REPORTABLE (84)

CONSTANCIA DZENGA
v
(1) GRAIN MARKETING BOARD (2) PRISCILLAH MGAZI N.O

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & MUSAKWA JA
HARARE: 19 JULY 2022 & 12 SEPTEMBER 2023

R. T Mutero, for the appellant

S. Bhebhe, for the first respondent.

No appearance for the second respondent

MUSAKWA JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) in which it declined to confirm a draft ruling by the second respondent who ordered the reinstatement of the appellant to the post of Finance Manager following termination of her contract employment by the first respondent.

FACTUAL BACKGROUND

The facts of this matter are common cause. The appellant was employed by the first respondent as a Finance Manager on a five-year fixed term contract for the period 1 July 2016 to 30 June 2021. The contract was terminated on three months' notice which expired on 30

December 2020. The appellant was aggrieved by the termination and approached the second respondent, a labour officer with a claim for unlawful dismissal.

The appellant argued that the first respondent had no right to terminate the contract on notice in terms of Article IX of the contract of employment as read with s 12(4)(a) of the Labour Act [*Chapter 28:01*] in the absence of mutual agreement. She further argued that in the event that the first respondent was not willing to let the contract run until 30 June 2021, she would accept the termination on condition that the first respondent paid her the full salary and benefits that she was entitled to until June 2021. She further argued that she was entitled to a Mitsubishi Triton motor vehicle, registration number AEF 9594 and an HP Spectre 360 Convertible laptop which were taken away from her.

The appellant also argued that she had been competently and efficiently discharging her duties. She further argued that she was entitled to a fair hearing in terms of s 65 of the Constitution of Zimbabwe, 2013 before she could be dismissed. The appellant also argued that in terms of s 12 B (3)(B) of the Labour Act, she had a legitimate expectation to be re-engaged in her employment when her contract expired as she had not committed any acts of misconduct.

In response, the first respondent argued that the termination was in terms of s 12 (4a) (a) of the Labour Act. It further argued that article IX of the appellant's contract of employment contemplated termination of employment in any manner which includes termination of a fixed-term contract of employment by notice. The first respondent further argued that the Supreme Court in the case of *Don Nyamande and Kingstone Donga v Zuva Pretroleum (Pvt) Ltd*

SC 43/15 confirmed the right of the employer to terminate a contract of employment upon giving notice. It further argued that an employer who terminates an employee's contract on notice is not required to provide reasons for doing so. It further argued that the appellant's salary was paid in accordance with article V of her contract of employment from the time that she was served with the notice of termination in September 2020.

After considering the arguments advanced by the appellant and first respondent, the second respondent found that the termination was unlawful. The second respondent ordered the reinstatement of the appellant. The second respondent then filed an application to the Labour Court in terms of s 93 (5a) (a) and (b) for the confirmation of her ruling. The first respondent opposed the application on the basis that the second respondent had granted an incompetent relief in that she ordered reinstatement without the alternative of damages in lieu of reinstatement. It further argued that the second respondent based her finding on an issue which had not raised or argued by the parties.

The court *a quo* found that the second respondent had determined issues not raised by the parties. It also found that the order granted by the second respondent was incompetent for failure to provide for damages in lieu of reinstatement.

Aggrieved by the findings of the court *a quo*, the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

The grounds of appeal are set out as follows:

1. "The court *a quo* grossly misdirected itself on the facts in finding that the question of the legality of a termination on notice premised on s12 (4) (a) of the Labour Act [*Chapter 28:01*] was not raised before the second respondent.
2. The court *a quo* erred at law in dismissing the application before it on the basis that the second respondent had determined issues not placed before her without itself resolving the matter on the basis of the issues placed before the second respondent.
3. The court *a quo* erred at law in not making a determination on the substantive correctness of the draft ruling before it as it is required to at law.
4. The court *a quo* erred at law by dismissing the application before it without using the power reposed in it to make the necessary amendments to the draft ruling as it is required to in terms of s 93 5(b) of the Labour Act [*Chapter 28:01*]."

RELIEF SOUGHT

WHEREFORE, the appellant prays that,

1. The instant appeal be and is hereby allowed with costs.
2. The judgment of the Labour Court under LC/H/LRA/3/21 and dated 10 September 2021 be and is hereby set aside and in its place the following be substituted:
    a. The application be and is hereby granted.
    b. The draft ruling by Priscillah Mgazi N.O dated 27 January be and is hereby confirmed.

c. The termination of the second respondent's contract of employment by the first respondent was unlawful.

d. The first respondent be and is hereby ordered to reinstate the second respondent to her original employment position without loss of salary and benefits from the date of termination to the date of this order.

e. If reinstatement is no longer possible, the first respondent shall pay the second respondent damages being all her salaries and benefits for the outstanding period of her contract as well as comply with the other terms of her employment contract.

ALTERNATIVELY

1. The instant appeal be and is hereby allowed with costs.

2. The judgment of the Labour Court under LC/H/LRA/3/21 and dated 10 September 2021 be and is hereby set aside.
3. The matter be and is hereby remitted to the Labour Court for a determination of the substantive correctness of the ruling by the second respondent dated 21 January 2021."

Before this Court, the following submissions were made.

APPELLANT'S SUBMISSIONS

Mr *Mutero*, for the appellant submitted that the court *a quo* erred in its finding that the second respondent had made a determination on an issue that had not been raised by the parties. He argued that the matter that was before the second respondent was conciliation and not adjudication. He further argued that conciliation does not use the adversarial system and that the

second respondent was not bound by what the parties submitted. He also submitted that the issue of whether or not s 12 (4)(a) of the Labour Act gives an employer the right to terminate employment on notice was raised before the second respondent. He further submitted that s 12 (4) (a) of the Labour Act does not give the employer the right to terminate a fixed term contract on notice.

Counsel for the appellant further contended that the relief sought by the appellant before the second respondent was that of reinstatement or damages in lieu of reinstatement. He also argued that whether or not proper conciliation was done is a question of fact and not of law, therefore this Court cannot deal with that issue at this point. He submitted that the appeal has merit and ought to succeed. He concluded by submitting that in the event that the court is not persuaded by the arguments raised by the appellant, the matter may be remitted to a labour officer for proper conciliation.

FIRST RESPONDENT'S SUBMISSIONS

In the main, Mr *Bhebhe*, for the first respondent submitted that the appeal should be dismissed. In support thereof he submitted that the court *a quo* was correct in declining to confirm the draft ruling. He further submitted that the appellant never argued that a wrong provision of the Labour Act had been relied upon by the second respondent. He also submitted that the common law right of terminating a contract of employment on notice was not ousted by statute.

In the alternative, Mr *Bhebhe* submitted that the second respondent did not conduct conciliation but adjudication. This is because a statement of claim, opposing submissions, replication and heads of arguments were filed before oral submissions were made. He also submitted that the second respondent made a determination on an issue that was never raised by the parties. He further argued that in terms of the common law an employer can terminate a fixed term employment contract and that the Labour Act did not oust the right of an employer to do so but rather it only regulated termination in certain instances. He submitted that the appeal has no merit and ought to fail.

ISSUE FOR DETERMINATION

Although the appellant raised four grounds of appeal, the main issue for determination which disposes of this matter is:

Whether or not the court a quo erred in declining to confirm the draft ruling made by the second respondent

APPLICATION OF THE LAW TO THE FACTS

Mr Mutero argued that the court *a quo* erred in refusing to confirm the draft ruling on the basis that the second respondent went on a frolic of her own by determining issues that were not raised or placed before her. On the other hand, Mr *Bhebhe's* alternative argument is that the second respondent went beyond what was required of her in conciliation proceedings.

Section 93 of the Labour Act provides for conciliation. Conciliation is a method for the resolution of all disputes and unfair labour practices referred to a labour officer. The provision provides as follows:

"**93 Powers of labour officers**

(1) A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.

(2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing.

(3) If the dispute or unfair labour practice is not settled within thirty days after the Labour Officer began to attempt to settle it under subsection (1), the Labour Officer shall issue a certificate of no settlement to the parties to the dispute or unfair labour practice.

(4) The parties to a dispute or unfair labour practice may agree to extend the period for conciliation of the dispute or unfair labour practice referred to in subsection (3)…
(5)..."

In terms of the above provision, all disputes properly referred to a labour officer must first be subjected to the process of conciliation before they are referred to arbitration or adjudication, depending on the nature of the dispute. Although the Act does not require a party to allege a cause of action, it is necessary to allege a dispute which falls within the jurisdiction of the labour officer. The following jurisdictional facts must be asserted or must appear when referring a dispute in terms of s 93(1) of the Act, to a Labour Officer –

(a) there must be a dispute;
(b) the dispute should have arisen within an employment relationship;

(c) the dispute should fall within the powers of a labour officer;
(d) the issue in dispute should not be subject to proceedings under the employment code (s 101(5), as read with s 101(6) of the Act);
(e) the parties should not be subject to an employment council with jurisdiction. In other words, a designated agent should not be seized with the dispute (s 63(3b) of the Act); and
(f) the referral should be timeous (s 94(1) of the Act).

The case of *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Memory Darikwa* CCZ 6/20 is instructive on what conciliation entails. As was set out in that case, the conciliator should assist the parties and obtain admissions of fact and documents relevant to the dispute. The labour officer is supposed to analyse the information given to him or her by the parties in order to understand the dispute and the real issues between the parties. Further, the labour officer is enjoined to bring the parties together at a joint-meeting where he or she goes through the analysis of a dispute and this is regarded as the most important step in conciliation.

Additionally, as was held in *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Memory Darikwa supra*, the labour officer is required to explore options for settlement. The purpose of this step as set out in the aforementioned authority is to assist the parties explore options for a possible settlement. Thus, the labour officer assists in the moderation of the parties' positions and expectations. The labour officer should then assist the parties to agree to a resolution of the dispute which is practical, cost effective and to the mutual satisfaction of the parties. This entails that the parties are the ones really in control. The labour officer's duty is to simply assist and

offer advice to the parties. He or she should not pronounce on the merits of the respective cases of the parties.

Moreover, in the *Isoquant* case *supra*, the Chief Justice remarked that after properly discharging his or her functions as a conciliator in terms of s 93(1) of the Labour Act, a labour officer can then issue a certificate of no settlement in terms of s 93 (3) of the Act. This certificate is issued at the end of the 30-day period or any further period agreed by the parties.

It is necessary to take into consideration what transpired before the second respondent in the instant case. The second respondent directed the parties to file written submissions on the dispute. The appellant filed a statement of claim, thereafter the first respondent filed responding submissions. Thereafter the first respondent filed a replication. The parties also filed heads of argument. The second respondent then held an oral hearing for purposes of considering the submissions filed by the parties. In addition, the issue that was before the second respondent is that the appellant challenged her termination on notice on the basis of the clauses in the employment contract. The second respondent, in her draft ruling found that the first respondent used a wrong provision of the Labour Act. None of the parties had suggested that the first respondent relied on a wrong provision. The second respondent was required to confine herself to issues raised by the parties (without of course making any findings). Thus, the second respondent went beyond her duty as a mediator. A thorough reading of the proceedings shows that she adjudicated the matter that was placed before her. Requiring parties to file written submissions and conducting an oral hearing is alien to conciliation proceedings. The second respondent erred in conducting adjudication and not conciliation

proceedings. This clearly vitiates the proceedings. In the *Isoquant* case *supra*, it was held as follows at p 23:

> "Conciliation as a method of dispute resolution is different from adjudication which involves the use of power by the third party to resolve the dispute between the parties. Procedures such as the hearing of oral submissions or the production of written submissions by the parties and determination of the matters in dispute, typical of the adjudication process, are alien to the conciliation process.
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> During the conciliation process the labour officer collects information and attempts to settle the dispute between the parties in a friendly manner. It is neither a trial nor a hearing…… A correct reading of the provisions of s 93 of the Act shows that they do not give the labour officer any powers of adjudication. A labour officer cannot be referred to as an adjudicator when he or she performs her the functions of conciliation in accordance with the procedures prescribed for the process…"

Kudya AJA (as he then was) in *Vundla & Anor v Innscor Africa Bread Company Zimbabwe (Pvt) Ltd & Anor* SC 14/22 stated the following regarding conciliation at p 17:

> "Conciliation therefore constitutes the first consensus seeking step that is actively and not passively presided over by the labour officer but is driven by the disputants. The proper way of conducting conciliation, which was approved by the Constitutional Court generally involves the four-stage approach that consists of the introduction, story-telling, dispute analysis and problem solving. These stages were borrowed from the South African labour case of *National Union of Metalworkers in SA & Ors v Cementation Africa Contracts* (Pty) Ltd (1998) 19 ILJ 1208 (LC) at para 21 (the NUMSA case) and the suggestions of various academic writers in the field such a Grogan: Labour Litigation and Dispute Resolution 1st ed Juta p 113, Brand et al Dispute Resolution 5ed Juta pp 122-123, 127 and Darcy du Toit et al Labour Relations Law A Comprehensive Guide 6ed Lexis Nexis pp 117-146.
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> If the properly conducted conciliation fails to achieve a settlement within 30 days, or any further extension agreed to by the parties, from the commencement of the attempt at settlement, the labour officer issues a certificate of no settlement. The legal effect of such a certificate is that the dispute or unfair labour practice arising from a dispute of right, by operation of law, automatically and specifically proceeds to adjudication before the Labour Court in terms of s 93 (3) as read with s 93 (5) of the Labour Act and not to compulsory or voluntary arbitration. Such an application is a sui generis application that is within the contemplation of s 89 (1) of the Labour Act. It is only those disputes that involve disputes of interest for parties engaged in an essential service that take the arbitral route.

At pp. 22 and 24 of the Isoquant case, supra, it was held that the Draft Ruling is the exclusive domain of the Labour officer that is prepared after issuing a certificate of no settlement. It is based on the information collected and collated by the Labour officer during the process of conciliation…."

In remarks that mirror what took place in the present matter, in the *Vundla case supra*, Kudya AJA further observed as follows at pp 19-20:

"The founding affidavit of the applicants fails to demonstrate that the conciliation conducted by the labour officer met the requirements set out in the Isoquant case, supra. The first respondent averred in the opposing affidavit that following upon the complaint of 31 August 2015, the labour officer issued a certificate of no settlement by agreement of the parties on 9 November 2015. Thereafter, on an undisclosed date the applicants filed a statement of claim while the first respondent filed its statement of defence on 9 December 2015. The applicants then filed their reply on 14 December 2016. It was common cause that the parties proceeded to file written submissions at the behest of the labour officer so as "to enable him to determine the matter." It is clear from these pleadings that the labour officer failed to conduct the conciliation in the manner stipulated in the Isoquant judgment, supra. A properly conducted conciliation does not require a statement of claim, response, reply and heads of argument. The labour officer does not make a determination in making his Draft Ruling. These features pertain to a hearing. Rather, he or she utilizes both the oral and written information and documents that he collects and collates from the parties to make a Draft Ruling. A Draft Ruling that emanates from improper procedural steps and substantive requirements is a nullity. It is incapable of invoking the confirmation jurisdiction of the Labour Court. It is unlikely that the applicants will be able to surpass this hurdle on appeal. This will, therefore, dampen their prospects of success on appeal. I would dismiss the application for condonation and extension of time within which to appeal on this basis..." (my emphasis)

In *casu*, it is apparent that the second respondent did not conduct conciliation in accordance with the law. The proceedings which she conducted are a nullity. The court *a quo* declined to confirm the draft ruling for different reasons. The crux of the matter is that the *court a quo* ought to have struck off the proceedings as they were a nullity.

DISPOSITION

This case warrants invoking the court's review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. This is because there was an irregularity in the conciliation proceedings before the second respondent and such irregularity was not the subject of the present appeal. The irregularity pertains to the second respondent adjudicating as opposed to conciliating the matter before her. The court *a quo* ought to have struck off the proceedings. As the matter has not been determined on the merits, each party will bear its own costs.

In the result, it is ordered as follows:

(1) The matter be and is hereby struck off the roll.

(2) In the exercise of this Court's review powers in terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*], the judgment of the Labour Court under LC/H/LRA/03/21 be and is hereby set aside and is substituted with the following:

"The application be and is hereby struck off the roll with costs."

(3) Each party shall bear its own costs.

MAVANGIRA JA: I agree

MAKONI JA: I agree

Caleb Mucheche and Partners Law Chambers, appellant's legal practitioners

Kantor and Immerman, respondent's legal practitioners