

REPORTABLE (17)

BLESSING MUSHAPAI DZE

v

**(1) ST ANNE'S HOSPITAL
(2) CAPS HOLDING LIMITED
(3) NATIONAL EMPLOYMENT COUNCIL FOR THE WELFARE AND
EDUCATIONAL INSTITUTIONS**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA JCC
HARARE, FEBRUARY 11, 2015 & SEPTEMBER 20, 2017**

F Mahere, for the applicant

S Mupindu, for the first and second respondents

C Mucheche, for the third respondent

MALABA DCJ: The applicant approached this Court in terms of s 85(1)(a) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”), alleging that the respondents infringed the following of her fundamental rights – the right to dignity; the right not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment; and the right not to have a health condition disclosed. The allegation was that these rights, which are enshrined in the Constitution, were violated when the first respondent subjected the applicant to disciplinary proceedings for alleged misconduct arising from her alleged failure to disclose her HIV status in a form she completed

when applying for employment with the first respondent. The allegation was that the disciplinary proceedings were based on a failure to complete a form that compelled her to disclose the condition of her health. She alleged that, by subjecting her to the disciplinary proceedings by which she was found guilty of the misconduct charged resulting in her dismissal from employment, the first respondent infringed her rights.

The applicant seeks an order in the following terms:

- a. The first respondent's conduct in requiring that the applicant discloses her health condition is declared unconstitutional and in breach of sections 57(e); 51 and 53 of the Constitution.
- b. The disciplinary proceedings conducted by the first respondent relating to the applicant's failure to disclose her health condition are accordingly set aside. Any appeal in relation to the said disciplinary proceedings is permanently stayed.
- c. Section 8 of Schedule 4 of the Employment Code of Conduct for the NEC for Welfare and Educational Institutions, which penalises a failure by an employee to disclose their medical status when undergoing a medical examination at the instance of the employer, is hereby declared unconstitutional.
- d. The first respondent is hereby ordered to reinstate the applicant to the post of ward manager, or alternatively to pay her damages as quantified by the Labour Court for unfair dismissal.
- e. The first respondent and the second respondent are hereby ordered to pay the applicant \$30 000 as constitutional damages to compensate her for the violation of her privacy and dignity and for causing the applicant to suffer inhuman and degrading treatment.
- f. The first respondent is hereby ordered to pay costs of suit on a legal practitioner and client scale."

The facts which gave rise to the application are these. The applicant was diagnosed with Human Immune-Deficiency Virus (HIV) in 2003 while she was employed at the Avenues Clinic as a nurse. She later resigned in 2006 when her health condition deteriorated. Her health condition later improved and in 2010 she applied for a job with the first respondent. She was

interviewed for a post of a general nurse and successfully passed the interview. The applicant was required to complete a medical examination form before commencing employment.

The medical examination form required her to indicate whether she had suffered from any serious illness or injury. She indicated that she had not suffered from any serious illness. She also failed to disclose that she had once retired from her previous employment on medical grounds. The applicant proceeded to enter into a contract of employment with the first respondent as a general nurse.

The applicant was again interviewed in March 2011. She succeeded and was appointed to the post of ward manager. In September 2012 the applicant suffered a stroke and went on sick leave from 21 September 2012. When the applicant resumed work on 2 December 2012 she was referred to one Dr Ngwende, who advised the first respondent's human resources manager that she had made some progress and could resume her duties. The doctor recommended that the applicant should perform light duties.

The first respondent was not pleased with the health condition of the applicant and served her with an investigation notice, in which it alleged that the applicant had given false information when she completed the medical examination form. The applicant was suspended from employment on allegations that she contravened Schedule 4(8) of the Employment Code of Conduct for the National Employment Council for the Welfare and Educational Institutions, ("the Code of Conduct") which provides that supplying false information or knowingly omitting relevant information in an application for employment or when undergoing a medical examination is an act of misconduct. The applicant was charged with that misconduct, it being alleged that she had supplied false information or knowingly omitted relevant information

when she completed the medical examination form, in that she said she had not suffered from any serious illness when she knew that the statement was false.

A disciplinary hearing was conducted and the applicant was found guilty as charged. The disciplinary committee found that the applicant committed an act of dishonesty, which is a serious offence as the relationship between an employer and employee is based on honesty and trust. A penalty of dismissal was imposed.

Aggrieved by the decision of the disciplinary committee, the applicant appealed to the third respondent's appeals committee ("the NEC Appeals Committee"). The appeal was allowed. The decision of the first respondent's disciplinary hearing committee was set aside and substituted with an order that the applicant be reinstated to her former position without loss of salary and benefits from the date of dismissal. The first respondent noted an appeal against the decision of the NEC Appeals Committee to the Labour Court. At the same time, the applicant brought an application for review of the proceedings of the first respondent's disciplinary committee before the Labour Court.

Whilst both matters were pending before the Labour Court, the applicant made this application in terms of s 85(1) of the Constitution. The applicant alleges that the respondents have breached her right to privacy as enshrined in s 57(e) of the Constitution, which provides that:

- “Every person has the right to privacy, which includes the right not to have —
- (a) - (d) ...;
 - (e) their health condition disclosed”.

The applicant further alleges that her right to dignity (s 51 of the Constitution) and her right to protection against inhuman and degrading treatment (s 53 of the Constitution) were violated by the first respondent's conduct in conducting the disciplinary proceedings. It was the applicant's submission that the disciplinary proceedings were designed to compel her to disclose her medical condition, in particular her HIV status.

A preliminary point was raised as to whether the application was properly before the Court, considering that there was a pending appeal and an application for review before the Labour Court.

Counsel for the applicant, Ms *Mahere*, submitted that what was in the Labour Court was an appeal against the decision of the third respondent. She also submitted that there was nothing constitutional pending before the Labour Court. As such, there is no rule which prevented the applicant from approaching the Constitutional Court in terms of s 85(1)(a) of the Constitution. She went further and argued that the Labour Court has no power to issue a *declaratur*. It was on that basis that the applicant argued that the matter was properly before the Court.

Mr *Mupindu* submitted that the application was an abuse of court process as there was a pending appeal before the Labour Court. Counsel for the third respondent, Mr *Mucheche*, made submissions to the same effect. He further submitted that the ground on which the application was brought was that the first respondent compelled the applicant to disclose her health condition. The matter before the Labour Court involved the determination of the question whether the applicant was compelled to disclose her health condition. The ground on which the application was brought to this Court alleging the violation of the fundamental rights

referred to in the founding affidavit is the same as the ground on which the appeal before the Labour Court is to be determined.

In determining the question whether the first respondent acted lawfully when it charged, convicted and dismissed the applicant for giving false information or knowingly omitting relevant information when she completed the medical examination form for employment purposes, the Labour Court would *ipso facto* decide the question whether the applicant's rights were infringed.

It is important to note that the purpose of the disciplinary proceedings was not to compel the applicant to reveal her health condition. The purpose was to determine the question whether she had given false information when she answered in the negative the question whether she had suffered from any serious illness. If she was honest, she needed only to answer the question in the affirmative.

The application is not only ill-conceived, it is procedurally improper, as an application cannot be made directly to the Constitutional Court in terms of s 85(1) of the Constitution alleging a violation of a fundamental right in respect of conduct, the lawfulness of which is a subject of inquiry in proceedings pending before a subordinate court. If a question of violation of a fundamental right arises in proceedings before a subordinate court, the correct procedure for bringing the matter to the Constitutional Court is the one set out in s 175(4) of the Constitution. The applicant ignored the procedure she was obliged to follow if she wanted to have the question of the infringement of her fundamental rights brought to the Constitutional Court for determination.

The application is dismissed with costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

Messrs Kwenda & Associates, applicant's legal practitioners

Messrs Mupindu Legal Practitioners, first and second respondents' legal practitioners

Messrs Matsikidze and Mucheche, third respondent's legal practitioners