Judgment No. S.C. 39/2000
Civil Appeal No. 818/97

E. FILON v (1) THE PUBLIC SERVICE COMMISSION

(2) THE MINISTER OF LANDS AND WATER RESOURCES

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & EBRAHIM JA
HARARE, FEBRUARY 17 & MAY 24, 2000

The appellant in person

Y Dondo, for the respondents

EBRAHIM JA: The appellant was discharged from the Public Service. He had been suspended from duty by the Secretary to his Minister, and later served with charges to which were attached certain documents. The letter containing the charges was signed by a Mr Moyo, on behalf of the Secretary to the Ministry. The appellant duly replied in writing to the allegations. He required other documents. He was not supplied with copies of those documents, nor were his legal practitioners, who also demanded copies of them. He was, however, allowed access to them and to make notes.

The Public Service Commission ("the Commission") held its enquiry and as a result the appellant was found guilty of misconduct and discharged. He took the matter on review, the sole point of review being that the *audi alteram partem* rule

had been breached because of the respondent's failure to supply the requested documents. The learned judge *a quo* rejected that argument. He was right to do so. The appellant had access to all the relevant documents. He was supplied with some documents along with the charges, and was given access to the others. His legal practitioner had the opportunity to examine the documents, though it is not clear whether he did so. He replied to the charges, in writing, at some length. In general, on the *audi alteram partem* rule and its applicability to proceedings under Public Service disciplinary regulations, see *Jiah & Ors v Public Service Commission & Anor* 1999 (1) ZLR 17 (S); *Chitzanga v Public Service Commission* HH-28-00. This was not a case like *Binza v Acting Director of Works* 1998 (2) ZLR 364 (H), where the employee and the court were denied access to the relevant documents.

Before this Court, the appellant took a different line. He raised several new points for the first time. As he correctly stated, points of law can be raised for the first time on appeal. In addition, the appellant is a self-actor, and the courts – within limits – always give the greatest latitude to self-actors.

The appellant argued that the disciplinary proceedings were void *ab initio* on several grounds –

(1) the suspension was defective;

(2) even if the suspension was valid, it lapsed automatically after three months, as the charges did not involve financial prejudice to the State;

(3) the charges were invalid, having been preferred by someone other than his head of office, head of department, head of ministry, or the Commission itself;

(4) the charges were fatally defective.

He also argued that his case was not fairly considered, in that –

(5) the Commission did not verify the truthfulness or otherwise of his answers to the misconduct charges by referring to documents referred to it by the appellant;

(6) information favouring the appellant and which was available to the Commission was not placed before it;

(7) there were serious disputes of fact which could not be resolved on the papers only;

(8) the Commission misdirected itself in law in a number of ways.

The respondents do not specifically address point (1) in their heads of argument. In my view, there is no substance in the appellant's submission on this point. The grounds for suspension are very wide and the Secretary's action could be justified on any of a number of the grounds enumerated in s 8(1) of the Public Service Regulations.

It is also not true to say that the charges did not involve financial prejudice to the State. Clearly, financial prejudice is at the heart of all the charges.

The respondents argue, in respect of point (3), that as s 28 of the Regulations permits the delegation of disciplinary functions to any person, it must be presumed that Mr Moyo had been duly authorised by the Secretary to sign on his behalf. As in *Marumahokko v Chairman, Public Service Commission & Anor* 1991 (1) ZLR 27 (H) at 34, there is nothing specific to show that the Secretary had authorised Mr Moyo to sign on his behalf. The maxim *omnia praesumuntur rite esse acta* should not override the requirements of the Regulations. It is likely that Mr Moyo was authorised, but there is no specific evidence that he was. However, it should be noted that the letter containing the charges was written "further to" the letter of suspension, which itself clearly adumbrated charges being brought. It is also relevant that s 28(2) of the Regulations states that the Commission may depart from or authorise any departure from the Regulations, or condone any irregularity or departure from any provision of the Regulations where the irregularity or departure has not resulted, or will not result, in a substantial miscarriage of justice. It is not clear whether the Commission has formally condoned the irregularity, if indeed it was an irregularity. But in the circumstances, the irregularity was, in my view, not such as to invalidate the proceedings, being one of the most technical kind and of no real significance.

The Commission reached its decision without the benefit of very important information, which might well have led it to a different conclusion. It is clear that the Commission was aware that the appellant was trying to shift the blame in respect of the first three charges to the late Mr Guyo, but it does not seem to have considered the report of the board of inquiry into the late Mr Guyo's activities. (In this regard, the remarks of CHIDYAUSIKU JP in *Marketing Sales Agents (Private)*

Limited v Minister of Lands and Water Development HH-235-98 may well be pertinent). No reason is given for this omission, and the respondents content themselves with saying in their heads of argument that the disputes of fact go to the merits and could not be argued on review. The respondents' submission is that the appellant should not be allowed to introduce the evidence relating to Mr Guyo's board of inquiry "as (the documents) concern another officer and could only have a bearing possibly on the merits, which is not a reviewable ground". They concede that they would not be prejudiced if the evidence were to be admitted.

It seems to me that where a tribunal has reached a decision in the absence (for whatever reason) of vital evidence, it cannot be said to have reached a decision on the merits. It would be contrary to justice to allow the decision to stand. It must be pointed out, though, that the fourth charge did not, apparently concern Mr Guyo. It is a relatively minor charge. If the Commission were to acquit the appellant on the charges where Mr Guyo was allegedly involved, it may take a different view of the penalty on the fourth charge. I therefore consider it prudent that the whole matter be heard afresh.

I do not believe that this Court should consider the evidence. This is a situation where the appropriate course would be to set aside the Commission's decision and remit the matter to it, so that it can reconsider the case in the light of the report of the board of inquiry's findings into Mr Guyo's activities. It also seems to me that this is a case where oral evidence should have been heard.

In the result, the appeal is allowed with costs. The matter is remitted to the Public Service Commission for a full hearing.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

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