BENARD W BARE
and
NYARADZO MATINDIKE
versus
FIDELITY LIFE ASSURANCE OF ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 June 2019 & 19 June 2019

Opposed Application

M Mbuyisa, for the applicants
W Mafusire, for the respondent

MATHONSI J: The applicants were employed by the respondent as management employees, the first applicant was the General Manager – Finance and Administration while the second applicant was the General Manager – Life & Health. They were separately charged with several charges of misconduct in terms of the registered Employment Code of Conduct of the employer. The first applicant was charged with 7 counts ranging from fraud to unsatisfactory work performance in breach of ss 7.5.8 and 7.5.3 of the Code of Conduct. He was found guilty in respect of 5 charges and found not guilty on the remaining 2 charges and dismissed from employment.

The second applicant faced 5 charges of misconduct also involving fraud, violation of conflict of interest and causing prejudice in the purchase of property from the employer at a price lower than the authorised price. She was found guilty in respect of 3 of the 5 charges and found not guilty of the other 2 charges. The second applicant was also dismissed from employment.

The two separately appealed in terms of s 5.7.8 of the Employment Code of Conduct to the managing director. The first applicant's appeal was lodged on 18 July 2018 while that of the

second applicant was lodged on 11 July 2018. Up to now both appeals have not been determined. This has forced the 2 of them, acting in liaison, to launch this application for a mandatory interdict compelling the employer to determine the appeals as provided for in the Code of Conduct. They stated that upon realising that the employer had not determined the matters within a period of one month of the noting of the appeals, they requested the record of the disciplinary proceedings to enable them to pursue their rights through a Labour Officer in terms of s 101 (6) of the Labour Act [*Chapter 28:01*].

Indeed a labour officer was seized with the matters for quite some time from 13 September 2018 and even set the matters down for hearing on 2 separate occasions but the respondent failed to co-operate. First, the respondent failed to release the record of disciplinary proceedings or to submit same to the labour officer. Second, the respondent did not bother to attend the hearings on the dates fixed by the labour officer after giving excuses. In the end, without the record and in the absence of the respondent, the labour officer, washed his hands in typical Pilate style, as he could not determine the matter without the record of proceedings and in the absence of the respondent.

Finding themselves in a fix their appeals not having been determined and with the respondent exhibiting clear signs of disinterest as time went on, the applicants made this application in order to assert their rights of appeal as enshrined in s 5.7.8 of the employer's Code of Conduct. This they say they elected because the law enjoins them to exhaust all domestic remedies before approaching external tribunals for the resolution of their labour dispute. The failure by the respondent to determine their appeals within a reasonable infringes upon their rights as entrenched in the Code of Conduct and the law. As it is now, it has been close to a year but the appeals remain unresolved.

The respondent has opposed the application. Its position as stated in the opposing affidavit of Rueben Java, its Chief Executive Officer, is that the applicants' employment contracts were lawfully terminated after due process had been complied with and the respondent's determination in that regard is unassailable. According to the respondent, there is no basis for compelling it to determine the appeal because the matter was referred to a labour officer who is now seized with it and must therefore determine the appeal. It is a question of the

respondent abdicating its responsibility and deferring to the labour officer the role given to it by the Employment Code of Conduct.

Java stated further that the respondent cannot determine the appeals because the Managing Director or Chief Executive Officer (the terms are used interchangeably), is conflicted, he having been the complainant during the disciplinary hearings. Although he is the one reposed with the power and authority of an appeals authority he could not perform that function. As a result, the applicants were advised to submit their appeals to a labour officer, which was done. As things stand, the labour officer is the one who should perform appellate function in terms of s 101 (6) of the Labour Act [*Chapter 28:01*].

In that regard the applicants have no business being in this court because they have an alternative remedy. In the case of the labour officer being incapacitated by the absence of the record of proceedings, s 124 (4) (a) of the Labour Act should have been utilised for the labour officer to "request the record of proceedings" from the respondent. Mr *Mafusire* who appeared for the respondent added that if the respondent failed to avail the record of proceedings as requested, the labour officer should have compelled it to provide the record of proceedings. He did not explain why the respondent needed to be "requested" or indeed "compelled" to avail the record of proceedings. Neither could he advert to any provision in the law entitling the labour officer to compel the parties but still maintained that the relief sought is incompetent.

It is common cause that the applicants did refer the dispute to a labour officer by letter written by their legal practitioners on 13 September 2018 while at the same time the respondent was required to forward the record of proceedings to the labour officer. It is common cause that the record was never availed to the labour officer or the applicants. Indeed the labour officer did serve the parties with a notice of hearing set for 31 October 2018 at 11:00 hours. The respondent did not attend. It is also common cause that when the matter was again set down for 7 November 2018 by notice served on the respondent on 1 November 2018, the respondent still did not attend. In the end the labour officer could not intervene and the applicants say that he could not be of any further assistance to them forcing them to seek recourse in this court.

Mr *Mbuyisa* for the applicant submitted that having been dismissed by the employer in terms of its registered Code of Conduct, the applicants have a clear right of appeal against that determination. Where they have exercised that right of appeal they have an even clearer right to

have the appeals determined in terms of the Code of Conduct. If the right is infringed upon they are entitled to approach this court for a mandamus to compel the respondent to determine the appeals as required by the Code of Conduct. He submitted further that the applicants have no effective alternative remedy other than the relief they seek because those suggested by the respondent do not meet the threshold of effective, reasonable and adequate remedies as to disentitle the applicants to the relief sought.

This is because the suggested resort to a labour officer is not available to the applicants because the respondent failed to avail the record of proceedings to the labour officer who can only determine the appeals on the 4 corners of the record. It is for this reason that the labour officer washed his hands of the matter especially as the respondent did not bother to attend the hearing on 2 separate occasions. The applicants could not reconstruct the record either not having been the custodians of all the documents.

An appeal by a managerial employee in governed by ss 5, 7.7 to 5.7, 12 of the Fidelity Life Assurance of Zimbabwe (Pvt) Ltd Employment Code of Conduct. They provide:

> "5.7.7 An appeal against the Designated Officer shall be made to the Managing Director.
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> 5.7.8 Where a managerial employee is dissatisfied by the decision of the Designated Officer, he shall cause a copy of the proceedings to be submitted to the Managing Director together with the reasons for his appeal within seven days of the verdict.
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> 5.7.9 The Managing Director shall consider the appeal on the papers and shall advise the employee concerned of the decision of the appeal in writing. The decision of the Managing Director is final.
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> 5.7.10 A managerial employee who is not satisfied with the decision of the Managing Director shall appeal to the Labour Relations Officer within fourteen (14) days from the date of receiving the decision of the Managing Director.
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> 5.7.11 Where the Designated Officer is the complainant, another General Manager shall preside over the matter.
>
> 5.7.12 Where the complaint is against the Managing Director, the appeal will be made to the Human Resources Committee of the Board of Directors. The Committee's decision will be final."

Mr *Mafusire* was clearly wrong in referring to the procedure set out in Part Three,

s 6.5 of the Employment Code of Conduct. In doing so he submitted that the applicants should have followed stages Three and Four of the "Procedure for Managerial Employees." Stage four is stated as:

> "If the employee with a grievance is not satisfied with the decision of the Managing Director, he shall appeal to the Labour Relations Officer within 14 days of being informed of the decision."

The procedure alluded to by Mr *Mafusire* relates to Grievance Procedure as opposed to appeal procedure. It has no application whatsoever to the facts of the present matter where the managerial employees lodged appeals to the Managing Director against the decisions of the Designated Agent dismiss them from employment. The Code requires that such appeals be determined by the Managing Director.

It is true the Managing Director could not sit in judgment over appeals in which he was the complainant but that is the employer's problem. The employer cannot have its cake and eat it at the same time. It is the employer which desires to dismiss the employees. It set about doing so thereby entitling the employees to the remedies of appeals provided for in the Code of Conduct. The employer is not at liberty to say that "because our Managing Director is conflicted, that becomes your problem. We will not do anything and it is up to you to look for recourse elsewhere." Disciplinary action in terms of the Code of Conduct must be exhausted in terms of that code including exhausting the appeal procedure provided for therein. It is naïve to say that the decision to dismiss is unassailable and the matter must end there without exhausting the internal remedies available.

I do not agree that where the Managing Director is conflicted the employer is exempted from facilitating the constitution of an appeal tribunal. It is trite that a deficient code of conduct must be interpreted sensibly in order to make it effective and to achieve its purpose, which in this case is to accord the employees their right of appeal. In that regard Mr *Mbuyisa* drew my attention to the case of *Duly Holdings* v *Chanaiwa* 2007 (1) ZLR 1 (S) at 6 B-C where the following is stated:

> "The appellant argues, correctly that the adoption of disciplinary procedures not specifically outlined in the code finds support in *ZFC* v *Gaza* 1998 (1) ZLR 137 (S), where this court emphasised the importance of flexibility in the conduct of disciplinary tribunals, and the principle that they were there to conduct an enquiry. It cannot, in my view, be said in this case that the disciplinary tribunal did not conduct an enquiry."

In fact in this particular case the Code itself shows the way as to what should happened where the Managing Director is compromised. Section 5.7.12 allows for a matter to be referred to the Human Resources Committee of the Board of Directors where the complaint is against the Managing Director. By parity of reasoning one would want to believe that even where the Managing Director is conflicted by reason of being the complainant the matter should be referred to that Committee. Therefore if one is flexible and interprets the Code sensibly, as the authorities require, it means that the respondent should constitute an appellate tribunal from personnel in the Board of Directors. In any event it is for that reason that the Designated Officer who presided over the disciplinary proceedings is a board member.

But then one senses a deliberate and concerted effort on the part of the employer to frustrate the appeals. There is a discernible element of arrogance in the manner in which the employer has been steadfast that it will do nothing to accord the employees their rights. When the appeals were noted the employer did nothing. When the matter was referred to a labour officer, the employer did not attend making excuses. When the record of proceedings was requested, it was not provided either to the employees or the labour officer. When this application was made, it was resisted on the ground that either the employees or the labour officer should have "requested" the record of proceedings and if the request was not responded to the employer should have been "compelled".

What is that? What kind of an employer is this? It is clearly using its financial muscle to stretch the employees to the limit in the hope that they would despair and capitulate. Perhaps NTSEBEZA AJ had in mind a case like this in *Khoza* v *Sasol Ltd* [2002] 9 BLLR 868 LC when he made the following remarks:

> "I have yet to encounter a worse case where there is a more callous disregard of the prejudice that an employee suffers when the wheels of justice are deliberately slowed down by a resort of obfuscation by those who flaunt their financial muscle in what appears to be an obscene game of cat and mouse in which the only loser can be the employee. In the unequal contest between a multi-billion rand empire that the employer is, and an unemployed person, as was submitted by Mr Spoor, all you have to do is to wear down the resolve of your less endowed opponent, tire him out and hope that he will go away, his quest for justice abandoned. Delay the day when he can get justice, and you can then thereby deny him justice."

See also *Madhuku* v *Redcliff Municipality* HB 348-17.

I reject completely the submissions made on behalf of the respondent that the applicants have an alternative remedies. It is settled in this jurisdiction that in order to defeat an application

for a mandatory interdict it must be shown that the alternative remedy is adequate in the circumstances, is ordinary and reasonable; is a legal remedy and grants similar protection. See the remarks of GUBBAY CJ in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (5) at 56A-D where the learned Chief Justice said:

> "An application for a *mandamus* or 'mandatory interdict', as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz* v *Wattrus N.O* 1980 (1) SA 662 (T) at 673 C-D; *Kaputuaza and Anor* v *Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 (SWA) at 317E: These are;
> 1. A clear or definite right-this is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection."

I am satisfied that all these requirements are met in this case. The applicants have the right of appeal to the Managing director which has been infringed thereby causing prejudice. No adequate alternative remedy has been suggested in opposition. The facts speak for themselves. The applicants tried the s (101) (6) route and came unstuck because of the intransigence of the respondent who could not avail the record of proceedings until the Labour Officer gave in. To say that s 125 (4) should have been applied is to misinterpret the law because the demand for a record of proceedings provided for therein is one made by either a labour officer; or a designated agent. It is not a remedy available to the applicants.

A case has been made for the relief sought. The respondent must constitute an appellate tribunal through the Human Resources Committee of the Board to determine the appeals or any other body or individual meeting the stature of the conflicted Managing Director.

In the result, it is ordered that:

1. The respondent and is hereby directed to hand down a determination on the appeal filed by the first applicant on 18 July 2018 and by the 2nd applicant 11 July 2018 within seven (7) days of service of this order upon it.
2. The respondent be and is hereby directed to compile complete records of proceedings consisting of the minutes of the disciplinary hearing, the evidence tendered and any other material relied upon by the parties during the disciplinary hearings and deliver the complete records to the applicants within seven (7) days of service of this order.
3. The respondent shall bear the costs of suit on a legal practitioner and client scale.

Mtetwa & Nyambirai, applicants' legal practitioners
Matsikidze & Mucheche, respondent's legal practitioners