EDWIN MUSHORIWA
versus
ZIMBABWE BANKING CORPORATION

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 30 January 2008

Court Application

T Biti, for the applicant
Advocate *Y R Philips*

GOWORA J: The applicant filed an application in this court seeking relief which is stated in the draft order as follows:

1. The respondent's termination of the applicant's contract of employment effected on the 8th April 2005, and communicated to him by way of a letter dated 9th May be and is hereby set aside.

Prior to this dispute the applicant was employed by the respondent as a personal banker until the 8th April 2005 when his contract of employment was unilaterally terminated by the respondent. The background to the unilateral termination aforementioned is as follows. On 4th April 2001, the parties herein concluded an agreement in terms of which the respondent availed to the applicant sabbatical leave to permit him to perform his duties as a member of the Parliament for Zimbabwe, the applicant having been elected to that office on the Movement for Democratic Change (MDC) party ticket. In terms of the agreement, the sabbatical leave was for the duration of that term of Parliament. In March 2005 after the term envisaged came to an end the applicant again stood for re-election. He was successful in his endevours and thus was a member of the Parliament for the subsequent term. After the elections he reported for duty on 3rd April 2005 and was advised his services were no longer needed. On 9th April 2005 he then received a letter advising him that his contract of employment had been terminated. He has therefore filed these proceedings for an order 'setting aside the termination'.

Two preliminary issues have risen for determination, firstly, whether or not the deponent to the opposing affidavit had the necessary authority to depose to the same and thus defend

the application. The second is whether the application is properly before this court in view of the provisions of s 89 of the Labour Act [*Chapter 28:02*] (the Act) which ousts the jurisdiction of other courts or tribunals in certain instances to do with labour matters. It would be in order to deal with the question of jurisdiction before I determine whether or not the affidavit by the deponent to the opposing affidavit has been sworn to by a person with the requisite authority to do so.

In terms of S 89 (1) amongst the powers bestowed on the Labour Court by the enabling Act is the power to in subsection (1) (di) to exercise the same powers of review as would be exercisable by the High Court in respect of labour matters. This was the amendment ushered in by the Labour Amendment Act 7 of 2005. The application was filed on 9 March 2006. It is therefore common cause that when the application was filed the Labour Amendment Act 7 of 2005 had already been promulgated. That Act came into effect on 30 December 2005. The effect of this, contends the respondent, is to oust the jurisdiction of the High Court in labour matters even where the issue concerns a review. The respondent in this contention relies on s 89 (6) of the Labour Act [*Chapter 28:02*]. According to the respondent the section brings about a statutory ouster of jurisdiction by the High Court where applications, appeals or matters referred to in subsection (1) are concerned. The section is in the following terms:

> "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)."

The applicant does not dispute that the application is before this court as a court of first instance. He however disputes that the nature of the relief that he seeks is what is provided for in s 89 (1). He contends that what he seeks is a declaratur in which event the High Court would have jurisdiction to hear and determine the application. According to the respondent, the applicant, whatever he wishes to call his application, is seeking a review of the decision to terminate his employment.

In the body of the founding affidavit, at this juncture it is only proper that I mention the grammatical inadequacy of the said affidavit, the applicant avers that what he seeks is a declaratur, the effect of which is sought to declare that the termination of employment is null and void. The basis for nullity of the termination of employment has not been specified in the affidavit. It is only in the answering affidavit that the applicant, in a terse sentence, for the first time mentions that in terminating the contract of employment, the respondent should

have had recourse to the registered code of conduct which is the instrument that ought to have been used. In this manner is the question of illegality raised. It is not referred to in any other form. In the answering affidavit, the applicant then states that his right to freedom of assembly, as enshrined in sections 20 and 21 of the Constitution have been violated by the respondent as he was given express permission to participate in the elections. Further he contends that the respondent is violating his rights as guaranteed by sections 81 and 89 of the Constitution. He avers that he is entitled to due process and thus he was entitled to be heard before an adverse decision is taken. He avers that the respondent had breached the labour laws of this country as it had not followed the provisions of section 12B or 12C of the Act in terminating his contract of employment. He concludes by stating that he had approached this court directly, notwithstanding the provisions of section 93 of the Act, because of the Constitutional issues raised in the affidavit.

The incidence of s 89 (6) of the Act resulted in a number of judgments from this court in relation to the instances where it would retain jurisdiction in the first instance, to determine issues relating to labour matters. In *Tuso v City of Harare*[1], BHUNU J decided that this court did not have jurisdiction to consider reviews arising out of contracts of employment as that power had been bestowed on the Labour Court by virtue of s 89 (6) and which also ousted the power of the High Court to review such decisions. In *Sibanda & Anor v Chinemhute N.O. & Anor*[2] MAKARAU J (as she then was) had to consider whether or not, in the construction of s 89 (6) this court still retained the power to issue declaratory orders. This is what she had to say:

> "Thus, the power to issue a declaratory order is not available in all courts that apply common law. It is specific to this court.
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> It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction"[3].

It stands to reason therefore that if the relief that the applicant seeks is in the nature of a declaratory order, this court would have original jurisdiction as that power has not been

[1] HH 1/2004
[2] HH 131/2004
[3] At p 7 of the stylocycled judgment.

specifically ousted by statute. The draft order annexed to the application is in the following terms:

> "The respondent's termination of the applicant's contract of employment effected on the 8th April 2005, and communicated to him by way of a letter dated 9th May 2005 be and is hereby set aside".

According to the respondent, it is not what the applicant wishes to call his application that matters but rather the substance of the relief he claims that is important. What the applicant seeks from this court is the court grants him an order for reinstatement in his former position. To that end he has invoked the *audi alteram partem* principle to the effect that he was not heard before the respondent made a decision dismissing him from his employment. It is trite that the *audi alteram partem* rule is a ground for review. Reviews relating to labour matters issues for determination at first instance is one of the matters specifically reserved for the Labour Court. The jurisdiction of the High Court to determine such a review has been ousted by the Legislature under the Act and the applicant would therefore not be afforded relief by this court in respect of the same.

In addition to the above ground, the applicant has contended further that the respondent had, by its failure to proceed in terms of its registered code of conduct in dismissing him from employment, 'breached the labour laws' of the country. The applicant, in his affidavit, makes reference to the provisions of s 12 of the Act. In heads of argument filed on his behalf extensive reference to the Act and provisions of S.I. 130/2003 is made by the applicant which submissions, in my view, raise legal issues pertinent to the appropriateness of the dismissal of the applicant on the merits of such dismissal. For instance, the applicant has contended in his heads of argument that the respondent did not have the right to terminate the contract of employment between the two parties hereto except in accordance with the provisions of the Act, either on the basis of S.I. 130/2003 for disciplinary reasons or, alternatively, in terms of a registered code of conduct, or by means of a no fault terminations which is provided for in terms of s 12C of the Act.

The further contention by the applicant is that in view of the clarity and lack of ambiguity of s 12 of the Act and s 2 of S.I. 130/2003, an employer can only terminate a contract of employment in accordance with the provisions of a registered code of conduct or the Act. Therefore, so the argument goes, any purported termination which does not accord

with the provisions of a registered code of conduct or which has not been done in terms of the Act and the regulations is as a consequence, null and void. The respondent did not proceed either in terms of a registered code or the Act and regulations and therefore the purported termination is rendered null and void. For this contention, the applicant has sought reliance on *Masasi v PTC*[4], and *Gumbo v PTC*[5]. My reading of the authorities cited does not make me come to the same conclusion as the applicant. The issue for determination in those authorities was concerned with whether or not the Act applied to the employees of P.T.C Consequently the dicta in the authorities is to the effect that the Act is applicable to employees of the PTC.

Section 12 of the Act provides for the duration, particulars and termination of contracts of employment. S 12A provides for the remuneration of an employee and deductions from such remuneration. S 12B is concerned with the dismissal of employees from employment whilst 12C deals with the question of retrenchments. By arguing that his dismissal from employment was not effected in terms of the provisions of s 12, the applicant is inviting this court to view the manner of his dismissal vis-`a-vis the provisions of the Act. In order then to determine whether or not the dismissal was null and void, this court would have to have regard to the provisions of s 12 of the Act and come to a finding as to what the section requires of an employer before he can dismiss an employee. The provisions of the section then have to be considered in the light of the actions or omissions on the part of the respondent in effecting the dismissal of the applicant.

Thus an exercise undertaken by this court to examine the manner in which the respondent effected the dismissal of the applicant is, in this case, no more than a review of that process. The argument by the applicant that what he seeks is a declaration of nullity which form of relief is not reserved by the Act to the jurisdiction of the Labour Court does not, to my mind, detract from the nature of the relief sought by the applicant. In determining the nature of the relief that is sought by a litigant a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot, on its own, per se be the determining factor of the nature of such relief as the draft order is achieved or arrived at through a process. In this case, it is pertinent to note that one cannot determine the matter without subjecting the conduct of the respondent to scrutiny in light of the provisions of s 12 of the Act. Such process by a judicial officer in the circumstance pertaining in this

[4] 1991 (1) ZLR 73,
[5] 1992 (2) ZLR 403

application, no matter what the applicant may choose to name it is a process of review. Thus a declaration of nullity by this court can only come about in this case after a process of review. This court, in view of the provisions of the Act, is strictly precluded from exercising powers of review in the first instance over matters to deal with labour issues as that function has been specifically reserved for the Labour Court. Thus I decline jurisdiction in this matter.

Over and above this, the applicant has, in his founding affidavit and heads of argument, made certain averments and conclusions as to the contractual nature of his relationship with the respondent and the effect on the contract of the actions of the latter in terminating the same. The applicant contends that the nature of an employment contract are such that the terms are fixed and that neither party thereto can unilaterally vary the same unless the original contract provides for such variation. It cannot have escaped the applicant in having submissions of this tenor made on his behalf that the court is being asked to pronounce on the terms and conditions pertaining to a contract of employment and whether or not the termination by the employer was done in accordance with our law. According to the Act, in particular s 3, thereof, the Labour Act applies to all employers and employees save where the employment is in terms of the Constitution. The applicant was not employed in terms of the Constitution, This application therefore falls under the provisions of S 89 (1) of the Act and this court does not have the jurisdiction to determine the matter.

It is not important in view of my finding above that I determine the other preliminary issue as this court does not jurisdiction to consider the merits of the application.

Accordingly I find that the application is not properly before this court and it is hereby dismissed with costs.

Honey & Blanckenberg, legal practitioners for the applicant.
Gill Godlonton & Gerrans, legal practitioners for the respondent.