

ANDREW MATARUSE
versus
E. MUNDENDA N.O
and
PARIRENYATWA GROUP OF HOSPITALS
and
MINISTER OF HEALTH AND CHILD CARE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 October 2017 & 3 July 2019

Opposed application

T. Mpofo, for the applicant
T. Tandi, for the respondent

NDEWERE J: On 20 March, 2017, the applicant filed a court application for review. The grounds of review on page 1 to 2 of the application were as follows:

1. The decision by the respondents that the applicant is double dipping due to his employment by the second respondent and the University of Zimbabwe and therefore should pay back the remuneration paid to him by the second respondent is grossly irregular. It is illegal and irrational.
2. The instruction by the first respondent that the applicant must resign retrospectively with effect from 19 September, 2016 is unlawful and amounts to constructive dismissal.
3. The unilateral decision by the respondents to cease applicant's salary is unlawful.

The relief which the applicant sought was the following;

- “1. The decision of the first respondent communicated to the applicant through a memorandum dated 7 February, 2017, be and is hereby set aside.
2. The decision of the respondents to unilaterally cease applicant's salary be and is hereby set aside.
3. The first and second respondent, jointly and severally to pay costs of suit.”

The applicant filed a founding affidavit from page 4 of the court application.

The first and second respondents filed an opposing affidavit on 3 April, 2017. They said the application did not contain grounds of review. They also said the High Court had no jurisdiction as this was a labour related dispute. In addition the first respondent objected to being cited as a respondent and asked that he be removed from the matter as a party.

The respondents further said since the second respondent was a statutory body and capable of suing and being sued in its own name, there was no need to cite the third and fourth respondents as parties in the matter since the second respondents operations were independent of them.

On the merits of the application, the respondents confirmed that what applicant did was an act of misconduct. They confirmed that they had Disciplinary Procedures for acts of misconduct. They however said instituting those procedures was their prerogative as employer and in this case they proceeded outside the Disciplinary Procedures and invited the applicant to resign.

They also said the applicant should have exhausted domestic remedies and appealed against their decision to the Board instead of approaching the High Court. They prayed for the dismissal of the application with punitive costs.

After going through the submissions by both the applicant and the respondents the court made the observations which follow below.

The applicants filed a court application for review. After providing the grounds of review on pages 1 to page 2 of the application, they attached a founding affidavit by the applicant from p 4 to 11. On page 7 of the Founding Affidavit, in paragraph 9, the applicant attacked the procedure adopted by the respondents. He repeated this attack in paragraph 10, through the use of the word “unilaterally” in reference to the cessation of his salary. The use of that word shows that the procedure adopted was being criticised in that the applicant was not afforded the right to be heard. In paragraph 12, the use of the phrase “gross irregularity” and the use of “unfounded allegations” in paragraph 13, is a criticism of the procedure adopted. In paragraphs 17, and 18 the failure to follow disciplinary procedures is raised in specific terms.

After the founding affidavit, the relief is sought on pages 13 to 14 as follows:

- “1. The decision of the first respondent communicated to the applicant through a memorandum dated 7 February, 2017, be and is hereby set aside.
2. The decision of the respondents to unilaterally cease applicant’s salary be and is hereby set aside.

3. The first and second respondent, jointly and severally to pay costs of suit.”

While the applicant must be criticised for not mentioning the specific procedural irregularities in his grounds of review, the court’s view is that since he mentioned them in his founding affidavit, his failure to specify them in the grounds of review is not fatal to his application. The respondents were informed of the basis of the review in the founding affidavit before the Draft Order was attached. So they knew what review case they needed to respond to. They were not prejudiced. Therefore whilst the respondents were correct to criticise the applicant for the failure to “state shortly and clearly” the grounds upon which the applicant sought to have the proceedings set aside or corrected in terms of rule 257, his failure to do so is not fatal because he provided the procedural irregularities in his founding affidavit in the paragraphs alluded to above. The case of *Pasalk and Another v Kuzora and Others* SC 97/02 referred to by the respondents is a case in point.

At page 94, the court said;

“it is not for the respondent, or the court, to study the affidavits carefully in order to determine what case the respondent is to answer. The grounds of review must be clearly and shortly stated, and in my view, this must be in the court application itself or, at the commencement of the founding affidavit”.

The above case shows that it is permissible to have the grounds of review in the founding affidavit, although having them on the face of the application itself is more appropriate. The preliminary point of having no grounds of review is therefore dismissed.

On the issue of jurisdiction of the High Court, the respondents are incorrect. Section 171 of the Constitution of Zimbabwe No. 20 of 2013 provides as follows:

“(1) The High Court—
(a) Has original jurisdiction over all civil and criminal matters throughout Zimbabwe;

Section 13 of the High Court Act provides as follows:

“13 Original civil jurisdiction
Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe”.

Section 26 of the High Court Act also provides as follows:

“Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe”.

The respondents are one such administrative authority.

In addition, as stated by the applicant in his Answering Affidavit, the applicant is not covered by the Labour Act but by the Health Service Act [*Chapter 15:16*] and the Health Service Regulations of 2006. The respondents did not dispute this assertion in their submissions. The preliminary point about lack of jurisdiction is therefore dismissed.

The 3rd preliminary point raised by the respondents was that first respondent should not have been cited as a party and should be struck out. The court found no merit in that point. It is first respondent who wrote the Memorandum of 7 February 2017 which appears on p 12 of the application. He wrote it in his capacity as Director of Operations. That is why the letters “N.O” appear after the citation of his name to indicate that he is being proceeded against in his official capacity as Director of Operations and not in his personal capacity. In the Memorandum of 7 February 2017, he never cited the Board or referred to it. He wrote;

“It has come to my attention ...”

He did not say “it has come to the Board’s attention,” or . “... to our attention.” All this shows that his citation as a party to the proceedings was proper since the Memorandum of 7 February 2017 is what started the case between the applicant and the respondents. First respondent’s objection is therefore dismissed.

However, there was no need to cite the third and fourth respondents since second respondent is a statutory body clothed with a legal personality. The court noted, however, that no specific relief was sought against the third and fourth respondents. Furthermore, in view of the provisions of r 87 of the High Court Rules, the citation of third and fourth respondents is not fatal to the application.

Since the first and second respondents have objected to the inclusion of third and fourth respondents and because it appears that their inclusion was not necessary since the second respondent is an independent statutory body, the court will invoke r 87 (2) (a) of the High Court Rules and order the third and fourth respondents to cease to be parties in this matter and shall accordingly strike them off as parties.

As regards the merits of the matter, the court is of the view that the respondents had an arguable case against the applicant. The applicant said he was appointed on an indefinite contract of employment by the second respondent. Then on 20 September 2016, he said in his own words he was appointed “a full time lecturer” in the Medical School at the University of Zimbabwe. He did not indicate when he was going to be available to perform his duties to the second respondent, now that he was “full time” lecturing. It would have been a different case if he had said he was going to be part time.

The applicant said his duties to the two employers were not in conflict with each other. That cannot be correct in relation to time. If he was lecturing at the Medical School, during that lecture period, if summoned by the Stroke Unit and Neurology Clinic would he be able to respond there and then and abandon his lecture in the middle? The probability is that he would not be available for the clinic until after his lecture was finished. So there was definitely a conflict in relation to his time. It was not possible for him to be available for both jobs at the same time.

However, after identifying the problem of a conflicting appointment of the applicant, the respondents proceeded in an irregular manner. They asked the applicant to resign from 19 September 2016, and asked him to pay back what they had paid him from 20 September 2016. In actual fact, they were saying from 20 September 2016, you ceased to be our employee, so resign from that date and pay us back what we paid you. First respondent intimated that this position had been discussed and then applicant requested that it be put in writing. After putting it in writing, the respondent should have waited for the applicant to accept the arrangement. If he had accepted the arrangement, that would have been the end of the matter. The moment he did not accept it, disciplinary procedures should have been invoked.

The court noted that the respondents confirmed that the applicant committed an act of misconduct. They accepted that they had appropriate disciplinary procedures. They admitted that they proceeded outside the disciplinary processes; saying instituting them was their prerogative. Indeed, it was their prerogative, but if the procedures were not being instituted, applicant's consent had to be obtained. If it was not obtained, the employer could not unilaterally withdraw the benefits of an employee while that employee was still working except in terms of the disciplinary procedures. If consent was not obtained, then following the disciplinary procedures became imperative. It was no longer a matter of choice. That is because the disciplinary procedures are the process which gives an employee the opportunity to be heard in his own defence.

The failure by the respondents to invoke the disciplinary procedures when the applicant did not resign amounted to gross irregularity.

The issue of exhaustion of domestic remedies did not arise at all.

The respondents referred to s 17 of the Health Services Act [*Chapter 15:16*]. That section allows any person aggrieved by a verdict reached or punishment given, to appeal to the Hospital Management body. A verdict is given after a disciplinary hearing. So s 17 which the

respondent wanted to rely on only applied where the disciplinary process had been followed.

Section 17 (4) provides as follows;

“Any person who is aggrieved by a verdict reached or punishment imposed following misconduct proceedings conducted in terms of subsection (1) or (2) may appeal to the Board in the form and manner prescribed in service regulations.” (The underlining is my own).

So for s 17 to apply, there had to be misconduct proceedings.

The application for review therefore has merit and must succeed.

The relief sought by the applicant was however, incomplete. His draft order requested that the respondents’ decisions be set aside and he ended there; yet there was need to correct the procedural irregularity committed by the respondents. That is the purpose behind reviewing proceedings which are irregular. The court will therefore set aside the respondents’ decisions and remit the matter back to the second respondent for it to institute disciplinary procedures against the applicant.

It is therefore ordered that:

1. The decision of the first respondent communicated to the applicant through the Memorandum of 7 February 2017 be and is hereby set aside.
2. The decision by the respondents to unilaterally cease applicant’s salary be and is hereby set aside.
3. The matter be and is hereby referred back to the second respondent for it to institute disciplinary proceedings against the applicant for the alleged misconduct.
4. The first and second respondents, jointly and severally, to pay the costs of suit.

Rubaya and Chatambudza, applicant’s legal practitioners
Kantor and Immerman, 1st & 2nd respondent’s legal practitioners