Judgment No. S.C. 6/02
Civil Appeal No. 139/01

MAXWELL MWANYISA v

(1) THE MINISTER OF FINANCE
(2) THE CONTROLLER, DEPARTMENT OF PRINTING AND STATIONERY
(3) THE PUBLIC SERVICE COMMISSION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 28, 2002

J Musimbe, for the appellant

S Gurure, for the respondents

EBRAHIM JA: The appellant was employed in the Public Service in the Department of Printing and Stationery. He absented himself from duty on 1 July 1999 without notifying his superiors or being granted leave. On 31 December 1999 he was discharged from the Public Service on the grounds of absence from duty without being granted leave. On 31 May 2000 he filed two applications in the High Court. In the first matter he applied for condonation of the late noting of his application for the review of the decision of the respondents to discharge him. In the second, he applied for the review and setting aside of the decision to discharge him.

His case is that some time in February 1999 he experienced a mild but persistent headache and he was constantly feeling dizzy. He took medication and reported for work but his headaches became more acute and unbearable. He also

developed a "mental condition" which caused him not to remember or appreciate what he was doing. He also became violent for no reason. From July the mental illness became worse and he could not go to work or look after his family. He went for treatment to a herbalist. He was also having problems with his wife whom he alleged was not co-operative and did not report his condition to his employer as she had agreed to do. In October 1999, when he was recovering and preparing to return to work, his mental illness struck again. Whilst wandering around Mufakose one night he was set upon by some people and severely assaulted. He sustained a fracture of the tibia and fibula of his left leg and was kept in hospital for four days. His leg was kept in plaster until 1 March 2000. Even after the removal of the plaster his leg was badly swollen and he had difficulty in walking.

The second respondent, in a letter dated 31 December 1999, advised the appellant that he had been discharged in terms of s 25(b) of the Public Service (Disciplinary) Regulations, 1992, for absenting himself from duty for a continuous period in excess of thirty days without having been granted leave of absence. It noted that the appellant had a "very bad record" of absenting himself from duty without authority and that he had failed to improve his attitude towards his work despite several warnings.

As regards the application for condonation of the late filing of the application for review, the appellant's counsel submitted that the delay was only three months and therefore it was not inordinate and that the reasons the appellant gave for the delay in filing his application were reasonable. He had broken his leg and was not able to walk. Also, that he had not received his salary from October 1999 and so

he had no money to brief a lawyer to handle his case. He also submitted that the prospects of success of his application on review were good.

The learned judge *a quo* was not impressed and observed:

> "In my view, Maxwell's explanations for his failure to file his application for review within the prescribed period of eight weeks are not convincing. The court cannot accept that because of his broken leg Maxwell was unable to file his application for review by the end of February 2000. Then when one looks at the merits of the application, it is clear that the prospects of success are minimal. Maxwell did not appear for work on 1 July 1999. For the next seven months he did not contact the second or the third respondent(s) and advise that he was not able to come to work. After his absence from work for three months his salary was stopped and that evoked no response from him. When he was discharged on 29 December 1999 Maxwell had been absent from work for six months without advising the second respondent of the reasons why he had not reported for duty. It is difficult to accept that the injuries he sustained caused him so much pain and suffering that he was unable to visit his workplace and advise his employer of his mental and physical ailments. Even if one accepted that he could not personally visit his workplace, it is impossible to believe that he could not send a message to his workplace."

In my view, this reasoning is difficult to fault.

The appellant's counsel also submitted that the discharge was wrongful and irregular because he had not been given an opportunity to respond to the charges of misconduct. He submitted that the *audi alteram partem* principle was not observed. The appellant had been ill and therefore there were good and substantial reasons why he did not turn up for work.

The learned judge dealt with this submission thus:

> "I accept that ordinarily, where an employee is charged with misconduct, he must be afforded an opportunity to respond to the charge against him. It is different, however, where the employee had deliberately

absented himself from his workplace for an unreasonably lengthy period. In *Girjac Services (Pvt) Ltd v Mudzingwa* SC-41-99 the Court considered the case where an employee had failed to present himself at his workplace. At p 4 of the cyclostyled judgment GUBBAY CJ said:

> 'A distinction must be drawn between absenteeism due to illness or some other form of incapacity, and wilful abscondment. In the former situation the employer cannot *ex eo* cancel the contract. Incapacity is not a breach of contract. Nonetheless, the fact that the employee is incapacitated by a cause beyond his control - by an act of God, if you like - does not deprive the employer of the right to terminate the contract where the absence was unreasonable. Non-performance by the employee of his duties for an unreasonable time justifies the employer in refusing to perform his part of the contract and in considering his obligations at an end. The crucial question of what is reasonable in such cases depends on the surrounding circumstances. What has to be considered is the nature of the business and whether the employee's absence may cause irreparable damage to the employer.'

In that case it was held that by staying away from work for seventeen days the employee had repudiated his contract of employment. In this case, the respondents followed the requirements of the Public Service (Disciplinary) Regulations, 1992, but allowed Maxwell much greater latitude than could have been expected. Instead of exercising the power of discharge after Maxwell had been absent from duty without leave for a period of thirty days, the respondent(s) only acted after he had been absent for six months.

For the foregoing reasons, it appears that Maxwell's prospects of success are very bleak."

The learned trial judge declined to condone the late noting of the application and held that the application for review fell away. In doing this he exercised his discretion.

It cannot be said that he exercised his discretion injudiciously – see *Cargo Carriers (Private) Limited v Zambezi & Ors* 1996 (1) ZLR 613 (S); *Barros & Ano v Chimponda* 1999 (1) ZLR 58 (S); *ZFC Ltd v Geza* 1998 (1) ZLR 137 at 139; *Cluff Minerals Exploration (Zimbabwe) Ltd v Union Carbide Management Services*

(Pvt) Ltd & Ors 1989 (3) ZLR 338 (S) at 344-5; and *Robinson v Minister of Lands, Agriculture and Rural Resettlement & Anor* 1994 (2) ZLR 171 (S).

It is trite that we therefore cannot interfere.

It is for these reasons that at the conclusion of the hearing of this appeal we dismissed the appeal with costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

J Musimbe & Associates, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners