MARTIN MUCHERO
versus
GRAIN MARKETING BOARD

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 19 and 26 July 2006

Mrs *Wood*, for the applicant
Mr *Machiridza*, for the respondent

Opposed Court Application

BHUNU J: The applicant was employed by the respondent as its Chief Executive Officer. In that capacity he was an ex officio member of its Board of Directors.

Following allegations of misconduct the applicant was suspended by the Ministry of Lands and Agriculture on the 1st of March 2000. That suspension was later withdrawn it having been realised that the suspension was invalid. He was however again re-suspended on the 8th of March 2000 by the Grain Marketing Board, that is to say the respondent in terms of its code conduct. That too was aborted when it was realised that the code of conduct was inapplicable to the applicant in his capacity as the Chief Executive Officer.

The respondent's Board Chairman finally suspended the applicant without pay and benefits in terms of the Labour Relations (General Conditions of Employment Termination or Employment) Regulations Statutory Instrument 371 of 1985 on the 24th October 2000. that statutory instrument requires an employer who suspends an employee without pay to apply forthwith to a Labour Officer for an order terminating the employee's contract of employment.

In a bid to comply with statutory requirements the respondent's then legal practitioners *Dube Manikai and Hwacha* addressed a letter dated 14th November 2000 to the Labour Officer in the following vain:-

"Attention Labour Relations Officer –

Dear Sir

RE: APPLICATION FOR TERMINATION OF EMPLOYMENT : MR M. MUCHERO

We enclose a copy of the letter of suspension and detailed disciplinary charges brought by our client Grain Marketing Board against Mr M. Muchero.

We wish specifically to advise that whilst our client does have a code of conduct, the code of conduct might be difficult to apply in respect of the Chief Executive and/or that it might not apply at all.

At this stage, and in order to avoid unnecessary procedural pitfalls, the Chief Executive has been advised that his suspension without pay and benefits and the charges constitute and stand as proceedings under statutory instrument 371/85 and simultaneously and alternatively in terms of the code of conduct. In the event that there are difficulties with applying the code of conduct and if the consensus is that the code of conduct is applicable, we believe in any event that our clients will prefer to have the matter referred to your office for adjudication.

At this stage, we request you to kindly receive this letter according to the requirements in Satutory Instrument 371/85."

The applicant then approached this court challenging the validity of the current suspension. Relying on the above letter I dismissed the applicant's case saying that the matter was pending before the Labour Officer and that the applicant should first exhaust domestic remedies before approaching this court.

Aggrieved by that determination the applicant took his grievance to the Supreme Court. At the Supreme Court the respondent was represented by Mr *Mandizha*. Mr *Mandizha* is recorded as having conceded that the letter in question did not establish that the matter was pending before the Labour Court.

Under case number SC 2/06 at page 4 between the same parties CHEDA JA observed that:-

"The respondent regarded a letter written on behalf of the respondent dated 14 November 2000 as indicating that the matter was pending before the Labour Court (Officer). Not much need be said about the letter now since Mr *Mandizha* for the respondent finally conceded that the letter does not establish that the matter was pending before the Labour Court (Officer)" (my emphasis)

The net result of the above concession is that following the suspension of the applicant without pay the respondent did not comply with the mandatory provisions of section 3(1) of S.I. 371/85. That was a fatal procedural irregularity.

In the case of *Standard Chartered Bank Zimbabwe v Matsika* 1996 (1) ZLR 123(S) the Supreme Court with reference to the headnote held that:-

> "By failing to make its application for the respondent's dismissal "forthwith" in the sense of as soon as reasonably possible in the circumstances" the suspension without pay was a nullity" (my emphasis)

The concession having been made in the Supreme Court the highest court in the land the position cannot be otherwise.

The applicant has been on suspension from 24th October 2000 to date without any application being made for his dismissal that is to say a period spunning almost 6 years. There has been no reasonable explanation for this lengthy delay.

The respondent cannot now comply with section 3(1) of S.I. 371/85 because it has since been repealed and labour officers nolonger have the necessary jurisdiction to preside over the matter. See S.I. 130/2003.

The proceedings could not have been saved under section 47(5) of the Labour Relations Amendment Act 17 of 2002 for the simple but good reason that there were no proceedings commenced in terms of Part XII of the Principal Act as envisaged by the section. There was therefore no proceedings to save.

The applicant's suspension being a nullity it means that in the eyes of the law he was never suspended from work. He is still at work. Having said that I consider it unnecessary to consider all the other issues raised relating to the validity of the applicants suspension.

In conclusion I only wish to say that the respondent was given 14 days to file its opposing papers by the Supreme Court. It is common cause that the respondent filed its opposing papers out of time. The respondent was

therefore automatically barred. There has been no application for the upliftment of the bar. All what its lawyer has done is to tell the court that that the delay was due to him being taken ill. There being no application for the upliftment of the bar it remains firmly in place. For that reason as well this application cannot succeed.

The applicant is therefore entitled to the relief sought. It is accordingly declared.

(1) That the applicant's suspension from employment with the respondent be and is hereby declared to be a nullity.

(2) That the applicant is entitled to all his salary and benefits with effect from the date of suspension being the 24th October 2000.

(3) That the respondent is to bear costs of this application.

Byron Ventures & Partners, the applicant's legal practitioners
Muzangaza, Mandaza & Tomana, the respondent's legal practitioners