

COLLEN CHIBA  
CHARLES MHURI  
BOTHWELL GOREKORE  
HILLARY MUBARIKI  
DEMOCRACY MURAMBADORO  
GIBSON MADZINGA

versus

COMMANDER – ZIMBABWE DEFENCE FORCES  
MINISTER OF DEFENCE AND WAR VETERANS

HIGH COURT OF ZIMBABWE  
CHINAMORA J  
HARARE 13 July 2020 and 7 December 2021

**Opposed court application for review**

*Adv GRJ Sithole with Mr B Mutiro*, for the applicants  
*Mr K Chimiti*, for the respondents

CHINAMORA J:

**Background facts:**

The applicants filed in this court on 12 March 2019 an application for review on two grounds. In the first ground, the applicants complained that the decision to discharge them from the Zimbabwe National Army (ZNA) was grossly irregular in that it was not made within the framework of the empowering law. Secondly, the applicants argued that the decision to discharge them was irrational and un-procedural since appropriate procedures and rules of natural justice were not followed. The letter of discharge dated 7 February 2019, *inter alia*, reads:

- “1. Authority was granted by Army HQ letter Crs/9/4/3 dated 1/02/2019 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.
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”.

Before the applicants were discharged, they were charged in terms of the Defence Act [Chapter 11:02] with theft of State property, and brought before a court martial for trial. They were acquitted as shown on Annexure “CC3”, which appears on pages 12-13 of the record. The Judge Advocate (Squadron Leader Kambudzi) who presided over the trial wrote a report, Annexure “CC4”, concerning 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> applicants, which appears on pages 15-19 of the record. It is worth mentioning that, in paragraph 5 of his report (on page 15-17 of the record) he said:

“I must explain that at the end of the State case there was no prima facie case against the three accused persons. The defending officer made an application for a discharge at the end of the State case in terms of section 198 (3) of the Criminal Procedure and Evidence Act. The basis of the application was that the State had failed to prove a prima facie case against the three accused.

... ..

The court then discharged the three accused after it was also convinced that there was no basis to put the accused to their defences hoping that their evidence will bolster the weak State case.

... ..

The record is clear that the accused were discharged on merit since there was no evidence to put them to their defence. The acquittal was anchored on legal basis not technicalities.”

Subsequent to the acquittal of the applicants, a Board of Suitability was convened to consider their suitability to remain in the army. The Board looked at precisely the same issues that had been examined by the court martial, which acquitted them. The applicants complained that the Board proceedings were conducted in a manner contrary to the convening order, which states:

“This convening order serves to inform the above mentioned 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 section 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 own emphasis]

The applicants said that they were neither afforded the opportunity to give evidence nor cross-examine witnesses or interrogate documents relied on by the Board. Their case was that they were not heard before they were discharged. Thus, they contended that the decision was grossly irregular and irrational, and contravened section 68 (1) of the Constitution as read with section 3 of the Administrative Justice Act [Chapter 10:28]. In addition, the applicants submitted that, having initiated a trial process, the 1<sup>st</sup> respondent should have respected the decision of the court martial acquitting them.

Finally, the applicants argued that they were not given reasons for the discharge despite making a request to the 1<sup>st</sup> respondent. In this regard, they attached a letter dated 15 February 2018 written by their lawyers, which is marked Annexure “CC5” and is on pages 20-21 of the record. In the relevant parts, the letter reads as follows:

“The Commander  
Zimbabwe National Army  
J M Tongogara Barracks  
HARARE

Dear Sir,

**Re: Discharge from Zimbabwe National Army of 812554K Sgt Chiba C, 763715S Sgt Mhuri, 811302Z Sgt Gorekore B, 816796W Sgt Mubariki H K, 825325R Cpl Murambadoro D, 829845E Cpl Madzinga G**

The above matter refers and in particular the above members of the Zimbabwe National Army who have favoured us with instructions to engage you. Kindly note our professional interest.

Our clients instruct that they have been discharged from the Zimbabwe National Army effectively from the 28<sup>th</sup> of February 2019 as per the radio communication which is attached hereto as Annexure “A”. Our clients indicate that they were charged, tried and acquitted on charges of breach of the Defence Act. Dissatisfied with their acquittal, certain officers then instituted a board of enquiry into their suitability.

The proceedings of that board of suitability were then not made available to other clients only for them to be discharged from the force.

We are instructed to request for urgent furnishing of reasons for the finding that they are “*inefficient or otherwise unfit to remain in the organization*” in circumstances where they were not heard. The demand for reasons is premised on the Constitution of Zimbabwe [section 68], which provides as follows:

- “(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair;
- (2) Any person whose right, freedom, interests or legitimate expectations has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”.

Additionally, you have referred to the allegations of theft that were dealt with by your legal system and they were acquitted. Kindly advise us if our clients are being discharged from the force consequent to the same matter that they were acquitted of. If that is the case, that would be a sad day for justice given that such a decision is not only unlawful but unconstitutional as it is a breach of basic tenets of natural justice.

Our instructions are to demand, as we hereby do, the reasons for the declaration that they are “*inefficient or otherwise unfit to remain in the organization*” and that they should be discharged from the Zimbabwe National Army. We expect those reasons on or before 20<sup>th</sup> February 2018, failing which we have strict instructions to institute legal proceedings in the relevant court challenging the validity of your decision to discharge our clients.

We trust the litigation route shall not be necessary.

So be advised accordingly.

Yours faithfully

**RUBAYA A (Mr)**  
**RUBAYA AND CHATAMBUDZA”**

This letter sums up the basis of the application in *casu*. The 1<sup>st</sup> respondent opposed the application, and began by raising a point in *limine*, namely, that the applicants had come to court before approaching the Defence Service Commission in terms of section 26 (4) of the Defence Act. Essentially, the point advanced was that the applicants should have exhausted domestic remedies before coming to court. In response to the preliminary objection, the applicants maintained that their application was properly before the court. They argued that they were not discharged in terms of section 26 (1) of the Defence Act, but in terms of section 12 (1) (a) (i) of SI 172 of 1989. Additionally, the applicants argued that there were no valid Board of Suitability proceedings as the board did not comply with the law. Consequently, they contended that the only remedy was to apply for review to set aside a decision reached through an invalid process. Another point in *limine* raised by the 1<sup>st</sup> respondent was that the applicants did not cite the Defence Service Commission, yet it the employer in terms of section 218 (1) (a) of the Constitution. The argument continued that this failure meant that there was no proper respondent before the court. The applicants’ reply was that the Defence Service Commission did not make a decision relating to their suitability to remain in the army. Finally, the 1<sup>st</sup> respondent submitted that the 4<sup>th</sup> applicant is not properly before the court as the current application is *lis pendens*, because there is another matter HC 162/19 which is pending before the High Court. To this argument, the applicants submitted that the 4<sup>th</sup> applicant had withdrawn his application under HC 2021/19.

On the merits, the 1<sup>st</sup> respondent submitted that the Board of Suitability was duly convened in terms of section 30 of the Defence Forces (Discipline) Regulations, Statutory Instrument 205 of 2003 (“SI 205 of 2003”). He stated that he was satisfied on a balance of probabilities that the applicants had committed the offences for which they were charged. The 1<sup>st</sup> respondent went on to aver that there was no need for the applicants to lead evidence under oath or to interrogate the comments from members who conducted the enquiry. He was categorical that the applicants were given the chance to make representations before the board.

It was the 1<sup>st</sup> respondent's assertion that:

"It is not in dispute that the applicants were acquitted by the court martial. However, criminal proceedings do not debar the Commander Zimbabwe National Army from conducting an administrative enquiry to determine whether or not any member should be retained in the ZNA. The conduct gathered during the Board of Suitability took into account past conduct of the applicants ... The sum total of the applicants' past conduct aforementioned taken in conjunction with the conviction on the charge of theft made the commander Zimbabwe National Army to dismiss the applicants". [My own emphasis]

See paragraph 8.3 of the 1<sup>st</sup> respondent's opposing affidavit, at page 42 of the record.

The 1<sup>st</sup> respondent maintained that the discharge was in accordance with the tenets of natural justice. He accepted that reasons for the decision were not provided to the applicants, but were "*amply provided*" in the opposing affidavit filed in the High Court. The 1<sup>st</sup> respondent then moved for the dismissal of this application. Let me deal with the preliminary points before addressing the merits of the application.

### **Points in *limine***

The fact that domestic remedies have not been exhausted does not preclude the jurisdiction of this court. In numerous cases, the point has been emphasized that domestic remedies must be able to provide an effective remedy if they have to be exhausted first. (See *Nhidza v Unifreight Ltd* S-27-99; *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S); *Nokuthula Moyo v Norman Gwindingwi NO & Anor* HB 168-11; *Moyo v Forestry Commission* 1996 (1) ZLR 173 (HC) at 192). I observe that this application is one for review to set aside a decision attacked on the ground of being substantively and procedurally wrong. Thus, to ask the applicants to follow administrative processes for redress would, in my view, not provide an effective remedy. I therefore dismiss this preliminary point for lack of merit. Turning to the second point in *limine*, I find no merit in the submission that the failure to cite the Defence Service Commission was a fatal non-joinder for two reasons. Firstly, the decision to discharge the applicants from the army was not made by the Defence Service Commission, but by the Board of Suitability. It is the alleged failure by that board to follow the provisions of the Constitution, Administrative Justice Act and the principles of natural justice that has been taken on review to the High Court. Secondly, Rule 87 of the High Court Rules, 1971 (Rule 32 of the High Court Rules, 2021) provide that the non-joinder or mis-joinder of a party does not ipso facto defeat an application. For these reasons, the

preliminary point lacks merit and, accordingly, I dismiss it. The final point raised by the 1<sup>st</sup> respondent was that the defence of *lis pendens* operated against the 4<sup>th</sup> applicant. Once the applicants asserted that the 4<sup>th</sup> applicant had withdrawn his application in HC 2021/19, the matter was resolved. Because of this, I dismiss the point in *limine* as being devoid of merit. Before proceeding to examine the merits of the case, I will first look at the law on the subject.

### **The relevant law**

The law on review of administrative decisions or actions is settled in this jurisdiction. In terms of section 26 of the High Court Act, this court has power to review proceedings and decisions of inferior courts, tribunals and administrative authorities. The grounds upon which a review may be brought are set out in the High Court Act, in particular, section 27 thereof which, in the relevant part, reads:

#### **“27 Grounds for review**

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
  - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
  - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
  - (c) gross irregularity in the proceedings or the decision.
- (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.”

See *Ndlovu N.O. v CBZ Bank & Anor* SC 27-17

Essentially, the applicants’ complaint is that there were gross irregularities in the manner the 1<sup>st</sup> respondent arrived at the decision to discharge them from the army. The appropriate place to begin is the Constitution which, through section 68 (1), entitles everyone to just administrative action which is carried out in a lawful, reasonable and procedurally fair manner. The section, *inter alia*, provides:

#### **“68 Right to administrative justice**

- (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”.

The constitutional right enshrined in section 68 (1) has been mirrored and given effect in terms of the AJA. In this respect, section 3 (1) of the AJA provides that an administrative authority which takes action which may affect the rights, interests or legitimate expectations of any person shall act lawfully, reasonably and in a fair manner and give reasons for its action. Section 3 (2) is worth referring to, as it states:

“(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –

- (a) adequate notice of the nature and purpose of the proposed action; and
- (b) a reasonable opportunity to make adequate representations; and
- (c) adequate notice of any right of review or appeal where applicable”.

### **Analysis of the case**

The crucial submission by the applicants is that, after the Board of Suitability was constituted to hear the issue of their continued tenure in the army, they were not given an opportunity to be heard. In this regard, they argued that they were not afforded the opportunity to call witnesses or to cross-examine witnesses. The applicants contended that the 1<sup>st</sup> respondent did not rebut their averments by failing to produce the record of proceedings to show otherwise. I notice that no reason has been advanced for not availing this critical evidence.

Additionally, the applicants argued that there was no reference to section 26 (4) of the Defence Act which deals with the issue of discharge from the army. Owing to this, the applicants submitted that their discharge was arrived at on the basis of a wrong provision of the law. My concern is not the incorrect citation of the law under which the applicants were discharged, I prefer to focus on the irregularities which the applicants averred bedeviled the discharge process. The 1<sup>st</sup> respondent accepts that the applicants were acquitted by the court martial which was tasked with determined whether the charge of theft could be sustained or not. In my view, the acquittal ought to have decisively settled the allegation of theft. The 1<sup>st</sup> respondent submitted that the acquittal does not stop him from enquiring into whether or not a member of the army is suitable to remain in the ZNA. However, while this may be so, the applicants having been found not guilty of theft, the 1<sup>st</sup> respondent could not insist that he was relying on theft and past conduct for the discharge. Even if one were to say that past conduct could be considered, I find it irregular and in breach of section 68 of the Constitution, section 3 of the Administrative Justice Act and the *audi alteram*

*partem* rule that the applicants were not heard on what they had to say about the alleged past conduct and in mitigation. The 1<sup>st</sup> respondent in his opposing affidavit stated that the applicants were not entitled to give evidence or cross-examine witnesses or interrogate the comments of the officers who comprised the Board of Suitability. I do not agree with this view. The convening order itself spelt out the rights of the applicants in clear terms. The convening order said:

“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”.

The 1<sup>st</sup> respondent has merely said that the opportunity was given to make representations, but has not made the record of proceedings available so as to refute the applicants’ vehement averments that they were denied that right. Moreover, the statement that the applicants had no right to cross-examine witnesses in in direct contradiction with what the convening order says. Since the 1<sup>st</sup> respondent has revealed himself as equivocating, I find the version of the applicants that they were not afforded the right to be heard more probable and accept it. I also want to look at the failure to provide reasons which has been admitted by the 1<sup>st</sup> respondent. The right to be given reasons when you are affected by an administrative decision is expressed in section 68 (2) of the Constitution, which reads as follows:

“Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”.

To say that reasons were not given but are contained in the opposing affidavit before a court of law does not satisfy the constitutional requirement. The Constitution anticipates the giving of reasons when requested and not in the context of litigation. Such reasons apart from justifying the decision taken, also enable the affected person to decide whether or not the litigation route should be embarked upon. For this reason alone, I would have granted the relief sought. From my assessment of the matter on the whole, I am satisfied that the applicants have established the requirements for the relief they are seeking, and are entitled to the order they have asked for. Ordinarily costs follow the result, and I see no reason from departing from that general rule.

**Disposition**

In the result, I grant the following order:

1. The decision of the 1<sup>st</sup> respondent discharging the applicants from the Zimbabwe National Army service communicated on 7<sup>th</sup> February 2019 be and is hereby set aside.
2. The 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.

*Rubaya & Chatambudza*, applicants' legal practitioners

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