

TADIOS MUTSENGI

versus

RURAL ELECTRIFICATION AGENCY

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 4 October 2020 and 22 February, 2021

Opposed Application

Applicant in person
T. Pasirayi for respondent

WAMAMBO J: This is an opposed application wherein applicant seeks the following relief:-

“IT IS HEREBY ORDERED

- 1. That applicant was on a contract without limit of time.*
- 2. That the variation of the applicant’s contract of employment is null and void*
- 3. That the fixed term contract be taken to never have existed and that the respondent reinstates the applicant to his employment as if the purported termination of contract never happened.*
- 4. That there be no order of costs if application is not opposed.”*

Applicant appeared in person. To a certain extent this explains the in elegant expression reflected in the draft order and the manner in which the founding affidavit is written both in form and in content. In the founding affidavit applicant states the following:

He was employed by respondent in the position of Stores Clerk since January 2010 up to 9 March 2011. The contract of employment was however not reduced to writing. Applicant through an appointment letter dated 9 March 2020 obtained a fixed term contract to run for two years.

After a year however on 30 April, 2012 the fixed term contract was terminated by respondent.

I say the founding affidavit is not properly formulated for it is a mixture of fact and law.

Sections of the Labour Act [*Chapter 28:01*] and the Constitution in particular are cited in the body of the founding affidavit. The version sought to be relied on by applicant is neither consistent nor chronological because of the reliance on provisions of the Labour Act and the Constitution mixed with the facts he alleges took place.

After painstaking efforts to glean the facts and the relief sought I can do no better than to say applicant seeks the relief as more fully expressed at the start of this judgment.

In the opposing affidavit respondent as represented by the Acting Chief Executive Officer states as follows:-

This matter is purely a labour matter. Applicant was employed as a Stores Clerk on a fixed term non-renewable two year contract effective from 1 May 2010 to 30 April 2012. The contract was not renewed. A dispute then arose as applicant alleged that he had a legitimate expectation that his fixed term of employment would be renewed. Respondent disputed this resulting in the matter being determined in respondent's favour by the Labour Court under LC/MS/14/17 handed down on 10 March, 2017.

Effectively respondent raised that this court has no jurisdiction as the issues raised were dealt with on the merits in LC/MS/14/17. Applicant in thus raising the special plea of *res judicata*. Applicant is coming through the back door instead of appealing against the Labour Court judgment as provided for in section 43(1) of the Labour Court Rules, 2017.

The first port of call is the judgment of the Labour Court LC/MS/14/17 which forms the basis why respondent claims that this matter is already *res judicata*.

The special plea of *res judicata* was raised by respondent as early in the opposing affidavit and developed in the heads of argument and in oral argument.

In Labour case LC/MS/14/17 the appellants in that case are reflected as W. Taudzai and Another. Respondent contends that the other appellant is the applicant in this case. Applicant in their papers and in oral argument did not dispute this point. I take it therefore that applicant was the other appellant in LC/MS/14/17.

In LC/MS/14/17 the matter came up on appeal from the decision of an arbitrator. There were two grounds of appeal expressed by the Honourable Labour Court KACHAMBWA J. as follows:-

“There are two grounds of appeal. The first ground of appeal is that the arbitrator grossly misdirected himself on the facts by finding that there were no ground for legitimate expectation of renewal of contract.

The second ground is that the finding that the appellants were fairly dismissed was a gross misdirection and error on the facts and so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind (to the facts) would have arrived at it.”

The Labour Court at the end of the day dismissed the appeal. The prerequisites of *res judicata* have been explored in many a case.

CHIWESHE J.P. in *ZAMBEZI Power (Private) Ltd (in liquidation) vs Zimbabwe Revenue Authority & 2 Others* HH 670/17 at page 3 summarised the requirements of the special plea of *res judicata* as follows:-

“the requirements for it to be upheld have been laid down in a number of cases. Suffice it to say for that plea to succeed, it must be shown that the action in which judgment was given was between the same parties, with respect to the same subject matter and based on the same ground or complaint as the action under consideration. See Banda and Ors v ZISCO 1990 (1) ZLR 340 (S)”

To apply the principles as enunciated above, the following becomes clear.

Applicant and respondent were both parties in LC/MS/14/17. The same subject matter namely the contract of employment as it related to its termination, were under examination in both matters.

One has to note that the second ground of appeal in LC/MS/14/17 attacked the finding that appellants in that matter were fairly dismissed.

In this case applicant seeks to reverse this finding. The ultimate request in this case as per the draft order is for reinstatement of applicant and a declaratory that the termination never took place.

Effectively I am attracted to respondent's argument that instead of applicant following the correct appeal procedure on LC/MS/14/17 he chose to approach this court through the back door.

I am, satisfied that in the circumstances the judgment in LC/MS/14/17 was on the subject matter based on the same ground as the matter before me. Notably although raised as a second ground of appeal the said ground

was not developed according to the findings of the Labour Court.

In the circumstances although other points *in limine* have been raised, I will not deal with them as I find that the special plea of *res judicata* holds water.

I order as follows:-

1. That the special plea of *res judicata* is upheld
2. That the applicant's claim is dismissed with costs.

Gill, Godlonton & Gerrans, respondent's legal practitioners