REPORTABLE: (70)

TN HARLEQUIN LUXAIRE LIMITED
v
MBERIKUNASHE MASVIMBO & 14 ORS

SUPREME COURT OF ZIMBABWE
BEFORE GARWE JA, HLATSHWAYO JA & GUVAVA JA
BULAWAYO: 31 JULY 2017, 11 APRIL 2022 & 15 JULY 2022

F Mahere, for the appellant

L Nkomo, for the respondents

HLATSHWAYO JA:

[1] On 23 September 2020 we invited the parties to address the Court on a point *in limine* that arose after judgment was reserved in this matter. The point *in limine* is whether the High Court, in the exercise of its powers to issue a *declaratur*, could properly issue one in a purely labour matter in the light of s 2A(3) of the Labour Act [*Chapter 26:01*] "the Labour Act," which provides that the Labour Act shall prevail over any other enactment inconsistent with it, as read also with s 89(6), which provides for the exclusive jurisdiction of the Labour Court in the first instance to hear and determine any application, appeal or matter concerned with labour issues.

[2] Both parties filed supplementary heads of argument. It had been expected that the matter would be enrolled and *viva voce* submissions made. However, after receipt of

the supplementary heads of arguments it was considered that another hearing on the matter was not necessary, but the parties were given time to file any additional heads they deemed necessary *in lieu* of a hearing, which the respondents did on 11 April 2022.

FACTUAL BACKGROUND

[3] The respondents were employed on contracts without limit of time by the appellant at its various branches across the country. On 10 and 11 June 2015, the appellant wrote letters to the respondents advising them that due to viability constraints, their employment contracts had been terminated on three months` notice. In the same letter, the appellant offered to replace the terminated employment contracts with new ones which provided for remuneration based on productivity. The reason for so doing was that the appellant still required the respondent`s services. The letters were couched in the following terms:

> "*The macro-economic challenges facing the country are seriously hampering the viability of the company*. Particular reference is made to the poor performance of the company as reflected by the month on month sales figures from last year to date. *The sales figures are well below operating costs. These figures show that it is impossible for the company to adapt the way it does business to its operating environment to ensure that it survives. The costs of the company must be aligned and positively correlated to productivity*.
>
> Your current contract of employment was concluded when the environment was not as hostile on manufacturers as it now is. At the time that we concluded the employment contract, we agreed that the contract could be terminated on notice other than through dismissal. Because we still require your services, *we wish to terminate your current contract on notice and replace it with one that provides for remuneration based on productivity. We hereby give you three months` notice for the termination of your current contract of employment. At the same time, we hereby offer you a new performance contract which aligns your remuneration to your productivity*. Your new contract, if accepted shall become effective on the date that the termination of your current employment contract becomes effective. Should you want to bring forward the effective date of your new contract, you will be required to waive the notice required to terminate your contract of employment." (my emphasis)

[4] There were several correspondences between the appellant and the respondents through their legal practitioners wherein the respondents pointed out to the appellant that its decision to terminate the employment contracts and replace them with new ones was unlawful. The appellant, however, remained adamant that its decision was lawful. This prompted the respondents to approach the court *a quo* seeking an order declaring the termination or variation of their employment contracts to be unlawful on 4 September 2015. The court issued the following declaratory order:

1. The termination or variation of the applicant`s contracts of employment by the respondent be and is hereby declared unlawful.
2. The respondent be and is hereby ordered to reinstate the applicants to their employment without loss of salary and benefits.
3. In the event that reinstatement is no longer an option, the respondent be and is hereby ordered to pay the applicants` damages to be determined by an arbitrator appointed by a Senior Labour Officer.
4. The respondent is ordered to pay the costs of suit."

SUBMISSIONS IN THE COURT *A QUO*

[5] The respondents` case before the court *a quo* was that the purported termination of their employment contracts and the offer of new contracts was unlawful in that it was a calculated manoeuvre to circumvent the retrenchment procedures set out in s 12C of the Labour Act [*Chapter 28:01*] and the Regulations thereto. The respondents argued that since the termination of the employment contracts had been necessitated by economic hardships, the appellant was in fact re-organising the undertaking hence the termination of employment contracts was a way to reduce costs. The respondents thus prayed for an order declaring the termination or variation of their employment contracts to be unlawful.

[6] The appellant denied that the termination of the employment contracts was a way to circumvent retrenchment laws, instead it averred that the respondents were to remain employed albeit on new employment contracts. The appellant contended in opposition that all the respondents, save for the 13th respondent, had repudiated their employment contracts by not rendering their services after its branches had closed. It was the appellant`s case that it accepted the repudiation of the employment contract by letters dated 19 September 2015 and that the repudiation was the reason the respondents` employment contracts stood terminated.

[7] Further, it was the appellant`s case that the relief that was being sought by the respondents was within the powers of the Labour Court and hence they ought to have exhausted that remedy before approaching the High Court. The appellant argued that s 89 of the Labour Act endows the Labour Court with the same review powers as the High Court hence the Labour Court has power to grant the relief that the respondents sought in the court *a quo*. To that extent, the appellant argued further that the court *a quo* should have declined jurisdiction on the basis of s 89(6) of the Labour Act.

DECISION OF THE COURT *A QUO*

[8] The court *a quo* found that the circumstances of the case warranted the granting of a *declaratur* as provided for by s 14 of the High Court Act [*Chapter 7:06*]. The court found that the reason for the termination of the respondents` contracts of employment was informed by alleged macro-economic challenges and, therefore, the appellant was conducting an unlawful dismissal. On the allegations of repudiation, the court held that it was not satisfied that the respondents had repudiated their contracts since the letters purporting to accept the repudiation were authored after the commencement of

the matter before it. Accordingly, the court *a quo* made an order declaring the termination of the respondents` contracts of employment unlawful. It also made an order for the reinstatement without loss of salary and benefits or damages in the alternative, together with an order of costs against the appellant as detailed above.

Aggrieved by that outcome, the appellant filed the present appeal.

GROUNDS OF APPEAL

1. The Learned Judge in the court *a quo* erred in law in finding that respondents were entitled to claims made and erred further in not finding that as no cause of action had arisen as at the date of the filing of the application, respondents were not entitled to any relief at all.
2. The learned judge in the court *a quo* erred in failing to place any weight on the fact that no cause of action had accrued to respondents as at the date of the filing of their application.
3. The learned judge in the court *a quo* erred in finding that the appellant sought to retrench its employees and erred further in failing to place due weight on the fact that appellant was actively attempting to avoid retrenchment and to maintain jobs.
4. The learned judge in the court *a quo* erred in finding that respondents had not repudiated their contracts of employment, such error being a gross misdirection.
5. In all circumstances the learned judge in the court *a quo* erred in granting the relief sought.

APPELLANT`S SUBMISSIONS ON POINT *IN LIMINE*

[9] On the point in *limine* raised *mero motu* by the Court, the appellant's main borne of contention is that the Labour Court has exclusive jurisdiction to hear matters which are labour in nature. The appellant contends that the labour court is a specialised court empowered in terms of s 172(2) of the new constitution (Constitution of Zimbabwe Amendment (No.20) Act 2013) to have jurisdiction to deal with matters of employment and labour as may be conferred upon it by an act of parliament.

[10] The appellant further argued that the provisions of s 89(6) of the Labour Act gives the labour court some special protection that ensures that it is only the Labour Court that fulfils the constitutional obligation of dealing with labour matters and matters relating to employment. In that regard, the appellant is of the view that s 89(6) of the Labour Act gives the labour court exclusive jurisdiction to deal with the matters that are referred to in s 89(1) of the Act. Furthermore, it was the appellant's submission that s 89(6) of the Labour Act must be read together with s 2A(3) of the Act which provides that the Labour Act shall prevail over any Act that is inconsistent with it.

[11] It was further argued that although the High Court is empowered to grant *declaraturs* in terms of s 14 of the High Court Act [*Chapter 7:06*], that power is discretionary and ought to be exercised in cases that are justifiable, and that, therefore, the High Court's power to grant a declaratory order in a purely labour matter is curtailed by s 2A(3) of the Labour Act which provides that the Labour Act shall prevail in the event of any inconsistency with any other Act.

RESPONDENTS` SUBMISSIONS

[12] *Per contra*, the respondent's submitted that there does not exist any conflict of jurisdiction in labour matters between the Labour Act and the High Court Act. In that sense they argued that s 89(6) of the Labour Act does not bring all labour disputes exclusively under the jurisdiction of the Labour Court. It was further submitted that s 14 of the High Court Act is not inconsistent with s 89(6) of the Labour Act. In that sense the respondents argue that s 2A(3) of the Labour Act is of no application in this matter.

[13] It was further submitted that as s 171(1) of the Constitution gives the High Court original jurisdiction over all civil and criminal matters, there does not appear to be any provision in the Constitution that limits the original jurisdiction of the High Court over all civil matters. In that regard, it was submitted that the proper approach is that the High Court enjoys jurisdiction over all matters including labour matters and that, in fact, any unconstitutionality lay in the extent that s 89(6) of the Labour Act seeks to oust the jurisdiction of the High Court.

[14] The respondents finally argued that the present matter was distinguishable from the recently decided cases of ***Nhari v Mugabe & Ors* SC 161/20** and ***Chingombe & Anor v City of Harare & Ors* SC 177/20**. They therefore submitted that the nature of the dispute between the parties was such that it required a declaration of rights which only the High Court could hear. However, in an apparent realization of the weaknesses of their submissions, the respondents posited that if the court was not persuaded by their arguments, this Court should exercise its powers of review in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] and proceed to find that the actions of the Appellant were unlawful and confirm the decision of the High Court on that basis.

ISSUE FOR DETERMINATION

[15] This appeal will be decided on the preliminary point of whether or not the court *a quo* in the exercise of its power to issue a *declaratur* could issue one in a purely labour matter in the light of the provisions of the Constitution and relevant legislation.

WHETHER THE COURT *A QUO* COULD ISSUE A *DECLARATUR* IN THE CIRCUMSTANCES

[16] Section 14 of the High Court Act [*Chapter 7:06*] enjoins the High Court to exercise its discretion in appropriate cases and issue a *declaratur*. Specifically, the provision is couched as followings:

> "The High Court may in its discretion, at the instance of any interested person, inquire into and determine any existing, future, or contigent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination"

Clearly, the power granted to the High Court above is discretionary and can be exercised only in appropriate circumstances. *In casu*, the matter at hand was a labour matter and the question that ought to be answered is whether the High Court could issue out a *declaratur* in a matter that is purely labour in nature.

[17] It is prudent to first note that the Labour Court is a court of specialised jurisdiction. See *Lowveld Rhino Trust v Dhlomo-Bhala* SC 34-20. The Constitution of Zimbabwe in s 172(2) provides that the Labour Court shall have such jurisdiction over matters of labour and employment as may be conferred by an Act of Parliament. Section 89(6) of the Labour Act, gives the Labour Court exclusive jurisdiction to hear labour matters and it provides thus:

"**89 Functions, powers and jurisdiction of Labour Court**

(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subs (1)…"

[18] The essence of the above provision is that the Labour Court has exclusive jurisdiction when it comes to issues dealing with labour matters at the first instance. This is further cemented by the provision of s 2A(3) of the Act which provides that the Labour Act shall prevail over any enactment that is inconsistent with it. Section 89 (6) and s 2A(3) of the Labour Act therefore have to be read together. And the import of both provisions is that the inherent jurisdiction of the High Court becomes limited by the fact that the Labour Court has exclusive jurisdiction in respect of all labour matters at the first instance.

[19] The above vexed question has been answered differently in various episodes of our legal history, which can be identified as the period before the inauguration of the new constitution in 2013, the immediate post 2013 situation and the current position. Before the coming into force of the new constitution in 2013, the position was settled that the High Court had no jurisdiction in matters of labour and employment. Thus, various decisions handed down by the courts in this period confirm this. For example, in *DHL International Ltd v Madzikanda* 2010 (1) ZLR 201 (H) it was stated:

"The Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and that the possession of the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide one without deciding on the other."

Similarly in *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 the court held:

"Section 89(6) is clear and unambiguous that "no court" has jurisdiction over matters falling under the purview of the Labour Court. This court does not possess

> the machinery to jealously guard its inherent jurisdiction where the legislature has specifically taken it away."

See also *Zimtradre v Makaya* 2005 (1) ZLR 427 (H) 429 wherein the court held as follows:

> "I am of the opinion that matters relating to suspension from employment with or without salary and matters relating to dismissals are specifically within the purview of the Labour Court as these matters are provided for in the Act and the regulations made thereunder… the jurisdiction of this Court is specifically ousted in respect of matters of dismissals and suspensions, as these are specifically provided for in the Act."

[20] However, with the advent of the new constitution in 2013, there followed a period of conflicting decisions in the High Court with some opinions plumping for the High Court having original jurisdiction on all matters including those involving labour and employment on the basis that s 171(1) of the Constitution trumps s 89(6) of the Labour Act. On the other hand, contrary opinion favoured the view that the Labour Court exercised exclusive jurisdiction in the first instance in all matters involving employment and labour. These cases are concisely discussed in the *Nhari v Mugabe* (*supra*) case.

[21] One of the pillars of the those opinions which championed the overall and original jurisdiction of the High Court in all matters was that only the High Court has jurisdiction to issue a declaratory order, per s 14 of the High Court Act. However, in my view, this was an incorrect understanding of the nature of the remedy of a declaratory order. While s 14 of the High Court Act captures this remedy in its broadest and classical form as a "gentle order" which may be issued with or without any consequential relief, there is absolutely no doubt in my mind that the Labour Court in its daily operations does routinely issue declaratory orders, holding, for example,

that an employee has been wrongfully dismissed or certain actions constitute unfair labour practices and then proceeding to grant consequential relief. I make this point to emphasize that even in the absence of the *Nhari v Mugabe (supra)* matter, the view of this Court would have been to uphold the Labour Court's exclusive jurisdiction in employment and labour matters. More so, because it would have taken very clear and explicit provisions in the new Constitution to oust the legal regime established and solidified before its enactment.

[22] Happily, the vexed controversy over the exclusive jurisdiction of the Labour Court on all labour matters versus the High Court's unlimited, original jurisdiction on all matters which had led to "an unhappy state of law" has been put to rest in *Nhari v Mugabe*, *supra*, as follows:

> "(30) The same Constitution that conferred original jurisdiction on the High Court over all civil and criminal matters also made provision for the creation of other specialised courts, whose jurisdiction over specialised areas of the law and the exercise of such jurisdiction was left entirely to Acts of Parliament. In other words, it is the Constitution itself which has permitted the establishment of these specialised courts and, in the same breath, provided for the issue of jurisdiction and exercise of such jurisdiction to be left to an Act of Parliament. Section 172 of the Constitution which establishes the Labour Court is not made subject to s 171 which creates the High Court. The two sections are in *pari materia* and must therefore be construed together. In making provision for the establishment of specialised courts in Acts of Parliament, the Constitution has not in any way attempted to fetter or restrict the jurisdiction that is to be conferred upon such courts, or to make such jurisdiction subject to s 171 which creates and provides for the jurisdiction of the High Court."

The learned Appeal Judge then goes on the give examples of specialised courts such as military tribunals, tax courts and customary law courts and concludes that not only would it be absurd to extend the jurisdiction of the High Court to all such specialised courts, but it would get the High Court "bogged down in matters over which it may have very little expertise or petty matters that should ordinarily not detain the court".

[23] The *Stanley Nhari v Mugabe & Ors* (*supra*) was followed recently by *Cainos Chingombe & Anor v City of Harare & Ors. (supra)* where following their suspension from employemt, the appellants unsuccessfully sought a declaration at the High Court that such suspension was unlawful and consequential relief. The Supreme Court held that "the High Court had no jurisdiction to issue a declaratur in respect of issues of labour and employment" and that "Section 2A of the Labour Act makes it clear that notwithstanding the powers of the High Court to issue declaraturs, the Labour Act prevails over all other laws inconsistent with it".

{24} Accordingly, it this Court's conclusion that the High Court erred in assuming jurisdiction in a purely labour matter. It should have declined jurisdiction.

[25] In light of the above, it is evident that s 25(2) of the Supreme Court Act confers upon this Court the power of review over matters that have come before it by way of appeal. The powers of review are exercisable upon the discovery of any irregularity in the proceedings which took place in the lower court. In the circumstances, the matter in the High Court was a matter brought about as a result of the appellant's termination of the respondent's contracts of employment on notice and replacing those terminated contracts with new ones which provided for remuneration based on productivity. That in my view is purely a labour matter as enshrined in s 89(1) of the Labour Act. The High Court did not have jurisdiction to hear the matter. Such an irregularity cannot stand.

DISPOSITION

[26] Giving due regard to the submissions made by the parties and the considerations of the law thereon, the court *a quo* ought to have declined its jurisdiction on the matter as it was a purely labour issue. This Court in the exercise of its review powers sets aside the decision of the court *a quo.*

Accordingly, it is ordered as follows:

1. The appeal succeeds with each party bearing its own costs.
2. The Court, in the exercise of its review powers in terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*] hereby sets aside the decision of the court *a quo* and substitutes it with the following:

   "The application is struck off the roll with costs."

GARWE JA : I agree

GUVAVA JA : I agree

Mtetwa & Nyambirai, appellant`s legal practitioners

Calderwood, Bryce-Hendrie & Partners, respondent`s legal practitioners