

STANLEY NHARI
versus
ROBERT GABRIEL MUGABE
and
DR GRACE MUGABE
and
GUSHUNGO DAIRY HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 13 February 2019 and 20 February 2019

Special Plea

R. Mabwe, for the plaintiff
E. Mubaiwa, for the defendants

CHIKOWERO J: At the end of oral argument on 13 February 2019, I upheld the special plea and dismissed the plaintiff's claim with costs.

The background facts are as follows.

The plaintiff is a male Zimbabwean adult.

So is the first defendant, the Executive President of the Republic of Zimbabwe until sometime in November 2017.

The second defendant is the latter's spouse.

The third defendant is a company duly incorporated in terms of the laws of Zimbabwe.

According to the plaintiff, the third defendant is the first and second defendants' investment vehicle.

On or about 1st January 2007 the plaintiff entered into an oral employment contract with the first and second defendants.

In terms thereof the plaintiff was employed by the two as their General Manager.

Such employment was under the third defendant, the investment vehicle aforesaid.

The material terms of the employment contract were these.

The contract, which was without limit of time, entailed the plaintiff performing, for the third defendant, all such acts as are customarily carried out by a person in the position of a General Manager.

Further, the plaintiff was also required to and did undertake all such work as the first and second defendants would require of him including that which had nothing to do with farming operations.

On 6 October 2015 and in breach of the terms of the employment contract, the first and second defendants by dint of illegitimate influence, force and might required the plaintiff to relinquish his position.

However, he was ordered to continue working for no salary until 6th November 2015.

As a result of the unlawful termination of the employment contract, the plaintiff claimed from all three defendants damages for the period 1st October 2015 to 6 November 2015.

The amount claimed was \$8 909,14, computed on the basis of the plaintiff's salary.

The plaintiff also claimed \$69 492,69 being cash in lieu of leave, arising from accrued leave days at the rate of 25 days per year. The total period covered by this claim spans from 1st January 2007 to 6th November 2015.

Further, the plaintiff alleged that at the time of the termination of the employment contract, the plaintiff was entitled to the contractual benefit of a motor vehicle.

Consequently, the plaintiff claimed payment of the sum of \$90 000,00 averring that as the value of the motor vehicle.

Finally, the plaintiff alleged that upon the enforced termination of the employment contract, the first and second defendants employed public media to denigrate the plaintiff at various gatherings.

To the plaintiff, this imperilled his future prospects of employment.

The plaintiff complains that the acts of defendants in interfering with his employment prospects are wrongful and deliberate, and resulted in plaintiff losing potential employment.

The damages claimed in this regard are in the sum of US\$588 000.00.

To this suit, the defendants filed a special plea in bar.

In so far as the defendants are concerned, the High Court has no jurisdiction to entertain this matter as it is a purely labour dispute in which the Labour Court is the Court of first instance in terms of s 89 (6) of the Labour Act [*Chapter 28:01*].

The cause of action involves an allegation of non-payment of post termination of employment wages and other benefits as set out in s 13 of that Act which allegation, if proved, would amount to an unfair labour practice.

Further, the defendants averred, the procedure for dealing with allegations of unfair labour practices is set out in s 93 of the Act meaning that the matter must be dealt with by the Labour Court. The High Court has had its jurisdiction ousted by s 89 (6) of the Labour Act [*Chapter 28:01*].

The defendants averred that the intention of the legislature in enacting s 13 (1) of the Labour Act was to enable an employee who alleges he is owed terminal benefits to use those provisions to enforce payment. Parliament created the necessary machinery in the Labour Act to deal with issues of non-payment.

The defendant further averred that in as much as the High Court has original jurisdiction to deal with civil matters as set out in s 171 (1) of the Constitution of Zimbabwe Amendment (NO. 20) Act, 2013, this does not usurp the power of the Labour Court.

Parliament has, by virtue of ss 172 (2) and (3) of the Constitution, circumscribed matters over which the Labour Court has exclusive jurisdiction to the exclusion of other courts, the High Court included, so pleaded the defendants.

Resultantly I was urged to uphold the special plea and dismiss the entire claim with costs on the higher scale.

Analysis

This court has interpreted ss 171 (1) (a) and 172 (2) of the Constitution to mean that, although the High Court has original or inherent jurisdiction in respect of all civil matters in Zimbabwe, in so far as labour matters are concerned, the intention of the legislature is that the Labour Court be the court of first instance: *Stanley Machote v Zimbabwe Manpower Development Fund* HH 813/15; *Nyanzara v Mbada Diamonds (Private) Limited* 2016 (1) ZLR 195 (H) and *Triangle Limited and Others v Zimbabwe Sugar Milling Industry Workers Union and others* HH 74/16.

I agree with Advocate Mubaiwa for the defendants that the drafters of the Constitution deliberately separated civil and labour causes in ss 171 (1) (a) and 172 (2) of the Constitution.

While the High Court's original jurisdiction in civil matters was constitutionally entrenched in the former provision, the Constitution went on to provide for a specialized Court to deal with labour and employment disputes, at first instance, in the latter provision. The Labour Court is that specialized Court.

The Constitution recognizes the distinction between labour matters and civil matters.

My understanding of the *National Employment Council for the Construction Industry v Zimbabwe Nantong International (Private) Limited* SC 1/18 judgment is that the Supreme Court left open the question of the jurisdiction of the Labour Court *vis-à-vis* the current constitution.

I am aware that s 13 of the High Court Act [*Chapter 7:06*] reads:

“subject to this Act and any other law, the High Court shall have full civil jurisdiction over all persons and over all matters within Zimbabwe.”

My construction of this provision in conformity with s 171 (1) (a) and 172 (2) of the Constitution is that labour matters are excluded from the “all matters within Zimbabwe.” Any other interpretation would mean the High Court Act, in this regard, supercedes the Constitution. That cannot be so.

Indeed, s 13 of the High Court Act itself makes that section subject to any other law. My view is that that other law is the current constitution, particularly ss 171 (1) (a) and 172 (2).

I also hold the view that even if s 13 of the High Court Act were inconsistent with s 89 (6) of the Labour Act, the latter would prevail by virtue of s 2A (3) of the Labour Act. It reads:

“2A Purpose of the Act
(1)
(2)
(3) This Act shall prevail over any other enactment inconsistent with it.”

With the foregoing in mind, I now examine each of the Plaintiff’s claims in turn. In doing so, I am mindful of the need to determine, in respect of each, whether the same is purely civil or labour/employment related.

The US\$8 909-14 damages claim

I accept that this is not a claim for arrear salary, despite the fact that para 2.1 of the declaration states that the computation is based on the salary Plaintiff was earning as at October 1st 2015.

There was therefore no contract of employment to talk about, for the period October 1st 2015 to November 6th 2015.

But my finding is that this claim remains a labour matter. Compelling someone to work without being employed and without therefore being entitled to any remuneration, is forced labour.

Forced labour is defined in the interpretation section of the Labour Act to mean:

“any work or services which a person is required to perform against his or her will under the threat of some form of punishment.”

When a person is ordered to continue working for no remuneration, after the enforced termination of an employment contract, that to me is forced labour. It certainly is not voluntary work. It also is not work undertaken in terms of a contract of employment, for no such contract subsists.

It is for these reasons that I upheld the special plea in respect of this particular claim.

Cash in lieu of leave in the sum of US\$69 492.69 for the period 1 January 2007 to 6 November 2015.

Despite alleging that the employment relationship was terminated on 1 October 2015, plaintiff claims cash in lieu of leave up to 6 November 2015.

I respectfully am unable to associate myself with the *ratio decidendi* in *Chiweshe & Others v Air Zimbabwe Holding (Pvt) Ltd* 2014 (2) ZLR 837 (H). It was therein held that outstanding salaries and allowances owed to ex-employees rendered efforts to recover same a debt collection exercise, rather than a labour issue, because the employment relationship had ended.

Were I to follow that reasoning, it would mean that I would also find that the summons issued by plaintiff to recover the cash in lieu of leave is also a step in debt collection. Section 13 of the Labour Act precludes me from making such a finding.

Indeed, I am unable to see how, merely because the employment relationship has ended, a claim for cash in lieu of leave mutates from being founded on the terminated employment contract to being a pure civil debt. To hold otherwise would be akin to saying a claim founded on delict ceases to be delictual in nature once the wrong has been committed.

There are legion decisions, both by the Labour Court and the Supreme Court, where judgments have been granted in respect of claims for payment of cash in lieu of leave, properly treated as labour matters. See, e.g. *First Mutual Life Assurance Ltd v Muzivi* 2007 (1) ZLR 325 (S).

I need only add that the only time that the High Court becomes seized with such matters is when dealing with applications for registration of such judgments for purposes of enforcement. Such applications are purely procedural, not substantive. In disposing of such applications the High Court is not called upon to delve into the merits of the matter.

Quite clearly, I had no option but to uphold the special plea in respect of this claim.

The US\$90 000.00 being the value of the motor vehicle benefit due to plaintiff by defendants

The benefit being *ex contractu*, what I have said in respect of the claim for payment of cash in lieu of leave applies in respect of this claim with equal force. I, accordingly, need not say more.

US\$588 000 being delictual damages due from defendants to plaintiff for loss of employment prospects and or the impairment of economic prospects.

I do not think the appellation “delictual” *vis-à-vis* this head of damages transforms it into a delictual matter. What was important to me was that the damages suffered were to plaintiff’s employment prospects.

The claim therefore remained rooted in labour law.

The principles applicable in investigating the questions of liability and quantum of damages are labour law principles. There is a special platform for that. It is the Labour Court. Such factors would include the age, health and qualifications of the plaintiff. The Labour Court, being a court of equity, is statutorily created and enabled to undertake that exercise. See generally *Delta Beverages (Pvt) Ltd v Kudakwashe Murandu* SC 38/15.

Costs

As for the scale of costs, I accept that there has been no pronouncement by either the Supreme Court or the Constitutional Court on the jurisdiction of the Labour Court in light of the current constitutional provisions. *Nyhora v CFI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) did not consider sections 171 (1) (a) and 171 (2) of the Constitution vis a vis the jurisdiction of the Labour Court and the High Court in respect of labour matters.

Further, the *Chiweshe & Ors v Air Zimbabwe Holdings (Pvt) Ltd* case (*supra*) is just one of a number of High Court decisions to the effect that the High Court, being a court of inherent jurisdiction, can entertain any matter brought before it, labour matters included.

In light of this unhappy state of the law, and in the exercise of my discretion, I saw no justification in awarding punitive costs against plaintiff

The law needs to be authoritatively laid out. I am unable to fault plaintiff for assisting in that endeavour. His submissions, although not finding favour with me, were invaluable in enabling me to dispose of the special plea.

Finally, I wonder why the Labour Court is established and called by that name if labour matters can continue to be dealt with by the High Court at first instance.

In the result, I ordered that

1. The special plea is upheld.

2. The plaintiff's claim is dismissed with costs.

Munangati and Associates, plaintiff's legal practitioners
Hussein Ranchod, defendant's legal practitioners