

CLEVER VUTETE  
versus  
CHAIRPERSON OF THE APPEALS COMMITTEE  
(ZIMBABWE OPEN UNIVERSITY)  
and  
ZIMBABWE OPEN UNIVERSITY

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 15 May 2018

**Opposed Matter**

Mr *N Mugiya*, for the applicant  
Mr *A K Maguchu*, for the 1<sup>st</sup> respondent

MUNANGATI-MANONGWA J: The applicant herein was employed by the second respondent Zimbabwe Open University and was discharged for violating the second respondent's Code of Conduct. He appealed against the decision of the disciplinary committee. The appellate body failed to inform applicant of the outcome of the appeal within the period provided in the Code of Conduct. Applicant is claiming a violation of his rights as enshrined in s 69 of the constitution due to the employer's failure to adhere to its own Code of Conduct. For that he seeks a declaratory order for the following relief.

It is ordered that

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' failure to process and deal with the applicant's appeal in terms of the 2<sup>nd</sup> respondent's Code of Conduct be declared unlawful and wrongful.
2. The subsequent discharge of the applicant by the respondents be and is hereby declared to be unlawful and wrongful.

3. The disciplinary proceedings against the applicant by the respondents on the basis of the obtaining allegations be and are hereby stayed permanently.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are ordered to pay costs of suit on a client-attorney scale, jointly and severally, one paying the other to be absolved.

The application is opposed.

The applicant raised a point *in limine* at the hearing that there is no opposition before the court. Mr *Mugiya* for the applicant submitted that there was no proper opposition before the court as the deponent of the opposing affidavit did not state which of the two respondents he was representing and whence from he derives his authority. He argued that merely stating that he was employed as a Human Resources Manager by the second respondent was not sufficient.

Mr *Maguchu* in response conceded that whilst the opposing affidavit could have been better drafted, it is apparent that the deponent Mr Mutaviri was deposing to the opposing affidavit on behalf of the respondents. The applicants had not provided any evidence indicating that the deponent was on a frolic of his own.

I find that the opposition should be read together with the notice of opposition. The filed notice indicates that the opposing affidavit is filed on behalf of the respondents by the respondents' legal practitioners.

That the deponent alleges that he is employed by the second respondent as Human Resources Manager, and that he purports to know the facts of the matter, and this being a labour related matter, I have no doubt that the respondents would in fact repose authority in the deponent. Further, the respondents provided the authority although it then came as an attachment to the heads of argument. In my view there was/is no prejudice suffered by the applicants. I find that there is no merit in the point raised as what is crucial is that the deponent is deposing to what is in his personal knowledge. Accordingly the point is dismissed.

It is not denied that the decision of the appeals committee was not timeously availed to the applicant. The failure by the respondents to adhere to time lines provided by their code in peremptory terms becomes unlawful. The pertinent question becomes what is the effect of the delay.

Does the delay entitle the applicant to reinstatement or conversely does the delay render the applicant's discharge wrongful and unlawful. Further does the delay justify the relief sought by the applicant to have the court declare the allegations stayed permanently.

I identify with Mr *Maguchu* (counsel for respondents')'s argument that the appeals committee failed to determine the appeal timeously does not render their decision wrong. This position finds support in the sentiments by Gillespie J in *Nyoni v Secretary to Public Service Labour & Social Welfare & Another* 1997 (2) ZLR 516 (H) at 523 A-B which I find compelling

“an employee validly suspended does not, because of delay alone, become entitled to reinstatement nor to reversal on review of a subsequent dismissal. Instead, they (the parties) each have available to them the remedy of mandamus to enforce due compliance with that which is timeous.”

Thus, failure to comply with a code of conduct by way of delays in this case where applicant's appeal had to be determined within 14 days does not result in reinstatement. The delay in the hearing of the appeal did not in any way render the initial decision of discharge invalid. The delay pertained to deliberations on the correctness of the decision. Given that situation, a *mandamus* would be the appropriate legal remedy. This would entail instituting proceedings to compel the employer or the committee concerned to comply with the times provided in the code.

Whilst it is appreciated that the applicant suffered inconvenience necessitated by the delay in availing the outcome of the appeal, that does not have the effect of nullifying the verdict of the initial disciplinary hearing nor the findings of the appeals committee.

Further, the fact that applicant is no longer employed or was discharged does not lie in the delay in the appeal proceedings but arises out of being found guilty of violating the code of conduct. It is borne by considerations of the merits of the case.

The case of *Air Zimbabwe (Pvt) Ltd v Mnensa & Another* SC 89/04 is instructive. CHIDYAUSIKU CJ (as he then was) stated:

“a person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent.”

It is clear to me that applicant seeks to be exonerated not so much out of the belief of innocence but rather squarely on the basis of the delay. Whilst failure to adhere to time lines provided in codes of conduct should not be condoned due to the ramifications this may have on a

person's rights, the effect of the delay on appeal in this matter can never be interpreted to have invalidated the proceedings that led to applicant's conviction.

Since the application succeeded partially in so far as declaring first and second respondent's failure to deal with applicant's appeal timeously declared unlawful, applicant is entitled to 50% of his costs. The rest of the relief sought is denied.

Accordingly it is ordered as follows:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' failure to process and deal with the applicant's appeal in terms of the 2<sup>nd</sup> respondent's Code of Conduct is declared wrongful and unlawful.
2. The relief sought in clauses 2-4 of the draft order is dismissed.
3. 1<sup>st</sup> and 2<sup>nd</sup> defendants to pay 50% of applicant's costs jointly and severally the one paying the other to be absolved.

*Mugiya & Macharaga*, applicant's legal practitioners