MUNYARADZI KUVHENGUHWA
versus
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 1 October 2018 & 24 October 2018

**Opposed application**

*A Gurira*, for the applicant
*H Muromba*, for the respondent

MUREMBA J: The applicant is employed by the respondent as a Revenue Officer stationed at Masvingo. Consequently, the applicant is bound by the respondent's Registered Code of Conduct i.e. the Zimbabwe Revenue Authority Employment Code of Conduct and Grievances Procedure (the Code of Conduct). On 27 November 2017, the applicant was charged with misconduct and was suspended from employment without pay and benefits in terms of clause 10.1 (a) of the Code of Conduct. The misconduct pertained to making false declarations by the applicant in respect of assets he owns. The respondent avers that due to the nature of its organisation, it is critical for its employees to declare their assets as a way of curbing corruption and bad practices.

In terms of clause 5 (3) of the Code of Conduct, the Disciplinary and Grievance Committee which is supposed to hear the matter of the applicant has to be composed of
three management representatives and two employee representatives who are seconded by the respondent's Workers' Committee. The Workers' Committee refused to second any of its members thereby making it impossible for the Disciplinary and Grievance Committee to be properly constituted to enable the applicant's case to be heard within the prescribed time limits. In terms of clause 6.15 of the Code of Conduct, once an employee has been charged with an act of

misconduct all investigations into the offence, hearing and determination of the matter should not exceed 40 days. In *casu*, it is common cause that the respondent failed to comply with the time lines stipulated in the Code of Conduct. On 21 December 2017 and on 11 January 2018, the applicant wrote to the respondent asking to be reinstated on the basis that his continued suspension was illegal. In response in a letter dated 16 January 2018 the respondent conceded that the time limits had been exceeded, but it did not reinstate the applicant. It advised him that the failure to conduct a hearing on its part had been necessitated by the Workers' Committee which was refusing to second its representatives to the Disciplinary and Grievance Committee until the grievances it had against the employer had been addressed. The applicant was advised to refer the matter to a Labour Officer for a hearing in terms of s 101 (6) of the Labour Act [*Chapter* 28:01] if he could not wait for the impasse to be resolved. Instead of referring the matter to a Labour Officer as suggested by the respondent, the applicant opted to approach this court. He thus filed the present application. The applicant seeks the following declaratory order and consequential relief.

"1. The continued suspension of the applicant from the employment of the respondent without pay and benefits be and is hereby declared unlawful.
2. The applicant is hereby reinstated to his position without any loss of salary and benefits.
3. The respondent shall pay cost of suit."

*The point in limine*

In opposing the application the respondent raised a point *in limine* to the effect that the Labour Act provides a domestic remedy to the applicant which he had not exhausted before approaching this court. The respondent averred that this application although it is being brought as a *declaratur*, in reality it is a ploy by the applicant to be reinstated to his position without any loss of salary and benefits without disciplinary proceedings having been conducted. The respondent contended that the applicant should have referred the matter to a labour officer in terms of s 101 (6) of the Labour Act for him to be called upon to answer to the substantive charge of misconduct he is facing and for a determination to be made on the issue. On this basis the respondent urged this court to withhold its jurisdiction in the matter and dismiss the application.

The applicant contended that s 101 (6) of the Labour Act will not grant him the relief of a *declaratur* that he is seeking in this court. He disputed that he is seeking to evade the disciplinary

hearing. He averred that he is not responsible for the respondent's failure to constitute a disciplinary hearing hence he was seeking reinstatement.

What is apparent from the application is that the applicant is seeking a *declaratur* or a declaratory order. In addition to it he is also seeking reinstatement as a consequential relief. He wants it declared that his continued suspension is unlawful. A declaratory order consists of a statement by the court of the true legal position in the particular circumstances of the dispute in question. It is not an order by the court for either party to do anything. It is generally used in circumstances where it is thought that the parties will voluntarily do whatever is necessary to give effect to it[1]. However, this is not a relief a labour officer is empowered to grant. The Labour Act does not even provide for such a relief. On the other hand, this court is empowered to grant declaratory orders in terms of s 14 of the High Court Act. The section reads:

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

On the basis that it is this court which has jurisdiction to grant a *declaratur* which relief the applicant is seeking, I cannot decline jurisdiction in the matter. I have to determine the application and decide whether or not it has merit. In the result, the point *in limine* is dismissed.

*The merits*

As already stated above, the applicant is seeking a *declaratur* to the effect that his continued suspension from the employment of the respondent without pay and benefits is unlawful. The respondent is opposed to the granting of a declaratory order. Its argument is that in terms of s 6.15 of the Code of Conduct, it is permissible to extend the period of suspension of an employee in special circumstances. The respondent averred that the only reason the disciplinary hearing has not been conducted on time is that the Workers' Committee has refused to second its two employee representatives to the Disciplinary and Grievance Committee. It further averred that such refusal by the Workers' Committee to second its representatives to the Disciplinary Committee for the matter to be heard constitutes special circumstances warranting the extension of the time frames. It contended that the suspension is not therefore a nullity. The respondent averred that this is an application for reinstatement which is coming under the guise of an application for a *declaratur*.

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[11] F.K.H. Maher, Loius Walker & Sir David Derham *Cases and Materials on the Legal Process* (Sydney: The Law Book Company Limited 4th ed 1979) at p 94.

The respondent contended that the correct procedure under the circumstances is to refer the matter to a labour officer in terms of s 101 (6) of the Labour Act.

In his answering affidavit the applicant averred that it is not his concern how the respondent constitutes the disciplinary hearing. The continued suspension is causing him prejudice because he is without salary and benefits. As an employee of the respondent, he cannot look for a job elsewhere. The applicant further contended that the extension of the period of suspension is only permissible where reasons are given and both parties are agreed that there should be an extension. It is the duty of the respondent to ensure that the matter is investigated and determined promptly. He averred that in this case he did not agree to an extension of his suspension.

At the hearing submissions were made to the effect that the parties never sat down and agreed to extend the period of suspension. The applicant did not therefore agree to any extension of his suspension beyond the 40 days that is allowed by the Code of Conduct.

In terms of the law Codes of Conduct are registered by the Registrar of Labour in terms of s 101 of the Labour Act. For a Code of Conduct to be registered it should provide for matters referred to in subs (3) (a) – (g) thereof. Of relevance is subs (3) (e) which reads,

> "An employment code shall provide for the notification to any person who is alleged to have breached the employment code that proceedings are to be commenced against him in respect of the alleged breach."

This means that if an employee is alleged to have breached the employment code, he or she is entitled to be dealt with in terms of the registered employment Code of Conduct. As was correctly submitted by Mr *Muromba*, by enacting s 101 (6) the legislature envisaged a situation where a disciplinary hearing may fail to be conducted in terms of the registered employment Code of Conduct as is the situation in the present matter. The provision reads:

> "If a matter is not determined within thirty days of the date of notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour officer who may then determine or otherwise dispose of the matter in accordance with section ninety-three."

The provision simply states that either an employee or an employer may refer the matter to a Labour Officer if the matter is not determined in terms of the registered Code of Conduct within 30 days of the date of notification. See *Mashonganyika* v *Lena N.O & Anor* 2001 (2) ZLR 103 (H). In *Monday Watyoka* v *Zupco (Northern Division)* SC 87 – 05 the Supreme Court at p 4 held that,

> "The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination ……. It was probably foreseen that in certain cases one party could frustrate the other by causing delays to the prejudice of the other. That seems to be the reason why the word "may" is used…….. It follows that where the thirty days has lapsed the concerned party can choose to refer the matter to a labour relations officer or wait for a determination to be made."

In *Mwenye* v *Lonrho Zimbabwe Ltd* 1999 (2) ZLR 429 (SC) it was also held that in terms of s 101 (6) of the Labour Relations Act [*Chapter 28:01*) a matter may only be referred to a Labour Relations officer if the matter has not been determined in terms of the relevant code of conduct, 30 days having lapsed, and notification having been given to the employee that proceedings are to be commenced against him in respect of the alleged breach.

Lovemore Madhuku in his book *Labour Law in Zimbabwe* at p 150 says that once the word used in s 101 (6) is "may" and not "shall" either party is entitled to refer the matter to the Labour Officer, failing which any further proceedings under the Code of Conduct remain valid. He further states that the provision does not make it mandatory, but merely entitles either party if it so wishes or elects, to refer the matter to a labour officer if the proceedings under the registered code of conduct cannot be concluded timeously. Citing the case of *Robson Marimo* v *National Breweries* SC 125/2000, Lovemore Madhuku goes on to say that besides referring the matter to a labour officer, the employee is also entitled to bring a High Court application for a *mandamus* compelling the employer to have the matter resolved in terms of the Code of Conduct. In *Posts and Telecommunications Corporation* v *Zvenyika Chizema* SC-108-04 it was held that,

> "……an employee validly suspended does not, because of delay alone, become entitled to reinstatement nor to reversal on review of a subsequent dismissal. Instead they (the parties) each have available to them the remedy of mandamus to enforce due compliance with that which is timeous. See *Nyoni* v *Secretary for Public Service, Social Welfare & Anor* 1997 (2) ZLR 516 (H) at 522 G – 523 A."

In *Stella Nhari* v *Zimbabwe Allied Banking Group* SC 51 – 13 it was also held that delay alone cannot justify reinstatement and that "delay merely gives the aggrieved party the right to the remedy of a *mandamus* to enforce due compliance with any time limits……"

These legal authorities make it clear and unambiguous that in a matter where a disciplinary hearing is not conducted timeously, the employee does not have a remedy of reinstatement. Instead he can either approach a labour officer for a disciplinary hearing to be conducted in terms of s 101 (6) of the Labour Act or he can approach this court seeking an order for a *mandamus* compelling the employer to conduct a disciplinary hearing in terms of the Code of Conduct. Either way, the

end result is the conducting of the disciplinary hearing and not reinstatement. In *casu* it follows therefore that if the applicant wanted the disciplinary hearing to be conducted he had two options at his disposal. Either he could have approached a Labour Officer for a disciplinary hearing to be conducted in terms of s 101 (6) of the Labour Act or he could have approached this court seeking an order for a *mandamus* compelling the respondent to conduct a disciplinary hearing in terms of the Code of Conduct. However, he chose not to employ any of the two options. Instead he chose to approach this court with an application for a declaratory order.

In *Puwayi Chiutsi* v *The Sheriff of the High Court & Others* HH 604/18 at p 10-11 MATHONSI J said,

> "In terms of s 14 of the High Court Act [*Chapter 7:06*], at the instance of any interested party this court may inquire into and determine any existing, future or contingent right or obligation. The circumstances under which this court grants a declaratory order are well settled. The approach of the court involves a 2 stage inquiry during the first of which the court enquires whether the applicant is an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The second stage of the inquiry involves the decision by the court, notwithstanding the finding in the first stage that the applicant has a direct interest, whether or not the case in question is a proper one for the exercise of its discretion under s 14. See *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at 343 F – 344 A – E. *Gama N.O* v *Mpofu & Ors* 2016 (1) ZLR 496 (H) at 498 E – G."

In *casu* it is common cause that the applicant is an interested person in the subject matter of suit. It is common cause that the respondent failed to conduct a disciplinary hearing within the time prescribed in the Code of Conduct. Despite that failure, the respondent has refused to uplift the applicant's suspension. The applicant continues to be on suspension. An employee cannot be on suspension indefinitely. The employer cannot hide behind the reason that the failure to hold the disciplinary hearing is not of its own making. Faced with the situation of an impasse with the Workers' Committee which disabled it from holding the disciplinary hearing, the respondent being the employer that had charged and suspended the applicant, it could have referred the matter to a labour officer in terms of s 101 (6) of the Labour Act. It had that option if it had really wanted to deal with the matter and finalize it timeously. However, it chose not to take that option and made the applicant to remain on suspension without the applicant having consented to it. The continued suspension cannot therefore be lawful. The continued suspension outside the 40 days stipulated in s 6:15 of the Code of Conduct which is the period within which the hearing ought to have been concluded is unlawful.

The continued suspension being unlawful the next question that needs to be answered by this court is, is this a proper case for the exercise of its discretion under s 14? In other words is this a proper case for this court to grant a *declaratur?*

In *Puwayi Chiutsi* v *The Sheriff of the High Court & Others, supra* at p 11 MATHONSI J went on to say,

> "Discussing what constitutes a proper case for the grant of a declaratory order WILLIAMSON J concluded in *Adbro Investments Co Ltd* v *Minister of the Interior & Ors* 1961 (3) SA 283 (T) at 285 C;
> "I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."
> See also *Johnsen* v *Agricultural Finance Corp* 1995 (1) ZLR 65 (H). *Reinecke* v *Incorporated General Insurance Ltd* 1974 (2) SA 84 F (A)."

Looking at the circumstances of this case and the fact that the applicant had and still has an effective remedy under s 101 (6) of the Labour Act at his disposal, I am not inclined to grant the *declaratur* he is seeking. It was neither the applicant's nor the respondent's fault that a disciplinary hearing could not be conducted in terms of the Code of Conduct. The Workers' Committee is to blame for refusing to second its representatives to the Disciplinary Committee thereby making it impossible to conduct a disciplinary hearing. With neither party being to blame and with the respondent being reluctant to refer the matter to a labour officer in terms of s 101 (6) of the Labour Act, the applicant could have employed the same provision and approached a labour officer for a disciplinary hearing to be conducted as he was advised by the respondent if he felt that he could not wait for the impasse between the respondent and the Workers' Committee to be resolved. He also had that remedy at his disposal, but he chose not to employ it. The legal authorities I have cited above make it clear that if an employee opts to approach this court instead, he should seek the remedy of a *mandamus* to compel the conducting of the disciplinary hearing by the employer. This means that when the applicant opted not to approach the labour officer in terms of s 101 (6) of the Labour Act, but opted to approach this court, he should have applied for a *mandamus* to compel the disciplinary proceedings to be conducted. This therefore means that his remedy lies in having the disciplinary proceedings conducted. The disciplinary proceedings cannot be conducted on the basis of the applicant having obtained a *declaratur*, but a *mandamus.* Consequently, there is no point in granting the *declaratur* that the continued suspension is unlawful

when there will not be any tangible and justifiable advantage that will flow from the grant of the *declaratur*. The applicant will still not be reinstated at work by virtue of the *declaratur*. For this to happen, a disciplinary hearing has to be conducted first. As already discussed above, the applicant has two remedies that he can pursue that are at his disposal if he wants the disciplinary proceedings to be conducted. In light of this, in the exercise of my discretion I decline to grant the *declaratur* the applicant is seeking.

As I have already discussed above, an employee validly suspended does not, because of delay alone, become entitled to reinstatement. What he is entitled to is having the disciplinary proceedings conducted. This therefore means that the applicant cannot be granted the consequential relief of reinstatement that he is seeking.

*Costs*

The respondent being the employer that suspended the applicant, it should have taken the initiative to refer the matter to a labour officer when it realized that the Workers' Committee was disabling it from convening the disciplinary hearing, but it did not. It did not even take the initiative to write to the applicant advising him of the predicament it was in and that because of that it was unlikely to be able to convene the disciplinary hearing within the stipulated time. It waited until the applicant had written to it twice well after the expiration of the 40 days seeking to be reinstated to advise him of the reason why it had failed to conduct the disciplinary hearing. That is when it advised him that he could approach a Labour Officer in terms of s 101 (6) of the Labour Act if he was unable to wait for the impasse between it and the Workers' Committee to be resolved. The respondent's conduct showed lack of concern about the applicant's situation and the prejudice he was suffering. He was on suspension without pay. An employer cannot charge an employee, fail to deal with him within the stipulated time limits and not care what happens to him simply because it is the employee who suffers prejudice. If the respondent did not want to refer the matter to a labour officer, it should have at least written to the applicant advising him of the predicament it was in for him to take whatever action he deemed necessary instead of waiting for the 40 days to lapse and for the applicant to write two letters to it seeking reinstatement. It took no action and just continued with the unlawful suspension of the applicant as if everything was normal. In view of this reprehensible conduct by the respondent, I am not going to award costs to it although the applicant has lost this case.

In the result, it be and is hereby ordered that:-

1. The application is dismissed.
2. Each party is to bear its own costs.

*Thondhlanga & Associates*, applicant's legal practitioners
*Kantor & Immerman*, respondent's legal practitioners