

JEMIAS TIMIRE
versus
THE DIRECTOR GENERAL
and
THE DIRECTOR ADMINISTRATION
and
THE CENTRAL INTELLIGENCE ORGANISATION
and
THE MINISTER FOR STATE & NATIONAL SECURITY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 20 October 2015 and 13 January 2016

Opposed Application

T Deme, for the applicant
T Tabana, for the respondents

MTSHIYA J: On 10 October 2014, the applicant filed an application in this court seeking the following relief:

“IT IS ORDERED THAT:

1. That the findings and recommendations of the Board of Inquiry and the discharge notice are hereby null and void
2. The applicant be and is hereby reinstated without loss of salary and benefits from the date on which they withheld
3. The costs be borne by the Respondents.”

I heard the application on 20 October 2015 and dismissed it with costs.

I have since been asked to give reasons for my decision and these are they.

In February 1998, the applicant, a fully qualified mechanic, joined the third respondent as a general hand with the responsibility of maintaining the third respondent’s motor-vehicles. Through promotion he ended up being a Motor Mechanic II in 2006.

In March 2010, an audit was carried out in the third respondent's workshop. The audit report indicated that there were some vehicle parts missing from the workshop. Investigations were carried out leading to the arrest of the applicant. On 17 July 2011, the applicant appeared before a Disciplinary Board. Part of the Board's report reads as follows:

"12.1 circumstances surrounding TIMIRE's case are that, he is alleged to have stolen the under listed vehicle parts from the workshop and supplied some of them to one KUMUZEZA Nathaniel with who he shared a vehicle repair workshop at Fashion Fair Shops near the Training Academy:-

- | | |
|--|-----------------------------------|
| i) 2 x Mazda 323 gearbox | xii) Nissan Hardbody driff |
| ii) 2 x Toyota Tazz Gearbox | xiii) 2 x Mazda B1600 roms |
| iii) Mazda B1600/1800 air cleaning housing | xiv) Mazda 232 corner lamp |
| iv) Tazz starter | xv) 2 x Mazda B1600 roms |
| v) Alternator universal | xvi) ignition coil electric |
| vi) 4 x Plugs | xvii) 2 x Mazda B1600 air cleaner |
| vii) Sleeve Cylinder | xix) Sleeve Cylinder |
| viii) Oil filter | xx) Tazz Starter |
| ix) 2 x Mazda B1600 front wheels | xxi) Mazda B1600 alternator |
| x) 6 x park plugs | |
| xi) 2 x Mazda B1600 wheeldrums | |

TIMIRE admitted to stealing the abovementioned components during an Audit Investigation and as a result, was suspended from duty with effect from 18 March 2010."

At the end of the hearing, the Disciplinary Board found the applicant guilty and recommended his discharge from the employ of the third respondent.

On 24 November 2010, the following Discharge notice was dispatched to the third respondent's Chief Transport Officer:

"DISCHARGE NOTICE
MOTOR MECHANIC II (ASIO) JEMIAS TIMIRE

1. As a result of a Board of Inquiry convened on 14 July 2010 at CIO Headquarters in respect of the abovementioned officer, the Director general has approved TIMIRE's discharge from the organization with effect from 10 November 2010.
2. In view of the above, arrangements will be made to claim his pension fund on his behalf in terms of the State Service (Pensions) (Uniformed Forces) Regulations 2001 (No. 15). The payment of any cash-in-leu of leave due to him will be done in due course.
3. In this respect, TIMIRE is requested to provide a forwarding address for any future correspondence.
4. It will be appreciated. If you, on behalf of the Director General, thank Mr. TIMIRE for his service to the organization.

5. Please ensure that all CIO cards in his possession are withdrawn and the attached Declaratum of Secrecy form on leaving the Organisation is completed and returned to the Personnel Division as soon as possible.”

On 6 December 2010, the applicant acknowledged receipt of the above notice by appending his signature on a copy of the same. However, in his papers, the applicant contends that up to this day the third respondent has not formally informed him of his discharge. This has prompted him to file this application seeking the nullification of this discharge.

In opposing papers the second respondent raises a number of points in *limine* as follows:

“IN LIMINE

4. LIS PENDENS

The present application creates a situation of *lis pendens* in that the matter is already pending in the Labour Court under case number LC/APP/818/14. Consequently, this matter is improperly before this Honourable court.

5. NON-COMPLIANCE WITH RULES OF COURT

The present application does not comply with the High Court rules in that it does not state briefly and clearly the grounds upon which the applicant seeks to have the proceedings set aside and also on the exact relief prayed for. These do not appear on the face of the application and therefore rendering this application fatally defective in its present form.

6. APPLICATION OUT OF TIME

It is common cause that the Applicant was discharged in 2010 and is only bringing the present application now. He is way out of time for instituting these proceedings since he was supposed to do so within eight weeks after having known of the dismissal. No condonation has been sought for having filed the application hopelessly well out of time. This also renders the application fatally defective and therefore improperly before this Honourable court.

7. MIS-JOINDER

There is no legal basis for joining the 1st and the 2nd Respondents in this suit. The **State Liabilities Act** is clear on who should be cited as the nominal defendant in the circumstances. The 1st and the 2nd Respondents should not have been cited in the first place in these proceedings. Apart from the misjoinder, the 1st and the 2nd Respondents have not been properly cited even if the applicant is to insist that they have to be parties.

- 7.1. Further, the 3rd Respondent has also been misjoined, but what is more critical to note is that the 3rd respondent is not even a legal persona that has capacity to be sued in its own name. The applicant has cited a non-existent party that was not supposed to be cited in the first place.

8. **EXHAUSTION OF INTERNAL REMEDIES**

The applicant has not exhausted all the internal remedies available to him before seeking recourse from the courts. He ought to have asserted his right to appeal against the finding of the Board of Inquiry to the Director General of the Central Intelligence Organisation and further, to the 4th Respondent if unsatisfied with the decision of the Director General. The present application has therefore been prematurely brought and should be dismissed.

9. For all the reasons stated above, the present application should fail on that basis alone even without going into the merits. It should therefore be dismissed with costs on a legal practitioner and client scale.”

Although, in his answering affidavit, the applicant responded to the above points in *limine*, I think the primary function of the court, before going into the rest of the preliminary points raised and considering the merits of the matter, is to determine whether or not the applicant has placed a proper application before the court. In doing so, the court will take into account that the applicant has since withdrawn the matter that was pending in the Labour Court and now wants to pursue this particular application. It is therefore crucial for this court to start by determining whether or not there is a proper application before it.

In heads of argument filed through the Civil Division of the Attorney General, the respondents, in addition to the other points in *limine*, state as follows:

“3. **APPLICATION OUT OF TIME**

The applicant was discharged in 2010 and is only bringing the present application now. The proceedings should have been brought within eight weeks after having known of the dismissal. No condonation has been sought for having filed the application hopelessly well out of time. As if that was not enough, he avers that he did not know the date on which he was discharged. This averment, with respect, is without merit. The applicant acknowledged the discharge notice on 6/12/10 by affixing his signature on the notice. Further, he complied with the notice but not reporting for duty at least four years. The notice is part of the application.

- 3.2 In light of the foregoing, it is apparent that the applicant was obliged to seek condonation first as was held in the case of **Matsambare v Gweru City Council SC-183-95** where the court held that proceedings by way of review were not instituted within the specified eight week period and condonation for the breach of rule 259 was not sought so the matter was not properly before the court.
- 3.3 In *casu*, the applicant has no sought the indulgence of the court and it is apparent from his answering affidavit that he does not believe he is obliged to seek the indulgence and thus, the application is improperly before the court.”

The above submissions are correct and as such I have no hesitation in pronouncing that there is no proper application before the court.

The applicant does not deny that on 6 December 2010, through his own signature, he acknowledged the discharge notice given to him by the “Director Administration” in the third respondent. That notice of discharge appears herein at p 2 of this judgment. Admittedly it was addressed to the third respondent’s Chief Transport Officer. However, it was acknowledged by the applicant” who proceeded to follow all the discharge formalities. The notice relate to the applicant, who, on 6 December, 2010 “read” it.

There is, in my view, no doubt that, from 6 December 2010 the applicant knew his fate with respect to his job in the third respondent. It is therefore totally unreasonable to argue that up to this day he has no knowledge of the contents of the discharge notice and hence the filing of this application on 10 November 2014 outside the requisite eight weeks, without caring to apply for condonation. Without condonation there is no valid application before the court.

I was therefore disabled to go any further in the absence of a valid application before me. It is for that reason that I found myself having no option but to dismiss the application with costs.

Messrs Chibuwe & Associates, applicant’s legal practitioners
Attorney General Civil Division, respondents’ legal practitioners