LUKE HASHA
versus
MINISTER OF STATE FOR NATIONAL SECURITY
IN THE PRESIDENT'S OFFICE N.O.
and
DEPARTMENT OF STATE FOR NATIONAL SECURITY,
CENTRAL INTELLIGENCE ORGANISATION
and
DIRECTOR GENERAL CENTRAL INTELLIGENCE
ORGANISATION N.O.

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 29 June & 2 August 2017

Opposed Application

C. Mucheche, for the applicant
S. Chihuri, for respondents

MUSAKWA J: The applicant seeks the following order -

"1……..
2. The 1st Respondent is hereby declared and consequently confirmed as a substantive Divisional Intelligence Officer in the employ of the 2nd Respondent with effect from 1st July 2013.
3. Consequently, Respondents jointly and severally are ordered to reflect the records of the Applicant as such as per paragraph 1 of this order, including updating and paying entitlements applicable to the position of Divisional Intelligence Officer effective 1st of July 2013.
4. The Respondents pay costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved.

OR ALTERNATIVELY
1……..
2. The 1st Respondent is hereby ordered to determine the Applicant's appeal filed of record on the 17th of August 2016 and to issue a decision as mandated by the applicable Code within 5 days of receipt of this order of Court.
3. Failure by the 1st Respondent to so act as per paragraph 2 of this order, the Applicant shall be declared and confirmed as Respondents' substantive Divisional Intelligence Officer without loss of salaries and benefits effective 1st July 2013.
4. The Respondents pay costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved."

As can be noted, para 2 of the main order sought is erroneous. The applicant's counsel did not seek an amendment. On the other hand counsel for the respondents did not bring the anomaly to the attention of the court. Nothing will turn on this as that relief is not going to succeed.

The applicant has been employed by the Department of State For National Security since 3 April 1995. He holds the rank of Senior Intelligence Officer. The applicant claims that on the 1st January 2013 he was appointed Acting Divisional Intelligence Officer until 31st March 2015. As Acting Divisional Intelligence Officer he was paid an acting allowance in terms of the applicable code of conduct.

In his founding affidavit the applicant claims that in terms of the Code of Conduct, a member who acts for more than six months is entitled to be confirmed in the substantive post. Accordingly, the applicant's supervisor recommended his promotion to the Director of Administration. The Director of Administration in turn informed the applicant that promotion was subject to other considerations. The applicant appealed to the third respondent. There being no decision by the third respondent the applicant lodged an appeal with the first respondent. The first respondent has also not made a determination of the appeal.

In opposing the application, the second respondent who deposed to the opposing affidavit on behalf of the other respondents contends that the applicant was not duly appointed to act as Divisional Head. The applicant is said to have acted by default following the transfer of the then Officer In Charge of the station. The continued acting of the applicant was attributed to an administrative lapse in failing to fill the post with a suitably qualified person.

It is further averred that after the applicant ceased to act, he took part in a promotion exercise in which he could not succeed. Thus, it is contended that the applicant forfeited any entitlement or right to be confirmed as the substantive divisional head.

In his submissions, Mr *Mucheche* submitted that the case hinges on the interpretation of clause 19 of the Code of Conduct. He also referred to clause 19 (7) thereof as well as to annexure G to the applicant's papers. Mr *Mucheche* also submitted that the Labour Act does not apply to the applicant. Where there is such a void, recourse is had to s 65 (1) of the Constitution. He further submitted that an employee's terms of employment cannot be altered unilaterally. The applicant has pursued internal remedies in vain. Mr *Mucheche* prayed for relief in the main.

Ms *Chihuri* placed reliance on clause 19 (7). She also drew the court's attention to the definitions of 'act' and 'acting allowance'. Thus she further submitted that the question to address is whether the applicant was ever appointed to act in the post.

The issue of whether the applicant was ever appointed as acting Divisional Intelligence Officer exercised the court's mind as the applicant never provided such proof. This was posed to Mr *Mucheche* who submitted that the applicant attended relevant meetings and was acknowledged in that capacity. He further submitted that the fact that the applicant was subsequently paid an acting allowance is proof of that appointment.

The Code Of Conduct For The Department Of State For National Security came into operation on 1 January 2012. It defines appointing authority as follows-

> "appointing authority" in relation to any appointment to the Department, means the directorate;"

Directorate is defined as follows-

> "directorate" means the committee comprising the Director General, Deputy Director General, and the Director Administration or their respective nominees and any other Directors as the Director General may appoint."

"Act" is defined in clause 19 (1) of the Code of Conduct as-

> "Act" means to be assigned to perform the duties and functions of a member in a higher grade or vacant post;"

The averment by the applicant that whilst he occupied the acting post he was in receipt of an acting allowance is not factually correct. This is because the minute by the Chief Personnel Officer dated 20 August 2015 was merely confirming that the Director Administration had approved the payment of an acting allowance to the applicant for the period between 1 January 2013 and 31 March 2015. The minute is confirmation that the acting allowance was paid in retrospect.

It is not in doubt that the applicant was never formally appointed to act in the post. That is why he was not able to make such an averment or to produce proof of such appointment. He did not specify who made the appointment and in what form. The applicant did not even specify the exact date from which he claimed to have commenced to act in the post. The best he stated was that he acted between January 2013 and March 2015. I cannot see how a department such as the second respondent can appoint someone without there being a record of such appointment. What is likely to have happened was that the applicant

being the most senior officer at the station found himself having to attend meetings in that capacity. There is not even proof of any minutes in which the applicant was acknowledged as Acting Divisional Intelligence Officer.

Clause 19 (1) of the Code of Conduct defines "acting allowance" as –

> "acting allowance" means the additional remuneration payable to a member appointed to act for another member or in a vacant post."

Again, in that definition is the word appointed. There is no way an appointment could have been informal as the applicant wants the court to believe.

Whilst the second respondent paid the applicant an acting allowance upon request by the applicant, it is really an issue for the Director of Administration to justify as he is the one who approved it. I cannot see how that was approved without considering whether the applicant had been appointed to act. I am not even sure how the auditors dealt with such an issue. Perhaps the second respondent found it worthwhile that the applicant should be rewarded for holding fort for Chitungwiza (in whatever capacity) for two years but it was certainly erroneous to term that an acting allowance without there being proof that the applicant was appointed to act.

Coming to the issue of the appeal that was lodged with the first respondent, s 68 (1) of the constitution provides that-

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

There is no doubt that the appeal that was lodged by the applicant has not been determined promptly, efficiently or reasonably in accordance with the Constitution. It is of no consequence to claim that the delay in determining the appeal is due to the uniqueness of the case. It is almost a year now without the appeal having been determined. Even the Code of Conduct provides that the Minister shall respond to an appeal within fourteen working days. Obviously the provision was badly drafted. On a literal interpretation it does not mean that the Minister must determine the appeal within the prescribed period. Even if no response was made within fourteen days, it is abundantly clear that a delay has also occurred in substantively determining the matter.

The applicant has been very ambitious in the alternative relief that is being sought. For example, he is seeking an order that compels the first respondent to determine his appeal within five days, failing which he should be declared and confirmed as substantive Divisional

Intelligence Officer. He cannot attain promotion by default in light of my finding that he did not prove how he was appointed to act. A promotion by default would not be in keeping with clause 7 of the Code of Conduct which prescribes the procedure for promotion.

In the case of *Muwenga* v *PTC* 1997 (2) ZLR 483 (S) which is cited in the applicant's heads of argument, it was held that promotion is not a right an employee can claim entitlement to unless it is provided in the contract of employment. As I have already found that the applicant did not prove his appointment to act in the post, it cannot be said that his rights in regard to a legitimate expectation to a promotion were violated. Even when the applicant sought a promotion premised on his having acted the response by the Director Internal dated 27 January 2015 is very telling as it reads in part as follows-

> "2. Be advised that the application could not be considered because the 2014 Annual promotions Board (APB) had wound down its operations.
>
> 3. The request, however, shall be considered during the 2015 Annual Promotions exercise subject to SIO HASHA's good performance."

I am not certain that it is a reply on which the applicant could have harboured a legitimate expectation to automatic promotion.

In light of my finding that the applicant did not prove his appointment to act in the post, the application can only partially succeed in the alternative relief. In terms of s 4 (2) of the Administrative Justice Act [*Chapter 10:28*] the High Court may direct an administrative authority to take administrative action within the period specified by law. In the present matter the period is fourteen working days. Because of the dilatoriness exhibited by the first respondent punitive costs are appropriate.

Accordingly it is ordered as follows-

(a) The 1st Respondent is hereby ordered to determine the Applicant's appeal filed of record on the 17th of August 2016 and to issue a decision as mandated by the applicable Code within fourteen working days of receipt of this order.

(b) The first respondent shall pay costs of suit on a legal practitioner and client scale.

Matsikidze & Mucheche, applicant's legal practitioners
Civil Division of The Attorney General's Office, respondent's legal practitioners