ELIZABETH CHIPUNZA
versus
NATIONAL EMPLOYMENT COUNCIL FOR THE IRON AND STEEL INDUSTRY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 June & 23rd October 2019

Opposed Application

B Makururu, for applicant
G Ndlovu, for respondent

TAGU J: This is an application for an inquiry into and the determination of existing, future or contingent rights or obligations. The application is made in terms of section 14 of the High Court Act [Chapter 07.06]. The applicant prays that the court makes an inquiry into the effect of the Labour Amendment Act [No. 5] of 2015 in relation to the termination of employment contracts on notice after 17th July 2015 in so far as this affects the laws regulating retrenchment. In short the applicant want the court to determine whether or not the applicant's administrative and constitutional rights have been violated by the respondent in the manner in which it purportedly exercised its right in terms of section 12 (4a) (d) of the Act.

The facts giving rise to this application are that 0n the 7th of March 2016 the respondent issued the applicant with a notice of termination of her contract of employment. The termination was purportedly carried out in terms of section 12 (4a) (d) of the Labour Act [*Chapter 28.01*].
The respondent raised a point *in limine* that this court has no jurisdiction to deal with the matter. The argument being that this is simply a labour matter determinable by the Labour Act. It was submitted that in terms of s 89 (2) (c) (iii) of the Labour Act the High Court has no jurisdiction. Reference was made to the cases of *DHL International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 204(H), *McCosh* v *Pioneer Corporation Africa Ltd* 2010 (2) ZLR 211, *ZIMASCO* v *Marikano* 2014 (1) ZLR 1 (S) and *Aswel Nyanzara* v *Mbada Diamonds (Private) Limited* HH -63-15 at p12.
The applicant opposed the point *in limine* and submitted that the High Court has jurisdiction. It was submitted by the applicant that this is an application for declaratory order and the Labour

Court cannot issue a declaratory order. It was submitted further that the High Court has jurisdiction over all civil matters. In support of her submission the applicant relied on the cases *Innocent Chitiki* v *Pan African Mining (Private) Limited* HH-656/16, *Aswel Nyanzara* v *Mbada Diamonds supra and EX-Constable Thibi Maluleki* v *Commissioner General Police +2* HH 132/19. It was further submitted that sections 56 (1) and 68 (2) have been violated thereby taking the matter outside the Labour Act. However, a concession was made that there are conflicting judgments on the matter.

Having read the authorities cited by the counsels it is indeed correct that there are conflicting judgments on the issue of Jurisdiction of the High Court. However, in some cases it was ruled that the jurisdiction of this court has not been ousted in matters involving an admitted indebtedness by the employer to an employee even if such indebtedness arises from a labour relationship. There is extensive discussion on the issue by KUDYA J in *McCosh* v *Pioneer Corporation Africa Limited supra.* MAKARAU J (as she then was) in the case of *DHL International (Pvt) Ltd* v *Clive Madzikanda supra* said-

> "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 for in the Act."

In the case of *Aleck Kabichi* v *Minerals Marketing Corporation of Zimbabwe* HH-38-18 CHAREWA J refused to exercise jurisdiction over a matter involving unfair labour practice. She commented as follows-

> "I therefore find that the plaintiff has brought his claim before the wrong court as the Labour Act provides that the Labour Court shall be the exclusive court of first instance to remedy any unfair labour practice. The jurisdiction of the High Court, as a court of first instance in labour matters, is thus ousted by operation of the law, [s 171 (2) and s 172 (2) of the Constitution as read with s 89 (6) of the Labour Act]."

The common thread that I found in most of the authorities cited is that what determines whether or not the High Court has jurisdiction is the relief sought. For example where the relief sought is an interdict though it involves a labour matter, the High Court has jurisdiction because the Labour Court has no jurisdiction to grant interdicts. In short the functions bestowed upon the Labour Court under subsection (1) of section 89 of the Act are the following:

> "(a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
> (b) hearing and determining matters referred to it by the Minister in terms of this Act; and

(c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
(d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section ninety-eight to hear and determine an application;
(d1) exercising the same powers of review as would be exercisable by the High Court in respect of labour matters; and
(e) doing such other things as may be assigned to it in terms of this Act or any other enactment."

In the present case what is being sought are declarators that-

1 "The purported retrenchment of the Applicant by the Respondent on 07 March 2016 violates section 56 (1) and 68 (1) and (2) of the Constitution and consequently null and void.

2 Section 12 (4a) (d) of the Labour Act [Chapter 28.01] does not extinguish the need to follow retrenchment procedures as set out in section 12C of the Labour Act [*Chapter 28.01*]. consequently, Respondent's failure to follow the retrenchment process, including special measures to avoid retrenchment renders Applicant's purported retrenchment by Respondent fatally defective and consequently null and void.

3 An employer's failure to comply with section 12 (4a) of the Labour Act [*Chapter 28.01*] renders the minimum package set out in section 12C of the same Act inapplicable. Consequently, in the event that Respondent is not willing to reinstate Applicant following its failure to abide by section 12 (4a) (d) of the Act, the quantum of damages due to Applicant must be determined in terms of section 89 (2) (c) (iii) of the Labour Act [*Chapter 28.01*]. Consequently, Applicant is entitled to seek recourse in such event, in terms of section 93 of the Labour Act [*Chapter 28.01*].

4 Respondent shall bear costs of this application."

According to the applicant this court has jurisdiction over all civil matters. She therefore submitted that the Labour Court cannot issue declaratory orders.

My reading of the reliefs sought by the applicant clearly shows that the applicant intends this court to make three declarations. The first one being that the purported retrenchment of the applicant violated section 56 (1) and 68 (1) and (2) of the Constitution of Zimbabwe. The second one being that section 12 (4a) (d) of the Labour Act does not extinguish the need to follow retrenchment procedures as set out in section 12C of the Labour Act and thirdly that an employer's failure to comply with section 12 (4a) of the Labour Act renders the minimum package set out in section 12C of the same Act inapplicable.

It follows therefore, in my view that s 89 (6) does not oust the jurisdiction of all other courts at first instance in relation to all labour matters. To that extent I agree with the applicant that while the Labour Court has exclusive jurisdiction to deal with all labour matters, it cannot make declaratory orders. The High Court therefore is the appropriate court to make such declaratory orders hence this court has jurisdiction to hear this matter. I therefore dismiss the point *in limine*.

I will proceed to deal with the application. The applicant wants this court to make an inquiry into the effect of the Labour Amendment Act [No. 5] of 2015 in relation to the termination of employment contracts on notice after 17 July 2015 in so far as this affects the laws regulating retrenchment.

What happened in this case is that the applicant was an employee. Her status in the employ of the employer was not clearly stated neither was the employer stated. What is clear is that on the 17th of February 2016 she was served with a notice to go on immediate leave by the Chairman of the National Employment Council for the Engineering and Iron and Steel Industry. The notice read as follows-

> "RE: IMMEDIATE LEAVE
> You are hereby ordered to go on immediate leave with pay and benefits.
> The leave is for fifteen working days with effect from 17th February to 4th March 2016. The leave period may be increased or shortened."

Then on the 7th of March 2016 she was served with a Notice of termination of contract of employment. The notice of termination reads as follows:

> "Notice of termination of contract of employment in terms of section 12 (4a) (d) of the Labour Act (Chapter 28.01)
>
> This letter serves to give you notice of termination of your contract of employment by the employer in terms of section 12 (4a) (d) of the Labour Act. In terms of section 12C of the Labour Act, the employer shall pay you one month's salary for every two years served as compensation for your loss of employment.
>
> You shall no longer be required to report for duty with effect from the date of receipt of this letter.
>
> Yours Faithfully
>
> FOR AND ON BEHALF OF NEC ENGINEERING
>
> COUNCIL CHAIRMAN"

In her founding affidavit the applicant submitted that the termination of employment is purportedly issued in terms of section 12 (4a) (d) of the Labour Act [*Chapter 28.01*]. She further submitted that in terms of that section, termination on notice is only permissible if the termination on notice is pursuant to retrenchment in terms of section 12C of the Act. However, the notice of termination does not make reference to any retrenchment process as having been carried out before the act of termination was effected. The failure to follow the retrenchment process set out in section 12C infringes upon her constitutional right to the equal benefit and protection of the law and renders the termination of her employment unconstitutional and consequently void. She further submitted that if the notice was meant to be the notice of retrenchment as opposed to being the final act of termination of employment, it is also fatally defective in that it is not addressed to the Retrenchment Board. Ordinarily, notices of retrenchment are given to the works council, and in the absence of a works council, the notice must be issued to the employment council if the majority of the workers agree, and in the absence of either the works council of the employment council, the notice of retrenchment must be sent to the retrenchment board. In her case, there was no works council in Respondent's set up, and respondent was not a member to any employment council. This made it imperative for the notice of retrenchment to be sent to the Retrenchment Board. Respondent's failure to give notice to the Retrenchment Board of its intention to retrench her renders the notice fatally defective on this point too as it is a further denial of her right to equal benefit and protection of the law.

Section 12 (4a) (d) reads as follows-

"No employer shall terminate a contract of employment on notice unless –

(a) the termination is in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or
(b) the employer and employee mutually agree in writing to the termination of the contract, or
(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 section 12C." (my underlining).

In casu it shows that the employer decided to terminate the applicant's contract of employment in terms of section 12 (4a) (d). Where this happened the provisions of section 12C shall apply. Section 12C reads as follows-

"(12C Retrenchment and compensation for loss of employment on retrenchment or in terms of section 12 (4a)

(1) An employer who wishes to retrench any one or more employees shall –

(a) give written notice of his or her intention -
(i) to the works council established for the undertaking ; or
(ii) if there is no works council established for the undertaking or if a majority of the employees concerned agree to such a course, to the employment council established for the undertaking or industry ; or
(iii) if there is no works council or retrenchment council for the undertaking concerned, to the Retrenchment Board, and in such event any reference in this section to the performance of functions by a works council or employment council shall be construed as a reference to the Retrenchment Board or a person appointed by the Board to perform such functions on its behalf;
and
(b) provide the works council, employment council or the Retrenchment Board, as the case may be, with details of every employee whom the employer wishes to retrench and of the reasons for the proposed retrenchment; and
(c) send a copy of the notice to the Retrenchment Board."

What is clear in my view, is that before 17th July 2015 an employer or employee could terminate a contract of employment on notice. This was confirmed by the Supreme Court in the case of *Don Nyamande and (2) Kingstone Donga* v *Zuva Petrolem (Pvt) Ltd* SC-43/15 that underscored the following points-

1. The employer's common law right to terminate a contract of employment on notice can only be limited, abolished or regulated by an Act of Parliament or a Statutory Instrument that is clearly intra vires an Act of Parliament.
2. That section 12B does not abolish employer's common law right to terminate employment on notice in terms of an employment contract.
3. That the right to terminate the contract on notice is derived from the common law and Section 12 (4) of the Act only regulated the exercise of that right.
4. That Section 12(4) stated that the right to terminate on notice should apply to both the employer and the employee.
5. That there are many forms of termination of employment which include termination on notice. Termination by way of dismissal and termination by way of retrenchment among others.

It is therefore critical to note that the Supreme Court case of *Don Nyamande and Kingstone Donga* v *ZUVA Petroleum supra* is still extant and binding to retrenchments on notice to cases that occurred before 17 July 2015 since the same has not been overturned. In my view the Labour Amendment Act No. 5 of 2015 did not abolish or outlaw termination on notice. For avoidance of doubt the Labour Amendment No. 5 of 2015 which was published on the 26th of August 2015 and

came into operation on the same day under Government Notice 237A/15 reinforced the employer's right to terminate an employee's contract of employment on notice via an amendment to the old section 12 of the Labour Act by the insertion of section 12 (4a). What the Labour Amendment Act No. 5 of 2015 did was to widen the grounds upon which an employer can terminate an employee's contract of employment on notice and stipulate the compensation payable to an employee for such loss of employment by the insertion of after subsection (4) of section (4a). It further added subsection (4b) which stipulates that-

> "(4b) Where an employee is given notice of termination of contract in terms of subsection (4a) and such employee is employee under the terms of a contract without limitation of time the provisions of section 12C shall apply with regards to compensation for loss of employment."

However, the case of *Don Nyamande (2) Kingston Donga* v *Zuva Petroleum (Private) Limited supra* was delivered on the 17th of July 2015. The Labour Amendment Act (No. 5) of 2015 was published and came into operation on the 26 August 2015. This Act added extra conditions under which an employer can terminate an employee's contract of employment on notice. These conditions were not available when the ZUVA case supra was heard. *In casu* the applicant's notice of termination of employment was made on the 7th of March 2016 after the Amendment came into operation. While the respondent maintained that the notice it served on the applicant was lawful I did not hear the respondent to explain whether or not the extra condition were complied with. These conditions are contained in section (4a). In my view while the employer was right to give notice in terms of section 12 (4a) (d) it failed to comply with the provisions of section 12C in that it failed to give written notice of its intention to retrench to a works council, the Retrenchment Board or to get consent of the applicant. Further the respondent fell short of the provisions of section 56 (1) of the Constitution of Zimbabwe which provide that -

> "(1) All persons are equal before the law and have the right to equal protection and benefit of the law."
> Further the respondent failed to comply with the provisions of section 68 (1) and (2) of the Constitution of Zimbabwe which provide that –
> (68 Right to administrative justice
> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

The respondent in its heads of argument did not even address the issue. The effect of the Amendment Act is that any retrenchment notice given after the 17th of July 2015 must comply with the provisions of section 12C. To that extent the notice is null and void. The application therefore succeeds.

IT IS DECLARED THAT

1. The purported retrenchment of the Applicant by the Respondent on 07 March 2016 violates section 56 (1) and 68 (1) and (2) of the Constitution and consequently null and void.
2. Section 12(4a) (d) of the Labour Act [*Chapter 28.01*] does not extinguish the need to follow retrenchment procedures as set out in section 12C of the Labour Act [*Chapter 28.01*]. consequently, Respondent's failure to follow the retrenchment process, including special measure to avoid retrenchment renders Applicant's purported retrenchment by Respondent fatally defective and consequently null and void.
3. An employer's failure to comply with section 12 (4a) of the Labour Act [*Chapter 28.01*] renders the minimum package set out in section 12C of the same Act inapplicable. Consequently, in the event that Respondent is not willing to reinstate Applicant following its failure to abide by section 12 (4a) (d) of the Act, the quantum of damages due to Applicant must be determined in terms of section 89 (2) (c) (iii) of the Labour Act [Chapter 28'01]. C0onsequently, Applicant is entitled to seek recourse in such event, in terms of section 93 of the Labour Act [Chapter 26:01]
4. Respondent shall bear costs of this application.

Makururu & Partners, applicant's legal practitioners
Gill Godlonton & Gerrans, respondent's legal practitioners