NYASHA DOGO
and
TEDCO MANAGEMENT SERVICES (PVT) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 13 May 2003 and 24 March 2004

Opposed Court Application

Applicant in person
R Moyo for the respondent

GOWORA J: This applicant was argued before me on 13th May 2003. Unbeknown to the court the applicant and counsel for the respondent, the legislature had promulgated an amendment to the Labour Relations Act being Act 17/2002, which had come into effect on 7 March 2003, the effect of which was to restrict the jurisdiction in labour issues to the Labour Court created in terms of the statute in question. In October 2003, I requested additional heads of argument from the parties on whether or the High Court notwithstanding the provisions of the amendment to the Act the court had jurisdiction to determine the matters already pending before it at the time the amendment came into effect.

In terms of the recent amendment to the Labour Relations Act section 89(6) thereof provides as follows:

> "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)."

The matters referred to in subsection (1) are variously- the hearing and determining of applications and appeals in terms of the Actor any other enactment, hearing and determining matters referred to it by the Minister in terms of the Act, referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute, appointing an arbitrator from the panel of arbitrators provided for in the Act, and doing any such things as may be assigned to it in terms of the Act.

Without going into the question of whether or not the matter before me would fall into the category of matters referred to in subsection (1) of section 89(6), in section 47(5) it is provided that any proceedings that were commenced in terms of Part XII of the Act before the date of commencement of

the amendment to the or were pending before the Labour Relations Tribunal shall be deemed to have been commenced in terms of the appropriate provisions of the principal act as amended by the amendment of 2002 and shall be proceeded with accordingly.

In the event the matter may safely proceed before me.

Having determined that the court had jurisdiction to determine the issue between the parties I turn now to determine the matter on the merits.

The applicant has applied for relief on a draft order phrased in the following terms:

1 That misconduct proceedings since concluded against the applicant in terms of the Code of Conduct of the Commercial Sectors of Zimbabwe and the applicant's discharge from employment with respondent be and are hereby declared null and void.

In the alternative.

That the discharge of the applicant from employment with the respondent be and is hereby set aside.

2 That respondents (sic) shall pay applicant the full amount of salary, benefits and bonuses she should have received for the period of her suspension and discharge.

3 That respondents shall pay for the costs of this application.

Prior to the hearing the applicant had filed an application seeking condonation for the late filing of an application for review. At the hearing, at which she was not represented, she indicated that she did not intend to pursue the application for condonation, as her application was not one for a review, but was rather for a declaratory order. The respondent in turn sought a condonation for the late filing of the opposing affidavit. This was granted by consent.

The applicant was employed by the respondent as an assistant bookkeeper. It is common cause that on 8 November 2000, employees of the respondent went on strike. The applicant left her station at about the time the strike was going on and did not return to her station until after a period of two days. On 10th November 2000, she was summoned to the office of Chishanga and subsequent to a discussion with him she given on the same day a letter advising her that she was being suspended without salary or benefits. She was also in terms of the same letter advised to attend a disciplinary hearing before Chishanga on 17th November 2000. She duly attended the hearing at which she was represented by a member of the union of the Commercial Sectors.

The hearing was presided over by Chishanga and another of the respondent's representatives, Mashava also attended. He gave evidence and also asked questions of the applicant. He also called two

witnesses on behalf of the respondent. Subsequent to the hearing, Chishanga wrote a letter to the applicant on 23 November 2000, that she had been found guilty on the charge of misconduct and that he was recommending that she be dismissed from her employment with the respondent. On the same day, the respondent's Finance and Retail Manager also addressed a letter to the respondent advising her that her services had been terminated with effect from 8th November 2000, the date of the suspension. The applicant filed an appeal with the Finance and Retail Manger which up to the time the matter came up for hearing had not yet been determined.

In its opposing affidavit which was deposed to by one Wellington Mutambanengwe the Human Resources Manager for the respondent, issue was taken with the nature of the relief being sought by the applicant. The respondent stated that the applicant was seeking a review of the decision to send her on suspension and also the decision to dismiss her. The applicant however had not complied with Order 33 rule 259 of the High Court Rules 1971. The applicant had not brought the application within eight weeks of the date of the termination of employment as required by the rules. Having failed to bring the application for review within the required period, the applicant should have applied to the court for an order condoning her failure to comply with the rules. The respondent has in addition averred that the applicant in seeking the review should have cited Chishanga as he was the designated officer whose decisions and actions she wishes to have reviewed and ultimately set aside.

The position of the applicant on the hand, is that what she is seeking is not a review but a declaration in terms of the draft order attached to her application and in that respect she had no need to comply with Order 33 Rule 259 or apply for condonation in the absence of due compliance with the same.

In *Kwete v Africa Community Publishing and Development Trust & Ors*[1] in considering whether or not what was before him was an application for a declaratory order or an application for review as envisaged by rule 257, SMITH J stated;

> "In *Matsambire's* case, *supra,* GUBBAY CJ held that the application was a review because it was 'clearly designed at bringing the claimed irregularities in the procedures adopted by the Gweru City Council under the scrutiny of the High Court and for the exercise of that court's review powers'. It seems to me that that is the crux of the matter. Is the application aimed at, and based on 'irregularities in the procedures adopted' by the body or person concerned? Order 33 of the High Court Rules, 1971, deals with reviews. Rule 256 therein provides that any proceedings to bring under review the decision or proceedings of an inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of a court application."

It becomes necessary in my view to determine whether the application is aimed at bringing

1 HH 216/98 at p 4

under review alleged irregularities on the part of the respondent's designated officer. In the court application the applicant lists the following as the grounds upon which she is seeking a declaratory order.

a) absence of jurisdiction in that the official who dealt with the matter was not appointed 'Designated Officer' in writing after consultation with the Works Council

b) the proceedings were vitiated by the sitting of the Creditors Supervisor who is not conferred with any disciplinary functions.

c) the procedure of the code of conduct which binds both parties was not given effect to.

d) the proceedings were not bona fide and were not well founded.

e) the charges were not properly formulated and were not fairly considered.

In respect of grounds b, c, d and e the applicant contends as follows. The Creditors Supervisor is not a designated officer and therefore his presence at the hearing, his active participation in the proceedings by questioning the applicant and calling witnesses on behalf of the complainant had rendered the entire proceedings null and void. In *Minerals Marketing Corp v Mazvimavi*[2] GUBBAY CJ stated :

> "Nonetheless, it is certain that Mr Sibanda was not present merely as an observer. The minutes reflect that he was permitted to put questions to and make statements concerning the respondent, although the occasions on which he did so were few. The purpose of his attendance was, in his own words 'to guide the committee'. The extent to which he may have influenced the deputy chairman and the two divisional managers or hampered their discussion is not known. What is plain is that in allowing Mr Sibanda to be present in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus a procedural irregularity occurred which, if not vitiating the proceedings rendered them voidable at the instance of the respondent"

In casu, on almost similar facts I would say that what the applicant is seeking to have declared a nullity is a procedural irregularity which can only be dealt with by way of review, and is not null and void *per se*.

The applicant has also complained that the procedures in the code of conduct were not adhered to. She also states that the proceedings were not *bona fide* and well founded and that the charges were not properly formulated and were not fairly considered. All these in my view are irregularities which should be determined pursuant to an application for a review. I am unable to consider them as the application for review is not properly before me for want of compliance with the rules.

However, notwithstanding my comments above, the applicant has, as one of the grounds on which the declarator is predicated, that the officer who dealt with the matter was not appointed a 'Designated Officer' in writing after consultation with the Works Council.

2 1995(2) ZLR 353 (S) at 362C-E

In her founding affidavit the applicant states that the code of conduct should be administered by a designated officer duly appointed in writing after consultation with the works council. She avers further that Chishanga was not so appointed and that she had consulted with members of the works council over the issue and was convinced that he had not been properly appointed. She challenged the respondent to produce the letter in terms of which Chishanga was appointed as well as the minutes of the Works Council on the appointment.

In its opposing affidavit the respondent stated that Chishanga had been properly appointed and produced as proof of his appointment a list of designated and proposed designated officers within the respondent as at the 10th August 1998. It did not as requested by the applicant provide either the letter in terms of which Chishanga was appointed or the proof of its consultation with the Works Council.

In her heads of argument, the applicant contended that the respondent, despite being challenged by her to prove that Chishanga had been properly appointed as a Designated Officer had failed to provide any proof in respect of the same. There were no affidavits either from the person who appointed Chishanga or from members of the Works Council regarding the appointment of Chishanga as Designated Officer. The applicant further submits that in the absence of proof that Chishanga was appointed in writing it follows therefore that he was not properly appointed as the appointment was not in accordance with the provisions of the code and consequently he had no jurisdiction to deal with the matter even the suspension itself. She contends that absence of jurisdiction is a fatal defect which renders the whole process null and void. She submits that any act done without jurisdiction is null and void and of no legal force or effect. She contends further that any act therefore done by Chishanga in respect of the misconduct proceedings is null and void *ab initio* as if it never was.

The respondent contends that the onus to establish that Chishanga was not appointed in writing was on the applicant and not on the respondent. It was contended that as the applicant had had made the averment, it was up to her to prove it. It was the further contention on behalf of the respondent that the list produced by the respondent as Annexure 'I' to the opposing affidavit showed that Chishanga was one of the Designated Officers of the respondent. It is further contended that the code merely requires that such appointment be in writing and that the list complied with the provisions of the code of conduct.

In the code of conduct Designated Officer is defined as :

"Designated Officer" means a person appointed in terms of paragraph 3.3 of this code.

Paragraph 3.3 reads as follows:

> 'The employer, after consultation with the Works Council, shall appoint in writing one or more persons in his employ to be the "Designated Officer" for the purpose of administering this code.'

In *Geddes Limited v Tawonezvi*[3] the Supreme Court was confronted with a similar set of facts. The code of conduct at issue was the same one – viz the code of conduct for the Commercial Sectors. The respondent had been dismissed from employment after a suspension and hearing which had been effected by a Mrs Madyira. After the hearing the respondent had been dismissed from his employment with the appellant. Thirty three months after his notification that he had been dismissed he had filed an application with the High Court for an order setting aside his dismissal on the basis that the official who dealt with the matter lacked jurisdiction and also that the charges had not been properly formulated as they did not disclose any misconduct. It was his further allegation that the determination had no basis in evidence or factual allegations and the procedures in the code had not been adhered to. At p 8 of his judgment this is what MALABA JA had to say:

> 'In highlighting the want of jurisdiction on the part of Mrs Madyara to do what she did, the respondent did not need to review her actions. The approach adopted by the respondent receives authority from the decision in *Bayat & Ors v Hansa & Ano* 1955 (3) SA 547 where at 552C-D CANEY J said:
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> "………..the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or ignoring the second respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights……."(the underlining is for emphasis'

The respondent is in my view mistaken in its averment that the applicant must prove that Chishanga was not appointed in writing. It was incumbent upon the respondent to establish that Chishanga was appointed in terms of the code of conduct. The code requires the appointment of a Designated Officer to be in writing and only a person appointed in terms of the code of conduct can administer the code. It is not for the applicant to disprove the adequacy of the appointment, but rather it was for the respondent to establish that there had been due compliance with the code in the manner in which it appointed its Designated Officers. As MALABA JA remarked in the *Geddes* case (supra) at p 10 of his judgment:

> 'Even at the eleventh hour the appellant failed to produce the letter in terms of which it appointed Mrs Madyara as a designated officer. It is clear from the provisions of the Code that only a person appointed a designated officer by the employer in writing could investigate allegations of misconduct against an employee, suspend him from work and institute disciplinary proceedings.'

3 SC 34/02 (unreported)

Similarly in *Magwebe v Seed Co Ltd & Anor*,[4] SANDURA JA, in considering an application brought in almost the same set of facts had the following to say:

> 'The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect I can do no better than quote what LORD DENNING said in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 I:
> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." (the emphasis is mine)'

In the absence of proof in the form of a letter appointing him as such, Chishanga was not in my view appointed designated in writing. He therefore had no jurisdiction to administer the Code of Conduct. Any act performed by him as a designated officer was as a consequence null and void.

The applicant has as part of the relief being sought an order she be paid the full amount of salary benefits and bonuses she should have received for the period of her suspension and discharge. In my view this is relief that would have followed an order in which the suspension and dismissal were set aside after a review process and there had been an order of reinstatement. I do not believe that an order which is of a declaratory in nature would encampass an order pertaining to salary and benefits. The applicant therefore succeeds as far as the main paragraph in her draft order and I order as follows:

1 That the misconduct proceedings against the applicant in terms of the Code of Conduct of the Commercial Sectors of Zimbabwe and the applicant's discharge from employment be and are hereby declared null and void

That the respondent shall pay the costs of this application.

Coghlan Welsh & Guest, legal practitioners for the respondent.

4 2000(1) ZLR 93(S) at 96H-97A