

RATANG MUYAMBO

Versus

BEITBRIDGE RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 FEBRUARY 2020 & 3 JUNE 2021

Opposed application

K. Ngwenya for the applicant

J. J. Moyo for the respondent

TAKUVA J: This is an application for a declarator against the respondent. Applicant seeks an order declaring that the respondent's deduction of her health allowance extended to her by the Ministry of Health and Child Care is illegal and unlawful. Further applicant seeks an ancillary order for the payment of all monies that have been deducted by the respondent to date.

Background facts

Applicant is employed by the respondent as an Executive Officer Health. By virtue of that position the Ministry of Health and Child Care put in place an arrangement for some allowable deduction allowance for health personnel in councils including the applicant. The applicant's allowance total \$218,00 per month. Applicant received her health allowance without any challenges until 2010 when the allowance was deducted from her salary by the respondent. Following discussions, the issue was rectified. However in March 2015, respondent started again deducting the applicant's health allowance from applicant's salary.

Aggrieved, applicant approached the Ministry of Labour arguing that the effect of the deduction of her health allowance was a reduction in her salary contrary to the provisions of the Labour Act Chapter 28:01. The applicant also claimed payment of all the monies deducted by the respondent up to that date. A Designated Agent eventually dealt with the matter and dismissed the applicant's claim.

In this application, applicant argued that the relief she seeks is different from the relief granted by the Designated Agent in that the dispute before the Designated Agent was whether the applicant's salary had been unlawfully reduced whereas the effect of a declarator is to declare the applicant's "entitlement to the allowance". Applicant agrees that one of the issues before the Designated Agent was "whether or not the claimant's salary was unilaterally reduced". In fact, the issue is put beyond any reasonable doubt by the applicant in the following words; "what the applicant has referred to this Honourable Court is that a declaration be made that the deduction by the respondent of her health allowance paid by the Ministry of Health and Child Care be declared unlawful and illegal. Indeed no pronouncement was made by the Designated Agent on this issue. Accordingly, it is submitted that the respondent's contention

that “a tribunal of competent jurisdiction has made a pronouncement of the applicant’s legal entitlement to her health allowances has no merit and cannot be sustained”. (my emphasis)

According to the applicant there are only three issues for determination namely;

- “(i) whether the respondent has any authority or legal basis to deduct applicant’s health allowance paid by the Ministry of Health and Child Care?
- (ii) whether the applicant’s legal entitlement to the health allowance paid by the Ministry of Health and Child care has been determined by a tribunal of competent jurisdiction; and
- (iii) whether the applicant has managed to satisfy the requirements for a declarateur and the relief she is seeking”.

Applicant proceeded to argue her case on the above premise.

The application was opposed by the respondent on the ground that the matter has already been determined by a tribunal of competent jurisdiction. In the circumstances, the applicant ought to have taken the necessary steps to challenge the decision that was made either through an appeal process or one of review so that the decision if wrong at law, may be set aside.

The defence is one of *res judicata*. In my view this is the issue before this Court. The requirements of the principle of *res judicata* were set out in the following cases; *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC); *Towers v Chitapa* 1996 (2) ZLR 261(H); *Farai Chitsinde and Nyasha Chitsinde v Stanny Musa and the Registrar of Deeds and The Deputy Sheriff* HH-274-2010; *S. Makonyene v Alfred Muchini and the Sheriff and The Master of the High Court* HH-46-2013.

In a nutshell the requirements are that;

- (i) The two matters involve the same parties;
- (ii) The two matters must involve the same issues; and
- (iii) The earlier matter having been brought before a court of competent jurisdiction and which court made its determination on that issue – see the *Chitsinde* case *supra*.

In casu, it is common cause that in both the matter before the Designated Agent, and in this application, applicant and the respondent remain the same parties.

As regards the second requirement, there exists a dispute as to whether the issue is the same. I must note that this requirement is interpreted expansively so as to permit the probability of the defence being satisfactorily invoked in respect of an issue determined as part of the *ratio decidendi* of the previous decision – see *Towers v Chitapa supra*.

In order to unravel the origin and basis of this dispute, it is necessary for the factual matrix to be closely examined. It is common cause that applicant presented a set of facts relating to a labour dispute to a competent labour tribunal and urged that tribunal to find that the deduction by the respondent from her pay and benefits of an allowance given by the Ministry of Health and Child Care, was unlawful and that the respondent should be ordered to

pay back amounts so deducted since 2015. This version is consistent with applicant's written submissions to the Designated Agent. What then is the version presented to this Court? The answer is in applicant's founding affidavit to this application.

A reading of the submissions by the applicant in the tribunal below and her founding affidavit in this application present the same case. I take the view that in both presentations, the case she makes is that as an Executive Health Officer, she is entitled to allowances from the Ministry of Health and Child Care, whose aggregate is \$218,00 and the respondent has no right to withhold this allowance and must pass it on to her in full. In both, she then asks for payment of these allowances from 2015 to date.

Even the Designated Agent correctly identified the case he was asked to determine. In his ruling he states; "The issues in dispute". According to claimant her salary which was initially \$1 172,78 and which included allowances from the Ministry of Health and Child Care was unilaterally reduced by respondent to \$954,78 by scrapping of Ministry of Health monthly allowances of \$218,00 from 2015 onwards. The claimant is therefore claiming \$7 412,00 in unpaid allowances of \$218,00 over a period of 34 months".

In my view, that is the same complaint applicant makes in this application and the relief sought is the same as what was sought in the lower tribunal. Further, the overall effect of the decision of the Designated Agent was that there was nothing wrong in the manner respondent treated the allowances received from the Ministry of Health, i.e. processing it through its payroll and topping up to ensure that the applicant receives her full pay as per her contract of employment. He also found that it was quite proper to subject the allowance to tax. More importantly, he found that there was nothing wrong or illegal in the way respondent was doing things. Accordingly, he concluded that the applicant's claim had no merit and he dismissed it.

On the other hand, the effect of the declarateur sought, if granted will be to provide for exactly the opposite of what the Designated Agent found in that applicant now wants this Court to find that the respondent acted unlawfully, as it has no right to tax the allowance from the Ministry of Health, and it must be passed on to her as it is. Clearly, such a finding would contradict the Designated Agent's finding. Whilst this CCourt is a superior Court, it would be undesirable for it to make decisions that contradict those made by lower tribunals and without the decision of such lower tribunals first being set aside. This is the hallmark of the principle of *res judicata*.

In this regard, I agree with Mr Moyo's submission respondent that, "To try and distinguish the case presented here from the case that was presented to the Designated Agent and the decision of the Designated Agent and the one sought here, is just splitting hairs. The applicant is trying to have the Designated Agent overruled without appealing against his decision or subjecting it to an application for review. This is legally untenable ..."

For these reasons, I find that the applicant is essentially bringing before this Court the same issue that she brought before the Designated Agent of the National Employment Council for the Rural District Councils and without first having the decision of the Designated Agent set aside. The wording and content of the declarateur in essence seek an answer to the very

question that the Designated Agent was asked to determine, namely whether the deduction of the health allowance provided by the Ministry of Health by the respondent was proper.

I now turn to the 3rd requirement of the principle of *res judicata*. In terms of section 93 as read with section 63(b) of the Labour Act [Chapter 28:01], a Designated Agent of an Employment Council enjoys exclusive jurisdiction in determining labour disputes within the industry he is appointed to act as Designated Agent and to the exclusion of a labour officer. Therefore, there is no argument that this is a tribunal of competent jurisdiction. Further, applicant also understood it as such which is why she correctly referred her matter to that tribunal.

This application is simply an invitation to go back and re-argue before this Court, a case that the parties have argued elsewhere and a decision made for them. The fact that the issues are the same is further demonstrated by the ancillary relief sought namely the “payment of all the monies that have been deducted by the respondent to date”. Essentially, the Designated Agent declared the manner in which the deduction was carried out by the respondent legal and lawful. On the other hand the applicant seeks through a declarateur that the deduction be declared by this Court illegal and unlawful. The unlawfulness and illegality issues are settled by the earlier matter and the applicant cannot reopen them while the Designated Agent’s ruling stands intact.

Disposition

1. The doctrine for *res judicata* applied in this case.
2. The application is dismissed with costs.

Messrs T. J. Mabhikwa & Partners, applicant’s legal practitioners
Calderwood, Bryce Hendrie & Partners, respondent’s legal practitioners