of the International Covenant on Civil and Political Rights to which Zimbabwe is a party. The section reads as follows,

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The same approach is followed in our own s 69 (2) of the Zimbabwe Constitution which draws inspiration from these international instruments. The section provides for the right to a

fair hearing before an independent and impartial court or tribunal. The right to a fair hearing has been extended to forums other than the courts and tribunals. It provides that every person has a right to a fair hearing before an impartial court, tribunal or other forum established by law. Article 26 of the African Charter on Human Rights and Peoples' Rights imposes a duty on state parties to guarantee the independence of the courts. It calls for impartial and competent courts or tribunals in article 7. Article 14 of the International Covenant on Civil and Political Rights provides for fair trials and fair hearing rights.

In *Administrator Transvaal, & OR's* v *Theletsane and Ors* 1991 (2) SA 192 (A) @ 206 C-D the court dealt with the right to a fair hearing and remarked as follows:

> "What the *audi* rule calls for is a fair hearing, fairness is after an elusive concept, to determine its existence within a given act or set of circumstances is not always an easy task. No specific all-encompassing test can be laid down for determining whether a hearing is fair – everything will depend upon the circumstances of the particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair, there must be notice of the contemplated action and a proper opportunity to be heard."

I agree with the approach taken by the court. Two critical requirements to be satisfied before a hearing can be classified as fair emerge from this case:

(a) there must be notice of the contemplated hearing

b) there must be a proper opportunity to be heard during the hearing.

In *R* v *Sussex Justices Ex p McCarthy* [1923] All ER Rep 233 the court emphasized the importance of an impartial court. A court deciding whether or not there was a fair hearing has to consider whether looking at the proceedings as a whole, whether an ordinary man would view the proceedings as having been fair. See also *Wishart and Ors* v *Blieden N O and Ors* (2013) 1 All SA 485 (KZP). The test for impartiality is an objective one.

The principle that no man is to be a judge in his own cause was set out in the case of *Dimes* v *Grad Junction Canol* (1852) 3 HL Cas 759. In *Metropolitan Properties Co. (FAC) Ltd* v *Lanna and Ors* (1969) IQB 577 (CA) @ 599 A-F the court held that:

> "So far as bias is concerned, it has acknowledged that there was no actual basis on the part of Mr Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias ….."

The persons tasked to make the decision must act in good faith. The test for bias was laid down in [*Porter* v *MAGILL* [2002] 2 AC 357 as follows,

> "whether the fair minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased. The test for bias operates in all adjudication forums."

In *Austin and Anor* v *Chairman Detainees Review Tribunal and Anor* 1988 (1) ZLR 21 (SC) the court dealt with the issue of perception of bias and held that if a right minded person examining the proceedings would think that there was a likelihood of bias on the part of the panel, then the right to a fair hearing would have been infringed. The applicant does not have to show that the committee showed bias towards a particular side. The test for bias and impartiality is an objective one.

The rules of natural justice demand that every decision that affects the rights of an individual must be arrived at after a fair hearing. The hearing must be conducted by a competent, independent and impartial court or tribunal. There cannot be said to be a proper opportunity to be heard where a litigant is subjected to a tribunal that is not independent and impartial. An impartial judge or tribunal is a fundamental prerequisite for a fair trial. Justice must not only be done but must be seen to be done. The trial or hearing must be free from bias or the perception that there was bias. The tribunal or court must be seen to be independent and impartial and there must not be any conflict of interest. The courts do not look at whether there was bias but rather at the impression which would be given to a reasonable person. The court will not look at whether the disciplinary committees did in fact favour one side. The right to a free trial may be queried where certain minimum guarantees such as an impartial and independent tribunal are not met. An employer who conducts disciplinary proceedings must show that the dismissal was procedurally fair.

The effect of an infringement of the right to a fair trial is that the decision cannot stand, see *R* v *Huggins [1895-99] ALL ER Rep 914, R* v *Sinderlad Justices* (1901) 2 KB 357.In *R* v *Huggins* the court held that in any case where it has been shown that the decision was tainted with bias or an appearance of bias, such a decision cannot stand.

The enquiry is whether a reasonable, objective and informed person would reasonably apprehend that the circumstances of this case will bring an impartial mind to bear on the adjudication of the case.

The applicant alleges that his right to a fair trial has been infringed and relies on s85 (1) in bringing this application. He avers that every person, has a duty to respect, protect, promote and fulfil the rights and freedoms set out in the Constitution in terms of section 44.

At the time the charges were preferred against the applicant, the first respondent did not have a substantive board of directors. The Permanent Secretary of the Ministry of Mines, Professor Gudyanga was the acting chairperson. He was the only board member available. The

Minerals Marketing Corporation of Zimbabwe Act, [*Chapter 21:04*] (hereinafter referred to as the MMCZ Act) stipulates a minimum of 6 and a maximum of 10 board members. In terms of s 16 of the MMCZ Act, no decision or act done under the authority of the board becomes invalid by reason of the fact that the board consisted of less than the number of persons constituting the board. I find therefore that the Act allows a scenario where the board functions with less than the required number of board members. No decision may be invalidated by reason of the fact that the board consisted of less than the number of members specified in the Act. The decision of Professor Gudyanga to institute these proceedings accords with the provisions of the Act.

Whilst the applicant may have been given notice of the contemplated action, my concern lies with the hearing itself. A proper opportunity to be heard does not become so where the disciplinary hearing is not properly constituted. Section 2.1.9 of the respondent's code of conduct reads as follows:

> "In cases where the General Manager is the complainant or the accused, the employer as represented by the MMCZ Board will appoint the committee in accordance with part 2 of this code."

Section 2.1.9 deals with appointment of a committee where the general manager is accused of misconduct. The board is empowered to appoint the committee to discipline him in accordance with part 2. Part 2 of the code of conduct deals generally with the conduct of disciplinary procedures. The section does not specify the level of persons who shall constitute the committee in the case where the general manager is accused. The section is too wide and lacks direction regarding who may be appointed to sit in a disciplinary hearing where the general manager is being disciplined. The section is open to abuse. It does not limit the first respondent to appoint individuals from the board who are more senior in a case where the general manager is disciplined. As a result the committee appointed to determine the charges against the applicant comprised of his subordinates and junior persons. The provision leaves a General Manager at the mercy of the respondent. Section 2.1.9. allows the first respondent to be unfair by allowing the applicant to be evaluated and adjudicated by his subordinates. The section in the form in which it is offends the notion of justice. It is palpably perverse to appoint one's subordinates or juniors to evaluate the guilt of their superior. Where a disciplinary committee is constituted by persons not qualified or suitable to conduct such proceedings, the disciplinary committee cannot be said to have been properly constituted and the hearing said to be fair.

The respondent submitted that its employees concerned did not answer to the applicant's authority but were his subordinates by virtue of him being the team leader of the respondent company. Leaving semantics aside, what emerges out of this proposition is that the employees who constituted the disciplinary committee were his subordinates and juniors at work. The disciplinary committee as well as the appeals panel were not properly constituted. The applicant was in management, it would have been appropriate that he be tried by his peers in management and of above rank. The people who sat in the disciplinary hearing were all former subordinates of the applicant. There was potential for bias. The applicant has a basis to fear that the disciplinary committee was impartial. Whist the court cannot say for certain that the applicant's subordinates showed actual bias in their conduct, a real likelihood of bias existed. The impression created by this set of circumstances is that the disciplinary committee was biased. A reasonable and informed person would not think that the committee as constituted would consider the matter with an open mind. He would think that there was a real likelihood of bias and would not apprehend that the applicant received a fair trial. The appointment of subordinates to sit in a disciplinary committee against their general manager infringed the applicant's right to a fair hearing. The disciplinary hearing can never be characterised as a fair hearing. This scenario is constitutionally untenable. A travesty of justice occurred in these proceedings. A hearing that is conducted in a manner where bias can reasonably be inferred cannot be allowed to stand. Again, a reasonable and objective bystander would not apprehend that such a scenario will not bring an impartial mind to bear on the adjudication process.

The applicant was suspended by Prof Gudyanga. The same professor also appointed the adjudicators for the disciplinary committee. It was also Prof Gudyanga who was the complainant at the disciplinary hearing and at the subsequent internal appeal. He was reported to have been a witness at the disciplinary hearing Professor Gudyanga also appointed members of the tribunal including the prosecutor. When the matter went on appeal he also appointed the appeal body. The chairperson of the board was the main man. It is preposterous that the Professor is allowed to play such multiple roles. Section 2.1.9 of the code of conduct has the effect of violating one's right to a fair hearing for the reason that the powers given to the first respondent by s 2.1.9 are too wide and has the effect of violating applicant's constitutional rights. The section allows the chairperson to appoint everyone and he is in control of everyone in the process. There is no way that a general manager can be fairly disciplined in these circumstances.

The disciplinary hearing and the eventual appeal are tainted by reason of the fact that they are born out of an improperly constituted disciplinary hearing and an impartial adjudication. *The* applicant's right to a fair trial was violated. A disciplinary hearing conducted by ones subordinates where the complainant in the disciplinary hearing appoints the adjudicators, prefers the charges, is a witness in the matter, appoints the prosecutor and also appoints the adjudicators in the appeal does not yield a fair trial. Section 2.1.9 is unconstitutional in that it is too wide and affords a scenario where a general manager's rights to a fair trial are violated. The disciplinary processes conducted by the respondents are invalid and cannot stand.

In the result, the applicant is entitled to the relief sought. I accordingly order as follows:

1. Section 2.1.9 of the 1st respondent's Code of Conduct is constitutionally invalid in that it violates the applicant's right to a fair trial as enshrined in section 69 (2) as read with section 44 of the Constitution.
2. The applicant's disciplinary hearing pursuant to section 2.1.9 of the 1st respondent's code of conduct violated the applicant's right to a fair hearing.

Chambati Mataka & Makonese, applicant's legal practitioners
Chinawa Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd & 3rd respondents' legal practitioners