

WATER AND ALLIED WORKERS' UNION OF ZIMBABWE
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 January 2015 and 11 March 2015

Opposed Application

A. Mugandiwa, for the applicant
G. Mhlanga, for the defendant

MTSHIYA J: This is an opposed application wherein the applicant prays for the following relief:

“IT IS ORDERED THAT:

1. The purported retirement by the Respondent of its employees as contained in its letters dated 13th March 2014 be and is hereby declared unlawful and set aside with the employees being reinstated to their respective positions without loss of salary and benefits.
2. The Respondent pays the costs of this application.”

The applicant is a trade union duly registered in terms of the Labour Act [*Chapter 28:01*]. It, the applicant, represents some employees of the respondent, who, constitute the majority of its membership.

In March 2014 the respondent took a decision to retire about 94 of its employees who are members of the applicant. The employees were being retired for having reached the normal or official retirement age of 60 years. The respondent could, however, if it so wished, retire the employees at 65 years (late retirement).

In the main, letters sent to the affected employees generally read as follows:

“RE: YOUR NORMAL RETIREMENT FROM COUNCIL SERVICE

Our records show that you attained the age of **60** years in **2013** and in terms of **HR and GPC recommendations items 30 and 2 of 28 January and 4 February 2014 respectively and adopted by Council on the 6th of March 2014** as read with Clause 7(4) (a) and Clause 10(1)(b) of Statutory Instrument 135 of 2012 Collective Bargaining Agreement your service with Council is hereby terminated with immediate effect.

You will receive your terminal benefits including **3 months** notice period payment from the Remuneration and Welfare Division of the Human Capital Department, Pay Office at Rowan Martin Building. It is also important for you to note that Council engaged Local Authorities Pension Fund (LAPF) and agreed that the processing of your pension will be expedited. You are required to return any Council property in your possession to your Head of Section before you retire.

I now wish to extend my profound gratitude for the loyal and valuable service you have rendered to the Department and Council as a whole for the period of service and wish you a happy time after retirement.”

Employees affected by the above communication fall under the Local Authorities Pension Fund Rules, which rules allow the respondent to fix the retiring ages of its employees i.e. applicant’s members. That point is common cause.

Section 11 of the Pension Fund Rules provides as follows:-

“Retirement of contributors

11. (1) Subject to the provisions of subsection (2), for the purposes of this Scheme a contributor-

(a) may retire or be retired on attaining or at any time after he has attained the age fifty-five years;

(b) shall retire or be retired on attaining-

(i) such age between the ages of fifty-five and sixty-five years, both included, as his employer may fix as the retiring age for contributors.

(ii) where his employer has not fixed a retiring age for the purposes of subparagraph (i) applicable to him, the age of sixty years.

(2) Where an employer considers it desirable to retain a contributor beyond the retiring age applicable to him in terms of paragraph (b) of subsection (i), the contributor may, with his consent, be retained in the service of his employer beyond such retiring age but shall retire or be retired not later than the last day of the month in which he attains the age of sixty-five years.”

Furthermore, s 10 (1) (b) of the Collective Bargaining Agreement Harare Municipal Undertaking (General Conditions of Service) S.I 135/12 (the CBA) provides as follows:

“Subject to the Local Authority Pension Regulations, the following shall be considered pensionable ages –

- (a) 55 years of age - Early Retirement;
- (b) 60 years of age - Normal Retirement;
- (c) 65 years of age - Late Retirement;

Provided such employee shall qualify for a pension upon having served the employer for a continuous period of ten (10) years on pensionable conditions upon reaching the aforementioned ages.”

It is also common cause that when the respondent took the decision being challenged, some of the employees were already above the age of 60 years and were therefore awaiting late retirement at 65 years.

The applicant takes no issue with the provisions of the law quoted above but argues that the respondent cannot proceed to exercise its right to retire the affected employees at the normal retirement age of 60 years without their consent. The applicant also argues that the respondent is aware that the pension fund has no money and that the respondent has not been paying its dues. Added to that, the applicant notes that the Medical Aid Scheme under which its members fall (i.e. the Harare Municipal Medical Aid Society) is also owed money by the respondent. The applicant then contends that the respondent should honour its obligation under the pension fund and the medical aid scheme before forcing its members to retire at the age of 60 years.

On its part the respondent, in the main, opposes the relief sought on the grounds that:-

- a) this court has no jurisdiction to deal with a labour matter.
- b) it retired employees who had reached normal retirement age and was not obliged to seek their consent.
- c) consultations were made with the employees’ Central Works Council.
- d) its financial problems do not take away its right to retire employees who have attained the normal retirement age and the financial issue is before an arbitrator.
- e) retired employees would be assured of their pensions; and

f) retrenchment was not applicable.

For this matter to proceed, I am obliged to start by addressing the question of jurisdiction.

My immediate answer to the question of jurisdiction is that both the Constitution of Zimbabwe Amendment (No. 20) Act 2013, (the Constitution) now in force, and the High Court Act [*Chapter 7:06*], through ss 171 and 13, respectively, grant the High Court unfettered jurisdiction over all civil matters in Zimbabwe.

Section 171 (1) (a) of the Constitution provides as follows:-

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

Section 13 of the High Court Act provides as follows:-

“Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.”

I agree that the relief sought is in the form of a declarator and would normally not be dealt with by the Labour Court, as per ZIYAMBI JA in *UZ – UCSF Collaborative Research Programme in Women’s Health v Shamuyarira* 2010 (1) ZLR 130, where she said:

“there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction.”

However, the above provisions in our law, give the applicant the right to be in this forum. We are, in *casu*, dealing with a civil matter which is in the form of a labour dispute.

In view of the above, I believe it would be unconstitutional to deny the applicant the right to be heard in this court. I am therefore, unable to uphold the point in *limine*.

On the merits of the matter, I find myself being unable to agree that the applicant is entitled to the relief it seeks.

It is clear to me that in terms of s 10(1) (b) of the CBD the normal retirement age was fixed at 60 years. That, in my view, is in line with s 11 of the Pension Fund Rules which grant the respondent the power to fix the retirement age.

The respondent fixed the normal retirement age at 60 years and set 65 years as the late retirement age. The applicant agrees with that but contends that there was still a need on the part of the respondent to obtain consent from each of its members. I disagree.

As indicated in the pension fund rules as read with s 10 (1) (b) of the CBA, the employee's concern only becomes an issue if the respondent desires the services of the employee beyond the normal retirement age. There is no dispute regarding the meaning of normal retirement age. The normal retirement age was fixed at 60 years. I will therefore not delve into that.

I agree that some members of the applicant were allowed to continue serving beyond the age of 60 years. That would certainly have caused them to believe they would now fall under the late retirement age of 65 years. (i.e. legitimate expectation) I, however, venture to say, upon reaching the normal retirement age, members of the applicant served at the pleasure of the respondent. That explains why we are not told about the process of obtaining their consent to serve beyond the normal retirement age. The members raised no issue with that, yet the issue of late retirement should not have been taken for granted.

The respondent, in deciding to retire the applicants' members before the age of 65 years was magnanimous enough to give them three months notice upon having consulted with the Central Works Council. It was not denied that some members of the applicant, namely Messrs Kisi and Kuzora attended the consultation meeting(s) with the respondent. I want to believe that those members of the applicant who attended the meetings had the requisite mandate.

I do not believe that once an employee reaches the normal retirement age, he or she has an obligation to engage the employer unless he or she wants to apply to be considered for late retirement. The same applies to the employer in the sense that engagement with the employee is only necessary if the employer wants to retain the employee beyond the age of 60 years. That is the interpretation I give to the relevant provisions of the CBA and the pension fund rules.

Furthermore I do not think that where there are clear retirement provisions in a contract of employment, the law will dictate that the employer abandons same in favour of retrenchment. The employer can only be challenged if the retirement rules have been

violated. I do not find that to be the case in *casu*. The applicant's members were lawfully retired and the issue of retrenchment never arose.

The above finding means that other financial issues raised by the applicant do not in any way impact on the legality of the respondent's decision. The applicant's members are at liberty to lay their claims before the pension fund. In any case the financial matters that the applicant raised are the subject of an on-going arbitration process. That position was not disputed by the applicant.

In view of the foregoing, the application cannot succeed.

The application is dismissed with costs.

Messrs Wintertons, Applicant's Legal Practitioners

Messrs Chihambakwe, Mutizwa & Partners, Respondent's Legal Practitioners