

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/10/14

HELD AT HARARE 21ST NOVEMBER 2013

CASE NO LC/REV/104/10

& 31ST JANUARY 2014

In the matter between:-

DOMINIC MUBAYIWA

Applicant

And

ZIMBABWE MINING DEVELOPMENT CORPORATION

Respondent

Before The Honourable Hove, J

For Appellant

Mr Moyo (Legal Practitioner)

For Respondent

**Advocate Mpofu with Mr Mutevedzi J (Client
Representative)**

HOVE, J:

The Applicant was employed as the Chief Executive Officer (CEO) by the first Respondent. Applicant had been employed by the 1st Respondent in February 1985 initially as an Internal Auditor. He later became first Respondent's Group Chief Accountant, the Group Financial Controller and the General Manager Finance and Investments. In 2004, he was appointed to the position of Chief Executive Officer. He reported directly to the Board of Directors.

The Chairman of the Board of Directors was appointed in June 2010. Applicant alleges that right from the time the new Board of Directors

Chairperson was appointed it was clear that he had a specific task to remove him as the Chief Executive Officer. He was not sure why this attitude existed but he is of the opinion that the reasons were malicious. He outlined why he was of that opinion.

Firstly he alleges that in less than a month of the new chairperson's appointment, he was sent on forced leave in July 2010 but several things had happened prior to the Applicant's being sent on forced leave.

- 1) at a strategic planning meeting it was resolved to abolish the Applicant's position
- 2) sometime in the same month of July 2010 the Chairperson had communicated to Applicant to change the 1st Respondent's lawyers to a firm of lawyers he (the chairman) had served in the position of a board member. Applicant advised against such a move pointing out that there would be a conflict of interest.
- 3) during the Chairperson's 2nd week in office, he had also wanted to allocate a new Jeep Cherokee to the Deputy Chairperson again Applicant advised against this move arguing that it would be against a ministerial directive and also it was not provided for in the 1st Respondent's conditions of service.
- 4) around 20 July the Chairman wanted the purchase of vehicles that were not budgeted for and again Applicant advised against this as being against the Audit and Exchequer Act and that further, the purchase had to be approved by the Tender Board but there had not been such approval.
- 5) again in July 2010, the Applicant had advised the Chairperson against declaring a dividend because it was ill timed and that the declaration

would require an audit first. In spite of this advise, the Chairperson advised that a cheque be prepared to be presented to the Minister of Mines as a dividend on 27 July.

- 6) on 27 July, the Chairperson called for a board meeting and management was excused from the deliberations. It was then that the board resolved to send Applicant and other senior managers on forced leave.
- 7) In the same month of July Applicant had again advised against the appointment of some thirty three persons as board members of subsidiary mining companies before the nominees' curriculum vitae had been received, before security vetting had been conducted and before considering the issue of balancing of skills.
- 8) the Applicant had also resisted what he submitted was an illegal transaction of allocating committed mineral rights to a company called Khameni.

It was submitted that these points of conflicting opinions clearly demonstrate why Applicant was of the view that the Chairperson would be biased against him. When allegations of misconduct were preferred he had an apprehension that he would not receive a fair hearing.

Against this background, the Applicant was sent on forced leave and the Chairperson proceeded to disregard the advise of the now suspended Chief Executive Officer and proceeded to introduce all the changes and purchase vehicles etc which he had been advised against.

What followed were allegations of misconduct. 16 charges were raised against him. The Applicant alleges that the Chairperson was abrasive and

uncooperative. He was impatient with Applicant's adherence to good corporate governance. He was trying to get rid of the Applicant who would not be bullied into any irregular or unlawful actions

One day after receiving the letter of suspension with the 16 charges of misconduct on 20th October, he received a notice to attend a disciplinary hearing on 26 October 2010. Applicant was given less than a week to prepare for the hearing. Applicant engaged a lawyer who requested for further particulars and asked to have copies of documents which would be used against the Applicant.

The 2nd Respondent denied the Applicant access to some of the documents like the audit report. Further, he allowed the production of other voluminous document and did not allow a postponement to enable the Applicant to properly prepare for the hearing.

The merits of this application for review raise the following issues;

- 1) *The Disciplinary Authority was irregularly set up. It was set up contrary to the agreement between the parties.*
- 2) *The composition of the Disciplinary Authority was contrary to the provisions of Statutory Instrument No 15 of 2006.*
- 3) *There was malice and bias.*
- 4) *The circumstances of the disciplinary proceedings were not conducive to a fair hearing.*

I will deal with these issues raised one after the other here below:

Whether or not the Disciplinary Authority was unlawfully appointed

The Applicant alleges that the contract of employment provided in clause 29 as follows;

“In the case of any dispute or difference arising between the parties hereto as to the construction of/or their rights, duties or obligations under or any matter arising out of/or concerning this agreement, any difference or dispute shall unless otherwise agreed to by the parties hereto, be referred to a single arbitrator in accordance with the provisions of the Arbitration Act of Zimbabwe [Chapter 7:02].”

The parties therefore specifically agreed on the method of dispute Resolution. But when a dispute arose, the 1st Respondent completely ignored the provision of clause 29 and appointed the 2nd Respondent and an Assessor. These two were unilaterally appointed and they were presumably going to be paid by the 1st Respondent which would on the face of it compromise their ability to adjudicate fairly or at least in the eyes of an objective person, their ability to be fair would be seriously compromised.

It is clear and not disputed by the 1st Respondent that it appointed the 2nd Respondent and the Assessor unilaterally. The Applicant had no impute in the whole process. He even found that the press had been invited to the hearing. All this was contrary to the spirit of clause 29 of the contract of employment which called for “agreement” between the parties or in terms of law i.e. the Arbitration Act.

The 1st Respondent acted ultra vires the agreement between the parties and the proceedings were therefore irregular.

Whether or not the Disciplinary Committee was improperly composed

This is an issue that becomes irrelevant after my initial finding that the Disciplinary Authority was unlawfully appointed.

Statutory Instrument 15/2006 does not provide for the appointment of a hearing authority and an assessor as was the case in this incident. So even if it was lawful to proceed in terms of Statutory Instrument 15/2006, the provisions of that instrument had not been complied with.

Whether or not there was malice and bias and whether there was a conducive environment for a fair hearing

The law provides that in cases where bias and malice are alleged you need not prove actual bias, the test is whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased.

See the case of **City and Suburban Transport (Pvt) Ltd v Local Board Road Transportation, Johannesburg** 1932 WLD 100.

In order to establish bias, the onus rests on the person alleging bias to show that

- i) The bias was clearly or actually displayed or;
- ii) That in the circumstances there was a real possibility of bias.

The proceedings, as outlined, ie the hearing and the setting up of the Disciplinary Authority were in circumstances where there was a real possibility of bias.

The 2nd Respondent and the assessor had been privately appointed by the 1st Respondent. Circumstances of their appointment and remuneration were not revealed to the Applicant when he sought to inquire into this matter by asking for further particulars, the Disciplinary Authority refused to allow for the production of these particulars.

The Disciplinary Authority also made decisions that were unfortunate. They refused to postpone the disciplinary proceedings in circumstances that principles of fairness were such that a postponement ought to have been granted.

The Disciplinary Authority appeared to have knowledge of the Applicant's imprisonment in circumstances that showed that they may have been closely associating with the employer party in the absence of the Applicant.

The Disciplinary Authority also appeared to have wanted to go along with the employer's initial decision to call members of the Press when the Applicant had indicated that he was not comfortable with the proceedings being conducted in full glare of members of the press.

The 2nd Respondent also refused for the Applicant to be given sight of all relevant documents which included the audit report. This would have made it difficult for the Applicant to prepare his defence. See the case of **Chataira vs Zesa** 2001 (1) ZLR 30. Principle of natural justice require that a party be given an opportunity to have sight of all the documents that are intended to be used against him.

All these incidences and decisions made by the 2nd Respondent and the 1st Respondent do give an impression that the Applicant was not going to be afforded a fair hearing as there was likely going to be bias against the Applicant. Further the Applicant was not going to be able to prepare his defence properly without having seen the relevant documents.

The 1st Respondent argued that clause 29 provided that any dispute arising would be referred to a single arbitrator in the absence of agreement between the parties. It was argued that Applicant agreed to the appointment of the 2nd Respondent because he did not question their appointment and he pleaded to the charges.

This cannot be true. The facts show that the Applicant pleaded not guilty yes but in his request for particulars, he immediately questioned the appointment of the 2nd Respondent. There is thus no evidence of actual or tacit agreement to the appointment of the 2nd Respondent and the assessor.

I find that the appointment of the 2nd Respondent and the assessor was unlawful everything that then flowed from such an appointment was a nullity. The entire proceedings were null and void. I am fortified in this view by the remarks of Lord Denning in the case of **Macfay v United Africa Co. Ltd** [1961] 3 All ER quoted with approval in **Muchakata v Nertherburn Mine** 1996 (1) ZLR 153.

“If an act is void then it is a nullity. It is not only bad but incurably bad... and ever proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Flowing from this finding it becomes unnecessary to consider the other issues in any great detail.

I therefore make the following order;

- 1) *That the proceedings being null and void are hereby set aside.*
- 2) *The matter is remitted to the employer for it to proceed in terms of article 29 of the contract of employment.*
- 3) *Should the employer fail to conduct the fresh proceedings in terms of Article 29 of the contract of employment, within 21 days of the date of this decision, Applicant would be deemed to be reinstated with no loss of salary or benefits.*
- 4) *Should reinstatement no longer be an option, the Applicant is to be paid damages in lieu of reinstatement and for the premature loss of his employment.*

Should parties fail to agree on the quantum of damages, either party can approach the Court for quantification.

Kentor & Immerman, Applicant's Legal Practitioners

Mutamangira & Associates, Respondent's Legal Practitioners