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Judgment No. SC 25/10
Civil Appeal No. 213/09

(1) RICKY NELSON MAWERE (2) DAVID NYABANDO v

(1) THE CENTRAL INTELLIGENCE ORGANISATION
(2) THE DIRECTOR, ADMINISTRATION, CENTRAL INTELLIGENCE ORGANISATION
(3) THE MINISTER OF STATE AND NATIONAL SECURITY

SUPREME COURT OF ZIMBABWE
MALABA DCJ, SANDURA JA & ZIYAMBI JA
HARARE, MAY 18 & OCTOBER 4, 2010

J B Wood, for the appellants

F Chimbaru, for the respondents

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellants' application for the confirmation of a provisional order granted by the High Court on February 2, 2009.

The background facts in this matter were set out by this Court in *Ricky Nelson Mawere & David Nyabando v The Central Intelligence Organisation* SC 30/07. That was a judgment in a Constitutional application brought to this Court by the first appellant ("Mawere") and the second appellant ("Nyabando") against the first respondent ("the C.I.O.") in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"), for a declaratory order stating that the delay by the C.I.O. in

dealing with their suspension from duty for more than eight years was a violation of their right to a fair hearing within a reasonable time, guaranteed by s 18(9) of the Constitution.

Mawere and Nyabando had been notified on December 29, 2005 that in terms of the Public Service Regulations, 2000 (Statutory Instrument 1 of 2000) ("the Regulations") a board of inquiry had been convened to inquire into the allegation that they had committed an act of misconduct involving theft or making improper or unauthorised use of public funds amounting to Z$16 972 784.32.

Section 18(9) of the Constitution, relied upon by Mawere and Nyabando in the constitutional application, reads as follows:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

After considering the submissions made by both counsel, this Court dismissed the constitutional application, mainly because, on the facts, Mawere and Nyabando had failed to establish that they were entitled to the protection guaranteed by s 18(9) of the Constitution, in respect of the disciplinary hearing by the board, as the board was not covered by the expression "court or other adjudicating authority established by law" in s 18(9) of the Constitution.

After the dismissal of the constitutional application, the C.I.O. notified Mawere and Nyabando, on January 12, 2009, that the disciplinary hearing by the board would be held on February 5, 2009.

That notification prompted Mawere and Nyabando to file an urgent chamber application in the High Court on February 4, 2009, against the C.I.O., seeking a provisional order in the following terms:

> "**Terms of Final Order**
>
> That (the) respondent show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. The respondent be and is hereby ordered and directed to lift the suspension of the applicants immediately upon being served with this order.
>
> 2. The respondent be and is hereby ordered and directed to reinstate the applicants without loss of salaries and benefits from the date of their suspension.
>
> 3. The respondent shall pay costs for this application.
>
> **Interim Relief Granted**
>
> Pending the determination of this matter, the applicants are granted the following relief:
>
> 1. The respondent be and is hereby ordered and directed not to convene the board of inquiry in respect of the applicants which it intends to convene on 5 February 2009, or at any time thereafter until the finalisation of this matter."

The provisional order set out above was granted by the High Court on February 6, 2009, but an application for the confirmation of the order was dismissed with costs on September 3, 2009. Aggrieved by that result, the appellants appealed to this Court.

In my view, the provisional order was fatally defective, and should not have been granted. I say so because the interim relief granted was in effect a final order restraining the C.I.O. from convening the board.

In terms of the interim relief granted, the C.I.O. was restrained from convening the board "until the finalisation of this matter". What this meant was that until the High Court determined whether the appellants' suspension should be lifted and the appellants reinstated, the C.I.O. could not convene the board. In other words, the board could only be convened after the High Court had made that determination. In my view, at that stage there would be no need for convening the board because the High Court would have finally determined the issues of suspension and reinstatement.

Thus, by obtaining the interim relief the appellants in fact obtained a final order restraining the C.I.O. from convening the board.

The granting of interim relief which has the same substantive effect as a final order is impermissible, because interim relief is usually granted once the applicant has established a *prima facie* case, whereas a final order is only granted when the applicant has established his case on a balance of probabilities.

Where, therefore, the interim relief granted has the same substantive effect as a final order, the granting of such interim relief means that the applicant is granted a final order when only a *prima facie* case has been established. This is undesirable and impermissible.

In the circumstances, the appeal is dismissed with costs.

MALABA DCJ: I agree

ZIYAMBI JA: I agree

Nyikadzino, Koworera & Associates, appellants' legal practitioners

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