

AIRCRAFTSMAN BERNARD CHAMBE
versus
THE COMMANDER OF THE AIRFORCE OF ZIMBABWE
and
THE BOARD OF INQUIRY (SUITABILITY)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 14 & 23 November 2022

Opposed Application

I Murambasvina, for applicant
T Tembo, for respondents

TAGU J: This is an application for condonation of late noting of Review. The facts are common cause. The Applicant was convicted on 12 May 2011 on a Charge of contravening para 14(3) of the First Schedule to the Defence Act [*Chapter 11.02*] which subsequently led to the convening of a Board of Suitability leading to the dismissal of the applicant from the Airforce of Zimbabwe. The applicant attempted to note his appeal to the Defence Forces Service Commission which unfortunately did not go through as it was out of time and condonation was denied. Applicant had noted his appeal after 9 months well after 14 working days required by Regulations. The applicant ought to have noted his appeal against dismissal to the Defence Forces Service Commission within 14 working days of the date of such dismissal as prescribed by S 15 (1) of the Defence (Regular Force) Non Commissioned Members Regulations. After his failure to get relief via the above mentioned internal remedies, the applicant was advised by his Legal Practitioner that his last hope to have his situation redressed is to petition this Honourable Court to review the correctness of the decision to dismiss him from the Air force of

Zimbabwe. Unfortunately, he is again out of time for 14 months to file his application for Review, hence the present application for condonation.

In opposition to the application for condonation the first respondent raised a point *in limine* that the Board of Suitability discharged its obligations to establish the suitability or otherwise of the applicant to continue serving in the Force. The eventual dismissal of the applicant was a result of the decision by the Commander Airforce of Zimbabwe acting in terms of S 26 of the Defence Act [*Chapter 11.02*] which the second respondent had no control over. Accordingly the Defence Forces Services Commission ought to have been cited as the second respondent and not the Board of Inquiry.

In his answering affidavit the applicant submitted that what is before this Honourable Court is an application for condonation for the late filing of a Review application. That it is not the Review application that is before the Court. Should condonation be granted then in the Review application, the Defence Services Commission may be cited should it be deemed necessary. However, applicant is of the firm view and considered view that citing the Defence Services Commission is not necessary particularly as the decision sought to be reviewed was not made by the Defence Services Commission but by the first and second respondents.

In the present case the decision to be reviewed was made by the first and second respondents. The two respondents may have acted on the basis of some delegated powers. In my view, the fact that there is a misjoinder or non -joinder of a party is not fatal to the application since in terms of the Rules of this Honourable Court the court can still make a decision basing on the parties before it.

As a result the preliminary point is dismissed.

ON THE MERITS

THE LAW

It is trite that “in considering applications for non-compliance with rules, the court has a discretion which it has to exercise judicially in the sense that it has to reconsider all the facts and apply established principles bearing in mind that it had to do justice. Some of the relevant factors that may be considered and weighed against the other are the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case, the

Respondents interest in the finality of the judgment, the convenience of the Court and the avoidance of the unnecessary delays in the administration of justice.”

See the matters of:

FBC Bank Limited v Robert Chidziva SC 31/17,
State v Tanyanyiwa HH 389/19,
Mahiya v Independent African Church SC 58/07,
Paul Gary Friendship v (1) Cargo Carriers Limited (2) Across Enterprises (Pvt) Ltd SC 1/13

The extent of the delay in this matter is 14 months and largely attributable to the applicant’s health condition he sets out in the founding affidavit. When applicant instructs counsel to appeal it was noted for him by his legal practitioner that it was out of time. An attempt to apply for condonation failed as this was dismissed by the Defence Forces Service Commission. In dismissing the application for condonation of late filing of the appeal it was said;

“...In terms of the Defence (Regular Force) (Non-Commissioned Members) Regulations, your appeal is out of time as it is being made 9 months after your dismissal. Please be advised that due to the prolonged time span your appeal is out of time and cannot be processed. The Defence Forces Service Commission also noted that the prospects of success on appeal are slim and therefore ruled that the condonation of late noting of appeal be turned down. Please be guided accordingly.”

In the present application which was lodged with the view that the Court may grant condonation for failure to comply with the Regulations, was made 14 months late. The applicant seemed to be on a fishing expedition. Having failed to get condonation in 9 months’ time to file notice of appeal, hoped to get condonation in 14 months’ time to file application for review. He said he fell down while serving a term of imprisonment. He attended the second respondent’s Board of inquiry into his suitability to remain employed while in that condition. At the time of discharge his condition was still bad. It is not clear how his condition disabled him from filing his review personally, through a lawyer or someone else. I find the explanation for the delay to be unreasonable. In the case referred to me of *Lovemore Sango v Chairman of The Public Service Commission and Another* HH 28-96 the court highlighted that:

“Those who sit on their litigation until cows come home have only themselves to blame if condonation is refused when they finally wake up from their years of somnambulism”

As to prospects of success it is settled law that where there are prospects of success in the main matter the court will grant condonation, this was aptly captured in the case of *Moyo v President Board of Enquiry and Others* 1996 (1) ZLR 319 where the court said:

“Authorities show that the court will grant condonation even if the delay is unreasonable and the explanation of it is not good enough as long as there are clear prospects of success.”

In the present case the applicant submitted that he has good prospects of success more particularly in that there was a violation of fundamental principles of natural justice vis that the personality who recommended his dismissal is the same who confirmed it. That he was denied an opportunity to cross examine the witnesses in his criminal trial.

The respondents denied this and said in terms of S 63 of the Defence Act, powers of a confirming authority, is clear that the issue of confirming is an internal review. It follows that if the presiding officer confirmed his recommendation it means the applicant was dismissed by the presiding officer which is not. In his opposing affidavit the Commander of Air force of Zimbabwe stated that, “the eventual dismissal of the Applicant was a result of the decision by the Commander Air Force of Zimbabwe acting in terms of s 26 of the Defence Act [*Chapter 11.12*] which the second respondent had no control over.” The aforementioned statement from the first respondent clearly shows that the first respondent confirmed the recommendation by the Board of Suitability. There is no merit in the submission that the personality who recommended applicant’s dismissal is the same who confirmed it. Coming to the issue of cross examination, I read the record of proceedings. It is clear on page 16 of the record that the applicant was given an opportunity to cross examine the first witness SQN LDR J. Chimpamba but he declined to do so. The second witness A.C. Katsande was cross examined at length by the Applicant. So it is incorrect to say the applicant was denied the opportunity to cross examine witnesses. His prospects of success in the main matter are not bright. For these reasons the application for condonation will fail.

IT IS ORDERED THAT:

1. The application for condonation is dismissed.
2. The applicant is to pay costs on an ordinary scale.

Murambasvina Legal Practice, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners