THOMAS TUSO
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 23 October and 7 January 2004

Opposed Application

Mr *Fitches,* for the applicant
Miss *Njerere,* for the respondent

BHUNU J: The applicant was employed as the respondent's chief clerical officer in its department of works. He was suspended from employment with effect from the 31st January 2001 on allegations of misconduct.

Following disciplinary proceedings the applicant's contract of employment was subsequently terminated in terms of section 141(6)(b)(ii) of the Urban Councils Act [*Chapter 19:15*] as read with General Conditions of Service Agreement Statutory Instrument 66 of 1992. The termination of employment was with effect from the 7th August 2001.

Dissatisfied with the decision of the Executive Committee the applicant appealed to the Review Board. His appeal found no favour with the Review Board on the merits. The Review Board however found that there had been no compliance with section 7 of the Urban Councils Act which prescribes that an employee may not be suspended without pay for a period in excess of 6 months. To rectify the anomaly the Review Board awarded the applicant his full salary and benefits from the date of suspension to the date of dismissal.

Thus the Review Board confirmed the dismissal subject to the applicant being paid his salary and benefits for the period he was on suspension. That decision was adopted by a full Council resolution which confirmed the applicant's dismissal from Council employment on 3rd October 2001.

Aggrieved by the above determination the applicant

approached this court for review complaining of procedural irregularities in procedures which led to his dismissal. The gravamen of his complaint was that there was gross non-compliance with the Urban Councils Act which sets out procedures for the suspension and dismissal of junior employees.

When counsel for both parties appeared before me they agreed that the matter be determined on the basis of the heads of argument filed of record. At that brief hearing I queried *mero motu* whether the High Court had jurisdiction to hear and determine a labour relations dispute in view of the recent Labour Amendment Act 17 of 2002 of which section 89 appears to prescribe exclusive jurisdiction to the Labour Court on all labour matters in the first instance.

The labour court is a special court established in terms of section 92 of the Constitution. Its functions, powers and jurisdiction are spelt out under section 89 of the Labour Amendment Act 17 of 2002 which provides as follows:

"(1) The Labour Court shall exercise the following functions -

a) hearing and determining applications and appeals in terms of this Act or any other enactment; and

b) hearing and determining maters referred to it by the Minister in terms of this Act;

c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;

d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;

e) doing such other things as may be assigned to it in terms of this Act or any other enactment."

(2)(a) In the case of an appeal -

i) …
ii) …
iii) exercise the same powers of review as would be exercisable by the High Court in relation to the decision, order or action that is appealed against or

> any proceedings connected therewith. (**my emphasis**)

Having conferred what are admittedly very wide powers on the Labour Court the Lawmaker proceeded to restrict or exclude the jurisdiction of other courts in related matters under section 89(6) of the Amendment Act which provides that:

> "No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)." (**my emphasis**)

It is manifestly clear to me that the intention of the Legislator was to expressly exclude the jurisdiction of all other Courts in areas where the Labour Court has jurisdiction in the first instance.

In response to my query whether the High Court has review jurisdiction in this labour dispute both lawyers agreed. They submitted that the High Court has jurisdiction because it was not hearing the matter in the first instance.

With respect I am unable to agree with that submission. I take the view that the High Court was being invited to hear and determine the application for review as the court of first instance. This is for the simple but good reason that no other court or body had reviewed the proceedings prior to the High Court being invited to exercise its powers of review. There had only been trial proceedings in the form of an initial hearing and an appeal to the Review Board but certainly no review in the ordinary sense.

Matters could have been different had the Labour Court exercised its appeal or review jurisdiction and the High Court was being invited to review the proceedings of the Labour Court under its general powers of review.

It has been previously suggested that the High Court has jurisdiction to exercise review jurisdiction in labour matters because it will not be hearing the application in terms of the Labour Act.

I am not persuaded by that argument in so far as it relates to employees to whom the Labour Relations Amendment Act applies under section 3. That section makes it clear that the Labour Relations

Act applies to all employees save for members of a disciplined force of the State or foreign State who are in Zimbabwe under any agreement concluded between the Government of Zimbabwe and that of the foreign State.

It is my considered view that it is only in respect of those employees who do not fall under the perview of the Labour Relations Act that the High Court may exercise its general powers of review because its powers in this regard have not been expressly excluded by statute.

To draw an analogy, a labour dispute is essentially a civil dispute, over which the Magistrate's Court ordinarily has jurisdiction in terms of its limited jurisdiction. A magistrate cannot arrogate to himself jurisdiction which has been expressly excluded by statute over labour maters on the pretext that it is a civil dispute over which he will be exercising jurisdiction under the Magistrate's Court Act and not the Labour Relations Act.

By the same token the High Court cannot exercise review powers which have been expressly excluded under the pretext that it will be exercising its general powers of review under the High Court Act.

Bearing in mind that the Lawmaker has seen it fit to create a special court with equal review powers to the High Court in relation to labour matters, could it have been the intention of the legislator that both the Labour Court and the High Court should have parallel jurisdiction in this regard when section 124 of the Labour relations Act seeks to protect litigants against multiple proceedings in different courts? The answer should definitely be in the negative.

By creating a special court exclusively dealing with labour matters and conferring it with review powers equivalent to the High Court and then proceeding to expressly exclude the jurisdiction of all other courts in the first instance, the Legislator must have intended to oust the jurisdiction of all other courts in this regard.

Mindful as I am of the fact that every court guards jealously its jurisdiction, in this case I am satisfied that this court's review

jurisdiction in the first instance in respect of labour matters has been ousted by statute.

In coming to this conclusion I am aware of a chain of cases emanating from both the High Court and the Supreme Court such as *Leonard Ziki v United Bottlers* HH 60-98 and *Moyo v Forestry Commission* 1996 (1) ZLR 173 which consistently held that the High Court has jurisdiction to exercise its general powers of review in cases of this nature. Those cases were however decided before the Labour Relations Amendment Act 17 of 2002 became law on the 7th of March 2003. That enactment as I have already demonstrated elsewhere in this judgment transformed the Labour Tribunal into a court, clothed it with equal review powers to the High Court and expressly excluded the jurisdiction of all other courts in areas where it had jurisdiction. That amendment must have been intended to prohibit duplication of proceedings in the Labour Court and the High Court.

Looked at differently the superior courts have consistently held that this court should hesitate to exercise its general powers of review where a litigant has not exhausted his domestic remedies. In the case of *Musanhu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee* SMITH J had occasion to remark that:

> "In my view this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier."

Thus assuming that this court has the necessary jurisdiction it still has the discretion to decide whether or not to hear the matter before the exhaustion of domestic remedies available to the applicant. In exercising that discretion the court has to make a value judgment and determine which procedure is more expedient, cheaper and generally best suited to dispense justice between the parties. In this regard MALABA J as he then was, observed in the case of *Moyo v Forestry Commission supra)* that:

"A court will not insist on an applicant first exhausting domestic

> remedies where the appeal system created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined those domestic remedies themselves, for example, where the Tribunal had no power to make the decision in question."

Now that the Lawmaker has conferred review powers on the Labour Court identical to those of the High Court litigants in labour matters will have very little or no justification for approaching the High Court for review by-passing the Labour Court which was specially created to provide the same remedy in labour matters.

Apart from review jurisdiction the Labour Court has appeal jurisdiction which the High Court does not have. Thus the Labour Court can combine both appeal and review procedures and determine the matter more expeditiously and conclusively than the High Court. The High Court can only deal with the procedural aspects of the case without dealing with the merits yet the Supreme Court has ruled that it is undesirable to determine labour matters on technicalities. In *Dalny Mine v Musa Banda* SC 39/99 McNALLY JA remarked that:

> "As a general rule it seems to me undesirable that labour relations matters should not be decided on the basis of procedural irregularities. By this I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:
>
> a) by remitting the mater for hearing *de novo* and in a procedurally correct manner.
> (b) by the Tribunal (Labour Court) hearing evidence *de novo.*"

It is clear that the Labour Court can deal with both the procedural and substantive aspects of the case under one roof, whereas this court can only deal with the procedural aspects of the case which it cannot put right but refer to other fora for rectification if need be. This is obviously time-consuming, cumbersome and expensive.

The applicant has made no attempt to explain why he has approached this court without exhausting his domestic remedies which are in my view better suited than this court to provide the

required remedy.

Thus even if I were to hold that this court has the necessary review jurisdiction, a finding which I do not agree with, I would still decline to hear the matter and refer it to the Labour Court for a determination.

That being the case it is accordingly ordered:

1. That this Court declines jurisdiction.

2. That this matter be and is hereby referred to the Labour Court for a determination.

3. That the applicant is to bear the costs for this application.

Manase & Manase, applicant's legal practitioners.
Honey & Blanckenberg, respondent's legal practitioners.