MUSA MANYIKA
versus
LEABRIDGE INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 29 November 2021 & 11 May 2022

Court Application

O Mushuma, for the applicant
M Hogwe, for the respondent

MANZUNZU J: In this court application the applicant seeks a declaratory order in the following terms;

"IT IS ORDERED THAT"

1. The applicant's suspension on 5 December 2014 together with the disciplinary proceedings instituted by the respondent against applicant and presided over by the late Mr Pardon Chakanyuka as the disciplinary authority are null and void and of no legal force and effect.
2. The applicant is entitled to reinstatement to his position in respondent's employ without loss of salaries and benefits from 7 July 2014 provided that if reinstatement is no longer an option, the applicant is entitled to payment of damages in lieu of reinstatement.
3. The respondent shall pay applicant's costs of suit."

The application is opposed. The respondent has raised two preliminary points which this judgment is set to resolve.

APPLICANT'S CASE

On 12 April 2013 the applicant was employed by the respondent as a sales representative. On 7 July 2014 the applicant was suspended from work without pay and benefits pending a disciplinary hearing. A disciplinary hearing chaired by one Pardon Chakanyuka was held on 24 July 2014. The applicant was charged with contravening s 4 (f) and s 4 (g) of SI 15 of 2006. When the hearing delayed in completion, the applicant challenged the same on 22 September 2014.

On 22 October 2014 the applicant referred the matter to a labour officer in terms of s 101 (6) of the Labour Act, [*Chapter 28:01*]. The outcome was that the parties reached a settlement in which the applicant was to be reinstated with effect from 1 December 2014. On 5 December 2014 the applicant was suspended with an invitation to attend a disciplinary hearing. The charges were the same as before with one additional charge. Disciplinary proceedings commenced on 11 December 2014 before Pardon Chakanyuka. The applicant protested against the fairness of the proceedings given among other things that the respondent had not paid him benefits accruing from the settlement agreement. The respondent did not take

heed. As a result, the applicant filed an application for review with the Labour Court on 16 December 2014. The disciplinary hearing proceeded on 17, 18 and 19 December 2014. The applicant was found guilty and discharged from employment as a penalty.

Applicant said he requested for reasons for the decision with intent to file an appeal with an Appeals Officer, which reasons never came.

Without giving sufficient history of the application for review before the Labour Court, in which the applicant challenged the fairness of the disciplinary proceedings, the applicant says on 21 May 2020 the Supreme Court heard his appeal against the outcome of the review application by the Labour Court. The Supreme Court reserved judgment.

On 31 December 2020 Mr Pardon Chakanyuka passed on. By then the applicant says no reasons had been furnished.

It is on the basis of these facts that the applicant seeks relief as outlined above.

RESPONDENT'S CASE

The first reaction by the respondent was that the application is *lis pendens*. The reason being that when the applicant was tried before the disciplinary tribunal, he was convicted on the third charge and was meted with a penalty of dismissal. This was at a time the applicant had filed an application for review with the Labour Court. The outcome of that review application was a default judgment on 20 May 2015 against the respondent in the following terms;

> "1. The disciplinary proceedings by respondent's disciplinary authority in respect to charges 1 and 2 be and are hereby quashed.
> 2. The disciplinary proceedings in respect to charge 3 are hereby remitted back for a hearing de novo.
> 3. Applicant be and is hereby reinstated to his original position without loss of salary and benefits with effect from 7 July 2014 to date of reinstatement.
> 4. In the event that reinstatement is no longer tenable, applicant is to be paid damages in lieu of reinstatement, the quantum of which is to be agreed by the parties, failing which either party can approach this court for assessment.
> 5. Respondent is to pay costs."

The respondent successfully applied for the rescission of this order on 4 March 2016 when the following order was granted by the Labour Court;

> "1. The judgment of this Honourable Court granted on 20 May 2015 be and is hereby partially rescinded by striking out paragraphs 2, 3 and 4.
> 2. There is no order as to costs."

Following a successful application for leave to appeal to the Supreme Court the applicant filed his appeal under SC 384/17 on 20 June 2017 against the order of 4 March 2016

by the Labour Court. The appeal was heard and judgment was reserved on 21 May 2020. In the meantime, on 13 April 2021 the applicant has brought this application in which respondent has raised the preliminary point of *lis pendens*.

The authors Herbstein and Van Winsen in the *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed* at page 605 state the following concerning *lis pendens:-*

> "*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court… It matters not, in my view, that the matters have been brought by way of application and the other by way of action. It is not so much the vehicle by which the matters have been brought to court but the nature of the issues and relief sought, that is the substance and not the form."

In *Nestle (SA) (Pty) Ltd* v *Mars Incorporated* (2001) 4 ALL SA 315 (SCA), it was stated as follows:

> "The defence of *lis alibi pendens* shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of these elements there is no potential for a duplication of actions."

It is therefore trite that for the defence of *lis pendens* to succeed the following requirements must be met.

a) There must be another pending matter
b) Between the same parties
c) On the same cause of action
d) In respect of the same subject matter.

The fact that there is another matter pending before the Supreme Court in respect of the same parties is not in dispute. The question is, is the matter before the Supreme Court on the same cause of action and in respect of the same subject matter.

CAUSE OF ACTION

What is a cause of action?. In *Dube* v *Banana 1998 (2) ZLR at 95* the court said;

> "a cause of action is a combination of facts that are material for the plaintiff to prove in order to succeed in his action." In *Mukhahlera* v *Clerk of Parliament and Others* HH 107/07 the court defines a cause of action as; "the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his action."

In Booker v *Mudhandha and Anor SC 5/18* the court on what constitutes 'a cause of action' cited with approval the definition by WATERMEYER J in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626. At 637 that:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

Mr Hogwe for the respondent argued that if applicant's appeal were to succeed, the effect is that the applicant's dismissal will be set aside and he will be reinstated with full benefits something which this application seeks to achieve. In other words, if the appeal succeeds, the order by the Labour Court of 20 May 2015 becomes operative. The essence of that order is that the applicant is reinstated and that the disciplinary tribunal will sit to deal with the third charge against the applicant *de novo*.

Mr Mushuma for the applicant argued from a position that the proceedings before the disciplinary authority were rendered a nullity by the death of the chairperson, when no court has declared as such. The fact that there is an appeal pending in the Supreme Court cannot be disputed. It is inappropriate for Mr Mushuma to argue that the appeal is rendered academic and moot on account of his views of the disciplinary proceedings. The argument was a diversion of whether the appeal and present application share the same cause of action.

The applicant's contention is that the matter before the Supreme Court is based on the conduct of the disciplinary authority while this application is based on a supervening impossibility that of the death of the chairperson.

In both instances, in my view, the applicant seeks to set aside the disciplinary proceedings to pave way for his reinstatement. The cause of action is the same. The relief sought in the current application is what the Labour Court granted on 20 May 2015 though for different reasons. Before the Labor court it was a question of irregularities in the proceedings and *in casu* its supervening impossibility. This application is a duplication of the relief sought in the matter before the Supreme Court. It is based on the same cause of action whether or not the applicant must be reinstated.

SAME SUBJECT MATTER

The subject matter of the two cases is identical, that is whether the disciplinary proceedings should be set aside. It is neither here nor there the reason for setting aside the disciplinary proceedings. The subject matter does not change because the applicant says in one case, the proceedings were irregular and, in another case, that there is a supervening impossibility.

In both situations the subject matter remains one, that is to set aside the proceedings.

The respondent did not pursue the second point *in limine*.

However, the plea of *lis pendens* has merit and must succeed.

DISPOSITION

1. The point *in limine of lis pendens* succeeds.
2. The application be and is hereby dismissed with costs.

Mushuma Law Chambers, applicant's legal practitioners
Hogwe Nyengedza, respondent's legal practitioners