

SANDRA NGWENDE

versus

COMPETITION AND TARIFF COMMISSION

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE, 15 September 2021 and 7 February 2023

### **Court application**

Mr *R Kadani*, for the applicant

Ms *R Nyemba-Dodzo*, for the respondent

#### **CHINAMORA J:**

This is an opposed court application seeking a declaratory order in terms of the High Court Act [*Chapter 7:06*], where the applicant seeks an order confirming the validity of the contract of employment contract which she entered into with the respondent on 5 May 2020.

In January 2020, the applicant responded to an advertisement for the post of Legal Officer which had been put out by the respondent. After an interview, the respondent's Human Resources Officer sent an offer letter via whatsapp on 5 May 2020, part of which reads as follows:

“I am pleased to offer you the post of Legal Officer in the Competition and Tariff Commission which you had applied for on 13 March 2020. The post is in D1 (Professional Grade and the incumbent reports to the Commission Secretary.

The offer is being made on the following terms and conditions:

The appointment will be subject to a three month probation period, which may be extended once for another three months subject to your performance.”

After reading the letter, the applicant called the respondent's Human Resources Officer advising her that she accepted the offer. She averred that she enquired whether a hard copy of her acceptance was required and was informed that it was not necessary, and that an acceptance through whatsapp would suffice. The applicant submitted that they agreed that she would report for work on 1 June 2020, and she then sent a whatsapp message accepting the offer. She further averred that, on 20 May 2020, the respondent's Human Resources Officer called her to advise that the offer was

being cancelled, and responded that she had already resigned from her employment and paid for accommodation in Harare in preparation for the job at the Commission. In addition, said the applicant, she asked for a formal letter of cancellation of the contract which, although promised, was never sent by the respondent. As a result, the applicant contends that he lawyers sent a letter to the respondent on 29 May 2020, advising that the withdrawal of the offer communicated by its Human Resources Officer was of no force and effect. The respondent replied, on 4 June 2020, advising that it had withdrawn the offer of employment as previously communicated to the applicant. On 23 June 2020, the present application was filed.

The application was opposed by the respondent, who raised two preliminary points. The first was that the application was defective in that the founding affidavit was not dated. In particular, it was argued that the affidavit does not state when the applicant deposed the affidavit before a commissioner of oaths. The argument was that the commissioner of oaths had not endorsed the date on the affidavit. The second objection was that this court had no jurisdiction, since the facts show that it is an employment dispute in respect of which the Labour Court has exclusive jurisdiction. Let me deal with these points *in limine* seriatim.

The first objection can be disposed of by looking at the relevant legislation, namely, the Justices of Peace and Commissioners of Oaths Act [*Chapter 7:09*], which requires an affidavit to be attested before a commissioner of oaths. Section 8 provides:

“A justice of the peace or commissioner of oaths may within the area for which he has been appointed administer an oath to any person:

Provided that he shall not administer an oath—

(a) in respect of any matter in relation to which he is in terms of any regulation made under section eleven, prohibited from administering an oath; or

(b) if he has reason to believe that the person in question is unwilling to make an oath.”

Clearly, the Act does not say that the affidavit must be dated. The other relevant piece of legislation is the Justices of the Peace & Commissioners of Oaths (General) Regulations, Statutory Instrument 183 of 1998. It does not have a requirement for endorsement of a date by the commissioner of oaths. Moreover, there is no other law that I am aware of which makes the insertion of a date a formal precondition for the validity of an affidavit. The law only stipulates that a commissioner of oaths can administer an oath. Such an oath is valid once so administered.

The position I take is fortified by the case of *Infralink (Pvt) Ltd v The Sheriff of Zimbabwe*

*NO and Ors* HH 1-19, where CHITAKUNYE J (as he then was) expressed the following pragmatic remarks:

“A perusal of the copies of the application filed of record shows that it was signed but not dated. The same applies to the certificate of urgency. Such omission on its own would not be fatal to the application as indeed no prejudice would be suffered by the respondent. The failure to endorse the date when the application and certificate of urgency were signed may be viewed as technical errors with no impact on the substance of the application”.

Although the learned judge’s remarks were made in the context of an application and certificate of urgency, the logic is equally compelling in relation to affidavits. Therefore, the point *in limine* taken does not raise a plausible issue and is dismissed.

The final point *in limine* is that this court lacks jurisdiction as the Labour Court should deal with this application which, essentially, concerns specific performance of a contract or the determination of whether or not an employment contract has been properly terminated. The import of section 89 of the Labour Act [*Chapter 28:01*] has to be considered. Section 89 (6) provides:

“No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)”.

I must emphasize two points which are apparent from the above provision. The first is that the jurisdiction of other courts is taken away in the first instance. The second is that such jurisdiction is taken away subject to the provisions of subsection (1), namely, in respect of matters dealt with in that subsection. That necessarily leads me to consider subsection one, which *inter alia* provides:

“(1) The Labour Court shall exercise the following functions—  
(a) hearing and determining applications and appeals in terms of this Act or any other enactment; and.....”

It is apparent that, in terms of s 89 (6) of the Labour Act, the High Court has no jurisdiction in the first instance to hear and determine the dispute *in casu*. Whilst I accept that in terms of s 171 (1) of the Constitution, this court has original jurisdiction over all civil and criminal matters throughout Zimbabwe, it is also evident that in s 172 (2) and (3) the same Constitution has identified matters over which the Labour Court has exclusive jurisdiction. For completeness of the record, ss 171 and 172 of the Constitution provide, in relevant part, as follows:

**“171 Jurisdiction of the High Court**

- (1) The High Court
  - (a) Has original jurisdiction over all civil and criminal matters throughout Zimbabwe,
  - (b) – (d) ..... (not relevant)
- (2) An Act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer the power to make rules of court.
- (3) ..... (not relevant)
- (4) .... (not relevant)

**172 Labour Court**

- (1) ... ..
- (2) The Labour Court has such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament.
- (3) An Act of Parliament may provide for the exercise of jurisdiction by the Labour Court and for that purpose may confer the power to make rules of court.”

There is no doubt that s 172 of the Constitution confers on the Labour Court jurisdiction over employment matters. As I have previously said, the issue before me is the determination of the single question: was the contract of employment between the applicant and the respondent properly terminated? My view is the dispute concerns a labour issue which falls within the exclusive jurisdiction of the Labour Court. In fact, there is no conflict or confusion between ss 171 and 172 of the Constitution in light of s 89 (6) of the Labour Act, and this was clearly articulated by CHITAPI J in *Nyanzara v Mbada Diamonds (Pvt) Ltd* 2016 (1) ZLR 195 (H) at 206, in the following language:

“What the legislature has done and acting by virtue of powers granted to it by the Constitution is to circumscribe matters of labour over which the Labour Court shall exercise exclusive jurisdiction in the first instance to the exclusion of other courts which of necessity must include the High Court ... In my reasoning, an exercise of original jurisdiction over a matter does not mean that the exercise of such jurisdiction, original as it may be called, is to be exercised in a manner which usurps or defeats the intention of the legislature where the legislature will have passed a law by virtue of powers given to it by the same Constitution ... The Labour Court is a special court created to deal with matters of employment and does so through exercising powers granted under an Act of Parliament. The Constitution does not limit the powers which the legislature can give to the Labour Court and the giving of exclusive jurisdiction to the Labour Court in specific matters by the Legislature... The High Court in my judgment should exercise its original jurisdiction taking into account existing legislative provisions in place unless the same are unconstitutional ...”

**[My own emphasis]**

I also note that this question was addressed, quite pointedly, in *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H). This court held that the jurisdiction of a special court should not be ousted by the mere framing of disputes into common law causes of action where the Act has made specific provisions for the same. In this regard, it matters not that the applicant has approached the court seeking a declarator that the employment contract signed on 5 May 2020 is still valid. It is obvious from the facts of this case that the applicant is, in reality, questioning the propriety of the termination of the contract. In this respect, in *Muchenje v Mutangadura & Ors* HH 21-21, MUREMBAJ pertinently pointed out that, for jurisdictional purposes, the court should look beyond the relief sought and go into the substance of the application, in order to identify the real nature of the dispute. The learned judge concluded that, while the applicant asked for an interdict in the High Court, the real cause of action was founded on his dismissal by the employer.

Taking into account the facts of this matter and the relief sought, I came to the conclusion the dispute *in casu* is a labour or employment one within the contemplation of the Labour Act. Consequently, I had no hesitation in upholding the respondent's point *in limine* and granted the following order:

1. The first point in *limine* relating to the founding affidavit being fatally defective is hereby dismissed.
2. The second point in *limine* relating to the absence of jurisdiction of the High Court is hereby upheld.
3. The applicant shall pay the respondent's costs of suit.

*Atherstone & Cook*, applicant's legal practitioners

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners