

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/62/14

HELD AT HARARE 28TH JANUARY 2014

CASE NO LC/REV/H/110/13

& 14TH FEBRUARY 2014

In the matter between:-

KEITH VITRINO

Applicant

And

**HIGHLANDS PRIMARY SCHOOL
DEVELOPMENT ASSOCIATION**

1st Respondent

And

GEORGE CHITSINDE N.O.

2nd Respondent

Before The Honourable L.M. Murasi, Judge

For Applicant

Mr V Macharaga (Legal Practitioner)

For Respondents

Mr M Nkomo (Legal Practitioner)

MURASI, J:

Applicant was employed by 1st Respondent as its Accounts Clerk. Applicant was suspended in June 2006 over allegations of misappropriation of funds and incompetence. The matter only saw the light of day when a report was made to the Labour Officer culminating in arbitration where the Arbitrator found in favour of applicant. Respondent appealed to this Court and in her judgment dated 27 September 2013 Justice Hove ordered that the matter be referred to the employer to hold a hearing within specified periods of time.

The hearing was held and concluded on 22 November 2013. Applicant is dissatisfied with some procedural aspects and has applied to this Court for review.

Before going in to the merits of the application a few preliminary issues have to be disposed of. Respondents made an application for condonation of late filing of Notice of Response. This application was not opposed by Applicant and the Court proceeded to grant the condonation. Secondly, Respondents raised certain points on the application itself. Respondents averred that Applicant has approached this Court when he has not exhausted the internal remedies available. Respondents further alleged that the application is no longer necessary and has been overtaken by events as the Appeals Committee has since referred the matter to the Disciplinary Committee for the hearing of evidence in mitigation. Lastly, Respondents raised the point that the application for review does not comply with the Rules relating to the filing of review documents and should be struck off the roll. Applicant insisted that the application was properly before the Court and apologised for not adhering to the Rules in respect of the contents of the Founding Affidavit which exceeds the two (2) pages prescribed. The Court informed the parties that consideration of these issues would be done at the same time as consideration of the merits of the matter would be made. The Court impressed upon the parties that there was need to put finality to the case as there was another application pending. Both parties abided by their Heads of Argument and they had nothing further to add.

Herbestein and Van Winsen in The Civil Practice of the High Court of South Africa 5 ed p 1271 state:

“The reason for bringing proceedings under review or appeal is usually the same, viz, to have the judgments set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review.”

Applicant takes issue with two procedural points. Applicant alleges that Respondents did not give him the chance to mitigate and did not provide reasons for the decision. Respondents, on the other hand, state that applicant has not exhausted the internal remedies available to him. An analysis of the facts pertaining to this matter is necessary to understand the position. After the order by Justice Hove, 1st Respondent invited Applicant to a hearing scheduled for 8 November 2013 at 1400 hours. Applicant applied for a postponement to 18 November 2013 to allow him an opportunity to study the documents. The hearing commenced on 18 November 2013 and was finalised on 22 November 2013 culminating in a letter of dismissal of the same date addressed to Applicant. The letter specifically states that:

“The full details of the judgment will be delivered to you in due course.”

A letter from the 1st Respondent dated 29 November 2013 titled “Confirmation of Dismissal” gives the reasons for Applicant’s being found guilty. On 2 December 2013 Applicant’s legal practitioners appealed to Respondent’s Appeals Committee stating the fact that Applicant had been denied the right to mitigate and no reasons had been given by Respondents. On 11 December 2013 the Appeals Committee responded to this appeal and upheld the ground that no mitigation was led from Applicant but dismissed the other grounds of appeal. The Disciplinary Committee heard applicant’s mitigation on 18 December 2013 and communicated its deliberations on 19

December 2013. The present application for review was filed on 29 November 2013, that is, on the same day that 1st Respondent provided the reasons for judgment. Applicant filed the appeal to 1st Respondent on 2 December 2013 on basically the same issues that he has brought before this Court. A reading of the record and the procedures taken by Applicant shows that when Applicant approached this Court, he had not exhausted the internal remedies available to him. He filed the application for review to this Court on 29 November 2013 but proceeded to note an appeal on the same grounds before 1st Respondent. The question is what were applicant's reasons for filing applications in two different fora basically seeking the same relief?

The explanation given by the Applicant is that no rule precludes a litigant from approaching the Court for relief where the proceedings are fraught with irregularities. Was this not a case of "double-dipping" or a speculative fishing expedition? During the hearing Applicant's Counsel was asked by the Court whether there was still need to consider the ground of review regarding the fact that Applicant was denied the opportunity to mitigate. Applicant's Counsel made a concession that there was indeed no need to determine that issue. The Court was amazed that Applicant still insisted on proceeding on the issue of the absence of reasons when these were supplied on 29 November 2013. Applicant was pursuing his matter on two fronts. This is an indication that Applicant was indeed aware that he had not exhausted the internal remedies available to him. I am inclined to agree with the submissions of the respondents on this point that Applicant should be denied relief as he had not exhausted the internal remedies. (See *Tuso v City of Harare HH 1/2004*)

It is trite that it is not enough to point out procedural irregularities but that one must go on to allege and show prejudice. Applicant, in the whole

application, has not been able to demonstrate that there was any prejudice to him.

I should venture at this juncture to point out the role of the legal practitioner in the formulation of Court documents. The Applicant's Founding Affidavit could have been improved upon as it required a lot of editing. Another example is the Draft Order. This document clearly shows that the legal practitioner did not have a look at it. It is the Court's view that the legal practitioner's actions in this regard constitute a failure to exercise due diligence.

After considering the submissions made to Court, I am of the considered view that Applicant should have exhausted the internal remedies available and was therefore improperly before this Court. Further, Applicant was unable to demonstrate that he suffered any prejudice from the alleged procedural irregularities.

In the result, the Court dismisses the application.

There will be no order as to costs.

Mugiya & Macharaga Law Chambers, Applicant's Legal Practitioners

Donsa - Nkomo & Mutangi Legal Practice, Respondents' Legal Practitioners