Judgment No. SC 62/06
Civil Appeal No. 122/06

ECKEM WILLIAM SITHOLE

v

(1) DR CHARLES NHERERA (2) CHINHOYI UNIVERSITY OF TECHNOLOGY (3) MR M KAPITA (NO)

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 12, 2006 & JANUARY 25, 2007

The appellant in person

S Mushonga, for the first and second respondents

No appearance for the third respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court. The appellant who was employed by the respondent as an assistant lecturer was, on 12 October 2004, dismissed for misconduct, the allegation being that he had wilfully absented himself from work without leave from his superiors.

It was the appellant's contention, in the court *a quo*, that his dismissal was a nullity. He therefore sought a declaration to that effect as well as an order for his reinstatement to his employment without loss of salary or benefits. Various other orders

were sought by the appellant but we are of the view that the resolution of the validity or otherwise of the dismissal will determine the appeal.

The facts forming the background of the appeal are as follows –

The appellant was employed, by the second respondent, on 2 May 2003, as an assistant lecturer. Following his suspension from employment on 23 September 2004, the appellant was summoned to attend a hearing before the staff disciplinary committee of the second respondent on 12 October 2004. At this hearing the appellant, having been advised of his right to legal representation, appeared in person and took objection to a part of the letter of suspension which read:

> "… should you fail to attend as requested, the disciplinary committee shall proceed to deal with the matter in your absence and recommend one of the penalties provided in terms of section 26(7)(a) to (d) of the Chinhoyi University of Technology Act No. 15/2001 [*Cap 25:23*] to the Vice Chancellor who will in turn act as he deems fit in terms of ss 8(3)g)(i) of the Act."

According to the record the appellant applied that the above sentence be struck off and replaced with "something more appropriate". When his application was refused, the appellant walked out in protest and the hearing proceeded in his absence. Evidence was heard that the appellant had absented himself from work from 23 August 2004. His absence was noticed when students began to enquire when he would be delivering his lectures. The staff disciplinary committee found the appellant guilty of "absence from duty without reasonable cause". It recommended that the appellant be dismissed from employment with effect from 23 August 2004. Thereafter, although there

is no document on record to show the actual date of the appellant's dismissal, payment of his salary and benefits ceased on 12 October 2004.

The appellant claimed that the proceedings leading to his dismissal were not determined within 14 days as required by s 3(2) of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations, 2003 S.I. 130 of 2003 (now repealed)("the Regulations") and sought a declaration that his suspension on 23 September 2004 as well as the disciplinary hearing of 12 October 2004 was null and void. The learned Judge dealt with this issue as follows -

> "The Disciplinary Committee was established in terms of the Act (The Chinhoyi University of Technology Act [*Cap 25:23*] and had the requisite power to determine the guilt or otherwise of the applicant. He has neither challenged the composition of the committee nor its power to conduct the disciplinary proceedings. What the applicant is alleging is that the committee failed to adhere to the provisions of the regulations and did not determine the proceedings within the time frame set by the regulations. What the disciplinary committee did was that they failed, in the misconduct proceedings against the applicant, to adhere to the strict and peremptory provisions of the statutory instrument. They disregarded its provisions and took longer to conclude the process than the period permitted in the regulations. That, in my view constitutes an irregularity, but this irregularity does not necessarily render the process null and void. An irregularity is a basis for review and the applicant has not applied for a review before me…"

As correctly noted by the learned judge, the appellant did not apply for a review of the disciplinary proceedings. Indeed, one is at pains to find the legal basis for the application and can only conclude that great latitude was given to the appellant by the court *a quo* in view of the fact that he was not legally represented.

However, even if he had applied for a review, it is doubtful whether the court *a quo* would have found that the irregularity was calculated to cause prejudice and therefore vitiated the entire proceedings particularly in view of the fact that the appellant appeared before the staff disciplinary committee for the hearing and raised no objection to the fact that the hearing took place outside the period of fourteen days from the date of his suspension. (A period of nineteen days).

In any event, and *en passant*, since this point is not before us for consideration, a reading of the provision relied upon leads me to the conclusion that the meaning of s 3(2) of the Regulations is far from clear. It provides:

> "(2) Upon serving the employee with the suspension letter in terms of subsection (1), the employer shall, within 14 working days before terminating the contract of employment, investigate the matter and conduct a hearing into the alleged misconduct of the employee and, may, according to the circumstances of the case…" (my underlining).

What do the underlined words mean? One view could be that if the words mean what they say then the calculation of the period of 14 days is governed by the date of termination of the contract of employment and one would have to count backwards from the date of termination. However, since the matter is not an issue for determination by this Court and in view of the fact that this Statutory Instrument has been repealed, it is not necessary to decide the meaning of the underlined words. Suffice it to say that the wording has been changed in the new Statutory Instrument, the Labour (National Code of Conduct) Regulations 2006 S.I. 15 of 2006.

In view of the above it is clear that no legal basis was established by the appellant for the relief sought and that the application was correctly dismissed by the court *a quo*.

Accordingly the appeal is dismissed with costs.

SANDURA JA: I agree.

MALABA JA: I agree.

Mushonga & Associates, respondents' legal practitioners