

REPORTABLE (34)

**ZIMBABWE ASSEMBLIES OF GOD AFRICA (ZAOGA)
v
KASIKAI MASHONGANYIKA**

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA, MAVANGIRA JA
HARARE, JANUARY 30, 2018 & JULY 19, 2018**

C. Mucheche, for the appellant

Respondent in person

GWAUNZA JA

[1] This is an appeal against the entire judgment of the Labour Court sitting at Harare, handed down on the 8 February 2017.

BACKGROUND

[2] The respondent was employed by the appellant as a watchman from 3 May 2005. He lodged a complaint of unfair labour practice with the conciliator alleging that since January 2010, the appellant had been paying him a salary which was below the national employment

council for welfare and educational institutions' rates. The respondent also alleged that the appellant had not been paying him transport and housing allowances. The conciliator failed to settle the matter and referred it for arbitration.

- [3] The parties appeared before an arbitrator with the respondent claiming payment of \$ 15 293.84 in arrear salaries and allowances. The appellant raised a point *in limine* relating to the legality of a labour consultant representing the respondent in the proceedings before the arbitrator. The arbitrator dismissed the point *in limine* and held that Article 24 (4) of the Arbitration Act [*Chapter 7:15*] allowed an employee to be represented by a person of their choice. In the arbitrator's view, this included a labour consultant. The appellant was aggrieved by the decision of the arbitrator and appealed to the Labour Court, which dismissed the appeal. Aggrieved, the appellant has appealed to this Court on two grounds that essentially raise only one issue for determination. This is whether or not a labour consultant has, to use the appellant's words, the '*locus standi*' to represent a party in arbitration proceedings.

PROCEEDINGS BEFORE THIS COURT

- [4] It is pertinent to note from the outset that the appellant improperly uses the term '*locus standi*' in relation to the labour consultant's representation of a party before an arbitrator. The concept of *locus standi* was succinctly explained in the case of *Zimbabwe Allied Bank Limited v Dengu and Anor* SC 52/16 as follows;

“The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he or she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action.”

[5] A labour consultant, like a legal practitioner representing a party in any court proceedings, would have no personal interest in the cause of action in question nor the relief sought therein. He is an agent of the party who has the requisite *locus standi* and for whom he or she acts. It follows therefore that the issue to be determined *in casu* is not the *locus standi* of the labour consultant to represent a party before the arbitrator. Rather, it is whether or not the labour consultant has the authority to represent the respondent before an arbitrator.

[6] In its heads of argument, the appellant relies on s 92 of the Labour Act (“the Act”) which provides as follows:

“A party to a matter before the Labour Court may appear in person or be represented by:

- (a) A legal Practitioner registered in terms of the Legal Practitioners Act [*Chapter27:07*];
- (b) An official or employee of a registered trade union or employer’s organization of which the party is a member.” (*my emphasis*)

[7] While the appellant correctly contends that this provision provides a closed list of persons who may represent parties before the Labour Court, it argues nevertheless that the same provision regulates representation in labour proceedings before an arbitrator. For this contention, the appellant relies on its interpretation of s 98(9) of the same Act, which states as follows;

“In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court.” (*my emphasis*)

[8] The import of the appellant’s submission is that by virtue of being clothed with the same powers as those of the Labour Court, the arbitrator is on that basis empowered to bar labour

consultants from purporting to represent any party appearing before him or her. The appellant argues that the Act takes precedence over provisions in the Arbitration Act that are inconsistent with it. Further, that s 2(a)(3) of the Act states that it shall prevail over any other enactment that is inconsistent with it. On this ground, the appellant avers that the provision in the Arbitration Act dealing with representation before the arbitrator, being inconsistent with the Act, is therefore overridden by the provisions of its s 92.

- [9] The respondent argues in response that the Arbitration Act is clear on who may be a representative in labour proceedings before an arbitrator. He submits further that there is no conflict or inconsistency between the Arbitration Act and the Labour Act on the question of who may represent a party before the two tribunals. The submission is made that Article 24(4) of the Arbitration Act does, with as much clarity as s 92 of the Act as regards the Labour Court, set out who may represent a party not acting in person at any hearing of the arbitral tribunal. The appellant anchors its argument as regards the alleged inconsistency between Article 24(4) of the Arbitration Act, and the Act, on s 92 of the latter. This inconsistency, the appellant argues, is what results in Article 24(4) being overridden by s 92 of the Act.

Article 24(4) provides as follows:

“At any hearing or any meeting of the arbitral tribunal of which notice is required to be given under paragraph (2) of this article, or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.” (*my emphasis*)

[10] I will state at this juncture that I do not find merit in the appellant's contentions, nor its interpretation of the import of the cited provisions, that is ss 92 and 89 of the Act. In this respect I find the submissions made to be unsustainable on two main grounds.

[11] Firstly, s 89 of the Act, which sets out the powers and functions of the Labour Court refers to such powers as;

- (a) hearing and determining applications and appeals in terms of the Act or any other enactment; and
- (b) hearing and determining matters referred to it by the Minister in; an
- (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 s 98 (6) of section
- (e) exercising the same powers of review as would be exercisable by the High Court in respect of labour matters;
- (f) doing such other things as may be assigned to it in terms of this Act or any other enactment.
- (g) in the case of an appeal, to
 - (i) conduct a hearing into the matter or decide it on the record; or
 - (ii) confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order;and so on.

[12] It is evident from the above that the powers of the Labour Court as set out in s 89 do not envisage the determination, by that court, of who may or may not represent any party appearing before it. That issue is prescribed by s 92 of the Act and is solely to do with the conduct of the proceedings themselves. By contrast, the powers conferred on the Labour Court in terms of s 89 have everything to do with that court's jurisdiction and competence to take certain action related to the substance of the dispute before it, or its resolution.

[13] These are the same powers that the arbitrator in s 98(9) of the Labour Act is enjoined to exercise in determining matters that fall within his or her jurisdiction. As the powers of the Labour Court clearly do not include any reference to the issue of representation, it follows that the arbitral tribunal is not obliged by law to import into the conduct of its proceedings, the matrix of representation that is outlined in s 92 of the Act. In order to put the matter beyond any doubt, the Legislature saw it fit to enact Article 24(4) of the Arbitration Act which governs the representation of parties in labour proceedings before an arbitrator.

[14] Taking all this into account, the conclusion is inevitable that neither s 92 of the Act, nor Article 24(4) of the Arbitration Act, are concerned with the powers of the Labour Court, (and by extension, of the arbitral tribunal), as outlined in s 89 of the Act. They accordingly do not have to be consistent on that basis alone.

[15] Secondly and in my view, the appellant mistakenly perceives a conflict *inter se* as regards s 92 of the Act and Article 24(4) of the Arbitration Act, and on that basis argues that the former provision should prevail in terms of s 2A (3) of the latter Act which provides as follows:

“(3) This Act shall prevail over any enactment inconsistent with it.”

[16] The meaning of this provision is clear. There must be a demonstrated inconsistency between the enactment in question, and the Act, for the latter to prevail. In my view, an inconsistency arises only where two or more statutory provisions address the same issue or subject matter differently. In *casu* two separate issues are addressed by the two provisions, namely representation in proceedings in the Labour Court (s 92 of the Act), and representation in

proceedings before the arbitral tribunal, (Article 24(4) of the Arbitration Act). Despite the fact that both provisions are concerned with the main issue of representation, it is the forum in which such representation plays out that distinguishes the two. Additionally, and as a matter of logic, I do not believe a statutory provision addressing a particular issue can override another that clearly deals with a different subject matter. This is particularly so where, as *in casu*, neither provision is prefixed with the phrase “subject to ...” or some such rider. The language of both provisions in my opinion makes it clear that the Legislature fully intended the meaning and effect thereof.

[17] Before the arbitrator the respondent chose a representative in the person of a labour consultant to represent him at the hearing. The word ‘person’ in the provision cited above does not come with any qualification except that such person should be of the relevant party’s choice. This circumstance makes the ambit of Article 24(4) wider than that prescribed in s 92 of the Act. The person chosen by a party can therefore be anyone, even a legal practitioner or an official or employee of a registered trade union or employer’s organization, as envisaged in s 92 of the Act. More to the point however, is the fact that the provision does not expressly exclude a labour consultant from representing a party at a hearing before an Arbitrator. Therefore, being further alive, as it must have been, to s 92 of the Act which deals with representation, *albeit* narrower in scope, of parties appearing before the Labour Court, the Legislature must be taken to have deliberately widened the scope of representation of parties in matters before the arbitral tribunal. Both provisions are clear in their meaning and admit of no ambiguity, absurdity or any inconsistency. That being the case it is my finding

that no legal basis has been laid for recourse to the Labour Act *in lieu* of the Arbitration Act on the issue of representation.

[18] It appears evident that the appellant, in its quest for a basis to ascribe mutual inconsistency to the meaning and effect of these two provisions, reached beyond and outside their clear meaning. Thus it seeks to persuade the court to confer on Article 24(4), an interpretation that is inconsistent with its clear grammatical meaning. This approach, not being justified, flies in the face of basic principles of statutory interpretation. I am not persuaded that the appellant has proved a case that justifies a departure from the general rule of interpretation, stated thus in E. A. Kelly's book *'The Principles of Legal Interpretation: Statutes, Contracts and Wills'*¹:

“the language of the legislature should be read in its ordinary sense, and where it is clear, a court should not depart from the natural and ordinary meaning.”

[19] Contrary to what is argued for the appellant in its second ground of appeal, the court neither ‘misconstrued nor misapplied’ the relevant provisions of the Arbitration Act *vis a vis* the Act, on the matter in dispute. It follows from this that the appellant's contention in relation to alleged violations of s 69 of the Constitution as well as the Legal Practitioners Act [Chapter 27:07], fall away. The constitutional argument was in any case not raised properly in terms of the procedures laid down for that purpose. The judgment of the court *a quo* and the reasoning on which it was based cannot in my view be faulted.

DISPOSITION

¹ First Ed. at page 16

[20] I find, when all is considered, that the appeal is without merit and must therefore fail.

[21] In the result, it is ordered as follows;

The appeal be and is hereby dismissed with costs.

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Matsikidze and Mucheche Commercial and Labour Law Chambers, Appellant's Legal Practitioners