STEPHEN PARADZAI KUIPA
versus
CFI HOLDINGS LIMITED

IN THE HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 15 June 2018; 4 July 2018; 25 July 2018

Opposed Application

E Matinenga, for the applicant
T. Magwaliba, for the respondent

KWENDA J: The plaintiff's issued summons against the defendant for the payment of $208 839.98 (two hundred and eight thousand eight hundred and thirty nine dollars and ninety eight cents) being retrenchment benefits, interest thereon at the prescribed rate and costs of suit on the attorney- client scale. When the matter was called for trial, defendant objected to the jurisdiction of this Court arguing that the plaintiff's cause of action is in the form of a Labour dispute exclusively resolvable in terms section 89 of the Labour Act [*Chapter 28:01*]. The objection in *limine* was opposed by the plaintiff.

BACKGROUND

The salient averments in plaintiff's declaration are as follows;

> "4. …. the plaintiff was employed by the defendant as its Group Chief Executive Officer until he was retrenched.
> 5. On the 25th January 2016, defendant calculated for the plaintiff his retrenchment benefit and lump sum due to him in the sum of $360 500.00. **This has been acknowledged in writing**.
> 6. The defendant on the 7th March 2016 applied for registration of the retrenchment agreement and it was confirmed on the 9th March 2016 by the Retrenchment Board.
> 6.2. The defendant proceeded to make an application for a tax deduction directive from Zimra on the 7th April 2016 and it was processed by96th April 2016 with the defendant being given a directive to deduct tax in the amount of $151 660.05 from the retrenchment package due to plaintiff.
> 6.3. The defendant proceeded to pay the assessed tax to Zimra.
> 6.4. Defendant promised to pay the sum stated above (but) never stood by its word.
> 7. In breach of its obligation the defendant failed to fulfill its obligation –despite demand ……"

The defendant pleaded as follows;

"2. Plaintiff was employed as defendant's Chief Executive Officer until he went on retirement.
3.3.1 Defendant denies that it entered into an agreement with the plaintiff for his retrenchment.
3.2. The agreement then is being alleged by the plaintiff was entered into by him and the defendant's chairperson whom the knowledge and necessary resolution of the defendant's board authorising the same.
3.3. The agreement is therefore not binding on the defendant. it is null and void.
4.4.1. It is denied that the defendant applied for tax deduction directive from ZIMRA. This was done at the instance of the plaintiff without the knowledge and authorization of the defendant's Board of Directors.
4.2. It is further denied that defendant paid tax deduction to ZIMRA. Upon discovery of the unauthorized retrenchment agreement, defendant refused to pay the tax deduction and has not paid to date.
5.2. Defendant never promised to pay plaintiff the amount claimed. Defendant made it clear that the company was not liable.
5.3. Defendant has not breached any obligation to plaintiff as the retrenchment agreement was not authorised by the defendant's board of directors and is accordingly not binding on the defendant."

DEFENDANT'S POINT *IN LIMINE*

The defendant couched the point *in limine* in the following terms;

"The Honourable Court has no jurisdiction to grant the relief sought by plaintiff on the grounds:-

1. The claim is a labour dispute that falls for determination in terms of the dispute resolution mechanisms established by the Labour Act [*Chapter 28:01*].
2. By virtue of the provisions of s 89 (b) of the Labour Act, labour disputes fall within the exclusive jurisdiction of the Labour Court at the first instance.

Wherefore defendant prays that plaintiff's claim be dismissed with costs."

Plaintiff opposed the objection *in limine*, submitting that;

1. Absence of jurisdiction must be pleaded.
2. The Labour Act is intended to address and resolve differences between employers and employees who are still engaged. It does not apply where, parties to the employment relationship are no longer engaged and in this case the parties' employment relationship was ended as soon as retrenchment was agreed on.
3. The objection in *limine* is a deliberate attempt to frustrate what is due to the plaintiff.

In reply, defendant's counsel submitted that absence of jurisdiction can be raised at any time.

I reject the submission by plaintiff that the objection *in limine* may not be raised at the commencement of the trial just because it was not specially pleaded. In the case of *ZIMASCO (Pvt) Ltd* v *Marika* 2014 (1) ZLR (1)S (1) The Supreme Court held that the Labour Court erred when it declined to hear an objection to jurisdiction raised after the court had received closing submissions and reserved judgment. The Supreme Court allowed argument on the legal issue on appeal. In a more recent judgment of the Supreme Court *TN Harlequin Luxaire Limited and Anor vs Quest Motors Manufacturing(Pvt) Ltd SC 30/18* the Supreme Court observed as follows:-

Para 16

> "Case authorities hold that a question of law may be advanced for the first time on appeal. This is however only permissible if the point is covered by the pleadings in the Court *a quo* and its if its consideration will involve no unfairness to the party against whom it is directed.

Para 17

> "The rationale behind allowing the introduction of a point of law on appeal for the first time is that the appeal court is duty bound to always come the correct position of the law on the issues that were before the Court *a quo* as covered by the pleadings."

I find that in this matter the defendant based its objection to jurisdiction on the facts appearing in the pleadings before me.

I also reject the submission by the plaintiff that the Labour Act would not apply because the parties are no longer in an employer / employee relationship. A huge number of cases brought in terms of the Labour Act, are commenced by former employees after leaving employment. I will give examples of disputes over the manner of termination of employment, underpayment of wages or salaries during employment and damages upon unlawful termination/loss of employment; just to mention a few. Therefore the fact that employment has terminated is not a bar to seek relief in terms of the Labour Act. I am mindful of the fact that it is not in dispute that the parties are no longer in an employer / employee relationship. I am also mindful of the fact that I am not required to decide on whether or not the plaintiff's employment was terminated lawfully. My attention was drawn to the case of *Andrew Mills* v *Tanganda Company Limited*. The matter came up before the High Court in case no. HC 6380/12. The High Court declined to exercise jurisdiction on the grounds that the dispute before it was determinable in terms of section 89 of the Labour Act. On appeal to the Supreme Court, the appellant argued that the High Court erred because it was common cause that the contract of employment between the appellant and the respondent had

terminate by mutual consent…I have added the underlining for emphasis. The Supreme Court set aside the High court decision by consent and the matter remitted to the High Court to continue with the trial. See *Andrew Mills* v *Tanganda Tea Company Limited* SC 497/14. As will more fully appear hereunder the circumstances in the case of *Andrew Mills* v *Tanganda Tea Company Limited* (supra) are dissimilar to this case. Unlike in this matter, the manner of termination of the parties' employer / employee relationship was not up for determination. In this matter the pleadings reveal the dispute and I have to determine that dispute as a prerequisite before deciding whether what the plaintiff claims is due and payable to him.

I will now deal, in more detail, with the third submission by the plaintiff in opposing the objection *in limine*. Counsel submitted that the objection to this Court's jurisdiction is a deliberate attempt to frustrate plaintiff's claim for the payment of a retrenchment package. I note that the plaintiff's avers that the money claimed by him is due and payable because due process was followed leading to confirmation of his retrenchment package by the Retrenchment Board. The narration in plaintiff's declaration from paras 4 to 7 (quoted above) is intended to demonstrate that his retrenchment followed due process. The plaintiff added, in bold, that **"The offer was acknowledged in writing".**

The issue of the jurisdiction of the High Court in labour matters has been the subject of a lot of debate in the High Court. I find that the weight of case authority is that the High Court must defer to the special jurisdiction of the Labour Court in all disputes that are contemplated or fall under s 89 of the Labour Act. In the matter of *DHC International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H) the Honourable Justice MAKARAU JP (as she then was) quoted section 89 (6) of the Act which I reproduce below:-.

> "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."

The Honourable Judge then stated as follows p 203 of the law report:-

> "The issue of when the jurisdiction of this court is ousted by the provisions of the (Labour) Act has been before this court in a number of cases…see *National Railways of Zimbabwe* v *Zimbabwe Railways Artisans Union & Others* 2005 (1) ZLR 341 S and *Tuso* v *City of Harare* 2004 (1) ZLR (1) H. In my view i think the position is now settled that a dispute falls to be determined exclusively by the Labour Court if such arises from a cause of action that has been specifically provided for in the Act and for which a remedy is also provided in the Act."

See also at p 204 D – F

> "As a general statement, it is correct that the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Act. Where, however, a dispute can either found a cause of action at common law and/ or in terms of the Act, a case of apparent concurrent jurisdiction between this court and the Labour Court appears to arise… the apparent conflict can be easily resolved by paying regard to the overall intention of the legislature in creating the Labour Court--- in such case, the Labour Court jurisdiction being special must prevail. It would make a mockery of the clear intention of the legislature to create a special court if the jurisdiction of the special court could be defeated by mere framing of a dispute as a common law caused of action where the Act has made specific provisions of the same. In my view, if the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is resolvable at common law"

The Honourable KUDYA J arrived at the same conclusion in *Mc Cosh* v *Pioneer Corporation Africa Ltd* 2010 (2) ZLR 211 (H) at p 216

> "……this court lacks jurisdiction to determine the matter by virtue of the provisions of s 89 (6) of the Labour Act."

The Supreme Court in *Zimasco Pvt Ltd* v *Marikan* (*supra*) endorsed the two a High Court judgments cited above. See page 3 of the cyclostyled Supreme Court judgment.

> "….. the act is clear that no court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal a matter referred to in s 89 (1) of the Act- see s 59 (b) of the Act. In various decisions, the High Court has interpreted this provision to mean that the High Court has no jurisdiction."

> "In the circumstances the suggestion that the High Court would have any jurisdiction in respect of labour matters generally would be untenable."

I am aware of the judgment of the Supreme Court in *Borend Van Wyk* v *Tarcon Private Ltd Private Ltd* SC 49/14. In that matter the claim was for the balance owing to plaintiff for unpaid salaries and allowances and charges for the hire of a truck. The defendant denied that there had been any agreed reconciliation, that the appellant was employed by it and that the reconciliation had not yet been approved by the Chairman. The High Court ruled that the claim for salaries and allowances was not based on a statement of account but on a contract of employment governed by the Labour Act [*Chapter 28:01*] and thus fell outside the jurisdiction of the High Court at the first instance. On appeal, the Supreme court overturned the High Court decision and held that reconciliation statements relied on by the appellant constituted an agreed statement of account and the respondent was liable notwithstanding that the reconciliation had not yet been approved by the Chairman. See at page 3 "…. it is competent to sue a debtor on his admission of liability as set out

in an acknowledgement of debt, without founding the action on the original transaction giving rise to the debt." Accordingly, the Supreme Court found that the High Court had erred in holding that the contractual claim before constituted a labour dispute beyond its jurisdiction and within the exclusive domain of the Labour Court by virtue of s 89 (1) and 89 (6) of the Labour Act.

In that matter however, the Supreme Court made telling observations. The evidence adduced by the plaintiff to prove the statement of amount had not been contradicted by the defendant and, further, the defendant had made part payments pursuant to the reconciliation statements. See p 3 of the cyclostyled judgment

> "In the circumstances I am inclined to take the view, **in the absence of evidence to the contrary adduced before the court *a quo*,** that the claim *in casu* was based on a stated account. There was agreed acknowledgement of liability signed on behalf of the respondent. **All that appears to have been required thereafter is its chairman's approval of payment plan or method of discharging the liability**." The emphasis is mine.

THE MERITS

Retirement and retrenchment are, in my view, different processes and the benefits that accrue to an employee are dependent on whether he/she is retired or retrenched. Retirement is governed by the contract of employment. (See section 12(4 a) (a) of the Labour Act). Retrenchment follows an elaborate procedure outlined in s 12 C and 12 D of the Labour Act. Although it was not specifically argued before me, it is clear, plaintiff added the words "This has been acknowledged in writing" in bold, deliberately, in order to portray his cause of action, as a contractual dispute at common law thereby distinguishing it from the disputes resolvable in terms of section 89 of the Labour Act. I did not hear Plaintiff's counsel to submit that the plaintiff has no remedy in terms of the Labour Act. He simply submitted that the payment is due to him because defendant offered the package by way of letter dated 25 January 2015. The letter signed by the then board chairperson, Mr P Chihambakwe offered him $360 500.00 on retirement (as retrenchment) subject to fulfillment of the necessary formalities. I have added the underlining for emphasis and note that the chairman wrote the letter before presenting the retrenchment proposal to the Board. Both counsel relied on the letter which they both submitted with their respective bundles of documents to curtail proceedings as contemplated in Order 26 r 182 (2) (j), yet do not agree on the interpretation to be given to it. The plaintiff describes letter in his index to the bundle as "Letter of retirement ….." The subject matter of the letter is "Retirement from the CFI Group: 30th April 2016." The first paragraph of the letter reads as follows;

> "Further to our meeting of 25 January 2016, I confirm that you will be proceeding on retirement as at 30th April 2016 in accordance with company policies and terms of employment. In that regard the company has approved the following package (based on retrenchment)"

The last paragraph reads

> "It is understood that your entitlements as stated herein will be paid as soon as it is practically possible to do so and once all formalities have been concluded."

As stated above both parties discovered the letter and rely on it. Its contents are, therefore, common cause. The letter is dated 26 January 2015 but curiously it purports to be a follow up from a meeting not yet held but to be held on 25 January 2016, a year later. The anomaly could have been a result of a typing error. The plaintiff did not address the anomaly in his pleadings. However the anomaly will not influence my decision.

There are various methods of lawful termination of employment provided for in the Labour Act. See section 12(4 a)

> "No employer shall terminate a contract of employment on notice unless
>
> (a) Termination is in terms of an employment code or in the absence of an employment code in terms of the model code.
>
> (b) The employer and employee mutually agree in writing to the termination of the contract.
>
> **(c)** The employee was engaged for a period of fixed duration or for the performance of some specific service or
>
> (d) pursuant to retrenchment, in accordance with s 12C."

The package due and payable to a former employee depends on the manner in which employment was terminated. As stated above, the plaintiff says he was retrenched, while defendant says he retired. The letter speaks of both retrenchment and retirement. Both versions therefore find confirmation in the letter. Accordingly, the letter does not resolve that dispute. It ironically underscores the dispute. Both parties discovered and placed before the court, the minutes of the defendant's board meeting held on 16 February 2016. Although the minutes have not been formally become part of the record there is no doubt that both parties discovered the minutes because they intent to rely on them at the trial. The minutes reveal that the chairman announced in the board meeting, that the shareholders of the defendant and the plaintiff had agreed on his exit from the defendant and the 'exit package'. A board member responded that one of the shareholders was unaware of the so called agreement, whereupon the chairman said he had come to simply

inform the Board and not to ask it make a decision on the matter. The then chairman went on to say what he had said was final. The plaintiff was present when those deliberations took place. He therefore became aware of the resistance to his so called exit package.

In the premises I hold that the papers before me reveal the manner in which the plaintiff's employment was terminated as a triable issue. I would not be able to determine plaintiff's claim without, firstly, resolving that dispute. The plaintiff knew before he left employment that the package due to him was contested issue. Plaintiff knew that Defendant's failure to pay him arose from that dispute. Plaintiff chose not to pay attention to that and proceeded as if there was no dispute concerning the termination of his employment. I do not believe that this is a case of breach of contract. The plaintiff must have been alive to the true nature of the dispute when he filed an amended summary of evidence on 15 June 2017. He will lead evidence to prove the following:

(i) his appointment and salient features of the appointment letter
(ii) powers of the directors
(iii) his efforts to keep the defendant viable during the era of Hyperinflation
(v) shareholders' desire to inject new capital subject to a major management shakeup and retrenchment exercise to contain costs.
(vi) various meetings between the chairman and shareholders where the plaintiff exit from the defendant was discussed.
(viii) that negotiation of the plaintiffs exit package was an open secret.

The plaintiff suggested the adoption of the following as the only to be referred to trial.
"Whether defendant authorised its then chairman, Mr S J Chihambakwe to agree an exit package with plaintiff."

The parties adopted that as the only issue, thereby introducing the term "exit package" for the first time. This added a new and third dimension to this case. The defendant initially based his claim on a retrenchment agreement confirmed by the Board (s 12 (4 a) d of the Labour Act). The defendant relied on retirement (s 12 (4 a) of the Act). Now the issue referred to trial is concerned with an exit package (i.e. mutual termination contemplated in 12 (4 a) b). For me to grant the relief sought by the plaintiff in his summons I must necessarily make a definitive finding

that he did not retire but was retrenched. The dispute is squarely within the purview of s 89 of the Labour Act and I must defer to the jurisdiction of the special court created for such disputes.

The order I make is based on the reasoning above, I will mention, by the way, that the recent amendment no. 21 to the constitution on the hierarchy of the courts could be an additional factor. Judicial precedent is that the High Court has deferred to the jurisdiction of special courts or tribunals created to deal with specified matters. See the judgment of the Honourable UCHENA J (as he then was) in the case of *African Consolidated Resources DLC & Ors* v *Minister of Mines & Ors* 2010 (1) ZLR 208.

In the exercise of my discretion I will decline to exercise jurisdiction in this matter at the first instance. The trial has not commenced. I am unable to accede to the request by the defendant to dismiss the plaintiff's claim. At the same time the issue would not have waited this long if the defendant had specially pleaded it.

I order as follows:

1. I uphold the point *in limine* and decline to exercise jurisdiction to deal with the plaintiff's cause of action at first instance.
2. There will be no order as to costs.

Govere Law Chambers, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners