ENISON KAHONDE
versus
UNKI MINES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 19 January and 8 June 2022

Opposed Application

Applicant in person
Mr *H Muromba*, for the respondent

MANYANGADZE J: This is an application for a compelling order in which the applicant seeks an order stated in his draft order as follows:

> "1. The Respondent be and is hereby ordered to release and submit to the applicant or his legal practitioners, a complete transcribed record of proceedings for the disciplinary hearing held on the 23rd of May 2005 within seven (7) days from the date of this order.
> 2. The Respondent to pay costs of suit."

The facts forming the background to the case are that the applicant was employed by the respondent as Cost Controller from December 2003 to May 2005. On 18 May 2005, the applicant was charged with misconduct, in terms of the respondent's code of conduct. The charges were fraud, forgery and uttering and giving false information.

In a decision issued on 24 May 2005, the applicant was found guilty as charged and dismissed from employment. The decision referred to a disciplinary hearing held on 23 May 2005, the previous day.

The applicant attempted an internal appeal on 25 May 2005. I say attempted because what is on record is only a letter to the Human Resources Manager, requesting for what he called "an appeal meeting". That is all there is to that letter. There are no grounds of appeal. It does not read like a notice of appeal at all. There is no record of what happened subsequent to that letter, in terms of the internal appeal process.

The next correspondence on record is a letter to a Labour Officer written by applicant's legal practitioners dated 26 February 2016, apparently referring the matter for adjudication.

Save for a notification to attend a hearing, there is no record of what took place before the Labour Officer.

It must be noted that the referral to a Labour Officer was made 11 years after applicant's dismissal.

The matter ended up at the Labour Court on 11 July 2016. In an order handed down on 13 July 2016, MHURI J struck the matter off the roll. The court ruled that the matter was improperly before it, as there was no decision to be appealed against.

On 6 September 2018, the applicant filed an application in the High Court, in which he sought the setting aside of his dismissal and an order that he be reinstated. In an order handed down on 29 October 2019, under Case No. HC 8150/18, PHIRI J dismissed the application.

Undeterred, the applicant then filed the instant application on 27 May 2021. He seeks an order compelling the respondent to furnish him with the record of disciplinary proceedings held on 23 May 2005, 17 years ago.

The respondent has raised two points *in limine*. These are that:

(i) The applicant is approaching the court with dirty hands, in that he has not complied with the order of the court in HC 8150/18 on the payment of costs.

(ii) The application discloses no cause of action.

At the hearing of the matter, the respondent abandoned the first point *in limine*. The matter was reserved for judgment after argument on the second point *in limine*.

The respondent avers that the applicant has no cause of action against it. He has not laid a valid basis for the order he seeks.

It seems to me that this issue i.e. cause of action, though raised as a point *in limine*, touches on the merits of the matter. This is so when one takes into account what a cause of action is all about. It is constituted by all the facts on the basis of which a claim is made. In this regard, reference was made to the case of *ZIMASCO (Pvt) Ltd* v *Sah He Mining (Pvt) Ltd* HH-654-15. In that case, CHIGUMBA J remarked at p 4 of the cyclostyled judgment:

> "So in order for there to be a "cause of action', every fact which gives rise to a successful claim must be present. Every act which is relevant to the claim, if the claim is to succeed must be present before it can be said that there is a cause of action."

I am in full agreement with these remarks. The Judge made reference to the cases of *Mukahlera* v *Clerk of Parliament & Ors* 2005(2) ZLR 365(S), *Dube* v *Banana* 1998(2) ZLR 92(H), *Peebles* v *Dairiboard Zimbabwe* (*Pvt*) *Ltd* 1999(1) ZLR 41 (H).

In *Dube* v *Banana*, SMITH J stated at p 95G:

> "Generally, the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion regarding the unlawfulness and fault and also damages. The occurrence of either …., loss or emotional, harm (for example) *contumelia*, pain or mental illness completes the delictual cause of action."

Part of these remarks were cited by PATEL J (as he then was) in *Mukahlera* v *Clerk of Parliament & Ors supra*, together with other authorities on the subject. The learned Judge stated, at p 368H-369A-B:

> "The "cause of action" in relation to a claim is "the entire set of fact which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle plaintiff to succeed in his claim" (per WATERMYER J in *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel* v *Controller of Customs and Exercise* 1983 (2) ZLR 82(H) at 86, GUBBAY J (citing *Controller of Customs* v *Guiffre* 1971(1) RLR 91 (G) 197 (2) SA 81(R) at 84A, and *Read* v *Brown* (1888) 22QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court"."

Again, SMITH J, in *Dube* v *Banana*, 1998(2) ZLR 92(H) at 95, observed that:

> "The cause of action mean the conbination of facts that are material for the plaintiff to prove in order to succeed in his action. See also *Peeble* v *Dairiboard Zimbabwe* (*Pvt*) *Ltd* 1999 (1) ZLR 41."

Thus, when contending that the applicant has no cause of action against the respondent, the respondent is in essence saying it has no case to answer. The applicant has not disclosed a basis or recognizable grounds upon which his claim against the respondent should be upheld. In determining that aspect, the court inevitably traverses some aspects of the merits of the matter.

Be that as it may, I must consider the averments made by the parties on that point raised as it was, as a point *in limine*.

The respondent avers that the applicant's founding affidavit does not clearly lay out the material facts which justify granting the order he seeks. It contains bald assertions that the respondent's conduct is unlawful, without substantiating in what respect the conduct is unlawful. The respondent points out that the founding affidavit is no more than a narration of the factual background to the matter. It does not plead the cause of action.

On the other hand, the applicant insists that his founding affidavit states the purpose for which he requires a transcript of the record in question. He points to paragraphs 11 and 12 of the founding affidavit. A reading of these paragraphs does not show the reason why the

applicant wants the record. He only alleges that the respondent has failed, refused or neglected to make available the record and that such conduct is unlawful and unreasonable.

The only paragraphs in which an attempt is made to state the reason for the order sought are paragraphs 9 and 10 of the founding affidavit. In those paragraphs, the applicant states that he requires the record in order to initiate or institute proceedings against the respondent. He does not, however, clarify what proceedings he intends to institute.

This is where the applicant faces a serious, if not insurmountable, legal hurdle. What proceedings does he intend to "initiate" or "institute"? There is an extant order of this court where his application to set aside his dismissal from employment and be reinstated was dismissed. As already indicated, this order was handed down by PHIRI J on 29 October 2019, under case number HC 8150/18. A perusal of that record shows that the applicant filed a court application for a declarator, in which he sought the following order:

> "IT IS ORDERED THAT:
> (a) It be and is hereby declared that the disciplinary proceeding against applicant by respondent be and is hereby declared a nullity.
> (b) The dismissal of the applicant by the respondent be and is hereby set aside and respondent is ordered to reinstate the applicant without loss of salaries and benefits.
> (c) Failure of (b) above, the respondent be and is hereby ordered to pay applicant salaries and benefits from date of dismissal to date of this judgment at the rate of US$9 000 per month, plus damages in lieu of reinstatement in the sum equivalent to 24 months' salary and benefits.
> (d) Respondent be and is hereby ordered to pay costs of suit on higher scale.
>
> **Alternatively**
> 1. The respondent be and is hereby ordered and directed to conduct the appeal proceedings within 10 days of this order and to complete such proceeding within 14 days from date of such commencement.
> 2. Respondent to pay costs on higher scale."

The record shows that extensive heads of arguments were filed by the applicant and the respondent in motivation of the granting of the application and its dismissal, respectively.

The court issued the following order:

> "WHEREUPON, after reading documents filed of record and hearing counsel,
> IT IS ORDERED THAT:
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> The application be and is hereby dismissed with costs on the ordinary scale."

No appeal was noted against that order. It is therefore an extant order of this court. In light of this, no meaningful, if any purpose at all, is served by the filing of the instant application. What does the applicant intend to achieve with the said record of proceedings,

even if it was available, in the face of a dismissal of his application of 6 September 2018? After dismissal of the application on 29 October 2019, no further legal proceedings in relation to the dismissal were pursued by the applicant.

In the circumstances, I find merit in the point raised by the respondent that the application discloses no cause of action. The court does not give orders for the sake of it. This application must be premised on a well substantiated cause of action. The point *in limine* must be and is accordingly upheld. This is one of those points *in limine* that go to the root of the matter. Upholding it results in dismissal of the matter and not simply striking it off the roll.

GUVAVA JA in the case of *Fadzai John* v *Delta Beverages Limited* SC 40/17, at pages 6 and 7 of the cyclostyled judgment, pointed out that where defects in an application go to the root of the application, the court can properly dismiss such an application instead of merely striking it off the roll.

In the result,

IT IS ORDERED THAT:

1. **The point *in limine* raised by the respondent be and is hereby upheld.**
2. **The application be and is hereby dismissed.**
3. **The applicant bears the respondent's costs.**

Kantor & Immerman, respondent's legal practitioners