

REPORTABLE (87)

BARCLAYS BANK OF ZIMBABWE LIMITED
v
(1) NORMA MAPFANYA (2) SILINGANISO MOYO N.O.

**SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & BERE. JA
BULAWAYO: 20 NOVEMBER 2019**

E.T. Moyo for the appellant

A. Sibanda for the first respondent

No appearance for the second respondent

GOWORA JA:

[1] This is an appeal against a judgment of the Labour Court dismissing an application for the review of an arbitral award in favour of the first respondent. The second respondent is the arbitrator whose award is the genesis of the application for review. The arbitrator did not file papers in the court *a quo* and did not appear before this Court. As a consequence, there is only one respondent. After hearing the parties in this matter we allowed the appeal with costs. The substantive order will be set out in detail after the discussion of our reasons for judgment which are set out hereunder.

THE FACTS

[2] The respondent was employed by the appellant in 1980. Her initial post upon employment is not described in the papers but she rose through the ranks until she became the Senior Retail Manager for the Bulawayo branch in 2001. During 2006 the appellant and the respondent were engaged in a protracted labour dispute. This appeal is the culmination of that dispute. The respondent's main contention was that the appellant was guilty of unfair labour practices which constituted constructive dismissal.

[3] She alleged that she had, over a period of time, been shuffled from a number of departments and, further to that, that she would be given posts that were later found to be fictitious. She also alleged that she had been demoted to lesser posts from 2001 to 2007 when she finally lodged a complaint. The matter was referred to arbitration.

[4] In dealing with the matter, the arbitrator found that the respondent's contract of employment had been unilaterally varied and ordered her reinstatement. Subsequent to the reinstatement. The respondent that the appellant had not ceased the unfair labour practices and that the intolerable conditions in the workplace had in fact worsened. The respondent also alleged that she was sent on forced leave under the guise that the appellant wished to have an office prepared for her occupation as head of the debt collection department. She claimed that there were no debts to be collected.

[5] These events forced the respondent to apply to the Labour Court. According to the judgment, the respondent had filed an *“application for constructive dismissal. The applicant is asking the court to make a determination that the conduct of the employer made employment so*

intolerable for her to the extent that she has to be compensated for the losses she suffered contractually". (my emphasis)

[6] There is no suggestion anywhere in the record that she resigned her position as a result of these practices by the appellant. She however claimed that she had incurred losses in salaries, bonuses, and benefits. These were not quantified before the Labour Court.

[7] On 9 July 2014, under judgment number LC/JDT/MT/101/14, the Labour Court rendered a judgment in the following terms:

“In the result, I allow the application and find that the respondent should compensate the applicant for all the losses she suffered in salaries, salary increments, and bonuses. The matter is remitted to the arbitrator Miss S Mutare to hear the parties on the quantification of “such losses”. She is directed to deal with the matter within a month of receipt of this order.

The respondents are ordered to pay the costs of this application on a higher scale for the abuse of the court process”.

[8] As ordered by the Labour Court, the parties appeared before the arbitrator for the quantification of the “losses suffered” by the respondent. In her statement of claim, she claimed amounts representing salaries/bonuses/profit shares. She also claimed a car allowance and salary adjustments. In prosecuting the claim, the respondent requested that the appellant be directed to furnish to her documents that could prove that she had suffered the alleged losses in salaries, increments, bonuses, and benefits.

[9] The arbitrator accepted the contention by the respondent that she was entitled to be furnished with the documents. On 5 February 2018 the arbitrator issued an order for the appellant to produce the documents set out hereunder:

1. Actual payroll i.e payslips and payroll journal for B5 and B6 managers for the same for selected months from February 2009 to date.
2. List of all managers in B5 and B6 promoted from 2000 to date.
3. A clear salary progression for applicant from 2009 to January 2018 (to include increments and bonuses etc).
4. Payroll for February 2009 to December 2009 and where there are no pay-slips provide excel pay-slip extract.
5. From 2010 to December 2017 provide pay-slips for January, February, March, and April for each year and their payroll journals.
6. Applicant to be served with excel spreadsheets without names.
7. Provide explanatory notes where necessary.

[10] The appellant sought a review of the order by the arbitrator. The appellant alleged that there was a gross irregularity in the decision by the arbitrator to order the production of a wide range of payroll documents and, that the manner in which the decision was made created a reasonable apprehension of bias against the appellant.

[11] On the first point, that of gross irregularity, the appellant contended that the documents requested and ordered to be produced served to reverse the principle on the burden of proof in civil litigation. It was further contended that the arbitrator failed to have regard to the confidential nature

of some of the documents requested and that it was apparent that this fact had not exercised the mind of the arbitrator before proceeding to issue the order. It was also contended that some of the documents were irrelevant for the determination of the matter before the arbitrator. Some of the documents were inaccessible and could no longer be located due to the length of time that had elapsed.

[12] As regards the issue of bias, it was contended that the arbitrator had proceeded to give an order for production of the documents primarily based on what the respondent demanded and that no regard was placed on the appellant's cogent objections to the same.

[13] The court *a quo* was disinclined to grant the application for review. The court found no evidence of bias on the record. It also found that the process by which the arbitrator dealt with the application did not show any irregularity. The court dismissed the application with costs.

[14] The appellant was aggrieved and noted this appeal on the following grounds:

- “ 1. The learned judge of the Labour Court erred at law in holding that the order to produce documents was purely administrative which decision the court would be loath to interfere with on review.
2. The learned judge of the Labour Court grossly misdirected herself on the facts and erred at law in finding that:
 - 2.1 Both parties had agreed before the arbitrator on the documents to be produced and the appellant dictated those documents as directed by the second respondent.
 - 2.2 That it was uncontroverted that the appellant dictated the terms which became the directive of the second respondent on the documents to be produced.
3. The learned judge of the Labour Court misdirected herself and erred at law in failing to appreciate that the directive by the second respondent on the production of documents was unduly wide, oppressive, invasive, and trawling in nature as to be irrational and consequently reviewable on grounds of gross irregularity.”

ARGUMENTS ON APPEAL

[15] The appellant argued as follows. The decision of the court *a quo* that the decision was purely administrative and could not be interfered with was improper. He argued that s 89(1)(dl) of the Labour Act empowers the Labour Court to review the decisions of arbitrators.

[16] Besides, it was contended that the Labour Court had made an erroneous finding on the minutes before the court which did not support the conclusion reached by the court. The appellant argued that the court's failure to consider whether or not the documents were necessary to advance the respondent's case amounted to an irregularity warranting interference.

[17] Per contra, the respondent argued that the application before the Labour Court was improper on the premise that the appellant had not complied with Articles 12 and 13 of the Arbitration Act [*Chapter 7:15*]. Further to this, the respondent contended that the application for review fell foul of r 20 of the Labour Court Rules, S.I. 150/17 in that the application had been brought prematurely before the conclusion of proceedings before the arbitrator. The respondent further contended that the appellant had not substantiated the alleged bias or irregularity and, as a consequence, the court *a quo* could not be criticized for dismissing the application for review.

ISSUES FOR DETERMINATION

[18] It is not necessary, in my view, to delve into the grounds piecemeal. The only ground is whether or not the directive by the arbitrator was an irregularity as contended by the appellant. Aligned to this issue is the regularity of the order issued by the Labour Court remitting the matter to the arbitrator. It seems to me, however, that the respondent approached the Labour Court directly

through an application seeking relief arising out of an alleged constructive dismissal. The critical issue for determination as the first port of call is whether or not the Labour Court had the requisite jurisdiction to entertain such an application and if so, whether such jurisdiction was properly exercised under the circumstances.

THE JURISDICTION OF THE LABOUR COURT

[19] In the process of preparing reasons for the judgment, it occurred to the court that they might have been questions about the jurisdiction of the Labour Court sitting as a court of first instance in the claim for relief premised on an alleged constructive dismissal. Counsel for both parties were requested to address the court on this issue by filing written argument. Only counsel for the appellant complied with the request and we are indebted to him for availing the submissions in question.

[20] The respondent approached the Labour Court claiming constructive dismissal. Unfair dismissal, of which constructive dismissal is also one of the forms of unfair dismissal is proscribed in s 12B of the Act. This section provides, in relevant part:

12B Dismissal

- (1) Every employee has the right not to be unfairly dismissed.
- (2) n/a
- (3) An employee is deemed to have been unfairly dismissed—
 - (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
- (4) In any proceedings before a labour officer, designated agent, or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee,

consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee.

[21] On a proper construction of s 12B, it becomes evident that proceedings for the adjudication of the fairness of a dismissal lie before a labour officer, a designated agent, or the Labour Court in terms of s 12B (4). *In casu*, the respondent made a direct approach to the Labour Court for relief. According to the judgment, the respondent filed an application for appropriate relief alleging that the employer had by its conduct, constructively dismissed her from employment. The judgment is silent as to which section of the Act the application was premised upon. It becomes necessary to then determine whether or not the matter was properly placed before the Labour Court.

[22] The Labour Court is a creature of Statute and it is to the Act that one must turn to determine its jurisdictional ambit. Section 89 is pertinent in this regard. It reads as follows:

89 Functions, powers and jurisdiction of Labour Court

(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) hearing and determining matters referred to it by the Minister in terms of this Act; and
- (c) referring a dispute to a labour officer, designated agent, or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
- (d) appointing an arbitrator from the panel of arbitrators referred to in subs (6) of section *ninety-eight* to hear and determine an application;
- (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;

[Paragraph inserted by s 29 of Act 7 of 2005]

- (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.

[23] Amongst its functions as bestowed upon it by the Act, the Labour Court is empowered to hear applications. Constructive dismissal as alleged by the respondent would fall under Part XII

of the Act which provides for the resolution of disputes and unfair labour practices. An unfair labour practice is a dispute of right. According to the definition in the Act, a dispute of right is:

“dispute of right” means any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment.”

[24] An employee who claims relief against constructive dismissal alleges a breach of the Act and more particularly s 12B which provides that an employee has the right not to be unfairly dismissed. An employee seeking redress based on the allegation of the violation of a right must have recourse to s 93 of the Act under which such disputes are provided for. The respondent filed her application sometime in 2010. I consider the appeal in the light of the relevant legislation as it was during the period in question before amendments made to the Act subsequently. The specific section providing for such is s 93. It read as follows:

93 Powers of labour officers

- (1) A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.
- (2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing.
- (3) If the dispute or unfair labour practice is not settled within thirty days after the labour officer began to attempt to settle it under subs (1), the labour officer shall issue a certificate of no settlement to the parties to the dispute or unfair labour practice.
- (4) The parties to a dispute or unfair labour practice may agree to extend the period for conciliation of the dispute or unfair labour practice referred to in subs (3).
- (5) After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him and to whom he is responsible in the area in which he attempted to settle the dispute or unfair labour practice —
 - (a) shall refer the dispute to compulsory arbitration if the dispute is a dispute of interest and the parties are engaged in an essential service; or
 - (b) may, with the agreement of the parties, refer the dispute or unfair labour practice to compulsory arbitration; or

- (c) may refer the dispute or unfair labour practice to compulsory arbitration if the dispute or unfair labour practice is a dispute of right, and the provisions of section *ninety-eight* shall apply to such reference to compulsory arbitration.
- (6)
- (7) If, in relation to any dispute or unfair labour practice —
 - (a) after a labour officer has issued a certificate of no settlement in relation to the dispute or unfair labour practice, it is not possible for any reason to refer the dispute or unfair labour practice to compulsory arbitration as provided in subs (5); or
 - (b) a labour officer refuses, for any reason, to issue a certificate of no settlement in relation to any dispute or unfair labour practice after the expiry of the period allowed for conciliation under subs (3) or any extension of that period under subs (4); any party to the dispute may, in the time and manner prescribed, apply to the Labour Court—
 - (i) for the dispute or unfair labour practice to be disposed of in accordance with para (b) of subs (2) of section *eighty-nine*, in the case of a dispute of interest; or
 - (ii) for an order in terms of para (c) of subs (2) of section *eighty-nine*, in the case of a dispute of right.

[25] I have set out the provisions of s 93 *in extenso* in an effort to crystalize the jurisdictional ambit of the bodies under the Act that are empowered to determine specific disputes or matters. A reading of s 93 shows that a complaint of unfair labour practice is made to the labour officer. This is the office empowered under the Act to receive such complaints. The labour officer is required to conciliate the dispute before embarking on other processes provided for under the Act. There is no provision in the section, nor any other section in the Act, for the reference of a complaint of unfair labour practice directly to the Labour Court. The Labour Court in its judgment did not refer to the section under which it assumed jurisdiction nor have I found one.

[26] I am constrained to conclude as I do, that the Labour Court lacked the jurisdiction to entertain, as a court of first instance, a complaint of unfair dismissal arising out of a dispute of right provided for under s 12B. The matter was not properly before the court and it should have declined jurisdiction to hear the application. It ought to have struck the matter off its roll. It did

not do so. The proceedings, therefore, constitute a gross irregularity and cannot stand. They must be set aside on the basis of that irregularity.

[27] Ordinarily the above finding should be dispositive of this case. For the sake of completeness and the assistance of the Labour Court, it is necessary that I comment on the procedure adopted by the learned judge in the court *a quo*. These comments have assumed importance not only because of the absence of a cause of action based on an alleged constructive dismissal but also arising from the relief that the court *a quo* availed to the respondent, which relief was disconnected to a finding of constructive dismissal and, was in fact, not the relief claimable pursuant to a finding of constructive dismissal.

I commence with the issue of the allegation of constructive dismissal as that allegation is directly tied to the proceedings before the arbitrator.

WHAT IS CONSTRUCTIVE DISMISSAL

[28] Constructive dismissal is defined in s 12B (3) of the Act as discussed above. It is important that an employee terminates his or her employment as a result of deliberate conduct on the part of the employer which renders continued employment intolerable for the employee.

A definition of what constitutes constructive dismissal is found in *Workplace Law*, by the learned author John Grogan¹, wherein he states:

“The further form of statutory dismissal is the termination of the contract of employment by the employee with or without notice because the employer made continued employment intolerable for the employee’-in other words, where employees resign or otherwise terminate their contracts because they are left with no option but to do so by the employer’s conduct.

¹ 11 ed, p174

The first requirement of constructive dismissal is that an employment relationship must exist at the time the employee leaves the employer's service. Where an employee refused to sign a new contract of employment and 'resigned' after the employer stopped his salary, the court held that the employee could not have been constructively dismissed because the employment relationship ended.

The second requirement is that the employee must have brought the relationship to an end."

[29] The definition by Grogan omits the deliberate conduct on the part of the employer to render continued employment intolerable for the employee which is part of our labour law. In all other respects, the definition tallies with the definition in the Act.

[30] In this case, the respondent approached the Labour Court seeking that the court decides that the conduct of the employer made employment so intolerable for her to the extent that she has to be compensated for the losses she suffered contractually. Nowhere in the judgment does the learned judge state that the respondent resigned or left employment due to the actions of the employer. It is a common cause between the parties that, although she may have been subjected to the alleged intolerable conditions, she did not leave employment. The findings by the court *a quo* make this clear. In the learned judge's reasoning is found the following passage:

"After the court order that compelled the employer to withdraw the forced leave, all the other workers in the debt collectors department were deployed except for her. She remained there for a long time and would be reading newspapers. The treatment given to the applicant by the employer led to her ill health, her heart developed problems, she became gravely ill and as a result, she takes pills for life.

She has thus been pushed to the periphery of banking for no plausible reason and suffered losses in the process.

The employer denies all that but the denial is bare as the applicant has provided undisputed evidence. The employer argues that by asking the court to intervene, it is tantamount to asking the court to interfere with the employer's prerogative to make changes in the place of work. They argue that the court cannot interfere with such managerial prerogative."

[31] An employee cannot premise a claim for constructive dismissal unless the employment contract has been terminated. This position is set out clearly in the Labour Act.

[32] Section 12B (3) has received attention in various judgments within the jurisdiction. In *Astra Holdings (Pvt) Ltd v Kahwa* SC 97/04, MALABA JA (as he then was), stated:²

“Constructive dismissal is claimable where an employer has committed conduct which as a breach goes to the root of the contract of employment so as to constitute repudiation and by reason of that conduct the employee leaves employment. In *Western Excavating v Sharp* [1978]1 ALL ER 713 LORD DENNING MR at 717 d–f said;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must, in either case, be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

The respondent did not claim constructive dismissal. The conduct she complained of was that Astra Holding had not paid her salary and benefits from 1 April 2000 to the date of the order applied for in the court *a quo*. At no time did she say that because of the conduct of Astra Holding, she had treated herself as having been discharged from employment and left. She affirmed the contract of employment when she rejected the offer by Astra Holding to terminate it by mutual agreement.”

[33] Section 12B (3) also received attention in *Mbatha v National Foods (Pvt) Ltd* SC 149/20. Therein the court stated that the employer must have intentionally done something which causes

² At pp3-4 of the cyclostyled judgment

the employee to terminate the contract of employment intending to cause the termination of such employment.

[34] In *casu*, there was no finding by the court that the respondent terminated her contract of employment due to the intolerable conditions at the workplace. Although she claimed constructive dismissal, she did not terminate the employment relationship. She continued in the relationship.

[35] In the absence of proof that the employee terminated the employment relationship arising out of intolerable conditions at the workplace, an employee cannot mount litigation for relief premised on constructive dismissal. The first premise for such a claim is an assertion that the employee left work due to intolerable conditions created by the employer. In this case, the employee was still in employment when the application for relief was launched. The order by the Labour Court to issue an order for losses in the circumstances was most irregular. There was no proper claim for constructive dismissal before that court. The consequential order issued after that finding was therefore irregular. The order was not premised on a proper claim.

[36] The court *a quo* also ordered that the arbitrator quantify the losses incurred by the respondent. She had not claimed any losses before the Labour Court. A loss must be pleaded in specific terms. The learned Judge in the Labour Court made an order which assumed, in the absence of a specific claim and evidence in proof thereof, that the respondent had suffered losses. This is a gross irregularity. The order of remittal and the finding upon which the remittal was premised were also irregular.

DISPOSITION

[37] It follows therefore that the proceedings before the Labour Court, being a gross irregularity due to the absence of jurisdiction on the part of the court *a quo*, must be set aside by this court in the exercise of its review powers under s 25 of the Supreme Court Act [*Chapter 7:13*], which provides as follows:

“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 subs (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 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.”

[38] In the exercise of the review power vested in the Supreme Court in terms of the above-mentioned provision, the proceedings before the Labour Court, under case number LC/MT/42/10, and the judgment of the Labour Court under case number LC/JDT/101/14 are accordingly set aside. The proceedings before the arbitrator, which were premised on the judgment of the Labour Court above are also set aside on the grounds that they constitute an irregularity.

[39] It was for the above reasons that we issued the following order:

1. The appeal is allowed with costs
2. In the exercise of the powers of review of this Court in terms of s 25(2) of the Supreme Court Act [*Chapter 7:13*], the judgment of the Labour Court, namely judgment number LC/JDT/MT101/14 dated 9 July 2014 be and is hereby set aside on the grounds that it is an irregularity.
3. The directive by the Honourable Arbitrator S Moyo, dated 5 February 2018, and the proceedings connected therewith be and are hereby set aside on the grounds that they constitute a gross irregularity.

GUVAVA JA : I agree

BERE JA : (no longer in office)

Scanlen & Holderness legal practitioners, for the appellant

Joel, Pincus, Konson & Wolhuter legal practitioners, for the first respondent