REPORTABLE (ZLR) (26)

Judgment No. SC 30/07
Civil Application No. 229/06

(1) RICKY NELSON MAWERE (2) DAVID NYABANDO v

THE CENTRAL INTELLIGENCE ORGANISATION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, JANUARY 25 & OCTOBER 15, 2007

O Takaendesa, for the applicants

C Muchenga, for the respondent

SANDURA JA: This application was filed in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution").

The applicants seek a declaratory order stating that the delay by the respondent ("the C.I.O.") in dealing with their suspension from duty for more than eight years was a violation of their right to a fair hearing within a reasonable time guaranteed by s 18(9) of the Constitution.

The background facts in the matter are as follows. At the relevant time the applicants were employed by the C.I.O., an organisation established in the President's

Office for the protection of national security. In October 1998 they were suspended from duty.

The letter of suspension, received by the first applicant ("Mawere") on 10 November 1998, in relevant part, reads as follows:

> "… Chief Transport Officer, Ricky N Mawere, you are hereby notified that with effect from 06 October 1998, you are suspended from all duties that you would normally be required to perform as a member of the Organisation. …
>
> During the period of your suspension you will receive your normal salary.
>
> A Board will be convened in due course to look into allegations that you committed an act of misconduct as defined in the Second Schedule of the Public Service (Disciplinary) Regulations 1992. The act of misconduct is reflected in the Audit Report on Phase One Construction Projects."

The second applicant ("Nyabando") received a similar letter.

What happened after the applicants had been suspended from duty is set out by Mawere in a letter addressed to the Director of Administration ("the Director") and dated 15 February 1999 (the year should be 2000). The letter, in relevant part, reads as follows:

> "Your good office is requested to kindly consider review of my suspension from duty without pay. Suspension was effected in October 1998 to (the) present date. I was on full salary up to (the) end of January 1999.
>
> I appeared before a Disciplinary Board in January 1999. I was again suspended, this time without pay until this date. …
>
> In January 1999 when I appeared before the Board, I was told that I would receive a Questionnaire in two weeks time and answer to the allegations of Fraud. I

never received anything from C.I.O. Headquarters till this date. It's now a period (of) over a year whilst waiting for the Questionnaire to answer. …

In March 1999 I was detained by C.I.D. Frauds to face fraud charges reported to the Police by (the) Central Intelligence Organisation. I was granted bail of $10 000.00, the following day. I have been on remand for almost a year. On 28 January 2000, my lawyer successfully applied for Refusal for further Remand (*sic*). He was granted the order on 31 January 2000.

I submit that I have been on suspension for over a year, a period I consider unreasonable and unrealistic …".

On 21 February 2000 the Director replied as follows:

"Please be advised that your continued suspension is in terms of Public Service Regulations, 2000 (S.I. 1 of 2000).

This minute also serves as notice that in terms of the Regulations, your suspension remains in force until such time that the criminal investigation into your alleged fraud case are concluded, and or you are convicted or acquitted of the criminal charge.

The Director-General has also reiterated that no salary shall be paid to you because the allegation levelled against you involves financial prejudice to the Government."

Thereafter, on 13 November 2000 Mawere wrote to the responsible Minister requesting him to review the suspension and order his reinstatement.

On 22 February 2001 the Minister replied as follows:

"1. Reference is made to your letter dated 13 November 2000, seeking a review of your suspension from work.

2. Please be advised that the review of your suspension will be carried out after the hearing of your case and others in the High Court. We understand the case will be heard in May 2001."

Subsequently, on 29 December 2005 Mawere received a written notification of the setting up of a Board of Inquiry ("the Board") which, in relevant part, reads as follows:

> "You are hereby notified that in terms of Public Service (Disciplinary) Regulations of 2000, a Board of Inquiry has been convened to inquire into your contravention of Paragraph 8 of the First Schedule (Section 2) which states:
>
> > 'Theft of, or failure to take reasonable care of or account for, or making improper or unauthorised use of, public moneys or the moneys of any statutory body.'
>
> The Board will assemble in the 9th Floor boardroom, Chaminuka Building, on 13 January 2006 at 1030 hours. …
>
> The Inquiry will be based upon the allegations that you were involved, together with Lovemore Itai Mukandi, in a financial scum (scam) from the C.I.O. Construction Projects which resulted in the Organisation suffering financial prejudice to the tune of $16 972 784.32."

On 13 January 2006 Mawere and his lawyer went to the venue where the Board was to sit and arrived there at 10 am. At 11.35 am they were informed that the hearing had been cancelled and that they would be notified about a new date in due course. They were later advised that the hearing would be on 6 July 2006.

At the hearing before the Board Mawere's lawyer raised several points *in limine*, the most important of which was that Mawere's right to a fair hearing within a reasonable time had been violated. The Board found all the points to be without merit and dismissed them.

That decision prompted Mawere's lawyer to ask the Board to stop the hearing in order for him to file this application in terms of s 24(1) of the Constitution. The request was granted and the application was subsequently filed on 9 August 2006.

At the hearing of the application, the original draft order was amended in such a way that what the applicants now seek is the declaratory order indicated at the beginning of this judgment.

Section 18(9) of the Constitution, which the applicants allege was violated in relation to them, reads as follows:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

The question which immediately arises for consideration is whether the Board was covered by the expression "court or other adjudicating authority established by law".

In my view, the Board was certainly not a court. The only issue is whether it was covered by the expression "other adjudicating authority established by law".

The word "law" is defined in s 113(1) of the Constitution as follows:

"'law' means –

(a) any provision of this Constitution or of an Act of Parliament;

(b) any provision of a statutory instrument; and

(c) any unwritten law in force in Zimbabwe, including African customary law;".

When the C.I.O. set up the Board it purportedly acted in terms of the Public Service Regulations, 2000, published in Statutory Instrument 1 of 2000 ("the Regulations"). The Regulations were made by the Public Service Commission ("the P.S.C.") in terms of s 31 of the Public Service Act [*Cap 16:04*] ("the Act"), with the concurrence of the Minister of Public Service, Labour and Social Welfare.

In my view, the Regulations do not apply to the applicants because the Act does not apply to the members of the C.I.O.. In this regard, s 14(e) of the Act provides as follows:

"**14 Constitution of Public Service**

Subject to section 113 of the Constitution, the Public Service shall consist of all persons in the service of the State, other than –

(a) – (d) …; or

(e) members of any organisation established in the President's Office for the protection of national security;".

And s 113(1) of the Constitution, in relevant part, reads as follows:

"'Public Service' means the service of the State but does not include –

(a) – (c) …;

(d) service which this Constitution or an Act of Parliament provides shall not form part of the Public Service."

It is, therefore, clear beyond any doubt that the applicants, being members of the C.I.O., were not part of the Public Service and were not governed by the Act and the Regulations. Accordingly, the disciplinary procedure set out in the Regulations did not apply to them.

Consequently, the Board set up by the C.I.O., purportedly in terms of the Regulations, was not covered by the expression "other adjudicating authority established by law" in s 18(9) of the Constitution, as it was not set up in terms of any law governing the members of the C.I.O..

I now wish to consider the effect of para 2 of the contract of employment between the C.I.O. and the applicants. It reads as follows:

"2. Your conditions of service are in general aligned to the provisions of the following legislation:

a. – f. …;

g. Public Service (Officers) (Discharge and Misconduct) Regulations, 1979, published in Statutory Instrument 561 of 1979 (now replaced by the Public Service Regulations, 2000, published in Statutory Instrument 1 of 2000)."

In my view, the effect of the above provision was that the C.I.O. and the applicants agreed that the disciplinary procedure applicable to the applicants would, to a

large extent, be the same as or similar to the disciplinary procedure set out in the Regulations for the members of the Public Service.

However, that did not mean that s 14(e) of the Act had been amended and that the employment contract had made the applicants part of the Public Service. That could only have been done by means of an Act of Parliament.

In addition, the above provision did not mean that the disciplinary authority (i.e. the Board), set up by the C.I.O. for the purpose of determining the allegation of misconduct against the applicants, was a disciplinary authority established by law, because the Board was not set up in terms of any law.

As the Board was not "an independent and impartial court or other adjudicating authority established by law", the right claimed by the applicants in terms of s 18(9) of the Constitution did not exist, and the application cannot succeed.

That being the case, all the other issues debated in this application fall away.

Finally, as far as costs are concerned, my view is that there should be no order as to costs because the matter has been determined on the basis of a point not raised by the parties.

In the result, the application is dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

Kwenda & Associates, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners