

REPORTABLE (29)

NICHOLAS MUKARATI
v
PIONEER COACHES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE: 18 JANUARY 2022 & 24 FEBRUARY 2022

A. K. Maguchu, for the appellant

C. Mucheche, for the respondent

MATHONSI JA: This is an appeal against the judgment of the Labour Court (the court *a quo*) handed down on 21 October 2016 which allowed an appeal by the respondent against an arbitral award issued by an arbitrator on 13 October 2015. The court *a quo* set aside the arbitral award and remitted the matter to an arbitrator of the parties' choice or one selected by the registrar for a hearing to determine the appropriate penalty to be imposed on the appellant.

FACTUAL BACKGROUND

The case itself has a chequered history being a labour dispute that has gone backwards and forwards as the parties bickered over either the procedure adopted or the choice of arbiter. The appellant was employed by the respondent as its Managing Director. He was suspended from employment in April 2010 on allegations of gross incompetence and gross inefficiency under s 4(f) and (h) of the National Employment Code of Conduct, S.I. 15 of 2006 (the National Code of Conduct).

Five counts of misconduct were preferred against the appellant. Firstly, it was alleged that he had submitted a report to the Board of Directors of a net loss of US\$56 930 for the year ending on 31 December 2009 when the real net loss as uncovered by external auditors was US\$657 365. Secondly, it was alleged that the appellant failed to fully account for R700 000 which had been transferred from Mavambo Coaches.

Thirdly, it was alleged that the appellant paid himself a US\$2000 long service award in January 2010 without Management and Board approval. Fourthly, he was accused of authorising staff loans amounting to US\$23 549 in December 2009 and January 2010 when the company was in financial dire straits. Fifthly, the appellant was accused of paying management incentives amounting to US\$21 800 in December 2009 against a loss which militated against payment of incentives.

An internal disciplinary hearing was conducted which found the appellant guilty and recommended his dismissal from employment. The appellant challenged the propriety of those proceedings through a review application brought before the court *a quo*. That contested review application yielded a consent order granted by the court *a quo* on 28 October 2010 in the following terms:

“IT IS HEREBY ORDERED THAT:

1. The disciplinary hearing held against the applicant be and is hereby set aside to allow a *de novo* hearing and the suspension letter dated 13 April 2010 remains in force.
2. The arbitration proceedings before Arbitrator M. Dangwa be and is (sic) hereby withdrawn.
3. A fresh disciplinary hearing shall be held before Mr J. T. Mawire as the hearing officer and the parties shall share the costs of the hearing officer equally.
4. The issue of whether the applicant should be paid between the period of April to October 2010 is reserved for ruling by the court after receiving submissions from the parties’ legal practitioners before close of business on 29 October 2010.”

I note in passing that J. T. Mawire was appointed as a “hearing officer” by consent of the parties. The earlier disciplinary proceedings were abandoned in favour of a hearing *de novo* before a different hearing officer, J. T. Mawire, who was appointed “to hear and determine the matter in terms of the code.”

Indeed, hearing officer Mawire heard the matter, took evidence from both parties and received written closing submissions. In his determination dated 22 February 2012, Mawire found the appellant not guilty of misconduct. He ordered that he be reinstated without loss of salary and benefits from the date of suspension.

The respondent was aggrieved. Initially it made frantic efforts to appeal internally against the determination by the hearing officer. Again the parties bickered for some time on the choice of an appeals authority. Problems started when, at the instance of the appellant as claimant, “an independent arbitrator,” Munyaradzi Dangarembizi, issued an arbitral award on 13 November 2012 to wit:-

“AWARD

Wherefore, after carefully analysing the facts and the law, I make the following award-

- That the claimant’s prayer is upheld and I hereby order that the merits of the matter be conciliated upon by the Labour Officer.”

Following that award, it is common cause that a Labour Officer unsuccessfully held conciliation proceedings as a result of which the matter was referred to compulsory arbitration before an arbitrator. When the respondent took its grievance to the arbitrator it stated categorically at para 2.8 of the Claimant’s statement of claim and submissions:

“2.8. Hence, the matter *in casu*, is an appeal by the employer, the claimant herein against the determination of Mr Mawire, the Disciplinary Authority dated 22nd February 2012.”

It is also beyond disputation that the arbitrator also dealt with the matter as an appeal. He said so at para 5 of the arbitral award dated 8 October 2015, to wit:-

“Therefore the instant matter is an appeal by the claimant against the determination of Mr Mawire the disciplinary authority dated 22 February 2012.”

The arbitrator upheld the determination of the hearing officer. He ordered the reinstatement of the appellant to his position with no loss of salary and benefits from the date of dismissal. In the event that reinstatement was no longer possible, the appellant was to be paid damages *in lieu* of reinstatement.

PROCEEDINGS BEFORE THE COURT *A QUO*

The respondent was again unhappy with the arbitral award. It lodged an appeal to the court *a quo* on three grounds. The first was that the arbitrator grossly erred and misdirected himself on a point of law by failing to make a finding that the employee was grossly incompetent.

The second was that the arbitrator erred and misdirected himself at law by relying on an affidavit without according the respondent the opportunity to cross examine its deponent and to adduce oral evidence. The third ground was that the arbitrator grossly erred and misdirected himself at law by handing down a grossly irrational and unreasonable award.

The court *a quo* found that the appellant had a responsibility to account to the Board on the operations of the business. He could not simply rely on his subordinates regarding the financial figures of the company as the buck stopped with him because he was the Managing Director. The court *a quo* found that before presenting the financial figures to the Board, it was incumbent upon the appellant to verify the correctness of the figures. In its view

this was a case of *res ipsa loquitar* wherein the failure of the appellant to verify the figures was proof of incompetence.

The court *a quo* further found that the arbitrator's finding that the appellant was not responsible for the presentation of the faulty accounts to the Board flew in the face of available evidence. It was a gross misdirection entitling the court to interfere and set aside the award. It set aside the award and remitted the matter for the assessment of an appropriate penalty.

PROCEEDINGS BEFORE THIS COURT

It became the appellant's turn to be aggrieved. He appealed to this Court on 5 grounds of appeal most of which attacked the factual findings of the court *a quo* instead of the law as required by s 92 F(1) of the Labour Act [*Chapter 28:01*]. In terms of that section an appeal lies from any decision of the Labour Court to this Court on a question of law only.

As that issue was not canvassed with the parties at the hearing of the appeal it shall not be used as a basis for resolution of the appeal.

At the commencement of the hearing Mr *Maguchu*, who appeared for the appellant, took a point of law that the entire proceedings before the Labour Officer who conciliated the matter, the arbitrator who heard what was in fact an appeal from a decision of the hearing officer and the subsequent appeal before the court *a quo* were a nullity. Mr *Maguchu* entreated this Court to strike off the appeal from the roll and to invoke its power in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] to set aside those proceedings.

In advancing that argument on nullity of the proceedings Mr *Maguchu* relied on the authority of two judgments of this Court in *Mabeza v Sandvick Mining (2) Construction (Pvt) Ltd & Anor* SC 91/19 and *Living Waters Theological Seminary v Rev Chikwanha* SC 59/21. In those cases this Court pronounced that proceedings referred to the court *a quo* having been adjudicated upon by a Labour Officer without authority to do so were a nullity.

In response, Mr *Mucheche* for the respondent took a different view, namely that the authorities in question were distinguishable from the present case. In his view, those authorities applied to situations where an employer would have made a determination in terms of a code of conduct thereby ousting the jurisdiction of the Labour Officer.

Mr *Mucheche* submitted further that in the present case the employer did not decide the matter at all. According to counsel, what was placed before the Labour Officer was not an appeal but a referral to the Labour Officer in terms of s 93 of the Labour Act.

He submitted that s 93 conferred what he called “a special jurisdiction” to the Labour Officer. Mr *Mucheche* submitted that the law which was applicable at the time the dispute arose made it legally competent for disputes to be referred to Labour Officers as happened in this case.

I must mention that after hearing submissions from counsel on that preliminary point, this Court directed the parties to file written submissions on the point of law. The appellant was directed to do so by 24 January 2022 while the respondent was directed to file a response by 27 January 2022. The parties managed to file their submissions timeously which is commendable indeed. In his written submissions Mr *Maguchu* surprisingly moved for an

order that the appeal should succeed with costs and that the decision of both the Labour Court and the arbitrator be set aside in terms of s 25 of the Supreme Court Act on the basis that both are a nullity. No ground of appeal attacked the proceedings *a quo* on the basis of a nullity. The appeal cannot succeed on non-existent grounds.

On the other hand, in his written submissions Mr *Mucheche* submitted that the appellant did not point to any prejudice suffered as a result of the manner in which the proceedings were conducted. On the authorities pointing to the lack of jurisdiction by a labour officer to deal with a referral under s 8 of the National Employment Code, counsel submitted that those cases do not have retrospective effect. They are not applicable to cases that were referred to labour officers prior to their pronouncement. Counsel also sought to distinguish this case by virtue of the arbitral award issued by Dangarembizi which referred the dispute to a labour officer. As shall be demonstrated below this proposition is faulty.

I also mention for completeness that the court proceeded to hear arguments on the merits. That was done on the understanding that in the event that the point of law raised by counsel for the appellant found favour with the court, it would not be necessary for the court to determine the merits.

The point of law relating to the validity of the proceedings is dispositive of the matter if upheld. The court would only relate to the merits if the proceedings were valid. The position taken in this judgment makes it unnecessary to consider the merits.

The question of when a Labour Officer may exercise jurisdiction over a dispute is one that has been with us for a long time mainly because of the problematic wording of the

relevant provisions of the Labour Act. In *Watyoka v Zupco (Northen Division)* SC 87/05 the employee was charged with misconduct and dismissed from employment before he referred the matter to a Labour Relations Officer who ordered his reinstatement, a decision later upheld by a senior Labour Relations Officer.

In that case this Court considered the provisions of s 101(5) and (6) of the then Labour Relations Act [*Chapter 28:01*] which read:

- “(5) Notwithstanding this part but subject to subsection (6), no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code, nor shall he intervene in any such proceedings.
- (6) If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3) the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section ninety-three.”

The court reasoned that three important conditions upon which a matter can be referred to a labour relations officer emanated from that provision. These were that the matter must not be one that is or is liable to be the subject of proceedings under a Code of Conduct; the matter has not been determined within thirty days of notification and where the parties to the dispute request it and agree on the issue in dispute.

It went on to pronounce at p 5 of the judgment:

“Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made.”
(Emphasis added)

A more recent case dealing with the same issue is *Mabeza v Sandvik Mining (2) Construction (Pvt) Ltd*, supra. Again in that case, following an internal disciplinary hearing, the employee was dismissed for misconduct. His internal appeal was also dismissed. Thereafter the matter was referred to a Labour Officer for conciliation which failed resulting in the Labour Officer referring the matter to compulsory arbitration.

The arbitrator found in favour of the employee but the employer appealed to the Labour Court which found in favour of the employer. On appeal to this Court, the court considered that the matter had proceeded to compulsory arbitration through reference to the Labour Officer in terms of s 8(6) of the National Code of Conduct. The relevant provisions of that Code read:

- “(6) A person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or an employment Council Agent, as the case maybe, within seven working days of receipt of such decision.
- (7) The Labour Officer or an Employment Council Agent to whom a case has been so referred shall process the case as provided for under section 93 of the Act.”

GOWORA JA (as she then was) took the view that regardless of how the case was disguised, it was in fact an appeal against the dismissal of the appeal by the Appeals Authority. In considering whether the arbitrator had jurisdiction to act as an appeal tribunal, the learned appeal judge concluded that the arbitrator did not have such jurisdiction. She remarked at p 12 of the judgment:

“In my view, the principle emerging from all the authorities referred to above can be summarised by the statement to the effect that a labour officer 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. It is clear that in this case the labour officer presided over a matter over which he did not have any jurisdiction. As stated in *Watyoka's case (Supra)*, once there is a determination on the merits of a dispute a labour officer has no jurisdiction under s 93 of the Act.

In this context the implications of what the arbitrator did are obvious.”

Later in that judgment the court stated at p 14:

“I conclude therefore that the labour officer did not have jurisdiction to hear a complaint from the appellant of whatever nature and that the referral to compulsory arbitration was unlawful and the proceedings before the arbitrator were as a result an irregularity.”

See also *Munchville Investments (Pvt) Ltd t/a Bernstein Clothing v Mugavha* SC 62/19.

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 work place.

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 in operative by their being *ultra vires* and inconsistent with the provisions of ss 93 and 101 of the Labour Act.

Whether the proceedings were regular.

In this case, internal disciplinary proceedings were conducted before a hearing officer J. T. Mawire who rendered a determination. The determination was never set aside on appeal which the employer had commenced, before another arbitrator erroneously referred the matter to a Labour Officer for conciliation. To the extent that there was an internal disciplinary process which had yielded a determination, by the authorities I have referred to above, the Labour Officer did not have jurisdiction to conciliate the matter. The matter had to proceed by way of an appeal firstly to an internal appeal authority and later to the Labour Court.

I do not agree with Mr *Mucheche* that Mawire was clothed with special jurisdiction to determine the matter in any manner outside the provisions of the National Code of Conduct. The law as it existed at the time the parties reached a deadlock on the appeals authority to hear the appeal did not allow for a referral to a Labour Officer in the way arbitrator Dangarembizi sought to do on 13 November 2012. The recent authorities cited above only underscored a legal truism that has always existed. The issue of their retrospective application does not arise at all.

It follows that the proceedings before the Labour Officer who referred the dispute to arbitration were irregular, the Labour Officer not having had jurisdiction. By the same token the arbitration yielded by an irregular conciliation and indeed the appeal to the Labour Court that followed, were also irregular. Nothing lawful could result from an invalidity. It follows that this appeal could not have been properly before this Court.

DISPOSITION

An invalidity occurred which has come to the attention of this Court. This Court has review power reposed upon it by s 25(1) of the Supreme Court Act. The logical thing to do is to invoke that provision to set aside the invalid proceedings.

Regarding the issue of costs, the jurisprudence which has come out of this Court on the invalidity of proceedings brought before a Labour Officer in the way the present matter was done, has been available for quite some time. Counsel in this matter should have known of it. They did not do anything about the fate of this appeal right up to the date of hearing. Accordingly the view that I take is that neither of the parties is entitled to costs for that reason.

In the result, it is ordered as follows:

1. The matter 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 Labour Officer, the arbitrator and the Labour Court are hereby set aside.

GWAUNZA DCJ:

I agree

CHITAKUNYE JA:

I agree

Maguchu & Muchada Business Attorneys, appellant's legal practitioners

Caleb Mucheche & Partners, respondent's legal practitioners