

NGAATENDWE TAKAWIRA
versus
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 11 & 20 November 2015

Urgent Application

A T Muza with Ms Bwanya, for applicant
LT Mapuranga with Mr Mtizwa, for respondent

TSANGA J: The applicant brought an urgent application seeking interim relief that the respondent, the University of Zimbabwe, immediately reinstate her salary pending the determination of the hearing of her matter on the return date. The final order that she seeks on the return date is that the respondent's purported variation of the terms of her suspension from employment be declared unlawful. She also seeks that the terms of suspension that were originally communicated by letter to her on 7 October 2015, be maintained as the *status quo*. Furthermore, she seeks that the respondent pay the costs of the application on an attorney and client scale.

The factual context of the application

The context of the suspension in issue relates to three academic caps, made to order, which the Chancellor of the University of Zimbabwe had attempted to adorn without success at this year's graduation ceremony, as they were all too big. An observation having been made by the Vice-Chancellor to applicant in her capacity as Deputy Registrar (Academic), that the previous year the caps worn by the Chancellor and himself had been too small, active steps had been taken in the course of the year to replace the ill-fitting caps for this year's graduation, which took place on 2 October. On what should have been a happy occasion all round, the replacement caps, despite having been procured amidst what appear to have been

diligent efforts to ensure the right fit and size, turned out to be too big. As a result there was some forty –five minute delay in commencing the ceremony due to frantic efforts to locate the cap that had been worn the previous year.

Embarrassed by the turn of events and the resultant delay, the Vice Chancellor wrote to the applicant on 7 October advising her of her suspension **with pay** pending investigations.¹ At the disciplinary hearing 26 October, applicant had objected to the composition of the Disciplinary Committee on the likelihood of bias. This was on the basis that justice was unlikely to be done by the Committee as it was made up of subordinates to the Vice Chancellor who was the complainant.² She had applied for its recusal. Upon her request being refused she had filed a review in the labour court under **LC/H/Rev/116/15** which matter is still pending. Furthermore, on 30 October she had lodged a further application with the High Court under **HC10478/15** seeking an order staying any disciplinary proceedings pending finalisation of her review in the labour court. At the time of this hearing, judgment in that matter was still pending on the preliminary procedural issues that had been raised thereunder.

Following the filing of the review matter in the labour court, the Vice Chancellor had then sent written communication to the applicant on 29 October advising her that she was now on suspension without pay with effect from 1 November 2015 until her matter was finalised.³ It is this communication that has spawned this urgent application which seeks

¹ She was said to have contravened s4 (a) of Statutory Instrument No. 15 of 2006, Labour (National Employment Code of Conduct) which deals with misconduct as “any act of conduct or omission inconsistent with the fulfilment of express or implied conditions of his or her contract.” The suspension was in terms of 8(3)(a) of the University of Zimbabwe Act [Chapter 25:16] as read with the Labour (National Employment Code of Conduct) Regulations Statutory Instrument 15 2006, s 6(1) and (2).

² In terms of the University of Zimbabwe Act [Chapter 25:16] the Staff Disciplinary Committee **shall** consist of :

- a) a Pro Vice Chancellor , who shall be the chairman (sic)
- b) a senior member of the academic administration staff
- c) a member of the Council: and
- d) a member of the academic or administrative staff of similar status to the person charged.

³ This was said to be in terms of 8(3)(a) of the University of Zimbabwe Act [Chapter 25:16] which permits the Vice Chancellor to suspend a from duty any member of staff of the University as read with the Labour (National Employment Code of Conduct) Regulations Statutory Instrument 15 2006, s 6(1) and (2).

interim relief. What has to be satisfied in the matter before me are the requirements of an interim interdict.⁴ These are that the right which is sought to be protected should be clear; or that if it is not clear, it must be *prima facie* established, though open to some doubt. Also there should to be a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing her right. The balance of convenience should favour the granting of interim relief. Furthermore, there should be no other satisfactory remedy. See *Midkwe Minerals (Pvt) Ltd v Ziki* HH 219/15.

Legal arguments by the parties

The applicant is aggrieved at the reversal of her suspension terms of the grounds that the action fundamentally violates the law given that an election of the suspension terms had been made and respondent was bound by its election. The gist of her argument, put forward by her lawyer Mr *Muza*, is founded on the fact that whereas under common law the suspension of an employee was with pay, unless the contract stipulated otherwise, this position had been varied by the Labour (National Employment Code of Conduct) Regulations Statutory Instrument 15 2006, s 6(1) and (2) which permits an employer to suspend with or without pay. The operative principle is that an election as to which reality will pertain to an employee's situation is one that is made at the time of suspension. The applicant relies on the case of *Makova v Urban Development Corporation* 1992(1) ZLR 326 for its core argument that the election whether to suspend the employee with or without pay had been made at the time of suspension and that the employee had been told of the condition. The case of *Nhete & Ors v Mudzi Rural District Council* SC 92/04 was also relied upon by applicant's counsel as bolstering this position that an employee's status vis a vis their pay is made known at the time of suspension. Chidyausiku CJ articulated the legal position in that matter as follows:

“I hold that once the employer decides to suspend his employee he has to go further and consider whether such suspension is to be with pay or without pay and having made that decision the employer must communicate his decision to his employee”

The respondent, on the other hand, argues that it reversed its original decision and written communication because it had anticipated that the proceedings would be completed within 30 days. Furthermore, it bases the validity of its alteration of the suspension terms on

⁴ At the hearing, respondent's counsel raised points *in limine* relating to the form used by the Applicant. Having heard them, I dismissed the points *in limine* in favour of the substance of the case as they did not go to the root of the matter. I therefore concentrate on the merits of the case in this judgment.

the fact that with various actions now pending and which are likely to take time before they are resolved, the applicant cannot be paid for not working. Mr *Mapuranga* who appeared on behalf of respondent was adamant that it is applicant who has now prolonged the proceedings unnecessarily by filing various court applications before the courts, chief of which being the application for review. Furthermore, he alleged that the applicant was now actively relishing the limelight of media publicity and was deliberately prolonging the matter. Reliance for the “no pay no work” argument was placed on the case of *National Railways of Zimbabwe v National Railways of Zimbabwe Artisans Union SC8/2005*. The applicant’s counsel argued that this case is distinguishable in the sense that no election had been made thereunder.

The import of the above decisions drawn upon by the applicant is that the fact that the applicant will not be working pending finalisation of the review matter is not the point. The point is that the election to suspend with pay was made at the time of suspension. Notably it is the respondent’s Vice Chancellor who elected to send the applicant home whilst the investigations were taking place. Granted the letter that communicated the suspension indicated that a Disciplinary Committee would be convened by 21 October but it did not actively state that the suspension was with pay because it was anticipated that the matter would be finalised within 30 days. The fact that applicant has lodged a review application of the Disciplinary Committee dismissal of her request for its recusal cannot be used against her to reverse the clear choice that had been made by the employer regarding the terms of the suspension. While the prolonged hearing may indeed give the impression that she will be now on a prolonged paid holiday, it was the respondent who made the choice to remove her from the work environment in the initial instance. Indeed from the factual averments filed in support of this application it is unclear why she needed to be “raked over the coals in the first place” by being investigated and suspended from work when she was neither responsible for taking the Chancellor’s head measurements nor manufacturing the caps herself. What in fact merges is an abundance of caution in ensuring that on the information provided to her she ordered a cap that would fit. An employee is free to take appropriate steps in pursuance of a fair outcome of a hearing. Section 6 (1) (e) of the Labour Act [*Chapter 28:01*] is clear in this regard when it provides as follows:

“No employer shall-

- a).....
- b).....
- c).....

- d).....
- e) hinder, obstruct or prevent any employee from, or penalise him for, seeking access to any lawful proceedings that may be available to him to enable him lawfully to advance or protect his rights or interests as an employee.”

Section 7 (b) of the same Act also protects an employee when it states that:

“No person shall –

- a).....
- b) threaten an employee with any reprisal for any lawful action taken by him in advancing or protecting his rights or interests.”

Clearly, the prerogative to pursue various avenues of justice is not that of the employer alone. Whether the complaint lodged by the applicant in her review is ultimately justified or not is obviously the subject matter of the reviewing court. The point however is that she cannot be penalised for having made that complaint by suspending her without pay when she had already been told that her suspension was with pay. The fact that her complaint prolongs the matter is neither here nor there.

The applicant has therefore made out a strong *prima facie* case for an interim order which seeks reinstatement of pay and benefits given what was communicated to her in the initial instance by the respondent. Furthermore, the balance of convenience favours that the interim order be granted pending the hearing of the matter as she had a legitimate to continue receiving her salary in light of the communication and the overall factual basis of the case. She will be greatly inconvenienced by the withdrawal of her livelihood at this point and the harm would be irreparable. I am in agreement with applicant’s counsel that the prejudice to the respondent is minimal as it can always re-coup what it will have paid from her terminal benefits in the event that it is found that the payment was not due. I do not see what other remedy she has as it is not her choice to be not at work at this point.

In the final analysis the following interim order is granted:

TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. That the respondent’s purported variation of the terms of applicant’s suspension from employment, communicated in its letter to applicant dated 29th of October 2015 be and is hereby declared unlawful.

2. That the *status quo* of applicant's suspension from employment and the terms thereof follow respondent's letter of suspension from employment to the applicant dated 07th October 2015.
3. That the respondent shall pay the costs of this application on the attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. That the respondent be and is hereby ordered to immediately reinstate the applicant's salary and benefits pending the determination of this matter on the return date.

Mawere & Sibanda, applicant's legal practitioners

Chihambakwe, Mtizwa Legal Practitioners, respondent's legal practitioners