NYASHA CHIZU
versus
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE
and
MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE (NO)
and
ATTORNEY –GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 9 November 2021 and 16 March 2022

Opposed Application

M Hogwe, for the applicant
A Moyo with N Chidembo, for the respondents

TAGU J: In the preset application the Applicant seeks relief in two (2) parts, namely a declaration that s 12 (4a) (c) of the Labour Act [*Chapter 28.01*] (Labour Act) is inconsistent with the Constitution (more particularly s 68 (1) and (2) of the Constitution) of the land and therefore unconstitutional and consequential order that his termination of employment pursuant to s 12(4a) (c) of the Labour Act be set aside.

The brief facts are that the Applicant was employed by the first Respondent in 2012 and worked in different capacities until he was Chief Executive Officer (CEO) on 29 August 2018. On or about 7 July 2020, the first Respondent sent him on forced leave for 30 days commencing 8 July 2020. The forced leave was subsequently extended for a further 30 days on at least 2 occasions and he remained on such leave until the Notice of Termination dated 23 October 2020.

The Applicant now prays for the following reliefs-

"IT IS ORDERED THAT

1. The provisions of s 12(4a) (c) of the Labour Act allowing arbitrary termination of employment on notice are inconsistent with the Constitution of the land and therefore unconstitutional.
2. The termination of the Applicant's employment which was done in terms of s12(4a) (c) of the Labour Act be and is hereby set aside.
3. The costs of this application shall be borne by the first Respondent."

First and second Respondents filed Notices of opposition to the application. 3 points *in limine* were taken by the first Respondent. The first being that the Applicant has no valid cause of action. The second being that the Applicant is improperly before the Court. The third one being that the relief sought by the Applicant is incompetent and ineffective.

I will dispose of the points *in limine* first which were opposed by the Applicant.

APPLICANT HAS NO VALID CAUSE OF ACTION

The contention by the first Respondent is that the Applicant's present application is based on the allegation that the termination of his contract of employment on notice by the first Respondent allegedly amounted to grossly unfair "administrative conduct". The first Respondent submitted that the termination of the Applicant's contract of employment on notice by the first Respondent did not constitute administrative action, but the exercise of a contractual power. Hence the administrative remedies the Applicant seeks to invoke are Constitutionally and are not available to him. The first Respondent prayed that the application be dismissed with costs.

In his answering affidavit the Applicant maintained that the conduct of the 1st Respondent constituted administrative action. He said he will canvass fully the issue in his heads of argument. It was his contention that the Administrative Justice Act [Chapter 10.28] cannot have the effect of amending the Constitution. In fact it can only give effect to his rights as enshrined in the Constitution rather than take them away.

I do not agree with the Applicant's submissions. A look at para 6.6 of the Applicant's founding affidavit will show that the Applicant said –

> ''it goes without saying that the purported termination of my employment amounted to administrative conduct. It was grossly unfair both procedurally and substantively as it was done without giving me any kind of audience. It therefore cannot possibly pass the test of constitutionality."

The gist of the Applicant is that he was not given the chance to make an address before he was dismissed. If that is so he should have cited the Administrative Justice Act [*Chapter 10.28*] (AJA) that is where this cause of action lies. I therefore uphold the first respondent's first point *in limine.*

THE APPLICANT IS IMPROPERLY BEFORE THE COURT

The second contention by the first Respondent was that should this Honourable Court find that the termination of the Applicant's contract of employment on notice amounted to administrative conduct, then the Applicant is improperly before this Honourable Court. The first Respondent submitted that it is common cause that the Applicant's present application is founded on s 68 as read with s 85 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ('the Constitution') it is therefore these two provisions that the Applicant makes repeated reference to throughout his Founding Affidavit (See para(s) 3, 4.1, 6.4 and 6.5 of the Applicant's Founding Affidavit). The first Respondent submitted that in our law, the question of whether any administrative conduct meets the requirements of administrative justice must be determined in accordance with the provisions of the Administrative Justice Act. it said that s 68 of the Constitution cannot found a complaint of its violation in terms of s 85 of the Constitution unless there is no Administrative Justice Act or the complaint is that the provisions of the AJA Act do not give effect to the fundamental rights guaranteed under s 68(1) of the Constitution. In the present application the Applicant has alleged neither. I therefore agree with the first Respondent. Basing on the above the Applicant is improperly before this Honourable Court. Accordingly, the Applicant's Application ought to be struck off the roll with costs.

THE RELIEF SOUGHT IS INCOMPETENT AND INEFFECTUAL

The first Respondent submitted that it is common cause that the Applicant's application is based on the premise that the first Respondent's right to have terminated the Applicant's contract of employment on notice was established by s 12(4a) (c) of the Labour Act [Chapter 28.01] 'the Labour Act). See para 3.1 of the Applicant's Founding Affidavit and paragraph 1 of the draft order. This however, is not the position at law.

The first Respondent's right to have terminated the Applicant's contract of employment on notice was created by common law and not by Statute. Section 1294(a) (c) of the Labour Act simply regulated the existence of common law right otherwise conferred on the first Respondent by common law. *In casu*, the Applicant neither alleged that an Employer's common law right to terminate a contract of employment on notice is inconsistent with a constitutional provision, nor invited this Honourable Court to adapt, develop or modify the common law on termination on

notice in any way, in order to harmonise it with, what he perceives to be, and the Constitutional norm. I agree with the first Respondent that the practical import of the Applicant's failure to do so, is that the relief sought is incompetent and ineffective as it does not strike at the source of the alleged unconstitutional infringement. I will therefore uphold the first Respondent's third point *in limine*.

IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The Applicant to pay costs of suit.

Hogwe Nyengedza, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners
Attorney- General's Office, second respondent's legal practitioners.