CLOUDIOUS KURAUVONE
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11 March 2015 and 13 May 2015

Opposed application

R Chingwena, for the applicant
G Mhlanga, for the respondent

MUREMBA J: The applicant is employed by the respondent as a City Architect. On 14 March 2014 the respondent wrote a letter to the applicant notifying him that he was going to be retired on 30 July 2014. The basis of his retirement was that he was going to turn 60 years on 30 July 2014 and as such he had reached normal retirement age. The letter also stated that his 3 months' notice period was going to commence on 1 May to 30 July 2014.

The letter stated that the retirement was in line with the Human Resources and General Purposes Committee recommendations items 30 and 2 of 28 January 2014 and 4 February 2014.

The basis of this application by the applicant is to contest his retirement stating that he should be retired at 65 years not 60 years in terms of s 22 of the Collective Bargaining Agreement: Harare Municipal Undertaking (General Conditions of Service) S.I 66 of 1992 which puts the retirement age at 65 years. The applicant further argues that he is entitled to 12 months' notice of retirement in terms of Standing Resolution no. 50/GP/6:1:86 (2). His argument is that the Human Resources and General Purposes Committee recommendations items 30 and 2 of 28 January 2014 and 4 February 2014 which are being used by the respondent to retire him are not applicable to him as they were passed in 2014. He argues that these recommendations cannot be applied retrospectively.

The applicant's other argument is that while he was being retired other employees were being retrenched. In his view this is discriminatory and not allowed at law. He wants equal treatment with other employees.

The applicant's prayer is as follows:

"1. It is hereby declared that
   a) That the normal retirement age for the applicant is 65 years.
   b) That the purported retirement is discriminatory, the respondent should retrench the applicant like other employees being retrenched.
   c) The respondent's HR and GPC recommendation items 30 and 2 of 28 January and 4 February 2014 cannot operate with retrospective effect.
   d) The respondent retirement is a nullity for failure to give the requisite notice as per respondent's resolution.
   e) That the purported retirement is a legal nullity.
2. It is hereby ordered as follows;
   a) The respondent is and hereby ordered to reinstate or alternatively retrench the applicant.
   b) Costs on attorney-client scale**.**"

In response to the application the respondent started by raising a preliminary point to the effect that this is a labour matter which should be dealt with by the Labour Court in terms of s 89(6) of the Labour Act [*Chapter28:01*] which says,

> "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)."

Subsection 1 thereof reads,

> "(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*……
> (*c*) .....
> (*d*1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;"

In the answering affidavit the applicant objected to the preliminary point on the grounds that he is seeking a declaratory order. He argued that the Labour Court has no jurisdiction to grant it. He argued that even if the Labour Court has such jurisdiction that does not exclude this court's inherent jurisdiction to deal with all matters including labour matters.

Having considered the arguments made by the parties I am persuaded by the arguments made by Mr *Mhlanga* for the respondent.

Mr *Mhlanga* was in agreement with Advocate *Chingwena* that it is the High Court not the Labour Court which has jurisdiction to issue a declaratur. The High Court derives this power from s 14 of the High Court Act [*Chapter 7:06*] which reads as follows:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

However, Mr *Mhlanga* went on to advance a convincing argument that the issues raised by the applicant are purely labour issues brought to this court in the guise of a declaratur. He correctly argued that the contents of an application for a declaratur should meet the requirements of an application for such a relief. He argued that what should be considered are the grounds on which the application is based instead of the relief that is being sought. He made reference to the following cases which I found relevant.

In *Johnson* v *AFC* 1995 (1) ZLR 65 (S) at p 72 E GUBBAY CJ said,

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgement of the court. The interest must concern an existing, future or contigent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto…….
>
> **At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter**."

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) at 484 G, MALABA JA said,

> "In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. **The fact that an application seeks a declaratory relief is not in itself proof that that application is not for review**."

In casu it is apparent from the content of the applicant's application that he is not seeking a declaration of rights, but the setting aside of the decision which was made by the respondent to retire him at the age of 60 years instead of 65 years and giving him 3 months' notice instead of 12 months. The applicant is challenging the regulations and resolutions which were used in retiring him. By this, the applicant is citing procedural irregularities which were made by the respondent in arriving at the decision to retire him.

The applicant is also challenging the respondent's decision to retire him while it retrenched the applicant's fellow employees. He argues that he was unfairly treated and discriminated against.

The applicant also made an argument that he has a legitimate expectation that he will be retired at 65 since he was given a car loan which would take him 3 years to repay. He argued that by 30 July 2014 he would only have repaid half of the loan at the rate of US $1 700 per month. The applicant argued that the decision to retire him is against public policy.

In *Geddes Ltd* v *Tawonezvi supra* at p 485 H MALABA JA had this to say,

> "Setting aside of a decision or proceeding is a relief normally sought in an application for review"

In the present case Mr *Mhlanga* correctly argued that the issues at hand do not need a declaratur. These are purely labour issues which need to be reviewed.

It is my conclusion that in terms of s 14 of the High Court Act the applicant passes the first stage of enquiry which demands that the applicant be an interested person. It is not in contention that the applicant is an interested person in this matter. It cannot be disputed that he has shown that he has a direct and substantial interest in the subject matter of the suit.

However, the application fails the second stage of enquiry, which is whether or not this is a proper case for the exercise of this court's discretion under s 14 of the Act. It fails because the applicant is attacking the decision and procedure which was used to arrive at the decision to retire him. The proper procedure would be an application for review.

It does not matter that the applicant in his application indicates that he is seeking a declaratory order. As was said in the cases that I have referred to above, a draft order cannot, *per se*, be the determining factor. The grounds upon which the application is based should be considered too. Consequently I uphold the preliminary point raised by the respondent that this is a labour matter which has been brought in the guise of a declaratur.

In terms of s 89(6) of the Labour Act, the Labour Court has jurisdiction in first instance to hear and determine applications and appeals in labour matters. As such I decline jurisdiction in this matter.

Matsikidze &Mucheche, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondent's legal practitioners