

REPORTABLE (1)

**NATIONAL EMPLOYMENT COUNCIL
FOR THE CONSTRUCTION INDUSTRY
v
ZIMBABWE NANTONG INTERNATIONAL (PRIVATE) LIMITED
(NO. 2)**

**SUPREME COURT OF ZIMBABWE
PATEL JA, GUVAVA JA & UCHENA JA
HARARE, 22 JUNE 2017 & 25 JANUARY 2018**

T. Mpofu & N. Chamisa, for the appellant

T. Magwaliba, for the respondent

PATEL JA: This is an appeal against the whole judgment of the High Court handed down in Case No. HC 8150/13 on 14 November 2014.

This matter was first argued on 5 June 2015 in relation to the first ground of appeal, to wit, the procedural point that the court *a quo* had erred in entertaining a challenge to its jurisdiction by way of an exception as opposed to a special plea. Argument was confined to this procedural point on the basis that a decision on that point in favour of the appellant would dispose of the entire appeal.

On 29 October 2015, the court rendered its judgment (No. SC 616/15) dismissing the first ground of appeal and directing the Registrar to set the matter down for hearing of argument on the remaining grounds of appeal.

Background

The appellant is a national employment council in the construction industry, while the respondent is an employer of employees engaged in the same industry. The appellant issued summons against the respondent claiming the sum of US\$165,755 for general fund and pensions contributions due from 16 February 2009 to 31 March 2013, in terms of the Collective Bargaining Agreement for the Construction Industry, S.I. 244 of 1999 – “the 1999 CBA”. (This instrument has since been repealed and replaced by S.I. 45 of 2013 – “the 2013 CBA”). The appellant also claimed interest on the principal amount, at the rate of 7.5 per cent per annum, and costs of suit. The respondent duly filed its notice of appearance to defend.

Following the further exchange of pleadings between the parties, but before filing its plea, the respondent filed an exception to the appellant’s claim. The principal objection raised was that the High Court lacked jurisdiction to entertain the claim as it was a labour matter. The respondent also averred that part of the claim had prescribed by effluxion of time and that the rate of interest claimed exceeded the prescribed rate of interest.

The court *a quo* found that the appellant's claim was premised on the provisions of the 1999 CBA which had been negotiated and registered under s 79 of the Labour Act [*Chapter 28:01*]. Consequently, the alleged failure to comply with the CBA was a labour matter to be dealt with by the Labour Court at first instance in terms of s 89 (1) (a) of the Act, the jurisdiction of the High Court having been specifically ousted by s 89 (6) of the Act. The court further held that it was an abuse of court process for the appellant to approach the High Court after the jurisdictional issue was raised by the respondent. The appellant's claim was accordingly dismissed with costs on a legal practitioner and client scale.

The grounds of appeal canvassed and argued by counsel at the second hearing encompass the judgment of the court *a quo* pertaining to its jurisdictional competence, including the merits of that judgment under the new constitutional dispensation. Accordingly, the judgment herein will address the following questions:

- Whether the dispute between the parties was one within the exclusive jurisdiction of the Labour Court and therefore outside the jurisdictional competence of the High Court.
- Whether the exclusive jurisdiction of the Labour Court under s 89 of the Labour Act [*Chapter 28:01*] has been superseded by section 171 of the new Constitution.

Nature of Dispute between the Parties

Section 89(1)(a) of the Labour Act sets out the primary function of the Labour Court, *viz.* "hearing and determining applications and appeals in terms of this Act

or any other enactment”. Section 89(6), which was relied upon by the court *a quo* to disavow its competence to adjudicate the appellant’s claim, provides that:

“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).”

It is trite that the High Court is a superior court of inherent jurisdiction and that there is a presumption against the ouster of its jurisdiction unless this is clearly intended by the legislature. Thus, any statutory or contractual provision that purports to oust its jurisdiction must be restrictively interpreted. With particular reference to s 89(6) the Labour Act, it was emphasised by ZIYAMBI JA in *Nyhora v CFI Holdings (Pvt) Ltd* SC 81/2014, at p 7 of the judgment, that the right to approach the High Court for relief in matters other than those specifically set out in s 89(1)(a) of the Act has not been abrogated.

Mr *Magwaliba*, for the respondent, submits that the Labour Act must be broadly construed, in tandem with s 172(2) of the Constitution, to confer exclusive jurisdiction upon the Labour Court over all matters concerning labour and employment generally. The intention of creating a specialised court would be defeated if its jurisdiction over unfair labour practices were to be shared with the High Court. Thus, the purview of the Act should not be limited purely to disputes between employers and employees. Mr *Magwaliba* relies upon various provisions of the Act to buttress his submissions, in particular, ss 8 and 82, as read with s 44 of the 2013 CBA.

Section 8 of the Act deals with unfair labour practices. In terms of s 8(e)(i), “an employer ... commits an unfair labour practice if, by act or omission, he ... fails to comply with or to implement ... a collective bargaining agreement”. Section 82 stipulates the binding nature of registered collective bargaining agreements. The enforcement of such agreements is provided for in subs (3) and (4) as follows:

“(3) Any person who fails to comply with a collective bargaining agreement which is binding upon him shall, without derogation from any other remedies that may be available against him for its enforcement—

(a) commit an unfair labour practice for which redress may be sought in terms of Part XII; and

(b) be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) If a registered collective bargaining agreement provides a procedure for the conciliation and arbitration of any category of dispute, that procedure is the exclusive procedure for the determination of disputes within that category.”

Section 44 of the 2013 CBA is titled “Penalties”. It draws attention to s 82(3) of the Labour Act by quoting and reproducing that provision in its entirety. Section 44 of the 1999 CBA (which is the relevant instrument for the purposes of the appellant’s cause of action *in casu*) is virtually identical in its terms, save for the citation of the Act and the prescription of the applicable penalty.

The argument advanced by Mr *Magwaliba* is that neither CBA provides a procedure for the conciliation and arbitration of any category of dispute. However, s 44 of both CBAs refers to Part XII of the Act which provides for the resolution of disputes and unfair labour practices. That being the case, it is Part XII of the Act that becomes, by virtue of s 82(4) of the Act, the exclusive procedure for the determination of all disputes in every

category. The procedure to be followed is by way of reference of the dispute in question to a labour officer, followed by conciliation and arbitration and, eventually, by way of an appeal to the Labour Court under its exclusive jurisdiction in terms of s 89(6) of the Act.

In my view, this argument is not only tendentious but entirely fallacious for the following reasons. First and foremost, s 44 of the 1999 (or 2013) CBA does not provide any procedure for the conciliation and arbitration of any specific category of dispute. It simply draws attention to s 82(3) of the Act for the purpose of highlighting the penalty applicable for any failure to comply with a binding collective bargaining agreement. In other words, s 82(4) of the Act is totally irrelevant in the present context. Secondly, and equally importantly, s 82(3) of the Act is very clear as to the extent of its scope of coverage. It applies “without derogation from any other remedies that may be available” for the enforcement of any collective bargaining agreement. Additionally, it relates to the commission of an unfair labour practice “for which redress may be sought in terms of Part XII” of the Act. It follows that the provision is not only permissive but also expressly acknowledges the non-exclusivity of Part XII of the Act as a procedural mechanism for the enforcement of collective bargaining agreements.

In my view, the pivotal provision for consideration in this matter is s 3(1) of the Labour Act which governs the application of the Act as follows:

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

The significance of this provision is relatively clear. The primary purpose of the Act is to regulate employment relationships between employers and employees, and the scope of application of its provisions should in principle be restricted accordingly. By the same token, s 89 of the Act, which prescribes the functions, powers and jurisdiction of the Labour Court, must also be considered in that context. Accordingly, the exclusive jurisdiction conferred upon that court, in terms of s 89(6) of the Act, to hear and determine any application, appeal or matter in the first instance, must be similarly confined to matters pertaining to the relationship between employers and employees and/or their respective representatives, *i.e.* trade unions and employers organisations.

In the instant case, it must be accepted that the respondent's duty to pay national employment council dues is a statutory duty that arises from its employment relationship with its employees. Be that as it may, it is indisputably clear that a national employment council is neither an employer nor an employee in the context of the Labour Act. It is an entity constituted by employers and employees in the construction industry. It is equally clear that there is no employment relationship of any kind between the appellant and the respondent or between the appellant and the respondent's employees. The contractual nexus between the appellant and the respondent arose solely and exclusively from the rights and obligations embodied in the 1999 CBA which was the operative instrument at the relevant time. And it is that CBA which, in terms of s 11(2), entitled the appellant to receive from the respondent the dues prescribed to meet its expenses and which founded its cause of action in the High Court.

Turning to the other relevant provisions of the Act, ss 8 and 9 proscribe various unfair labour practices that may be committed by employers, trade unions or workers committees, without any reference whatsoever to national employment councils. By the same token, s 82 of the Act must be construed as being primarily, though not exclusively, applicable to employers and employees, insofar as it relates to the commission of unfair labour practices and remedies for their redress under Part XII of the Act. This is also reflected in s 89(2) of the Act which enumerates the powers of the Labour Court in respect of any appeal or application before it. As is evident from that provision, none of the remedies prescribed therein specifically contemplate the satisfaction of a claim for dues by a national employment council.

Finally, I have already alluded to s 82(3) which categorically puts the answer to the question at hand beyond any possible controversy. This provision allows for remedial action under the procedures laid out in the Act itself to address non-compliance with any binding collective bargaining agreement. In addition, however, it also explicitly stipulates that such procedures are to apply without derogation from any other remedies that may be available against a non-compliant employer for the enforcement of any such agreement. In my view, this clearly recognises the possibility and propriety of recourse to the High Court, by virtue of its inherent jurisdiction, to enforce the payment of dues payable to a national employment council in terms of a collective bargaining agreement.

It follows that the dispute *in casu* was not one within the exclusive jurisdiction of the Labour Court and therefore outside the jurisdictional remit of the High Court.

Jurisdictional Impact of New Constitution

In light of the foregoing conclusion and with deference to the twin doctrines of constitutional ripeness and avoidance, I deem it unnecessary and somewhat academic to delve into the broader question as to the possible supersession of the exclusive jurisdiction of the Labour Court with the advent of the current Constitution. Although this constitutional dimension is obviously important, it seems preferable to leave it for determination at a more opportune time and by a larger bench, possibly the Constitutional Court itself.

Disposition

It follows from all of the foregoing that the appeal must succeed on the first jurisdictional ground. It is accordingly ordered that:

1. Subject to the decision of this Court in Judgment No. SC 59/2015, the appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
 - “(i) The defendant’s exception is dismissed with costs.
 - (ii) The defendant shall plead to the plaintiff’s claim within 10 days of the date of this order.”

GUVAVA JA: I agree.

UCHENA JA: I agree.

Mabulala & Dembure, appellant's legal practitioners

Wintertons, respondent's legal practitioners