**ECKEM WILLIAM SITHOLE**

**Versus**

**P G INDUSTRIES (ZIMBABWE) LIMITED**
**T/A THE AFRICAN LUMBER COMPANY (PRIVATE) LIMITED**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 JANUARY 2009

The plaintiff in person
*K Phulu* for the defendant

Civil Trial

**NDOU J:** This matter has a chequered history. The matter ended up at the Supreme Court as constitutional application in terms of section 24(1) of the Constitution of Zimbabwe. The Supreme Court ordered:

> "(1) It is ordered that the applicant's rights in terms of sections 18(9) and 18(10) of the Constitution of Zimbabwe were violated.
> (2) It is declared that the attachment and removal of the applicant's property … were wrongful and unlawful.
> (3) …
> (4) At the hearing of case number HC 3222/98, the High Court shall deal with the following additional issues:
> (a) the compensation to be paid to the applicant for the loss of his property in accordance with the formula set out in this judgment.
> (b) The question of the damages payable to the applicant for the unlawful deprivation of the use of his property from the date it was removed from his residence to the date of the commencement of the trial; and
> (c) Whether the sum of $150 000,00 allegedly spent by the applicant when he appeared at the High Court for trial in May and July 2003,is recoverable from the respondent …"

During the course of this trial all the issues were eventually resolved by consent save for one issue, being whether the defendant unlawfully terminated the plaintiff's contract of employment. If so, the quantitative damages payable to the plaintiff.

Although the trial was long, most issues seem to me to be common cause or at least beyond dispute. On 1 June 1995 the plaintiff joined the defendant company as one of its employees in Bulawayo. The company had a code of conduct ("the code")



in terms of which the penalty for absenting oneself from duty for three or more consecutive days without a lawful excuse was a final written warning. On 4, 5 and 6 December 1995 the plaintiff did not turn up for work. He alleges that he had been authorised to be away from work as he was taking examinations, but that is denied by the company. On 14 December 1995 the company's disciplinary committee found him guilty of absenting himself from duty without a lawful excuse and issued a final written warning to him.

Thereafter, on 13 March 1996, the company's operations manager transferred the plaintiff to the company's Mutare branch, but he refused to go there. Consequently, the operations manager suspended him from duty pending dismissal. He cited two grounds. The first was wilful disobedience to a lawful order, and the second was acting in a manner inconsistent with the fulfilment of the express or implied conditions of the contract of employment. Subsequently, on 2 April 1996, the company's disciplinary committee was convened. After hearing the matter, the committee found plaintiff guilty on 22 April 1996 and recommended his dismissal. His employment was terminated on 31 May 1996. Aggrieved by the termination of his employment, the plaintiff instituted these proceedings under case number HC 3222/98 on 20 August 1998 claiming, *inter alia*, damages for wrongful dismissal. As alluded to above, this is the only issue outstanding for determination. The plaintiff was not happy with the proceedings of 14 December 1995, which found his guilty and penalised him with a final written warning. He appealed against this finding. He gave his appeal to the company's personal officer in his capacity as the chairman of the disciplinary committee. The chairperson refused to accept the appeal but instead advised the plaintiff to bring up the matter as "a grievance" as specified in the Code. The plaintiff obliged, and wrote to his immediate superiors. But the production foreman and the production manager did not respond. The defendant company, therefore, denied the plaintiff his labour rights enshrined in the code. The plaintiff was denied an opportunity to try and rescind the final written warning. The

explanation given by the defendant's witnesses for such denial is not reasonable. This committee could still have been convened in terms of the code even after the exclusion of the interested managers. This denial of the right to appeal is material



because without the final written warning the plaintiff would not have been dismissed. The company ignored the code to the detriment of the plaintiff's labour rights. In the circumstances, I hold the view that this subsequent dismissal was wrongful. On the question of the quantum of damages, it is not easy to determine them. This is so because the wrongful dismissal occurred in 1996. The amount of $70 162 577 950,50 claimed by the plaintiff is fair and reasonable.

The plaintiff also prayed that he be declared to have been appointed a substantive production superintended with effect from 1 June 1996 i.e. after he finished his training on 31 May 1996. It is common cause that the company had the discretion to make such an appointment depending on the plaintiff's performance and the performance of the company. The company also had the discretion to extend the training period. The plaintiff relies on legitimate expectation. It is trite that legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue – *Tullybelton in Council of Civil Service Unions* v *Minister of Civil Service* [1984] 3 ALL ER 935 (HL) 944; *Administrator, Transvaal* v *Traub* 1989(4) SA 731 (A) at 756 I; *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S); *Taylor* v *Minister of Education & Anor* 1996 (2) ZLR 772 (S); *National Director of Public Prosecutors* v *Phillips* 2002 (4) SA 60 (W); *South African Veterinary Council* v *Szymanski* 2003 (4) SA 42 (SCA); *President of the Republic of South Africa & Ors* v *South African Rugby Football Union & Ors* 2000 (1) SA I (CC) and *Matake & Ors* v *Ministry of Local Government & National Housing & Ors* HB-93-07. The discretion enjoyed by the company entails either a favourable or an unfavourable outcome. No legitimate expectation could therefore have been created by the defendant that the plaintiff will be appointed a production superintendent at the end of the training period in 31 May 1996. Such an expectation by the plaintiff would not be reasonable. In the circumstances the damages have to be determined on the basis of the plaintiff being a trainee.

Accordingly, it is ordered that:

(a) the plaintiff was wrongfully dismissed by the defendant company.

(b) The defendant company shall pay the plaintiff an amount of $70 162 577 950,50 as damages for such wrongful dismissal with interest thereon at the prescribed rate from 20 August 1998 up to date of payment in full.

(c) The defendant to pay costs of this application.

*Coghlan & Welsh*, defendant's legal practitioners