

LOVEMORE MUTANGARA
versus
FORESTRY COMPANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 21 and 29 SEPTEMBER 2004

Opposed Court Application

Mr *J.B. Colegrave*, for the applicant
Ms *Shumba*, for the respondent

KAMOCHA J: The applicant was employed by the Forestry Commission as a Human Resources Manager. He was, on 9 June 2000, suspended from employment without salary and benefits. He took his employer to court where he was victorious. In a judgment handed down on 21 February 2003 this court ordered his reinstatement with full pay and benefits.

Applicant later entered into an agreement of a retrenchment package with the Forestry Commission on 4 April 2003. Four days later on 11 April 2003 he received his back pay calculations. On going through the calculations he allegedly observed discrepancies which resulted in his under payment. This is what he said about the alleged discrepancies.

“My basic pay was calculated using \$468 000.00 per month instead of \$746 000.00 for 2003 per month since I was a top performer.

In 2000, the Respondent under paid me by \$406 719.90. In 2001, the respondent under paid me by \$584 826.00. In 2002, I was further under paid by \$5 085 000. Whilst in 2003, I was under paid by \$10 630 500.00.

I was entitled to claim car allowances as my benefits. The respondent did not pay my benefits as follows using HERTZ car hire rates for Nissan Sunny HB12 1.5 LX.

- (a) From June to December 2000 I was entitled to \$256.00 per kilometer for 35 000 kilometers.
- (b) In 2001, I was entitled to \$256.00 car allowance per kilometer for 60 000 kilometers.
- (c) In 2002, I was entitled to the same amount and number of kilometers, same amount as claimed in paragraph (b).
- (d) In 2003, I was entitled to \$256.00 per kilometer and also 35 000 kilometers.
- (e) I am overally entitled to \$48 640 000.00 for my car allowance benefits.

I was entitled to a Zimsun Credit Card up to \$50 000.00 per month but I was not paid my benefits as follows.

- (a) 2000 - \$350 000.00
- (b) 2001 - \$600 000.00
- (c) 2002 - \$600 000.00
- (d) 2003 - \$350 000.00
- (e) I am overally entitled to \$1 900 000.00 as my benefits.

I was also entitled to have my medical aid fees paid for myself, wife and three children as follows:

- (a) 2000 total amount of \$26 250.00
- (b) 2001 total amount of \$75 800.00
- (c) 2002 total amount \$90 720.00
- (d) 2003 total amount \$52 920.00
- (e) Overallly I am entitled to \$245 690.00 as my medical aid benefits.

I was also entitled to cellphone allowance benefit as follows:

- (a) 2000 \$17 500.00
- (b) 2001 \$30 000.00
- (c) 2002 \$42 000.00
- (d) 2003 \$24 500.00

I am overally entitled to \$114 000.00 as my cellphone allowance benefits.

I was also entitled to have the following newspapers, THE HERALD from Monday to Friday, Manica Post weekly and Financial Gazette weekly at the following total cost-

2000	\$11 400.00;	2001	\$8 650.00
2002	\$19 339.00;	2003	\$6 909.00

I am thus entitled to \$46 298.00 as my newspaper allowance benefits.

Wherefore I claim payment of \$67 653 033.90 as my underpayment for salary, bonus and unpaid benefits for credit card allowance, cellphone allowance, medical aid and car allowance.”

On 27 April, 2003 applicant wrote to the managing director of the Forestry Company of Zimbabwe Mr Kanyekanye pointing out the above alleged discrepancies from the company’s calculations and requested that the company rectify them. Mr Kanyekanye did not respond to the applicant’s letter, which was fairly detailed.

Failure to respond by the company led applicant to file this application on 12 November 2003 seeking an order that respondent pays him \$67 653 033.90 with interest thereon at the prescribed rate from 9 June 2000 to the date of payment in full plus costs of the application.

The respondent, *in limine* contended that the applicant was suing a wrong party. It stated that it did not exist at the time applicant’s employment was terminated. The applicant’s dispute and remedy was with the Forestry Commission, a statutory body which to this date exists distinct and separate from respondent. The respondent is a private company it was, therefore, incorrect to allege that applicant was employed by respondent.

Applicant on the other hand argued that the suggestion that applicant has sought redress against the wrong party was quite without merit because the respondent had delegated, its obligations under its contract of employment with the applicant, to the respondent. The applicant placed reliance on two letters written by the managing director of Forestry Company of Zimbabwe Mr Kanyekanye on 7 March 2003 and the general manager of Forestry Commission of that same date respectively.

Mr Kanye Kanye wrote to Mr E.M. Shumba General Manager Forestry Commission in these terms:-

“Please be advised that Mr Mutangara came to me today (7/03/03) with a High Court judgment nullifying his dismissal. The court ordered his reinstatement with full benefits.

Having spoken to him, the following course of action is required to resolve this matter:-

- (a) Clear instructions from you as the complainant as to whether you wish to appeal to the Supreme Court or resolve the matter at this stage via retrenchment.
- (b) Where retrenchment is an option agreeable to you, it is suggested that you confirm this in writing to allow the FCZ managing Director to facilitate the process as per set precedent.
Communication by 10 March 2003 will be most ideal as I am travelling out of the country for a week after 10/03/03.
- (c) The FCZ Managing Director will seek the chairman’s concurrence before agreeing to a retrenchment package with Mr Mutangara.

May you kindly action this with utmost urgency to avoid unnecessary publicity likely to be generated by failure to resolve this timeously. There are indications that Mutangara is also agreeable to quick retrenchment.”

The general manager of the Forestry Commission Mr E.M. Shumba responded to the above letter on the same day as follows.

“re: REINSTATEMENT OF MR MUTANGARA

Your memo dated 7 march, 2003 on the above subject refers.

The Forestry Commission as the then complainant, has no intention to appeal to the Supreme Court. We, therefore, suggest that you comply with the High Court Judgment.

We note that retrenchment is not one of the options in the judgment. Consequently, should you wish to follow this route you have to negotiate and agree with the employee before you proceed.”

There can be no doubt that the above correspondence clearly establishes that Forestry Commission delegated its obligations under its contract of employment with the applicant to Forestry Company of Zimbabwe Limited. The suggestion by the respondent that Mr J. Kanyenye was just an agent of the Forestry Commission is untenable because according to the above letter it was Forestry Commission of Zimbabwe which had the obligation of agreeing to a retrenchment package with the applicant. That was going to be done after FCZ managing director had sought the chairman's concurrence. There is, therefore, no merit in the submission that applicant was seeking redress against a wrong party.

There is however merit in the submission that there are various disputes of fact in this matter. The respondent therefore argued that the application should be dismissed with costs because the applicant should have foreseen that his claim was going to be vehemently opposed. I do not agree. While it is true that there are disputes of fact in the matter, which is now conceded by the applicant, the respondent led applicant to believe that his claims were not disputed by not responding to his letter of 22 April 2003 wherein he had requested the rectification and had hoped and prayed that the raised issues would be settled with speed and peacefully. Respondent failed to respond to the request until applicant instituted these proceedings in the belief, albeit wrongly, that his claims were not going to be disputed.

The correct course to adopt in the circumstance, in my view, is to refer the matter for trial. I would therefore issue the following order:

It is ordered that:-

- (1) the application be and is hereby dismissed;
- (2) the matter be and is hereby referred to trial and the papers filed of record shall stand as the pleadings;

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- (3) discovery shall be made and a pre-trial conference held in accordance with the Rules of court; and
- (4) Costs shall be in the cause.

Messrs *Mugadza, Mazengero and Dhliwayo*, applicant's legal practitioners

Honey and Blanckenberg, respondent's legal practitioners