

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

**SUPREME COURT OF ZIMBABWE
BHUNU JA, CHATUKUTA JA & MUSAKWA JA
HARARE: 11 MAY 2023**

Adv T. Mpofu, for the appellant

The first respondent in person

No appearance for the second respondent

**Judgment No. SC 91/23
Civil Appeal No. SC 351/22**

1

CHATUKUTA JA: This is an appeal, coupled with a cross appeal, against the whole judgment of the Labour Court of Zimbabwe (the court *a quo*) in which the it granted an application for review of the determination by the Retrenchment Board (the second respondent) dated 13 October 2015. After hearing submissions from the appellant and the first respondent, the court issued the following order:

- “1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with: ‘The application for review is dismissed with costs.’
3. The first respondent’s cross appeal be and is hereby struck off the roll.”

The court indicated that reasons for the order would follow. The reasons now appear hereunder.

FACTUAL BACKGROUND

The appellant initiated a retrenchment process against the first respondent before the second respondent. The second respondent made recommendations to the Minister of Labour and Social Services (the Minister) in terms of the Labour Relations Retrenchment Regulations, 2003 (SI 186/2003) (the Regulations).

By notice dated 2 March 2015, the Minister approved the retrenchment of the first respondent with effect from 23 February 2015. The approval included the terms for the retrenchment and more particularly that the first respondent was entitled to payment of a gratuity equivalent to one month's salary for every year worked, a stabilisation allowance equivalent to two months' salary and a severance payment equivalent to 13.5 months' salary. The first respondent was to be paid all statutory benefits and any other agreed items. The appellant thereafter paid the first respondent the amount of US\$ 171 397.51. The amount was computed using the first respondent's pensionable salary.

The first respondent was however of the view that he was entitled to an amount of US\$258 522.22, computed using what he described as the "total guaranteed remuneration package". The total guaranteed remuneration package was alleged to include the "basic pensionable pay, allowances (non-pensionable) -cafeteria benefits and annual travel allowance (non-pensionable)". He engaged the appellant for a recalculation of the package. The parties failed to agree. The first respondent approached the second respondent seeking re-quantification of the retrenchment package and that the appellant be compelled to pay the revalued retrenchment package.

The issue placed before the second respondent was whether, in computing the retrenchment package due to the first respondent, the second respondent was required to use

the pensionable salary or the total guaranteed remuneration package. The request for re-quantification of the retrenchment package was resisted by the appellant arguing that the second respondent was now *functus officio* and did not have jurisdiction to rehear and redetermine the matter. In a decision dated 12 October 2015, the second respondent declined jurisdiction over disputes arising from terms and conditions of employment. It instead referred the parties to a Labour Officer in terms of s 93 of the Labour Act [Chapter 28:01] (the Act).

Aggrieved, the first respondent filed an application in the court *a quo* for the review of the determination of the second respondent.

SUBMISSIONS IN THE COURT A QUO

The first respondent argued as follows: The second respondent acted irregularly by declining jurisdiction. It effectively abdicated its statutory duty to determine and finalise a retrenchment process. It further acted irregularly by directing that the matter be referred to a Labour Officer when a Labour Officer has no statutory powers to quantify a retrenchment package. The referral was *ultra vires* the provisions of the Act and as such unlawful.

In response, the appellant argued as follows: The second respondent did not abdicate its statutory duties. The statutory duties were exercised and exhausted when the second respondent made recommendations to the Minister, which recommendations were accepted by the Minister. Further, the Act did not empower the second respondent to deal with a matter that had already been determined by the Minister. The second respondent lacked the power to make determinations on the *quantum* of the retrenchment packages awarded by the Minister. The first respondent ought to have appealed against the decision of

the Minister or subjected the same for review. The appellant averred that the payment of the package was done with the agreement of the first respondent.

DETERMINATION BY THE COURT A QUO

The court *a quo* found that s 12 C (2) and (3) of the Act gives the retrenchment board the power to regulate the retrenchment package. It found that, contrary to what the second respondent stated in its letter dated 12 October 2015, the dispute in question was about the quantification of the retrenchment package and not about the conditions of employment. The court *a quo* also found that Labour Officers have no jurisdiction over retrenchment issues and the second respondent erred in referring the matter to the Labour Officer. It granted the application.

Aggrieved, the appellant filed the present appeal on the following grounds:
Judgment No. SC 91/23
Civil Appeal No. SC 351/22

4

GROUND OF APPEAL

- “1. The court *a quo* erred at law in relying on s 12 (2) of the Labour Act [Chapter 28:01] as currently worded notwithstanding that this was not the law at the time the retrenchment process between the parties was carried out.
2. The court *a quo* erred in holding that s 12C of the Labour Act as currently worded gave the second respondent jurisdiction to deal with the issues referred to it by the first respondent.
3. The court *a quo* grossly erred in failing to determine issues that were placed before it, *viz*,
 - i. Whether the process that culminated in the payment of the disputed retrenchment package could bar the first respondent from challenging the retrenchment exercise.

- ii. Whether the Retrenchment Board had exhausted its powers after making recommendations during the initial proceedings.
4. The court *a quo* erred at law in finding as it did that the powers of a Labour Officer under s 93 (1) of the Labour Act [*Chapter 28:01*] excluded the power to preside over matters which have a retrenchment background.
 5. The court *a quo* erred at law in holding as it did that the Retrenchment Board was empowered to determine the issue referred to it by the First Respondent after the Minister had exercised his powers in terms of the then s 12C (9) of the Labour Act [*Chapter 28:01*] to make a determination of the matter and set the terms of the retrenchment.
 6. The court *a quo* erred at law in failing to hold that after the Minister had exercised his powers in terms of the then s 12C (9) of the Labour Act [*Chapter 28:01*], the Retrenchment Board could no longer exercise any jurisdiction on a retrenchment matter and more specifically, quantify the retrenchment package as was requested of it by the First Respondent.
 7. The court *a quo* erred and misdirected itself at law in failing to hold that the determination by the Minister had resolved the issue that the first respondent requested the second respondent to deal with having determined that the retrenchment package was to be paid on the basis of the first respondent's salary."

Judgment No. SC 91/23
Civil Appeal No. SC 351/22

5

SUBMISSIONS MADE BEFORE THIS COURT

The first respondent, appearing in person, raised a number of preliminary objections. The first objection was that the notice of appeal was fatally defective for want of compliance with rule 11 (a) (iv) of the Supreme Court Rules, 2018 as it did not state the appellant's electronic address and telephone numbers at the time it was filed. Secondly, it was

argued that rule 59 (3) (e) of the Supreme Court Rules, 2018 was not complied with as the notice of appeal did not state the appellant's address for service. Lastly, it was submitted that the relief sought by the appellant was incompetent because it was allegedly intended to uphold an unlawful decision made by the second respondent. After an engagement with the court, the first respondent abandoned all preliminary objections. For the sake of completeness, the first respondent conceded that no prejudice had been occasioned by the failure to provide an electronic email address as he had been made aware of the appeal. He acknowledged that he was served with the notice of hearing and had appeared for the hearing. With regards to the absence of the appellant's address in the notice of appeal, he conceded that the address of the appellant's legal practitioners appeared in the notice of appeal. The appellant being represented by legal practitioners, it was not necessary to provide the appellant's own address. Lastly, the first respondent conceded that the question of the competency of the relief sought was a substantive issue to be determined by the court after argument on the merits.

Judgment No. SC 91/23
Civil Appeal No. SC 351/22

6

Mr *Mpofu*, for the appellant, addressed the Court on the merits. He argued that the first respondent erred in citing the second respondent as the substantive respondent *a quo* when the second respondent is not a legal *persona*. The application was therefore void. He ought to have cited the chairperson of the Board. This point was being raised for the first time without notice, it not having been raised in the court *a quo*. Counsel conceded that he was aware of this Court's judgment in *Mapondera and 55 Ors v Freda Rebecca Gold Mine Holdings Limited* SC 81/22 to the effect that the question of the proper citation of the name of a party is a technical issue which does not vitiate proceedings.

Secondly, he argued that the court *a quo* did not determine issues that were placed before it and these issues were:

- i) that the first respondent waived its right to challenge the quantification of the retrenchment package after having accepted and received the package which included a vehicle issued to him by the appellant during the subsistence of the contract of employment;
- ii) ii) there was a fatal non-joinder of the Minister who had approved the recommendations of the second respondent and stipulated the retrenchment package; and
- iii) iii) the fact that the second respondent was *functus officio* after it had made its recommendations to the Minister.

Thirdly, it was argued that the court *a quo*, in remitting the matter to the second respondent for quantification of the retrenchment package misdirected itself in relying on s 12C (2) of the Act as presently worded. It was submitted that the section was promulgated on 26 August 2015 after the cause of action had arisen in September 2014 and after the Minister had, on 2 March 2015, already approved the recommendations of the second respondent and communicated the approval to the parties. The section does not have retrospective effect. It was argued that the old s 12C which was applicable when the Minister made his decision did not give the second respondent jurisdiction to quantify retrenchment packages. It was contended that the court *a quo* grossly misdirected itself in relying on the wrong law.

It was submitted that the court *a quo* ought to have dismissed the application with costs.

Regarding the cross appeal, counsel submitted that there was no proper appeal before the Court because the first respondent had not obtained leave to appeal from the court *a quo* as required by the Act. As such he prayed for the cross appeal to be struck off the roll.

In response, the first respondent argued that the second respondent was a statutory body and as such had the capacity to sue and be sued in its own right. It was therefore properly cited as a party in the court *a quo*. He submitted that his retrenchment was a nullity on the basis that the appellant did not give notice to retrench him as is required in terms of s 6 of the Regulations. He contended that the notice by the Minister retrenching him was addressed to Old Mutual Limited. It did not relate to him because his employer was the appellant, Old Mutual Shared Services (Private) Limited and not Old Mutual Limited. He further argued that there was no evidence on record to show that the second respondent made any recommendation on his retrenchment to the Minister. In the absence of such proof, the decision by the Minister was a nullity.

The first respondent submitted that the court *a quo* correctly held that Labour Officers do not have jurisdiction over retrenchment disputes. He further submitted that the process leading to the retrenchment was irregular for failure to comply with the peremptory provisions of s 12C of the Act which require the second respondent to appoint an authority to superintend over the dispute between the parties. He argued that s 12C as promulgated on 26 August 2015 has retrospective effect to 15 July 2015 and was applicable to the dispute between the parties. The second respondent made its decision on 6 August 2015. The decision therefore properly fell within the period after 15 July 2015.

The first respondent disputed waiving his rights to challenge his retrenchment. He submitted that he has consistently argued that his contract of employment was unlawfully terminated without notice. He conceded that he received the retrenchment package and vehicle. He however argued that he did so on a without prejudice basis as he was entitled to his contractual rights until lawful termination of his contract of employment. He further

argued that he was still an employee of the appellant, that his contract of employment had not been terminated and further that he had not agreed to any terms of retrenchment.

Regarding the validity of the cross appeal, the first respondent submitted that he was entitled to file a cross appeal in terms of r 45 of the Supreme Court Rules, 2018 once the appellant noted its appeal. He submitted that the Supreme Court Rules are derived from s 34 of the Supreme Court Act and are therefore on the same footing as an Act of Parliament. He argued that s 92F (2) of the Act does not therefore apply to a cross appeal.

ISSUES FOR DETERMINATION

The following issues fall for determination:

1. Whether or not there was a cross appeal before the court.
2. Whether or not the second respondent was properly before the court when he filed his appeal. **Judgment No. SC 91/23**
Civil Appeal No. SC 351/22 9
there was a valid application before the court *a quo*.
3. Whether or not the second respondent erred in declining jurisdiction.
4. Whether or not the court *a quo* erred in relying on s 12C (2) of the Labour Act [Chapter 28:01].
5. Whether or not the first respondent waived his right to challenge his retrenchment.
6. Whether or not the court *a quo* erred by failing to determine issues placed before it.

APPLICATION OF THE LAW TO THE FACTS

- 1. Whether or not there was a valid cross appeal before the court.**

The first respondent sought to cross appeal against the decision of the court *a quo*. It is trite that before a litigant appeals the findings of the Labour Court, there is need, in terms of s 92F of the Act to obtain leave to appeal to the Supreme Court from the Labour Court or this Court.

Section 92 F (2) and (3) of the Labour Act reads:

- “(2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made the decision or, in his or her absence, from any other President leave to appeal that decision.
- (3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal.”

The above provision is couched in peremptory terms admitting no exception. The basis upon which each party would seek to appeal is different. Each party seeking to appeal must meet certain requirements before leave to appeal is granted. The requirements for the leave to appeal and rationale thereof were set out in *Ngazimbi v. Musowa Diamonds Pty Ltd* 2013 (1) ZLR 569 where this Court held at 572 B - G that:

Judgment No. SC 91/23
Civil Appeal No. SC 351/22 10

“The purpose of requiring leave before noting an appeal to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of s 92F (2) of the Act is to prevent appeals not based on questions of law getting to the Supreme Court. The right to appeal given by s 92F (1) is a limited right. The exercise of it is made conditional upon leave being granted.

.....

According to our law, authority must be sought from the President of the Labour Court for leave to exercise the right to appeal. Until that authority is granted, there cannot be said to be an appeal pending before the Supreme Court even though a purported notice of appeal has been filed. It is important to relate the requirement for an application for leave to appeal to the purposes thereof. These are for the decision to be made on the questions whether the grounds of appeal relate to questions of law and the existence of prospects of success on appeal.”

It follows from the above remarks that leave to appeal is not just there for the mere asking. A party seeking to cross appeal must satisfy the requirement whether the

proposed grounds of appeal raise questions of law and whether there are prospects of success on appeal before leave to appeal can be granted. Therefore, the leave to appeal granted by the court *a quo* applies to the appellant which sought leave and not to the first respondent.

In *casu*, the first respondent's submission that since the appellant had already been granted leave to appeal, he was automatically entitled by virtue of r 45 to lodge his cross appeal was ill conceived. Whilst the first respondent is entitled to file a cross appeal, he could only exercise that right after complying with s 92 F (2) of the Act. Rules of court are subservient to an Act of Parliament. A party cannot dispense with strict compliance with a statute on the basis that rules of court accord him an entitlement.

In *Breastplate Service (Private) Limited v Cambria Africa Plc* SC 66/20 it was held at p 12 that:

Judgment No. SC 91/23

“....It is trite that subsidiary or subordinate legislation **Civil Appeal No. SC 351/22** alter, whether expressly or impliedly, anything contained in its parent or enabling statute, or indeed in any other Act of Parliament. This proposition is so axiomatic that it requires no case law or other learned authority to support it.”

11

The cross appeal filed by the first respondent was a nullity for failure to seek leave to appeal and had to be struck off the roll.

2. WHETHER OR NOT THE SECOND RESPONDENT IS A LEGAL PERSON

Counsel for the appellant argued that the first respondent erred in citing the second respondent when the second respondent does not have legal personality to be sued or to sue. As noted earlier, this point was not raised before the court *a quo*. It is being introduced for the first time on appeal. However, this is a point of law and it is trite that a point of law can be raised for the first time on appeal. (See *ZIMASCO Pvt Ltd v Marikano* 2014 (1) ZLR 1 at 9EF).

The Retrenchment Board is created in terms of s 4 of the Labour Relations (Retrenchment) Regulations, 2003 (SI 186 of 2003). The Regulations do not vest legal personality on the second respondent. The second respondent cannot therefore sue or be sued. This meant that the second respondent was not properly before the court *a quo*.

Having said that, the wrong citation of the second respondent is of no moment as it does not affect the validity of an application for review in the Labour Court. It is trite that such legal technicalities and formalities have relevance in applications for review before the High Court and not the Labour Court. In *TM Supermarkets (Private) Limited v Bisset Chimhini* 2019 (2) ZLR 30, GARWE JA (as he then was) remarked that:

“[28] Although in terms of s 89(1)(d) of the Labour Act, [*Chapter 28:01*], the Labour Court shall exercise the same powers of review as does the High Court, there is no provision, either in the Act itself or the Rules of court made thereunder, requiring the citation of the presiding officer in these circumstances.

[29] **Judgment No. SC 91/23**
Civil Appeal No. SC 351/22

[30] The strict rules of procedure and evidence that apply in the High Court do not apply to proceedings before the Labour Court. Indeed, the Labour Court Rules provide that matters coming before that court must not be determined on technicalities but rather on the substance. In this regard attention is drawn to r 12 of both the 2006 and 2017 Labour Court Rules. On a related aspect, the High Court Rules, 1971 also provide that the non-joinder or misjoinder of a party shall not defeat a cause or matter on that score alone.

[31]

[32] In my considered view, the failure to specifically cite the presiding officer in review proceedings before the Labour Court cannot constitute a fatal irregularity. In this case, there is a complete record of the proceedings that took place before the hearing officer. As counsel for the respondent correctly points out, there are no other facts that she would have been required to set out to assist the Labour Court in its determination of the matter.”

(See also *Mapondera and 55 Ors v Freda Rebecca Gold Mine Holdings Limited (supra)*)

Whilst the decision being impugned is that of the second respondent, the dispute is between the appellant and the first respondent and remains so in this appeal. Contrary to the appellant's submissions, the substantive respondent before the court *a quo* was the appellant. It was properly before the court and was entitled to be heard and the court *a quo* was obliged to determine the application before it.

3. Whether or not the second respondent erred in declining jurisdiction.

The appellant submitted that the court *a quo*'s finding that the second respondent erred when it declined jurisdiction was flawed. In arriving at that finding, the court *a quo* relied on s 12C (2) of the Act as presently worded and found that the second respondent had jurisdiction to determine a dispute over a retrenchment package.

Judgment No. SC 91/23

Civil Appeal No. SC 351/22

13

As correctly submitted by the appellant, the court relied on a wrong provision in establishing whether or not the second respondent had jurisdiction. The following facts are common cause: The dispute between the parties commenced sometime in June 2014. The appellant and the first respondent jointly referred the dispute between them to the second respondent on 10 September 2014. Section 12C (2) was substituted by the Labour Amendment Act, 2015 (No. 5 of 2015). The amendment Act was promulgated on 26 August 2015. The Minister acted on the recommendations by the second respondent on 2 March 2015 before the amendment had been promulgated. Section 12C (2) reads as follows:

“(2) Unless better terms are agreed between the employer and employees concerned or their representatives, a package (hereinafter called “the minimum retrenchment package”) of not less than one month’s salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month’s salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment (whether the loss of employment is occasioned by retrenchment or by virtue of termination of employment pursuant to

s 12(4a)(a), (b) or (c)), no later than date when the notice of termination of employment takes effect.”

In terms of s 12C (2) as amended by the Labour Amendment Act, 2002 (No. 17 of 2002), the power to determine whether an employee should be retrenched and on what retrenchment package was vested in a works council or an employment council. It read:

“A works council or employment council to which notice has been given in terms of subsection (1) shall forthwith attempt to secure agreement between the employer and employee concerned or their representatives as to whether or not the employee should be retrenched and, if they are to be retrenched, the terms and conditions on which they may be retrenched, having regard to the considerations specified in subsection (11).”

It follows that, as at the time the matter was referred to the second respondent, it did not have power to consider the retrenchment package due to an employee who is being retrenched. The first respondent submitted that the amended s 12C had retrospective effect. He relied for the submission on s 18 of Act No 5 of 15 which states that s 12 shall apply to every employee whose services were terminated on three months’ notice on or after 17 July 2015. It therefore follows, as rightly submitted by the first respondent, that the amendment has a retrospective effect covering employees whose services were terminated on or after 17 July 2015. The retrenchment of the first respondent was approved by the Minister on 2 March 2015 and with effect from 23 February 2015. The first respondent did not therefore fall in the category of employees covered under s 18 of the Act. It follows that the court *a quo* grossly misdirected itself in relying on the wrong law in reaching its decision that the second respondent had the jurisdiction to consider the first respondent’s retrenchment package. In *Bell v Voorsitter Van Die Rasklassifikasieraad En Andere* 1968(2) SA 678 (A) it was remarked that:

“It is clear that our law accepts the rule that, where a statutory provision is amended, retrospectively or otherwise, while a matter is pending, the rights of the parties to the action, in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time of the institution of the action.”

See also *Rutsate v Wedzerai & Ors* SC 45/22

The court *a quo* was therefore enjoined to rely on the legislation prevailing as at the time the retrenchment proceedings commenced. It is trite that reliance on the wrong law does not yield a valid judgment. (See *Madzokere & Ors v The State* SC 71/21). The judgment of the court *a quo* cannot therefore stand.

DISPOSITION

The court's finding that the second respondent did not have jurisdiction to determine the first respondent's request for re-quantification of the retrenchment package is dispositive of this appeal. It is therefore not necessary to determine issues 4, 5 and 6.

It was for the foregoing reasons that the court allowed the appeal by the appellant and struck off the first respondent's cross appeal.

Judgment No. SC 351/22
Civil Appeal No. SC 351/22

15

BHUNU JA : I agree

MUSAKWA JA : I agree

Wintertons Legal Practitioners, the appellant's legal practitioners