

TENDAI MUTEMA  
versus  
CHAIRPERSON OF THE ZIMBABWE MEDIA COMMISSION N.O.  
and  
ZIMBABWE MEDIA COMMISSION  
and  
ACADEMY CHINAMHORA  
and  
CHIEF EXECUTIVE OFFICER OF THE  
ZIMBABWE MEDIA COMMISSION N.O.

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 11 October 2021 & 8 November 2022

### **COURT APPLICATION**

*N Tonhodzai*, for Applicant  
*T Magwaliba*, for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

### **INTRODUCTION:**

**MANZUNZU J:** This court application is brought in terms of Order 32 of the High Court Rules, 1971 (before they were repealed) as read with section 175 (6) and section 85 (1) of the Constitution of Zimbabwe.

Order 32 deals with the procedure for applications. Section 175 (6) of the Constitution provides that; “(6) *When deciding a constitutional matter within its jurisdiction a court may—*  
(a) *declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;*

(b) *make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.*”

Section 85 (1) of the Constitution states that;

“(1) *Any of the following persons, namely—*

(a) *any person acting in their own interests;*

(b) *any person acting on behalf of another person who cannot act for themselves;*

*(c) any person acting as a member, or in the interests, of a group or class of persons;*

*(d) any person acting in the public interest;*

*(e) any association acting in the interests of its members;*

*is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”*

In the wake of these provisions the applicant seeks the following relief:

*“1. It is declared that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are required to inquire into the complaint made against 3<sup>rd</sup> respondent, which complaint is allegedly the cause of applicant’s resignation, despite applicant’s resignation as Assistant Training and Development Officer in the Zimbabwe Media Commission.*

*2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are directed to institute the investigations into the complaint made by the applicant within forty-eight hours of this order.*

*3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are directed to suspend 3<sup>rd</sup> respondent from employment till the finalisation of the investigations.*

*4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are directed that pending the outcome of any investigations shall within twenty-four hours of this order lodge affidavits with this court confirming that the suspension has been done.*

*5. It is declared that 4<sup>th</sup> respondent has no jurisdiction to take over the complaint against members who are Divisions Heads.*

*6. It is declared that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have violated their constitutional obligations in section 233 (a) (d) and (f) of the constitution to support and entrench human rights and to promote accountability in the Commission and to ensure that injustices are remedied.*

*7. It is declared that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have violated their constitutional obligations in section 235 (1) (b) (c) to act in accordance with the constitution and to exercise their functions without fear, favour and prejudice.*

*8. It is declared that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have violated their constitutional obligations in section 249 (1) (c) of the constitution to receive and consider complaints and take action against 3<sup>rd</sup> respondent.*

*9. The respondents shall pay costs of this application on an attorney client scale.”*

This relief is somewhat couched in an unusual way in that it prescribes what the 1<sup>st</sup> and 2<sup>nd</sup> respondents ought to do as they mount an investigation into the alleged misconduct by the 3<sup>rd</sup> respondent. Suspension or no suspension of the 3<sup>rd</sup> respondent is the prerogative of the Zimbabwe Media Commission (ZMC). A court cannot order ZMC to suspend its employee even in circumstances where ZMC may think otherwise. That amounts to usurping the functions of an Administrative body. Apart from the intended *mandamus* to suspend and investigate, the court is asked to take a supervisory role of its order for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to file affidavits with the court of what they will have done. A court discharges judicial functions and is not expected to run as a commission of inquiry.

The draft order also seeks declaratory orders in that the 1<sup>st</sup> and 2<sup>nd</sup> respondent violated the following constitutional provisions:

(i) Section 233 (a) (d) and (f) which says;

*“The independent Commissions have the following general objectives in addition to those given to them in-dividually—*

*(a) to support and entrench human rights and democracy;*

*(b) ...*

*(c) ...*

*(d) to promote transparency and accountability in public institutions;*

*(e)...*

*(f) to ensure that injustices are remedied.”*

(ii) Section 235 (1) (b) (c) provides that:

*“(1) The independent Commissions—*

*(a) ...*

*(b) must act in accordance with this Constitution; and*

*(c) must exercise their functions without fear, favour or prejudice;*

*although they are accountable to Parliament for the efficient performance of their functions.”*

(iii) Section 249 (1) (e) says:

*“(1) The Zimbabwe Media Commission has the following functions—*

*(a) ...;*

*(b) ...;*

(c) ...

(d)...

(e) *to receive and consider complaints from the public and, where appropriate, to take action against journalists and other persons employed in the media or broadcasting who are found to have breached any law or any code of conduct applicable to them;*”

I have recited the above provisions because these are the provisions allegedly violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

### **APPLICANT’S CASE**

In 2008 the applicant was employed by the Zimbabwe Media Commission (ZMC) as an assistant training and professional development officer. She served three months’ probation before she became substantive. She worked under the supervision of Academy Chinamhora the 3<sup>rd</sup> respondent.

On 7 October 2020 the applicant served her employer ZMC, through 3<sup>rd</sup> respondent her supervisor, with an internal memo for resignation. The memo is addressed to “Manager Research” who happen to be the 3<sup>rd</sup> respondent. The memo reads;

*“I am writing this to notify you of my formal resignation from my position as the Assistant Training and Professional Development Officer.*

*As my contract requires that I give three months’ notice my last day will be 31 December 2020.*

*Thank you for the opportunities for professional and personal development presented to me during my time here at the Zimbabwe Media Commission. I am grateful for all of your support during my time here and deeply appreciate all of the valuable experiences I have gained. It has been a since pleasure working with you and the team.*

*Please let me know how I can help during this transition and make it as smooth as possible.*

*Thank you.*

*T. Mutema”*

The applicant says she discussed the issue of her resignation with the Personal Officer on 14 October 2020 who suggested the letter should have been addressed to that office as they wanted to know the reasons behind her resignation. She then says she approached the 3<sup>rd</sup> respondent in an attempt to withdraw her letter of resignation before she learnt on 15 October 2020 that management had accepted her resignation. Unhappy with the turn of events, she then did not report for duty from 16 to 23 October 2020. As a result of which, on 27 October 2020

the Personnel Administration Officer wrote her a letter raising issue with her absenteeism. On 29 October 2020 the applicant says she wrote a letter seeking to withdraw her resignation, but a reading of the letter is actually a response to her absenteeism.

On 13 November 2020 the applicant filed, under the guidance of her lawyers, a formal complaint against the 3<sup>rd</sup> respondent together with a request for the withdrawal of her resignation. In the complaint she raised the issue that the resignation was not voluntary but one forced by circumstances. She raises an array of allegations against the 3<sup>rd</sup> respondent and sought ZMC to act in one way or the other in dealing with the 3<sup>rd</sup> respondent. In response the 4<sup>th</sup> respondent drew the attention of the applicant's lawyers to the applicant's letter of resignation which was full of praises of ZMC. I understood this response to mean the applicant's complaints were inconsistent with her earlier version as contained in the letter of resignation.

Apart from factual issues, the applicant also made averments on points of law which border on submissions. In fact they are submissions ordinarily reserved for counsel. Applicant says this application was brought because of the inaction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Reference was made to the ZMC's internal regulations under which the applicant suggests the 1<sup>st</sup> and 2<sup>nd</sup> respondent must act. She said the 4<sup>th</sup> respondents had no authority to respond to her complaint.

### **RESPONDENTS' CASE**

The respondents raised three points *in limine* which I allowed to be argued together with the merits. These are, that the applicant has no *locus standi*, that she is in the wrong fora and that there is material non-disclosure.

On the merits the respondents gave a nutshell account of how the applicant improperly conducted herself after serving the employer with a letter of resignation. It is the respondents' contention that the applicant's application was an attempt to get the aid of the court to be reinstated to a position she voluntarily resigned from. In the process, it is alleged she is bent on fixing the 3<sup>rd</sup> respondent. Respondents denied that it was a forced resignation as the same was tendered voluntarily.

Further the respondents said they looked into the applicant's complaints and did not find any wrong doing by the 3<sup>rd</sup> respondent and had no duty to communicate such to applicant

who was no longer an employee of ZMC. They also said what essentially is a labour dispute has been put with the colouration of a constitutional matter.

The respondents also said what the applicant wish them to do has already been done, in that they investigated the alleged misconduct and did not see anything warranting the suspension of the 3<sup>rd</sup> respondent. The relief sought by the applicant is contested.

### **COMPLAINT**

Despite the voluminous nature of this application and the like manner response the court is to examine the cause of complaint and the nature of the relief being sought. This application is born out of the complaint document prepared by the applicant's lawyers on behalf of the applicant and lodged with ZMC on 13 November 2020. The 16 paged document is under the heading:

“(1) COMPLAINT OF EGREGIOUS MISCONDUCT BY MR CHINAMHORA IN HIS OFFICIAL CAPACITY AS MANAGER IN RESEARCH AND DEVELOPMENT.

(2) REQUEST FOR THE COMMISSION TO CONSENT TO MY RESIGNATION WITHDRAWAL.”

The complaint document is drawn in more or less the same lines as the founding affidavit. It sets out the background of the matter which essentially is the employment history of the applicant. The other parts deal with the 3<sup>rd</sup> respondent's alleged unbecoming behaviour towards applicant which includes a threat to replace her and disturbingly a gender issue for sexual harassment. Examples were given when applicant's views and proposals were not taken on board in and outside meetings. She took exception towards that as she felt her labour rights were infringed. She said she felt dejected by her supervisor's failure to accept her ideas. She also introduced hearsay evidence when she said some of her workmates told her were asked to spy on her.

On sexual harassment she alleged 3<sup>rd</sup> respondent would pass sexually coloured remarks as far back as May 2018. Some of the instances of such occasions were quoted in vernacular without translation. The document concludes by saying she resigned due to emotional state and her resignation can only be classified as constructive. She then pleaded in the same document for withdrawal of her resignation based on the allegations raised against the 3<sup>rd</sup> respondent and for the ZMC to allow her to continue to work. She further recommends what the Commission

must do to protect its employees. The complaint document therefore went beyond a mere complaint but made some recommendations as if it were a commission set for that purpose.

At the hearing I started by warning counsel to adhere to what is relevant to this application. It was necessary to do so because a reading of the papers of this application shows how counsels linguistically got carried away at the expense of addressing real issues between the parties. I further asked counsels to come out clear on whether the complaints against the 3<sup>rd</sup> respondent and the issue of reinstatement were connected or independent of each other and further if the court was to deal with a stand alone constitutional application.

## **ISSUES**

This matter was argued at length but had the following issues to determine:

- a) Does the applicant have the *locus standi in judicio*
- b) Is the applicant in the wrong fora
- c) Is there material non-disclosure
- d) Did the ZMC fail to perform its constitutional obligations
- e) Is the applicant entitled to the relief sought?

## ***LOCUS STANDI***

This Latin phrase literally means the right or capacity to bring an action or to appear in a court. In *Allied Bank Limited v Nyabonda* SC 52/16 the court commented on this principle thus: “*The principle of locus standi is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has locus standi. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action.*” The court cited with approval the concept of *locus standi* as defined in *Ndlovu v Marufu* HH-480-15 thus; “*It is trite that locus standi exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has locus standi has a right to sue which is derived from the legal interest recognised by the law. In the case of Stevenson v Minister of Local Government and National Housing and Ors* SC 38-02, the court in outlining *locus standi in judicio* stated that in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as “a real and substantial interest” or as a direct and substantial interest.”

The respondents' argument is that the applicant has no *locus standi* because her relationship with ZMC was terminated by virtue of her resignation. Realizing that disability, the respondents say applicant now hides behind the cloak of constitutionality. That may well be so but the test for *locus standi* is whether the applicant has a right to sue which is derived from the legal interest recognised by the law.

While the applicant accepts that resignation terminates employer/employee relationship, she argues, I think quite correctly in my view, that it does not *ipso facto* take away the legal standing of the applicant to bring an application before this court. This is as long as the applicant is able to show that she has substantial interest to a cause of action and is entitled to the relief being sought. Applicant maintains a position that her application is a *mandamus* to compel ZMC to act upon her complaint in the fulfilment of its constitutional obligation. The point *in limine* is bound to fail.

#### **MATERIAL NON-DISCLOSURE**

The respondents alleged applicant failed to disclose that she received her full benefits when she resigned. This preliminary point was not vigorously pursued. I see no point labouring on it more so in the face of an admission that employer/employee rights were terminated.

#### **FORA:**

The issue of fora is resolved by a determination of the identity of this application, is it a labour dispute or a constitutional matter?

The respondents say this application is essentially a labour issue where the applicant, after voluntarily resigning from her post, is now anxious to be re-engaged. The application has been described as misplaced with the suggestion that applicant should have used internal organs within ZMC to push for her re - instatement and if aggrieved use the appeal structures. The applicant persists with the application which she says is in terms of section 175 (6) as read with section 85 (1) of the Constitution.

Mr Magwaliba for the respondents argued that the founding affidavit is convoluted, long winding and fails to crystalize a recognizable cause of action. Nevertheless he said the

application before the court was a labour issue which ought to be dealt with in terms of section 89 (6) of the Labour Act, Chapter 28:01, which section provides that: “(6) *No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).*”

Mr Magwaliba said it was the Labour Court with the exclusive jurisdiction to deal with the applicant’s complaint. Mr Moyo stood by the fact that the Labour Court cannot order a declarator. In any event, it was argued, the applicant was not asking the court to make a determination of the complaint but rather to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to deal with the complaint. I did not hear Mr Moyo say the complaint itself is not within the province of the Labour Court. What he simply says is that the applicant is merely asking this court to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to consider her complaint. It sounds logical.

The applicant relied on the case of *PTC v Chizema SC 108/04* where the court had occasion to say:

*“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: ... The proper forum for an application for mandamus is the High Court. On this ground alone the appeal should succeed.”* This position of the law as set out above is trite.

Mr Magwaliba took his argument a step further which I found highly persuasive as shall be demonstrated below. This is in respect of the nature of the applicant’s application. He urged the court to be guided by the substance rather than the form of this application. The question is, is this a labour dispute or a constitutional application? The applicant says it is a constitutional matter and the respondents say it is not.

The applicant cited the case of *Chiite & 7 Others v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust CCZ 10/17* where the court said; “*A constitutional matter is defined under s 332 of the Constitution to mean a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. The issue raised before a court will be sufficient evidence of the existence of a constitutional matter to the extent that its determination requires the interpretation, protection or enforcement of the Constitution.*”

Mr Magwaliba said when the court looks at the application before it, it has to look at its effects, asking itself, what does the applicant really want? The court is being asked to discern from the facts and circumstances of the case as to the real intention of the applicant? If the applicant's real intention is to lay a ground for re-instatement, then it is a labour issue, but if the real intention is to enforce rights enshrined in the constitution, then it is a constitutional matter. After citing *Williams & Another v Msipha N O & Others 2010 (2) ZLR 552* in support of the effects of an application, Mr Magwaliba says despite the application being brought under section 85 (1) of the constitution, there is no specific averment in the founding affidavit of contravening any of the sections in Chapter 4 of the Constitution which create fundamental human rights and freedoms. The closest the founding affidavit came to was the violation of human dignity as per section 51 and the right to equality and non-discrimination as per section 56.

It must be born in mind that the applicant's evidence is examined from the perspective of a member of the public complaining to ZMC. It is not from the perspective of the applicant as an employee of ZMC. The question then is, will a member of the public lodge a complaint about the violation of human dignity, equality and discrimination to ZMC? The answer is simply found in the functions of ZMC as laid out in section 249 of the Constitution. Independent Commissions which are set out in section 232 have different functions which are well defined. Violations of human rights go to the Zimbabwe Human Rights Commission. Gender and sexual harassment violations go to the Zimbabwe Gender Commission. The applicant's position is that she is enforcing fundamental rights in terms of sections 175 (6) and 85 (1) of the constitution. In examining the application, the court cannot ignore the content of the complaint raised by the applicant to ZMC to which the applicant wants the ZMC to act. It is that complaint which gives the character and intention of the application. The applicant urges the court to give a blind eye to the complaint and focus on the intended *mandamus* and *declaratur*. That will not be proper because this is why in her application the applicant has in more than three quarters of the founding affidavit de-laboured the court with details of her complaint. Before an order can be granted, the court must satisfy itself whether it is appropriate for the respondents to be ordered as such.

The applicant relied on section 249 (1) (e) to say ZMC has power to receive and consider complaints, yes, but that does not mean taking any nature of complaints. The ZMC receives complaints against the media and journalists.

I agree with Mr Magwaliba when he said, *“Once the applicant wants to proceed under section 85 (1) it is obligatory for her to identify that constitutional right which is in the Bill of Rights which has been violated and then elaborate on how that right has been violated and then gets relief which is consistent with the alleged violation of that constitutional right.”*

In *casu* that is absent.

A reading of the factual history of this matter lead to one conclusion that the applicant’s story is a labour dispute more than it can be said to be a constitutional matter. I say so for several reasons. I have already summarized the applicant’s case. It must be noted that, one cannot detach the complaint from the application. When applicant raised a complaint on 13 November 2020 she was still an employee of ZMC but at the time she was serving a notice to terminate her contract.

One cannot ignore the history behind this complaint. This is so because in her letter of resignation of 7 October 2020 she showered praises on her employer without raising any complaints. How then did the issue of the complaint come about? The applicant says after discussions with the Personnel and Administrative Officer she then sought to withdraw her resignation as she wanted to explain the cause of her resignation. I did not find any impediment in the applicant explaining the reasons for her resignation without withdrawing her resignation.

The request to withdraw the resignation signifies a change of mind by the applicant. This explains why, instead of filing an independent complaint, the applicant also says it’s a request for the Commission to consent to her resignation withdrawal. The complaint is therefore an aid to reinstatement just as the court order is intended to be. The applicant demonstrates this point in her complaint to ZMC and founding affidavit. In the complaint she prays that; *“Since my resignation amounted to constructive dismissal by the accused, I howbeit besech the Commission to accept the withdrawal of my resignation and allow me to continue to work.”*

I have no doubt that the agenda of the application is to pave way for reinstatement. Paragraph 85 of the founding affidavit reads in part; *“If my complaint is later found to be correct then I am advised that the 2<sup>nd</sup> respondent will be required to consent to my resignation withdrawal.”* Purely a labour issue.

The applicant is fighting a labour matter for reinstatement under the umbrella of a constitutional application. The applicant has not only shown but proved to be a well-informed someone who would not sit docile while her rights are being trampled on. I am rest assured that had the applicant succeeded in being reinstated, the present application would not have arisen. I agree with the respondents that this is a labour dispute otherwise camouflaged as a constitutional matter hence is in the wrong fora.

The applicant cannot escape costs at a higher scale. The application is unnecessarily overloaded in a situation where it could have been avoided. The respondents have been put to the unnecessary expense of having to defend vexatious proceedings which are not properly before the court.

**DISPOSITION:**

The application be and is hereby dismissed with costs on a legal practitioner and client scale.

*Musendekwa – Mtisi*, applicant’s legal practitioners  
*Musunga and Associates*, respondents’ legal practitioners.