

REPORTABLE (25)

(1) TENDAYI TAMANIKWA (2) FRANK TINARWO
(3) EMMERSON PAMIRE (4) TENDAI MOMBESHORA
v
ZIMBABWE MANPOWER DEVELOPMENT FUND

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & OMERJEE AJA
HARARE, OCTOBER 15 & JULY 16, 2013**

G Machingambi, for the appellant

C Mucheche, for the respondent

GOWORA JA: This appeal from a decision by the Labour Court concerns the interpretation of seemingly conflicting provisions within the Labour Act [*Cap. 28:01*], and, additionally the conflict between the Labour Act itself, (“the Act”) and the Zimbabwe Manpower Development Fund (Conditions of Service and Misconduct) Regulations S.I.258/1996, “the Regulations”.

The respondent is a statutory body which is created in terms of s 47 of the Manpower Planning and Development Act [*Cap. 28:02*]. In terms of s 69 of the same Act, the Minister is empowered to enact regulations, which, in the opinion of the Minister, would enhance the performance of the functions of the respondent. In the exercise of those powers the Minister caused the promulgation of the Regulations.

The appellants were employed by the respondent in various capacities. On 18 August 2009, the appellants were given instructions to sign declarations of secrecy

following upon the leakage of information of a confidential nature from the respondent's office. All of the appellants refused to sign the declarations and they were charged with disobeying a lawful instruction. A second charge of hindering or obstructing another employee in the performance of his duties which was preferred against the second appellant could not be sustained and was dismissed. Following upon disciplinary proceedings all the appellants were found guilty of the charges and dismissed from employment. Dissatisfied with their dismissal, they appealed to the Trustee, who is the Minister of Higher and Tertiary Education, in terms of s 44 of the Regulations and were unsuccessful. Dissatisfied with the dismissal of that appeal, they noted an appeal to the Labour Court. They were unsuccessful before the Labour Court which held that there was no right of appeal to the Labour Court provided for in the Regulations. They have as a consequence, appealed to this Court.

The appellants have in their appeal to this Court raised issues on alleged inconsistencies as relates to the interpretation of ss 2, 3, 12B and 92D of the Act and s 44 (1) of the Regulations. The grounds upon which the appeal is premised are the following:

1. The court *a quo* erred in ruling as it did that it had no jurisdiction to hear the appeal by the appellants.
2. Having correctly ruled that the Labour Act [*Cap. 28:01*] applies to the appellants, the learned president *a quo* erred in declining to exercise jurisdiction to hear the appeal by the appellants.
3. The court *a quo* further erred in concluding that s 44(1) of the Zimbabwe Manpower Development Fund (Conditions of Service and Misconduct) Regulations 1996 S.I. 258/96 provides that an appeal to the respondent's Trustee is final and un-appealable.

4. The proceedings taken by the Respondent under the Zimbabwe Manpower Development Fund (Conditions of Service and Misconduct) Regulations 1996 S.I. 258/96 were *null* and *void ab initio* and of no force and effect by virtue of the application of s 5 (a) and (b) of S.I. 15 of 2006 as read with the peremptory provisions of section 12B of the Act. Accordingly the court *a quo* erred in refusing to entertain the appeal.

The learned President in the court *a quo* found that the Act applied to the appellants. The learned President was unable to find that the Act confers jurisdiction on the Labour Court to entertain the appeal principally due to the wording of s 44 of the Regulations which does not bestow a right of appeal beyond that of the Trustee.

The finding by the court *a quo* was to the effect that whilst s 3 of the Act provided that the Act applied to all employees except those specifically excluded in the said section, it did not confer jurisdiction upon the court to hear and determine appeals arising out of dismissals effected under the Regulations. The court said the following:

“Section 3 does not confer jurisdiction on any court to apply the provisions of the Labour Act. The question we are dealing with here is whether the Labour Court has jurisdiction to hear appeals determined in terms of S.I 258/96 where the Statutory Instrument does not provide for an appeal to the Labour Court? The Labour Court is a creature of Statute and its jurisdiction is derived from the Statute creating it.”

The appellants contend however, that, notwithstanding the provisions of s 44 (1) of the Regulations under which they were charged with misconduct and dismissed from employment, they are, by virtue of the provisions of the Labour Act, entitled to be heard by the Labour Court by way of appeal and that consequently, their appeal was properly before the court *a quo*. They contend further that the inconsistencies within the legislation do not

oust the jurisdiction of the Labour Court to entertain their appeal. With regard to the conflict between the Regulations and the provisions of the Act, it is contended by the appellants that in view of the provisions of s 2A of the Act, the Act prevails over the Regulations and consequently there exists a right of appeal to the Labour Court.

The Labour Court is a creature of statute and can exercise only those powers that it has bestowed upon it by its enabling Act. The powers of the Labour Court in relation to appeals are spelt out in s 89 (1) of the enabling Act. They are stated as follows:

The Labour Court shall exercise the following functions:

- “(a) Hearing and determining applications and appeals in terms of this Act or any other enactment.”

In my view, the starting point in determining the dispute is s 3 of the Act which provides as follows:

“3 Application of Act

- (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution.
- (2) For the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [*Cap. 16:04*].
- (3) This Act shall not apply to or in respect of—
- (a) members of a disciplined force of the State; or
- (b) members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State; or
- (c) such other employees of the State as the President may designate by statutory instrument.”

As is evident from the provisions of section 3, the Act applies to all employers and employees except for those whose conditions of employment are governed by the

Constitution or the Public Service Act [Chapter 16:04]. The precursor to the Labour Act, the Labour Relations Act 16 of 1985, now repealed provided in s 3 thereof:

“3. Application of Act

This Act shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by or under the Constitution.”

As a consequence of the above provision, prior to the promulgation of the Labour Act [Chapter 28:01], in construing the section, courts within this jurisdiction concluded that the Act was not of universal to all employees in Zimbabwe. See *City of Mutare v Matamisa* 1998 (1) ZLR 512, wherein despite the wording of the section providing that the Act applied to all employees, this court held that it was not obligatory for the City of Mutare to obtain the approval of the Minister as provided for in s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations S.I 371/1985. Effectively, therefore, the court found that employees of urban councils were not covered by the Act.¹

Subsections 2 and 3 of the current Act were promulgated by Act 7 of 2005 and as a consequence, with the exceptions of those specifically excluded by the section, all employees were brought under the umbrella of the Act. In the circumstances of this case it seems to me that the finding by the court that in terms of s 3 thereof the Act applied to the appellants was clearly contradictory to the subsequent finding that the court did not have jurisdiction to determine the appeal filed by the appellants.

¹ This decision was followed in *Mutare City Council v Mudzime &Ors* 1999 (2) ZLR 140.

It follows therefore that under s 89(1) employers and employees whose conditions of employment are covered under s 3 are impliedly given the right to appeal to the Labour Court. It is only those employers and employees who are excluded by s 3 who cannot have access to the Labour Court for the resolution of disputes.

It is the contention of the appellants which contention finds favour with me, that, notwithstanding the absence of a provision in the Regulations for an appeal process against the decision of the Trustee, the appellants are not deprived of a remedy against their dismissals under the Regulations. The appellants contend that an appeal lies to the Labour Court which has jurisdiction in terms of sections 2A, 3 and 92D of the Act.

The appellants suggest that the failure to provide for an appeal process beyond the Trustee is inconsistent with s 3 of the Act, wherein every employee except those specifically excluded therein, is provided for. As there is no specific provision denying the appellants a right of appeal to the Labour Court, it is the contention of the appellants that the court has jurisdiction to entertain an appeal under the circumstances of this particular case. I agree.

The appellants have argued that the provisions of s 44 (1) of the Regulations are inconsistent with the Act, in particular ss 3 and 2A thereof. They argue further that the Regulations are subservient to the Act in relation to the manner of termination of employment, and in particular s 2A (3).Section 2A provides as follows:

“2A Purpose of Act

- (1) The purpose of this Act is to advance social justice and democracy in the workplace by—
(a) giving effect to the fundamental rights of employees provided for under Part II;
(b)

[Paragraph repealed by section 3 of Act 7 of 2005]

- (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
 - (d) the promotion of fair labour standards;
 - (e) the promotion of the participation by employees in decisions affecting their interests in the work place;
 - (f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.
- (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).
- (3) This Act shall prevail over any other enactment inconsistent with it.
[Subsection substituted by section 3 of Act 7 of 2005]
[Section inserted by section 4 of Act 17 of 2002]”

In terms of s 2A (3) thereof, the Labour Act shall prevail over any other enactment the provisions of which are inconsistent with its own. The Regulations do not permit any appeal beyond the Trustee. Section 44(1) is worded as follows:

- “(1) An employee who is aggrieved by a decision of the Director or the Chief Executive may, within fourteen days of being notified of such decision appeal;
- (a) In the case of a decision by the Director to the Chief Executive;
 - (b) In the case of a decision by the Chief Executive to the Trustee.”

There is a general rule of statutory interpretation that where two statutes are in conflict with each other, the later statute, by virtue of the principle of *lex posterior derogate priori*, is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the legislature passes the latter Act it is presumed to have knowledge of the earlier Act.

In *Heavy Transport & Plant Hire (Pty) Ltd & Ors v Minister of Transport Affairs & Ors* 1985 (2) SA 597, NESTADT J stated:²

“The principle is that statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one or to take away rights conferred

² 604B-D

by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect, or such alteration is a necessary inference from the terms of the later statute. The inference must be a necessary one and not merely a possible one. (Kent N.O. v *South African Railways and Another* 1946 AD 398 at 405) As KOTZE AJA stated in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400:

“It is only when the language used in the subsequent statute is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one”.

In *Wendywood Development (Pty) Ltd v Rieger & Ano* 1971 (3) SA 28

DIEMONT AJA, stated at 38A-C

“That sec 30 must be modified to give it efficacy can hardly be gainsaid. Indeed Mr Smallberger, who appeared for the respondent conceded that some modification was necessary, but I am not persuaded that the modification need be so extensive as to make it impossible to reconcile the sections. It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the provisions of the later statute.”

DIEMONT AJA in the *Wendywood* case had occasion to quote with approval the remarks of WATERMEYER CJ in *Kent, N.O. v South African Railways and Another* 1946 AD 398, to the following effect:³

“The language of every enactment must be so construed as far as possible to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. But it is impossible to will contradictions; and if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later.”

³ At 405 (quoting from Maxwell Interpretation of Statutes 4ed p 233)

In view of the provisions of s 3 and s 2A (3) the only logical conclusion is that the Labour Act applies to the appellants and, that consequently they would be entitled to redress under the provisions of the Act and that the Labour Court would have jurisdiction to entertain the appeal. In my view the absence of an appeal process to the Labour Court in the Regulations could not have overridden, and was never intended by the Legislature to override the peremptory provisions of s 2A, which the court *a quo* should have had recourse to. To the extent that an apparent conflict would be manifest due to absence of a specific provision in the Regulations for an appeal beyond the Trustee, then it seems to me that the Labour Act prevails over the Regulations, suggesting an implicit repeal of the Regulations.

The Regulations were promulgated in 1996 and when read together with s 2A of the Act, in view of the provisions of s 2A the only construction available to the court is that s 44 (1) of the Regulations has been repealed by implication, not merely because s 2A is a later statutory provision, but also by virtue of the wording of s 2A which provides that the Labour Act prevails over any other statute or piece of legislation whose provisions are inconsistent with its own. In any event, the Regulations, being subsidiary legislation are subordinate legislation. They are not an Act of Parliament. They are made under delegated powers. In his book *Maxwell on the Interpretation of Statutes*, P. St. J. Langan refers to statutory instruments as being an inferior form of legislation. As a consequence, s44 of the Regulations is subservient to the Act and by virtue of s 2A (3) the Act must supersede the Regulations.⁴

I am further fortified in this view by the fact that the Regulations are not an employment code and in terms of s 12B, the Labour Act makes it mandatory for any

⁴12 ed at p 74

dismissal to be effected in terms of a registered code of conduct or the Labour National Employment Code of Conduct, S.I. 15/2006.

The appellants have not argued that their appeal to the Labour Court was premised under the Regulations in terms of which they were dismissed. Indeed, it is accepted that the Regulations do not provide for an appeal process beyond that provided for to the Trustee. The issue is whether they could claim a right of appeal directly to the Labour Court despite being dismissed under a statutory instrument which was not an employment code as defined by the Act.

The Regulations do not deny an appeal process beyond that available to the Trustee. They are silent and in my view, the omission to provide for such an appeal process to the Labour Court is not in itself constitutive of the denial of a right of appeal. What would be of importance is if a right of appeal is provided for in the Labour Act itself.

The issue that then arises is whether in the Act itself there is provided a right of appeal in favour of the appellants. The right of an employer or an employee to appeal to the Labour Court is encapsulated in ss 92D and 92E of the Act which provide:

“92D Appeals to the Labour Court not provided for elsewhere in this Act

A person who is aggrieved by a determination made under an employment code, may, within such time and in such manner as may be prescribed, appeal to the Labour Court.

[Section substituted by section 32 of Act 7 of 2005]

92E Appeals to the Labour Court generally

- (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.

- (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.
- (3) *Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.”*

The respondent has conceded that the Regulations under which the appellants were dismissed is not an employment code. Clearly, the appellants are not amongst the specie of employees whose conditions of employment are governed by the Constitution or the Public Service Act. It stands to reason therefore that their conditions of employment are governed by the Labour Act. The logical conclusion therefore is that they would have the right to approach the Labour Court by way of appeal.

However, on the face of it, s 92D seems to be in conflict with s 3 of the Act, which conflict stems from the fact that s 92D appears to exclude from its ambit any employee whose grievance does not emanate from a determination made under an employment code. This would suggest further that an employee in the same position as the appellants who is dismissed except in terms of an employment code has no right to appeal to the Labour Court.

It is a well established canon of construction that courts should endeavour to reconcile *prima facie* conflicting statutes as well as apparently conflicting provisions in the same statute. Courts therefore do not readily come to the conclusion that there is a conflict and by using all means at their disposal they attempt to effect a reconciliation. It is also an established canon of construction that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them. See *Amalgamated Packaging Industries Ltd v Hutt & Anor* 1975 (4) SA 943 at 949H.

Accordingly, where there are two sections in an Act which seem to clash but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be preferred as opposed to an interpretation that will partly destroy the effect of one of them. It is also an elementary principle of construction that the Legislature will not be presumed to take away any acquired rights. The intention to do so must be expressed or very clearly implied from the language of the statute. In *Principal Immigration Officer v Bhula* 1931 AD 323 WESSELS JA stated:⁵

“It would be extremely difficult in such a case to say that Parliament has by implication in a later section modified rights which in an earlier section it safeguarded explicitly. The implied intention of Parliament must be so clear as to leave no doubt whatever in the mind of the Court. The Legislature is presumed to be consistent with itself.

.....

Moreover where there are two sections in an Act which seem to clash, but can be so interpreted as to give full force and effect to each, then such an interpretation is to be adopted rather than one which will partly destroy the effect of one of them. More especially in this case where the interpretation of the later statute would violate or modify rights which had been safeguarded in the former section.”

In *casu*, it cannot have been the intent of the Legislature to exclude any employee from obtaining access to an appeal upon the termination of his employment. The appellants have, under s 3, been guaranteed a right to redress from the Labour Court. It would therefore amount to an absurdity to find that in terms of s 92D they cannot have their appeal heard on the grounds that their dismissal was not effected in terms of an employment code. It would be difficult for this Court to state in the circumstances of this case, that Parliament has by implication, in s 92D modified rights which it had guaranteed in an earlier section of the Act. The implied intention of the Legislature must be so clear as to leave no doubt in the mind of the court as the Parliament is presumed to be consistent with itself.

⁵ At 335

In *R v Pashda* 1923 AD 281, INNES CJ stated:⁶

“.....It is competent to Parliament to oust the jurisdiction of courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved person to apply to the only authority which can investigate and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is prima facie their duty, namely, from investigating cases of alleged injustice or illegality.”

Consequently, the rights and obligations set out in the Act govern the terms and conditions of the employment relationship between the appellants and the respondent. In view of the provisions of s 3 therefore, employees covered by the Act are entitled to the rights, benefits and obligations provided for in the Act as read with s 2A thereof, which rights include the access to an appeal process to the Labour Court.

It is appropriate in construing the pertinent sections to have regard to s 12B in order to place a proper perspective on the intention of the legislature as regards the Act in issue. S 12B read:

“12B Dismissal

- (1) Every employee has the right not to be unfairly dismissed.
- (2) An employee is unfairly dismissed—
 - (a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
 - (b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9).”

In my view, the intent of the legislature as manifested in the provisions of s 12B is to ensure that no employee is dismissed unfairly by making it mandatory that any dismissal be effected in accordance with a registered employment code. Added to this, it is my view that, a perusal of ss 2, 3 and 92D leads to an inescapable conclusion that the intent

⁶ At 304

of the Legislature, in enacting the provisions in question was, to ensure that the employment relationship was governed by the provisions of one Act and that disputes were settled in terms of procedures regulated by the provisions of that Act. I am bolstered in this view by reference to the provisions of s 12B of the Act, requiring that no dismissal be effected in the absence of an employment code. There is thus an obvious contradiction between the provisions of s 3 and those of s 12B and 92D of the Labour Act. If regard is had to the provisions of s 2A, 3, 12B and 92D of the Labour Act, it becomes evident that there is discord and contradiction in the Act. There is a suggestion of a lack of cohesion. I would venture to suggest that the law giver consider the need to bring cohesion to the entire Act in order to avoid instances where persons whose rights are covered and guaranteed under the Act fail to access such rights by virtue of the unintended inconsistencies within the legislation.

It seems to me that the right to an appeal under the Act cannot be taken away through a provision which is inconsistent with the clear and unambiguous provisions of ss 3, and 2A. It is a well- recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature. See *De Wet v Deetlefs* 1928 AD 286 at 290.

It is accordingly, inconceivable that the Legislature would have intended to oust the jurisdiction of the Labour Court to determine appeals in respect of employers and employees whose conditions of employment are governed by the Labour Act. I find therefore that notwithstanding the provisions of s 92D of the Act the Labour Court had jurisdiction to determine the appeal filed by the appellants and accordingly the appeal was properly before the court *a quo*.

Although, the appellants have not argued as such, the Labour Court is empowered with review jurisdiction. In terms of s 89 (1) (d1) the Labour Court shall “exercise the same powers of review as would be exercisable by the High Court in respect of labour matters”. In the exercise of its powers the court a quo was therefore empowered to enquire into the manner in which the appellants were dismissed from employment.

As already adverted to earlier on in this judgment, in terms of s 12B a dismissal must be in terms of an employment code or the national code. A dismissal effected other than in terms of that section is an unfair dismissal. The appellants would have recourse to the Labour Court on the basis of the unfair dismissal in terms of s 12B. The only conflict lies in the provisions of the Regulations which provided for dismissal other than in terms of s 12B. To that extent the Regulations are in conflict with s 12B and the provisions of s 12B should prevail.

The appellants have contended that the proceedings under which they were found guilty of misconduct were null and void by virtue of the fact that the respondent did not proceed under an employment code as required under the law. They premise this argument on the provisions of s12B of the Act which places an onus upon an employer to establish that the dismissal of an employee was not effected unfairly. The section further provides that if an employee is dismissed in the absence of an employment code then such dismissal constitutes unfair dismissal for purposes of the Act. The respondent is not in a position to show that the dismissal of the appellants was effected in terms of a registered code of code as required by s 12B of the Act. To the extent that s 44(1) of the Regulations which provides for the dismissal of employees of the respondent in contradiction with the

provisions of ss 12B and 92D and most importantly s 2A of the Act, then it is taken as having been repealed and not to be given effect to.

The contention by the appellants as to the alleged irregularity of the proceedings invites this court to review the proceedings under which the appellants were dealt with by the respondent and subsequently dismissed. This Court derives the power of review in this instance from s 25 of the Supreme Court Act which reads in relevant part:

25 Review powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
- (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination.

The respondent failed to comply with the provisions of S12B of the Act. An employer who terminates the contract of employment with an employee must proceed either in terms of a registered employment code or the Labour National Employment Code S.I. 15/06. The respondent utilised the Regulations and it has failed to establish that the dismissals were effected in terms of the provisions of S12B. Any disciplinary procedures which have been effected outside the peremptory provisions of s 12B are clearly unlawful. The dismissal of the appellants was therefore null and void.

The appellants have prayed that the appeal be allowed with costs and in addition that the matter be remitted to the court *a quo* for a determination on the merits. In view of the conclusion that the proceedings conducted by the respondent were null and void

the inevitable result is that the dismissals are of no force and effect by operation of law. As a consequence, the appellants are entitled to an order of reinstatement to their former positions without loss of salary and benefits.

The appeal is allowed with costs.

The judgment of the court *a quo* is set aside and substituted with the following:

It is ordered as follows:

1. The dismissal of the appellants by the respondent from employment be and is hereby set aside.
2. The respondent be and is hereby ordered to reinstate the appellants to their former positions without loss of salary and other benefits.
3. The respondent shall bear the appellants' costs for the appeal.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

G Machingambi Legal Practitioners, appellant's legal practitioners

Matsikidze & Mucheche, respondent's legal practitioners