

OLINDA CHAWORA
and
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KARWI, J
HARARE, 18 May 2005 and 28 June 2006

Opposed Court Application

Mr *C.T. Mantsebo*, for applicant
Mr *B. Mujeyi*, for the respondent

KARWI J: Applicant is employed by the respondent as its Division Chief-in-charge of Financial markets. She has been employed by the respondent since 1980 in various capacities. She has approached this court seeking an order declaring the disciplinary proceedings initiated by the respondent against her as a nullity and an order compelling the respondent to comply with the provisions of section 2(6)(b) as read with section 8 of Statutory Instrument 186 of 2003, Labour Relations (Retrenchment Regulations) 2003.

Applicant was suspended from service on 22 September 2004. She was later charged in terms of section 4.2.3(g) and (h) of the respondent's Code of conduct, that is:

- (a) habitual and or substantial neglect of duty; and
- (b) gross incompetence or inefficiency in the performance of work.

Parties then entered into prolonged correspondence concerning the alleged misconduct, attempts to negotiate an exit package and so forth. The failed attempts to reach an amicable understanding on the way forward culminated in this application.

A question has arisen as to whether this court has jurisdiction to determine the application in view of the provisions of the Labour Relations Act, which reposes the responsibility of determining all

labour related matters to the Labour Court. Applicant contends that although this is a labour matter *per se*, this court has jurisdiction to determine this application. Respondent is of the different view. Respondent contends that this is purely a labour matter which should be determined by the Labour Court. It is contended by respondent that applicant is in the wrong forum and that this court should simply decline to determine this matter on that basis.

In his submissions, counsel for the applicant has argued that this application was in terms of section 14 of the High Court Act [*Chapter 7:01*]. It was not an attempt to circumvent the domestic remedies available under the Labour Relations Act [*Chapter 28:07*]. It was submitted that this court had inherent jurisdiction to issue deilatory orders in terms of section 14 of the High Court Act. The jurisdiction of the High Court to hear Labour matters had not been ousted by the advent of the Labour Court, particularly with regard to its inherent powers to review labour matters or in terms of section 27 and 28, and to issue declaratory orders. It was submitted that declaratory orders were primarily used to declare that a "particular decision of a public body or authority was *ultra vires* and a nullity or to determine the existence of public law powers and public law duties."

It was also argued that a declaration were not only used for the primary purpose of establishing whether or not particular action or inaction is unlawful but also to perform an ancillary role in clarifying the consequences of a finding of invalidity or setting other questions of law that needed to be resolved. It was further submitted that before issuing a declarator, this court was obliged to decide whether the case before it was a proper one for the exercise of its direition provided under section 14 of the High Court Act. Thus it must take all the circumstances of the matter and what in the end constitutes, as proper case is where some tangible and justifiable advantage to applicant is

shown to exist. It was added that in this case the respondent had not acted in accordance with provisions of its code of conduct. The code of conduct did not provide for the suspension of a managerial employee in the applicant's position nor was it provided for in clause 7 of the code of conduct. It was therefore submitted that such failure to comply with the code of conduct rendered the suspension of an employee a complete nullity and the subsequent proceedings of no force or effect. It was also submitted that not only were the disciplinary proceedings instituted against applicant a nullity but also the respondent's refusal to enter into negotiations for a retrenchment package as prescribed in Statutory Instrument 186 of 2003 is an unfair labour practice which is illegal and it was proper for this court to declare so as this would enable the parties to know their respective rights and map the way forward.

In her apposing affidavit, Jean Maguranyanga who is respondent's Corporate Society, raised the all important issue of the jurisdiction of court to determine this matter. It was her view that "the applicant has brought these proceedings before the wrong court. This honorable court does not have jurisdiction to hear a labour matter as a court of first instance". She also added that "the fact is that the applicant wants to force herself to be retrenched so that she can garner as much by way of a retrenchment package as she can. I therefore submit that in as far as this application is premised on an intention to somewhat force the respondent to conduct a retrenchment exercise, it is incompetent and ought to fail on that basis." Mrs Muguranyanga further added that there was no basis at all upon which the respondent may be ordered to comply with retrenchment regulations because it has never been its intention to retrench the applicant.

The position is that before the enactment of the Amendment Act of 2002 to the Labour Relations Act, the High Court entertained any

labour matter. A litigant was free to approach this court on any such labour related matter and in exceptional cases, this court would decline jurisdiction on the basis that parties should have exhausted domestic remedies before approaching this court. This court would also take the view that the Labour Relations Act did not oust the inherent jurisdiction of this court so that a party would approach this court even before exhausting domestic remedies as long as "special grounds" existed which would justify a party to approach this court.

The situation in Zimbabwe changed completely in March 2003 when the Labour Relations Tribunal that had existed under the old Labour Relations Law was transformed into a fully fledged court in terms of section 92 of the Constitution of Zimbabwe as read with section 83 of the Labour relations Act [*Chapter 28:01*] as amended by the Labour Relations Amendment Act No. 17 of 2002 which became law in March 2003.

The functions of the Labour Court is provided for in terms of section 89 of the same Act as follows:

- "1. The Labour Court shall exercise the following functions:
 - (a) hearing and determining applications and appeals in terms of the Act.
 - (b) hearing and determining applications in terms of this Act.
 - (c)
 - (d)"

It would appear that it has been established that this court by virtue of its inherent jurisdiction can do anything except that which is specifically prohibited by law whereas on the other hand the Labour Court can only do those things that it is specifically permitted by law. See *Hatfield Town Management Board vs Mynfred Ponetry Farm (Pvt)*

Ltd, 1963(1) SA 737 (SR) at 739 and *City of Harare vs Gwindi* HC -H 147/03.

It is equally true that superior courts will jealously guard their jurisdiction and there exists a presumption against the ouster of the court's jurisdiction unless the legislative states so in very clear terms. Thus it is imperative that in any statute or contract that purport to oust the jurisdiction of the courts must be restrictively interpreted. See *Dewet vs Deetlefs*, 1928 AD 290 and *R. v Pashda* 1923 AD 281 C 304.

The competing jurisdiction of the Labour court and the High Court fell for decision in this court in *Thomas Juso v City of Harare* HC-H 1/04 and *Martin Sibanda and Onor vs Bensen Chinemhute and Martindale (Pvt) Ltd t/a Lyons* HC-H 131/04. In the *Tuso* case it was held that section 89 gave exclusive jurisdiction to the Labour Court in all labour matters in the first instance thus ousting this court's jurisdiction. It was held in the *Sibanda* case that this court jealously guarded its inherent jurisdiction and that jurisdiction could not impliedly ousted. It was held that this court had review jurisdiction in labour matters and the jurisdiction to issue, declaratory orders.

Section 89(6) of the Act provides as follows:

"No court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred in subsection (1)." It is clear that the jurisdiction of any other court has been ousted in respect of those applications and appeals that are defined in the Act.

These are:

- (a) the right to go to the Labour Court against a decision made in terms of a Code of Conduct;
- (b) an appeal against a decision of a Minister in terms of section 25, 40, 41, 71 & 82;
- (c) an appeal against a determination of a Labour Relations Officer;
- (d) an appeal on a question of law from the decision of an arbitrator;

- (e) an application for interim remedies provided for in section 97(H)
- (f) an application for rescission of judgment
- (g) an application for reference of a matter to the Labour Court.

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 correctly takes into recognition the fact that there is no law in Zimbabwe which has ousted the jurisdiction of this court in such matters.

In *casu*, applicant has sought to justify the bringing of application in this form on the basis that it was a prayer for a declaratory rather than an order and therefore this court was said to have jurisdiction in such matters. I do not agree. A perusal of the draft order in this matter clearly shows that applicant is seeking for an order, which order properly, in my view, sought from of the Labour Court in the first instance. This is a labour matter which squarely falls under the jurisdiction of the Labour Court. Applicant seeks an order to set aside her suspension from employment. Setting aside a suspension is not necessarily a declarator, but an order. A direction to the respondent to comply with the provisions of section 3(6)(b) of Statutory instrument 186 of 2003 Labour Relations (Retrenchments) Regulations, 2003 is equally not a declarator, but an order. These are matters which fall under the jurisdiction of the Labour Court. This court therefore declines to determine this application on that basis.

It is accordingly ordered that the application be and is hereby dismissed with costs.

Mantsebo & Partners, applicant's legal practitioners

Messrs Gollop & Blank, respondent's legal practitioners