

ANDREW BAKASA
versus
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 12 February 2021

Urgent Chamber Application

Mrs *M Mandingwa*, for the applicant
No appearance for the respondent

MWAYERA J: On 11 February 2021 the applicant approached this court through the urgent chamber book. The respondent was duly served with the application and set down date for hearing on 12 February 2021. In compliance with the practice direction, the applicant filed the application inclusive of heads of argument, in conformity with the directive. The matter was determined on papers in chambers. The respondent was properly served but did not file any response opposing or conceding the application. I thus proceeded to entertain the unopposed application and granted the provisional order with an indication that reasons would be availed. These are they.

The applicant approached the court seeking the following order:

A. TERMS OF THE FINAL ORDER SOUGHT

That the Respondent show cause why a final order should not be made in the following terms:
That

1. The provisional order be and is hereby confirmed.
2. Subjecting Applicant to a disciplinary hearing in this lockdown period poses a real risk of exposure to contracting SARS-COV-2 virus which causes COVID 19.
3. Respondent pays costs of suit on higher scale of legal practitioner client scale, only if it opposes this application.

B. INTERIM RELIEF GRANTED

Pending finalisation of this matter, an interim order be and is hereby granted in the following terms:

1. Pending the return date, the Respondent be and is hereby ordered to stay any disciplinary hearing proceeding against the Applicant.”

The brief background to the matter is that the applicant is an employee of the respondent since 2005 to date. The applicant a workshop engineer was on 3 February 2021 served with a notification to attend a disciplinary hearing on 10 February 2021. The applicant encountered challenges in securing legal representation due to the fact that the lawyer's offices were closed due to the lockdown imposed by government to try and contain the Covid 19 pandemic. The applicant only managed to contact his lawyers on 9 February 2021 and on the 10th sought for postponement of the matter as in person attendance in a boardroom was perceived to pose a real risk to attendees contracting SARS-COV-2 which causes Covid 19. Further compounding the applicant's problems was the fact that he had not been served with all documents which the respondent was to use during the hearing. The disciplinary authority declined to postpone the matter for Covid related risks but gave 2 days relief to enable the applicant to be served with all documents and prepare for hearing on 12 February. It is against this backdrop of insistence to proceed with the matter that the applicant approached this court on 11 February 2021 seeking an order to stop the disciplinary hearing during lockdown period.

That the matter is urgent appears much to be common cause considering the nature of relief sought. The applicant is seeking to temporarily halt a disciplinary hearing which if left to proceed would affect his rights and cause irreparable harm in the event the applicant and or his lawyers contracting Covid 19. By overzealously insisting on proceeding with a disciplinary hearing during the national lockdown the disciplinary authority did not only pay lip service to the safety and protection of the applicant and his legal counsel but frowned and defied government directive and law. Statutory Instrument 83/2020 "Public Health (Covid 19 Prevention, Containment and Treatment/National Lockdown Order" is instructive. Section 4(1) of the statutory instrument as amended by SI 10/2021 states as follows:

"Every individual is confined to his or her home and may not leave thereof except temporarily for various reasons which include the reasons as canvassed in para 4.

If the individual is employed in an essential service, to go to and from his or her place of employment and to go about the business of that essential service." (my emphasis)

Essential service is defined in s 4 (c) (VII) amongst others as: "transport service engaged in the carriage of staff for essential services, the carriage of sick persons to hospitals and other health providers, and transport of water, food, fuel, basic goods, medical supplies needed to combat Covid 19 and other medical supplies."

A reading of the relevant statutory instruments leaves no doubt that a disciplinary hearing is certainly not the essential service contemplated. National Railways of Zimbabwe was declared an essential services for purposes of transportation of goods and for health provisions. Conducting a disciplinary hearing certainly falls outside the parameters of the essential service envisaged by the law. Conducting a disciplinary hearing during the national lockdown would not only pose a threat to the applicant but applicant's lawyer, witnesses the presiding officer and the nation at large upon contact in the event of the participant contracting Covid and acting as vehicle to spread same. The insistence on hearing a disciplinary enquiry flies foul of the import and purpose of the national lockdown. The national lockdown was declared in terms of SI 83/2020 as amended with an aim to try and contain and curb the spread of the deadly Covid 19 pandemic. The effort to flatten the Covid 19 curve for the benefit of the nation would be frustrated by violation of the lockdown laws and regulations. The safety of individuals would unnecessarily be compromised by convening a clearly non-essential service of presiding over a disciplinary hearing during national lockdown. Infact as reflected on papers filed of record the persistence on the hearing was not accompanied by any provision of certificates reflective of the status of the members. In the absence of such information there is real risk that one may contract the virus which has ghastly consequences and can even cause death.

The circumstances show that the subjection to disciplinary hearing might cause irreparable harm to the applicant. The applicant did not waste time to seek redress of the directive to continue with the disciplinary much to the detriment of his right to health. As properly articulated in heads of argument by Mrs *Mandingwa* applicant's counsel of record health is a basic human right which is constitutionally guaranteed. Section 76 (1) of the Constitution provides for the right to health care and imposes a duty on the state to take reasonable legislative and other measures, within the limits of the resources available to it to achieve the realisation of the right to health. (underlining my emphasis).

In the present case the government on realising the transmission and ghastly effects of Covid 19 came up with a statutory instrument to govern the spread and containment of the disease so as to assist the Zimbabwean citizens inclusive of the applicant enjoy the right to health. Thus it is this government, move and noble directive that respondent seeks to thwart by persisting to hold a disciplinary hearing which is not an essential service much to the detriment of the applicant and other participants whose health would be exposed.

The obstinacy on carrying out a disciplinary hearing even in circumstances where regular courts have in conformity with the lockdown laws and regulations suspended one on one hearings and are only operational for urgent applications such as bail applications to protect the rights of individuals is misguided zeal to say the least. See (Practice Direction 1 of 2021 as amended by Practice Direction 5/2021 by the Chief Justice MALABA CJ). The applicant has properly approached the court on urgent basis seeking protection of his right to fair hearing and health which would be endangered by being dragged to a disciplinary hearing during the national lockdown in the midst of a deadly Covid 19 pandemic. The courts have a duty to protect human rights. Section 165 (1) (c) of the Constitution is instructive. It states:

“...the role of courts is paramount in safeguarding human rights and freedom and the rule of law.”

The applicant’s right to health is under threat. The same for his right to a fair hearing. The apprehension of irreparable harm occurring in the event of the interim relief not being granted is well grounded. There is no other satisfactory remedy available other than seeking the interim relief of stopping the respondent from conducting a disciplinary hearing during national lockdown in the wake of the deadly Covid 19 pandemic. By stopping the hearing temporarily the respondent will not suffer any prejudice but by proceeding in the dangerous environment the applicant will be prejudiced. The balance of convenience in this case favours the granting of the interim relief.

Accordingly the application is granted and it is ordered that:

1. Pending the return date, the Respondent be and is hereby ordered to stay disciplinary hearing proceedings against the applicant.

Mhungu & Associates, applicant’s legal practitioners