REPORTABLE (48)

THE COMMANDER DEFENCE FORCES
v
(1) COLLEN CHIBA (2) CHARLES MHURI (3) BOTHWELL GOREKORE (4) HILLARY MUBARIKI (5) DEMOCRACY MURAMBADORO (6) GIBSON MADZINGA (7) MINISTER OF DEFENCE, SECURITY AND WAR VETERANS

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, KUDYA JA & MUSAKWA JA
HARARE: 10 JANUARY 2023 & 31 MAY 2024

Ms D. Sanhanga, for the appellant

T.L. Mapuranga, for the first, second, third, fifth and the sixth respondents

No appearance for the fourth respondent

No appearance for the seventh respondent

KUDYA JA: The appellant seeks the setting aside and substitution with a dismissal of the judgment of the High Court (the court *a quo*) handed down on 13 July 2020. The court *a quo* set aside the discharge order of the respondents from the army and reinstated them without loss of salary or benefits.

The order of the court *a quo* reads as follows.

> "1. The decision of the first respondent discharging the applicants from the ZNA service communicated on 7 February 2019 be and is hereby set aside.
> 2. The applicants be and are hereby reinstated to their positions without loss of salary and benefits.

3. The respondents to pay costs of suit jointly and severally, the one paying the other to be absolved."

THE FACTS

On 17 August 2017, the respondents were, at the close of the prosecution case, duly acquitted of the theft of State property by a duly constituted General Court Martial (GMC). Aggrieved by the acquittal, the appellant issued a convening order on 4 April 2018 for a Board of Suitability (BOS) to investigate the theft of rations by the respondents. The order specifically referred to the Defence (Regular Forces) (Non-Commissioned Members) Regulations, SI 172/1989, Defence Forces (Discipline) Regulations, 2003 SI 205/2003 and the Judge Advocate's report, GMC 01/17 dated 28 February 2018 in respect of the GMC proceedings. The order enjoined the board to inquire fully and determine the suitability of the respondents to remain as serving members of the Zimbabwe National Army (ZNA). It also stipulated the procedure the board was required to follow. The board was directed to take evidence on oath, record its proceedings, findings and recommendations. It was entreated to have regard to the disciplinary record of each member. It was also directed to obtain the documentary proof from any relevant charge, company and regimental conduct sheet and the record of each member's competence and conduct. It was further mandated to obtain the comments of the Officer Commanding, Commanding Officer and Formation Commander of each member. Clause 5 of the convening order stipulated that:

> "This convening order serves to inform the abovementioned members of the Commander's intention to discharge them from the army should the Board reveal that they are unsuitable to continue serving in the ZNA, in terms of s 12 (1) (a) (i) of the Defence (Regular Force) Regulations, 1989. The Board should give the members the opportunity to respond in writing why they should continue serving in the ZNA and such responses filed in the proceedings. Therefore, the Board President is to ensure that a copy of the convening order is handed to all the members being investigated, record all the evidence in their presence and be able to cross-examine all the witnesses". (my emphasis)

Each respondent duly supplied a statement on oath to the BOS, prior to the commencement of the inquiry. Thereafter they were, by letter dated 7 February 2019, all cashiered from the army. The letter of discharge is couched thus:

> **"BOS: 02/18 IRO MEMBERS WHO WERE IMPLICATED FOR THEFT OF RATIONS AT ORDINANCE DIRECTORATE AND WERE ACQUITTED BY A GCM**
> **References**
>
> **G Army HQ letter C/r/s 9/4/3 dated 1 February 2019**
>
> 1. Authority was granted by reference G to administratively discharge the below listed members from the ZNA in terms of section 12 (1) (a) (i) of Statutory Instrument 172 of 1989 [SI 172 of 1989], with effect from 28 February 2019. (a-f lists the affected respondents names, force numbers, rank and stations).
> 2. Members were found after enquiry to be inefficient or otherwise unfit to remain in the organization.
> 3. In view of the above, the Board is hereby duly confirmed. You are to put the matter to rest and close file".

On 15 February 2019, the respondents' erstwhile legal practitioners requested the BOS's record of proceedings. Neither the record of proceedings nor the findings and recommendations of the BOS were ever availed to them. On 12 March 2019, they sought a review of the termination order from the court *a quo* on two grounds. The first was that the determination was *ultra vires* the empowering statutory enactments under which the inquiry was conducted. The second was that the determination was irrational, illegal, unfair and contrary to the tenets of natural justice.

It was common cause that the record of proceedings upon which the appellant declared the respondents inefficient and unfit to remain members of the ZNA was not furnished to the respondents or the court *a quo*. The appellant, in his opposing affidavit, was content to equate the

record of proceedings with his opposing affidavit. He also conceded that contrary to his instructions, the BOS did not call oral evidence, take the evidence of the witnesses on oath or accord the respondents their right of cross-examination. The papers filed of record do not disclose whether the BOS ever carried out its mandate.

THE CONTENTIONS BEFORE THE COURT *A QUO*

The appellant raised three preliminary issues in the court *a quo*. The first was that the respondents had not exhausted the domestic remedies provided in s 26 (4) of the Defence Act [*Chapter 11:02*] (the Act). The second was that the failure to cite the Defence Forces Service Commission (the Commission) as the employer was fatal to the application. The third invoked the dilatory special plea of *lis pendens* against the fourth respondent who had a pending similar review application before the same court.

On the merits, the appellant contended that the respondents were properly discharged on the basis of the findings and recommendations of the BOS. He argued that s 30 of SI 205/2003, under which the BOS was convened, did not require the board to call oral evidence, or the respondents to adduce oral evidence and be cross-examined or to cross-examine and interrogate any documentary evidence. The appellant conceded that the reasons for his determination had not been provided to the respondents and the court but argued that they had been "amply provided" in his opposing affidavit. The appellant submitted that he had conformed with the tenets of natural justice and honored the respondents' right to be heard.

Per contra, on the preliminary points, the respondents' contended that s 26 (4) of the Act did not provide for an internal review but an appeal process. They further argued that, as they were discharged in terms of s 12 (1) (a) (i) of SI 172/1989 and not s 26 (1) of the Defence Act, the need to exhaust domestic remedies did not arise. They argued that they were, therefore, entitled to approach the High Court in the first instance. In regard to the non-citation of the Commission, they contended that, they could not cite it as it did not participate in their discharge. Apparently, by the time the application was heard *a quo*, the fourth respondent had, on 11 April 2019, withdrawn his pending and "present" review applications. The third preliminary point was therefore conceded. On the merits, they contended the appellant's decision was tainted and vitiated by the BOS's failure to abide with the convening order and the provisions of the relevant statutory enactment. They submitted that their right to be heard, which is prescribed in s 68 (1) of the Constitution and s 3 of the Administrative Justice Act [*Chapter 10:28*] had been abrogated. They further submitted that the decision of the appellant was invalid, irregular and unfair because it was premised on the flawed proceedings of the BOS.

The court *a quo* upheld the preliminary point raised against the 4th respondent and dismissed the others. It held that the non-citation of the Commission was not fatal, firstly, because it had not participated in the decision-making process and secondly, by reason of r 87 of the High Court Rules, 1971, which provides that the non-joinder of a party does not, on its own, defeat an application. On the merits, it found that the appellant had breached the *audi alteram partem* principle. It also held that the assertion that the discharge was *inter alia* based on proven theft charges was, in the light of the acquittal by the GMC, irrational and irregular. The court *a quo* further adjudged that the appellant's conduct violated both the constitutional and administrative justice safeguards provided by law. It accordingly upheld the application, set aside the

determination and reinstated the respondents to their positions without any loss of salary or benefits.

THE AMENDMENTS TO THE GROUNDS OF APPEAL

Aggrieved, the appellant appeals to this court. At the commencement of the hearing, Ms *Sanhanga* for the appellant, acting in terms of r 44 (3) of the Supreme Court Rules, 2018, moved for the amendment of the appellant's grounds of appeal. Counsel sought the deletion of the first, fifth, sixth and seventh grounds of appeal and their substitution by the four grounds that were in the appellant's notice of amendment. The basis for the amendment was that the initial grounds of appeal had been settled on the basis of an *ex-tempore* judgment of the court *a quo*. The provision of written reasons on 7 December 2021 necessitated the recasting of the initial grounds. Mr *Mapuranga*, for the respondents, opposed the application. He contended that the four grounds did not arise from the judgment of the court *a quo*. He also argued that the grounds sought to raise new issues that had neither been raised nor argued *a quo*. He especially assailed the intended fourth ground of appeal for being vague and imprecise. He therefore submitted that the new grounds would be prejudicial to the respondents. In reply, Ms *Sanhanga* conceded that the prospective fourth ground of appeal was neither clear nor concise. She wisely abandoned it. We were satisfied that the remaining three intended grounds of appeal could possibly be regarded as emanating from the written judgment of the court *a quo*. We accordingly granted the application for the deletion of the first, fifth, sixth and seventh grounds and substitution thereof by the three-intended grounds.

In the result, the appellant motivated the appeal on the following six grounds of appeal.

1. "The court *a quo* erred at law by failing to determine that the application for review was fatally defective for failure to cite the person who had made the decision to dismiss the respondents.
2. The court *a quo* erred at law by failing to appreciate that the decision that ought to be before it for review was that of the army commander not appellant against whom the *court a quo* wrongly proceeded to grant the order, setting aside the discharge.
3. The court *a quo* grossly erred and misdirected itself by identifying the determination of the Board of Suitability as the subject of the review, whereas the subject of the review ought to have been the decision to dismiss the respondents.
4. The court *a quo* erred at law by granting an application for review made on the ground that the applicants had been denied the right to be heard under circumstances where it had been proven that the applicants had been afforded the right to be heard.
5. The court *a quo* erred at law by proceeding to determine an application for review when applicants had not exhausted domestic remedies available and further where justification for non-pursuit of domestic remedies had not been proffered.
6. The court *a quo* further erred by granting relief to the fourth respondent under circumstances where the said respondent had withdrawn his application.

RELIEF SOUGHT

TAKE NOTICE THAT the Appellant seeks the following relief:

1. The instant appeal succeeds with costs on a legal practitioner and client scale.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The application for review is dismissed with costs on an attorney and client scale."

THE ISSUES

The following issues fall for determination in this appeal.

1. The effect, if any, of the court *a quo's* purported failure to *mero motu* raise and determine the non-joinder of the army commander
2. Whether the court *a quo* erred in granting the application for review.
3. Whether the court *a quo's* order should have related to the fourth respondent.

THE CONTENTIONS BEFORE THIS COURT

In this Court, Ms *Sanhanga* argued that the application for review was fatally defective in that it cited the appellant instead of the army commander. She contended that the Commander Defence Forces (CDF or appellant) is the overall leader of the defence forces, which is mainly constituted by the Army and Airforce. However, the Commander of the Army is in charge of the army and the Commander of the Airforce superintends over the Airforce. These two service commanders' report to the CDF. Counsel further contended that, notwithstanding this operational imperative, s 19 of the Act, vests in mandatory terms, the jurisdiction, power and authority to appoint, discipline and dismiss members of the army in the army commander and not in the appellant. Once a member has been dismissed, he may, in terms of s 26 (4) appeal to the Commission. The citation or in the words of counsel, misjoinder of the appellant and the conspicuous non-joinder of the army commander invalidated the proceedings and the resultant order granted by the court *a quo*. She argued that the failure of the court *a quo* to determine this conundrum, which was raised in the appellant's opposing affidavit in paras. 5, 8.2, 8.3 and 8.5, also invalidated its decision.

Ms *Sanhanga* submitted that the court *a quo* ought to have declined jurisdiction and directed the respondents to exhaust the domestic remedies provided in s 26 (4) of the Defence Act. The provision accords a dismissed member the right of appeal to the Commission against a discharge or dismissal made in terms of subs (1) or (2) of that section. Counsel also impugned the order for including the fourth respondent who had withdrawn from the application *a quo*. In exchanges with the Court, Ms *Sanhanga* conceded that a finding that the review application was defective would result in the striking off and not a dismissal of the review application. Counsel also abandoned the appellant's prayer for punitive costs and conceded to a costs order on the ordinary scale.

Per contra, Mr *Mapuranga* for the active respondents submitted that the first ground of appeal, having been raised for the first time on appeal, should be dismissed. He argued that it was improper to raise such a ground for the first time on appeal. He submitted that the appellant, having fully participated, in his own right, in the proceedings *a quo*, is estopped from denying his conceded responsibilities. He therefore prayed for the dismissal of the first ground of appeal.

Mr *Mapuranga* further contended that the relevant legislative provisions and the convening order under which the respondents were charged and dismissed from the army did not provide for review. The legislative provisions, especially s 26 (4) of the Act only provides a disgruntled member with the right of appeal, which the respondents could not pursue. They could not pursue an appeal because, firstly, the conduct of the appellant's BOS was riddled with glaring procedural irregularities. Secondly, no reasons for the decision were ever provided. These procedural missteps, which in any event are reviewable, effectively closed the appeal route.

Counsel further contended that the respondent had no other option but to invoke the provisions of s 26 of the High Court Act [*Chapter 7:06*]. This section imbues the court *a quo* with wide review powers over the proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities in Zimbabwe. In addition, s 28 empowers the High Court, in such review proceedings, but subject to any other law, to set aside or correct the proceedings or decisions of these adjudicating authorities.

Mr *Mapuranga* also argued that the court *a quo* set aside the appellant's dismissal order on review because it was based on a defective procedural process, which undermined the respondent's right to be heard. He therefore prayed for the dismissal of the third, fourth and fifth grounds of appeal. Counsel however conceded the apparent error that relates to the fourth respondent. He urged the court to correct the error by invoking the powers vested in the court by s 22 of the Supreme Court Act [*Chapter 7:13*].

ANALYSIS

The effect, if any, of the court *a quo's* purported failure to *mero motu* determine the non-joinder of the army commander.

This issue arises from the first two grounds of appeal. It was common cause that, in making its decision, the court *a quo* did not relate to the non-joinder of the army commander. Ms *Sanhanga* submitted that even though the issue was not placed before the court *a quo,* the court ought to have raised it *mero motu*. Counsel's submission was premised on the assertions in the appellant's opposing affidavit that clearly showed that the respondents had been dismissed from the army by the army commander and not by him. She therefore argued that the application was fatally defective and ought to have been struck off.

It is settled law that a point of law which goes to the root of the matter can be raised at any time, even for the first time on appeal provided it is not one that must be specially pleaded and its consideration does not cause unfairness to the party against whom it is directed. See *Muchakata* v *Netherburn* 1996 (1) ZLR 153 (S) at 157A. Despite Mr *Mapuranga's* strong opposition, we agree with Ms *Sanhang*a that the first two grounds of appeal fall into this category. They are points of law, which though not raised, argued and determined in the court *a quo*, were implicitly pleaded by the appellant, go to the root of the appeal and do not cause any prejudice to the respondents. Ms *Sanhanga* submitted that the respondents ought to have been non-suited *a quo* for the misjoinder of the appellant and the non-joinder of the army commander. She relied on the provisions of s 12 (1) (a) (i) of SI 172/1989, s 30 of SI 205/2003, ss 19 and 26 (1) (b) and (4) of the Act.

Now, the issue can best be determined by a holistic consideration of the import of ss 2 (2) and 12 (1) (a) (i) of SI 172/1989, ss 29-35 in Part V (wrongly legislated as Part IV in the SI), ss 2, 11 (6) and (7), 19 and 26 (1) (b) and (4) of the Act. It is necessary for the determination of this appeal to recite them. Section 2 of the Act, defines Commander thus:

> "Commander" means the Commander of the Defence Forces appointed in terms of s 216 (2) of the Constitution;"

And s 216 (2) of the Constitution stipulates that:

> **"S 216 Command of Defence Forces**
> (1) An Act of Parliament may provide that—
> (a) the Defence Forces are to be under the command of a single Commander; or
>
> (b) each service of the Defence Forces or any two or more of them jointly, are to be under the command of a separate Commander.

(2) Every Commander of the Defence Forces, and every Commander of a service of the Defence Forces, is appointed by the President after consultation with the Minister responsible for the Defence Forces." (Our emphasis)

Section 216 (2) of the Constitution creates the positions of the Commander of the Defence Forces (CDF) and Service Commanders, who are subordinate to the CDF. The pecking order of these three top commanders is affirmed by s 11 (6) and (7), which reads:

"(6) The Commander of the Army shall command and control the Army and the Commander of the Air Force shall command and control the Air Force, and each shall carry out any directions given to him by the Commander and ensure that his branch fulfils its role within the Defence Forces.

(7) The Commander of the Army and the Commander of the Air Force shall report to the Commander on all matters affecting the Army and the Air Force, respectively."

In terms of s 11 (6) and (7) of the Act, the service Commanders fall under the operational and administrative command and control of the CDF, who is the ultimate military *supremo*. In common parlance, the buck stops with him. Section 19 of the Act vests wide powers in the service Commanders. It provides that:

"**19 Appointment, promotion, reduction in rank and dismissal of non-commissioned members**

The power to appoint, temporarily appoint, promote, reduce in rank or dismiss a non-commissioned officer shall vest, subject to this Act, in the Commander of the Army or the Commander of the Air Force, as may be appropriate."

And s 26 (1)(b) and (4) of the Act stipulates that:

"**26 Discharge or dismissal of members other than officers**

(1) Subject to subs (1) *(sic)*, a member, other than an officer, may be discharged by the Commander—

(*b*) if the Commander is satisfied, after the holding of such inquiry as the Commander may consider to be necessary or expedient for the purpose, that the member is inefficient or otherwise unfit to remain in the Defence Forces;

(4) Any member who has been discharged or dismissed in terms of subs (1) or (2) may appeal against the discharge or dismissal to the Commission, within such period and in such manner as may be prescribed, and the Commission may confirm or set aside the discharge or dismissal.

(5) Any decision by the Commission in terms of subsection (4) shall be final." (Our emphasis)

The definition of the Commander is not provided in SI 172/1989. However, s 2 (2) stipulates that:

"any other term used in these regulations that is defined in the Act shall bear the very same meaning."

And s 12 (1) (a) (i) provides as follows:

"12 Dismissal of member
(1) The Commander—

(a) May dismiss a member if that member—

(i) is found, after enquiry instituted by the Commander, to be inefficient or otherwise unfit to remain a member;"

It is noteworthy that the Commander defined in SI 172/1989 by reference to the definition in the Act, is none other than the CDF. The who, how and what of the board of inquiry is prescribed in ss 29 to 35 of Part V of SI 205/2003. S 29 defines the terms used in that Part. A convening authority is defined as:

"(a) the Commander;
(b) a Service Commander;
(c) a superior authority;
(d) the officer in command of any unit"

Section 30 vests the convening authority with the power to convene a board for the purpose of collecting and recording evidence and making a report, declaration, opinion or recommendation on the matter referred to it. Section 31 deals with the composition of the board and the nomination of its "president". Section 32 provides that "a board shall follow the written instructions of the convening authority and any standing orders or instructions issued which govern the proceedings of such boards". In terms of s 33, a board shall not take evidence on oath unless instructed to do so by the convening authority. The oath shall be administered by the president of the board. Section 34 allows the board members to put questions to any witness to test the cogency of the witness' evidence. Finally, s 35 (1) and (4) deals with the actual procedure that should be followed during the enquiry. It reads:

> "***35. Procedure on inquiry which might form subject of charge against member or affect his character or reputation***
>
> (1) Where an inquiry might—
>
> (a) form the subject of any charge against; or
>
> (b) affect the character of; or
>
> (c) affect the reputation within the Defence Forces of;
>
> a member, the member shall be entitled to be present throughout the inquiry and shall be given the opportunity—
>
> (i) to question witnesses; and
> (ii) to call witnesses; and
> (iii) subject to being cautioned by the president in terms of subs (7) of s 26, to make a statement.
>
> (4) Where *a member does not avail himself of his rights in terms of subs (1)* or (3) the president shall, after all the evidence has been recorded and before the proceedings are submitted to the convening authority—
>
> (a) furnish the member with a copy of the record of the evidence; and
>
> (b) subject to subparagraph (iii) of subs (1), invite the member to submit his written comments, if any, within seven days." (Our emphasis)

In summary, the provisions of Part V of SI 205/2003 prescribe, in mandatory terms, the overarching powers that a convening authority has over his board of inquiry. They further require the board to obey the convening authority's written instructions and any extant standing orders governing the conduct of such enquiries. The board is also required to take evidence on oath if so directed by the convening authority. Most importantly, by the statutory command of s 35, the board cannot conduct the enquiry in the absence of the member. It must provide the member with the opportunity to call evidence, to cross examine and be cross examined. However, where the member deliberately absents himself from the enquiry, the board is mandated to avail the full record of proceedings to the member and invite the member to submit written comments within seven days. Thereafter, the board must present its report and recommendations to the convening authority. The direct dictates of these statutory commands constitute the *audi alteram partem* principle.

The attempt by Ms *Sanhanga* to buttress her argument on the provisions of s 19 of the Act and s 12 (1) (a) (i) of SI 172/1989 is ill-taken. The former section limits or restricts the powers, *inter alia*, of dismissal of the army commander by the legislative device of the phrase "subject to this Act". The meaning and import of the phrase "subject to" was articulated by the South African Appellate *Division in S v Marwane* 1982 (3) SA 717 (A) at 747H-748A in the following manner:

> 'The purpose of the phrase "subject to" in such a context is to establish what is dominant and what [is] subordinate or subservient; that to which a provision is "subject" is dominant and in case of conflict it prevails over that which is subject to it."

In context, this means that the army Commander's powers of dismissal are subordinate to the powers of dismissal vested in the appellant by s 26 (1) and (4) of the same Act.

Counsel for appellant also sought to argue that the provisions of s 12 (1)(a) (i) refer to the army commander. They do not. They in fact refer to the Commander, who is defined by reference to the definition in the Act to be the CDF.

The statutory architecture and scheme of arrangement delineated in the Act and SI 172/1989 and SI 205/2003, which are enacted in terms of the Act, position the appellant at the apex of the Zimbabwe Defence Forces. The army commander is a subordinate commander under his overall command and control. The appellant is defined in all these legislative enactments as the Commander. This is confirmed by the use of the definite article "the" in reference to him while the indefinite article "a" often pre-fixes the service commanders. The acts of his subordinate commanders are done in his name. He is clearly aware of this. Indeed, in the preamble to his opposing affidavit he swears that:

> "I (his name) duly authorized in my capacity as the Commander of the Zimbabwe Defence Forces do hereby make oath and state that the undermentioned facts are true and correct to the best of my knowledge and belief."

In our estimation, this is the reason why it did not even begin to occur to the appellant to challenge his citation by the respondents *a quo*. After all, the respondents notified the appellant why they were suing him in para 8 of their founding affidavit. They asserted that:

> "The first respondent is the Commander, Zimbabwe Defence Forces cited in his official capacity as the official responsible for the overall command of the Zimbabwe Defence Forces. (our emphasis)

To which he responded in para.6:

> "**Ad paras. 1-10**
>
> No issues arise serve to state that the appellant's address of service is…"

He did not demur to the citation, which was in his official capacity and not in his personal capacity. In that capacity he is vicariously answerable in law for the actions of his subordinates. In these circumstances, it is disingenuous for him to attempt to abdicate from his responsibilities at this late stage.

We agree with Mr *Mapuranga* that the appellant was correctly cited as the first respondent in the court *a quo*. We also agree with him that the citation of the army commander was unnecessary in the circumstances of this case. The respondents were entitled by the Act and its subordinate legislation to go for the supreme Commander for the better enforcement of their order. Notwithstanding these findings, we are satisfied that it would have constituted a gross misdirection for the court *a quo* to go on a frolic of its own by raising and determining an issue that had not been brought before it by the parties. See Nzara *& Ors* v *Kashumba & Ors* 2018 (1) ZLR 194 (S) and *Tshuma & Ors* v *Zimra* SC 118/21 at p 6. The first and second grounds of appeal are clearly devoid of merit and ought to be dismissed.

WHETHER THE COURT *A QUO* ERRED IN GRANTING THE APPLICATION FOR REVIEW

Ms *Sanhanga* assailed the decision *a quo* on three main bases. These were that the court *a quo* improperly related to the recommendations of the BOS and not the decision of the commander. Further, that the court *a quo* incorrectly found that the respondents had not been heard when they were in fact heard. Lastly, that it entertained the application when the respondents had not exhausted the domestic remedies encoded in s 26 (4) of the Act.

The first sub-issue does not arise from the order appealed against or the reasons for judgment. The discharge order, which was reproduced in the court *a quo's* reasons for judgment, shows that the respondents were discharged from the army by the appellant (the first respondent *a quo*), on the recommendations of the BOS. This is conveyed at p. 6 of its judgment in the following manner:

> "Essentially, the applicants' complaint is that there were gross irregularities in the manner the first respondent arrived at the decision to discharge them from the army".

The question sought to be answered by the second sub-issue is whether the respondents' right to be heard, otherwise known as the *audi alteram partem* rule, was observed by the appellant. It was common cause that the respondents were discharged from the Defence Forces in terms of s 26 (1) (b) and (4) of the Act.

The procedure governing the conduct of a board of inquiry is prescribed by Part V of SI 205/2003. Para 5 of the convening order fully complied with the direct dictates of this Part. The appellant's opposing affidavit and the common cause documents filed of record clearly show that the BOS partially complied with the convening authority's instructions in para 5 of the convening order. The record of proceedings of the court *a quo* contains what can only be regarded as mitigatory statements, which were supplied by the respondents between 1 May 2018 and 22 August 2018. There are no further documents, such as the BOS's record of proceedings that would show that a hearing was ever conducted by the board. The respondents were found guilty of inefficiency and adjudged to be unfit to remain in the army without being heard. We are inclined to believe that, had they been heard the assertion in para 8.3 of the appellant's opposing affidavit that the dismissal was premised on their past conduct "in conjunction with their conviction on the

charge of theft", would not have been made. The mere request for mitigation was inadequate to satisfy the *audi alteram partem* requirements. It simply demonstrates that the decision of the convening authority was tainted by a flawed process emanating from the BOS.

The decision of the convening authority to discharge the respondents from the army was afflicted by a myriad of procedural irregularities. The primary one was the negation of the respondents' right to be heard. The failure to apply this basic tenet of natural justice was also in violation of the statutory provisions encapsulated in s 35 of SI 205/2003. A determination that is premised on the violation of a statute is void and of no legal effect. It is a nullity. See *Schierhout* v *Minister of Justice* 1926 AD 99 at 109, *Ellse v Johnson* SC 49/2017 at p 12, *Guoxing Gong* v *Mayor Logistics (Pvt) Ltd* SC 2/2017 at p 6, *Mtetwa & Anor* v *Mupamhadzi* 2007 (1) ZLR 253 (S) at 255B. The most obvious remedy for such a decision is to set it aside. See *Marange* v *Marange* SC 1/21 at p 13.

The third sub-issue concerns the argument that the respondents should have exhausted their domestic remedies before approaching the court *a quo*. Ms *Sanhanga* premised this proposition on the provisions of s 26 (4) of the Act, which reads:

> "(4) Any member who has been discharged or dismissed in terms of subs (1) or (2) <u>may appeal</u> against the discharge or dismissal to the Commission, within such period and in such manner as may be prescribed, and the Commission may confirm or set aside the discharge or dismissal." (My emphasis)

We agree with Mr *Mapuranga* that the words "may appeal" do not connote a mandatory command to appeal. They repose a discretion on the member. We also agree with his submission that, an appeal is different and distinct from a review. An appeal seeks to assail the

correctness of a decision while a review impugns the process or procedure by which the decision is made. See *Muringi* v *Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490F, *Charumbira* v *Commissioner of Taxes & Ors* 1998 (1) ZLR 584 (S) at 585D, *Secretary for Transport & Anor* v *Makuwarara* 1999 (1) ZLR 18 (S) and *Mugugu* v *Police Service Commission & Anor* 2010 (2) ZLR 185 (H) at 189F-190A.

In the instant case, the respondents were neither provided with the record of proceedings nor the reasons upon which the decision was made. They could not therefore impugn the correctness of the decision by appealing it. Rather, they were aggrieved by the decision-making process, which entailed seeking a review. Section 26 (4) provides for an appeal. There is no provision in the Act for a review of the convening authority's decision. The convening authority being an administrative authority falls within the review jurisdiction of the court *a quo*, which is provided in s 26 of the High Court Act [*Chapter 7:06*] as long as the respondents alleged and proved any one of the jurisdictional facts prescribed in s 27 of the same Act. Clearly, the appellant's actions constituted a gross irregularity and thus fell within the ambit of s 27 (1) (c) of the High Court Act.

It is on the basis of the above reasoning that we agree with Mr *Mapuranga* that there were no domestic remedies that the respondents could pursue. We therefore find that the court *a quo* correctly assumed jurisdiction over the review matter. All the three sub-issues raised by Ms *Sanhanga*, which relate to the third, fourth and fifth grounds of appeal are unmeritorious. In the circumstances, they must fail.

THE PROPRIETY OF THE REINSTATEMENT OF THE RESPONDENTS

This issue arose from the exchanges the court had with both counsel. Ms *Sanhanga* contended on the authority of *Mpofu v Commissioner of Police & Anor* SC 15/2008 that the court *a quo's* reinstatement order could not have been properly granted. She submitted that if the appeal were unsuccessful, the order of the court *a quo* should be amended by the deletion of the reinstatement order. Mr *Mapuranga* made the contrary argument that the reinstatement of the respondents was the inevitable result of the setting aside of the appellant's order of dismissal. He contended that the effect of the setting aside of the appellant's dismissal order restored the *status quo ante* that prevailed before it was issued.

The submission by Mr *Mapuranga* is in concordance with the apposite pronouncement articulated by this Court in *Zimbabwe United Passenger Co* v *Mashinge* SC 21/21 at paras 20 and 21. MAKARAU JA, as she then was, stated that:

> 20. The clear position of the law appears to me to be that upon the setting aside of employment disciplinary proceedings as a nullity, both the procedural and the substantive rights of the parties are restored to the position immediately before the nullified process. In other words, where a dismissal is set aside as being a nullity, the employee is reinstated as such notwithstanding the further disciplinary proceedings that the court may order by way of remittal or otherwise.
> 21. I thus reject as stating the correct position at law the argument by the appellant that the court *a quo* could only confine itself to confirming or nullifying the disciplinary proceedings of the appellant without granting substantive relief in the matter."

See also *Air Zimbabwe Corporation* v *Mlambo 19*97 (1) ZLR 220 (S) at 223H and *Minerals Marketing Corporation* v *Mazimavi* 1995 (2) ZLR 353 (S).

We therefore agree with Mr *Mapuranga* that the reinstatement of the respondents that is captured in the order of the court *a quo* is valid and cannot be interfered with.

WHETHER THE COURT *A QUO'S* ORDER SHOULD HAVE RELATED TO THE FOURTH RESPONDENT

Both counsel were *ad idem* that the court *a quo* erred in including the fourth respondent in its order. This was because, by the time the matter was heard and determined, he had withdrawn his application for review. The obvious remedy in the circumstances is for the court to invoke the provisions of s 22 (1) of the Supreme Court Act and correct the order. We will therefore amend the order by deleting all reference to the fourth respondent from it.

COSTS

The respondents have generally succeeded. They are entitled to their costs of appeal, on the ordinary scale.

DISPOSITION

It is accordingly ordered as follows:

1. The appeal is partially allowed.
2. The order of the court *a quo* is amended by the deletion of "applicants" and substitution of the "first, second, third, fifth, and sixth applicants" in paras 1 and 2, so that it reads as follows:

   "1. The decision of the first respondent discharging the first, second, third, fifth and sixth applicants from the Zimbabwe National Army service communicated on 7 February 2019 be and is hereby set aside.
   2. The first, second, third, fifth and sixth applicants be and are hereby reinstated to their positions without loss of benefits.
   3. The respondents shall pay costs of suit, jointly and severally, the one paying the other to be absolved."

3. The appellant shall pay the respondents' costs on the ordinary scale.

MAVANGIRA JA : I agree

MUSAKWA JA : I agree

Mutumbwa, Mugabe & Partners, the appellant's legal practitioners.

Rubaya & Chatambudza, the respondents' legal practitioners.