

REPORTABLE (86)

GUTU RURAL DISTRICT COUNCIL
v
JASON PARADZAI MUGAYO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & CHITAKUNYE JA
BULAWAYO: 17 JULY & 14 SEPTEMBER 2023

I. Mupfiga with W.T. Daviro and B. Dube, for the appellant

The respondent in person

MAKONI JA: This is an appeal against the whole judgment of the Labour Court handed down on 11 November 2022 wherein it dismissed the appellant’s appeal against a decision of a Designated Agent of the National Employment Council for Rural District Councils.

FACTUAL BACKGROUND

The respondent was employed by the appellant as a Housing Officer. He was indicted for a disciplinary hearing on 11 November 2017 before the appellant’s Disciplinary Committee. He was charged with ‘committing any act or conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment’ in terms of clause 8(d) of Statutory Instrument 87/2017, specifically that he unilaterally and unlawfully exempted some council tenants from paying rentals which resulted in the appellant losing revenue.

The Disciplinary Committee found in favour of the employer and dismissed the respondent. He then appealed the decision to the Internal Appeals Committee which upheld the decision of the Disciplinary Committee. Aggrieved by the decision, the respondent again appealed to the National Employment Council Exemptions Committee (“the Exemptions Committee”) which set aside the decision of the Internal Appeals Committee and referred the matter back to the Disciplinary Committee, for a hearing *de novo*, on the basis that the Disciplinary Committee was not properly constituted when it presided over the matter.

The matter was heard again by the Disciplinary Committee and it reached the same verdict and penalty. The respondent then appealed to the Internal Appeals Committee which, again, upheld the dismissal. On 13 March 2018, he further appealed the dismissal to the Exemptions Committee which heard the matter on 14 March 2018.

On the basis that the Exemptions Committee failed to conclude the matter within the time stipulated in s 14 of SI 87/17 and on 26 November, 2018, the respondent wrote to the Designated Agent advising him of that fact. Consequent to the respondent writing to the Designated Agent complaining about the failure by the Exemptions Committee to determine the matter within 30 days, the Exemptions Committee handed down reasons for its determination on 4 December 2018.

On 11 March 2021, the respondent filed an appeal with the Labour Court under cover of case number LC/H/57/19 seeking a referral of his appeal in accordance with clause 14 (c) of SI 78/17. He was seeking that the appeal be disposed of by the Designated Agent due to non-observance of the timelines and the lack of jurisdiction of the Exemptions Committee.

The grounds of appeal were couched as follows:

1. The exemptions committee erred at law in determining a matter without jurisdiction outside the prescribed thirty (30) working days and after the matter had been referred to the designated agent for disposal.
2. The exemptions committee erred at law in making a determination without providing reasons for such determination.

The respondent sought the following relief;

- a. 'That the appeal succeeds with costs.
- b. That the decision of the exemptions committee be set aside.
- c. That the matter shall be disposed of by the designated agent in accordance with section 93 of the Labour Act in terms of the referral made by the appellant on 26 November, 2018.'

On 22 May 2020, the Labour Court allowed the appeal under case number LC/H/57/19. It granted the following order: -

- “a. That the instant appeal succeeds with costs
- b. That the decision of the exemptions officer be set aside.
- c. That the matter be disposed of by the designated agent in accordance with s 93 of the labour act in terms of the referral made by the respondent.”

The respondent then approached the Designated Agent on the basis of this order of the Labour Court.

On 21 June 2021, the parties attended proceedings before the Designated Agent who advised the parties that he would proceed in terms of s 63(3a) of the Labour Act (the Act). The parties were invited to file written submissions and the Designated Agent proceeded to pronounce on the matter on 19 October 2021. In his determination, he made a finding that he lacked the requisite jurisdiction to preside over the matter as it raised review grounds. He, however, went on to deal with the substantive aspects of the matter and ultimately gave an order reinstating the respondent.

Disgruntled by the determination of the Designated Agent, the appellant appealed to the court *a quo* on 17 November 2021. The court found that the Designated Agent properly dealt with the matter. It found that the issue of grading was before the Designated Agent and that he properly disposed of it. In addition, it found that the reinstatement of the respondent was proper as reinstatement could be ordered where the merits of the matter have not been entertained. In the result, the court *a quo* dismissed the appeal. It is against this judgment that the present appeal was noted.

SUBMISSIONS ON APPEAL

At the hearing of the appeal, the court asked counsel for the appellant to address the question of whether s 63(3a) as read with s 93 of the Act confer appellate jurisdiction on a Designated Agent in view of the referral of an appeal to him by the Labour Court. Counsel for the appellant submitted that the matter was referred for hearing before the Designated Agent as an appeal. He contended that the Exemption Committee was seized with an appeal that it failed to conclude within the prescribed 30 days hence the appeal was then placed before the Designated Agent. He submitted that s 63(3a) of the Act does not confer appellate jurisdiction on Designated Agents but that a provision in SI 87/17 allows for matters not determined within the stipulated timeframe to be referred to a Designated Agent. He asserted that Designated Agents have no such powers to hear appeals. It was his submission that the Labour Court ought to have presided over the matter instead of deferring it to the Designated Agent. He relied on s 14 of SI 87/17 which provides that an appeal against the determination of the Exemptions Committee lies with the Labour Court. Counsel submitted that if a matter is not concluded within 30 days, it is then supposed to be referred to the Designated Agent who will dispose of it in accordance with s 93 of the Act.

On the merits, counsel submitted that the court *a quo* erred in upholding the decision of the Designated Agent when he had conceded that he did not have jurisdiction but nonetheless went on to deal with the substance of the matter. In addition to this, it was his contention that the court *a quo* misdirected itself by upholding the appeal and reinstating the respondent without having dealt with the merits of the matter. In this light, he moved that the matter be remitted to the Labour Court to deal with the matter on the merits and that the decision of the Designated Agent be set aside. He also stated that if the respondent's contention was that his matter was not heard within 30 days, the correct procedure available to the respondent was to file an application for review and not launch an appeal as he did.

Conversely, the respondent submitted that his appeal lay with the Designated Agent in terms of s 14 of SI 87/17 given that the matter was not heard and concluded by the Exemptions Committee within 30 days. He was convinced that the determination of the Designated Agent despite the absence of jurisdiction was proper as well as the accompanying order for reinstatement. He believed that the Designated Agent has powers conferred upon him to give redress in matters such as his.

THE LAW

Section 63(3a) of the Labour Act provides as follows:

“(3a) A designated agent of an employment council who meets such qualifications as may be prescribed shall, in his or her certification of appointment, be authorised by the Registrar to redress or attempt to redress any dispute which is referred to the designated agent or has come to his or her attention; where such dispute occurs in the undertaking or industry and within the area for which the employment council is registered, and the provisions of Part XII shall apply, with the necessary changes, to the designated agent as they apply to a labour officer.”

It is common cause that the provision that confers power on the Designated Agent to give redress to parties is s 63 (3a) of the Labour Act. The role of a Designated Agent was

explained in the judgment of *Isoquant Investments (Pvt) Ltd T/A Zimoco v Darikwa* CCZ 6/20 wherein the court remarked as follows at p 29:

“Section 63(3a) of the Act allows a designated agent, upon authorisation by the Registrar of Labour, to either **redress or attempt to redress any dispute** which is referred to the designated agent or has come to his or her attention. That is the case where such dispute occurs in the undertaking or industry and within the area for which the employment council is registered. Section 63(3b) of the Act expressly ousts the jurisdiction of a labour officer where a designated agent is authorised to redress any dispute or unfair labour practice in terms of s 63(3a) of the Act.

.....

What is key in understanding what a designated agent can or cannot do is to understand the meaning of the phrase “**redress any dispute**”, used in s 63(3a) of the Act. When used as a verb, the word “redress”, according to the *Oxford English Dictionary* means to remedy or set right an undesirable or unfair situation. A designated agent authorised by the Registrar of Labour redresses a dispute referred to him or her. He or she offers a remedy or sets right an unfair situation.”

In as much as the above case discusses the role of a Designated Agent, it does not expressly deal with whether or not a Designated Agent has any powers conferred upon him to deal with appeals. From a reading of the provision, there is nothing suggesting that a Designated Agent has appellate jurisdiction.

To have an appreciation of the powers bestowed upon a Designated Agent, one has to examine what it is that the Designated Agent has to do in redressing or attempting to redress a dispute.

In Isoquant supra at p30, it was stated;

“A designated agent may only exercise one power over a dispute. He or she may redress the dispute or attempt to redress it. He or she cannot do both. If he or she chooses to redress the dispute by hearing and determining the issues in dispute, he or she cannot at the same time attempt to redress the dispute. It is clear from the provisions of s 63(3a), as read with s 93(1), of the Act that a designated agent can only proceed in terms of s 93 of the Act if he or she has not redressed the dispute. He or she would be attempting to settle the dispute through conciliation. There can be no attempt to settle a dispute which has been redressed. The provisions of s 93 of the Act would apply

when the power to be exercised by the designated agent is an attempt to redress the dispute through conciliation”.

From the above, it is clear that a Designated Agent can do one of two things that is redress a dispute by hearing and determining the issues in dispute or attempt to redress the dispute through conciliation. He cannot do both. What is coming up from the above-quoted excerpts from *Isoquant supra* is that the Designated Agent will be redressing or attempting to redress a dispute in a fresh hearing. Given the above, it is apparent that a Designated Agent does not have any jurisdiction under s 93 to entertain a matter once a determination on the merits has been made through a disciplinary process under a registered code of conduct.

In casu the matter was referred to the Designated Agent by the Labour Court in terms of s 14 (c) of S/I 87/17 which provides as follows:

“Appeals to the NEC

14.—

- (a) the Exemptions Committee of the National Employment Council shall hear and conclude appeals referred to it within seven working days;
- (b) an appeal against the decision of the Exemptions Committee shall lie with the Labour Court;
- (c) **if a matter is not determined or concluded within 30 working days, the employee or employer concerned may refer such matter to the Designated Agent who will dispose of it in accordance with section 93 of the Labour Act [Chapter 28:01].”**

The ‘matter’ being referred to in ss (c), in the context of the present matter, is an appeal against the determination of the Appeals Committee. In other words, the above provision purports to give the Designated Agent power to ‘redress or attempt to redress’ the determination of the appeals committee. This Court, in a line of authorities, has spoken on this that a Designated Agent cannot preside over a matter where a determination has been made. See *Watyoka v Zupco (Northen Division)* SC 87/05, *Mabeza v Sandvick Mining (2) Construction (Pvt) Ltd & Anor* SC 91/19 and *Living Waters Theological Seminary v Rev Chikwanha* SC 59/21.

These matters were analysed in the recent case of *Nicholas Mukarati v Pioneer Coaches (Private) Limited* SC 34/22 where MATHONSI JA concluded on the issue as follows:

“The reasoning in *Mabeza, supra* rhymes with that in *Sakarombe N.O & Anor v Montana Carswell Meats (Pvt) Ltd* SC 44/20 where the court was called upon to consider the ambit of the jurisdiction of a Labour Officer under s 93 of the Act where a matter is referred to him or her in terms of s 8(6) of the National Code of Conduct. It concluded that under s 93(1) of the Act, a Labour Officer is only mandated to preside over a fresh hearing where a complaint has been lodged. The Labour Officer does not preside over any matter where a determination has been made or one in which completed disciplinary proceedings were conducted at the workplace.”

Although the above authorities were dealing with the powers of a labour officer the same principle applies with equal force to a Designated Agent as in terms of s 63(3a) “the provisions of Part XII shall apply, with the necessary changes, to the designated agent as they apply to a labour officer.” Section 8 (6) of the National Code which was under discussion in these cases is similarly worded to s 14 (c) of SI 18/17.

Further down on the same page MATHONSI JA observed the following;

“In fact, in *Living Waters Theological Seminary v Chikwanha, supra*, the court went further to state that the provisions of s 8(6) of the National Employment Code are rendered inoperative by their being *ultra vires* and inconsistent with the provisions of ss 93 and 101 of the Labour Act.”

The same can be said about s 14 (c) of S/I 87/17. It is rendered inoperative by being *ultra vires* and inconsistent with the provisions of ss 63(3a) and 93 of the Labour Act.

In casu, the Designated Agent presided over a matter over which he did not have jurisdiction. When there is a determination on the merits of a dispute, a Designated Agent has no jurisdiction under s 93 of the Act to redress or attempt to redress such a dispute.

The ramifications of what the Designated Agent did in this situation are clear. There is no power conferred upon him to hear appeals in terms of the Act. The matter was improperly referred to him and consequently, the proceedings before him and the resultant appeal before the court *a quo* were a nullity. There was therefore no proper appeal before both the Labour Court and this Court.

Regarding costs the appellant had prayed for costs of the appeal. In view of the fact that the matter turned on the interpretation of s 14 of S/I 18/17 it would be in the interests of justice that there be no order as to costs.

Given the irregularities deliberated in this judgment, in the result, it is ordered as follows:

1. The matter be and is hereby struck off the roll with no order as to costs.
2. In terms of this Court's review powers in s 25(1) of the Supreme Court Act [Chapter 7:13] the proceedings before the Designated Agent and the Labour Court are hereby set aside.

GWAUNZA DCJ: I agree

CHITAKUNYE JA: I agree

Gundu Dube and Pamucheche Legal Practitioners, appellant's legal practitioners