

**DISTRIBUTABLE: (96)**

**CHRISTMAS MAZARIRE**  
**v**  
**(1) THE RETRENCHMENT BOARD (2) OLD MUTUAL**  
**SHARED SERVICES (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**MAKARAU JA, GOWORA JA & HLATSHWAYO JA**  
**HARARE: JUNE 10, 2019 & JULY 17, 2020**

Appellant in person

No appearance for first respondent

*T. Magwaliba* for second Respondent

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17**

1

**MAKARAU JA:** On 12 October 2015, the first respondent declined jurisdiction to quantify the appellant's retrenchment package upon the termination of his employment with the second respondent. Aggrieved by the decision, the appellant brought a review application before the Labour Court, seeking among other relief, to have the first respondent's decision set aside. He was unsuccessful. This is an appeal against the entire judgment of the Labour Court handed down on 4 November 2016, dismissing with costs, the application for review.

**Background facts**

The appellant was employed by the second respondent as General Manager (Risk). By letter dated 6 March 2014, the second respondent advised the appellant of its

intention to terminate his services by way of retrenchment. The termination of services was to be effective on 31 March 2014.

A dispute arose between the parties as to the package payable to the appellant upon retrenchment. On 3 April 2014, the second respondent referred the dispute to the first respondent.

The first respondent heard the referral on 26 June 2014. It declined to determine the matter which it referred back to the employer, the second respondent. The first respondent's reasons for declining jurisdiction and referring the dispute back to the employer are not on record. They are not necessary for the determination of this appeal.

Subsequently, the second respondent issued the appellant with a "notice to retrench" after reinstating his salary in full. The dispute relating to the package payable to the appellant upon retrenchment remained unresolved and was referred back to the first respondent. Through a process that has not been fully explained in the papers filed of record, the matter was escalated to and was resolved by the Minister of Public Service, Labour and Social Welfare who, on 2 March 2015, authorised the second respondent to retrench the appellant. It is common cause that before approving the retrenchment of the appellant, the Minister received recommendations from the first respondent.

It is further common cause that the appellant's retrenchment was approved on condition the second respondent paid a gratuity equivalent to one month's salary for every year of service, a stabilisation allowance equivalent to two month's salary and a severance payment equivalent to 13,5 month's salary.

In implementing the retrenchment, the second respondent used the appellant's pensionable salary to quantify the total package payable. This dissatisfied the appellant who, contended that the second respondent ought to have used his total guaranteed monthly salary as the basis of the quantification. He referred the matter back to the first respondent, seeking determination of the dispute as to what would constitute an accurate computation of his package. This referral would constitute the third referral of the dispute to the first respondent.

The first respondent did not set the matter down for hearing. In a letter addressed to the parties and dated 12 October 2015, it declined jurisdiction in the following terms:

“Kindly be advised that the Retrenchment Board has no jurisdiction over disputes arising from terms and conditions of employment.  
Please refer the matter to a labour officer as per s 93 of the Labour Act *Chapter 28.01*”

Contending that the first respondent had acted irregularly in abdication of its statutory duty by declining jurisdiction in the matter, the appellant filed an application for review in the court *a quo*. As indicated above, the court *a quo* dismissed the application with an appropriate order of costs.

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17**

3

### **The proceedings *a quo***

In his application for review the appellant alleged that the first respondent had acted irregularly in *inter alia* declining jurisdiction in the matter when the statute setting it up empowered it to act as requested. It was his argument that the issue of the correct formula to be used in computing his retrenchment package had remained undetermined notwithstanding that it was one of the deadlocked positions that had been referred to the first respondent in March 2015 before the Minister approved the appellant's retrenchment. It was his further contention that the first respondent had irregularly and incompetently directed that the dispute

be referred to a labour officer, who in the circumstances of the matter, had no jurisdiction over the retrenchment of the appellant.

The first respondent did not oppose the application.

The second respondent did. It contended that the first respondent was correct in declining jurisdiction in the matter. In the main and against the main thrust of the appellant's contentions, it contended that once the first respondent had made its recommendations to the Minister on the retrenchment package, it became *functus*, having discharged its statutory duties. It further argued that the decision to retrench was ultimately that of the Minister and if the appellant was unhappy with the implementation of the Minister's decision, his relief lay in appealing against or bringing that decision on review.

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17**

4

After finding that the grievance by the appellant was against the Minister who made the final computation of the retrenchment package, the court dismissed the application for review with an appropriate order of costs.

Aggrieved by that decision the appellant noted this appeal.

### **The appeal**

The appellant raised two grounds of appeal as follows:

1. The court *a quo* grossly erred and misdirected itself on the facts and the law by failing to determine whether or not the first respondent's decision to decline jurisdiction was proper.

2. The court *a quo* erred on a point of law and further grossly erred and misdirected itself on the facts which error amounts to an error of law by dismissing the appellant's application for review inter alia on the following grounds:

- “(a) That the Minister had made “... the final computation of the package...” on the recommendations of the first respondent, hence it was the Minister's decision which should have been challenged;
- (b) That the decision which the applicant is not happy with is that of the Minister when it is common cause that the appellant was not happy with the second respondent's unilateral interpretation of the word “salary” and upon representations thereto, the first respondent declined jurisdiction.”

The issue that arises in this appeal is therefore whether the court *a quo* erred in failing to determine the issue that was before it or alternatively, in determining the issue after misdirecting itself on the facts.

### **The law**

It is a settled position at law that failure to determine a material issue that is before the court is a gross irregularity that vitiates the decision made.

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17** 5

The broad position of the law was recognised by **UCHENA JA** in *Nzara and Ors v Kashumba and Ors* SC 18/18 where he had this to say:

“A court is not entitled to determine a dispute placed before it, wholly based on its own discretion, which is not supported by the issues and facts of the case. It is required to apply the law to the facts and issues placed before it by the parties.”

Thus the general and trite position of the law that requires no further debate is that a court cannot go on a frolic of its own and determine the dispute before it by raising its own issues or facts and resolving the dispute on such.

Looking at the basic role of the court from a slightly different angle, **GOWORA JA** in *PG Industries v Bvekerwa* SC 53/16 observed that:

“The position is settled that where there is a dispute on a question, be it a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings.”

Whilst **GOWORA JA** in *PG Industries v Bvekerwa* (*supra*) was dealing with a case where the lower court had failed to deal with a preliminary issue that arose in the matter before it, the position still holds that even where there is a sole issue to be determined and the court does not determine that issue but focuses on irrelevant or incorrect issues, the failure to deal with the correct issue is fatal to the proceedings.

There are a number of other legal principles that converge to discourage a court from going on a frolic of its own and determining a matter on an issue that is not raised by the parties in their papers and arguments. These include the duty of the court, where it is of the view that a certain factual or legal position is dispositive of the matter before it, to invite the parties to address it on the point before resolving the dispute wholly or partly on the point. A detailed discussion of this and other principles is not necessary in this appeal as there was no dispute as to the applicable law.

## **Analysis**

As stated above, the issue before the court was whether the refusal by the first respondent to exercise jurisdiction in the third referral of the dispute to it by the appellant was irregularly made.

A reading of the judgment *a quo* indicates that the court appears to have laboured under the erroneous understanding that the review before it related to the second referral of

the matter to the first respondent, which led to the Minister of Public Service, Labour and Social Welfare Minister stepping in and approving the retrenchment of the appellant on 2 March 2015. This appears from the passage in the judgment *a quo* containing the ratio of the decision, which reads:

“Page 154-155 of the record shows that the Minister eventually made a decision after the Retrenchment Board’ recommendation. Section 12 (8) of the Labour Act states that even where the Board fails to make a recommendation, the Minister can still get relevant documentation and still make a decision. In this case it is the Minister who made the decision after recommendations from the Board. It is this court’s view that the grievance in this case is against the Minister who made the final computation of the package.... The Minister made the decision and thus the complaint should be raised against the Minister and not the Board which merely made recommendations.” (The underlining is mine).

With respect, the decision of the first respondent that was under the spotlight was not on the second referral of the matter in March 2014 but on the third referral, which decision was communicated to the parties on 12 October 2015.

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17**

7

I note that the court *a quo* does not at any stage advert to this decision in its judgment.

Having made this first error, the court *a quo* fell into the second and more serious error which vitiates its decision. It formulated its own issues for determination. Firstly, it formed the view that the issue before it was “the computation of the retrenchment package” due to the appellant. Whilst the computation of the package was at the centre of the dispute between the parties, it was not the immediate issue that fell to be determined in the review application *a quo*. As indicated above, the immediate issue to be determined was whether the second denial of jurisdiction by the first respondent over the matter was properly arrived at. Secondly, and as building up to its *ratio*, the court *a quo* raised and determined an issue that was not an issue for the parties. It made a finding that the final package had been computed

by the Minister. This finding was against the common position of both parties. It was common cause that the computation of the package had been done by the second respondent and not by the Minister. Therefore the identity of who made the final computation of the appellant's retirement package was not in issue and was therefore not a point on which a finding by the court was necessary.

I further note in passing that had the court *a quo* canvassed with counsel its view of the turning point in the application for review and the facts which it thought were in dispute between the parties, an eminently prudent practice for any court, this appeal may have been obviated. However, this was not so.

I find merit in the appellant's grounds of appeal. The court *a quo* failed to determine the issue that was before it. It raised its own and gravely misconstrued the facts giving rise to the dispute in resolving the issue it had raised for itself.

Judgment No. SC 105/20  
Civil Appeal No. SC 1019/17

8

### **Disposition**

Having fallen into error in not only formulating the incorrect issue for its determination but in basing its decision on incorrect facts, the decision of the court *a quo* cannot stand. It must be set aside and the matter remitted for fresh determination.

Costs of this appeal will follow the cause. I see no reason for departing from this general position in this appeal.

In the result I make the following order:

1. The appeal is allowed with costs.



2. The decision of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for determination *de novo*.

**GOWORA JA:**

I agree

**HLATSHWAYO JA:**

I agree

*Wintertons*, 2<sup>nd</sup> respondent's legal practitioners.

**Judgment No. SC 105/20**  
**Civil Appeal No. SC 1019/17**