

ZIMASCO PRIVATE LIMITED
v
MAYNARD FARAI MARIKANO

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, OCTOBER 30, 2013 & JANUARY 13, 2014

A P De Bourbon SC, for the appellant

S J Chihambakwe, assisted by *Ms Nemaramba*, for the respondent

GARWE JA: This is an appeal against the judgment of the Labour Court dismissing an application by the appellant to file supplementary heads of argument and setting aside the decision of the appellant to terminate the respondent's contract of employment with itself.

The facts of this case are largely common cause and are these. The respondent was employed by the appellant as a Medical Officer in 1995. He rose through the ranks to become the Health Services Manager. In terms of his letter of appointment, the appellant's policies and procedures were incorporated into his employment contract. On a date that is unclear on the papers, but between February and March 2009, the respondent was involved in a serious road accident, whilst about the appellant's business. The respondent suffered serious injuries to his spine as a result of which he was unable to attend to his official duties from 11 March 2009. The respondent was allowed to go on sick leave on full pay for a period of ninety (90) days. At the expiration of that period, the respondent was still unable to resume his duties and took more sick leave. On 7 September 2009, the appellant's services

director, a Mr Zvaipa, wrote to the respondent directing him to furnish a copy of his doctor's opinion, failure of which his remuneration and other benefits were to be suspended. Following further correspondence exchanged between the two, the respondent made it clear that he remained in the employ of the appellant until such time as his contract was lawfully terminated. On 18 September 2009 the appellant then wrote to the respondent advising that since he had exceeded the maximum sick leave permissible in a single year, his contract of employment was being terminated forthwith in terms of s 14 {4} of the Labour Act, [Cap 28:01] ("the Act").

Following this development the appellant then filed an application for review with the Labour Court on 9 October 2009. In the application the respondent alleged that the termination was unlawful as the appellant had not followed the procedural steps required at law or in terms of his contract of employment in terminating his employment on medical grounds. It appears that on the same date the respondent filed what purported to be a notice of appeal against the decision to dismiss him. It is apparent however that in both cases the respondent sought an order setting aside the decision to terminate his contract of employment.

The Labour Court treated the matter as an application for review. After hearing submissions from both parties, the court then reserved its judgment on 15 March 2010. On 15 November 2010, eight (8) months later, the appellant then filed an application for leave to file supplementary heads of argument. The supplementary heads of argument sought to raise the issue whether or not the Labour Court had jurisdiction to entertain an application for review in the first instance. The application was opposed by way of a letter to the Registrar. No formal opposing papers were filed. The Labour Court dealt with the request as part of its

judgment. The court was of the view that there should be finality in litigation and that to allow a party to file heads of argument after judgment had been reserved would defeat this principle. The Court therefore dismissed the application to file supplementary heads of argument. The court further reached the conclusion that an employer does not have the authority to summarily terminate an employee's contract of employment in terms of s 14 (4) of the Act and that, regard being had to the purpose of the Act, namely the promotion of fair labour standards, the employer was under obligation to conform to the requirements of substantive and procedural fairness and that failure to give notice to an employee of an intention to terminate a contract of employment in terms of s 14 (4) of the Act is fatally irregular. The court further found that since the respondent's contract of employment embodied other terms applicable in the event of sickness, the appellant should have fully related to those terms and given the respondent the option either of early retirement or being medical boarded. The court concluded that as this had not been done there had been procedural irregularities and consequently set aside the decision to terminate the contract of employment of the respondent. It is against that order that the appellant has appealed to this Court.

Both parties to this appeal are agreed that the appeal raises three (3) issues for determination. These are:

- (a) Whether or not the Labour Court had jurisdiction to entertain the respondent's application for review at first instance.
- (b) Whether the Labour Court erred as a matter of law in declining to consider the issue of jurisdiction raised in the application to allow the filing of supplementary heads of argument.
- (c) Whether the Labour Court was correct in holding, as it did, that the right to termination in terms of s 14 (4) was subject to procedure and that any irregularity in those procedures entitled the Labour Court to set aside the termination of the contract of employment. In particular whether the appellant was obliged to give the respondent the right to be heard before his contract was

terminated and secondly whether the appellant was obliged, in terms of the contract of employment between the respondent and itself, to comply with medical boarding procedures or the availing of an option of early retirement before the contract of employment could be terminated.

THE QUESTION OF JURISDICTION

The appellant's submission on the question of jurisdiction is this. The Labour Court does not have unlimited jurisdiction over all labour matters and such jurisdiction it may have has been specifically provided for by law. There is no general right of application to the Labour Court because s 89(1)(a) of the Act restricts the matter to "applications ... in terms of this Act". In terms of the Act, disputes are required to be dealt with by a labour officer. This is the first instance when a hearing takes place once a dispute has been referred to such officer. It is only when the labour officer is unable to settle the dispute properly referred to him, or where he issues a certificate of no settlement and fails to refer the matter to compulsory arbitration or where the labour officer refuses to issue a certificate of no settlement, that a party can apply to the Labour Court in terms of s 93 (7) of the Act. Only in this way can a dispute such as the present come before the Labour Court – this being one of the instances of an application contemplated in s 89(1)(a) of the Act. The intention was never to give the Labour Court the power of review at first instance but rather to place it on the same footing as the Supreme Court. The legislature has been very specific as to the nature of applications to be handled by the Labour Court.

The appellant further argues that the power of review in terms of s 89(1)(d) is confined to those instances where the High Court has the power of review in labour matters, and not to matters generally. If indeed the High Court has no review jurisdiction in labour matters then s 89(1)(d) confers no power of review on the Labour Court.

The appellant further takes the point that the legislature has established an elaborate chain of investigation and conciliation. The labour officer is the court of first instance and it is to him that the respondent should have directed his complain.

For the above reasons the appellant submits that the Labour Court did not have jurisdiction to entertain the application for review at first instance.

The respondent on the other hand argues that the Labour Court has the same powers of review in respect of labour matters as would be exercisable by the High Court in other matters.

For reasons that follow, I am not persuaded that the appellant is correct in its interpretation of s 89 of the Act.

Section 89 of the Act provides, in relevant part, 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)
 - (c)
 - (d)
 - (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters.”

The powers of review exercisable by the High Court are to be found in ss 26 and 27 of the High Court Act, [Cap 7:06]. Those two sections provide:

“26 Power to review proceedings and decisions

Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.

“27 Grounds for review

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decisions may be brought on review before the High Court shall be –
 - (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned;
 - (b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
 - (c) Gross irregularity in the proceedings or the decision.
- (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.”

The above provisions are in my view clear and unambiguous. In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. In order for a review to be the subject of a hearing, such review must be brought by way of application – see order 33, Rule 256 of the High Court of Zimbabwe Rules, 1971. Clearly an application for review is not the type of application contemplated in s 89 (1) (a) of the Act.

The suggestion by Mr *De Bourbon* that the Labour Court has been given the same power of review as would be exercisable by the High Court in respect of labour matters is, in my considered view, incorrect and inconsistent with the provisions of the Act. I say this for two reasons. Firstly, the Act is clear that 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 s 89(1) of the Act – see s 89(6) of the Act. In various decisions, the High Court has interpreted this provision to mean that the High Court has no jurisdiction in respect of the matters referred to in s 89(1) of the Act. See for instance *Zimtrade v Makaya* 2005(1) ZLR

427 (HC) at 429 and *DHL International (Pvt) Ltd v Madzikande* 2010 (1) ZLR 201 (HC) at 203 – 204. In the circumstances the suggestion that the High Court would have any review powers in respect of labour matters generally would be untenable. Secondly it is clear that the interpretation given relies on a superficial reading of the wording of s 89(1)(d). The section should be understood to mean “the same powers of review in respect of labour matters as would be exercisable by the High Court” or alternatively “the same powers of review, as would be exercisable by the High Court, in respect of labour matters”. Any other reading of the paragraph would clearly result in an absurdity.

The suggestion that the powers of review enjoyed by the Labour Court are similar to those of the Supreme Court is equally incorrect. Section 25 of the Supreme Court Act, [Cap7:06] provides:-

“25 Review powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
- (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination.”

It is clear from the above section that whilst the Supreme Court may exercise the same review jurisdiction, power and authority as the High Court, no person has the right

to institute any review in the first instance before the Supreme Court. In other words the Supreme Court has the power of review over matters coming before it for adjudication by way of appeal or whenever it comes to the notice of the Court that an irregularity has occurred in any proceedings or in the making of a decision and it is felt that such an irregularity should not be allowed to stand.

The fact that provision has been made for disputes to be first referred to a labour officer is in my view irrelevant. Review proceedings are concerned with the manner in which a decision is taken and not its merits. If for example a disciplinary authority had no jurisdiction to hear a particular matter, or was biased or its decision grossly unreasonable, the person aggrieved is empowered to approach the Labour Court and apply for the review of the proceedings. The fact that, instead of seeking a review, one can approach a labour officer in terms of s 93 of the Act does not and cannot affect the review power of the Labour Court provided the requirements for such review are met. A decision by a Magistrate Court can be the subject of not only review proceedings before the High Court but also appeal proceedings in the normal way. The fact that there is an elaborate appeal procedure would in no way suggest that the High Court has no review jurisdiction in the first instance.

In my view the Labour Court does have review jurisdiction to deal, in the first instance, with matters involving issues of labour.

THE APPLICATION TO FILE SUPPLEMENTARY HEADS OF ARGUMENT ON THE QUESTION OF JURISDICTION

It is common cause that after hearing submissions from the parties, the court *a quo* reserved judgment in this matter. This was on 15 March 2010. Exactly eight (8) months later, i.e. on 15 November 2010, the appellant then filed an application to file supplementary heads of argument in which the main issue raised was whether the Labour Court had jurisdiction to deal with the application for review. It is also common cause that the application was not set down for argument and that on 7 March 2011 the respondent's legal practitioners wrote to the Registrar of the Labour Court opposing the application on the basis firstly that it was too late for the appellant to seek to file supplementary heads at a time when judgment was awaited and secondly that there was need for finality in litigation. The court *a quo* then handed down its judgment on 21 March 2011. In dismissing the application to file further heads of argument appellant, the court *a quo* remarked,

“In my view this belated application should be dismissed for the simple reason that labour disputes should be finalised expeditiously and to allow a party to file further pleadings after the reservation of judgment would defeat this principle. There must be finality to litigation. ...”

In his submissions, Mr *De Bourbon* accepted that, in general, once judgment has been reserved, the parties have no right to file any further arguments. However the parties have the right to apply to file further heads of argument and where the argument relates to a legal matter, especially one of jurisdiction, a court should be slow to refuse to allow such further argument unless to do so would clearly interfere with the workings of the judicial officer concerned. Whilst the application was filed eight (8) months after judgment had been reserved, it was made four (4) months before judgment was handed down and clearly the matter had not been handled with any degree of urgency.

In his submissions the respondent argued that the appellant should have diligently submitted any further argument within a reasonable time and not eight (8) months after judgment had been reserved.

I am inclined to agree with Mr *De Bourbon* that in general, once judgment has been reserved, the parties have no right to file further heads of argument. However a party has the right to apply to file such heads of argument. When that happens, as it did in this case, it is incumbent upon the judicial officer seized with the matter to hear both sides and thereafter to make a decision on whether or not to allow such filing. In this case this was not done and it appears even the merits of the application were not considered. The court *a quo* merely considered the extent of the delay and the need for finality in litigation as sufficient grounds for the dismissal of the application. I have no doubt in my mind that in doing so the court *a quo* erred. As Mr *De Bourbon* correctly pointed out, where an issue of law, particularly one of jurisdiction, is raised, a court should be slow to refuse to allow such further argument unless the court is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process.

It is settled law that a question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. See *Ahmid v Manufacturing Industries (Pvt) Ltd* SC 254/96 at p 17 of the cyclostyled judgment and *Muchakata v Nertheburn Mine* 1996 (1) ZLR 153 (S), 157A.

Once the application to file further heads of argument was filed, the court *a quo* should have set the matter down and thereafter made a proper determination of the request. The court did not do so and proceeded to consider its judgment without so much as

considering whether a valid point of law had been raised. Only in its judgment did it then give its reason for ignoring the application, namely that it was belated and that there was need for finality in litigation. In my view the court erred in its approach to the application.

The rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled to make a proper decision. The issue raised was a serious one. If a court has no jurisdiction that would be the end of the matter and any determination made thereafter would be null and void.

That the court *a quo* should have allowed the filing of further heads of argument is buttressed by what has happened on appeal before this Court. The issue of jurisdiction has been raised and argued by both parties, notwithstanding that the court *a quo* had dismissed the request to file supplementary heads on this aspect. Indeed this is the first issue that this Court has had to determine in this appeal.

On the facts therefore I consider that personal inconvenience to the court *a quo* was not sufficient ground to refuse to even hear the application. This is a case where the court *a quo* should have allowed the appellant to file supplementary heads of argument and allow the other side the opportunity to respond before coming to a decision on the matter.

WHETHER THE RIGHT TO TERMINATE IN TERMS OF SECTION 14(4) OF THE LABOUR ACT WAS SUBJECT TO PROCEDURES

Two issues arise in this regard. These are firstly, whether a termination in terms of s 14(4) is subject to substantive and procedural fairness and, secondly, whether on the facts of this case the appellant complied with the provisions of s 14(1) of the Act and, if

so, whether its invocation of the provisions of s 14(4) of the Act was in the circumstances proper.

Section 14 of the Act provides:-

“14 Sick leave

- (1) Unless more favourable conditions have been provided for in any employment contract or in any enactment, sick leave shall be granted in terms of this section to an employee who is prevented from attending his duties because he is ill or injured or undergoes medical treatment which was not occasioned by his failure to take reasonable precautions.
- (2) During any one-year period of service of an employee an employer shall, at the request of the employee supported by a certificate signed by a registered medical practitioner, grant up to ninety days’ sick leave on full pay.
- (3) If, during any one-year period of service of an employee, the employee has used up the maximum period of sick leave on full pay, an employer shall, at the request of the employee supported by a certificate signed by a registered medical practitioner, grant a further period of up to ninety days’ sick leave on half pay where, in the opinion of the registered medical practitioner signing the certificate, it is probable that the employee will be able to resume duty after such further period of sick leave.
- (4) If, during any one-year period of service the period or aggregate periods of sick leave exceed –
 - (a) ninety days’ sick leave on full pay; or
 - (b) subject to subsection (3), one hundred and eighty days’ sick leave on full and half pay: the employer may terminate the employment of the employee concerned.
- (5) An employee who so wishes may be granted accrued vacation leave instead of sick leave on half pay or without pay.”

It is the appellant’s contention that s 14(4) gives the employer an absolute right to elect to terminate the employment of the employee if (a) the employee has taken more than ninety (90) days sick leave on full pay in any one year or (b) the employee has taken more than one hundred and eighty (180) days sick leave on full pay and half pay in any one year period. The appellant further argues that the right to terminate is not subject to compliance with any particular procedures.

The respondent, on the other hand, argues that s 14(4) of the Act does not give an employer an unfettered right to unilaterally and summarily dismiss an employee and that fair labour standards and the *audi alteram partem* rule still apply in this situation.

In determining this issue, the court *a quo* relied on the case of *Mutukwa v National Diary Co-operative Ltd* 1996 (1) ZLR (1) ZLR 348 which held, *inter alia*, that an employer was entitled to terminate the contract of employment on notice to the employee. The court was of the view that this principle was applicable to this case.

The reliance on the above case was clearly erroneous. I say so because s 14(b) of the then Labour Relations Act [Cap 28:01] provided that, unless more favourable conditions were provided in the contract, where an employee was unable for a period exceeding one month to fulfil the conditions of his employment, the employer was entitled to terminate the contract on due notice, in which event the employee was to be entitled to all benefits due to him up to the date of such termination. The requirement to give notice was in terms of s 14(b) and was mandatory. It is common cause that s 14(b) was repealed by Act 17/2002 which substituted the section currently in existence and which is the subject of this appeal. The current provision makes no provision for the giving of notice. Considering the circumstances as a whole, I would agree with Mr *De Bourbon* that there was a clear legislative shift and change of policy regarding the termination of employment on the grounds of excessive sick leave. Section 14(4) has no express conditions attached to it except the requirement as to the amount of sick leave which an employee can take in any one year before the right to terminate can be exercised by an employer.

However, since the decision to terminate an employment contract has far reaching consequences, one should assume that before such a decision is taken the employer

would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s 14(4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. In my view it would no be proper for an employer to invoke the provisions of s 14(4) of the Act and without notice to the employee, proceed to terminate his contract of employment. In short the *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void.

In the present case however it is apparent that there was correspondence between the appellant and the respondent in which the appellant made it clear that it would invoke the provisions of s 14(4) of the Act. The respondent challenged the appellant's right to terminate his employment in terms of s 14(4). The appellant then terminated the employment with effect from 18 September 2009.

I turn to deal with s 14(1) of the Act. In an ordinary employment contract, the termination of employment effected on 18 September 2009 would have been the end of the matter. However s 14(1) is qualified by the words:-

“Unless more favourable conditions have been provided for in an employment contract... sick leave shall be granted in terms of this section ...”

Clearly the intention on the part of the legislature was to give the employer and the employee the autonomy to agree on better terms and conditions than are provided for in s 14.

In the present case it is common cause that the appellant’s policy and procedure document was incorporated into the contract of employment of the respondent. The relevant portion of the Group Policy and Procedures, Referenced P+P No. 38, provides as follows:

“2 SICK LEAVE

2.1 All Employees:

2.1.1. 90 working days full pay in any one calendar year.

2.1.2. 90 working days half pay in any one calendar year.

2.1.3. During this period of half pay, full employee and Company contributions to the Pension Schemes must be continued.

ZIMASCO GROUP POLICY AND PROCEDURES	DATE: 17.03.03
SUB: LEAVE WITHOUT PAY/CASUAL/COMPASSIONATE/SICK/ACCIDENT	P&P NO.38
DISTRIBUTION: “E”	SUPERSEDES; 27.06.95

2.1.4. If, during the absence of an employee on sick leave at half pay, it is determined that he/she should be retired on the grounds of being permanently disabled, from illness, immediate steps must be taken to secure early retirement or to have the employee medically boarded.

2.1.5. ...

2.1.6. ...

2.1.7. ...

2.1.8. ...

ZIMASCO GROUP POLICY AND PROCEDURES	DATE: 17.03.03
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3. SICK LEAVE NECESSITATED BY INJURY

3.1 Arising from Accident at Work

1.1.1. Those employees covered by workers Compensation Insurance

Full pay for period of absence, recovered from Workers Compensation Department.

1.1.2. Those employees NOT covered by Workers Compensation Insurance

Full pay for the period of absence, provided that the cause of the accident which led to the injury is not attributable to the negligence of the employee.

3.2 Arising from Accident

The conditions laid down in sub-paragraph headed “sick leave, shall apply.”

The words “unless more favourable conditions have been provided for in a contract of employment” are wide and unambiguous. In other words, where more favourable conditions have been agreed to, those conditions will take precedence over the periods provided for in s 14(4) and will need to be complied with before any termination is contemplated by the employer.

Paragraph 2.1.4 in particular provides that if it is determined that an employee should be retired on the grounds of being permanently disabled, from illness, immediate steps must be taken to secure early retirement or to have the employee medically boarded. This provision also applies to sick leave necessitated by injury arising from an accident.

It is common cause in this case that the provisions of para 2.1.4. of the Group Policy and Procedures were not complied with. In the circumstances the appellant could not proceed as if that provision did not exist. It was a provision that the appellant itself had inserted into the Group Policy and Procedures and which had been incorporated into the

contract of employment. That provision certainly provided more favourable terms than would normally be the case. The appellant was therefore under obligation to look at the question of early retirement or medical boarding.

In the circumstances the decision by the appellant to terminate the appellant's contract of employment without reference to its own policy and procedures was irregular.

The finding that there was an irregularity in the termination of the respondents' contract of employment cannot therefore be impugned.

In the result, the following order is made:

- (1) The appeal is allowed only to the extent that para 3 of the order of the court *a quo* dismissing the application to file supplementary heads of argument is deleted.
- (2) The appellant shall pay the costs of appeal.

GOWORA JA: I agree

OMERJEE AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondent's legal practitioners