REPORTABLE (2)

Judgment No. SC. 2/06
Civil Appeal No. 167/2005

MARTIN TICHAONA MUCHERO v THE GRAIN MARKETING BOARD

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, FEBRUARY 14, 2006

*Ms J B Wood*, for the appellant

*G E Mandizha*, for the respondent

CHEDA JA: After hearing both counsel on this matter, we made the following order:

> "IT IS ORDERED THAT:
>
> 1. The appeal be and is hereby allowed with costs.
>
> 2. The judgment of the court *a quo* be set aside and the application in case No. HC 13115/00 be remitted to the court *a quo* for hearing on the merits by the same judge.
>
> 3. The respondent is given leave to file opposing papers to the application in case No. HC 13115/00 within fourteen days of this order."

We indicated that our reasons would follow in due course. These are the reasons.

On 1 March 2000 the appellant was issued with a letter of suspension by the Ministry of Lands and Agriculture. On 8 March 2000 the Grain Marketing Board served him with a letter of suspension on full salary and benefits. On 24 October 2000 he was served with a letter of suspension and the commencement of disciplinary proceedings.

The appellant was also arrested and detained by the police on allegations made against him by the respondent.

Thereafter a lot of correspondence was exchanged between the legal practitioners of the parties. A lot of other events occurred that are not relevant to this appeal.

What is relevant is that there was an urgent Chamber application before ADAM J, filed in December 2000, which was recorded as case No. HC 13115/00. IN this application the appellant was seeking a provisional order in the following terms:

> "PROVISIONAL ORDER
>
> 68. I pray that the Honourable Judge disqualifies (Messrs) Dube, Manikai & Hwacha from representing the Grain Marketing Board in this matter.
>
> 69. I pray that the Honourable Judge declare, with costs, the suspension of the applicant as per letter dated 24th October 2000 by the first respondent unlawful and therefore null and void.
>
> 70. I pray that the Honourable Judge grant an order compelling the first respondent to reinstate my salary and benefits with immediate effect retrospectively to the 24th October 2000 when these benefits were withdrawn.
>
> 71. I also pray that the Honourable Judge grant an order compelling the first respondent to pay me back my salary entitlement for October 2000 which the first respondent unlawfully withdrew from my account."

In response to the first prayer in para 68 of the Provisional Order, Mr Hwacha, of Messrs Dube, Manikai & Hwacha, filed an affidavit arguing that he had never acted for the appellant. The affidavit was not sworn.

When the application was placed before ADAM J, in Chambers, he directed by a note on the record that:

> "Since the matter is opposed, it is converted to a court application, with (the) parties to file heads of argument after Mr Hwacha's opposing affidavit is a sworn affidavit."

It seems there was a delay in complying with the above directive, because when the application was heard before BHUNU J the appellant objected to the presence of the respondents, arguing that they were barred. Following submissions made before it, the court *a quo* ruled that the bar be lifted in respect of the first respondent (now the respondent).

However, the court went on to rule in respect of the main application, holding that the matter of the main application was pending before the Labour Court and could not be entertained by the High Court because of the provisions of s 124 of the Labour Relations Act [*Chapter 28:01*] ("the Act"), which provide as follows:

> "**124 Protection against multiple proceedings**
>
> (1) Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted or shall continue any other proceedings in respect of the same or any related matter without first advising the authority, court or tribunal which is responsible for or concerned with the second mentioned proceedings of the fact of the earlier proceedings.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence."

The court *a quo* held that since the appellant had fallen foul of the above provisions by not advising the High Court accordingly, the reference of the

matter to it was therefore incompetent for want of compliance with s 124 of the Act. The main application was dismissed with costs.

When the matter came before us on appeal, it was argued for the appellant that the court *a quo* erred, in that it determined a matter that was not properly before it, the issue of the merits on the main application had not been argued, and there were no opposing papers for the then respondent.

A perusal of the record suggests that ADAM J may have regarded Mr Hwacha's affidavit as an opposing affidavit for the main application when in actual fact it was not.

The respondent regarded a letter written on behalf of the respondent dated 14 November 2000 as indicating that the matter was pending before the Labour Court. Not much need be said about the letter now, since Mr *Mandizha*, for the respondent, finally conceded that the letter does not establish that the matter was pending before the Labour Court.

It was for these reasons that we made the order referred to after the hearing.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

*Byron Venturas & Partners*, appellant's legal practitioners

*Muzangaza, Mandaza & Tomana*, respondent's legal practitioners