

RICKY NELSON MAWERE
and
DAVID NYABANDO
versus
THE DIRECTOR ADMINISTRATION- CENTRAL INTELLIGENCE ORGANISATION
and
THE DIRECTOR GENERAL - CENTRAL INTELLIGENCE ORGANISATION
and
THE MINISTER OF STATE AND NATIONAL SECURITY
and
CENTRAL INTELLIGENCE ORGANISATION

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 July 2013 and 4 September 2013

Opposed Application

Ms J. Wood, for the applicants
M. Chimombe, for the respondents

MATHONSI J: This is a court application in which the 2 applicants who are former members of the Central Intelligence Organisation (CIO) seek an order in the following terms:

“IT IS ORDERED THAT:

1. The first and second respondents be and are hereby found contemptuous of the order of Mr Justice BERE made on 14 December 2011.
2. The first and second respondents be and are hereby ordered that within 30 days of this order, they pay all salaries and allowances, provide all the non-monetary benefits such as fuel allocation, air time and newspapers for the whole period of suspension including affording applicants to purchase one vehicle at book value as due in 1998.
3. Should the first and second respondents not comply with the directive in (2) above they be held personally in contempt of the order of this court for which they should be sentenced to a term of imprisonment of 3 months.
4. The first and second respondents pay the cost (*sic*) of this application at the higher scale.”

It would seem that a lot has happened since this application was filed on 26 October 2012 which affects the order that the applicants seek. For instance according to Ms *Wood* who appeared on behalf of the applicants, the applicants have accepted retirement from the CIO which retirement took effect from May 2013. In fact, Ms *Wood* submitted that the applicants now seek to be paid their salaries and benefits from the time that these were terminated in 1998 to March 2009, when multi currencies were introduced (the Zimbabwe dollar component of their salaries and benefits), as well as their salaries and benefits for the period October 2012 to May 2013 when they retired.

The brief background of this matter is that the applicants were unlawfully suspended from employment. They successfully contested that action in the courts and on 14 December 2011 this court, per BERE J, issued the following order against the first, third and fourth respondents:

“IT IS ORDERED THAT:

1. The suspension of the applicants from their employment be and is hereby declared to be null and void.
2. The applicants are entitled to be reinstated in their posts and to be paid all salary and other benefits due to them with effect from the date they were withheld.
3. The respondents are not entitled to hold an inquiry into the alleged acts of misconduct on the part of the applicants before a board that has not been established by law.
4. The cost of this application be borne by respondents on (the) attorney and client scale.”

In pursuance of that court order the first respondent wrote letters of reinstatement to the applicants. The one addressed to the first applicant on 3 February 2012 reads;

“REINSTATEMENT: RICKY NELSON MAWERE

1. The above subject matter refers.
2. The Organisation acknowledges receipt of court order HC7577/10, which ordered your reinstatement.
3. Please be advised that you have been reinstated with effect from the date you were suspended (06 October 1998).

4. However, you are required to stay at home for at least three weeks from 01 February 2012, while your salary and deployment are being worked out.
5. Be guided accordingly.”

The respondents subsequently paid the applicants their salaries and benefits for the period 1 February 2009 to 31 December 2011. They reinstated the applicants’ monthly salaries. They advised the applicants that they were not paid the salary and benefits for the period September 1998 to January 2009;

“because Ministry of Finance has not yet come up with a formula to convert the Zimbabwe dollar to US dollar.”

The applicants would have none of it. They obtained from the Reserve Bank of Zimbabwe exchange rates for the years 1998 to 2009 and sought to use those rates to compute what they should be paid for that period thereby coming up with a figure which they reckon should be paid to them. When the respondents did not pay in terms of these computations, the applicants instituted these contempt of court proceedings.

Meanwhile, the respondents advised the applicants that they had reached retirement age and that for them to remain in the organisation they had to apply for extension of their employment. The applicants refused to do that and the respondents stopped paying their salaries and benefits, in October 2012 as they had been retired. The applicants do not appear to have accepted the retirement at that stage and it has been submitted on their behalf that their retirement took effect in May 2013 when they finally capitulated.

The question which arises therefore is whether the respondents are in contempt of the court order issued on 14 December 2011 firstly by withholding the Zimbabwe dollar salaries and benefits as well as not paying the salaries and benefits for the period October 2012 to May 2013.

Mr *Chimombe* who appeared on behalf of all the respondents submitted that the respondents have “substantially complied’ with the court order and as such are not in contempt of court. He stated that it is not possible to pay the Zimbabwe dollar component until such time that the Ministry of Finance has set out a formula of how those debts should be computed. Regarding the claim for payment between October 2012 and May 2013 Mr *Chimombe* maintained that the applicants having been retired in October 2012 their claim for

payment constitutes a fresh cause of action which should be pursued outside the court order of 14 December 2011. I agree.

While Ms *Wood* is correct in arguing that once a failure to comply with a court order is proven, a presumption arises that the failure was wilful and *mala fide* and the onus then shifts to that party to prove that the failure was not wilful and *mala fide*: *John Strong (Pvt) Ltd & Anor v Wachenuka* 2010(1) ZLR 151 (H) 156ED, I am of the view that the Respondents have discharged that onus; *Macheke v Moyo* 2003 (2) ZLR 49 (H); *Scheelite King Co (Pvt) Ltd v Mahachi* 1998(1) ZLR 173(H).

The respondents reinstated the applicants in compliance with the court order. They paid them their salaries and benefits from the date of dollarization to reinstatement and restored them on the payroll. This resulted in the applicants receiving their dues right up to October 2012 when they were retired. To my mind it matters not whether their retirement is governed by the Public Service Regulations SI 1 of 2000 or not, in fact it is common cause that they are not. The applicants were retired, rightly or wrongly in October 2012. It is not for them to choose that they will only accept retirement as at May 2013. If they are aggrieved by the decision of the respondents, they have a right to contest that decision. That right clearly does not derive from the court order of 14 December 2011. The respondents cannot be said to be in breach of the order on that score.

Regarding the outstanding Zimbabwe dollar component of their back pay, I am satisfied that it has not been determined and as things stand the respondents cannot pay what remains unknown.

What the applicants have done is to find a formula which they prefer to use to calculate what should be paid for that period, a kind of conversion method. What has been lost to the applicants is the fact that they cannot execute that element of the court order. There is still need for a conversion and their conversion method is not contained in the court order: *Shava v Bergus Investments (Pvt) Ltd & Anor* HH 226/11, *Kwindima Fabiola v Mvundura Louis* HH 25/09.

In my view the respondents have proffered a reasonable explanation for their inability to pay. Their general conduct cannot be said to be that of people who contemptuously do not want to comply with the court order. They have done everything possible to comply.

Accordingly they have discharged the onus of proving that their failure to satisfy the court order is neither wilful nor *mala fide*.

That conclusion should really bring the entire dispute to bed. No contempt of court has been established.

In the result the application is hereby dismissed with costs.

Nyikadzino, Simango & Associates, applicants' legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners