

GIFT CHIBATWA
versus
ZIMBABWE CATERING AND WORKERS' UNION
and
ENOCK MAHARI N.O.

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14 June 2019 & 22 August 2019

Opposed matter

C.T. Tinarwo, for applicant
E. Ndlovu, for respondents

MUREMBA J: This is an application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*].

The applicant was employed by the first respondent, Zimbabwe Catering and hotel Workers' Union (the Union) on 1 June 1990 as an Organising Secretary and then as an Education Officer in 1996. On 8 November 2018 he was served with a Notice of Retirement Date which informed him that in terms of the Union's pension rules and past practice he was due to retire on 21 November 2018 when he was going to attain 60 years of age. However, he was notified that since his retirement date was towards the end of the year, his retirement date had been extended to 31 December 2018. The letter was written by the Acting General Secretary of the Union, Enock Mahari, the second respondent on behalf of the Union. It should be noted that the second respondent was sued in his official capacity. He is cited as Enock Mahari N.O.

The applicant protested against the notice of retirement date arguing that he was supposed to retire at age 65 in terms of the law applicable to him. He also challenged the power of the second respondent who is also an appointee just like him to summarily terminate his employment contract without the input of the National Council or National Executive of the first respondent. He registered his protests by way of letter. There was exchange of communication with the second respondent but they failed to resolve the matter. This is what resulted in the applicant filing the present application.

It is the applicant's averment that he is governed by the National Social Security (Pension and Other Benefits Scheme) Notice 1993, SI 393/1993 (the NSSA Scheme) as amended. On 29 August 1994, s 26 of the NSSA Scheme was repealed by s 8 of the National Social Security (Pension and Other Benefits Scheme) (Amendment Notice, 1994) (No. 1) Statutory Instrument 193A of 1994 which provides:

"Entitlement to pension

(1)

(a)....

(b)....

(2) Subject to this section, an employee may retire on attaining the age of sixty years or at any time thereafter but shall in any case retire on attaining the age of sixty five."

The applicant averred that in terms of the NSSA Scheme as amended he had a choice to retire at 60 years or at any time thereafter but it is mandatory that he retires at 65 years. He averred that he was retired by force when he still had 5 more years left.

The applicant averred that the respondents purport to base their move to force him to retire at the age of 60 years on the Industrial Agreement: Catering Industry (Pension Fund) SI 359 of 1980 which provides for retirement at the age of 60 years. He averred that this is incorrect and unlawful because he is not employed by the Catering Industry and in any event the position of Education Officer does not fall under Schedule B of the Industrial Agreement: Catering Industry Pension Fund S.I 359 of 1980 which limits membership to the fund to occupations in the Catering Industry as specified therein. He then attached schedule B of SI 359 of 1980 which he said lists the occupations that are covered.

The applicant thus seeks a *declaratur* that the Notice of Retirement Date by the respondents is null and void. The order he seeks is couched as follows:

"IT IS HEREBY ORDERED AND DECLARED THAT:

- a) The Notice of Retirement dated 8 November 2018 is null and void;
- b) The Notice of Retirement does not meet the legal prescribed requirements (*sic*) in the NSSA Scheme which governs the applicant and is hence unlawful; and
- c) The applicant and respondents abide by the provisions of the NSSA Scheme in relation to retirement (*sic*).
- d) The legal age of retirement for the applicant is 65 years old in accordance with the National Social Security (Pension and Other Benefits Scheme) Notice, 1993, SI 393 of 1993, as amended;
- e) The respondent to pay costs of suit on an attorney client scale."

Enock Mahari, the second respondent deposed to the respondents' opposing affidavit. What is noticeable is that he was very rude in the tone of his language but the bottom line of the respondents' averment is that the applicant is not governed by the NSSA (Pension and Other Benefits) Scheme S.I 393 of 1993 but by the Industrial Agreement: Catering Industry (Pension Fund) S.I. 359 of 1980. The second respondent averred that the applicant was retired properly; it is just that he is in denial. One Felistas Nyamuda the President of the first respondent deposed to a supporting affidavit confirming the contents of the second respondent's opposing affidavit as accurate.

In his answering affidavit the applicant took great exception to the haughtiness exhibited in the respondents' opposing affidavit by the second respondent who deposed to it. The applicant averred that this is appalling to say the least. I agree with the applicant. As was correctly observed by the applicant, the tone of the affidavit is very rude and punctuated by repetitive use of exclamation marks. I will remark that this is very disrespectful of both the court and the applicant. Such disrespectful and disgraceful conduct should be shunned by any self-respecting person. Legal proceedings are not a platform to ridicule other litigants in as much as you disagree with them. Litigants should therefore learn to tone down their language otherwise the courts will not hesitate to visit them with costs to register their displeasure of such conduct even if the litigant succeeds in the matter. The second respondent should take heed of this warning and desist from such despicable behaviour in future. Legal practitioners are also warned to keep their clients in check. Any reputable legal practitioner should not allow affidavits with awful language to be filed.

The preliminary point

The applicant in his answering affidavit raised a point *in limine* to the effect that there is no competent opposing affidavit by the first respondent. He averred that neither Enock Mahari nor Felistas Nyamuda have authority to depose to an affidavit on behalf of the first respondent. He averred that no Union resolution giving them the requisite authorities was annexed to the affidavits and consequently the opposing and supporting affidavits are fatally defective and ought to be struck out.

In response to the preliminary point Mr *Ndlovu* for the respondents argued that the need to furnish a resolution that bestows authority is not a strict requirement. He submitted that there is a plethora of Zimbabwean cases that deal with that aspect, but he did not cite a single case.

Be that as it may, what is apparent is that Enock Mahari in deposing to the opposing affidavit on behalf of both the first and second respondents said,

“I Enock Mahari by virtue of my position as Acting General Secretary of 1st respondent do hereby take oath and state the following:”

He then went on to make the factual averments. He did not attach the resolution authorizing him to represent the first respondent. As was correctly submitted by Mr *Tinarwo* for the applicant, s 8 (5) (e) of the Constitution of the Zimbabwe Catering and National Workers’ Union provides that:

“The National Council shall, subject to the provisions of this Constitution, have power to institute or defend legal proceedings by or against the Union or against individual members.”

This means that the second respondent needed to be given authority by the National Council to represent the first respondent. In *African Banking Corp of Zimbabwe and Another v PWC Motors (Pvt) Ltd and Ors* 2013 (1) ZLR 376 (H) MATHONSI J (as he then was) held that while there is authority for demanding attachment of resolutions, that form of proof is not necessary in every case as each case must be considered on its own merits. The court is only required to satisfy itself that enough evidence has been placed before it to show that it is indeed the party which is litigating and not an authorised person. He further stated that where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason to disbelieve them unless evidence to the contrary is shown. He stated that where no such evidence is produced, the omission of the company resolution cannot be fatal to the application.

In *casu* taking a leaf from what MATHONSI J said, I would not say the failure to attach a resolution by the first respondent’s National Council alone is fatal. However, what is fatal is the lack of averment in the opposing affidavit by the second respondent that he has the authority of the National Council to represent the Union in these proceedings. What worsens the situation is that Mr *Ndlovu* for the respondents made submissions that the National Council which is the Union’s body that gives that resolution only sits once a year in terms of s 9 of the Union’s constitution and that it had not sat this year because of the economic hardships the country is facing. This was a clear admission that the National Council did not give authority to the second respondent to represent it. In view of this, I will uphold the point *in limine* in respect of the first respondent meaning that there is no opposing affidavit by the first respondent.

As for the second respondent, Mr *Tinarwo* submitted firstly that, because of an omission of an ‘S’ on the Notice of Opposition on page 31 where it is written, “Be pleased to take notice that respondent herein opposes the above matter,” it means that there is an opposition for one respondent only. I find this submission very petty and disgraceful because right below it, it is written,

“Mabundu & Ndlovu Law Chambers
1st & 2nd Respondent’s Legal Practitioners”

Clearly this shows that both 1st and 2nd respondents were opposing the matter, never mind that the apostrophe is at the wrong place. As was correctly submitted by Mr *Ndlovu*, there was an omission of an ‘S’ on the word respondent above. This is buttressed by the opposing affidavit which is on page 32 which reads “1st & 2nd respondent’s opposing affidavit.” Of course it should read 1st & 2nd respondents’ opposing affidavit but any legal practitioner who is worth his salt would not argue over such trivial grammatical errors when it is clear what the intention of the respondents was.

Secondly, it was Mr *Tinarwo*’s argument that there was no opposing affidavit by the second respondent, Enock Mahari N.O because in deposing to the opposing affidavit Enock Mahari said,

“I Enock Mahari, by virtue of my position as Acting General Secretary of 1st respondent do hereby take oath and state the following:”

Mr *Tinarwo* submitted that the above shows that Enock Mahari did not depose to the opposing affidavit on his own behalf as he did not indicate that in the opposing affidavit. This argument is without merit because the second respondent was sued not in his personal capacity, but in his official capacity as the Acting General Secretary of the first respondent. So when he then says, “by virtue of my position as Acting General Secretary do state the following,” it means that he is deposing to the affidavit in his official capacity being the capacity in which he was sued. There was therefore no need for him to say he was deposing to the affidavit on his own behalf. What he said was sufficient.

For the above reasons, I thus dismiss the point in *limine* in respect of the second respondent. There is a notice of opposition by the second respondent.

The Merits

On the merits, the applicant maintained in his answering affidavit that he is governed by the NSSA Scheme S.I 393 of 1993 and not the Industrial Agreement: Catering Industry (Pensions Fund) S.I 359 of 1980.

Mr *Tinarwo* for the applicant argued that the applicant is not employed by the Catering Industry and neither does the position of Education Officer fall under schedule B of the Industrial agreement: Catering Industry (Pension Fund) S.I 359 of 1980. He submitted that schedule B limits membership of the fund to occupations in the catering Industry as specified therein. Further, Mr *Tinarwo* argued that in terms of s 10 (2)(e) of the Constitution of the Union an Educational Officer is an appointee of the National Council whose terms and conditions are determined by the National Council. Therefore it is incompetent for the second respondent to purport to assume the duties of the National Council in determining the conditions of employment of the applicant. He further argued that the contract of employment the parties entered into in 1990 is still extant and is due to expire in 2023 and as such the notice to retire issued by the second respondent is unlawful and unprocedural. Mr *Tinarwo* submitted that the applicant's contract of employment does not provide that he should retire at age 60. However, the applicant did not attach his contract to this application. Mr *Tinarwo* further submitted that for a person to be governed by the Industrial Agreement: Catering Industry (Pension Fund) S.I 359 of 1980 they have to be a member thereof of which the applicant was not. It was submitted that apparently the applicant continues to report for duty at the first respondent's place irrespective of the notice to retire he was served with in November 2018. The applicant continues to render his services even though his employer is not remunerating him. It was submitted that he is doing this because he regards the notice to retire he was served with as a nullity.

Mr *Ndlovu* submitted that the applicant's heads of argument are unnecessarily voluminous because they largely address the issue of the *declaratur* when the second respondent does not even dispute that this is a proper case for the granting of a *declaratur* should the applicant manage to prove his case on a balance of probabilities. I agree. Mr *Ndlovu* submitted that the singular issue for determination is, is the applicant bound by the Industrial Agreement: Catering Industry (Pension Fund) S.I 359 of 1980? I again agree with Mr *Ndlovu*. It was Mr *Ndlovu*'s submission that to determine this issue the following three questions have to be answered.

1. Does S.I. 359 of 1980 define the scope of the industrial agreement? Put differently, who are the members that are bound by the agreement?

2. Is the Zimbabwe Catering and Hotel Workers' Union an employer in terms of S.I 359 of 1980?
3. Does schedule B of S.I 359 of 1980 absolve the applicant from being an employee in terms of this statutory instrument?

I am in entire agreement with Mr Ndlovu. I now turn to deal with the questions.

Does S.I. 359 of 1980 define the scope of the industrial agreement? Put differently, who are the members that are bound by the agreement?

In the preamble of S.I 359 of 1980 there is a heading titled "Agreement" which reads;

"In accordance with the provisions of the Industrial Conciliation Act [*Chapter 267*], made and entered into between the Catering Employers' Association of Zimbabwe (hereinafter referred to as "the employers" or the "Employers organization") of the one part and the Zimbabwe Catering and Hotel Workers Union (hereinafter referred to as "the employees" or the "trade Union" of the other part being parties to the National Industrial Council for the Catering Industry."

What is clear from this provision is that the first respondent, the Union is a party to S.I 359 of 1980. Immediately after the heading "Agreement" is the heading titled "Scope of Agreement" under clause 1 which reads:

"The provisions of this agreement shall be observed by all employers falling within the definition of "catering industry" contained in clause 3 of this agreement and by those persons eligible for the fund."(My underlining for emphasis)

All employers defined of in clause 3 are bound by this statutory instrument.

Is the Zimbabwe Catering and Hotel Workers Union an employer in terms of S.I 359 of 1980?

That the first respondent is or was the applicant's employer is not disputed. The critical question now is; is the first respondent, the union an employer envisaged by clause 3 of the Industrial Agreement? The term employer under clause 3 is defined as follows:

"Employer means-

- (a) an employer who is engaged in the catering Industry, other than an employer who is required to hold only a passenger vessel liquor licence;
- (b) the Council itself, the catering Employers Association of Zimbabwe and the Zimbabwe Catering and Hotel Workers' Union or their successors" (my emphasis)

Clearly, the Zimbabwe Catering and Hotel Workers' Union is an employer in the Catering Industry in terms of S.I 359 of 1980 and it being an employer, it is bound by the provisions of the Industrial Agreement as is indicated in clause 1 quoted above.

Does schedule B of S.I 359 of 1980 absolve the applicant from being an employee in terms of this statutory instrument?

It was Mr *Tinarwo*'s argument that the position of Education officer is not listed or does not fall under Schedule B of S.I 359 of 1980 which schedule he said limits membership of the fund to occupations in the Catering Industry as listed in the schedule. Put differently, it was submitted that membership to the fund is limited to the occupations listed in schedule B of S.I 359 of 1980 only. I disagree. As was correctly submitted by Mr *Ndlovu*, membership is not limited to employees or occupations listed in the schedule. The preamble to that schedule makes that clear. It reads:

“Notwithstanding any occupations listed in this Schedule membership of the fund shall be limited to those employees in the catering industry covered by the Industrial Agreement: Catering Industry (General Conditions) (Rhodesia) Government Notice 938 of 1978) as amended or replaced from time to time and voluntary members as defined in that agreement. (My underlining for emphasis).”

The provision makes it clear that the occupations listed in this Schedule are not exhaustive. The word “notwithstanding” means in spite of, despite or regardless. This means that there is more to what has been listed. The words “as amended or replaced from time to time” mean that the occupations listed in this Schedule are not restrictive or exhaustive. They are subject to amendment or replacement from time to time. The preamble to Schedule B therefore envisaged amendments or replacements of occupations with the passage of time. Although counsels did not refer to any amendments or replacements that have been made over the years, I would like to believe that there have been some amendments or replacements to the schedule considering that almost 40 years have gone by since the enactment of the statutory instrument. So what matters is not the list of occupations listed in Schedule B but the definition of employer in the definition section of the same statutory instrument and whether or not the Union as an employer is bound by the statutory instrument. I have already dealt with these above. Even though the applicant's job description is not covered in Schedule B, Clause 3 quoted above makes it crystal clear that the Union is an employer who in terms of clause 1 is bound to observe the provisions of this statutory instrument. Since the Union is bound by Statutory Instrument 359 of 1980 it naturally follows that the applicant is also bound by this statutory instrument as an employee of the Union.

The major issue for determination

The answers to the 3 questions above have answered what is the major issue for determination which is: is the applicant bound by Statutory Instrument 359 of 1980? As has been shown above, the answer is a clear yes. The applicant's argument that he was not making pension contributions to the catering industry pension fund but to the NSSA Scheme only and that as such he is not bound by S.I. 359 of 1980 is without merit as will be demonstrated below. To begin with, he did not furnish his contract of employment which would ordinarily show the terms and conditions of his employment contract. Secondly, he did not furnish his payslip. He was actually challenging the respondents to produce these documents which was quite erroneous because him being the applicant, he had the duty to prove his case on a balance of probabilities by adducing the necessary evidence. A party cannot make an averment and then expect the other party to prove that averment on its behalf. He who alleges must prove. The applicant failed to show that he was contributing to the NSSA Scheme only and not to the Catering Industry Pension Fund as well. In any case, the second respondent in the notice of retirement date he wrote to the applicant on 8 November 2018 he said,

“The Union will pay out all statutory obligations such as outstanding leave days and facilitate processing of your pension claims from the Catering Industry Pension Fund and National Social Security Authority.”(My underlining)

This shows that the applicant was contributing to both pension funds i.e. the catering industry pension fund and the NSSA Scheme. In any case even if the applicant had shown that he was not contributing to the catering industry pension fund that would not have changed the complexion of his case or that would not have taken his case any further. The reason is as follows. In Zimbabwe there are two types of pension schemes available and these are a State pension scheme and private pensions¹. The State pension scheme is a compulsory pension scheme created by NSSA in terms of the National Social Security Authority (Pensions and Other Benefits Scheme) Notice, 1993 (SI 393/1993). The scheme applies generally to all employers and employees in Zimbabwe². The scheme applies to every person who is a citizen of or ordinarily resident in Zimbabwe who has attained the age of 16 years but has not attained the age of 65 and is gainfully employed in any profession, trade, occupation, other than persons employed in the service of the State or as domestic workers in

¹ Lovemore Madhuku *Labour Law in Zimbabwe*, 2015 p 495.

² Ibid p 495; Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* at p 404.

private households³. All employers and employees are each liable to contribute to the pension fund an amount determined by the Minister of Public Service and Social welfare for every month an employee is employed⁴. The employer is actually obliged to deduct the employee's contributions from the employee's earnings and pay them together with the employer's contribution to the pension fund.⁵ So the pension contribution to the NSSA scheme that the applicant was making was not by choice. The law obliged him to do so.

Private pension schemes are voluntary pension schemes that are workplace based that are entered into between employers and employees⁶. They are a matter of contract and they are regulated by the Pension and Provident Funds Act [*Chapter 24:09*]. The terms of the pension contract may be contained in a collective bargaining agreement⁷.

In view of the foregoing even if the applicant had successfully shown that he was only making pension contributions to the NSSA Scheme that would not have made him bound by the retirement provision in the NSSA Scheme SI 393/1993 as amended. This is because the retirement provision in the NSSA Scheme statutory instrument is a default provision which is only applicable in situations where there is no collective bargaining agreement (a written contract) regulating the terms and conditions of employment of employees in a specific profession, trade, occupation or industry. If there is such an agreement, that agreement binds all parties to it including employers and employees who are members of the parties concerned.⁸ This means that in *casu* the retirement provision in the Industrial Agreement: Catering Industry (Pension Fund) S.I 359 of 1980 takes precedence over the retirement provision in the NSSA Scheme S.I. 393 of 1993. S 2A (3) of the Labour Act [*Chapter 28:01*] even provides that the Labour Act shall prevail over any other enactment inconsistent with it. This means that the Act and any agreements negotiated in accordance with the provisions of the Act regulating the terms and conditions of employment of employees take precedence over any other enactment. The NSSA retirement provision therefore applies across the board in all trades and professions in situations where there are no collective bargaining agreements or where there are no specific guidelines on the issue of retirement. In *casu* what it means is

³ Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* at p 404.

⁴ Lovemore Madhuku *Labour Law in Zimbabwe*, 2015 p 495.

⁵ *Ibid* p 495.

⁶ Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* at p 403.

⁷ Lovemore Madhuku *Labour Law in Zimbabwe*, 2015 p 499.

⁸ S 82 (1) of the Labour Act [*Chapter 28:01*]

that even if the applicant was not contributing to the catering industry pension fund as he says, the law pertaining to his retirement would still be governed by the Industrial Agreement: Catering Industry (Pension Fund) S.I. 359 of 1980 because he was working in the Catering Industry and there is an industrial agreement in place regulating the terms and conditions of employment of employees in that industry.

This therefore means that the applicable law for the applicant's retirement is the one that is provided for in the Industrial Agreement: Catering Industry (Pension Fund) S.I. 359 of 1980. Rule 3 of the Rules of the Catering Industry Pension Fund that are found in Annexure 1 of the statutory instrument provides that;

“The normal retirement date for each member will be first day of the month next following his attainment of age sixty.”(My underlining)

It is clear that the retirement age for the applicant in terms of S.I 359 of 1980 is 60 years.

Whether the notice of retirement date given by the second respondent is a nullity

Retirement being by operation of law, it means that the fact that the applicant was notified of his retirement date by the second respondent is not an issue. The second respondent as the Acting General Secretary was simply complying with the law when he gave notice to the applicant as he is required to do in terms of s 10 (2) (b) of the Union Constitution. Since retirement is by operation of law, the management body of the employer does not need to convene meetings and make resolutions or give directives about an employee's retirement. In *casu* there was therefore no need for the National Council, the body vested with the management of the affairs of the Union to convene meetings, make resolutions and give directives about the applicant's retirement. The notice which was given by the second respondent suffices and it is therefore not a nullity.

It is most unfortunate that the applicant relied on wrong legal advice and continued to go to work after 31 December 2018 which was the date of his retirement. He persevered with the hope that he would win this case and retire at 65 years. He is now in his 8th month of going to work and rendering his services without receiving any remuneration at all. It means that he has been working for nothing for all these months yet he has been looking for money for transport elsewhere to enable him to go to work. It is a pity because he has lost out. All his efforts have yielded to nothing. If he had received correct legal advice he would have channelled his energy elsewhere and earned himself money instead of providing free service to his former employer. Over and above that he has to pay the second respondent's costs.

In the result, it be and is hereby ordered that:

1. The application is dismissed.
2. The applicant shall pay the second respondent's costs.

Zimudzi & Associates, applicant's legal practitioners

Mabundu & Ndlovu Law Chambers, respondent's legal practitioners