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Judgment No S.C.21/04
Civil Application No. 302/02

BERNARD CHITEPO v

(1) CITY OF MUTARE

(2) THE MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, MARCH 3 & MAY 10, 2004

The appellant in person

Respondents barred from appearing for late filing of heads of argument

CHIDYAUSIKU CJ: The applicant was formerly employed by the first respondent as its City Treasurer until 3 December 1993 when the applicant's contract of employment was terminated. The respondent paid, and the applicant accepted, terminal benefits on that date.

On 6 July 1996, some two-and-a-half years after the applicant had been dismissed, he filed an application in the High Court seeking a declarator that the termination of his contract of employment was a nullity. The High Court concluded that the application was for a review and as such, was filed out of time. In terms of

Rule 259 of the High Court Rules the application for review should have been filed within eight weeks of 3 December 1993. The application was dismissed on that basis. The court also concluded that the applicant's employment had been lawfully terminated and the application had no prospects of success on the merits. The applicant was dissatisfied with this outcome and appealed to this court. The appeal was heard by the Supreme Court which upheld the judgment of the High Court. The Supreme Court was satisfied that the applicant had not provided a good explanation for the failure to launch the application for review timeously. The appeal was dismissed. In January 2001 the first respondent drafted its bill of costs and following the issuance of a writ of execution the full amount of the first respondent's costs were settled.

In September 2002 the applicant launched this application in terms of s 24(2) of the Constitution of Zimbabwe. The application, with the greatest respect to the applicant, is 116 pages of meaningless verbiage and convoluted citations of the Urban Council's Act. For instance, paragraph 1 of the court application reads as follows:-

> "I am the Applicant herein, I was employed as City Treasurer by the 1st Respondent whose address of service is care of the undersigned legal practitioners. The facts I depose hereto are fully within my knowledge and to the best of my belief true and correct. I was invalidly and unlawfully discharged, on the 3rd of December 1993, in contravention of the rule of law and in contravention of my constitutional rights in terms of the Declaration of Rights of the Constitution of Zimbabwe. The alleged discharge, without power, was a nullity, an invalidity and an *ultra vires* act that was in contravention of my constitutional rights per the Declaration of Rights of the Constitution of Zimbabwe. The alleged discharge, without power was either an act of fraud abetted by fraudulent misrepresentation in subversion of the rule of law or an act of wanton, unmitigated and outrageous thoughtlessness in contravention of my constitutional rights. The City Council of Mutare never discharged me. I am still a Senior Official of the City Council of Mutare by contractual, legislative and constitutional right."

Similarly paragraphs 4 to 6 of the founding affidavit read as follows:-

> "4. The instant application is made in terms of **Section 24 subsection (1) of the Declaration of Rights of the Constitution of Zimbabwe**, for the issue of declaratory orders regarding the various contraventions of the Declaration of Rights in regard to my rights as stated in this application. I specifically apply for a declaratory order confirming that my discharge by the Acting Mayor, on 3 December 1993, was unconstitutional, unlawful, invalid, null and void *ab initio* and **ultra vires** the **Urban Councils Act Chapter 214** and confirming my Constitutional right not to be discharged and confirming my Constitutional right to reinstatement with rights to arrear salary, benefits and interest a temporae morae on arrears from 3 December 1993 and confirming that the City Council of Mutare never discharged me.
>
> 5. With the greatest respect and humility to the High Court and Supreme Court decisions per judgments HH224/98 and SC 103/99 respectively, my fundamental right to protection of the law has been violated in contravention of sections **18(1) and 19(9) of the Declaration of Rights of the Constitution of Zimbabwe**.
>
> 6. The High Court and Supreme Court erred at law in that they used, a repealed statute to determine my application to the High Court for the issue of a declaratory order."

The application continues in similar fashion for the next over one hundred pages. When the matter was placed before me in Chambers I had serious doubts as to whether this application should be set down for hearing as it was patently frivolous and vexatious. (See s 24(4)(a) of the Constitution). However, as the applicant was a self actor, I felt that he should be given some latitude in the hope that he might be able to clarify the alleged contraventions of the declaration of rights in respect to him at the hearing. The matter was, accordingly, set down for hearing. The second respondent was in default. The first respondent did not file its heads of argument on time. The first respondent applied for condonation of its late filing of the heads of argument. The applicant opposed the application. The reason advanced

by the first respondent for not filing the heads of argument on time was that it felt that the application was frivolous and vexatious and that it would not be set down for hearing. In this regard they relied on s 24(4) of the Constitution which provides that this Court can determine an application made in terms of s 24(1) of the Constitution without a hearing if it is of the view that such an application is frivolous and vexatious. This explanation for the failure to file heads of argument is inadequate. While I accept the first respondent's contention that the case was frivolous and vexatious has merit, the matter was set down for a hearing. On 5 February 2004 the Registrar of this court advised the parties, including the first respondent that this court would hear and determine this matter on 4 March 2004. This was an unequivocal notification that this court had decided to hear the matter and the first respondent should have filed its heads of argument accordingly and timeously. The court accordingly refused to grant the first respondent the condonation sought. If the application had not been opposed the court might have decided otherwise.

At the hearing of this matter the court invited the applicant to clarify in what manner he was alleging the declaration of rights was contravened in relation to him. He submitted that the declaration of rights was contravened in relation to him in the following two respects:

1. he was denied legal representation at the disciplinary hearing while other employees of the first respondent were accorded the same at other similar disciplinary hearings. He submitted that he was therefore discriminated against contrary to s 23 of the Constitution which prohibits discrimination;

2. he was denied protection of the law by the High Court and the Supreme Court in that his case was determined in accordance with a law that had been repealed instead of the current or prevailing law.

I now wish to deal with the issue of discrimination. The applicant does allege in his papers that he was denied legal representation at the disciplinary proceedings. However the circumstances of such denial are not very clear on the papers. But at no stage during the long and tortuous history of this litigation has the applicant ever alleged that he was denied legal representation on the grounds of race, tribe, place of origin, political opinion, colour, creed or gender etc. He simply alleges that his co-workers received preferential treatment by being allowed legal representation which was denied to him.

I have no doubt that denial of legal representation to a party can form the basis of setting aside of proceedings on review. I am not persuaded that, on the facts of this case, it can form the basis of a constitutional challenge. The facts of this case do not establish that there was discrimination prohibited by s 23 of the Constitution. The applicant sought to have the disciplinary proceedings set aside on review. The High Court refused to review the proceedings because the applicant did not apply for such a review timeously, that is, within eight weeks of his dismissal. That decision was upheld by the Supreme Court. Much of the contents of the court application and the submissions by the applicant are devoted to the merits of the judgments of the High Court and of the Supreme Court. The Constitutional Court does not sit as an appeal court over the judgments of the Supreme Court. This court, sitting as the Constitutional Court, does not have such jurisdiction. The only relevant issue is the possible violation of the declaration of rights in relation to the applicant.

The applicant has come nowhere near establishing that s 23 of the Constitution was violated in respect to him.

The other alleged ground of violation of the appellant's constitutional right was that the applicant was denied the protection of the law. According to the applicant the basis of the allegation is that the High Court and the Supreme Court determined his application for review in accordance with a repealed section of the Urban Council's Act. It is quite clear from the papers that both the High Court and the Supreme Court concluded that the applicant's original application was in fact an application for review and not an application for a declarator as claimed by the applicant. That determination did not depend on any statute repealed or otherwise. Having concluded that the applicant's application before the High Court was an application for review the High Court further concluded that such application was out of time. As already stated above in terms of Rule 259 Order 33 of the High Court Rules an application for review has to be launched within 8 weeks of the termination of suit, action or proceedings in which the irregularity complained of is alleged to have occurred. The court may, for good cause shown, extend the time within which to file such an application. The applicant's application, which the court concluded was a review, was launched long after the termination of the proceedings he sought to have reviewed. The applicant was paid and accepted his terminal benefits in December 1993. About two-and-a-half years later, in July 1996, he filed the application for a review of his dismissal. In terms of the rules he should have filed that application within 8 weeks of the determination. The High Court and, indeed, this court, quite rightly refused to grant condonation for the applicant's delay in filing the application for the review of the proceedings leading to his dismissal. In

dismissing the applicant's application for review the High Court applied Rule 259 of the High Court Rules. There is no question of the above rule having been amended. The High Court therefore did not, as alleged by the applicant, decide the applicant's case on the basis of a repealed law. That ground of challenge cannot succeed.

This court application, as already stated, deals with the merits of both the High Court and the Supreme Court's previous judgment in the matter between the same parties. This court, as a Constitutional Court, has no jurisdiction to sit as an appeal court over Supreme Court judgments. I will accordingly not address the applicant's submissions in that regard.

In the result I am satisfied that this application is without merit and it is hereby dismissed with costs. The first respondent's costs in respect of the preparation of the heads of argument and appearance at the hearing are disallowed. The first respondent was in effect in default having failed to file its heads of argument timeously and condonation having been refused.

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

GWAUNZA JA: I agree