

WILSON CHANAKIRA
versus
ZIMBABWE POST (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 February and 4 February, 2016

Urgent Chamber Application

S. Mpofo, for the applicant
C. Kwaramba, for the respondent

MANGOTA J: The applicant works as the respondent's Assistant Accountant – Creditors. It was in that capacity that the respondent arraigned him before a disciplinary committee on two counts of the third category of misconduct charges. The charges were formulated under the National Employment Council, Communications And Allied Services Sector, Employment Code of Conduct. They run in the following order:

- (a) Section 3(8)(ii) of the code which states:
- “Unbecoming or objectionable behavior that is to say;
 - (ii) Use of abusive language whether spoken, written or published to customer, line management or any other member of staff;
 - (v) hindering or obstructing any member from performing his duties”.

At the hearing which occurred on 14 January 2016, the Disciplinary Committee refused the applicant's legal practitioner, a Mr *S Mpofo*, the right of audience. The committee stated that legal practitioners were not allowed to speak for their clients in the hearing. It insisted that legal practitioners were only allowed to attend the hearing and whisper answers to their clients without getting involved in the process.

The above described circumstances compelled the applicant to file the present application on an urgent basis. His bone of contention was that the committee was trampling upon his

constitutional right to legal representation. He referred the court to s 69(4) of the constitution of Zimbabwe. He moved the court to grant him an interim relief along the following lines:

- (1) that the disciplinary hearing proceedings against him be declared illegal – and
- (2) that the disciplinary hearing which the respondent lodged against him be suspended pending confirmation of the final terms of the provisional order.

In its opposition to the application, the respondent admitted that it interfered with Mr *Mpofu's* involvement in the hearing. It stated that its conduct was not without a foundation. It said it relied on Part 1, s 3 of the Communications and Allied Services Sector Employment Code of Conduct when it acted as it did. It stated that the employment code of conduct defines, in its interpretation section, “Member Representative” to refer to any member who may represent a member at a disciplinary or grievance hearing who shall be either a Trade Unionist or a member of the workers’ committee.

The committee stated that it innocently interpreted the phrase to mean that representation of a member at the hearing was confined to representation by a Trade Unionist or a member of the workers’ committee and not a legal practitioner. It accepted that the interpretation was not consistent with s 69 of the constitution.

The committee’s weird submission was that what it did was not illegal but was irregular. The court remains of the view that the submission was devoid of logic particularly in view of the committee’s admission that its conduct was not *in sinc* with s 69 of the constitution.

Section 69 of the constitution of Zimbabwe confers a right on people to be legally represented by lawyers of their own choice in any court, tribunal or forum. That right cannot be taken away from them by any law or regulation. A law or regulation which is inconsistent with the section is, to the extent of the inconsistency, null and void. It is of no force or effect. The respondent is, in this regard, referred to s 2 of the constitution of Zimbabwe. The section makes a pronouncement on the supremacy of the constitution over any other law. It reads:

“2 SUPREMACY OF CONSTITUTION

- (1) This constitution is the Supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this constitution are binding on every person, natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level and must be fulfilled by them”.

It follows from the above stated matter that the interpretation which the respondent's disciplinary committee relied upon in denying the applicant his constitutional right to legal representation was misplaced. The interpretation rendered the committee's proceedings a nullity. The proceedings which it conducted out of the provisions of the constitution were both irregular and illegal. They are of not force or effect as they violate the supreme law of the land. The applicant was within his rights when he moved the court to have the proceedings declared illegal. The court will not sanction any violation of the country's constitution. What occurred in regard to the hearing of the applicant is a non-event. It is treated as if nothing ever occurred. Nothing flows from an illegal act.

The applicant's hearing took place on 14 January, 2016. He filed the present application on the following day. He, accordingly, treated the matter which pertained to the application with the urgency which it deserved.

It does not require the knowledge of a rocket scientist to know that what the respondent did was ultra-vires the country's constitution. It was not only illegal but it was also null and void. The return day which the parties anticipated is, accordingly, not necessary. Save for clause 2 which appears in the draft interim, and final, order(s) of the applicant's papers - which clause the court is at liberty to strike out as it has done - the relief which the applicant moved the court to grant him in the interim, and final, orders is granted with costs.

Munangati & Associates, applicant's legal practitioners

Mbidzo Muchadehama & Makoni, respondent's legal practitioners