**REPORTABLE:** **(165)**

**AIR ZIMBABWE (PRIVATE) LIMITED**
**v**
**(1) J.V. MATEKO (2) ELIJAH CHIRIPASI AND OTHERS**

**SUPREME COURT OF ZIMBABWE**
**GARWE JA, MAVANGIRA JA & MATHONSI JA**
**HARARE: SEPTEMBER 24, 2019 & DECEMBER 7, 2020**

*T. Zhuwarara*, for the appellant

*C. Mucheche*, for the respondents

**Judgment No. SC 180/20**
**Civil Appeal No. SC 105/19**



**GARWE JA**

[1] This is an appeal against confirmatory proceedings conducted by the Labour Court on 8 September 2017 in terms of s 93(5) of the Labour Act. At the end of the proceedings the Labour Court made a number of alterations to the draft ruling issued by the Labour Officer.

[2] The Labour Court has the power to confirm a draft ruling with or without amendment. The issue for determination before this Court is the extent to which the Labour Court can, in confirmation proceedings of the draft ruling of a labour officer, amend such a ruling.

*FACTUAL BACKGROUND*

[3] The 2nd – 301st respondents were employed by Air Zimbabwe (Private) Limited ("the appellant") in various capacities at divers occasions. Following the decision of this Court in *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd*[1] on 17 July 2015, the appellant terminated the employment contracts of the respondents on three months' notice. The notices of termination were issued on 31 July 2015 and all made it clear that the termination was pursuant to the appellant's common law right to terminate employment on notice.

[4] Aggrieved by the termination of their employment, the respondents collectively lodged a complaint of unfair dismissal with the Labour Officer. They contended that the termination of their employment contracts had been carried out contrary to the provisions of s 12(4) of the Labour Act, [*Chapter 28:01*]. The appellant opposed the claims on three bases. First, that some of the respondents cited in the proceedings were not party to the proceedings as they had been re-engaged and one of them was deceased. Second, that the amendment to the Labour Act that sought to impose retrospective application of s 12(4)(b) of the Act was unconstitutional. Lastly that "if the tribunal was inclined to retrospectively apply the section, then the matter must be referred to the Constitutional Court".



[5] In her draft ruling the labour officer (the first respondent in this matter) found that the respondents had been unfairly dismissed and that the termination was therefore null and void. In addition she ordered the appellant to comply with s 12(C)(2) of the Act and that her ruling be implemented within thirty (30) days of receipt of the order. Pursuant to that

[1] 2015(2) ZLR 186(5)

draft ruling, the labour officer filed an application with the Labour Court for the confirmation of that ruling. The appellant opposed the application before the Labour Court on several grounds. First, that the labour officer had erred in failing to refer the matter to the Constitutional Court. Second that the ruling related, in part, to employees who were not party to the proceedings. Third, that the labour officer had granted a declarator in spite of the fact that she had no power to do so. Lastly that the order that the appellant complies with s 12(C)(2) of the Act was improper because that section was not applicable to the matter before her.

[6] In its determination, the Labour Court held that the first part of the operative portion of the draft ruling was a declarator in respect of which the labour officer and the Labour Court itself had no jurisdiction to grant. The court further determined that the labour officer ought to have removed the names of the employees who had been improperly joined to the proceedings. The court also held that the order that the appellant pay the minimum retrenchment package to the employees was a misdirection because once the labour officer found that the termination of the employment was unlawful, she should have granted an order of reinstatement.



[7] The court was also of the view that in light of s 93(5b) of the Act (which provides that the Labour Court may grant the application with or without amendments) it had the power to amend the ruling so that the final ruling would be legally sound. The court also determined that although the labour officer had not dealt with the request for the referral of the matter to the Constitutional Court, it was clear that such a referral could only be made

by a court and not a labour tribunal. Further that the Labour Act, as amended, was valid notwithstanding that it imposed financial obligations on employees retrospectively. Consequently the Labour Court issued an order in the following terms:

> "Consequently the draft order and ruling of the applicant is confirmed subject to the following amended terms:-
> 1. The 39th, 89th, 90th, 95th, 134th, 154th and 227 respondents are struck off the matter.
> 2. The first respondent unfairly and unlawfully terminated the contracts of the remaining 2nd to 301st respondents.
> 3. The first respondent be and is hereby ordered to, within 60 days of this order, reinstate the remaining 2nd to 301st respondents to their positions without loss of pay and benefits. If reinstatement is no longer tenable, the first respondent is to pay the remaining 2nd to 301st respondents, damages *in lieu* of reinstatement which the parties are to negotiate, failing which either party can approach the applicant for quantification."

*PROCEEDINGS BEFORE THIS COURT*

[8] Unhappy with the above determination by the court *a quo*, the appellant noted an appeal with this Court. In its notice of appeal, it raised five grounds. At the hearing of the appeal, however, it abandoned all its grounds of appeal except for the third ground. The first and second grounds attacking the retrospective application of s 18 of the Labour Amendment Act No. 5/15 were abandoned in light of the decision of the Constitutional Court in *Greatermans Stores (1979) (Private) Limited T/A Thomas Meikles Stores & Anor v The Minister of Public Service, Labour and Social Welfare & Anor* CCZ 2/18 in which the Constitutional Court held that the retrospective operation of the amendment was not unconstitutional. The fourth and fifth grounds of appeal were in turn abandoned because they were inconsistent with the law.



[9] The gravamen of the remaining ground was that the court *a quo* was wrong in substituting the ruling of the labour officer with its own determination and that in doing so

the court went beyond merely amending the ruling. Parties were given leave to file supplementary heads of argument in this regard.

[10] The appellant submitted that the court *a quo* erred in exercising appellate authority in confirmation proceedings. It argued that the court *a quo* had no statutory authority to substitute the relief granted by a labour officer with what it considered to be appropriate. In other words the *court a quo* exceeded its jurisdiction by substituting the ruling with its own determination. Whilst accepting that s 93(5b) allows the Labour Court to grant an application for confirmation with or without amendments, what the court *a quo* did, so the appellant argued, was more than amend the ruling. An amendment entails a minor revision or addition to an instrument and for this definition appellant relied on *Black's Law Dictionary, Bryan A. Garner 10th Edition, Thompson Reuters*, 2014. By substituting its own relief which had not been prayed for or contemplated by the labour officer, the court did not simply amend but substituted the ruling of the labour officer with its own.



[11] The appellant further submitted as follows. The court *a quo* had three options. It could have confirmed the ruling as it was. It could have simply refused to confirm it. Or it could have confirmed the ruling with an amendment, being a minor addition or subtraction. Instead the court *a quo* recast the disputation and determined the matter afresh after which it confirmed its own determination.

[12] The respondents dispute that this is a correct interpretation of the phrase "with or without amendments". They argued that the provision clothes the Labour Court with the

discretion to amend the draft ruling. The legislature was mindful of the fact that labour officers are not trained lawyers and consequently their draft rulings are subjected to scrutiny by the Labour Court which is a specialised court in labour matters. The word "amendment" is broad and gives the court the power to do justice as the case may require. The word "amend" means to make changes to a text in order to make it more accurate and meaningful. The legal complexion of the dispute remained the same. The court *a quo had* noted that the draft ruling was irregular as neither the labour officer nor the Labour Court itself can issue declaratory orders. Further, reinstatement is a necessary consequence of an unlawful termination of employment. The amendment was therefore proper and warranted as it sought to make the draft ruling sound at law.

*ISSUE(S) FOR DETERMINATION*



[13] The issue that consequently arises for determination before this Court is whether the court *a quo* acted within the bounds of its powers when it amended the labour officer's draft ruling in the manner it did. Central to this issue is the need to appreciate the nature and purpose of a draft ruling by a labour officer and what is meant by the term "amendment" when applied to such a ruling.

[14] In *Isoquant Investment (Pvt) Ltd t/a Zimoco v Darikwa* CCZ6/20 the Constitutional Court went to great lengths to explain the process to be followed by a labour officer before he or she comes up with a draft ruling. At that stage there is no formal hearing before the labour officer and the ruling is predicated on material collected by the labour officer during and after the conciliation process. The court was at pains to point out that:

> "The ruling has no legal force at this stage. An employee cannot enforce a "draft ruling". Both the employer and the employee cannot seek a review or appeal against the ruling at this stage since it will still be a "draft". It is a suspended ruling, which must not be taken as a direction that the money be paid there and then. It is an interlocutory ruling in abeyance and not a final ruling. It is a ruling that is made pending the decision of the court a quo which may subsequently give final effect to the "draft ruling".
> The matters in issue remain open depending on the conduct of the party at whom the "draft ruling directed…."

[15] In *Willmore Makamure v Minister of Public Service, Labour and Social Welfare (2) Attorney General of Zimbabwe* CCZ 01/20, dealing with the confirmation proceedings in declarations of invalidity of a law or conduct of the President or Parliament, the Constitutional Court noted that:

> "Confirmation proceedings are in the nature of a review. The court … is endowed with the power to review orders of constitutional invalidity made by lower courts …."

It will be apparent from the above decision that when the Labour Court is called upon to confirm a draft ruling it is essentially being asked to exercise its powers of review.



[16] It was common cause in the court *a quo* that the ruling by the labour officer was declaratory and further that neither the labour officer nor Labour Court has the power to grant a declarator. The operative part of the draft ruling was couched as follows:-

> "1. The termination on notice is hereby declared null and void.
> 2. The respondent to comply with s 12c(2) of the Act."

[17] The court *a quo* considered that the operative part in para one was a *declaratur*. Bearing in mind that neither the labour officer or Labour Court had the power to grant such an order, it decided to amend the draft order so that it would be, as the court stated, "legally sound". To cure the irregularities apparent from the ruling, the court *a quo* determined that

the order should be amended to remove the names of the employees who had been improperly joined in the proceedings. It proceeded to remove the reference to a *declaratur* that the termination was *null* and *void* and replaced the same with an order that the termination was unlawful and that the respondents be reinstated to their former positions and, that failing, that they be paid damages *in lieu* of such reinstatement.

[18] The issue that arises is what should the Labour Court do when faced with a draft ruling containing, in part, relief that is not sanctioned by the law. The Labour Court would have been aware of various decisions of this Court that have held that the Labour Court itself and the tribunals below it have no jurisdiction to grant a declaratur - in this regard see *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127(S), 130C-E, where this Court remarked as follows:



> "… nowhere in the Act is the power granted to the Labour Court to grant an order of the nature (declaratory order) sought by the respondents in the court *a quo*, nor have I been referred to any enactment. So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction authorizing the Labour Court to grant such an order."

[19] The above remarks on the lack of jurisdiction to issue declaratory orders by the Labour Court would of necessity apply to a labour officer. Such officer has no jurisdiction to issue a *declaratur* which relief is specifically bestowed on the High Court by statute.

[20] In these circumstances the court *a quo* could not have confirmed the ruling as it was because it too cannot grant such declaratory relief. Furthermore, the court is obliged to confirm a ruling that is capable of enforcement.

[21] As indicated earlier in this judgment, a draft ruling is exactly what the terms says. It is a draft and has no legal effect until confirmed by the Labour Court. The purpose of the confirmation proceedings is to test the substantive correctness or fairness of the draft ruling. Only through an application for confirmation of the draft ruling can it be given legal recognition and enforcement. As stated in the *Isoquent Investments* case *supra* at pp 26-28 of the judgment:-

> "Confirmation of a draft ruling is a legal process. The judicial officer… is not merely rubberstamping the "draft ruling" of the labour officer. The judicial officer is required to thoroughly investigate the matter …….. A "draft ruling" is not a determination, as it is not preceded by a hearing. The purpose of making an application supported by an affidavit is to place the matter in dispute and the evidence before the court for hearing and determination. A perusal of s 93(5b) of the Act is reflective of the fact that a hearing commences when the matter goes for confirmation before the Labour Court. It is not coincidental that the term "hearing" appears for the first time in the same section in terms of which the matter is brought to the Labour Court for confirmation…."



[22] It is apparent from these remarks that the purpose of making an application for confirmation is to place the matter in dispute and the evidence before the Labour Court for hearing and adjudication.

[23] Cognisant of the fact that the Labour Court is empowered to confirm the draft ruling with or without amendments, the question that arises is whether the changes effected by the Labour Court to the draft ruling constitute the amendment envisaged by the Act.

[24] Having found that the basic order that the termination was *null* and *void* was appropriate but had been expressed as a *declaratur* in the draft ruling, the court proceeded to "panel beat" the draft ruling in order to remove the reference to a *declaratur*. The court

then substituted the order that was in the contemplation of the labour officer. The court was also mindful of the correct legal position that a determination of unlawful or unfair dismissal necessarily results in a further order of reinstatement or alternatively payment of damages – see *Tamanikwa & Ors v Zimbabwe Manpower Development* SC 33/13.

[25] There is a dispute between the parties to this appeal as to what constitutes an amendment. The appellant argues that this refers to a minor correction or adjustment whilst the respondents submit that the word is much wider than suggested. Indeed both the *Oxford English and Spanish Dictionary, Thesaurus, and Spanish to English Translator* defines an amendment to be "a minor change or addition designed to improve a text, piece of legislation, etc". The *Longman Dictionary* of *Comprehension English* also defines an amendment as "a small change, improvement or addition that is made to a law or document". *Investopedia* however defines the term to mean "a change or an addition to the terms of a contract, a law …" whilst *Wikipedia* defines an amendment as "the alteration of a … document for the purpose of correcting some error or defect in the original …". *Thesaurus* also states that "an amendment is essentially a correction". *Merriam – Webster* defines an amendment as "an alteration in wording to cure the defect in the pleading".



[26] It will be apparent from the above definitions that an amendment is an alteration effected to a text or document to cure a defect. If may also be a variation. It cannot however entail a substitution which is the complete replacement of something with another.

[27] The finding in the draft ruling that the termination of employment was *null* and *void* meant that the termination of employment was wrongful and unlawful – see *Tamanikwa's* case, supra. The law is settled in this jurisdiction that the remedy to an unlawful termination is reinstatement, alternatively payment of damages – *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S). That finding was not interfered with by the court *a quo*.

[28] What the court did was to confirm that the termination of employment was indeed unlawful. In doing so it removed reference to a *declaratur*. It also removed the names of parties who had not been correctly joined to those proceedings. It also made provision for reinstatement alternatively payment of damages *in lieu* thereof.



[29] In my view, there was no substitution of the order of the labour officer but rather a correction and addition to make the order acceptable in terms of the law. At the end of the day therefore the order granted by the court *a quo* was one within the contemplation of the labour officer, the amendment having been made merely to ensure that the confirmed order accorded with the dictates of the law.

[30] I am of the considered view, in light of the above sentiments, that the changes effected by the Labour Court were indeed amendments and that they cannot, by any stretch of imagination, be termed a substitution. As noted earlier in this judgment, labour officers are often lay persons with little or no experience in matters legal. For that reason they are

given the power to make draft rulings which are then subjected to scrutiny by the Labour Court, a specialised court in matters of labour and employment.

*DISPOSITION*

[31] For the above reasons, I find that there is no merit in this appeal. The amendments effected by the court *a quo* in the process of confirming the draft ruling were completely consistent with s 93(5) which allows confirmation "with or without amendments".

[32] On the issue of costs, I am of the view that these should follow the event.

[33] In the result it is ordered as follows:-

"The appeal be and is hereby dismissed with costs."



**MAVANGIRA JA** **:** I agree

**MATHONSI JA** **:** I agree

*Mawere & Sibanda*, appellant's legal practitioners

*Caleb Mucheche & Partners,* respondents' legal practitioners