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Judgment No S.C. 27\2002
Civil Appeal No 213\2001

(1) DIRECTOR OF WORKS (2) CITY OF HARARE v
MAXWELL NYASULU & 2 ORS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & ZIYAMBI JA
HARARE FEBRUARY 28 & JUNE 20, 2002

P. Nherere, for the appellant

A. Mugandiwa, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court setting aside a decision taken by the Appellant to transfer the respondents.

The respondents are farm managers employed by the City of Harare on farms owned by the City. The City carries out cattle rearing projects on 3 farms, namely, Ingwe Farm, Crowborough Farm and Pension Farm. Pasture on the farms is irrigated by partially treated effluent sludge. The goal of the City is to combine effective pollution control with commercially viable farming operations. Farming operations are controlled by the appellant. There is a farm manager on each of the three farms, who is responsible for the day to day management of the farm. The farm managers report to the Farming Manager who in turn reports to the appellant.

On the 8th December 1999, a letter of warning was served on the 1st respondent by the Farming Manager. The first paragraph of the letter read:

> "I wish to warn you that your behaviour in respect of the following item (marked X) is considered reprehensible/misconduct and has been noted in your file. Whilst no further action may be taken in this case, any future recurrence of such behaviour may result in a recommendation for your dismissal from Council's service."

The items marked X were "idleness", "inefficiency/carelessness", and "failure to obey lawful instructions". The respondent refused to sign not knowing what the signature of the document would entail and what the consequences to him would be.

On the 15th March 2000, another letter was served on him. In this letter the Farming Manager described as disrespectful, his refusal to sign the letter of warning "when the cattle death rate at Ingwe Farm is so high" and concluded that:-

> "the situation explained above shows a continuous and costly deterioration in performance resulting from disregard of both written and verbal instructions, neglect of duty and over-reliance on some employees who in turn fail to meet the expected performance standards."

He recommended:-

> "7.2.1 That Mr Nyasulu be transferred to another farm in order to break the link between himself and some trusted employees and also to encourage an innovative approach to duty in a different environment.
>
> 7.2.2 That Mr Nyasulu's performance be monitored more closely and if he does not improve his attitude and performance, he be subjected to very strong disciplinary action."

The other two respondents received letters similar to annexure 'B'. In the letter to the 2nd respondent the conclusion arrived at was:-

> "The comparison between the two sets of 5-year production periods and the high financial losses show a continuous deterioration in the commitment by the manager to his duties which should not be allowed to go on indefinitely."

Paragraph 7.2 of the recommendations provided:-

> "That Mr Bobo be monitored and stiffer disciplinary measures be taken on him if his performance does not improve." (My emphasis).

With regard to the 3rd respondent, the letter served on him concluded as follows:-

> "The information given above shows a serious neglect of duty by the manager, resulting from disregard of written and verbal instructions, and leaving all the work to his subordinates."

The letter recommended that the 3rd respondent be transferred to another farm "where he will work with different employees in a different environment" and that he be subjected to very serious and close supervision with decisive and strong disciplinary measures being instituted on him if he fails to improve his performance."

All the respondents wrote their responses which are annexed to the founding affidavit. In effect, they denied the allegations made in the letter of warning citing the reason for the increase in the mortality rate as lack of adequate funding.

Nothing further was heard until the 2nd January 2001 when the respondents received letters from the appellant advising them of their transfer effective from the 9th January, 2001.

Aggrieved by the appellant's decision, the respondents consulted legal practitioners who entered into correspondence with the appellant's officials in an effort to persuade them to reverse the transfers on the grounds that they amounted to punitive measures taken against the respondents who were entitled to a hearing before the decisions were made.

In a letter dated 8th January 2001, addressed to the respondents' legal practitioners, the Chamber Secretary of the City of Harare wrote:-

> "On the question of the warning letter we further concede that, in so far as a warning is a penalty, it has to be founded on a finding of guilty, which in turn should be founded on an inquiry. I have therefore advised the relevant department to consider revoking same".

Notwithstanding the above, neither the letters of warning nor the transfers were revoked and the respondents applied to the High Court for an order setting aside the transfers in question. The High Court found in their favour and granted the order sought.

In his grounds of appeal, the appellant took issue with the finding by the trial court that the transfer was punitive. There was, it was alleged, no punishment at all and accordingly the respondents' rights, as protected by the principles of natural justice, had not been breached. In any event, so it was submitted, the decision to transfer was no more than an administrative decision made in terms of Section 21 of SI 66/92, the collective bargaining agreement. To the extent that no prejudice was suffered, the transfers were legitimate.

Section 21 provides as follows:-

"21. (1) A head of department may permanently transfer an employee from his position or occupation within his department –

(a) which has equivalent rates of pay, hours of work, type of work and terms and conditions of employment without the consent of the employee;

(b) which is not equivalent within the meaning of paragraph (a), with the consent of the employee.

(2) The employer may transfer an employee from his position or occupation to another position or occupation in another department -

(a) for a period not exceeding three months, without the consent of the employee; or

(b) for a period in excess of three months, with the consent of the employee.

(3) An employee who has been temporarily transferred in terms of subclause (2) shall, for the duration of such transfer -

(a) receive pay and allowances no less favourable than the pay and allowances which he received, or would have received in his previous department; and

(b) retain his seniority in his previous department."

This argument was rejected by the learned Judge in the court *a quo*. At page 127 of the record, the learned Judge said:-

"I cannot accede to this submission. The letters that were written to the applicants contained, in the first part, fairly detailed allegations of alleged negligent conduct and each of these letters conclude their recommendations by suggesting that the action to be taken is one of transfer and further that the conduct of these employees should be monitored on a strict basis. Thereafter, strong disciplinary measures should be taken in the future."

There is no doubt that the letters contain serious allegations of misconduct against the respondents. The learned judge was in my view justified in reaching the conclusion that:-

"even if the penalty of transfer was not involved, I would have thought that they still would have been justified in challenging a mere disciplinary measure in the form stated in the recommendation, namely, that the applicants were to

> be monitored closely and, that if they did not improve their attitude and performance they were to be subjected to strong disciplinary action. This was an extremely adverse finding likely to affect the applicants' future prospects in their careers and is one that should be taken after a proper enquiry if the rules of natural justice are to be complied with."

In any event, in a clear acknowledgement that there was an obligation on the appellant to hold an enquiry and afford the respondents an opportunity to controvert the allegations against them before issuing the letters of warning, it was conceded by the chamber secretary of the appellant that the warning was a disciplinary measure and ought to have been founded on a finding of guilt which in turn should be founded on an enquiry. Since there had been no hearing it was recommended that the appellant should revoke the warning. This course the appellant unfortunately failed to adopt.

The contention on behalf of the appellant that the transfers were wholly unrelated to the adverse findings contained in the letters of warning and that the appellant had acted in terms of SI 66/92 was found by the learned Judge, to have been an afterthought as there was no indication in the letter of transfer that it was being done in terms of the said statutory instrument. He also found that the letters of warning as well as the events following it, give rise to the unavoidable conclusion that the transfers were clearly punitive and were made upon the basis of the recommendations of the Farming Manager as set out above.

I am in respectful agreement with both conclusions reached by the learned Judge. It is therefore my view that the learned judge was correct in holding that the rules of natural justice had not been complied with in that the respondents

were not afforded a hearing before the punitive measures of warnings and transfers were taken against them.

The respondents further contended that even if this court were to hold that the appellant, in ordering the transfers, had acted in terms of SI 66/92, and was merely exercising an administrative function, they had a legitimate expectation to be heard before the decision to transfer them was taken. The legitimate expectation doctrine has been described as:-

> "sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken… In practice the two forms of expectation may be interrelated and even tend to merge."

Per Corbett CJ in *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A) at page 758; and, at page 761D-H:-

> "where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

The doctrine, which is an extension of the principle of natural justice, has been hailed in this jurisdiction. See *Health Professions Council v McGown* 1994 (2) ZLR 329 (S); *Taylor v Min of Education & Anor* 1996 (2) ZLR 772;

In *Taylor's* case, *supra*, this court applied the doctrine to unwilling transferees of the public service. In so doing GUBBAY CJ quoted, with approval, the following passage from *Gemi v Min of Justice, Transkei* 1993 (2) SA 276 (TkG):-

> "Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision. Officials are not relieved of this duty except to the extent that a departure from the rules of natural justice is expressly or impliedly sanctioned by the relevant enabling legislation. In the absence of such statutory authorisation a departure from the rules of natural justice can only be justified in circumstances where it is necessary to promote some value or end of equal or greater significance than natural justice or, to put it differently, 'where circumstances are so exceptional as to justify such a departure'. (Per Leon J in *Dhlamini v Minister of Education and Training and Others* 1984 (3) SA 255 (N) at 257H.) By approaching the test in this manner a balance can be struck between:
>
> 'the need to protect the individual from decisions unfairly arrived at by a public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in the administration'".

See also *Kanonhuwa v Cotton Company of Zimbabwe* 1998 (1) ZLR 68(H).

Thus it is from a standpoint of fairness and reasonableness that the situation must be viewed and that necessarily entails, in the context of the present matter, that the views, wishes and personal circumstances of the respondents ought to have been taken into account before the decision to transfer them was made.

The three respondents had lived and worked at the respective farms for periods of 9,19 and 18 years, respectively. They had settled on the farms and, it was submitted on their behalf, the schooling of their children would be affected by the transfer. It seems to me, although the matter does not turn on this point, that it could be argued that they had a legitimate expectation to be consulted and allowed to make representations before the decision to transfer them was taken.

It is no answer for the appellant to say, as was submitted in his heads of argument, that "the Applicants put their side of the story and that in fact the decision to transfer was made after due process". The reference there is to the responses made by the respondents in protest against the letters of warning and recommendations for their transfer made by the Farming Manager without affording them an opportunity to be heard. It is upon these recommendations that the appellant was found by the court *a quo* to have acted in issuing the letters of transfer.

As the learned judge remarked, even if the penalty of transfer had not been imposed the appellants would have had an entitlement to be heard before the issue of the letters of warning.

It is well established that the ability to make representations after the decision has been made rarely cures the procedural defect of a prior fair hearing:-

> "The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way the human inclination to adhere to the decision is avoided."

See *Taylor v Minister Of Higher Education & Anor* supra; *Health Professions Council v McGown* supra.

Accordingly it is my view that the learned Judge correctly found in favour of the respondents and the appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ: I agree

EBRAHIM JA: I agree

Honey & Blanckenberg, appellant's legal practitioners

Wintertons, respondent's legal practitioners