STANLEY ZHAKATA
versus
TICHAWANDA MANDOZA N.O.
and
N M BANK LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 23 November and 9 December 2004

Court Application for Review

Mr *Mutamagira,* for the applicant
Mr *Hwacha,* for the respondent

BHUNU J: The applicant was dismissed from employment in terms of the Labour Relations Act [*Chapter 28:01*] as amended. He is alleged to have committed an act inconsistent with the fulfillment of the express or implied conditions of his contract of employment and fraud.

He has now approached this court on review complaining of procedural irregularities. The respondents have raised a point *in limine* objecting to this court's jurisdiction. In the case of *Thomas Tuso v City of Harare* HH 1-04 in interpreting section 89(6) of the Labour Relations Act, [*Chapter 28:01*] as amended, I came to the conclusion that the intention of the legislature was to confer exclusive jurisdiction on the Labour Court in all labour matters. The Supreme Court is yet to determine the correctness or otherwise of that interpretation.

In the interim the judgment has generated intense heat and legal debate if not controversy. Not surprisingly counsel for the applicant has launched a spirited if not vitriolic attack on the decision in the *Tuso* case (*supra*).

The relevant provisions at issue provide as follows:

"89 Functions, powers and jurisdiction of the Labour Court:

(i) The Labour Court shall exercise the following functions -

(a) hearing and determining applications and appeals in terms of this Act or any other enactment.

(2) ….

(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 subsection (1)."

I believe it is trite that a review is an application. If it is accepted that a review is an application it follows therefore, that subsection (6) excludes the jurisdiction of all other courts in the first instance.

A great deal of energy was expended in trying to persuade the court that when the High Court sits to review a matter it is not sitting as a court of first instance. Reliance was placed on the dictionary meaning of the term "court of first instance". Counsel for the applicant could have saved his breath had he looked at the case of *Martin Tichaona Muchero (2) Dorothy Chasakara v The Attorney General* SC 107/2000 at page 4 where the then LEARNED CHIEF JUSTICE GUBBAY had occasion to remark as follows:

> "Quite apart from the non-compliance with rules 257 and 259 of the High Court Rules (applicable to the Supreme Court by virtue of Rule 58 of the Supreme Court Rules) s 25(3) of the Supreme Court Act [*Chapter 7:13*] denies any person the right to institute a review in the <u>first instance</u> before the Supreme Court or a judge of the Supreme Court. Recourse must be had to the High Court.
>
> In the result, this court is left with no option but to declare that the referral to it is incompetent."

The above quotation is lucid and self-explanatory it needs no further elucidation. It puts paid to the argument that when the High Court sits to review a case it does not sit as a court of first instance.

It was further argued that section 89(2)(iii) of the Labour Act specifically mentions appeals without specifically mentioning reviews. Had the legislature

intended to include reviews then the word "review" would have been specifically mentioned.

Had counsel looked at section 97 of the Act it would have been apparent that in the context of the Labour Act an appeal includes a review. The section reads in part:

> "97 Appeals To Labour Court
>
> (1) Any person who is aggrieved by -
>
> (a) ….
>
> (b) a determination made under an employment code in terms of section *one hundred* and *one ….*
>
> (c) ….
>
> May within such time and in such manner as may be prescribed appeal against such determination or conduct to the Labour Court.
>
> (2) An appeal in terms of subsection
>
> (1) May –
>
> (a) address the merits of the determination or decision appealed against.
>
> (b) seek a review of the determination or decision on any ground on which the High Court may review it;
>
> (c) address the merits of the determination appealed against and seek a review on a ground referred to in paragraph (b). " (my emphasis)

From the foregoing it is clear to me that an appeal in the context of the Labour Relations Act is an appeal not in the ordinary sense. It is a special kind of appeal which encompasses a review as provided under section 97 of the Act. Thus nothing can be gained from looking at the ordinary meaning and definition of "appeal" because an appeal in terms of the Labour Act was never intended to be an ordinary appeal. This explains why the law-maker was at pains to give a special definition of the word appeal under section 97(2).

Thus the word "appeal" under section 89 is not used in its ordinary and grammatical meaning but as specially defined under section 97(2) of the Act.

Looked at from that angle it means that the word "appeal" under section 89 includes review.

That finding leads to the inexorable conclusion that section 89(6) of the Labour Act expressly excludes the jurisdiction of this court in matters of this nature in the first instance.

Just like in the *Tichaona Muchero* case *supra* it appears to me that the intention of the Legislature was that matters of this nature should be first referred to the Labour Court for review before proceeding to the High Court.

In the case of *Tuso v City of Harare* HH 1-04 I dealt fully with the reasons why I feel that this court has no jurisdiction in labour disputes of this nature. Ideally they should be referred to the appropriate special court created for the purpose.

In the case of *Moyo v Ndhlovu* 1971 (2) RLR 50 the mere fact that the enabling statute provided for an appeal to a special appeal court was held to have ousted the High Court's review jurisdiction by necessary implication. The head note reads:

> "Held, that the African Affairs Act [Cap 92] provides for an appeal to a Special Court of appeal on questions of law and that it was a necessary implication of the legislation in question that the jurisdiction of the High Court is ousted when it comes to a question whether the court *a quo* correctly applied the law. Accordingly the review could not be entertained."

In providing reasons for his decision GREENFIELD J had this to say:

> "The African Affairs Act [Cap 92] which constitutes Civil Courts presided over by district commissioners also provides for an appeal to a special court of appeal. The plaintiff therefore had a remedy by way of an appeal if he was dissatisfied with the decision of the district officer … it seems to me that the appeal court referred to is eminently the forum which should be used to dispose of the case if the plaintiff remains dissatisfied with the outcome of the case in the court below….
>
> …. We are concerned not with an administrative tribunal but with a court of law, and the legislation constituting this court sets up an appeal court and

> makes provision for appeals *inter alia,* on questions of law, moreover there is no suggestion of any irregularity *strict sensu.* It seems to me to be a necessary implication from the legislation in question that the jurisdiction of the High Court is ousted when it comes to the question whether the court *a quo* correctly applied the law.
>
> In the circumstances I am not prepared to entertain the request for review of the proceedings, but I direct that copies of this judgment be supplied to the parties, so that the plaintiff can consider whether to make application to the appeal court for an extension of time in which to appeal.
>
> The Learned Chief Justice agrees with this judgment." (my emphasis)

I am in respectful agreement with the learned judge's reasoning and thought process. In this case the applicant had a remedy by way of an appeal to the Labour Court, a court specially created to deal with labour disputes on both appeal and review.

As I have already noted an appeal in terms of the Labour Act includes a review in terms of section 97 of the Act.

By vesting the Labour Court with both powers of appeal and review equivalent to the High Court, the law maker clearly intended to oust the High Court' s and any other court' s jurisdiction in all areas where the Labour Court has jurisdiction and has expressly said so under section 89(6) of the Act.

The legislator deliberately fused an appeal and a review under section 97 to enable the Labour Court to deal with both appeals and reviews under one roof exercising the same powers as the High Court but limited to its area of jurisdiction.

The Labour Court is an informed court which was created to dispense simple, cheap and speedy industrial justice. Its services are to a large extent free. Lawyers are in the main paid at the Magistrates' Court scale which is much cheaper than the High Court scale.

Being an ex-senior president of the Labour Court I know for a fact that the Labour Court is presided over by eminent lawyers of the same training and

experience as High Court judges. It is therefore difficult to fathom why some lawyers prefer to take their cases to the High Court rather than the Labour Court which was specially created to settle labour disputes.

One can only speculate and is left with the rather unpleasant feeling that some lawyers prefer the High Court to the Labour Court simply because there are better financial rewards to be gained from the High Court at the expense of their clients.

Reference of labour matters for review to the High Court where the proceedings are complex, expensive and cumbersome can only serve to defeat the noble purpose for which the special Labour Court was created.

It is trite and a matter of common sense that in labour matters poor indigent employees are often pitted against the vast wealth and resources of employers. Rich employers will not hesitate to use their financial muscle to gain an unfair advantage over poor employees in the most expensive courts where the employee will be dazzled and lost in the intricacies of legal jargon and technicalities. The majority of employees who will have lost their jobs are unable to afford the services of a lawyer at the Labour Court let lone at the High Court.

Clearly in the High Court the odds are heavily tilted against the unrepresented employee. With this in mind the law maker took a conscious and deliberate act to even and level out the playing field by creating an informal special court which it clothed with exclusive jurisdiction to hear and determine appeals and reviews in the first instance. By using the term "first instance" the law maker did not mean to confer jurisdiction on the High Court. It was only being careful not to exclude the jurisdiction of the Supreme Court.

Appeals and reviews in labour matters must therefore be referred to the Labour Court in the first instance for to do otherwise will defeat the whole purpose for which the Labour Court was created.

Even if I were to be proved wrong in holding that the court lacks the necessary jurisdiction the applicant has still not discharged the onus of establishing why he has not exhausted his domestic remedies.

In the result I am constrained to refer this matter to the appropriate court created for the purpose.

It is accordingly ordered:

1) That this matter be and is hereby referred to the Labour Court for determination.

2) That costs be costs in the cause.

Mudambanuki & Associates, the applicant's legal practitioners.
Dube, Manikai and Hwacha, the respondent's legal practitioners.