

HH 49-2002
 HC 2164/02
 FREDDY DANDAVARE
 and
 JOHN MARK MAHUMANJ
 and
 PAUL HATUGARI
 and
 MARTHA CHIGOME
 and
 ROGERS CHISI
 versus
 THE ZIMBABWE OPEN UNIVERSITY

HIGH COURT OF ZIMBABWE
 SMITH J,
 HARARE, 8 March, 2002

Mr *Mujeyi* for applicants
 Mr *T J Mapfumo* for respondent

SMITH J: The applicants were all employed by the University of Zimbabwe (hereinafter referred to as "UZ"). Sometime in 1995 the UZ wrote to the applicants offering them appointments on lateral transfer from their posts in the Audio Visual Teaching Unit of UZ to the same posts in the Centre for Distance Education, which was being operated by the University College for Distance Education (hereinafter referred to as "UCDE").

In March 1999 the respondent (hereinafter referred to as "ZOU") was created by an Act of Parliament, the Zimbabwe Open University Act [Chapter 25:20]. The ZOU took over the functions of UCDE. When ZOU took over those functions, UCDE ceased to exist. The applicants were not advised of any change in their contracts of employment that they had entered into with UZ. The applicants, when they entered into employment with the UZ started to pay contributions into the UZ pension scheme. They have continued to pay such pension contributions and have not received any refund of the pension contributions they paid to the UZ pension scheme.

In 1999 ZOU sent a memorandum, dated 30 June, 1990, addressed to all UCDE employees, advising them that UCDE was being disbanded and saying that UZ wanted to know which UCDE staff members wished to join ZOU and which wanted to go back to UZ "either voluntarily or as a result of redundancy in the new ZOU structures". On 13 December, 1999, the first applicant wrote to the Registrar of the UZ asking about his employment status. The Senior Assistant Registrar responded on 3 January 2000 saying -

"Now that you have indicated that you do not wish to be a ZOU employee, the UZ is still awaiting from ZOU a comprehensive list of all those employees including yourself, who have indicated that they do not wish to be employed by ZOU for their processing.

As soon as this list is available you will be notified accordingly".

Needless to say, it appears that UZ has still not received the list referred to because it has not responded to the applicants.

The founding affidavit was deposed to by the first applicant. In that affidavit he made the following statements. It is an understatement to say that their lives have been a nightmare during the period they have worked under ZOU. His colleagues were sent away for about 10 months. He was not given any work to do and his name was removed from the internal telephone list. In February 2000 when other employees got their salary advice slips, he did not get one. He was told that that was because he was not employed by ZOU. Finally he was given a salary cheque on 28 February. Then, by a letter dated 3 October 2000, from the legal practitioners of the ZOU, he was advised that ZOU was

terminating his employment because he had said that he would rather work for the UZ than for ZOU. That letter was followed by a letter dated 20 November 2000 from ZOU in which he was told that the letter of 3 October had been sent in error and that ZOU confirmed that, at no time, had it asked that his employment with ZOU be terminated.

The Director of the Registry Office of the ZOU sent the first applicant a memorandum, dated 13 June 2001, advising him that his contract of employment with UZ was still binding and that he was being paid by ZOU to render the services specified in that contract and saying -

"That situation was necessitated by the 'going concern' that ZOU took over from the University of Zimbabwe when it became an autonomous entity in 1999.

He was asked to state his position regarding his employment with ZOU.

The applicants say that they have all been virtually idle since March 1999. They were fairly senior employees of UZ before their secondment. After their return to work after their "10-month stay at home" they were treated very shabbily. They were not given computers to do their work and had to share offices. The second applicant says that he joined UZ in 1979 and has worked for it since then in various capacities. When he was asked whether he wanted to work for ZOU he said he wanted to stay with UZ. He received a memorandum from ZOU regarding his employment position in March and April 1999, but since then he has received no correspondence from UZ or the ZOU about his position. ZOU at one time locked him out of his office, and the contents thereof, including his personal computer, were confiscated. He was told to go back to UZ. ZOU told him to go home and wait until the matter was finalised. He stayed at home until April 2000, when UZ told him that he was employed by ZOU but with the proviso that the statutory requirements of the Zimbabwe Open University Act still had to be satisfied. When he reported for work on 2 May 2000 he was told to go home because there was no office space for him. Later, he was summoned by ZOU to return to work and a cleaner was told to allocate him an office. However, he has not been given any responsibilities since his return to work.

The applicants instituted an action (case No HC 9175/01) against UZ and ZOU in an attempt to clarify the legal position of their contracts of employment. They allege that they are still employees of UZ and they are seeking an order to that effect. UZ opposes their claim but ZOU does not. After that action was instituted ZOU decided to stop paying the applicants their salaries. UZ claims that the applicants are employees of ZOU and has disclaimed any responsibility for them. The applicants then made this urgent application seeking an order that ZOU continues to pay their salaries until case No HC 9175/02 is finalised.

ZOU opposed the application. It denied any ill-treatment of the applicants as averred and explained that "the whole problem was started by the operation of law through the promulgation of the Zimbabwe Open University Act (Chapter 25:20)". The contracts of employment entered into by the applicants are with UZ. There is no contract of employment between any of them and ZOU. In terms of s 23 of the said Act, every appointment to the academic staff shall be made by the Technical and Academic Appointments Board. None of the applicants have been appointed in terms of the said section. ZOU approached the people who had been working with UCDE to find out which of them wanted to join ZOU and which wanted to remain with UZ. All of the applicants expressed a preference to remain with UZ.

After hearing counsel, I dismissed the application with costs. I said that my reasons for doing so would be supplied. They are as follows.

The one thing on which both counsel agreed was that the applicants have been very badly treated. It seems incredible that institutions of higher learning such as UZ and ZOU could allow this case to drag on for some 3 years with resolution. Mr *Mujeyi* submitted that the ZOU has been paying the applicants their salaries for some years, even though their contracts of employment are with UZ. Therefore there is a duty on ZOU to clarify the issue of who is their employer and, until that is done, to continue paying their salaries. Mr *Mapfumo*, however, argued that there is no legal *nexus* between the applicants and ZOU. That being so, there is no basis on which ZOU can be required to continue paying their salaries instead of UZ doing so. The applicants were seconded by UZ to UCDE. UCDE ceased to exist when ZOU was established. The Act establishing ZOU did not provide for the automatic transfer of the staff of UCDE to ZOU. Those involved with the drawing up of the Act in question were reckless of the welfare of the applicants and other members of staff of the UCDE. No one considered their position.

The applicants do not allege that they have a contract of employment with ZOU. In fact they do not want to work for ZOU. They would prefer to maintain their ties with UZ. ZOU also claims

HH 49-2002

HC 2164/02

that the applicants are not their employees; they could only be employees if they have been appointed in terms of s 23 of the Act, by the Technical and Academic Appointments Committee. That committee has not appointed them in terms of that section. Since all parties agree that there is no employment contract between the applicants and ZOU, it is difficult to see on what basis ZOU can be ordered to continue paying their salaries. It may well be that when UCDE was established and the applicants were seconded to work for it, there was an agreement between UZ and UCDE that the latter would pay their salaries. However, there is nothing in the papers to show that that commitment was transferred to ZOU. Obviously ZOU did start to pay their salaries in 1999 and has been paying them until February this year. There is, however, nothing in the papers to show the legal basis therefor.

I think it is disgraceful that the applicants are being so badly treated by UZ and ZOU. Surely these two bodies should have been able to sit down together and decide what should be done about the applicants. It seems that they have been paid every month for nearly three years without being required to do any work. They are human beings and their welfare should be taken into consideration. Three years is a long time to keep them in suspense as to what their fate will be. I would urge UZ and ZOU to get together as soon as possible and sort out the problem.

Gollop & Blank legal practitioners for applicants

Mapfumo, Debwe & Partners, legal practitioners for respondent