DR JABULANI CHARLES KUCHENA
versus
THE SCIENTIFIC AND INDUSTRIAL RESEARCH AND DEVELOPMENT CENTRE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 8 February 2016 & 9 March 2016

Urgent Chamber Application

K. Gama, for applicant
S. Hwacha, for respondent

CHIGUMBA J: Section 10 of part 4 of the sixth schedule of the current Constitution (saving and transitional provisions) provides that all existing laws will continue in force but must be construed in conformity with the Constitution. In my view, this means that any inconsistency between the current Constitution and an existing law must be resolved in favour of conformity with the Constitution. This renders s 89 (6) of the Labour Act void to the extent of its inconsistency with s 171 (1) (a) of the current Constitution. The inescapable conclusion is that the High Court now has concurrent jurisdiction with the Labour Court to deal with purely labour matters at first instance. It is up to the High Court to decline to exercise that concurrent jurisdiction as a way of preserving and respecting the specialized nature of the Labour Court until the Legislature harmonises s 89 (6) of the Labour Act with s 171 (1) (a) of the current Constitution.

It is my view that as things currently stand the argument that the High Court has no jurisdiction to hear purely labour matters at first instance is not sustainable. It is my considered view that the High Court, being a creature of inherent jurisdiction, by implication can decline to exercise its jurisdiction in favor of a litigant for any reason that it deems fit, in the interests of justice. I see no reason why jurisdiction over purely labour matters at first instance, in some circumstances, cannot be declined on the basis that there is a specialized court which exercises

concurrent jurisdiction and that is where the litigant ought to go. In cases where litigation has already been commenced initially before the Labour Court, it is undesirable for this court to exercise jurisdiction over the same matter as this will promote forum shopping and will be detrimental to the administration of justice in the long run.

This is an urgent chamber application for a mandatory interdict, in which the following order is sought on an interim basis;- that respondent be and is hereby ordered to furnish applicant with the following information within forty eight hours of this order being granted;

1. A schedule detailing the applicant's back-pay and benefits from the period of March 2005 to 31 January 2016.
2. The respondent's salary advice slips for the period 22 March 2005 to January 2016
3. The date and time at which applicant shall resume his duties.
4. The date of payment of applicant's back-pay and benefits;
5. The dates on and manner in which the applicant's salaries shall be paid from the 1st of February 2016 until applicant ceases to be entitled to a salary.

The final order sought is for the respondent to show cause why a final order should not be made on the following terms;- Respondent be and is hereby ordered;

1. To immediately furnish the applicant with all information regarding and relevant to the applicant's employment contract and conditions of service when requested to do so.
2. To fully comply with the judgments of the Labour Court handed down on 6 February 2008 and 22 January 2016 within two weeks of this order being granted failing which the Director General (Chief Executive Officer) of respondent shall be committed to gaol for a period of three months for contempt of court.
3. To pay costs of suit on a legal practitioner and client scale.

The applicant is the holder of a doctorate in Engineering Science and the respondent (SIRDAC) is a university situated in Hatcliffe, Harare. The background to this application as set out in the founding affidavit is that the applicant was employed by the respondent from the year 2000 to 22 March 2005 as the director of the Building Technology Institute (BTI) of the respondent. The Labour Court made a finding on the 6th of February 2008, that the respondent's dismissal of the applicant was unlawful. The respondent was ordered to reinstate the applicant with effect from 22 March 2005 the date of dismissal, without loss of salary or benefits. The

applicant alleges that the respondent has failed to comply with this judgment by failing to reinstate him or to pay him his full salary or benefits, or even to pay him damages in lieu of reinstatement in the alternative. The applicant instituted proceedings in HC 4544-08 for an order of contempt to be made against the respondent's Director General. The respondent, in response to that application, purported to 'reinstate' the applicant by way of a letter dated 26 September 2008. The letter was delivered to the applicant on the 7th of October 2008.

It is common cause that, despite the letter of reinstatement, the respondent has not paid the applicant his salary or benefits, and that, the applicant has not re-joined the respondent's staff, to date. On 26 June 2009, the respondent terminated the applicant's employment by way of a letter. The applicant challenged this termination by way of an application for review before the Labour Court, which granted judgment in his favour on the 22nd of January 2016 (rp13). That judgment was done by two Labour Court Judges. They alluded to the judgment done by the same court on 6 February 2008 in which an order was made that the applicant be reinstated with full benefits or alternatively be paid damages in lieu of reinstatement. The Labour Court found that the parties should go back to the original order of 6 February 2008 and allowed the application for review, setting aside the decision of the disciplinary committee of 26 June 2009.

The applicant requires information pertaining to his salary arrears in order to prepare an application for damages in lieu of reinstatement. This information is in the possession of the respondent who is being uncooperative. The applicant is afraid that the respondent will continue to ignore the orders of the Labour Court with impunity. Letters written to the respondent on 22 January 2016 and 3 February 2016 have gone unanswered. The applicant is of the view that he has no other remedy than to approach this court on an urgent basis because he is wallowing in poverty whilst respondent remains in contempt of the Labour Court orders. At the hearing of the matter, the respondent took the stance that this matter was not urgent because the requirements of urgency were not met on the papers, and that the application was devoid of merit because the requirements of a mandatory interdict were again not established. It was agreed by consent that the parties file heads of argument to buttress their polarized position, when a preliminary point was taken that this court lacked the requisite jurisdiction to deal with a purely labour matter.

The applicant filed its heads of argument on the 11th of February 2016, and the respondent's heads were filed on 18 February 2016. The question that arose during the course of argument was whether in terms of s 171(1)(a) of the Constitution of Zimbabwe Amendment (no

20) Act 2013 the High Court now has jurisdiction as a court of first instance to deal with purely labour matters. The applicant's contention was that this was not a purely labour matter, the application was for a mandatory interdict which the Labour Court cannot grant. It is my considered view that the question of jurisdiction ought to be settled before a decision is made as to whether or not the applicants satisfied the requirements of urgency and then the merits of the matter can be ventilated. Section 171 (1) (a) of the current Constitution provides that;-

> **"171 Jurisdiction of High Court**
> (1) The High Court—
> (*a*) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
> (*b*) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;
> (*c*)…
> (*d*)…"

Section 171 (2) stipulates that;-

> "(2) An Act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer the power to make rules of court.
> (3)…
> (4)…"

The wording of s 171 (1) (a) has given rise to a new school of thought that these provisions of the current Constitution have restored the jurisdiction of the High Court over purely labour matters at first instance. Section 89 (6) of the Labour Act [*Chapter 28:01*] provides that;-

> "(6) 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 provisions of s 172 (2) the current Constitution provide, in relation to the jurisdiction of the Labour Court;-

> **"172 Labour Court**
> (1)…
> (*a*)…
> (*b*) …
> (2) The Labour Court has such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament.
> (3)…"

Section172(2) confers such jurisdiction on the Labour Court as may be found in the Labour Act. The current Labour Act, to the extent that s 89(6) is now inconsistent with s171(1)(a) requires express re-alignment with the Constitution by the Legislature. While we wait

for its re-alignment with the Constitution, the Labour Act no longer confers exclusive jurisdiction on the Labour Court over purely labour matters at first instance. The High Court, having always had inherent jurisdiction which had been expressly ousted by s 89 (6) from dealing with purely labour matters at first instance, now has concurrent jurisdiction with the Labour Court to deal with purely labour matters at first instance. This is undesirable, not merely because the High Court is likely to be inundated with labour matters at a time when it is grappling with backlog of cases, but because the Labour Court was expressly created to provide a streamlined, faster and cheaper remedy to both employers and employees at first instance in purely labour matters. The intention of the Legislature in setting up the Labour Court was to create a specialized court to deal with such matters at first instance. That intention will be circumvented if the current situation is not rectified soon, that of concurrent jurisdiction with the High Court.

Section 10 of part 4 of the sixth schedule of the current Constitution provide that;-

> "10. *Continuation of existing laws*
> Subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution."

In my view, this means that any inconsistency between the current Constitution and an existing law must be resolved in favour of conformity with the Constitution. This renders s 89 (6) of the Labour Act void to the extent of its inconsistency with s 171 (1)(a) of the current Constitution. The inescapable conclusion is that the High Court now has concurrent jurisdiction with the Labour Court to deal with purely Labour matters at first instance. It is up to the High Court to decline to exercise that concurrent jurisdiction as a way of preserving the specialized nature of the Labour court until the Legislature harmonises s89(6) the Labour Act with s171(1)(a) of the current Constitution. It is my view that as things currently stand the argument that the High Court has no jurisdiction to hear purely Labour matters at first instance is not sustainable.

I hold in this view, which I have previously expressed in the following cases:- *Innocent Chitiki* v *Pan African Mining*[1], *G Chiparaushe & 66 Ors* v *Triangle Limited and Triangle Staff Pension Fund*[2]. Other cases in which a similar view was expressed ar:- *Christmas Mazarire* v

[1] HH 656-15
[2] HH 196-15

Old Mutual Shared Services[3], *Capri* v *Maponga* [4] I found my brother judges views in *CZI* v *Mbatha*[5], persuasive that;-

> "…to the extent that the Constitution overrides any Act of parliament, there can be no doubt that s171(1)(a) overrides s89(6) of the Labour Act. What this means is that by clear Constitutional provision this Court has original jurisdiction over all matters including those of a labour nature whereas prior to the new constitutional order the Labour Court enjoyed exclusivity."

The submission made on behalf of the respondent, that s 172 of the current Constitution should be read together with s 170 and s 171, in the interests of achieving 'disambiguity', was not persuasive to me. Clearly s 172 (2) confers such jurisdiction on the Labour Court as may be conferred on it by an act of parliament, for which we read the Labour Act. It was submitted that a proper reading of s 172 (2) will show that the Labour Court derives its jurisdiction from s 172 (2) and not from s 89 (6) of the Labour Act. With all due respect to Mr *Hwacha* for the respondent such a chicken and egg approach is most unhelpful and will not resolve the issue in favor of restoring the exclusivity of the Labour Court in purely labour matters at first instance. I am grateful to counsel for the respondent for the guidance given in the heads of argument with regards to the cannons of statutory interpretation;- *Re-Interpretation of statutes*[6], '

> "To determine the purpose of the legislature it is necessary to have regard to the Act as a whole and not to focus on a single provision to the exclusion of all others. To treat a single provision as decisive…might obviously result in a wholly wrong conclusion".

And *Cox* v *Hales*[7], where the court said that;-

> "It is right for a court not only to look only at the provision immediately under the Constitution but any other which may throw light upon it and afford an indication that general words employed in it were not intended to be applied without some limitation"

Madoda v *Tanganda Tea company Ltd*[8];-

> "By adopting that approach to the interpretation s7 of the code the learned judge in the court a quo departed from the ordinary grammatical meaning of the section, and therefore, erred. As Joubert JA said in *Coopers & Lybrand & Ors* v *Byrant* 1999 (3) SA 761 (A) at 767 D-F;
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> 'The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various cannons of the Constitution are

[3] HH 187-14

[4] HH92-15

[5] HH125-15

[6] Laurens du Plessis Butterworths 2007, p112

[7] 1890 (15) App 509

[8] 1999 (1) ZLR 374 @ 377A-D

> available to ascertain their common intention at the time of concluding the cession. According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy ot inconsistency with the rest of the instrument". The same view was subsequently expressed by my brother McNally in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) @ 262 (S) @ 264 D-E where he said;
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> 'There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey* v *Perason* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further'.

I find the wording of s 172 (2) to be clear and unambiguous. The jurisdiction of the Labour Court is set out in the Labour Act. It is accepted that the Constitution confers jurisdiction on the Labour court in matters of labour and employment but such jurisdiction cannot be exclusive as long as s 89 (6) of the Labour Act is inconsistent with s171(1)(a) of the Constitution, which clothes the High Court with jurisdiction over **ALL civil and criminal matters**. That includes labour matters, unfortunately. No other interpretation will do. Even the cannons of statutory interpretation cannot save the previous exclusive jurisdiction over purely labour matters, at first instance of the Labour Court. Jurisdiction over pure labour matters at first instance is now shared, it is concurrent between the two courts because that High Court's jurisdiction is no longer ousted s 89 (6) of the Labour Act.

I cannot accept the submission made on behalf of the respondent that s 89 (6) of the Labour Act remains valid because it was enacted in terms of s 172 (3) of the current Constitution. That, in my view, has no bearing on the question of the inconsistency of s 89 (6) with s 171 (1)(a) of the Constitution. It is my considered view that the High Court, being a creature of inherent jurisdiction, by implication can decline to exercise this concurrent jurisdiction in favour of a litigant for any reason that it deems fit, in the interests of justice. I see no reason why jurisdiction over purely labour matters at first instance cannot be declined on the basis that there is a specialized court which exercises concurrent jurisdiction and that is where the litigant ought to go. In determining this question of concurrent jurisdiction over purely labour matters at first instance, I did not find the remarks of my brother Judge in the case of *Fortunate Chikoyo* v *Richard Ndlovu, Charles Simbi, Chief Elections Officer & Registrar of Voters* [9]

[9] HH 321-14

instructive for the simple reason that the facts of that case are distinguishable for two reasons. Firstly the jurisdiction in question was not original inherent jurisdiction of this court versus jurisdiction conferred on an inferior court which is governed by statute. The jurisdiction of the Electoral Court was in terms of appeals and reviews. In my view the provisions of the Electoral Court which the respondent seeks to be compared to the provisions of s 89 (6) the Labour Court, are different. One provision confers exclusive original jurisdiction, the other review or appeal jurisdiction. The remarks made in a case where what was in comparison was the original jurisdiction of the general division of this court and a special division, the Electoral Court, of this same court, are surely distinguishable from the relationship or jurisdiction disparity between this court and an inferior court which does not enjoy inherent jurisdiction. It is also my view that this is not a purely labour matter which is being brought at first instance. The matter has already been adjudicated on by the Labour Court, not one, but twice Having established that this court now enjoys concurrent jurisdiction with the Labour Court over purely labour matters at first instance, whereas previously its jurisdiction was expressly ousted in favour of exclusive jurisdiction in favor of the Labour Court, it is not time to consider whether this matter is urgent.

There is a plethora of cases in which the question of what constitutes urgency was exhaustively discussed, then settled. It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See [10] .

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [11] And[12], [13]

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[10] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189

[11] *Mathias Madzivanzira & @ Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002"

[12] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H

In my view, which I have previously expressed in other cases, in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy.

The applicant contended that the matter cannot wait because eleven years is a long time and the dispute has taken too long to resolve resulting in his being impoverished. He contended further, that he will be irreparably prejudiced if the matter is not dealt with straight away without delay. It is common cause that the applicant treated the matter as urgent. The question for determination is whether the applicant has no satisfactory alternative remedy. The certificate of urgency, which was signed by Mr. *Phineas Ngarava* states that the respondent is unjustifiably, unfairly and unreasonably refusing to furnish the applicant with information relating to his salary, back-pay and benefits, which refusal is in contempt of the order of the Labour Court. This has resulted in applicant being distressed because he has no other source of income. The court can hear a matter urgently where the urgency arises out of the need to protect commercial interests. See *Silver's Trucks (Pvt)Ltd* v *Director of Customs & Excise*[14].

The respondent submitted that there is no justification for urgent relief because the judgment of the Labour Court (LC/H/21/16) was served on it on Monday 25th January 2016 and this application was filed seven days later on 4 February 2016. The contention is that this application is premature because the respondent has thirty working days within which to file an application for leave to appeal and another fifteen days within which to lodge an appeal after

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[13] *Williams* v *Kroutz Investments Pvt Ltd & Ors* HB 25-06, *Lucas Mafu & Ors* v *Solusi University* HB 53-07

[14] 1999 (1) ZLR 490 (HC)

leave is granted. The respondent has indicated to the applicant that it wishes to note an appeal and it is of the view that it cannot be compelled to comply with a judgment that it wishes to appeal against before its entitlement to appeal expires. The respondent contends further, that the applicant has an alternative remedy in the Labour Court and has not satisfied the requirements of an interdict. What alternative remedies are provided in the Labour Act?

Section 89 (2) (c) allows the Labour Court to hear and determine any application in terms of the Labour Act. In the exercise of its functions, the Labour Court may make an order for payment of back-pay calculated from the time when the dispute or unfair labour practice arose. It has power to order payment of compensation to a prejudiced employee. It can order reinstatement or damages in lieu of reinstatement, or punitive damages (s89(c)(i)-(iii), proviso (i)-(iii). That is what the Labour court did on the 6th of February 2008. It ordered that the respondent reinstate the applicant with effect from the date of dismissal without loss of salary or benefits, or alternatively that respondent pay damages *in lieu* or reinstatement. The applicant was directed to approach the Labour court for quantification of damages. That is the alternative remedy that is available to the applicant. In seeking to utilize this remedy, can the applicant be guided by the provisions of s 90A which stipulate that the Labour Court shall not be bound by the strict rules of evidence, and may ascertain relevant facts by any means which the presiding officer thinks fit and which is not unfair or unjust to any party?

In other words, a finding that an applicant who is before us on an urgent certificate has suitable alternative remedies would ordinarily result in the applicant being struck off the urgent chamber roll and referred to the ordinary court application roll. In this case such a finding that an alternative remedy exists, does not in my view, necessarily have to result in the matter not being heard urgently. I say so because the applicant's contention is that the alternative remedy is not suitable or adequate because of the paucity of evidence available to the applicant regarding details of back-pay and benefits. With all due respect to the respondent the issue is not whether or not its right to appeal is being curtailed. The issue is whether the applicant is able to mount a credible case for damages *in lieu* of reinstatement and payment of backdated salaries when he has no idea what the salaries that he was entitled to actually were.

It is trite that only this court can grant a mandatory interdict. Such an interdict will compel the respondent to supply the information required by the applicant in order to utilize his remedy in the Labour Court, that of seeking payment of arrear salaries and damages *in lieu* of

reinstatement. See *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union & Ors*[15], where the following guidance was given;-

> "As a general statement, it is correct that the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Act. Where, however a dispute can either found a cause of action at common law, or in terms of the Act, a case of ***apparent concurrent jurisdiction between this court and the labour Court appears to arise(***my emphasis) I say appears to arise because the apparent conflict can easily be resolved by paying regard to the overall intention of the legislature in creating the Labour Court. In my view, in such a case, the Labour Court's jurisdiction being special must prevail. It would make a mockery of the clear intention of the Legislature to create a special court if the jurisdiction of such a court could be defeated by the mere framing of disputes into common law cause of action where the act has made specific provisions for the same. ***In my view, if the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is also resolvable at common law".*** (my emphasis)

This case was decided in 2005, before the advent of the current Constitution, and it would be interesting to see if the Supreme Court's guidance remains the same when the provisions of s 171 (1)(a) are taken into consideration. For purposes of determining whether an application for an interdict ought to be dealt with by this court because it is a common law remedy which the Labour Court has no power to grant, this case is indeed instructive. See also *DHL International Private Limited* v *Madzikanda*[16], *Surface Investments Private limited* v *Maurice Chinyani* , [17].

The requirements of an interdict are;

1. A clear or definitive right-this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.
3. The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See *Tribac (Pvt) Ltd* v *Tobbacco Marketing Board*[18], *Setlogelo* v *Setlogelo*[19], *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor*[20], *Boadi* v *Boadi & Anor*[21], *Diepsloot Residents' and Landowners' Association & Anor* v *Administrator Transvaal* [22]. For purposes of the interim relief sought, we need only be furnished with proof on a *prima facie* basis.

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[15] SC 8-05
[16] HH51-10
[17] HH295-14
[18] 1996 (2) ZLR 52 (SC) @56
[19] 1914 AD 221 @ 227
[20] 1980 ZLR 378
[21] 1992 (2) ZLR 22
[22] 1994 (3) SA 336 (A) @ 344H

> The applicant has a clear right which was affirmed by two judgments of the Labour Court. It is common cause that the two judgments have not been complied with so an injury has been committed against the applicant to his prejudice as set out in the founding affidavit. We have already found that although the Labour Act provides an alternative remedy, it is not adequate, and does not grant the applicant similar protection. Section 93 of the Labour Act only gives a sitting Judge power to compel the production of evidence. It does not assist a litigant to compel the production of documents or supply of information which he requires for the preparation of his case.

For these reasons, it is my view that the applicant has established the requirements of an interdict and for that reason, it be and is hereby ordered that;- respondent be and is hereby ordered to furnish applicant with the following information within forty eight hours of this order being granted;

1. A schedule detailing the applicant's back-pay and benefits from the period of March 2005 to 31 January 2016.
2. The respondent's salary advice slips for the period 22 March 2005 to January 2016.
3. The date and time at which applicant shall resume his duties.
4. The date of payment of applicant's back-pay and benefits;
5. The dates on and manner in which the applicant's salaries shall be paid from the 1st of February 2016 until applicant ceases to be entitled to a salary.

Gama & Partners, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners