RUDY TANDAYO MAFUNGA

Versus

TREGER PRODUCTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 8 JUNE 2020 AND 18 MARCH 2021

Opposed Application

V Majoko, for the applicant
Advocate G Nyoni, for the respondent

MABHIKWA J: The applicant is a former employee of the respondent. On 7 March 2014, he was suspended on allegations of misconduct. He was given a letter to that effect. He was charged with conduct inconsistent with the fulfillment of express or implied terms of his contract of employment.

The parties agreed to have two (2) retired Judges adjudicate in the misconduct hearing. These were the retired Justices G. SMITH and N. NDOU. The panel sat on 30 April 2014. At the hearing, the applicant had been represented by his current legal practitioners whilst the respondent was legally unrepresented. There were various arguments advanced, including the argument on which Code of Conduct was to be used at the hearing. Eventually, the applicant was found guilty of the conduct inconsistent with the fulfillment of express or implied terms of his employment contract.

On 24 July 2014, the applicant appealed to the Labour Court against the said decision by the 2 retired Judges. He claims that the appeal was dismissed without notice to him under unclear circumstances. The respondent on the other hand says that the applicant is not being candid with the court as he is aware that the appeal was dismissed because it was defective and improperly before the Labour Court. I am inclined to agree with the respondent that the appeal and or its merits or lack of same, is not before this court. There is no relevance in continuing to refer to it in this case. The applicant claims that for the reason that the wrong Code of Conduct was used during the hearing, he decided to file this application to have the

proceedings before the 2 esteemed retired Judges be declared null and void rather than appeal against their decision or file for review. The applicant insisted that he was at liberty and it was within his rights to choose to file and pray for a declaratur.

The respondent on the other hand argues that the applicant is being deliberately cunning. It argues, perhaps with merit, that the applicant filed this application about four (4) years after the decision sought to be impugned. Realising that he was way out of time he had an insurmountable task of filing for condonation which would be opposed and argued before he even got to file, if allowed, a notice of appeal or an application for review. He then opted for a declaratur because it has no time limits.

The issue of the Treggers group Code of Conduct was also one that was argued extensively. Applicant argued that the esteemed retired Judges used the wrong Code. The applicant attempted hard to produce minutes of some meeting and insisted that the hearing should have used respondent's Code of Conduct, not the National Code. I must say here that the disciplinary hearing before the two retired Judges was apparently heard on 30 April 2014. On 23 May 2014, the disciplinary panel rendered its judgement and found the applicant guilty of misconduct. Now the applicant uses and quotes extracts of meetings held on 9 June 2015 especially item 6 of the meeting which was headed "Code of Conduct." The applicant then argues that in those minutes, it was stated even by Mavhunga himself, that the respondent's Code of Conduct was registered. I honestly do not see the relevance of this argument and moreso the reference to the June 2015 minutes. Firstly, the meeting now refered to was held a year after the hearing and determination by the disciplinary panel. Secondly, it follows that applicant is asking the court to rely on what subsequently transpired after the disciplinary hearing which material was not tabled before the hearing itself. Thirdly, even if those minutes were to be believed, applicant still cannot show exactly when the said Code was allegedly registered and cannot produce the certificate of registration. That means even if registered it could have been registered sometime between the panel's judgement and the 9th June meeting.

To me, that Mr Mavhinga stated at the hearing that the applicant's Code had not been registered but allegedly admitted in the June 2015 meeting that the "Code is not being used although it is registered" does not change anything.

Section 101 (1) (b) of the Labour Act Employment Codes of Conduct reads as follows that;-

> "Where a Code is registered by a Works Council in respect of any industry, undertaking or workplace represented by an Employment Council and the Employment Council subsequently registers its own Code, the Code registered by the Employment Council shall supercede that of the Works Council unless the Works Council refers it to the Employment Council for approval." (emphasis is mine)

From the above, it follows that the respondent's Code of Conduct if any, would have had to be refered to the National Employment Council for approval for it to have been used at the hearing. This, even as argued by the applicant does not appear to have been the case. Ordinarily, and in the absence of the approval stated above, the National Code supercedes the Works Council Code which is what the two retired Judges accepted.

There was also the argument that the opposing affidavit by Mr Locks was commissioned by Ms Charmaine Kerr who is herself a Group Financial Director of the applicant. It was then argued that for that reason, the affidavit was commissioned by an interested party and therefore improperly before the court based on the signature. I must say however, that once denied, the counsel and the court cannot merely physically look at signatures, be handwriting experts and then decide who did or did not sign a document. In any event, based on the rationale in *Manyika v Manyika* – 1993 (2) ZLR 198 it again has not been shown that she would have been disqualified from commissioning the affidavit.

Section 27 of the High Court, Chapter 7:06 sets out the grounds for review. It states:-

> "27 (1) Subject to this Act and any other law, the grounds on which any proceedings or decisions may be bought on review before the High Court shall be –
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> a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
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> b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned as the case may be:
>
> c) gross irregularity in the proceedings or the decision."

It is clear that these are the grounds which applicant is persuing in his application but then disguises the application as one for a declaratur because after four (4) years, he had long failed to comply with the court rules on the time limits for an application for review as

already stated above. However, the applicant unwittingly betrays his real reason for the disguise of a declaratur at paragraph 10 of his answering affidavit stating that;

> "10 Ad paragraph 15
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> As I have said there is no time limit within which a declaratur can be sought.
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> There is no need to apply for condonation or extension of time because there is no time limit within which to seek a declaratur."

The attitude displayed and the impression given is that a declaratur was resorted to simply because "there is no time limit" within which to seek it. If this kind of an attitude or election is to be allowed, then all rules relating especially to the time lines in appeals, reviews, condonation of rescission of judgements etc would easily be rendered worthless. Parties would easily circumvent them by resorting to declaraturs. The whole legal system would be reduced to a chase game.

The court in the past has shown its displeasure when parties circumvent the rules of court and time limits.

In *Tafara Chatoka & Ors v The Chairpesron of the Rent Board & Anor* – HB 63-11, MATHONSI J (as he then was) made the following rebuke that;

> "The rent board is statutorily…….They chose neither of those two and waited until eviction proceedings had commenced in the Magistrate's Court, only to make this application for a declaratory order presumably upon a realization that the time to seek a review had lapsed. There is merit in the point raised *in-limine* that this is a review application disguised as an application for a declaratory order, especially considering that the basis of attacking the proceedings betrays grounds for review."

The attempt to misleadingly use the procedure of a declaratur in my view is again fortified by the fact that applicant, having had a go at the Labour Court in an appeal, does not disclose the reasons for his failure in that court. After four and a half years, he launched this declaratory application.

Further, the applicant has seemingly thrown everything into the bucket in typical "clutching at straws" style. He now even objects to the hearing panel. I have no doubt in my inclination to agree with *Advocate G Nyoni* that the challenge to the composition of the disciplinary committee is merely an afterthought. This is shown by the fact that this ascertion does not feature at all in applicant's papers filed of record including the Labour Court appeal. In any event the applicant has always been represented by a legal practitioner right from

inception. I have no reason to doubt that the esteemed retired Judges were the best suited to deal with the issues at hand and that if anything, the applicant should have been comforted by the very fact of him appearing before a disciplinary body in which the two were a part of. I agree also that it is improper for a litigant to partake in a process that he has objections or reservations. Instead of raising them, he fails to do so but partakes in the process to its final conclusion. Applicant and his counsel could not partake in the hearing process, right up to the conclusion, completely silent of any discomforts or objections they may have entertained concerning the composition and jurisdiction issue of the hearing panel, only to spring the objection and seek to pounce on it to nullify the whole process. There is plenty authority to that effect. See also *National Engineering Workers' Union v Ntombizodwa Dube* SC 01-16.

Finally, applicant has also raised the issue of time limits during the hearing. I have already said that the applicant has always been represented. It is common cause also that there was an attempt to settle the dispute amicably between counsel. An endeavor to settle matters out of court with minimal waste of time and expense has always been applauded by the court especially in civil courts and tribunals. No party put the other on terms as regards time lines. From the proceedings that ensued, the only inference is that the parties waived the time lines. For instance, the applicant was charged on 7 March 2014 and now argues that the hearing should have been concluded by 21 March 2014. However, there are documents showing that as late as 2nd and 3rd April 2014 the parties were still negotiating to settle the matter. It was only much later that the hearing commenced after it was discovered that negotiations to settle would never succeed. Tellingly, the applicant did not object or raise concern at the commencement, or during, or at the conclusion of the hearing that the matter could no longer be heard because of the time lapse. Instead, he partook in the whole hearing process right up to its conclusion. Four years later, he raises the point in an application for a declaratur. In my view, by engaging in an attempt to settle the matter amicably for some time, the parties, including applicant, naturally waived adherence to time limits unless counsel had placed the respondents on terms. I am convinced that the objection now being raised almost five (5) years after the conclusion of the hearing seeking to use it to nullify the whole tribunal process is an after thought.

Needless to say, there must be finality to litigation MacNALLY JA could not have put it more aptly in *Ndebele v Ncube* – 1992 91) ZLR 288 (S) at 290 C-E when he remarked that;

"It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or ….. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non-dormientibus jura subvemiunt* – roughly translated, the law will help the vigilant but not the sluggard."

I am convinced that the application is unmerited. It is dismissed with costs of suit.

Messrs Majoko and Majoko, applicant's legal practitioners
Messrs Venturas and Samukange, respondent's legal practitioners