

REPORTABLE (25)

Judgment No. S.C. 25/02  
Civil Appeal No. 54/01

MWAAKA SAMUEL MUKUNDU v

(1) THE CHAIRMAN MUTASA RURAL DISTRICT COUNCIL  
(2) MUTASA RURAL DISTRICT COUNCIL

SUPREME COURT OF ZIMBABWE  
CHIDYAUŠIKU CJ, ZIYAMBI JA & MALABA JA  
HARARE, MARCH 12 & MAY 23, 2002

*F G Gijima*, for the appellant

*N Machingauta*, for the respondents

MALABA JA: This is an appeal from a judgment of the High Court delivered on 15 February 2001 dismissing with costs an application by way of review for an order setting aside the decision by the second respondent to suspend the appellant from work and directing that he be reinstated to the post of chief executive officer.

The relevant facts placed before the court *a quo* may be summarised as follows. The appellant, to whom I will refer as “Mukundu”, was employed by the second respondent (hereinafter called “the Council”) as chief executive officer. In a report dated 5 January 1998 internal auditors who had examined the Council’s books of account made certain allegations of financial mismanagement against Mukundu. They alleged in particular that he –

1. Awarded himself increments in salary and allowances without authority from the Council;
2. Obtained cement blocks from Council premises for private purposes on credit without Council's authority. At the time of audit he had not paid for 1 300 cement blocks;
3. Failed to account for \$16 000 that went missing from Council funds;
4. Failed to keep records of the collection and use of the development levy so that it was not known what contributions were being made by wards and individuals; and
5. Sold Council assets to private individuals on credit after they had won tender without Council's authority. At the time of audit the full purchase price of a motor vehicle sold on credit after a successful tender had not been recovered.

On 10 February 1998 the Council appointed a committee in terms of s 62 of the Rural District Councils Act [*Chapter 29:13*] ("the Act") to investigate the allegations of misconduct made against Mukundu in the internal audit report. At the proceedings held by the committee Mukundu was asked to comment on the allegations made in the audit report. In addition to the verbal explanation Mukundu submitted written comments.

At the end of the inquiry on 18 February 1998 the committee was of the view that there were grounds to believe that Mukundu was guilty of misconduct,

dishonesty and negligence in the performance of his duties as chief executive officer. It recommended that he be suspended from work without pay and an application made to a labour relations officer in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371/85 (“SI 371/85”). A letter was written to Mukundu by the first respondent (“the chairman”) on 28 February 1998, notifying him that he was on suspension without pay as from that date. The letter advised him that an application was to be made to a labour relations officer for an order terminating his contract of employment and outlined the grounds the Council would rely upon in making the application.

On 6 March 1998 the Council ratified and adopted the decision of the committee and approved the suspension of Mukundu. On 11 March 1998 an application was made to the labour relations officer in terms of s 3 of SI 371/85 for an order terminating Mukundu’s contract of employment. On 26 March 1998 the labour relations officer notified the parties that the application for the dismissal of Mukundu was to be heard on 8 April 1998.

A day before the application for the order terminating his contract of employment was to be heard, Mukundu made an application to the High Court for the review of the decision of the Council to suspend him from work. He alleged that the suspension was unlawful because the Council had no right to refer the matter of the termination of his contract of employment to the labour relations officer. The argument was that the Council ought to have discharged Mukundu in terms of s 36(2)(b) of the Conditions of Service 1993 (“the Conditions of Service”).

The Conditions of Service were fixed by the Council with the approval of the Minister responsible for the administration of the Act in terms of s 67(1). Section 36(1)(e) of the Conditions of Service provided that the Council could discharge an officer without notice on the ground of misconduct. Section 36(2) then provided that:

“Where an officer ... is liable to dismissal without notice in terms of paragraph (e) of subsection (1) of section 36 of these Conditions of Service, the Council –

- (a) may suspend him from duty pending the outcome of an inquiry, which the Council shall carry out, and, unless the Council directs otherwise, his salary or wages shall terminate with effect from the date of his suspension;
- (b) on receipt of the report of the inquiry referred to in paragraph (a), the Council may, if it thinks fit, discharge such officer ... with effect from the date of suspension ...”.

The argument advanced on behalf of the appellant in the court *a quo* was that, having found that Mukundu had committed acts of misconduct which rendered him liable to dismissal without notice, the Council had to act in terms of s 36(2)(b) of the Conditions of Service and discharge him. It was said that the application to the labour relations officer was a nullity because it was not the sequel of a suspension in terms of s 36(2)(a) of the Conditions of Service. In other words, the submission was that the provisions of the Labour Relations Act [*Chapter 28:01*] and SI 371/85 were not applicable to the termination of Mukundu’s contract of employment with the Council. The learned judge rejected the argument, holding instead that the Council was obliged to apply the provisions of the Labour Relations Act and SI 371/85 to the dismissal of the appellant.

Section 3 of the Labour Relations Act provides that it:

“... shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by or under the Constitution”.

It is common cause that conditions of employment of employees of rural district councils are not provided for by or under the Constitution. (See *Gumbo v Norton-Selous Rural Council* 1992 (2) ZLR 403 (S)).

Section 2(1) of SI 371/85 provides that:

“... no employer shall, summarily or otherwise, terminate a contract of employment with an employee unless –

- (a) he has obtained the prior written approval of the Minister to do so; or
- (b) ...
- (c) ...
- (d) the contract of employment is terminated in terms of section 3.”

Section 3 provides that where an employer has:

“... good cause to believe that an employee is guilty of –

- (a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract; ...

the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment.”

Statutory Instrument 371/85 contains regulations made in terms of s 17(1) of the Labour Relations Act. The regulations are, by virtue of s 3(1) of the Interpretation Act [*Chapter 1*], part of the Labour Relations Act. Section 17(2)

provides that unless such regulations otherwise provide, they shall prevail over any other Statutory Instrument or any agreement or arrangement whatsoever.

Before considering the issue debated in the appeal, I must mention that the application for an order terminating Mukundu's contract of employment with the Council was subsequently heard by the labour relations officer. He found that the grounds for the suspension of the appellant from duty had been proved and had an order terminating his contract of employment served on him. Mr Mukundu appealed to the senior labour relations officer who, on 10 April 2000, upheld the decision of the labour relations officer. On 8 May 2000 an appeal was noted to the Labour Relations Tribunal ("the Tribunal") against the decision of the senior labour relations officer. The appeal is pending hearing by the Tribunal.

I turn now to consider the issue raised on appeal in this Court.

It is clear from the papers that the Council carried out the inquiry into the allegations of misconduct levelled against the appellant in the internal audit report in order to satisfy itself that there were grounds for suspending him from duty pending an application to the labour relations officer for an order or determination terminating his contract of employment. If the application was null and void the suspension was equally unlawful. In that event, the order of the labour relations officer terminating the appellant's contract of employment would not have effect from the date of his suspension. It would have effect from the date it was made.

I am, however, in agreement with the decision of the learned judge in the court *a quo* that the provisions of the Labour Relations Act and SI 371/85 were applicable to the termination of the appellant's contract of employment. An examination of the Act shows that there is no provision making the Labour Relations Act and SI 371/85 inapplicable to the termination of a contract of employment of a chief executive officer of a rural district council. Unlike the Urban Councils Act [*Chapter 29:15*], which contains ss 139 and 140 prohibiting an urban council from discharging a town clerk and a senior official respectively without the approval of the Local Government Board, the Rural District Councils Act has no specific provision relating to the discharge of a senior official such as a chief executive officer.

The cases in which the question of the applicability of the Labour Relations Act and SI 371/85 to the termination of a contract of employment has been raised and resolved show that an employer is obliged to obtain the approval of the Minister of Public Service, Labour and Social Welfare ("the Minister") to discharge an officer or apply to the labour relations officer for an order or determination terminating the contract of employment, unless the statute under consideration has an express provision allowing the employer to obtain permission to dismiss the officer from a specific body or some other Minister or makes the Labour Relations Act and SI 371/85 inapplicable. See *Masasi v Posts and Telecommunications Corporation* 1991 (2) ZLR 73 (H); *Gumbo v Norton-Selous Rural Council supra*; *City of Mutare v Matamisa* 1998 (1) ZLR 512 (S).

It must follow from the application of the general principle to the facts of this case that even if the Council had decided to discharge Mukundu in terms of

s 36(2)(b) of the Conditions of Service, the dismissal would have been unlawful for failure to obtain prior written approval of the discharge from the Minister.

In the circumstances, it is a contradiction in terms to talk of a valid discharge of the appellant in terms of s 36(2)(b) of the Conditions of Service without the acknowledgement of the applicability of s 2(1) of SI 371/85 to the termination of his contract of employment.

The judgment of the court *a quo* was, in my opinion, correct.

The appeal is, accordingly, dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

*F G Gijima & Associates*, appellant's legal practitioners

*Bere Brothers*, respondents' legal practitioners