ZB RETRENCHEES
versus
ZIMBABWE BROADCASTING HOLDINGS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 15 August 2015 and 15 March 2017

Opposed

C Kwaramba, for the applicant
L Uriri, for the respondent

MAKONI J: On 19 June 2002, the applicants and the respondent entered written into a retrenchment package agreement (agreement). The pertinent terms of the agreement were as captured in the LC/H/70/2005 by MAKAMURE J where she stated the following:

> "The retrenchment undertakes to pay the employees who have been retrenched the following retrenchment package.
>
> a) Payment in lieu of notice;
> b) Abolition of office – per staff rules;
> c) Cash in lieu of leave;
> d) Stabilization/gratutity-25 months gross salary times the number of years served including fraction thereof;
> e) Long service awards
> f) Relocation allowance - $ 10 000-00 across the board
> g) Medical aid support on current terms up to 31 December 2003, except for those who get employment and have a medical aid cover;
> h) Pension- in terms of pension regulations;
> i) Licence fees to be paid as per the following categories:
>
> | | |
> |---|---|
> | Less than 3 years | 1 year up to 31/12/03 |
> | 3-10 years | 1 year up to 31/12/04 |
> | 11-15 years | 1 year up to 31/12/5 |
> | 16-20 years | 1 year up to 31/12/06 |
> | 21-30 years | Life exemption |
> | 31 years + | Life exemption |
>
> j) Preferential recalls (temps/etc);
> k) ZBC accommodation – up to 30 December 2002"

Disputes arose regarding the implementation of the the agreement. Among other reasons, the respondent argued that payment of the pension could not be constructed as part

of the agreement. The parties took their dispute for arbitration. The arbitrator found in favour of the respondent and ordered that the applicants honours the agreement.

Aggrieved by the decision, the respondent appealed to the Labour Court and the matter was heard by MAKAMURE J who upheld the appeal. She found that the respondent had entered into the agreement freely and that it had chosen to be bound by the terms of the agreement. She also found that the agreement was the sole memorial of the parties intention and that there were no special circumstances warranting interference with what the parties had agreed.

The respondent then appealed to the Supreme Court and that appeal is still pending. The parties continued to engage each other through various correspondence. In the engagements arose the issue whether the retrenchment package had been paid in full or not. The respondent argued that the applicant's benefits including pension had been paid in full up to December 2003. The applicants then approached this court seeking a declaratur. The matter is opposed and the respondent took three points in *limine viz*.

1. Absence of jurisdiction on the part of this court
2. The matter is *lis alibi pendenis*
3. The fact that the applicant sued a non-existing entity.

I will first of all determine the points *in limine*.

Jurisdiction

Mr *Uriri* submitted that what is before the court that is a dispute of right as is defined in terms of s 2 of the Labour Act [*Chapter 28:01*] (the Act). One must consider s 8 of the Act which defines what an unfair labour practice is. The dispute between the parties is therefore a labour issue and can be resolved in terms of s 94 of the Act.

Mr *Kwaramba* submitted that the applicants are proceeding in terms of s 14 of the High Court Act [*Chapter 7:06*]. A dispute arose between the parties and the applicant's seek a declaratur. He further submitted that s 14 of the High Court Act is complementary to s 89 (2) of the Act. He submitted that the Labour Court is a creature of statute. Its powers and functions are provided for in the Act and in exercising those powers it cannot go beyond what the Act provides. He relied on the authority of *NRZ* v *Zimbabwe Artisan Union & Ors* 2005 (1) ZLR 341(S).

The issue is, looking at the dispute between the parties which is the appropriate foraie the High Court or the Labour Court to deal with the matter.

The law is settled and the parties are agreed on the position of the law regarding the granting of declaratur and the exclusivity of the jurisdiction of the Labour Court. In the *NRZ supra* at p 347 A ZIYAMBI JA (as she then was) had this to say:

> "Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or any other enactment must specifically provide for applications to the Labour court, of the type that the applicant seeks to bring: see *PTC* v *Chizema* S-108-04. In that case, it was pointed out that an application brought in terms of s 93 (7) of the Act would correctly be termed an application "in terms of the Act".
>
> Thus, the application and the remedies obtainable thereby must be authorised in the Act or the enactment authorising the application to the Labour Court.
>
> Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a – quo*, nor have I been referred to any enactment authorizing the Labour to grant such an order.
>
> The court, went further had earlier on p 346 G stated
>
> > There is, I think, judging from the case which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of s 89 of the Act, endowed with jurisdiction to entertain all applications brought before it."

The same was restated in *UZ-UCSF Collaborative Research Programme in Women's Health* v *Shamuyarira* 2010 (1) ZLR 127 (S) at 130 D respect of seeking a declaratur in the Labour Court.

> "So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction. Accordingly the appeal succeeds on this point."

The converse to the above can be found in *Tuso* v *City of Harare* 2004 (1) ZLR 1 where it was held that all labour matters, unless specifically excluded, must be dealt with by the Labour Court. In that case BHUNU J (as he then was) gave an analogy which clearly sets out the position regarding labour matters and the Labour Court powers when he stated

> "To draw an analogy, a labour dispute is essentially a civil dispute, over which the magistrates court ordinarily has jurisdiction in terms of its limited jurisdiction. A magistrate cannot arrogate to himself jurisdiction under the Magistrate Court Act and not the Labour Act.
>
> By the same token the High Court exercises review powers which have been expressly excluded under the pretext that it will be exercising its general powers of review under the High court Act."

The next question would be what is the nature of the dispute between the parties.

The respondent contends that it is a dispute of right. Dispute of right is defined in s (2) of the Act as follows:

> "means any dispute involving legal rights and obligations occasioned by an actual or alleged unfair labour practice."

What constitutes an unfair labour practice is defined in s 8 of the Act.

> "An employer …. Commits an unfair labour practice if, by act or commission he …..
>
> (a) …….
> (b) …….
> (c) …….
> (d) ……..
> (e) Fails to comply with or implement
> (i) A collective bargaining agreement; or
> (ii) ……
> (iii) A decision or finding made under Part XIII; or
> (iv) Any determination or direction which is binding upon him in terms of the Act."

The respondent contends that for the enforcement of such rights one looks at s 89 (2) as read with s 93 (7) (ii) of the Act. It further contends that s 93 (7) (ii) cross references itself with s 89 (2) with the result that an application for the pronouncement of an order stemming from a dispute of rights, is easily actionable. The respondent concluded by saying the issue before the court can therefore be determined by the Labour Court.

The applicants contend that, although the dispute bears elements of a labour dispute, the Labour Court cannot exercise jurisdiction over matters not specifically provided for in the Act such as declaraturs.

This contention by the applicants gives away the true nature of the dispute between the parties. It is a labour dispute. What one needs to look at, in terms of s 89 (1) as read with s 89 (6) of the Act is the nature of the application itself and not exclusively the relief sought as seems to be suggested by the applicants.

I would want to agree with the respondent that the dispute that is between the parties is a dispute of right. The applicants are complaining about the respondent's failure to comply with its obligation in that it failed to implement an agreement in terms of a determination made by the Labour Court which is binding upon it. This complaint fits squarely in the definition of an unfair labour practice. Such a dispute is a dispute of right. An application can be founded for a pronouncement or enforcement of such a right by reason of s 89 and 93 of the Act. It would be contrary to the intention of the legislature to allow a party whose case is

plainly a dispute of right to circumvent the exclusive jurisdiction of the Labour Court by labelling their order a 'declaratur' when in truth and substance it is not.

In view of the above finding, I will uphold the point *in limine* and decline jurisdiction in this matter. Having made that finding it will not be necessary for me to deal with the other points *in limine*.

In the result, I will make the following order

1) The application is dismissed
2) The applicants to pay the respondent's costs.

Mbizo, Muchadehama & Makoni, applicant's legal practitioners
Mandizha & Company, respondent's legal practitioners