REPORTABLE (55)

Judgment No. S.C. 91/99
Civil Appeal No. 292/98

CITY OF MUTARE v (1) FANUEL MUDZIME (2) MORGAN MUBURURU (3) LAMECK SIGAUKE (4) JEFFREY NYAMAKANGA (5) LOVEMORE MAKONI (6) TAKAENDESA HAUROVI (7) PFUNGWA MYAKUNU (8) WALTER CHIKEYA (9) FRANCIS DONZA

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, JUNE 15 & SEPTEMBER 2, 1999

T Biti, for the appellant

V G Guni, for the respondents

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 30 September 1998 in which the dismissals and suspensions of the respondents were held to be unlawful and invalid and the appellant was ordered to reinstate without loss of benefits the first, second, fourth, fifth, sixth, seventh and ninth respondents to the positions and grades they occupied as the appellant's employees at the time of their suspension or dismissal, and to pay the first, second, fourth, fifth, sixth, seventh and ninth respondents their salaries and wages for their period of suspension or dismissal up to the date of reinstatement.

The facts in the matter are that the respondents were employees of the appellant. They were suspended and dismissed by the appellant at various times between 11 April 1996 and 24 December 1996. In connection with all the respondents the appellant sought, on various occasions, authority from the labour relations office to dismiss them but authority was not granted on the ground that the applications were out of time. The appellant was advised to reinstate the respondents but did not do so. The appellant opposed the application for reinstatement in the court *a quo*.

The appellant's opposition in the court *a quo* was based on three grounds: The first ground was that the application was not properly before the court as it purported to join nine different applicants with nine different cases, circumstances and causes of action in one matter. The second ground was that the application before the court *a quo* was one for review and that, in view of the fact that the respondents had not complied with Order 33 of the High Court Rules, the application ought to be dismissed on that ground without even going into the merits. The third and more substantive ground was whether an urban Council is obliged to comply with the Labour Relations (General Conditions) (Termination of Employment) Regulations 1985, SI 371/85 ("the Regulations") when terminating the contracts of ordinary employees. In this Court the appellant only raised the second and third grounds in its heads of argument. I will, however, deal with both the second and third grounds. The third ground is an important issue in Urban Councils' labour laws.

In connection with the second ground, Mr *Biti's* submissions were to the effect that the application before the court *a quo* was a review in that it was directed at the procedure that the appellant had taken in terminating the respondents' contracts of employment. It was contended by the respondents that the appellant was obliged to seek Ministerial approval in terms of the said Regulations and that to the extent that such approval was not given the appellant's actions ought to be set aside and *a fortiori* reinstatement ought to follow. He went on to argue that his view was fortified by the nature of the draft order sought by the respondents, which sought reinstatement of the respondents. Mr *Biti* also argued that the court *a quo*, although it made no appropriate finding on the issue, made observations which indicate that it was reviewing the appellant's actions. For at pp 8-9 of the cyclostyled judgment (HH-162-98) the learned judge stated the following:-

> "The respondent purported to summarily dismiss some of its workers in breach of the provisions of the Statutory Instrument 371/85. The dismissals were null and void. Also of no force or effect were the purported suspensions followed by subsequent dismissals of the rest of the applicants. …
>
> In the light of the foregoing I hold that the purported dismissals or suspensions were unlawful and invalid and are hereby set aside and that the applicants be reinstated with full benefits."

In the heads of arguments for the respondents it is submitted that the respondents in the application sought a declaratory order and in this connection reliance is placed on *Musara v Zinatha* 1992 (1) ZLR 9. However, as was pointed out by Mr *Biti*, it is significant that in that judgment the learned judge at p 14 of the judgment indicated that there was:-

> "… just sufficient information on the papers to enable the Court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension - had there not been such information so that the petition amounted to a review *simpliciter* (see *Deputy Minister of Tribal Authorities &*

> *Anor v Kekana* 1983 (3) SA 492 (B)), then I would have dismissed the petition on the ground that it was out of time as a review matter and that no cause had been shown on the papers for the court, in terms of R 259 of the Rules of Court, to extend the prescribed eight week period within which a review is to be instituted."

I do not consider that this case falls within this special category as there is, in my view, no sufficient information for the court to have considered it as one seeking a declaratory order. As already pointed out, the order prayed for was not a declaration.

In this connection see *Kwete v Africa Community & Publishing Trust & Ors* HH-216-98 where SMITH J said at p 3 of the cyclostyled judgment:-

> "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of Rule 259 of the High Court Rules, 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought. In many cases it has been held that compliance with the requirements of Order 33 of the High Court Rules 1971, including Rule 259, is mandatory in the case for applications for review - see *Matsambire supra* (*Matsambire v Gweru City Council* S-183-95), *Maketo v The Chairman, Public Service Commission & Seven Ors* S-164-97 and *Masuka v Chitungwiza Town Council & Anor* HH-165-97. It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review. One can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation, which is refused. All then he has to do is to institute a fresh application for review but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round the provisions of Order 33 of the High Court Rules 1971 that easily? I think not."

See also *Minister of Labour & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (SC) and *R Mayi v National Supplies & Anor* S-86-90.

I agree with the above sentiments and the submissions of Mr *Biti*. The application before the court *a quo* was one for review. There was therefore need for

it to be lodged within eight weeks from the date of the dismissals in compliance with the requirements of Order 33 of the said Rules. Failure to do so would have entailed an application for condonation. The application was not lodged within the eight weeks and there was no application for condonation before the court *a quo* and before this Court. In such circumstances the Court has no discretion. It will simply dismiss the application. See *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at 260 C-E where the CHIEF JUSTICE stated the following:-

> "I entertain no doubt that absent an application, it was erroneous for the learned judge to condone what was, on the face of it, a grave non-compliance with Rule 259. For it is the making of the application that triggers the discretion to extend the time. In M*atsambire v Gweru City Council* S-183-95 (not reported) this Court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of Rule 259 was not sought the matter was not properly before the Court. I can conceive of no reason to depart from that ruling …".

I would therefore allow the appeal on this ground.

In connection with the third ground, it is common cause that all the respondents were ordinary council employees, that is, that they were neither town clerks nor senior officials. The termination of their contracts of employment is regulated in terms of s 141 of the Urban Councils Act [*Chapter 29:15*] ("the said Act"). It is now settled law that for council town clerks and senior officials Ministerial approval for the termination of their contracts of employment in terms of the said Regulations is no longer required - see *City of Mutare v Matamisa* 1998 (1) ZLR 512 (S).

The question to answer in this case is whether an urban council, after exhausting the provisions of s 141 of the said Act - there was full compliance with

the provisions of the section in this case - still needs to comply with the provisions of the said Regulations. Subsections (2) and (3) of s 141 of the said Act read:-

> "(2) Subject to the conditions of service of the employee concerned, a council or, in the case of a municipal council, the executive committee of the council, may at any time discharge an employee other than a senior official -
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> (a) upon notice of not less than three months; or
>
> (b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.
>
> (3) An executive committee of a council shall not discharge an employee, other than a senior official, unless the council has approved the discharge:
>
> Provided that the discharge of a health inspector shall in addition be subject to the approval of the Minister responsible for health in terms of section 11 of the Public Health Act [*Chapter 15:09*]." (My emphasis).

Mr *Biti's* submission was to the effect that the above provisions are not overridden by the provisions of the said Regulations. He argued, firstly, that the provisions of the said Regulations, being subsidiary legislation, cannot override the provisions of a statute - subss (2) and (3) of s 141 of the said Act - which are in the nature of primary legislation. See *The City of Mutare v Ncube & Ors* HH-139-87 at pp 6-7 of the cyclostyled judgment.

The second argument by Mr *Biti* was the principle of *lex posterior derogat priori*. This is a general rule of statutory interpretation to the effect that where two general statutes are irreconcilably in conflict with one another, the latter statute is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the Legislature passes the latter Act it is presumed to have knowledge of the earlier Act. This view was accepted and applied by

REYNOLDS J in *City of Mutare v Ncube supra* at pp 6-7 of the cyclostyled judgment. There he said:-

> "Secondly, it seems to me that sec 17(2) of the Labour Relations Act, 16 of 1985, provides merely that regulations made by the Minister under the enabling section 17(1) 'shall prevail over the provisions of any other statutory instrument …", and no reference is made in these regulations, or in the Act itself to their application over any other enactment. Although section 3 of this statute provides that 'this Act shall apply to all employers and all employees …', nowhere in the Act itself is any provision made regulating the discharge of employees which would apply in the instant case. The regulations that were made in terms of sec 17(1) of this Act would, therefore, in my view, have no force or effect in regard to the Urban Councils Act [*Chapter 214*]. I am fortified in this view by the fact that the Legislature, when passing the latter enactment, and being fully aware of the provisions of the Labour Relations Act, 16 of 1985, did not find it necessary to stipulate that the control of matters of employment would vest in the Minister of Labour, Manpower Planning and Social Welfare". (My emphasis).

The above view was accepted by SMITH J in *Masasi v PTC* 1991 (2) ZLR 73 (H) at 80-81. It was therefore argued that because of the above principle, the provisions of the said Regulations were overridden by the provisions of subss (2) and (3) of s 141 of the said Act.

I agree with the submissions and arguments of Mr *Biti*. These are fortified by the proviso at the end of subs (3) of s 141. The implication here is that the Legislature had excluded the requirement of any Ministerial approval to dismissals except in the case of an inspector of health. It is inconceivable that further Ministerial approval would be required in the case of a health inspector after the approval of the Minister of Health. The same applies to the other employees. The Legislature would have stated that further Ministerial approval would be required if that was the intention. This is the view which was properly taken by the CHIEF JUSTICE at pp 517H-518B of *City of Mutare v Matamisa supra*, where he said:-

> "Had the intent been other than to give the final say with respect to the discharge of a town clerk to the Local Government Board (in the present case it is the council's executive committee), the Legislature would have added a proviso to that effect to s 139(2). The provisos to ss 140(2) and 141(3) deal specifically with the discharge of a medical officer of health and a health inspector. In each, the discharge is subject not only to the approval of the Local Government Board but in addition to the approval of the Minister responsible for health in terms of s 11 of the Public Health Act [*Chapter 15:09*]. It is significant that with a medical officer of health, who is a senior official, and a health inspector, who is an ordinary employee, the provisos do not include the necessity to obtain the approval of the Minister of Labour." (My emphasis).

The respondents merely relied on the cases of *Gumbo v Norton-Selous Rural Council* 1992 (2) ZLR 403 (S) and *Masasi v PTC supra*. In this connection, I again agree with Mr *Biti's* submission that the case of *Gumbo supra* is irrelevant in this case. It dealt with a now repealed provision - s 63(2) of the then Rural Councils Act. On this see *Matimisa's* case *supra* at 513-514. The case of *Masasi v PTC supra* is equally irrelevant. It is, however, worthy of note that the learned judge's *obiter dictum* in that case is consistent with the decision in *Matamisa's* case *supra*.

In the result the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted instead:

"The application is dismissed with costs."

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Midzi, Ziweni & Partners, respondents' legal practitioners