VALENTINE SHANGANYA
versus
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 31 May 2022

Court Application – employment dispute

N Mugandiwa, for the applicant
T.M Kanengoni, for the respondent

KWENDA J:

[A] **Background facts***:*

The applicant is a female adult Zimbabwean national. The respondent is a body established by s 238 of the Constitution with legal capacity. On 19 September 2017 the respondent offered the applicant employment as a Website and Graphic Designer. The respondent is empowered and mandated by s 9 (7) of the Electoral Act [*Chapter 2:13*] to employ such persons as it considers expedient for the better exercise of the functions of the Commission. The applicant accepted the offer on 27 September 2017. The parties' contract of employment was governed by the Zimbabwe Electoral Commission (General Conditions of Service) Regulations, Statutory Instrument 91 of 2008 [General Conditions of Service]. In terms of s4 of the General Conditions of Service the applicant was appointed as an employee on probation for a period of twelve months from the date of assumption of duty and the probation period could be extended by up to six months in the event that the applicant failed to perform her work to the satisfaction of the respondent. Any time during the probation or extension thereof the respondent could terminate the employment for reason of unsatisfactory performance or work and notify the applicant in writing. On 28 September 2018 the respondent notified the applicant in writing of its decision not to confirm the applicant's employment. The applicant was aggrieved by the decision hence this application.

[B] **The application***:*

This is an application for review in terms of the Administrative Justice Act *[Chapter 10:28]*. The applicant named it an application for review in terms of s 4 of the Administrative Justice Act *[Chapter 10:28]* as read with order 33 of the High court rules 1971. The applicant averred as follows. The respondent's aforestated decision to terminate her employment was in contravention of "s 3 of the Administrative Justice Act *[Chapter 10:28]* as well as s 68 of the constitution." Her complaint is that the respondent's decision not to confirm her employment was unfair and unreasonable and actuated by the desire to avoid conducting disciplinary proceedings which the respondent had commenced against her. The respondent neglected to give her notice of its impending decision not to confirm her employment after probation. It neither advised the applicant of her failure to meet expectations during the period of probation nor gave her an opportunity to make representations before the adverse decision was made. The applicant had the legitimate expectation to be given cogent reasons or explanation for the decision. She therefore seeks an order setting aside the respondent's decision and reinstating her to her former position without loss of salary and benefits plus costs of suit.

[B] **Grounds of opposition***:*

The application is opposed by the respondent both on a technicality and on the merits. The respondent objected to the procedure adopted by the applicant on the following basis that. The procedure adopted by the applicant is wrong. She ought to have utilised the legal framework for the resolution of labour disputes as set out in the Labour Act [*Chapter 28: 01*] because the parties were in an employment relationship to which the Labour Act applies. The provisions of the Administrative Justice Act [*Chapter 10:28*] do not apply in this case where the relief sought by the applicant is reinstatement into employment and benefits. This application is therefore improperly before this court and ought, for that reason alone, to be dismissed with costs. In essence, it is the respondent's case that the applicant brought her dispute to a wrong forum, this court lacks the jurisdiction to deal with the matter.

It is not necessary for me, at this stage, to delve into the merits because the parties are in agreement that the parties will have to take their dispute elsewhere in the event that I uphold the preliminary objection.

The parties are in agreement that the dispute before me is in the nature of an employment dispute alleging an unfair labour practice. They however differ on the question of jurisdiction. On one hand the applicant avers that this court has jurisdiction because the respondent's decision qualifies as administrative action which is reviewable in terms of the jurisdiction given to this court under the provisions of the Administrative Justice Act. On the other hand, the respondent argues that this court does not have jurisdiction because the dispute falls within the exclusion jurisdiction of the Labour Court.

[C] **The applicant's case in detail***:*

[1] The applicant's case is that the respondent's decision not to confirm applicant's employment falls squarely within the definition of administrative action in s 2 of the Administrative Justice Act regardless of the fact that such administrative power was exercised in the context of employment. She avers that the respondent is an administrative body as defined in s 2(d) of the Administrative Justice Act.

[2] She cited s 68(1) of the Constitution and s 3 of the Administrative Justice Act read together and reproduced both in full underlining the portions she considers relevant to this application as reproduced below.

Section 68(1) of the Constitution: -

> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

Section 3 of the Administration Justice Act: -

> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall (
> *a*) act lawfully, reasonably and in a fair manner; and
> (*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
> (2) In order for an administrative action to be taken in a fair manner as required by subsection (1)(*a*), an administrative authority shall give a person referred to in subsection (1)
> (*a*) adequate notice of the nature and purpose of the proposed action; and
> (*b*) a reasonable opportunity to make adequate representations; and
> (*c*) adequate notice of any right of review or appeal where applicable.
> (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if

(*a*) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
(*b*) the departure is under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including
(i) the objects of the applicable enactment or rule of common law;
(ii) the likely effect of its action;
(iii) the urgency of the matter or the urgency of acting thereon;
(iv) the need to promote efficient administration and good governance;
(v) the need to promote the public interest."

[3] As authority for her argument that the Administrative Justice Act applies to the dispute before me the applicant placed reliance on and quoted extensively from the case of *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Anor* ZLR 259(H) [U-Tow Trailers case] particularly the following excerpts from the pages 6 and 7 of the cyclostyled version of the judgment.

"…….. the applicant on the other hand, perceived the issue arising from the provisions of the Act as simply whether these have introduced the application of rules of natural justice into the field of contract law where one of the parties is a local authority as is the first respondent before me. I tend to agree with his definition of the issue that falls for my determination in this suit.
The rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. (See *Machaya* v *BP Shell Marketing* (Pvt) Ltd 1997 (2) ZLR 473 (H)).
With the promulgation of the act, it appears to me that this common law was varied in some instances as it applies to administrative authorities to which the Act applies.
I first have to determine whether the Act applies to the first respondent.
In section 2, the Act defines administrative authority to include any person, committee or council of a local authority. In *casu,* it is common cause that the decision to summarily terminate the lease agreement between the applicant and the first respondent was taken on behalf of the first respondent by a duly authorised employee or committee of the first respondent, who or which by virtue of the provisions of the act, becomes the administrative authority for the purposes of the Act. This is not in dispute.
In the same section, an administrative action is defined to include any action or decision taken by an administrative authority. The definition given in the section appears to me to be immensely wide. I would venture to suggest that the definition of "administrative action" in the Act is wider than that given in section 1 of the South African promotion of Justice Act as reported in decisions such as *Sikutshwa* v *MEC for Social Development, Eastern Cape, and Others* 2009 (3) SA 47 (TkH) and *Nedbank Ltd* v *Master of the High Court, Witwatersrand Local Division, and Others* 2009 (3) SA 403 (W) where it is stated that "administrative action" in terms of s 1 of the Act means any decision taken, or any failure to take a decision by an organ of State when such organ of State is exercising a public power or performing a public function in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect .
In my view, the definition of 'administrative action" as given in section 1 of the South African equivalent of the Act, as compared to the definition given in the Act, marks the point of departure in the laws of our two countries.
Thus, in South Africa, if action is taken on the basis of a contract between the parties, such has been held not to constitute 'administrative action" that is subject to the provisions of the Act. (See *Chirwa* v *Transnet Ltd and Others* 2008 (4) SA 367 (CC) (2008 (3) BCLR 251 and *De Villiers* v *Minister of Education, Western Cape, and Anothe*r 2009 (2) SA 619 (C)). In excluding contractual

2 relations from the application of PAJA, the south African courts have been guided by the definition of "administrative action" that I have referred to above and is captured in the following remarks by NQCOBO J (as he then was), in para 142 of the judgment in *Chirwa's* case:

> "The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action."

With much commendable foresight, (or hindsight), the legislature in enacting the Act specifically included acts by all public authorities, even where the power to carry out the Act is derived from a contract, thereby obviating the need for our courts to debate the issue that fell for determination in the South African courts in matters involving the termination of employment contracts. Section 2 of the Act defines "administrative action" as follows:

> "(1) In this Act—
> "administrative action" means any action taken or decision made by an administrative authority and the words "act", "acting" and "actions" shall be construed and applied accordingly;"

in the same section, empowering provision, is defined as follows:

> "(1) In this Act—
> ""empowering provision" means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken;"

My reading of the two definitions put together makes me arrive at the conclusion that for the purposes of the Act, any decision made by an administrative authority under the empowering provisions of any enactment, in pursuance of any rule of common law' in terms of an agreement between itself and another party or in terms of any legal instrument, shall be made fairly and in accordance with the provisions of the Act.

In my view, one can say the statutory provisions protecting the public's rights to fair administrative decisions as given under the Act are considerably wider than those conferred under the South African equivalent and to construe them restrictively would be to take away from the public by judicial interpretation that which the legislature has given.

That the promulgation of the Act brings in a new era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities as there has been a seismic shift in this branch of the law. The shift that has occurred is in my view profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of section 3 (3) of the Act applies."

[3] She avers that the current review proceedings could not be brought before the Labour Court because it lacks jurisdiction. The only instances under which the Labour Court may exercise review jurisdiction are set out in s 92EE of the Labour Act.

[4] She also relied on the case of *Kwangwari* v *Commercial Bank of Zimbabwe* 2003(1) ZLR 551 (H) once again underlining those portions of the quotation which she considered

pertinent. In this case Mr Kwangwari's employment had been terminated by the CBZ bank after an extended period of probation. Wherein may court stated the following at pages 559-560: -

> "Generally, no formalities are required for contracts of employment except where some statutory law specifically requires it. Employers often seek to protect themselves against being permanently saddled with an incompetent worker by inserting so-called probationary clauses into their employees' contracts of service. Probationary clauses typically reserve for the employer the right to terminate the contract after a specific period if the employee's performance is found to be unsatisfactory. At common law, a probationary clause apparently empowers the employer to terminate, at will, at the conclusion of the stipulated period. The question is whether such termination amounts to dismissal or a mere non-renewal of the contract. Probationary clauses provide for a trial period during which the reciprocal periods of notice required for termination are shorter, and which purportedly give both parties the right either to confirm or not to confirm the contract at the conclusion of the probationary period. As alluded to above, at common law these clauses give the employers absolute power to terminate the contract on expiration of the probationary period. The courts, however, do not take such a liberal view of probationary clauses, and require employers to justify the dismissal of probationary employees in much the same way as they are required to do in the case of any other employee, with the possible proviso that the court may be disposed to accept, in the case of the dismissal of a probationary employee, reasons slightly less compelling that they would require in the case of employees of longer standing - see *Black Allied Workers Union* v *One Rander Steak House* (1988) 9 LL.J 326 (IC): *Kadesh* v *G Snow & Co* (1989) 10 U.J. 420 (IC); *Kadesh v G Snow & Co* (1980) 10 LLJ 420 (IC); Carlton-Shields *v* James North (Africa) (1990) 11 LL.J 82 (IC); and *Rickert's Basic Employment Law* by Grogan (2 ed) at pages 38 and 111-12.
>
> Before dismissal is embarked upon the general principle is that the employee should be timeously informed of his deficiency, be told how to rectify it and be given a reasonable opportunity to improve before any action is taken against him - see *Venter* v *Renown Food Products* (1989) 10 U.J 320 (IC) and also *Zungu* v *Strip Gasket Industries* (1986) 7 U.J 747 (IC) and *Madayi* v *Timpson Bata (Pty) Ltd* (1987) 6 LL. J 404 (IC) for the exception to this rule."

And at page 562 the judge proceeded as follows: -

> "Generally, where an employer wishes to dismiss a probationary employee on the grounds of incapacity or inability to do the job, the South African courts have required the employer to go through a process of appraisal and consultation prior to dismissal in order to acquaint the employee with the standards required of him, and to provide the employee with an opportunity to improve - see *Carlton-Shields* v *James North (Africa) (Pty) Ltd* (1990) 11 11.J 82 (IC); *Enslin* v *Society for the Prevention of Cruelty to Animals* NHK 13/2/1580; *Nandoo and Ors* v *Brand Engineering (Pty) Ltd* NHK 13/2/187 and *Van Dyke* v *Markly Investments (Pty) Ltd* (1988) 9 LL.J 918 (IV). I agree with this approach with the qualification that a senior probationary employee, like Mr Kwangwari, should himself realise that he also bears some responsibility to raise problems that he might have and to ensure that he complies with the required standards"

According to the applicant, the underlined the phrases underscore the point that an employee may not be dismissed arbitrarily upon completing probation. Perhaps the case is also authority for the argument that this court has jurisdiction to deal with this matter.

[5] The applicant cited the cases of *Janse Van Rensburg, N.O* v *Minister of Trade and Industry No*. 2001 (1) SA 29 CC to drive the point that administrative functionaries have far reaching powers which must be exercised in observance of the Bill of Rights procedural fairness.

[6] According to the applicant s 3 of the Labour Act [*Chapter 28:01]* excludes the application of the Labour Act from employees of the State and State Organs. She reproduced s 3 of the Labour Act which reads as follows: -

> "**3. Application of Act**
> (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution.
> (2) For the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [*Chapter 16:04*].
> (3) This Act shall not apply to or in respect of (*a*) members of a disciplined force of the State; or (*b*) members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State; or (*c*) such other employees of the State as the President may designate by statutory instrument."

***[D]*Respondent's case in detail:**

[1] As stated above the respondent is steadfast that the Administrative Justice Act does not apply to the employment dispute before the court and the applicant ought to have used the procedures in the Labour Act which are not excluded from applying to the present dispute. It avers that the *U-Tow Trailers (Pvt) Ltd case*, supra, is no longer applicable to employment disputes in light of the constitutional dispensation and structure of the courts ushered by the 2013 Constitution. Prior to the year 2013 the Constitution of Zimbabwe did not make a distinction between administrative and labour rights but it now does.

[2] The respondent relied on the cases *South Africa Supreme Court of Appeal* v *Legal Aid Board and Ors* (2009) ZASCA 76 and *Chirwa* v *Transert Ltd and Ors* 2008 (4) SA 367 (IC) as authority for its argument that an administration authority's decision to dismiss an employee in an exercise of contractual power and not administrative action.

[3] The respondent has therefore urged me to depart from the ratio of the cases cited by the applicant and follow the South African approach because the 2013 Constitutional separates administrative and labour rights and does not subordinate either to the other.

[E]Findings

The contention that the jurisdiction of the labour court in the present dispute is ousted by s 3 of the Labour Act is not borne by the relevant provision cited by the applicant and quoted above. The respondent is an independent body with legal capacity. The applicant was not a member of the Public Service. Her employment was not governed by the Public Service Act [*Chapter 16:04*].

The applicant's reference to the Labour court's review powers is irrelevant. There was no need for review. The applicant ought to utilise the remedies in the Labour Act to get relief.

I accept the argument that the *U-Tow Trailers* case, supra, was decided by this case before the 2013 Constitution. The *U-Tow Trailers* case is therefore from this case because the 2013 Constitution ushered in a new Constitutional dispensation which made separate provisions for administrative rights and labour rights. [See Sections 65 and 68 of the Constitution which provide for Labour and Administrative rights separately and respectively]. The constitution contemplates the enactment of Act of Parliament to provide for the jurisdiction of the Labour Court, hence s 89 of the Labour Act as follows: -

> "**89. Functions, powers and jurisdiction of Labour Court**
> (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
> (*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 section 98 (6) to hear and determine an application;
> (*d*1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;
> (*e*) doing such other things as may be assigned to it in terms of this Act or any other enactment.
> (2) ……..
> (3) ……..
> (4) …….
> (5) …….
> (6) 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)"

Subsection 6 of s 89 which I have underlined gives the Labour Court exclusive jurisdiction over matters to which the Labour Act applies. For a long time there was no consensus in the High Court regarding whether or not the High Court enjoys concurrent jurisdiction with the Labour Court in employment disputes. The Supreme Court has now pronounced itself on the issue with

finality. See *Stanely Nhari* v *Robert Gabriel Mugabe and Others* SC 161/20. At page 1 of the cyclostyled version of the court's judgment GARWE JA (with and MAVHANGIRA JA and MAKONI JA concurring) fronted the issue for determination and the disposition thereof as follows: -

> [1] This is an appeal against the judgment of the High Court upholding an exception by the respondents that the High Court did not have jurisdiction to determine issues of employment and labour law. At the centre the dispute between the parties, both before the court *a quo and before* this court, is whether the High Court which now enjoys original jurisdiction over all civil and criminal matters throughout Zimbabwe pursuant to s171 of the Constitution, has jurisdiction to determine all matters including issues labour and employment.
> [2] Having carefully considered all the constitutional provisions that have a bearing on this matter, as well as case authority, I am in no doubt that the powers of the High court are not unbounded and that in the field of labour and employment law, the court does not have jurisdiction to determine such matters in the first instance."
> In para 31 of the cyclostyled judgment the Supreme Court stated the following:
> "it would not have been the intention of the legislature that the High Court would have and criminal matters in all civil and criminal matters without exception. An interpretation that the High Court has unlimited jurisdiction in all case could clearly lead to an absurdity. The high court would then have jurisdiction to determine matters that in within the province of say, the Military courts……. Such an absurdity would not have been within the contemplation of the Legislature whe4n it provided for the jurisdiction and exercise of that jurisdiction by the court in s 171 of the Constitution."

The Supreme court endorsed earlier High Court decisions in the cases of *Stanley Nyachwe* v *Zimbabwe Manpower Development Fund* HH 813/15 per TSANGA J and *Nyanzera* v *Mbada Diamonds (Pvt) Ltd* 2016 (1) ZLR 195 (H) per CHITAPI J wherein the judges expressed the view that the Labour Court enjoys exclusive jurisdiction in labour disputes that fall for resolution in terms of the Labour Act.

[F] Disposition

In the result I uphold the preliminary objection to the jurisdiction of this court and hold that this court has no jurisdiction to adjudicate in the employment dispute before me despite it having come before me clothed as an application for review of an administrative decision. This matter is improperly before me because this court lacks jurisdiction. I am, for that reason, unable to delve into the merits and the remedy of dismissal would not be available to the respondent. In view of the conflicting views previously expressed in this court prior to the Supreme Court decision cited above, I will not award the successful party costs.

I order as follows: -

The application be and is hereby struck off with no order as to costs.

Kantor & Immerman, applicant's legal practitioners
Nyika, Kanengon & Partners, respondent's legal practitioners