NOKUTHULA MOYO **APPLICANT**

VERSUS

NORMAN GWINDINGWI N.O **1ST RESPONDENT**

AND

DAIRIBOARD ZIMBABWE (PVT) LTD **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 OCTOBER 2011 AND 3 NOVEMBER 2011

H. M. Moyo for the applicant
J. Tshuma for the respondents

Opposed Matter

MATHONSI J: The applicant was employed by the second respondent as a quality controller. She was charged under a code of conduct with neglect of duty in May 2006. Following an internal disciplinary hearing she was found guilty and dismissed from employment. As she was dissatisfied with that outcome she appealed to the Manufacturing Director who dismissed the appeal.

The applicant's further appeal to the Director of Corporate Services did not find favour either and she was advised in the determination of the Director of Corporate Services dated 22 June 2006 as follows;

> "My determination is that the verdict of the original disciplinary hearing to dismiss you is upheld. In line with the code of conduct your next level of appeal is at the Labour Court."

The applicant did not appeal to the Labour Court as advised and in terms of the Code of Conduct. Instead she filed an urgent application in this court which was a hybrid of a chamber application and a review application. On 13 July 2006 a provisional order was issued in

applicant's favour, the interim relief of which interdicted the respondents from evicting the applicant from House number 5 Lourie Road, Burnside, Bulawayo, a company house belonging to the second respondent, which was occupied by the applicant by virtue of her employment.

The final relief the applicant sought was to the following effect;

"(1) That the decision of the first respondent dated 7th June 2006 in terms of which the applicant was dismissed from the second respondent be and is hereby set aside.
(2) The second respondent be and is hereby ordered to reinstate applicant to her position of Quality Controller without loss of salary or benefits.
(3) The second respondent be and is hereby interdicted and prohibited from evicting the applicant from No. 5 Lourie Road, Burnside, Bulawayo or threatening such eviction or in any way interfering with her peaceful occupation and enjoyment thereof pending the determination of the Applicant's application for review and if the applicant be unsuccessful, proper notice to vacate.
(4) The first and second respondents pay the costs of this application on an attorney and client scale jointly and severally the one paying the other to be resolved. (sic)"

The judge who granted the provisional order directed that the applicant should make a separate application for review. She did not. In fact, it would appear that the judge's directive was not brought to the applicant's attention. She only made a separate application after I had drawn her attention to the directive.

At the hearing of this application and with the consent of the respondents I granted the following order;

"IT IS hereby ordered that:
(1) The late application for review of the 1st respondent's determination of the 7th June 2006 be and is hereby condoned and accordingly the applicant be and is hereby given leave to file the application for review out of time.
(2) This court application and the urgent chamber application under case number HC 1564/06 be and are hereby consolidated and all the documents filed of record in HC 1564/06 including the founding affidavit, the notice of opposition and opposing affidavits and the applicant's answering affidavit and the heads of argument by both parties are hereby incorporated in this application so that it shall not be necessary for either of the parties to file any further documents in support or in opposition of the court application for review."

The motivating factor in granting the order was to save the applicant's case which would have failed by reason of her failure to comply with the directive to file a separate application for review.

The respondents have raised a two pronged point in limine namely that the applicant has not exhausted domestic remedies and therefore has approached the wrong court and that this being a purely labour dispute, this court does not have jurisdiction as the application should have been made in the Labour Court in terms of the Labour Act, [Chapter 28:01].

In a line of cases, this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach. See *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Moyo v Forestry Commission* 1996(1) ZLR 173 (H) *Tuso v City of Harare* 2004(1) ZLR (1)(H); *Chawora v Reserve Bank of Zimbabwe* 2006(1) ZLR 525 (H); *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88(H).

In her heads of argument Mrs *Moyo* for the applicant submitted that an application for review can be made to the High Court provided the applicant can show "special circumstances" or "good reason" for not exhausting domestic remedies. She argued that the dispute between the parties was intertwined between the termination of employment and the applicant's tenancy at a house belonging to the first respondent from which she was threatened with eviction. This therefore created the special reason to approach the court earlier.

Counsel for the applicant appeared to shift from the above argument in her submissions in court. She stated that the applicant had in fact exhausted the available domestic remedies as "domestic" should be interpreted to exclude the Labour Court where the applicant should have appealed in terms of the code of conduct.

I do not agree with both schools of thought. In my view, domestic remedies in this particular case are those remedies and the procedure set out in the code of conduct as being available to an aggrieved party to pursue. An appeal to the Labour Court from a decision of the

Director of Corporate services is provided for in the code of conduct. It is a domestic remedy available to the applicant and she has to exhaust it.

In *Girjac Services (Pvt) Ltd v Mudzingwa* 1999(1) ZLR 243(S) at 249 C – F GUBBAY C J stated:

> "In *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88(H) at 95D, Mutambanengwe J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach was applied by Smith J in *Musandu v Chairperson Cresta Lodge Disciplinary Committee* HH 115/94 (not reported) and was referred to with approval by MALABA J in *Moyo v Forestry Commission* 1996(1) ZLR 173 (H) at 191 D – 192B. I respectfully endorse it.
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> In this matter, the procedure under section 6 of the code of conduct, and the availability of an appeal to the Labour Relations Tribunal, was capable of affording the respondent effective redress against the unlawful termination of his employment. Furthermore, the unlawfulness had not been undermined by such domestic remedies, for the grievance procedure had not been resorted to. Finally, no special circumstances or good reasons were advanced by the respondent for approaching the High Court."

Clearly therefore the availability of an appeal to the Labour Court is part of domestic remedies and it was capable of according the applicant effective redress.

I agree with Mrs *Moyo* that the occupational right of the applicant in respect of the company house is intertwined with the employment contract. However that does not constitute a special reason for by passing available domestic remedies and approaching this court early.

I am in total agreement with MAKARAU J P (as she then was) when she stated in *DHL International Ltd v Madzikanda* HH 51/10 that the Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and that the possession of the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. For that reason, if the Labour Court has exclusive jurisdiction over the one, it must have exclusive jurisdiction over the other.

Section 89(6) of the Labour Act [Chapter 28:01] provides:

> "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)."

In addition to that, Section 89(1) (d1) of that Act provides that the Labour Court shall have "the same powers of review as would be exercisable by the High Court in respect of Labour matters."

This court has had occasion in a number of cases to interpret these provisions which were introduced to the Labour Act in 2003. BHUNU J was more explicit in *Tuso v City of Harare* (supra) at 3F where the learned judge said:

> "It is manifestly clear to me that the intention of the legislature was to expressly exclude the jurisdiction of all other courts in areas where the Labour Court has jurisdiction in the first instance."

At 4C he said;

> "It is my considered view that it is only in respect of those employees who do not fall under the purview of the Labour Relations Act that the High Court may exercise its general powers of review because its powers in this regard have not been expressly excluded by statute."

This interpretation was followed by Bere J in *Plaza Hotel (Pvt) Ltd v Marimbita and Another* 2007(1) ZLR 80(H) at 83E. On his way to dismissing an application on the basis that the applicant had not exhausted domestic remedies Karwi J in *Chawora v Reserve Bank of Zimbabwe* (supra) at 529F criticised the decision in *Tuso's* case as follows:

> "It seems to me that there is no specific provision in the Labour Act that ousted this court's jurisdiction. I am of the considered opinion that a cursory and simplistic approach was adopted in the *Tuso* case. Besides jealously guarding the inherent jurisdiction of this court, the Sibanda case (*Sibanda and Another v Chinemhute NO and Another* HH 131/04) correctly takes into recognition the fact that there is no law in Zimbabwe which has ousted the jurisdiction of this court in such matters."

I respectfully disagree. Section 89(6) is clear and unambiguous that "no court" has jurisdiction over matters falling under the purview of the Labour Court. This court does not

possess the machinery to jealously guard its inherent jurisdiction where the legislature has specifically taken it away.

I find the interpretation made by MAKARAU JP (as she then was) in *Medical Investments Ltd v Pedzisayi* HH 26/10 more compelling. It is to the effect that the Labour Court has jurisdiction in all matters where the cause of action and remedy are provided for in the Labour Act. Where the cause of action and remedy are at common law, the jurisdiction of the High Court is not ousted. See also *DHL International Ltd v Madzikanda* (supra)

In casu, the applicant is contesting the termination of her employment contract on which her right of occupation of No. 5 Lourie Road, Burnside is premised. The cause of action and the remedy are in the Labour Act. For that reason the jurisdiction of this court has been ousted by section 89(6) of the Act.

The applicant has therefore proceeded in the wrong court. She did not exhaust remedies available to her. No amount of double speak can alter that position. The provisional order granted to the applicant was predicated upon a valid application being made to challenge the termination of applicant's contract of employment. There is no such application in existence. It must be discharged.

In the result, I make the following order, that

(1) The application is hereby dismissed with costs.

(2) The provisional order made on 13 July 2006 is hereby discharged.

Joel Pincus Konson & Wolhuter, applicant's legal practitioners
Webb Low and Barry, respondents' legal practitioners