REPORTABLE (110)

TOBIAS ZANGAIRAI
v
(1) ZIMBABWE REVENUE AUTHORITY (2) CAROLINE ATUMA MUCHUNGA

IN THE SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
BULAWAYO: 17 JULY 2021 & 14 OCTOBER 2021

N. Mashizha, for the appellant

K. Kachambwa, for the first respondent

Second respondent in default

MATHONSI JA: On 25 September 2020 the Labour Court (the court *a quo*), handed down judgment declining to confirm a draft ruling by the second respondent, a labour officer, which sought to reinstate the appellant to his position in the employ of the first respondent without loss of salary and benefits. If reinstatement was no longer possible, the draft ruling awarded the appellant damages in *lieu* thereof. This appeal is against that judgment of the court *a quo*.

BACKGROUND

The appellant was employed by the first respondent in the non-managerial position of Revenue Officer in 2004. Owing to the susceptibility of revenue collection to corrupt activities, it was the policy of the first respondent to require all its employees to regularly complete assets declaration forms in which they declared all their assets. So central to the

scheme of things was the declaration of assets that the first respondent's Code of Conduct listed the "deliberate misrepresentation of facts in the declaration of assets" in Group D providing for "Most Serious Offences." A breach of a Group D offence invites the maximum penalty of dismissal for a first offence.

The first respondent conducted a lifestyle audit on its employees which revealed that during the period extending from 2012 to 2017, the appellant had completed assets declaration forms in which he omitted certain substantial assets he owned or were owned by his family. In fact a number of immovable properties, motor vehicles and bank accounts had not been declared.

On 2 May 2017 the appellant was suspended from employment without pay and benefits on a charge of "deliberate misrepresentation of facts in the declaration of assets" in breach of Group D 26 of the Zimbabwe Revenue Authority Employment Code of Conduct. Although the charge letter summoned the appellant to appear before a disciplinary committee on 22 November 2017, owing to a combination of factors, chief among which was the appellant's series of complaints against the disciplinary procedure adopted, the disciplinary hearing never took place.

Having exceeded the requisite 30 days during which the hearing should have been concluded, the first respondent referred the matter to a labour officer for conciliation in terms of s 101(6) of the Labour Act [*Chapter 28:01*] (the Act). The labour officer, the second respondent herein, issued a certificate of no settlement on 24 July 2019 and directed the parties to make written submissions.

The appellant denied the charge maintaining that his employment contract did not oblige him to declare his assets. He contested the audit report compiled by the Loss Control Department of the first respondent. In addition he took the view that there was no asset declaration policy mandating him to declare his personal assets. At the same time he sought to produce original asset declaration forms in which the assets in question were included. Those forms were, however, not in the possession of the employer's Human Resources Department.

The first respondent's position was that the appellant's conduct of filling the asset declaration forms religiously during the relevant period and submitting same to the Human Resources Department was indicative of the existence of the obligation to declare assets. The fact that the appellant omitted substantial assets on the form he submitted is what constituted an act of misconduct in terms of the Code of Conduct. The first respondent also contested the documentary evidence of declaration forms produced by the appellant as a fabrication.

The second respondent found in favour of the appellant holding that there existed no asset declaration policy and that there was no deliberate misrepresentation of facts. She ordered the appellant's reinstatement without loss of salary and benefits with effect from the date of suspension. Alternatively, if reinstatement was no longer possible, the first respondent was directed to pay damages in *lieu* thereof.

PROCEEDINGS *A QUO*

The second respondent brought an application to the court *a quo* in terms of s 93(5a)(a) of the Act for confirmation of the draft ruling. She attached the draft ruling together with the parties' submission made before her to the application.

The first respondent opposed the confirmation of the draft ruling. It was the first respondent's case that the appellant committed an act of misconduct because he was aware of the existence of the asset declaration policy. The policy did not have to be in writing for it to be valid and binding. In fact, according to the first respondent, the appellant complied with the directive to submit his asset declaration forms.

In the process of complying with the asset declaration policy, so it was argued, the appellant misrepresented facts by failing to declare property owned by his family. This was in breach of his employment contract clause 22 of which provides that the parties are bound by the terms and conditions of employment laid down in various human resources policies and procedures including the Code of Conduct.

The first respondent prayed for the setting aside of the second respondent's draft ruling and its substitution with an order that the appellant was guilty of misconduct. It further sought the dismissal of the appellant from employment from the date of suspension.

On the other hand, the appellant supported the draft ruling. His case was that there existed no asset declaration policy. According to him, that position was underscored by a meeting of the National Employment Council (NEC) whose findings were binding on the parties. The appellant asserted his support of the second respondent's determination that there was no contractual obligation to declare personal assets.

In the appellant's view, the Code of Conduct did not require him to declare his personal assets because the requirement to declare assets is contained in individual contracts of some employees but not in his own employment contract. He maintained that if the Code

of Conduct provided for asset declaration, there would have been no need for individual employees' contracts to specifically contain a clause to that effect.

The court *a quo* rejected the evidence of asset declaration forms presented by the appellant, which the first respondent did not have, as fabricated in order to cover up for the misconduct. In its view, the procedure for submitting the declaration forms was such that the declaring employees did not remain with a copy of the form.

The court *a quo* found that the employment code of conduct under which the appellant was charged and suspended provides for the offence for which he was charged and suspended from employment. The offence in question is "deliberate misrepresentation of facts in the declaration of assets." The Code of Conduct also provides the penalty of dismissal for such infraction which it regards as a serious misconduct.

In the court *a quo*'s view the existence of such misconduct in the Code of Conduct means that employees are enjoined to declare their assets and do so truthfully. It was observed by the court *a quo* that during the years 2012, 2013, 2016 and 2017, the appellant had submitted asset declaration forms in compliance with the employer's instructions. In the court *a quo*'s view, it was therefore incorrect for the appellant to then turn round and argue that he was not obliged to declare assets. The appellant knew that he was required to comply and that it was an offence to fail to declare personal assets.

The court *a quo* found further that the appellant's failure to declare his personal assets was deliberate because, in respect of the properties in Beitbridge, the appellant had submitted to the labour officer that those properties were leased and not owned by him.

However, the appellant had sought to produce documentary evidence in which the same properties had been declared as his.

In concluding that the misrepresentation by the appellant was deliberate thereby constituting a misconduct, the court *a quo* noted that the asset declaration forms themselves were in the form of an oath. The forms also contain a statement warning the author that "any failure to disclose assets which qualify for disclosure under this declaration or misrepresentations … shall constitute an act of misconduct."

Having found that the appellant was properly charged and that there was proof that the appellant deliberately omitted some properties on the declaration forms, the court rejected the appellant's defence that the employer did not have a policy on declaration of assets. In the court's view the appellant was guilty of misconduct. It concluded;

> "The employee was perfectly aware of it or could reasonabl(y) be expected to have been aware of it as it had been consistently applied by the employer with him consistently complying before the commission of the misconduct. He is also aware that the breach of the code in that regard results in dismissals. This brings me to the issue of the proper sentence by the labour officer as I alluded to earlier. The second respondent had argued for a straight reinstatement as he had not been dismissed. <u>But the role of the disciplinary committee was taken over by the labour officer when he disposed of the matter in terms of s 101(6).</u>
>
> <u>In conclusion, I therefore fail to find that the findings of the labour officer were properly made on a balance of probabilities.</u>
>
> <u>In the circumstance the granting of the application for confirmation is declined. The second respondent is to bear the costs on an ordinary scale."</u> (The underlining is for emphasis.)

That is how the judgment ended. The court *a quo* could only decline to confirm the draft ruling of the labour officer even though it made specific findings that a misconduct was committed which should have resulted in dismissal.

PROCEEDINGS BEFORE THIS COURT

The appellant was disenchanted by the decision of the court *a quo*. He filed the present appeal on 8 grounds the import of which is an attack on the court *a quo*'s finding that he had an obligation to declare his personal assets in the asset declaration forms that he was made to complete. The appellant's challenge is that no such obligation existed in the Code of Conduct or his contract and that the first respondent did not even have a policy, whether written or verbal, for declaration of assets.

Further, and in the alternative, the appellant seeks to impugn the decision of the court *a quo* on the basis that the instruction given by the first respondent to its employees to declare personal assets was unlawful and a unilateral variation of the employment contract. Finally, the appellant attacks the court *a quo*'s failure to impose an appropriate penalty after finding that he was guilty of misconduct.

Only two issues arise from the appellant's grounds of appeal namely;

1. Whether there was sufficient evidence of the commission of a misconduct.
2. If there was, the appropriate remedy thereof.

WHETHER THERE WAS SUFFICIENT EVIDENCE OF MISCONDUCT

The employment contract signed by the parties in November 2006 contains two very poignant provisions. The first one is clause 22 which specifically and unambiguously incorporates the Code of Conduct. It states in part:

> "22. HUMAN RESOURCES POLICIES
> Both yourself (the appellant) and ZIMRA are bound by the terms and conditions of employment laid down in terms of various human resource policies and procedures. This includes the Code of Conduct and the Staff Handbook." (The underlining is for emphasis.)

There can be no doubt therefore that the provisions of the Code of Conduct were specifically incorporated in the contract of employment. They were also specifically made binding on the parties. Not that it was necessary for such a provision to be included in the employment contract. It is trite that a registered Code of Conduct is itself a binding contract between an employer and its employee. That view was expressed by this Court in *Triangle Limited v Sigauke* SC 52/15 in the following words:

> "An employment code of conduct specific to a particular undertaking is, in effect, an agreement by the employer and employee that they will be bound by its terms."

The second poignant provision of the employment contract signed by the parties is found in the acknowledgment signed by the appellant himself right at the tail end of the document. It reads:

> "I Tobias Zangairai acknowledge receipt of the above letter. I accept the offer of employment and the terms and conditions of employment as stated above.
> I also declare that I am not corrupt, and that I will continue to demonstrate the required values and will strive to achieve the required performance standards, I understand that this offer is conditional upon me continuing to meet the performance requirements of the position.
> I also understand that ZIMRA reserves the right to summarily terminate this contract of employment if it is discovered that I did not make full disclosure in my CV and or during interviews."

From the onset the parties recognised the centrality of the anti-corruption crusade which the first respondent embarked on. There can be no question that the parties put a huge premium on honesty and integrity in their relationship.

The Code of Conduct under which the appellant was charged underscored the serious light with which full disclosure and honesty were regarded. I have already made reference to Group D "Most Serious Offences" in the Code of Conduct which carry the "maximum penalty" of dismissal from employment on a first offence. The appellant was

charged with one such offence that is, D26, "deliberate misrepresentation of facts in the declaration of assets."

Indeed even the asset declaration forms themselves which appellant gladly but dishonestly filled, loudly warned him of the consequences of misrepresenting facts. For instance the declaration reads in part:

> "I have signed this form out of my own free will without any undue influence, and acknowledge that any failure to disclose assets which qualify for disclosure under this declaration, or any misrepresentation that I make in the declaration of assets shall constitute an act of misconduct." (The underlining is for emphasis).

In *Damanjera v Zimbabwe Revenue Authority* SC 78/20 this Court acknowledged that the first respondent's Code of Conduct lists deliberate misrepresentation of facts in an asset declaration form as a dismissible act of misconduct. This Court also noted that the asset declaration form itself admits no doubt that all the employee's assets ought to be listed on the form.

Yet, the appellant misrepresented the totality of his assets in the forms that he completed and signed between 2012 and 2017. Quite substantial properties were omitted. At least seven immovable properties located in Harare, Beitbridge and Mutare as well as at least 10 motor vehicles were left out. The effect of the omission was to misrepresent the extent of the appellant's wealth, wealth which was alarming given that he was a low level employee.

In doing so, the appellant breached the employment code of conduct which specifically forbade misrepresentation of facts in the asset declaration form. He was therefore liable to dismissal. It mattered not that the first respondent did not have a written or verbal

policy on asset declaration. That entire argument by the appellant was a red herring. The Code of Conduct created a misconduct which the appellant committed.

The court *a quo* cannot be faulted for finding that the appellant committed an act of misconduct and that he ought to have been dismissed.

THE APPROPRIATE REMEDY

What was before the court *a quo* was an application by a labour officer for confirmation of a draft ruling which application is made in terms of s 93 (5a) of the Act. This followed a ruling which the labour officer had made in terms of s 93(5)(c) of the Act.

Prior to the application being made to the court *a quo* for confirmation of the draft ruling, the matter had been referred to the labour officer in terms of s 101(6) of the Act which provides:

> "If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter in accordance with section ninety three."

Section 93 sets out the powers of a labour officer. They include settlement of the dispute through conciliation or referral of a dispute to arbitration where the parties agree to such course being taken. Where a certificate of no settlement has been issued in terms of s 93(3), the labour officer may make a ruling in terms of s 93(5)(c).

I reproduce the relevant provisions hereunder because of their centrality to the issue at hand.

> "93(5). After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him or her and to whom he or she is responsible in the area in which he or she attempted to settle the dispute or unfair labour practice.

(a) …
(b) …
(c) may if the dispute or unfair labour practice is a dispute of right, make a ruling that, upon a finding on a balance of probabilities that –
  (i) the employer or other person is guilty of an unfair labour practice, or
  (ii) the dispute of right or unfair labour practice must be resolved against any employer or other person in a specific manner by an order –
    A. directing the employer concerned to rectify the infringement or threatened infringement as the case may be, including the payment of moneys, where appropriate;
    B. for damages for any loss or prospective loss caused either directly or indirectly as a result of the infringement or threatened infringement, as the case may be,

    where upon the provisions of subsections (5a) and (5b) shall apply.

    (5a) A labour officer who makes a ruling and order in terms of subsection (5)(c) shall as soon as practicable –
      (a) make an affidavit to that effect incorporating, referring to or annexing thereto any evidence upon which he or she makes the draft ruling and order; and
      (b) lodge, on due notice to the employer or other person against whom the ruling and order is made ('the respondent'), an application to the Labour Court, together with the affidavit and a claim for the costs of the application (which shall not exceed such amount as may be prescribed), for an order directing the respondent by a certain day ('the restitution day') not being earlier than thirty days from the date that the application is set down to for hearing (the 'return day' of the application) to do or pay what the labour officer ordered under subsection (5)(c) (ii) and to pay the costs of the application.

    (5b) If, on the return day of the application, the respondent makes no appearance or, after a hearing, the Labour Court grants the application for the order with or without amendment, the labour officer concerned shall, if the respondent does not comply fully or at all with the order by the restitution day submit the order for registration to whichever court would have had jurisdiction to make such an order had the matter been determined by it, and thereupon the order shall have effect, for purposes of enforcement, of a civil judgment of the appropriate court."

In the present case, the labour officer settled for reinstatement alternatively, damages having concluded that a misconduct was not proved. She could have settled for dismissal if satisfied that the evidence established misconduct.

These provisions of the Act have recently received the full attention and interpretation of both this Court and the Constitutional Court. Discussing subs (5a) and (5b) in *Drum City (Pvt) Ltd v Garudzo* SC 57/18 this Court remarked;

> "(12) It is to be noted from the above, that only if the labour officer rules against the employer or any person will he or she be required to take the steps outlined in ss (5a) and (5b). In other words, the provisions do not confer on the Labour Court the jurisdiction to confirm a draft ruling against an employee. That this is the case is left in no doubt by the wording of s 93(5)(c)(ii) which specifically provides for a ruling like the one *in casu* in circumstances where the labour officer finds that the dispute of right in question 'must be resolved against any employer or other person in a specific manner …'
>
> (13) Without a clear pronouncement to that effect, there can in my view be no doubt that reference to 'any person' in this provision, is not to be read as including the employee in the same dispute. I am satisfied that the import of the provision is to exclude the confirmation and registration of a draft ruling by the labour officer, which is made in favour of an employer and against an aggrieved employee. It follows that the Labour Court has no jurisdiction to entertain such a matter and should on that basis properly decline to hear it."

Again commenting *obiter dictum* at para (14), the court recognised the power of the Labour Court, on an application made by a labour officer for confirmation of a draft ruling, to set aside or reverse such a draft ruling if it is of the view that the ruling has no merit. Having noted the challenges posed by the above provisions and the frailties in their formulation, this Court ended by entreating the legislature to consider addressing the concerns set out in that judgment.

Dealing with the same provisions in *Isoquant Investments (Pvt) Ltd t/a Zimoco vs Darikwa* CCZ 6/20 at pp 25-26, the Constitutional Court stated:

> "A 'draft ruling' does not determine the dispute between the parties. Whether made against an employer or employee, it does not confer any right until it is confirmed by the Labour Court. It is not clear why a procedure providing access to the Labour Court should by construction be made available to one party in a dispute of right which has not been resolved and not the other party. The best that may be said of s 93(5)(c) of the Act is that there is an element of vagueness lurking behind the use of the words 'employer or other person.' Statutory ambiguity or vagueness is a matter of interpretation of the statute. It

is not a matter of constitutional validity of the statute concerned." (The underlining is for emphasis)

Clearly the apex court was inviting remedial action on the part of the law-giver. The Constitutional Court went on to observe at p 26-28:

> "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 …." (The underlining is for emphasis)

It must follow therefore that if the purpose of confirmation proceeding is for the Labour Court to hear and determine the dispute, that court cannot be expected to resolve the matter in a one-sided manner, that is, by confirming the "draft ruling" only. If a court of law is required to hear a dispute it does so in order to decide for or against the party making the approach to it. Where the weight of evidence points in a certain direction, as in the present case where the evidence points to the appellant having committed a misconduct, surely the adjudicating process requires the Labour Court to order the dismissal of the appellant from employment.

The problem is that s 93(5b) has an unnecessary limitation which encumbered the court *a quo* resulting in it leaving the matter hanging. It could only refuse to confirm the draft ruling because of the wording of that provision. It allows the court *a quo* to grant the application for confirmation "with or without amendment". It does not empower it to substitute its own decision, something which is completely undesirable given the nature of the proceedings.

In *Air Zimbabwe (Pvt) Ltd v Mateko & Others* SC 180/20 this Court had occasion to deal with the interpretation of the phrase "with or without amendment." It stated at paragraph 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 define 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.'"

Having discussed the definition of an amendment at length the court then drew the conclusion at paragraph 26 that;

> "It will be apparent from the above definitions that an amendment is an alteration effected to a text or document to cure a defect. It may also be a variation. It cannot however entail a substitution which is the complete replacement of something with another." (Emphasis added)

In *Triangle (Pvt) Ltd v Mutasa & Others* SC 77/21 at para 35 this Court reiterated what was stated in *Air Zimbabwe, supra* that:

> "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."

See also *Makamure v Minister of Public Service, Labour and Social Welfare & Anor* CCZ 01/20.

The above authorities make it clear that confirmation proceedings in terms of s 93(5b) are a fresh hearing and adjudication of a dispute. In adjudicating over the case, the Labour Court exercises its review jurisdiction in terms of which it thoroughly examines the

evidence and the draft. Generally, in review proceedings the reviewing authority has power to uphold the proceedings and/or decision, to set aside the proceedings and/or decision and indeed to substitute an appropriate remedy.

That is where the restrictive wording of s 93(5b) of the Act creates a conundrum of gigantic proportions. An absurdity occurs wherein the Labour Court is expected to conduct a hearing of a dispute following a draft ruling by a labour officer. That court is required to review the evidence and the draft ruling but it can only confirm the draft ruling "with or without amendment". It cannot substitute its own decision even where the draft ruling is fundamentally flawed or patently wrong.

Surely, following a hearing, the Labour Court is fully equipped to adjudicate either for or against the contesting parties. This is therefore the part where this Court recommends an amendment of the provisions relating to confirmation proceedings to enable the Labour Court, in appropriate circumstances, to substitute its own decision. Nothing whatsoever is achieved by merely declining to confirm a draft ruling and leaving the parties *in limbo* and without a desirable finality to the dispute.

DISPOSITION

The Labour Court was correct to find that a misconduct was committed. It was hamstrung by the limitation to its jurisdiction imposed by s 93(5b) to finalise the matter. Hence this court's call for an amendment to the section. The Labour Court should be empowered to issue an order bringing the matter to finality. I must add however that, having found that the draft ruling was faulty, the Labour Court should have set it aside instead of leaving it as it is. There is need to amend the judgment *a quo* in that regard.

The appeal is devoid of merit and ought to be dismissed. There is no reason why the costs should not follow the result as is the norm.

In the result it be and is hereby ordered as follows:

1. The appeal is dismissed with costs.
2. By virtue of this Court's powers in s 25 of the Supreme Court Act [*Chapter 7:13*] the judgment of the court *a quo* is amended to read:

   "1. In the circumstances, the granting of the application for confirmation is declined.
   2. The draft ruling by the applicant is hereby set aside.
   3. The second respondent shall bear the costs on an ordinary scale."

GWAUNZA DCJ: I agree

CHITAKUNYE JA: I agree

Mashizha & Associates, appellant's legal practitioners

Coghlan & Welsh, 1st respondent's legal practitioners