

SHADRECK MOYO
and
ALEXIO CHIKOPFA
and
JOSEPH MARAVANYIKA
and
TEDIOUS MUBAIWA
and
GOODSON UZANI
and
CHARLES MAGANGA
and
BATAI MAPARADZE
and
DAVID CHIMUNGU
and
DAVID VASHIKINO
and
SHEPHERD CHIDHAKWA
and
ENOCK MANANZWA
and
JEFFEY BHANDE
and
GIBSON PHIRI
and
WEBSTER JECHE
versus
CENTRAL AFRICA BATTERIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 15 November 2022, 6 February & 19 September 2023

Opposed Matter

Applicant in person
Mr *J Makanda*, for the respondent

MUNANGATI-MANONGWA J: The applicants and the respondent have a long litigation history spurning for over 20 years. In *casu* the applicants who are former employees of the respondent seek the following order after this court granted an application for amendment of the initial draft order:

1. It is declared that in terms of s 85(1) of the Constitution the conduct of the respondent violated the applicant's fundamental rights and freedoms enshrined in [*Chapter 4*] provided for under ss 51,53, 56, 65,68,69,75,76,77,78,80,81 and 82 of the Constitution.
2. It is declared that the respondent comply with the determination no. 0019/38/99 upheld by the Supreme Court in judgment No. SC 66/02
3. It is declared that the respondent comply with the quantification process ordered by the Labour Court in judgment LC/H/236/21
4. It is declared that the Respondent shall pay an award of the compensation provided for in section 85(1) of the Constitution as sought in the application.
5. The respondent shall pay the applicant's legal costs incurred in pursuing the infringements of rights.

The background facts are that in 1997, the applicants were suspended from work without pay pending an application to the Ministry of Labour for the dismissal from work after they participated in a collective job action. A Labour Relations Officer ordered reinstatement without loss of salary and benefits. The respondent appealed against that decision to a Senior Labour Relations officer. The appeal was successful and the Senior Labour Relations Officer granted permission for the applicants' dismissal but ordered the respondent to pay applicants their terminal benefits within 15 days of receipt of the determination. The applicants ultimately appealed to the Labour Tribunal without success. An appeal to the Supreme Court against the determination of the Labour Tribunal did not yield any positive results to the applicants herein. The Supreme Court in Case No SC 66/02 upheld the dismissal on 18 June 2002 upon finding that the collective job action was unlawful. After 7 years the applicants approached this court and claimed US\$275 375.08 for outstanding salaries and benefits and US\$500 000 general damages for lost earnings in HC 5958/09. This court ruled that the applicants had no cause of action against the respondent other than payment of terminal benefits and granted absolution from the instance for the claim based on the fact that terminal benefits at the date of dismissal and the claimed loss of earnings

were not proven. The applicants appealed against the High Court judgment and the Supreme Court in Case No SC 26/13 dismissed the appeal with costs.

The applicants approached the Labour Court seeking quantification of terminal benefits from time of dismissal. The application was struck of the roll with the Labour Court Judge stating in judgment under LC/H/236/21 that “...this court has no powers to sit to quantify the damages for the deducted but unremitted benefits as well as the general damages that the applicants are seeking. The power is reposed in the Labour Officer by virtue of the provisions of s 93 of the Labour Act [*Chapter 28:01*].” Undeterred the applicants approached a Labour Officer for the quantification of their terminal benefits. The respondent raised the defence of prescription. Both parties made submissions on the issue and judgment was reserved by the Labour Officer.

In this application the applicants allege that the respondent has defied orders to pay them hence it has violated their constitutional rights. The applicants cite the Labour Court judgment LC/H/236/21 and argue that the said judgment proves the validity of applicant’s claim for payment of its benefits which respondent is refusing to pay. For purposes of clarity, the matter was struck of the roll by the Labour Court. The respondent vehemently opposed this application in the process raising several points *in limine* being:

i. Jurisdiction

The respondent contended that this court has no jurisdiction to hear this matter as same pertains to a labour matter and in the light of the provisions of the Labour Act the dispute resolution structures set up by the relevant Act have the jurisdiction to hear and determine the matter in the first instance. In that regard the respondent maintained that this court had no jurisdiction to entertain the matter.

ii. *Res judicata*

The respondent contended that the applicant is raising the same issue raised and previously adjudicated upon by this court, the Labour Court and the Supreme Court. The Labour court dismissed the application relating to the same claim and that Labour Court judgment is still extant. Reference was also made to the substantive findings by the Supreme Court which pertain to the same issues being raised in this matter.

iii. Prescription

The respondent contends that the matter has prescribed given that the cause of action arose in 1998. The respondent argued that applicants' claim has prescribed in terms of s 94 of the Labour Act. It was argued that even if it were to be taken that the claim is in terms of the common law the claim cannot be sustained due to the provisions of s 15 (d) of the Prescription Act.

iv. *Lis pendens*

The respondent contended that the matter is pending before a Labour Officer involving the same cause of action and the same subject matter wherein the applicants sought to have the benefits quantified. The respondent states that it raised a point in *limine* that the matter has prescribed and the parties await a ruling as the Labour Officer reserved the ruling. In that regard the respondent contends that this court cannot hear the matter as same has not been withdrawn.

v. Application is vague and argumentative

The respondent contends that the application makes reference to numerous sections in the Constitution and the Labour Act and that it is unclear how the applicants who had a cause of action arising in 1998 acquired rights from the 2013 Constitution in the absence of retrospective application of the provisions of the cited Constitution. The respondent argued that due to the vagueness the only proper way to deal with the application will be to dismiss it.

On the merits the respondents denied refusing to comply with any court order and violating any constitutional rights. The respondent contends that the Supreme Court decision SC 66/02 in fact upheld the decision that the collective job action was unlawful. That in the absence of quantification there cannot be any violation of rights. Further the respondent maintains that the claim is not for a declaratory order but rather a claim for damages as the founding affidavit would show.

Mr *Makanda* for the respondent submitted that there is no substantiation of the allegations of infringement of fundamental rights entitling the applicants to approach the court for relief in terms of s 85 and s 86 of the Constitution. The respondent contends that nothing was placed before the court apart from referring to a refusal to pay terminal benefits. The respondent states that no

such refusal ensued except after the matter has prescribed, thus, it is argued there is no cause of action as there was no violation of rights. He urged the court to consider that after the letter of September 2009 there is a Supreme Court judgment SC 26/13 where MALABA DCJ (as he then was) made a finding that in compliance with an order of the Senior Labour Relations Officer the respondent called the applicants to collect their benefits and they did not. Equally that the High Court was correct in granting the respondent absolution from the instance when the applicant claimed terminal benefits payable up to an unspecified future date. Mr. Makanda referred to a finding by the Supreme Court that despite being entitled to claim terminal benefits accrued up to 5 January 1998 they did not claim the same in the High Court. This he maintained supported the prescription point raised.

In response the applicant has contended that as the application is for a declaratory order in terms of s 85 of the Constitution the High Court can hear the matter. On *res judicata* the applicant maintained that the Labour Court indicated that there is no evidence of quantification so the matter was not finalized. They went on to contend that the matter cannot be said to have prescribed as the Labour Court referred the matter to a Labour Officer and the matter is pending before a Labour Officer. On infringement of rights the applicants referred to a letter written on 23 September 2009 to the respondent demanding payment of the terminal benefits as the appeal of 2002 had been finalized. The applicants maintain that respondent failed to pay their dues and follow the terms of the court orders granted hence their fundamental rights had been violated.

The applicant seeks a declaratur that the applicant violated their rights in terms of 51, 53, 56, 65, 68, 69,75,76,77,78,80,81 and 82 of the Constitution. The High Court has the powers to grant a declaratur in appropriate circumstances. The respondent has contended that the High Court has no jurisdiction to hear this matter. The court finds that despite the matter being labour related where an applicant seeks a declaratur this court can grant the same provided the matter meets the requirements of a declaratur. Thus the point *in limine* raised by the respondent on lack of jurisdiction pertaining to the claim in respect of violation of rights is dismissed.

The applicants seem to have confusion regarding the orders granted by the court. It is baffling how the applicants seek that the respondent complies with the determination in 0019/38/99 as upheld by the Supreme Court in SC66/02. The determination No 0019/38/99 by the Senior Labour Relations Officer granted respondent permission to dismiss the applicants and that they be

paid their terminal benefits. The Supreme Court in SC66/02 confirmed the job action to be unlawful hence dismissed the appeal by applicants meaning their dismissal as authorized by the Labour Relations officer remained extant. What therefore remained was the quantification of their terminal benefits wherein they lost the case when they brought the matter to this court and absolution from the instance was granted. The applicants have a pending case before the Labour Officer.

The Labour Court judgment LC/H/236/21 made it clear that the Labour Court had no powers to sit and quantify damages as the power is reposed in the Labour Officer by virtue of the provisions of s 93 of the Labour Court Act [*Chapter 28:01*]. It is for this reason that the applicants approached the Labour Officer for quantification of damages. The parties await a determination after the respondents raised a point *in limine* that the case has prescribed. In that regard the High Court cannot order the respondent to do what the applicants have already applied for before a Labour Officer. The applicants took the matter for quantification before a Labour Officer which is the correct procedure thus the matter pertaining to quantification of terminal benefits is *lis pendens* as argued by the respondents.

It is clear that the parties have been to the Labour Court, the High Court and the Supreme Court and the applicants have not won a single case, the issues raised have been the same as pleaded herein the only difference being that the applicants now seek a declaratur on the very issues deliberated by all the three aforesaid courts. Due to the fact that the applicants now seek a declaratur it cannot be said that the matter is *res judicata* due to the fact that the relief sought is now different, thus the point *in limine* on *res judicata* cannot be upheld.

The respondents have further submitted that the application is vague and argumentative and that it should be dismissed due to the vagueness. The respondent pointed to the citation of numerous sections of the Constitution and the Labour Act by the applicants. It must be noted that the applicants are self-actors and cannot be expected to express themselves with the same eloquence and be sequential as expected where a party has legal representation more particularly where the issues pertain to constitutional rights. The application will thus not be dismissed on that basis and the court will consider the application as it is.

The respondent has raised the issue of prescription. The respondent argues that the claim for terminal benefits arose in 1998 hence the claim is prescribed. The respondent points to the

provisions of Section 94 of the Labour Relations Act [*Chapter 28:01*] which provided that a labour dispute has to be brought up within 2 years from the date when the dispute or unfair labour practice first arises unless if the unfair labour practice is continuing at the time it comes to the attention of the Labour Officer. The respondent further points to s 15(d) of the Prescription Act which provides a prescription period of 3 (three) years. In response the applicant stated that the claim cannot be said to have prescribed as same was pending before a Labour Officer.

Despite mixed averments in the affidavit, the draft order is clear that the applicants seek a declaration of violation of their fundamental rights, a declaratur seeking compliance with court orders and compensation for the purported violations. Such claims cannot be said to have prescribed. The issue which the court will have to grapple with is whether the claims are substantiated. In that regard the point *in limine* pertaining to prescription is dismissed.

The applicants seek that there be a declaration that the respondent violated their rights in terms of s 51, 53, 56, 65, and 69 of the Constitution. The applicants have further pleaded violation of their fundamental constitutional rights as per ss 75, 76, 77,78,80,81 and 82 of the Constitution. The provisions thereto read as follows:

75 Right to education

- (1) Every citizen and permanent resident of Zimbabwe has a right to—
 - (a) a basic State-funded education, including adult basic education; and
 - (b) further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.
- (2) Every person has the right to establish and maintain, at their own expense, independent educational institutions of reasonable standards, provided they do not discriminate on any ground prohibited by this Constitution.
- (3) A law may provide for the registration of educational institutions referred to in subsection (2) and for the closing of any such institutions that do not meet reasonable standards prescribed for registration.
- (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right set out in subsection (1).

76 Right to health care

- (1) Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care
- (2) Every person living with a chronic illness has the right to have access to basic healthcare services for the illness.
- (3) No person may be refused emergency medical treatment in any health-care institution.
- (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

77 Right to food and water

Every person has the right to—

- (a) safe, clean and potable water; and
- (b) sufficient food;

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.

78 Marriage rights

- (1) Every person who has attained the age of eighteen years has the right to found a family. 29
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.

80 Rights of women

- (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.
- (2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
- (3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.

81 Rights of children

- (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—
 - (a) to equal treatment before the law, including the right to be heard;
 - (b) to be given a name and family name;
 - (c) in the case of a child who is—
 - (i) born in Zimbabwe; or
 - (ii) born outside Zimbabwe and is a Zimbabwean citizen by descent;to the prompt provision of a birth certificate;
- (d) to family or parental care, or to appropriate care when removed from the family environment;
- (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
- (f) to education, health care services, nutrition and shelter;
- (g) not to be recruited into a militia force or take part in armed conflict or hostilities;
- (h) not to be compelled to take part in any political activity; and
- (i) not to be detained except as a measure of last resort and, if detained—
 - (i) to be detained for the shortest appropriate period;
 - (ii) to be kept separately from detained persons over the age of eighteen years; and
 - (iii) to be treated in a manner, and kept in conditions, that take account of the child's age.
- (2) A child's best interests are paramount in every matter concerning the child.
- (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

82 Rights of the elderly

- People over the age of seventy years have the right—
- (a) to receive reasonable care and assistance from their families and the State;
 - (b) to receive health care and medical assistance from the State; and
 - (c) to receive financial support by way of social security and welfare;
- and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.

The applicants have brought their claim in terms of s 85(1) of the Constitution alleging that fundamental rights or freedoms enshrined in [*Chapter 4*] has been, is being or is likely to be

infringed. In such an instance the court may grant appropriate relief, including a declaration of rights and an award of compensation. It is a pre requisite that applicants must show that their own interests and rights have been violated or that there is an existing threat of such violation. It is therefore incumbent upon the applicants to substantiate such allegations by furnishing the court with facts supporting or proving such a violation. This they do in the founding affidavit. A bald averment will not suffice. In *Tsvangirai v Registrar General & Ors* the court held as follows; “The first observation to be made is that a bald unsubstantiated allegation will not satisfy the requirements of the section. The applicants must aver in his founding affidavit facts, which if proved would establish that a fundamental right enshrined in the Declaration of Rights has been contravened in respect of himself...(p 25G-271a). See *Majome v Zimbabwe Broadcasting Corporation & Ors CCZ14/16*. Thus an allegation of infringement of a right has to be buttressed by proven factual evidence properly and duly averred in one’s affidavit.

There is no evidence placed before the court as to how it is alleged that the right to dignity as stated in s 51 has been violated nor how it is alleged that the applicants have been subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment as provided in s 53. Neither has there been any evidence showing that that applicants have not received equal treatment before the law or that they have been subjected to discrimination and unfair treatment in any of the stated instances under s 56 of the Constitution. Equally the applicants have been pursuing claims pertaining to their labour rights by litigating in the Labour Court, the High Court and the Supreme Court by all means asserting their labour rights despite recorded failures. There is no proof of violation of their labour rights in terms of s 65 more so when the court considers the findings by the Supreme Court in Case No SC 26/13 that the applicants were entitled to claim their benefits up to the 5th January 1998 but they did not do so before the High Court hence the High Court was within its rights to grant absolution from the instance.

Vis the above cited sections there is no evidence of how the respondents are purported to have violated the above constitutional rights which in essence have got nothing to do with the claim for payment of terminal benefits after dismissal. The applicants have not pleaded how their *rights to education, the right to health care and the right to food and water or the right to marry* have been violated by the conduct of the respondent. It is not apparent how the *rights of women, children and the rights of the elderly* come into the matrix of the matter. This is a typical case of

litigants blindly quoting sections of the Constitution without reading let alone understanding the provisions of the Constitution. It is at worst a calculated move to frustrate the respondent by bringing numerous court applications which have no basis.

The order sought by the applicants declaring that the respondents comply with the determination No. 0019/38/99 as upheld by the Supreme Court in Case No SC 66/02 is not tenable. This is because of the misinterpretation of both the senior Labour Officer's determination and the Supreme Court judgment. The Senior Labour Relations Officer's determination in 0019/38/99 gave the respondent the green light to dismiss the applicants and pay them terminal benefits within 14 days. The Supreme Court judgment upheld the findings of the Labour Tribunal (which confirmed the correctness of the Senior Labour Relations' finding) and found that the collective job action by the applicants was unlawful. Thus the order for the applicants' dismissal remained extant. Thus there is nothing to comply with from those orders in the absence of quantification of terminal benefits.

It is a fact that there is no order which granted the applicants any form of damages neither has there be any quantification of terminal benefits by any court. This is clear from the Labour Court Judgment LC/236/21 which referred the applicants to a Labour Officer for quantification. It is this judgment which led the applicants to approach a Labour Officer and under Case No 433/21 to have the benefits quantified. The relief sought that this court declares that the respondent comply with the quantification process ordered by the Labour Court in LC/236/21 is thus misplaced. The obligation was not and is not on the respondents to seek such quantification but same lies with the applicants and the applicants have already pursued that route.

It is only when the court finds that there is a violation that it then compensate the applicants as provided in s 85. As demonstrated above, there is no factual evidence of violation of the applicant's fundamental constitutional rights. The applicants randomly chose sections in the declaration of rights the bulk of which had not even a remote relationship to the purported claim at hand. The applicants simply baldly claimed infringement of fundamental rights without an iota of evidence and there is no evidence to satisfy the requirements of the sections at issue. The applicants simply claimed that the respondents refused to pay them their terminal benefits yet the same have not been determined and there is a pending determination by a Labour Officer whom the applicants had approached.

It may as well be concluded that the applicants have no cause of action. This is because whilst a litigant is free to indicate the relief he seeks in the draft order it is the substance of the claim and the evidence available which informs the court whether or not to grant the order. This process is driven by rules of evidence and the legal requirements for the particular relief. Infringement of rights has to be substantiated by the mention of what it is that the respondent is purported to have done or is threatening to do which is wrongful and to the detriment or erosion of the applicant's fundamental rights. This court finds that the allegation that the respondent has violated a court order or orders which require respondent to pay applicants their benefits is without substance as the benefits have not been quantified. No violation of any rights have been made by the respondents. Most pertinent the applicants' claims are premised on misinterpretation of court orders whether this is out of ignorance or is deliberate remains unanswered. If anything this court is tempted to think that the application was an attempt to bypass the current proceeding before a labour officer which await a determination on a point of prescription which was raised by the respondents. In that regard the applicants disguised the application as a declaratur. If that is so, the exercise has been futile as what the applicants sought the court to declare as against the respondent was untenable as shown in the foregoing paragraphs. Equally no violations were proven for the court to order compensation which compensation was also not proven.

Suffice that litigants should not just drag others to court without thinking through the processes involved and whether that which they seek is supported in law by evidence. The applicants have dragged the respondent on issues pertaining to dismissal to the Senior Labour Relations Office, Labour Tribunal, and the Labour Court, twice to the High Court (including this instance) and twice to the Supreme Court. In all these instances they have never been successful. As stated earlier the applicants state that a particular order granted this relief when it is not so. The manner in which this application has been instituted and presented is such that punitive costs ought to be ordered against applicants for dragging the respondent to court in a hopeless case. Whilst there are a number of applicants' none of them deposed to an affidavit and the first applicant has been deposing to affidavits relying on a power of attorney granted to him on 31 March 2018. It remains in doubt whether the other 13 applicants still identify with the cause. It is in the court's opinion that the applicant appears to be a lone fighter who despite lack of success in different courts continues to pursue the matter. Whilst it is his right to do so, he seems not to appreciate the

import of the orders or determinations coming out of Tribunals and courts. It would therefore be amiss to order costs against all the applicants without adequate evidence of their current participation in these proceedings given that they gave their mandate 5 years ago.

In the result, it is ordered as follows:

1. The application is dismissed.
2. 1st Applicant shall pay respondent's costs on a legal practitioner and client scale

Kantor & Immerman, respondent's legal practitioners