ISAU MUGUGU
versus
POLICE SERVICE COMMISSION
and
COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE

N Ruzengwe, for the applicant
S Maposa, for the respondents

GOWORA J: The applicant is a service police officer within the Zimbabwe Republic Police. On 13 August 2003 he was charged under the Police Act of having contravened para 35 of the schedule to the Police Act as read with ss 29 and 34 of the same Act. He was convicted on 25 August 2003 and was sentenced accordingly. An appeal against the conviction and sentence to the second respondent met with no success. In addition, apart from dismissing the appeal the second respondent ordered his transfer from Morris Depot. The applicant was at that stage resigned to taking the punishment meted out to him and decided against further appeals. However, in May 2004, the incident which had led his subsequent conviction was referred to a board of inquiry which board was tasked to enquire into his suitability to remain in the force and on 4 August 2004 he received communication that the second respondent had approved that his rank be reduced to that of sergeant and that his transfer to another posting be confirmed.

The applicant was aggrieved by this development and on 12 August 2004 he lodged an appeal with the first respondent against the reduction in rank through the Morris Depot Acting Officer in Charge. Despite numerous letters from his legal practitioners for a speedy resolution it was not until 27 June 2007 that the first respondent wrote a letter advising the applicant that the appeal had not been successful. His legal practitioners received the letter on 3 July 2007. The applicant has also complained that during the period that the applicant and his legal practitioners were processing his appeal he was placed on suspension on the basis that the applicant had appealed against his reduction in rank. Happily for him wiser counsel prevailed and the suspension was lifted. Although no remedy is being sought from the suspension it is obvious that the suspension was meant to bully him into withdrawing his appeal. It is also

because of unjustified actions such as this that made the applicant conclude that he was being victimized. Following receipt of the letter of 27 June dismissing his appeal the applicant then filed this motion for a review of the decision by the first respondent in upholding the decision of the disciplinary board. In the application the applicant had cited a number of grounds as being the basis of review but Mr *Ruzengwe* indicated from the bar that he would no longer move for all of them.

The first ground being sought to be relied on was that the first respondent had misdirected itself in failing to take into account that the convening of the board of inquiry and its subsequent decision were a nullity as the applicant had already been sentenced for the alleged transgression. Counsel has accepted that a mis-direction is not a ground for review and has also accepted that the second respondent has the discretion under the Act to set up a board of inquiry into an officer's conduct or suitability to remain a member of the police force. The second alleged ground for review was a failure to appreciate the facts. Again counsel accepts that this is not a ground for review but for appeal.

The third ground for review was framed in this manner:

> "C) even assuming, without admitting, that the Board of Inquiry was properly convened and empowered to hear the matter, the first respondent failed to appreciate the fact that the punishment imposed upon me by the Board was unduly harsh, grossly unreasonable and not in tandem with the facts of the case. The Board of Inquiry/Suitability (*sic*) usually sits to determine cases of incorrigible members of the Police who despite being convicted several times for misconduct, remain unrepentant and those who will have committed "one off" serious offences-in which cases such punishment as reductions in rank would suffice. As a first offender with a clean 16-year record in the Police Force, I did not and does (*si*c) not deserve the punishment of reduction in rank, but at most a reprimand."

I raised a query with the applicant's counsel as to whether or not this additional ground was for a review or an appeal. Counsel was adamant that it was a ground for review. I am unable to agree.

It is appropriate at this juncture to consider the function that a court is exercising when it reviews the actions or decisions of an administrative body. Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements. It is a process in which the three arms of government, the executive, the judiciary and the legislature are enmeshed in a trilateral relationship. The power to review is

inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision.

In *casu*, the board was empowered in terms of the Act to convene an enquiry into the suitability of the applicant to remain a member of the force. Section 50 of the Act provides as follows:

> "A board of inquiry consisting of not less than three officers of such rank not being below that of superintendent, as may be considered necessary by the Commissioner, may be convened by the Commissioner to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary:
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> Provided that no officer who is a material witness or has a personal interest in the matter shall be appointed to such a board."

Thus, the power of the Commissioner to convene a board to inquire into a member's suitability to remain in the force is undisputed. The board itself is in terms of the section granted the discretion to either find that a member is no longer fit to remain in the force or to reduce his rank. The first respondent confirmed the decision of the board upon appeal. In seeking for an order from this court to the effect that the punishment of reduction in rank "was unduly harsh, grossly unreasonable and not in tandem with the facts of the case", it is my considered view that the applicant is asking the court to inquire into the merits surrounding the punishment. That would turn this court into an appeal court to determine the correctness of the punishment, and that is synonymous with assessing the merits of the punishment imposed. The Act does not empower this court to venture into the merits of the punishment imposed or the wisdom of the decision and if the court were to do so without being empowered by the Act it would be tantamount to the court usurping the authority that has been entrusted to the administrative body by the Act. The process of review is for the court to examine the circumstances under which the administrative body reached its decision, and it is not open to the court, in a judicial review, to scrutinize the decision lest the court is accused of usurping the powers of the administrative body. See *Chief Constable* v *Evans*[1], where at p 154 LORD BRIGHTMAN stated:

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in

[1] 1982 (3) All. E.R 141

> my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is however not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it by treating the individual subjected to it under that lawful authority unfairly. In the event if the circumstances under which the decision was made are proof that the decision was reached fairly and in a reasonable manner then clearly the court does not have the power to intervene.

The applicant has however, as part of his review, alleged that there was bias on the part of the first respondent. The basis of the alleged bias is that the first respondent had arrived at a decision without having regard to the record of proceedings of the board and without affording the applicant or his legal practitioners a hearing on the appeal lodged. The applicant contends further that the first respondent's bias is evident from the record where the applicant is castigated for not being grateful for not having been fired as a result of his transgressions.

Two affidavits have been filed in opposing the application. The manner in which the affidavits were drafted leaves a lot to be desired. Although an attempt was made to respond to the allegations in the various paragraphs, a number of paragraphs were lumped together for purposes of responding to the allegations and as a result it is difficult to make sense of the affidavits. The allegations by the applicant relating to alleged bias do not appear to have been responded to. I note however, that in the heads of argument filed on behalf of the applicant, instead of making reference to the absence of a record, the applicant raises the issue of the first respondent having recommended that he be discharged from the service instead of a mere reduction in rank. The applicant also raises in the heads of argument an allegation of absence of logic on the part of the first respondent which was proof of gross unreasonableness. A ground for review cannot be raised for the first time in the heads of argument as the rules provide that the application including the affidavit must give a concise statement as the grounds for review. As to the first respondent raising an issue for the first time which was not in the record, the first respondent has stated in the opposing affidavit that it was never the intention of the first respondent to discharge the applicant from the service and that the recommendation was an apparent error. A reading of the record of proceedings suggests that

the first respondent accepted that the applicant should be grateful to have his rank reduced and thus keep his job. There is no suggestion on the record that the first respondent considered that the applicant should be dismissed from his post. I do not understand the comment in the record to the effect that the applicant should be grateful that he still had a job to mean that the commission was biased against him. Rather the remark if read within the context of the paragraph reveals that the first respondent's members considered the offence to have been very grave. The first respondent does not make reference to the record in its findings, but I cannot accept that this proves that the members did not have the record before them in determining the appeal. The first respondent states that the appeal was on the record and I cannot find anything on the papers before me to suggest otherwise. Sight must not be lost of the fact that the first respondent is not a court of law and therefore the detail that would be expected from a court of law would be somewhat lacking in the record produced of the proceedings conducted by the commission set up under the Act. I am unable to find that there was bias on the part of the first respondent in considering the appeal before it.

As to the complaint by the applicant that the first respondent did not call himself or his legal practitioners for a hearing, I find that the Act does not specify the manner in which the first respondent ought to determine appeals brought before it. The precise form of the appeal and the powers that a statutory body has in the determination of appeal should derive from the language of the enabling statute. In this instance the Act is silent on the form of the appeal and it is therefore safe to assume that the appeal would be on the record as in a normal appeal.

The applicant has suggested that the failure by the first respondent to call him or his legal practitioners for the appeal amounted to an irregularity. He has argued that the conduct of the first respondent was in breach of the *audi alteram partem* rule. He has referred this court to a decision of the Supreme Court *Metsola* v *Chairman, Public Service Commission & Anor*[2] as authority for that proposition. I believe that the applicant's counsel failed to appreciate that in the authority he quoted the respondents were not acting as an appeal tribunal but were in fact the equivalent of a court of first instance. The case however is instructive as the court went to discuss what constitutes a fair hearing for purposes of the *audi alteram* rule. At pp 154D-155 where GUBBAY JA (as he then was) stated:

> "The *audi maxim* is not a rule of fixed content, but varies with circumstances. In its fullest extent, it may include the right to be appraised of the information and reason

[2] 1989 (3) ZLR 147

> underlying the impending decision; to disclosure of material documents; to a public hearing, to appear with legal representation and to examine and cross-examine witnesses. See generally, Baxter Administrative Law at pp 545-547. The criterion as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the right to be heard in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a hearing as that term is ordinarily understood. This was stressed by COLMAN J in *Heatherdale Farms* (Pty) *Ltd & Ors* v *Deputy Minister of Agriculture & Anor* 1980 (3) S.A. 476 (T), where at 486D-G he remarked:
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> > 'It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to put forward his representations, secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one'."

Thus the underlying principle in the right to heard is that of fairness and natural justice in that each person appearing before the administrative body is given an opportunity to put his or her position to that body. An oral hearing is not an absolute necessity as that may not necessarily that the person has been heard as may happen where the person has been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him, and yet a hearing may be called. In any event, the applicant does not state that when the initial board of inquiry was held, he was not given an opportunity to be heard. He was heard and dissatisfied with the result he then launched an appeal. There is no suggestion that such an appeal should have been a re-hearing of the initial inquiry. I am inclined to find that the applicant was heard and that the first respondent did not commit an irregularity.

The last complaint by the applicant is that the first respondent took time to determine his appeal. He therefore prays that on that basis its determination be set aside. Going by the relief that the Administrative Justice Act provides for, I could set aside the decision of the first respondent. That would be a *brutum fulmen* as the decision of the board of inquiry would still

stand. I also find that even though the appeal took long to be determined there was no prejudice to the applicant as he remained on his salary of inspector for the time it took for the initial decision to be made that his rank be reduced and its eventual implementation. In the event, the delay in finalization of the process may have in the short run acted to his benefit in terms of the salary and emoluments that went with the rank of inspector. I do not find that any relief under the Act would assist him.

In the premises, it is my view that the applicant is non suited and the application is hereby dismissed with costs.

Mapombere, Musakana & Ruzengwe, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners