

GODFREY MUNYAMO JONGA
versus
CHIEF EXECUTIVE OFFICER, ZAMBEZI RIVER AUTHORITY
and
ZAMBEZI RIVER AUTHORITY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 15 January 2015 and 11 February 2015

Opposed Application

T. Tazvitya, for the applicant
E.T Moyo, for the respondents

MTSHIYA J: On 15 February 2013, the applicant, who was employed by the second respondent as an Accounting Officer, filed this application seeking a review of the first respondent's decision made on 13 April 2012. The first respondent's decision was a refusal to extend the applicant's retirement age from 60 years to 65 years.

On 12 March 2012, the applicant had sent the following memorandum to the first respondent:-

“Reference : Extension of Retirement up to my sixty – fifth birthday

Date : 12th March, 2012

Pursuant to Section (6) of S.I.119 of 1995 subsection (1) and (2) I humbly request the Chief Executive to extend my service to the Authority up to my sixth fifth birthday. I turned fifty nine years old on the 27th of February 2012.

Enclosed herewith please find a statement of my accrued pension and monthly annuity for your attention. Our pension scheme was eroded in the economic crisis that has bedevilled our economy in the last decade. The other personal retirement benefit policies we had secured with Insurance companies to help ensure a comfortable retirement, also collapsed. My sick old mother who has

to visit a Medical Doctor nearly every fortnight is my dependent on the Authority medical aid scheme. What I will pay in subscription to the scheme to cover her membership will take up half of up my monthly annuity and removing her from the scheme will be signing her death warrant.

I understand that the Authority under your direction is trying to revive the pension fund by making some capital injections and I would be grateful if I will be permitted to serve for five more years while the recapitalization works to make a return to give retiring employees a worthwhile pension, not a possibility of going into a life of penury and death in a few years. I am still in good health and would be happy to contribute towards bringing the Batoka Gorge scheme on stream. I believe there will be a lot of work at Batoka and I would be happy to give a hand in this noble project.

GM JONGA”

The actual response from the first respondent dated 13 April 2012, declining the extension of the applicant’s retirement age, read as follows:-

“Dear Mr Jonga

EXTENSION OF RETIREMENT UP TO 65 YEARS

Reference is made to your memorandum dated March 12, 2012 concerning the above mentioned subject.

I wish to advise that your request to remain in the employment of the Authority until your attainment of the age of 65 years has been noted. However, please note that the Authority’s policy on retirement is that employees retire at the attainment of 60 years save for the ex CAPCO employees who are expected to retire upon the attainment of the age of 65 years.

In view of the foregoing, I regret to advise that your request to have your retirement age extended has not been granted.

Yours sincerely

**ENG MC MUNODAWAFA
CHIEF EXECUTIVE”**

The applicant took issue with the first respondent’s decision of 13 April 2012 and addressed the following memorandum to the first respondent:-

“Subject : **Extension of Retirement to 65 years**”

I acknowledge, with gratitude, your response to my request to extend my services to the Authority up to my 65th birthday.

I would however, like to bring your attention to the meagre pension benefits (less than the ILO recommended pension) that I will receive on retirement due to collapse of the pension scheme because of hyper-inflation and the collapse of the Zimbabwe Dollar over the period 2004 to 2008. This resulted in the loss of all pension benefits accumulated before 2008. My current pension benefits are therefore calculated as 3 years (since the resuscitation of the pension scheme in 2009) and not 23 years as is the actual duration of time in service.

The reason I requested to extend my service with the Authority was to enable me build up a decent pension and recoup some of the losses so that I do not become destitute on the day that I leave the Authority.

I therefore, request the Authority to re-consider extending my service to 65 years or to boost up my pension benefits to match that of my fellow Zambian counterparts who have given the Authority a similar length of service, i.e. by meeting the shortfall of US\$183,467.97. Bearing in mind that our salaries are denominated in United States Dollars (US\$) and the fact that the Authority receives its money in US\$, it is only logical for the Authority to compensate employees for pension losses considering that debts from Zimbabwe Power Company at that time were maintained in US\$ and these debts are being liquidated today in US\$.

I look forward to your consideration and fair disposal of this matter.

Best regards.

G. JONGA”

The applicant did not receive any joy from the first respondent who, on 30 January 2013, reiterated his earlier decision in the following manner:-

“SUB : Extension of Retirement to 65 Years

I refer to your request on the above subject matter in your correspondence dated 8th January 2013. Kindly accept my apologies for the delayed response.

After thorough consideration of your request to extend your retirement to 65 years, I regret to advise that the request is declined.

I wish to advise that the erosion of pensions affected all Zimbabweans and that in response to the problem, ZRA injected US\$750,000 to boost its employees' pension coffers. I advise that you take up this issue with the Trustees of the Pension Scheme.

Regards,

ENG. M.C. MUNODAWAFA

The above represents the first respondent's final position on the issue and hence this application for review by the applicant.

The applicant sets out his grounds of review as follows:-

- “1. The 1st Respondent did not apply his mind properly in arriving at the decision he made.
2. The 1st Respondent's decision is irrational and unreasonable, so grossly unreasonable to so striking a degree that no reasonable person, applying his or her mind properly, would have so arrived at a similar decision.”

Having outlined his grounds of review as indicated above, the applicant then seeks the following relief:-

“IT IS ORDERED THAT:

1. The decision by 1st Respondent on the 30th day of January 2013 declining to extend Applicant's retirement age to his sixty fifth birthday be and is hereby set aside.

IT IS CONSEQUENTLY ORDERED THAT:

1. The Applicant's retirement age is hereby extended from his sixtieth birthday to his sixty fifth birthday.
2. 1st and 2nd Respondent to pay costs of this application jointly and severally the one paying the other to be absolved.

The application is opposed.

In addition to a response to the merits of the case, the respondents have raised two preliminary issues (i.e. points *in limine*). The respondents argue that:-

- (a) the dispute, being in respect of a labour matter, this court has no jurisdiction to entertain the application; and
- (b) the first respondent has been improperly cited.

In challenging the jurisdiction of this court over the matter, the first respondent relied on s 89(6) of the Labour Act [*Cap 28:01*] (the Labour Act) which provides:-

“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 in subs (1)”.

Subsection 1 of s 89 of the Labour Act 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 matters referred to it by the Minister in terms of this Act; and
- (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;
- (d1) exercise the same powers of review as would be exercised by the High Court in respect of labour matters.
- (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.”

Given the above provisions of the law, which grant the Labour Court the same powers of review as the High Court in labour matters, (i.e. s 89(1) (d1) above). Mr *Moyo*, for the respondents, strongly argued that it was therefore not the business of this court to deal with this application.

In response to the respondents’ contention, Mr *Tazvitya*, for the applicant, submitted that although employment related, the decision was administrative in nature and delivered by an administrative authority i.e. the first respondent. He said the decision was not necessarily based on contract. To that end, he relied on the following definition of “administrative action” given under s 2 (1) of the Administration of Justice Act [*Cap 10:28*] (the Act):-

“Administrative action means an action taken or decision made by an administrative authority.”

The same section of the Act defines administrative authority as follows:-

“administrative authority means any person who is –

- a) an officer, employee, member, committee council, or board of the State or a local authority or parastatal; or
- b) a committee appointed by or in terms of any enactment; or
- c) a Minister or Deputy Minister of the State; or
- d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty.”

The first respondent is an officer of a parastatal who performed an administrative action.

Mr *Tazvitya* then argued that the High Court had inherent jurisdiction to deal with the matter. He said the Labour Court lacked the jurisdiction which would enable it to issue a declarator leading to the setting aside of the first respondent’s decision.

The issue of jurisdiction being raised by the respondents has been raised before in similar matters. However, it cannot be argued outside the current provision in s 171 of the Constitution of the Republic of Zimbabwe as read together with s 13 of the High Court Act [*Cap 7:06*] (the High Court Act), which states that:

“The High Court shall have full original civil jurisdiction over all persons and all matters within Zimbabwe.”

Section 171 of the Constitution of Zimbabwe reinforces that jurisdiction by stating that:

“The High Court – has original jurisdiction over all civil and criminal matters throughout Zimbabwe.”

Given the Constitutional provision, it means that no other Act of parliament can oust the jurisdiction of the High Court in all civil matters in Zimbabwe. Accordingly, except for cases expressly reserved for the Constitutional and Supreme Courts, the High Court can, in terms of our law, deal with all civil matters, notwithstanding the fact that they may be statutorily reserved for the Labour Court or any other lower court (i.e. concurrent jurisdiction exists). It would, in my view, be unconstitutional for the High Court to close its doors to litigants with respect to any civil matters.

In view of the foregoing, I am unable to uphold the respondents' point *in limine* regarding jurisdiction. This court can entertain the application.

Furthermore apart from the Constitutional provision quoted above, in *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* 2009 (2) ZLR 259 (H) MAKARAU J, as she then was, in making reference to the Administrative Justice Act, said:-

“Section 4 of the Act provides that any person who is aggrieved by the failure of an administrative authority to comply with s 3 therein may apply to the High Court for relief. It is common cause that the applicant filed this application challenging the decision of the first respondent summarily to cancel the lease agreement. It filed a court application in terms of the High Court Rules. While the application does not make any reference to the provisions of the Act, in my view it makes allegations that fall squarely within the provisions of the Act. I was satisfied before I referred the question to the parties for further argument that the allegations and contentions made by the applicant in its court application fell within the purview of the Act even if the Act was not specifically invoked. In my view, generally, it is not necessary for an applicant specifically to plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law unless the law under which he or she is proceeding requires that certain averments be specifically pleaded. The court is not a slave to the form of the law. It is always a slave to justice whom it must always serve.

For the avoidance of doubt, if I have erred in allowing the applicant to bring a deformed application before the court and the correct position is that it was necessary for the applicant specifically to invoke the provisions of the Act, I will condone that oversight in terms of r 4C of the High Court Rules, 1971.

As correctly pointed out by the first respondent, this is not an application for review. It is an application for the setting aside of an administrative decision on the basis that it was not arrived at fairly and thus, at law, contravenes the Act. In view of the fact that the applicant succeeds on a matter that it did not specifically raise in its initial heads of argument, I will not punish the first respondent with an award of costs. The same does not apply to the second respondent.”

In view of the above, I am inclined to agree with the applicant that in the review process what he seeks is the setting aside of an administrative decision/action. That challenge, in terms of s 4 of the Administrative Justice Act, can be placed before this court. The remedy sought and the reasons for it are clear. Accordingly, notwithstanding the fact

that the applicant may not have specifically mentioned the statute relied on in placing the matter before the court, the cause of action is clear and can be entertained by this court.

I shall now deal with the second point *in limine*. The respondents are challenging the citation of the first respondent arguing that it is an office title and not a legal person or natural person. In putting forward this challenge, the respondents relied heavily on *JDM Agro-Consult & Marketing (Pvt) Ltd v The Editor of the Herald Newspaper & Anor* HH 61/07 where it was said:-

“The editor of a newspaper is the person responsible for the editorial content of such newspaper. It is a position that is occupied for the appropriate period by such individual employed in that capacity. It is therefore an occupation wherein the occupant can change from time to time. It is not a natural person or legal person and there is no person identified by that name. The citation of the 1st Defendant in that name is therefore irregular. It mattered not in my view that the two Defendants entered appearance to defend and proceeded to file a plea. The process of filing pleadings in that name would not have imbued the summons with any form of legality. There was no summons for them to plead given that there were no persons answering to the names on the summons. They cannot be identified as such. This is not a mis-description which can be amended by alteration of the names on the summons, nor is it a substitution. You cannot amend or substitute something which does not exist. In the premises it is my finding that the proceedings before me are a nullity.”

The above decision was, in my view, correct because it related to delict proceedings where personal liability was in issue. That is not the case *in casu*. The applicant seeks to challenge the decision of the first respondent in a totally different way as would be the case in delict. Furthermore the position of the first respondent is statutorily created and cannot therefore be equated to that of a Newspaper Editor.

Paragraphs 1 and 4 of Art 11 of the Zambezi River Authority Act [*Cap 20:23*] provide as follows:-

“There shall be a Chief Executive to the Authority who shall, subject to the approval of the Council, be appointed by the Board and shall be a national or resident of the Contracting State other than that in which the Authority’s Head Office is situated. The provisions of paragraph (b) of Article 13 shall apply, as appropriate, in relation to the appointment of the Chief Executive.

2.
3.

4. Subject to the control of the Board, the Chief Executive shall be responsible for the day-to-day management of the operations and property of the Authority.
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The first respondent’s post exists in terms of the above law and the decision the first respondent made is in line with the definitions given under s 2 (1) of the Act.

It is the day-to-day administrative decision of the first respondent that the applicant seeks to have set aside. Indeed in review applications the decision maker ought to be cited. That is what the applicant has done *in casu* and the decision maker has since responded. There is no hunting for the decision maker. I am therefore unable to uphold the respondents’ second point *in limine*.

I shall now proceed to consider the merits of the case.

The applicant admits that the decision to extend or not to extend the retirement age from 60 years to 65 years was a discretionary one on the part of the first respondent. He, however, submitted that the decision by the first respondent to deny extension of the retirement age was “irrational and unreasonable.”

The applicant reasoned that the first respondent had not taken into account the effects of the economic decline in Zimbabwe in 2008 which led to the demise of the Zimbabwean Dollar. That economic decline had wiped out the pension contributions he had made over a period of 19 years. He argued that it would not be “morally acceptable” for him to survive on paltry contributions made over a period of 4 years i.e. from 2009 to 27 February 2013 when he reached the normal retirement age of sixty years. The applicant also argued for parity with his Zambian counterparts who had not experienced the same economic problems that affected Zimbabwean employees.

On their part the respondents argued that the applicant’s request was personal and contrary to the norm. The respondents were not “keen to create a precedent” which would have adverse effects on the Authority. They argued that the discretion had been used reasonably. Furthermore, they argued, the Authority had addressed the issue of pensions by injecting US\$750 000-00 into pensions as a booster. That move had been a decision of the contracting states who knew how the economic situation in Zimbabwe had affected Zimbabwean employees of the Authority.

I find merit in submissions made by the respondents. Whilst on the moral plane it may appear as if the decision was harsh, I am unable to fault the manner in which the first respondent used his discretion. It was in line with the Authority's position on pensions. I am unable to accept that the discretion was used in an irrational and unreasonable manner. The applicant has not demonstrated that to me.

In *Zambezi Proteins (Pvt) Ltd & Others v Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H) GARWE J, as he then was, quoted from Professor Feltoe's book, *Guide to Zimbabwean Administrative Law* (p 31) as follows:-

“As the function of the Court is not to delve into the substantive correctness of administrative decision, but only to ascertain whether there have been any procedural irregularities or action of an *ultra vires* nature, it would seem to follow that on review the Court has no power to overturn a decision simply because it considers it to be unreasonable. If it was to do so, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision.”

The learned author remarks further:

“In certain circumstances, however, the courts will set aside decision of a grossly unreasonable nature. A well-recognised ground for doing this is where the decision is not only grossly unreasonable but is so grossly unreasonable that it is only explicable on the basis of *male fides*, ulterior motive or failure of the decision-maker to apply its mind to the decision it had to make.”

Paragraph 2 in the above quoted passages sets out the grounds upon which the court may interfere with an Administrative decision. Those grounds have not been proved *in casu*.

The applicant does not deny that the Authority had indeed boosted the pension fund by injecting US\$750 000-00. The applicant, in his memorandum of 12 March 2012, acknowledges that fact. That in my view is clear evidence that, although not to the satisfaction of the applicant, the Authority had indeed paid attention to his predicament. It was within that factual situation that the first respondent used his discretion. The first respondent accordingly referred the applicant to the Trustees of the Pension Scheme. In any case, it is normal practice for many companies to inject new blood into their staff structures by adhering to the stipulated retirement age. I agree that in rare cases some employers/companies have extended retirement age upon application by employees or upon the employers/companies themselves continuing to require certain skills of employees who

ought to be retired. That, however, is not the norm and hence the reason for the requirement to apply for extension. Clearly, if there is a set normal retirement age, extension is not automatic.

In *casu*, the request for extension did not find favour with the first respondent and he explained why he could not accede to the request. I did not find his reasons distant to a reasonable exercise of his discretion. I am therefore, unable to interfere with the decision reached.

The application is dismissed with costs.

Messrs Sibanda & Partners, Applicant's Legal Practitioners
Messrs Scalen & Holderness, Respondents' Legal Practitioners