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Judgment No. SC 108/04

Civil Appeal No. 165/02

POSTS AND TELECOMMUNCIATIONS CORPORATION

v ZVENYIKA CHIZEMA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, OCTOBER 4, 2004 & DECEMBER 16, 2004

H Zhou, for the appellant

The respondent in person

ZIYAMBI JA: The respondent was dismissed by the appellant following a disciplinary hearing conducted in terms of the applicable Code of Conduct ("the Code"). The respondent lodged an appeal against his dismissal to the National Hearing Committee ("NHC") which is the body designated by the Code for hearing appeals. However, this appeal was not determined because the NHC was not constituted by the appellant.

Frustrated by the failure to prosecute his appeal, the respondent wrote to the Labour Relations Tribunal ("the Tribunal"), now the Labour Court, on 7 June 2001 requesting an order directing the NHC to determine his appeal.

Meanwhile, on 6 July 2001, the appellant, purporting to act in terms of s 101(6) of the Labour Relations Act [*Chapter 28:01*], now the Labour Act, referred the matter to the labour relations officer for determination. Nothing further was heard of this referral.

The Tribunal heard the respondent's application and delivered its judgment on 15 May 2002. It found that the "failure to prosecute the appeal is a fault that lies squarely with the respondent" (now the appellant) and remarked that "they cannot benefit from their own default." It concluded:

> "The respondent have (*sic*) failed to prosecute their case against the applicant. That case must now be discharged for want of prosecution."

It ordered:

> "That the allegations against the applicant be discharged for want of prosecution. The appellant (*sic*) is to be reinstated into his position with no loss of salary or benefits."

In its notice of appeal the appellant advanced two grounds of appeal, namely -

1. That the court *a quo* misdirected itself in granting to the respondent relief which he had not sought; and

2. That the court *a quo* had erred in entertaining the application since it had no jurisdiction to hear it, regard being had to its functions as set out in s 89 of the Labour Act.

The issue of jurisdiction

It was contended on behalf of the appellant that the Tribunal, being a creature of statute, (established in terms of s 83(1) of the Labour Relations Act [*Chapter 28:01*], now the Labour Act (hereinafter referred to as "the Act")) has no inherent jurisdiction such as is possessed by the superior courts, and may claim no

authority which cannot be found within the four corners of the Act.

Section 89 of the Act, (before its amendment by the Labour Relations Amendment Act No. 17 of 2002) which set out the functions, powers and jurisdiction of the Tribunal, provided as follows:

> "The Tribunal shall exercise the following functions -
>
> (a) hearing and determining appeals in terms of any provision of this Act which provides for an appeal to the Tribunal; and
>
> (b) hearing and determining appeals from any determination, direction or decision of the Minister in terms of section twenty-five, fifty-one, seventy-nine or eighty-one; and
>
> (c) hearing and determining matters referred to it by the Minister in terms of this Act; and
>
> (d) doing such other things as may be assigned to it in terms of this Act or any other enactment."

The request by the respondent for a *mandamus* from the Tribunal does not fall within any of the functions of the Tribunal set out in s 89 *supra*. This being so, the Tribunal had no jurisdiction to entertain the application since the authorities are clear that:

> "... nothing shall be intended to be within the jurisdiction of an inferior court but that which is alleged".

See *Peacock v Bell & Kendal*, (1667) IWMS Saund 73 cited in Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* at p 3.

The proper forum for an application for *mandamus* is the High Court. On this ground alone the appeal should succeed.

However, even if the Tribunal had been endowed with jurisdiction to hear this application, the grant to the respondent of an order of reinstatement was a misdirection on the part of the court *a quo* for the following reasons:

Firstly, what was sought by the respondent was an opportunity to prosecute his appeal before the relevant body. Instead, the court *a quo* granted reinstatement without hearing evidence on the merits of the application.

Secondly, as submitted by Mr *Zhou* for the appellant, the delay in finalisation of his appeal did not give rise to a right to reinstatement or the termination of the suspension or dismissal but would entitle the prejudiced party to apply for a mandatory interdict to compel the conduct of the appeal hearing:

> "... an employee validly suspended does not, because of delay alone, become entitled to reinstatement nor to reversal on review of a subsequent dismissal. Instead, they (the parties) each have available to them the remedy of *mandamus* to enforce due compliance with that which is timeous."

See *Nyoni v Secretary for Public Service, Social Welfare & Anor* 1997 (2) ZLR 516 (H) at 522G–523A.

Thirdly, in terms of the proviso to para (c) of subs (1) of s 96 of the Act, where the Tribunal makes an order of reinstatement it is enjoined to specify an amount of damages to be paid as an alternative to reinstatement. Thus the order made by the Tribunal was not legally sustainable.

Options open to the respondent

It seems to me that the more expedient of the two options available to the respondent was to appeal to the Tribunal (the other option being to apply to the High Court for a *mandamus* ordering the appellant to constitute a body as required by the Code to hear and determine his appeal), the Tribunal being the next appeal body in the structure set up by the Code. The Tribunal had the power, in terms of s 97(4)(a) of the Act, to conduct a hearing afresh into any matter before it on appeal. The adoption of such a course would have placed the Tribunal in a position to determine the matter on the merits and give a final order. The propriety of the grant of an order of reinstatement or damages in the alternative, if that order was merited on the evidence, would not, in these circumstances, have been open to question.

Accordingly the appeal is allowed with costs. The order of the Tribunal is set aside.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners