

HOSEA JAMBWA
versus
GRAIN MARKETING BOARD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 5 April 2013

Opposed Application

E Maphosa, for the applicant
G H Muzondo, for the respondent

MATHONSI J: This is an application in which the applicant seeks the following order:

“It is ordered that:

1. The respondent’s suspension letter of the 14th August 2011 be and is hereby declared null and void.
2. The disciplinary hearing held on the 3rd October 2011 and subsequent proceedings be and is (sic) hereby declared null and void and the respondent is hereby barred from further charging and prosecuting the applicant.
3. The respondent be and is hereby ordered to reinstate the applicant without loss of salary and benefits.
4. The respondent shall pay the costs of this application.”

In his founding affidavit, the applicant states that he was employed by the respondent in 2003 as a deport messenger for Murewa and that the relationship between the parties is governed by a Code of Conduct which he has attached to the application. He states further that he was suspended without salary and benefits on 14 August 2011 and was subsequently charged with misconduct.

After aborted hearings, a disciplinary hearing finally took place on 3 October 2011 albeit late. On 12 October 2011 he was notified of the outcome of the hearing which was a verdict of guilty of misconduct and a final written warning. In terms of the Code of Conduct of the respondent, the management appealed that decision to the General Manager who upheld the appeal and ordered the dismissal of the applicant from employment.

In his view, the disciplinary proceedings were a smoke screen intended to achieve a predetermined goal because the respondent's general manager had come out on national television announcing to the nation that he had fired two employees at GMB Murewa deport.

He therefore seeks the relief aforesaid on the grounds that there was a breach of the Code of Conduct which rendered the disciplinary proceedings a nullity in that his suspension was not done by his departmental head as required by the Code. A determination was not made within 14 days in breach of a provision in the Code. He was not properly advised of the outcome of the disciplinary hearing and he was not accorded a fair hearing again in breach of provisions of the Code. The appeal process was also done in violation of the Code.

The respondent, on the other hand opposes the application on the basis that the remedy sought by the applicant is not available to him in law. The respondent insists that the disciplinary proceedings were conducted in accordance with the Code of Conduct governing the relationship of the parties.

The issue which however exercises my mind is whether it was appropriate for the applicant to approach this court seeking the relief that he seeks. The applicant insists that his relationship with the respondent is governed by the Code of Conduct and has come to court protesting what he perceives to be serious breaches of that Code of Conduct which has been made available to the court. Clause 6 G of that code provides:

“The Appeals Procedure

- (i) If either party is dissatisfied with the decision made by the disciplinary hearing committee, they may appeal to the General Manager within seven (7) days.
- (ii) The General Manager through the Appeals Committee shall resolve the appeal within fourteen (14) days.
- (iii) If either party remains dissatisfied after the decision by the General Manager, they may seek redress from the Labour Court.” (The underlining is mine)

Mr *Maphosa* for the applicant argued that this is an application for a declaratory order and that this court must entertain it for that reason. I do not agree. The applicant elected to ignore the available domestic remedy provided for in the Code of Conduct preferring to seek redress in this court. There is a catena of cases in which this court has stated that it will be very slow to exercise its general review jurisdiction where a litigant has not exhausted available domestic remedies before approaching the court. It will only exercise that jurisdiction where good cause is shown for the early approach: *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 & Ors* 1987 (2) ZLR 88 (H); *Moyo v Gwindingwi N O & Anor* HB 168/11.

In *Moyo v Gwindingwi (supra)* at pp 3 - 4 this court made the following pronouncement which I still stand by:

“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 *casu* an appeal to the Labour Court from a decision of the General Manager is a domestic remedy available to the applicant. It is able to afford him redress. Therefore the applicant has not exhausted domestic remedies as he should have proceeded in the Labour Court by way of appeal. The application cannot succeed on that basis. It does not help the applicant to call it an application for a declarator as argued by Mr *Maphosa*. He had other domestic remedies available and for that reason this court will not exercise jurisdiction.

Even if I am wrong in that conclusion, the applicant still has the insurmountable difficulty arising from the provisions of s 89 (6) of the Labour Act [*Cap 28:01*] which 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 subs (1)”

Subsection (1) of s 89 lists the functions of the Labour Court. It states:

“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 s 98 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.
- (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.”

The jurisdiction of this court has therefore been ousted in matters provided for in the Labour Act. This court retains jurisdiction in respect of only those matters falling outside the ambit of the Act.

The Labour Court has jurisdiction in all matters where the cause of action and the remedy for that are provided for in the Act: *Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111 (H) 114 C; *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H) 204 A.

The applicant's claim arises out of what he perceives to be an unlawful termination of his employment contract. He seeks his reinstatement on the basis that the entire disciplinary process was flawed. These are matters which fall within the jurisdiction of the Labour Court. The jurisdiction of this court has therefore been ousted by s 89 (6) of the Act.

The applicant has unfortunately proceeded in the wrong court without even exhausting domestic remedies.

Accordingly the application is hereby dismissed with costs.

Chirenje Legal Practitioners, applicant's legal practitioners
Garabga, Ncube & Partners respondent's legal practitioners