KIZITO MAZVIMAVI
versus
PETER CARBERRY
and
INTERNATIONAL CROPS RESEARCH INSTITUTE FOR THE SEMI-ARID CROPS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 October 2020 and 2 September 2021

Opposed Application

L. Uriri for the applicant
S. Bhebhe for the respondents

ZHOU J: This is an application for the setting aside on review of the termination of the applicant's contract of employment with the second respondent and the disciplinary proceedings which resulted in the termination of employment. Applicant also seeks reinstatement to the position of Country Representative without loss of salary and benefits from 1 May 2019, and costs of suit on the attorney-client scale. Applicant alleges gross irregularities in the proceedings, bias and gross irrationality as the grounds of review. The application is opposed by the respondents. At the hearing of the matter I heard submissions in respect of both the objections *in limine* and the merits and indicated that my decision on the points *in limine* would determine whether or not I would consider the merits of the application.

Background

The applicant was employed by the second respondent as its Country Representative and Head of Station, based at Bulawayo. He was appointed to that position in 2014 having started as an Agricultural Scientist based at the research centre at Matopos in 2004. The second respondent is an international non-governmental organization which has its headquarters in India. Its sphere of operation is research in semi-arid crops. The first respondent is the second respondent's Director General.

In May 2019 the applicant was suspended from his employment following an internal audit triggered by allegations of impropriety against him. The suspension was in terms of the second respondent's Personnel Policy Manual. The letter of suspension detailed the allegations against the applicant. The applicant was given the opportunity to respond to the allegations. He responded by letter dated 3 May 2019. After that an investigation was instituted into the allegations of misconduct. The applicant made both oral and written submissions. A written report dated 18 July 2019 was submitted by the applicant in addition to the report submitted earlier in May 2019. After considering all the evidence the investigating authority recommended the termination of the applicant's contract of employment on the grounds of misconduct.

By letter dated 13 August 2019, signed by the first respondent in his capacity as the Director-General of the second respondent, the applicant was notified that he had been found guilty of misconduct and that his contract of employment was being terminated with immediate effect. The letter sets out the acts of misconduct which the applicant was found guilty of as follows:

- You have utilized ICRISAT's resources i.e. farm equipment, ICRISAT workforce members, casual labours (*sic*) and the Genebank car for personal purposes without appropriate authorization and without personally covering the associated costs. Such actions under ICRISAT's Personnel Policy Manual clause 16.4.3.1 "Serious or deliberate damage to or misuse of, the property of the Institute, fellow worker, contractor, supplier, customer or the public" constitute gross misconduct.
- Your acts and omissions have violated established processes such as travel process, purchase and procurement processes. You have set processes for your personal advantage such as fuel purchase limits. This resulted in violation of the Institute's then prevalent clause 2.0 Code of Ethics Personnel Policy Manual and such actions under ICRISAT's Personnel Policy Manual clause 16.4.3.1 "Intentional and deliberated failure to observe Institute Personnel Policies and rules, Code of Professional Ethics, Policy on Outside Activities and Interests, duties of employment and applicable laws as revised from time to time, which may lead to loss of Institute's reputation and/or Institute's property" constitute gross misconduct.

The applicant appealed against his conviction for misconduct and the termination of his employment. The appeal was in terms of article 16.6.9 as read together with article 17.1 of the Personnel Policy Manual. The appeal raised a lot of complainants pertaining to procedural issues as well as some grounds on the merits of the determination. The applicant was duly informed of the names of the members of the Appeals Committee and of the fact that the appeal hearing would be done virtually on 26 September 2019. The invitation to attend the appeal hearing had attached to it documents relating to the appeal, including some which had been used in the earlier proceedings. The letter, among other things, advised the applicant that he was not entitled to be

represented by a lawyer. At the hearing the applicant raised preliminary objections to the proceedings based on the denial of legal representation, the entitlement to cross-examine witnesses and the appointment of Amit Chakravarty to the Appeals Committee. The latter ground of objection was predicated upon the alleged involvement of Amit Chakravarty in the investigations which preceded the dismissal of the applicant. The hearing was adjourned to enable the Chairman to seek clarification on the extent to which Amit Chakravarty had been involved in the matter prior to the appeal hearing. The applicant also objected to proceeding to lead evidence before the issues which he had raised in the notice of appeal concerning the initial proceedings had been addressed. The applicant alleges that the Appeals Committee did not make a determination on his objections but adjourned the proceedings.

What is on record is that after the adjournment of the appeal proceedings there was exchange of correspondence between the applicant and the first respondent. Applicant also wrote a letter to the then Chairperson of the second respondent's board. By email dated 28 October 2019 sent at 0754 hours the first respondent informed the applicant that the Chairperson of the Appeals Committee, Dr Tabo, was engaging him and urged him to cooperate. In the meantime, the applicant had addressed a letter dated 26 October 2019 to the Chairperson reiterating his request for a ruling on the preliminary objections which he had raised at the hearing of the appeal. He advised that he would not be making submissions at the resumed hearing scheduled for 28 October 2019 until he had been furnished with the determination on his objections.

The other complaints made in the founding affidavit pertain to the manner in which the investigation and the initial hearing were conducted. The applicant complains that he was not furnished with some written statements made by persons interviewed during the investigation and that he was not given the opportunity to cross-examine those who gave evidence against him. Applicant also complains that he was not allowed to make submissions in mitigation before the penalty of dismissal was imposed.

The respondents objected *in limine* to the hearing of the application on the ground that the application was filed out of time. The submission is that, being an application for review, the application ought to have been filed within a period of eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred, as is prescribed by Order 33 r 259. The disciplinary committee made its decision on 13

or 14 August 2019. The Appeals Committee made its decision and communicated it to the first respondent on 31 October 2019. The second respondent communicated to the applicant the dismissal of his appeal by letter dated 12 November 2019. The instant application was filed on 10 January 2020. The period of eight weeks from the 12th November 2019 ended on 7 January 2020. The applicant confirms receipt of the letter dated 12 November 2019 which had attached to it the report by the Appeals Committee dated 31 October 2019 (para 118 of founding affidavit). In his letter dated 22 November 2019 (annexure KM 23), the applicant confirms that he received the letter dismissing his appeal on 12 November 2019, which is the date when it was written. This means that when the application was filed on 10 January 2020 it was out of time by three days. The point that the application was filed out of time was taken by the respondents in the opposing affidavits (para 10 of the opposing affidavit of first respondent). In his answering affidavit the applicant contradicts his letter of 22 November 2019, by stating, equivocally, that he collected the letter "on or around the 14th of November 2019 when it was brought to Harare" by the first respondent. On this basis the applicant asserts that the application was not filed out of time. Clearly, the applicant is mistaken, because if he received the letter on 14 November then he had up to the 9th January 2020 to file the application for review. This is not to suggest that this court accepts as a fact that the applicant received the letter dismissing his appeal on 14 November 2019. Although the court does not usually determine questions of credibility on the papers, where there is a manifest inconsistency in the facts stated, such as obtains in the applicant's papers, the Court is entitled to disbelieve the litigant in the absence of an explanation of the inconsistency. The court is thus entitled to reject his version. After all, even the 14th November 2019 is not stated with certainty, quite apart from the fact that it does not resolve the applicant's problem. The applicant makes the further submission that Saturdays, Sundays and public holidays are excluded in the reckoning of the period of eight weeks. That submission is not supported by the wording of the relevant provisions in the rules.

Although in the answering affidavit there was an indication that the court would be asked to apply the provisions of r 4C and indulge the applicant for the non-compliance with the time limits, no such application was made at the hearing. In fact, the applicant through counsel insisted that the application was timeously filed and that the *dies* only started to run from the 15th January 2020. In the absence of an application for condonation there is nothing that triggers the discretion

of the court to extend the time for filing the application or to condone the non-compliance with the rules, see *Forestry Commission* v *Moyo* 1997 (1) ZLR 254(S) at 260C-D. While the delay was of only a few days, it is not for the court to turn a blind eye to the non-compliance which was drawn to the attention of the applicant but the applicant chose not to seek condonation even though in the answering affidavit and heads of argument filed on his behalf there was an indication that such an application might be made. At the hearing of the matter the applicant, through counsel, took the hardline position that the application was made timeously, an approach which precludes the Court from inquiring into the question of condonation.

Having found that the application was made out of time, this matter is therefore not properly before the court and must be struck off the roll. Since the matter is not properly before the court it is unnecessary for the court to inquire into the other matters raised in argument, including the other objections *in limine*.

In the result, IT IS ORDERED THAT:

1. The application is struck off the roll.
2. Applicant shall pay the costs.

Mafume Law Chambers, applicant's legal practitioners
Kantor & Immerman, first and second respondent's legal practitioners