

IDAH TAGARIROFA
versus
NHEDZIWA HIGH SCHOOL DEVELOPMENT COMMITTEE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 February 2020 and 12 March 2020

Opposed Application

A Marara, for the applicant
T G Mboko, for the respondent

MUZENDA J: This is an application for a declaratur where that applicant is seeking the following relief as per her draft order.

“IT IS ORDERER THAT:

1. The application be and is hereby granted.
2. The disciplinary proceedings conducted by the respondent against the applicant in terms of SI 15 of 2006, be and is hereby declared a nullity.
3. The respondent be and is hereby ordered to reinstate the applicant without loss of salary and benefits with effect from the date of termination of contract of employment
4. The respondent be and hereby ordered to pay costs of suit on an attorney-client scale up to the application is opposed”

The application is opposed. The respondent raised three points *in limine*:

1. This matter has already been determined by the labour court sitting at Harare under case No. LC/H/LRA/216/17. This identical application has already has a judgement.
2. In as far as this Honourable Court has jurisdiction over labour matters, it is not permissible for parties to approach the High Court and the Labour Court with the same issue as was done herein. In other words, the matter is *res judicata*
3. The dispute has already been dealt with by the Labour Court.

BACKGROUND

Applicant is a former employee of the respondent. Her contract of employment was terminated by the respondent using the standard National Employment Council SI, 15 of 2006. A designated agent attempted to register the determination with the Labour court but the Labour Court rejected the application on the basis that the respondent did not fall under the auspices of National Employment Council for Zimbabwe Schools Development Association and Committees of Zimbabwe. The applicant made another application in the Labour Court seeking among other things the setting aside of the disciplinary proceedings conducted by the respondent in terms of SI 15 of 2006 and reinstatement of the application without loss of benefits. The Labour Court application was struck off the roll with costs for lack of compliance with the rules. The applicant then filed the present application.

In opposing the application, the respondent contend on the merits that after the dismissal of the applicant, she appealed against her dismissal in terms of the National Employment Council for Schools Development association, as already highlighted herein, the Labour court declined. Respondent contend further that she used SI 15 of 2006 because at the time the disciplinary proceedings were conducted there was no registered code of conduct governing the labour issues of the respondent. Respondent added that when the Labour court removed the matter from the roll, applicant made another application which was also dismissed by the Labour Court.

Points in limine

Before dealing with the points *in limine* the court needs to register its concern with the condition of the record of proceedings. The index was randomly prepared and the documents are not arranged in tandem with their positions spelt out on the index. The papers are repeatedly annexed and it is clear that applicant's legal practitioners did not check if the record was in order before the matter was set down for hearings. It is the sole duty of the applicant's legal practitioners to ensure that the record is properly arranged, well paginated in sequence of the pleadings and more particularly that the court's copy corresponds with the copies retained by the parties, this will make it easy for quick reference by the court during proceedings. In future, the parties were informed during the hearing the matter can be struck off the roll and applicant ordered to pay the wasted costs of the other party *debonis propriis*. The lack of order of the record was condoned and the application was allowed to be heard, but applicant was asked by the court to address it on the issue of costs at a later stage.

WHETHER THE MATTER HAS ALREADY BEEN DETERMINED BY THE LABOUR COURT AND WHETHER IT IS *RES JUDICATA*

The respondent submitted that the applicant is abusing the court process by bringing an application which has already been disposed of by the labour Court. The applicant on the other hand contended vigorously that the application before this court is for a declaratur and no such application had previously been placed before a Labour Court because the latter court does not have jurisdiction to grant a declaratur. Applicant further added that what was before the Labour Court was an application relating to scope.

I am persuaded by Mr *Marara* when he submitted quoting MUTEWA J¹ when he ruled that a litigant raising the issue of *res judicata* must show that the dispute has been conclusively settled on the merits by a court of competent jurisdiction and that the two actions are between the same parties, concerning the same subject matter founded on the same cause complaint. I am satisfied that the points *in limine* are misplaced and they are all dismissed.

WHETHER APPLICANT CAN BE GRANTED THE RELIEF SOUGHT

The basis for seeking the order for a declaratur by the applicant is basically that the proceedings were conducted under the auspices of SI 15 of 2006 and not under the code of conduct for the National Employment Council for Welfare and Educational Institutions which was the appropriate employment Council at the time the disciplinary proceedings were conducted. The respondent denies that it used SI 15 of 2006 wrongly. It argues that at that time there was no registered code of conduct to be used by it so it used SI 15 of 2006, the argument by the respondent does not find favour with this court. The National Employment Council for Welfare and Educational Institutions apply to non-governmental schools and has been in existence for fairly a long time. In my view the respondent sought to have resorted to that employment council in disciplining the applicant. I agree with the applicant that once the respondent used the wrong statute and or wrong code of conduct, the subsequent proceedings are nullity.² the proceedings were not in accordance with the due process of the appropriate legislation applicable to the dispute in question. SI 15 of 2006 would only apply where there is no applicable code of conduct.

¹ In SAMANYANGA AND OTHERS V FLEXMALL (PRIVATE)LIMITED HH5710/09)

² See Makumbe Primary School v Vivian makumbe and 2 others LC/11/14/16
Chikomba Rural District Council V Herbert pasipanodya SC 26/2012

On the question of whether this court has jurisdiction over labour matters, Mr *Mboko* submitted that, he was aware that the court has jurisdiction and in my view there is no need to belabour the issue where it is common cause to the parties before me.

In the matter of *Johnson v Agricultural Finance Cooperation*³, GUBBAY CJ (as he then was) held that:

“A declaratory order under s 14 of the High court of Zimbabwe Act, requires a two prong enquiry:

- (a) Is applicant an interested party.
- (b) Is this a proper case for the exercise of the court’s discretion?”

The *Johnson* case (*supra*), is also of the authority that a declaratory order ought to be granted on one aspect if it will solve that part of dispute. In *Bubye Minerals Private Limited v Minister of Mines and Mining Development and 3 Others*⁴ MALABA DCJ⁵ citing *Mcfoy v United Africa Co. Limited*⁶ reiterated the authority of the principle relied upon that all proceeding founded upon a decision which is null and void *abi initio* are also bad and incurably bad.⁷ The employer, the respondent can only do things which are governed by law and act in accordance with the provisions of an appropriate employment statute even where the employee does not object to the use of the SI 15 of 2006.

The applicant prayed for an order reinstating her without loss of salary and benefits with effect from date of termination of her contract of employment. I am aware that when the proceedings are declared null and void the status quo is restored however in this case the applicant or respondent must use the appropriate conduct to deal with the issue of whether the applicant should remain at work or not. There is no need to reinstate the obvious result in my view moreso where the proceedings are declared a nullity. I asked Mr *Marara* to address the court on the aspect of costs of the application. He indicated to the court that he will not pursue an order of costs as he had done on the papers. That concession is proper in my view, instead of the applicant straight away coming to this court for a declaratur she approached the labour court on two different occasion unnecessarily causing the respondent to incur costs. Either she could have applied for review of the proceedings or make an appeal if she was not happy with the dismissal. I will not grant costs to the applicant also on the basis of the poorly prepared record of proceedings and that duty fell on Mr *Marara*. He admitted that the record was

³ SC-17-1995

⁴ SC 3/11

⁵ On p.11 of the cyclostyled judgement

⁶ [196] 3 All ER 1169 (PC) at 11721

⁷ See also *Mugwebie V Seed Co. Limited and another* 2000 (1) ZLR 93 @ 97 A-B

shambles and by such a conduct, the court will not grant an order of costs even though the applicant succeeded in this matter.

Accordingly, it is ordered as follows:

- (a) The disciplinary proceedings conducted by the respondent against the applicant in terms of SI 15 of 2006 be and are hereby declared a nullity.
- (b) There will be no order as to costs

Mutamangira and Associates, applicant's legal practitioners
Mboko T G Legal Practitioners, respondent's legal practitioners