

REPORTABLE (8)

MEDICINES CONTROL AUTHORITY OF ZIMBABWE
v
(1) NATHAN TORONGA (2) NOZIPHO MATSHITSE (3)
BELLINGTON MUDYAWABIKWA (4) KUMBIRAI KAJONGWE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA AND PATEL JA
HARARE, JUNE 4, 2015 and FEBRUARY 10, 2017

E. Matinenga, for the appellant

S. Mushonga, for the respondents

GWAUNZA JA: This is an appeal against the whole judgment of the Labour Court of Zimbabwe, Harare, handed down on 11 of October 2011.

The factual background of the matter is as follows:

The respondents were employed by the appellant (“MCAZ”) in different clerical capacities and were also members of its Workers Committee. On 29 November 2010, the respondents were suspended from employment in terms of s 4 (a) and (b) of SI 15/2006, on charges of each having committed,

- i) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract of employment, and
- ii) wilful disobedience to a lawful order.

It was alleged against the respondents, in their capacity as workers' committee members, that they had attempted to force the MCAZ management to address several issues said to be of concern to the appellant's workers. The appellant's executive sub-committee believed it had resolved the various grievances and, through written communication dated 18 October 2010, advised the respondents that the committee had fully dealt with the complaints in question. Further, that the appellant desired and was effectively ordering 'closure' to the whole issue.

The respondents who were apparently of the opposite view, thereafter (and unprocedurally, according to the appellant), wrote a memorandum to the Minister of Health setting out a multiplicity of grievances and complaints against the conduct of the appellant and its senior personnel. The appellant took a dim view of this development and saw it as constituting a failure by the respondents to comply with the employer's lawful instruction. In specific terms, the instruction was that there be closure to the whole dispute.

Letters of suspension were subsequently issued to the respondents on 29 November 2010, inviting them to attend disciplinary hearings on different dates during the early days of December, 2011. Disciplinary proceedings were thereafter conducted with the result that the respondents were dismissed from their employment.

It is in my view pertinent, given the appellant's first ground of appeal, to set out the sequence of events following the issuance of the letters of suspension:

- 29 November 2010 - letters of suspension issued to all respondents.
- 30 November 2010 - the respondents took the matter to a labour officer for conciliation.
- 15-17 December 2010 - disciplinary hearings were conducted before a disciplinary committee and all the respondents were dismissed from their employment with effect from the date of suspension.
- 20-22 December 2010 - the respondents wrote identical letters to the appellant advising of their intention to appeal against 'the procedure, verdict and penalty' of the disciplinary committee.
- January 2011 - a follow-up letter (to the one of 30 November 2010) was written by the respondents to the Labour Officer through the Ministry of Labour. It purported to add two more grievances to the one already filed, that is, unlawful Dismissal.
- 19 January 2011 - a Certificate of No Settlement was issued by the Labour Officer and the matter was on that day referred to arbitration on a number of terms of reference.
- 27 March 2011 - Arbitral award issued.
- 17 June 2013 - Labour Court hears appeal.
- 11 October 2013 - Labour Court judgment issued.

The first of the Arbitrator's 10 terms of reference reads as follows:

"whether or not the labour officer has jurisdiction" (*sic*)

The arbitrator made no ruling on this specific issue and after considering the other terms of reference, ruled that the appellant had convened and brought the respondents before an improperly constituted disciplinary committee, in contravention of laid down procedures. The arbitrator consequently held that all the other consequential proceedings founded on the

improperly constituted disciplinary committee were a nullity. He ordered that the respondents be reinstated to their positions without any loss of salary and benefits effective from the day of suspension, failing which, that they be paid damages *in lieu* of reinstatement.

The appellant was aggrieved at this decision and filed an appeal to the Labour Court. Its appeal having been dismissed, the appellant has now filed this appeal.

It appears to me that three issues for determination arise from the appellant's grounds of appeal, and these are:

1. Whether or not the arbitrator ought to have made a finding on the issue regarding jurisdiction,
2. Whether or not an employee representative should have been included in the composition of the disciplinary committee,
3. Whether or not the respondents waived their right to have employee representatives on the committee panel.

The first issue is articulated thus in the appellant's grounds of appeal:

"The court *a quo* erred in holding that the failure of the arbitrator to make a finding in regard to jurisdiction was a procedural issue that should have been raised by way of review"

This ground of appeal addresses the appellant's contention before the arbitrator to the effect that the respondents had not exhausted all internal appeal remedies and had prematurely, therefore improperly, brought the matter to the Labour Officer. As a consequence, the appellant further contended, the matter (On the merits) was also improperly before the arbitrator.

The fact that the arbitrator was fully alive to the issue of jurisdiction having been raised before him is evident from his summation of the appellant's submissions, thus:

“Respondent (appellant *in casu*) submitted that notwithstanding the fact that the given notices of appeal had no grounds, the claimants never gave the internal appeals structure an opportunity to dispose of the matter. Before an Appeals Officer was even selected, the claimants went before the Labour Officer for Conciliation. The respondent submitted that the internal appeal process had not been concluded and could not be concluded.”

In its heads of argument before the Labour Court, the appellant elaborated this issue and pointed out, correctly as the above sequence of events shows, that the respondents referred the matter for conciliation the very next day (30 November 2010) following their receipt of the letters of suspension. At that time they had neither been subjected to a disciplinary hearing nor dismissed. They therefore, by that token, triggered and followed a process parallel to the one that started with their letters of suspension. This is because during the time that the Labour Officer, rightly or wrongly, was seized with the dispute:

- i) the appellant was in the process of conducting disciplinary hearings against the respondents, which ultimately culminated in their dismissal from employment; and
- ii) the respondents were from the 20th of December 2010 onwards, requesting from the appellant, records of the disciplinary proceedings for appeal purposes.

Furthermore, and despite their request for the records of the disciplinary proceedings purportedly for appeal purposes, the respondents dispatched to the Labour Officer a follow-up letter containing additional grievances for that officer's consideration. The respondents however, and this is not something that they dispute, never pursued the

threatened appeal but were seemingly content to have the matter heard by the arbitrator, to whom the dispute had now been referred. By so doing, the respondents abandoned the procedural route which should have started with an appeal to the appellant's Appeals Committee, then gone on to conciliation¹, arbitration and the Labour Court.

The appellant contends that the respondents having been suspended in terms of SI 15/2006 (its default Code of Employment), the referral of the matter to conciliation was "unlawful" as it was done in violation of the provisions of ss (5) of s 101 of the Act which reads as follows:

(5) Notwithstanding this Part but subject to subsection (6), no labour officer shall intervene in any dispute or matter which is or liable to be the subject of proceedings under an employment Code, nor shall he intervene in any such proceedings (*my emphasis*)

Subsection (6) imposes time limits within which a matter left undetermined at the level of the workplace despite requisite notice, may be referred to a labour Officer. It is not relevant to the circumstances of this case.

It is apparent from ss (5) (*supra*) that the respondents followed a route that may have placed before the Labour Officer a dispute such as the one referred to in that subsection, that is, one which is or is liable to be, the subject of proceedings under an employment Code. This circumstance in my view reasonably called into question the jurisdiction of the Labour Officer to hear the dispute referred to conciliation under those circumstances. The appellant was therefore within its rights to raise the matter before the arbitrator.

¹ See section 8 of SI 15\2006

While the arbitrator completely disregarded the appellant's submissions on the subject and determined the matter on other grounds, the Labour Court, before which the same issue was raised, gave its reasons for not considering it, thus:

“The first ground was not pursued in oral argument. In any event, it raised a procedural point. Such points ought to be raised by way of review rather than an appeal. Whether or not the matter was referred to the Arbitrator “prematurely” is clearly a matter of procedure. Thus the point could not be dealt with in this appeal”

I find there is merit in the appellant's submission that the court *a quo* erred in finding that the issue of jurisdiction, that the Labour Officer did not consider, was a procedural issue that should have been raised by review.

Jurisdiction in simple terms can be defined as the power or competence of a particular court or tribunal to hear and determine an issue brought before it.² A plea of jurisdiction therefore attacks the competence of a court or tribunal to hear and determine the matter. It follows that a court or tribunal that has no jurisdiction, for whatever reason, to entertain a matter is not in a position to go beyond the question of its jurisdiction to determine any other issue to do with the dispute in question.

In casu it may be safely assumed that the Labour Officer heard and dismissed a challenge to his jurisdiction (or lack thereof) to hear the matter. He however, in my view correctly, included this particular issue among those referred for arbitration. But, as already indicated and for reasons best known to himself, the arbitrator disregarded the issue and proceeded to hear the matter on the merits. That being the case, the Labour Court ought to

² Page 44-45 Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, Fifth Ed. Volume 1

have found that the arbitrator misdirected himself by not addressing, before he did anything else, the question of whether or not the Labour Officer had jurisdiction to hear the matter. A positive finding on the issue would have placed the dispute properly before the arbitrator for his determination thereof on the merits. In other words, the arbitrator's competence to hear the matter was predicated on the Labour Officer having validly and properly heard and considered the matter. By contrast, a negative finding would have rendered the whole conciliation process a nullity. The effect would have been that there was no issue for further determination before and by the arbitrator. This, in turn, would have meant that the appeal against the arbitrator's award was improperly brought to the Labour Court. There is truth to the saying that you cannot put something on nothing and expect it to hold. It will collapse³.

In view of the fact that ss(5) of s 101 of the Act all but outlines the parameters for the Labour Officer's competence to consider or 'intervene' in a dispute such as the one at hand, I find that the Labour Court clearly erred when it found that the issue of jurisdiction was merely procedural. Not only is the matter provided for in a statute, its domino effect (in the case of a negative finding) as outlined above would be to strike at the very root of the proceedings that started with the Labour Officer's determination of the matter. Far from it being a procedural issue, therefore, the question of the Labour Officer's jurisdiction, or lack thereof, to hear the matter, was one of law.

Because the crucial issue of the Labour Officer's jurisdiction to hear the dispute was not determined, and given that such determination had implications on the Labour Court's own competence to hear the appeal in question, it was misdirection for the court *a*

³ *McFoy v United Africa Co Ltd* (1961) 3 All ER 1169 at 1172

quo to have proceeded to hear the matter and purport to determine it on the merits. Rather, the court should have remitted the matter to the arbitrator for him to determine the issue.

Accordingly, the determination of the appeal on the merits by the Labour Court was wrong at law and cannot be allowed to stand.

It is in the result ordered as follows:

- 1 . The appeal is allowed with costs.
- 2 . The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

- “1. The appeal be and is hereby allowed.
2. The award of the arbitrator is hereby set aside.
3. There shall be no order as to costs.”

MALABA DCJ: I agree

PATEL JA: I agree

Honey & Blackenberg, applicant’s legal practitioners.

Mushonga, Mutsvairo & Associates, respondent’s legal practitioners.