

**REPORTABLE** (50)

**CITY OF GWERU**  
**v**  
**RICHARD MASINIRE**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, MAVANGIRA JA & BHUNU JA**  
**HARARE, 29 MAY 2017 & 27 SEPTEMBER 2018**

*T Magwaliba*, for the appellant

*T Mpofo*, for the respondent

**BHUNU JA:**

This is an appeal against the judgment of the Labour Court which upheld the respondent’s appeal against dismissal from employment in terms of the Labour (National Employment Code of Conduct) Regulations S.I.15 of 2006. The court *a quo* upheld the respondent’s appeal on the basis that the termination of employment of Senior Urban Council employees is exclusively governed by the Urban Councils Act [*Chapter 29:15*](“the Act”). Having come to that conclusion it proceeded to nullify all prior proceedings leading to the respondent’s dismissal from employment. It held that:

“...by virtue of the fact that the Urban Councils Act was ignored and the National code used instead, all the proceedings became a nullity and I hereby allow the appeal with costs.”

Aggrieved by the above findings and conclusion of law the appellant appealed to this court for relief. The grounds of appeal are as follows:

1. The court *a quo* erred in finding that the termination of contracts of employment of senior Urban Council employees is governed exclusively by provisions of the Urban Council Act [*Chapter 29:15*] to the exclusion of the Labour Act [*Chapter 28:15*] and the regulations made thereunder.
2. The court *a quo* erred in holding that it had the jurisdiction to hear and determine the matter before it.

Before delving into resolving the contentious issues between the parties, it is necessary to lay down the factual basis of the case which is by and large not in dispute.

It is common cause that the respondent was employed as a Chamber Secretary by the appellant City Council. In that capacity he was a senior official of the respondent, appointed as such in terms of s 133 of the Act. The appellant dismissed the respondent from its employment following disciplinary proceedings in terms of the Labour (National Employment Code of Conduct) Regulations SI 15 of 2006, hereinafter referred to as the (model code).

The dismissal was approved by the Local Government Board in terms of s 140 (2) of the Act.

Dissatisfied by the dismissal, the respondent appealed to the court *a quo*. The appellant objected to the court's jurisdiction without success, hence this appeal. The cardinal issue which emerges for determination is, whether the Urban Councils Act has exclusive jurisdiction over the dismissal of senior Urban Council Employees. In other words the question

to be answered is whether the respondent in his capacity as a senior City of Gweru employee was susceptible to disciplinary action under the Labour Act as read with its Regulations.

Section 140 of the Act provides for the discharge of senior employees of Urban Councils. It states as follows:

“140

- (1) Subject to subsection (2) and to the conditions of service of the senior official concerned, a council may at any time discharge a senior official –
  - (a) Upon notice of not less than three months; or
  - (b) Summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.
- (2) A council shall not discharge a senior official unless the discharge has been approved by the Local Board;  
Provided that the discharge of a medical officer of health shall in addition be subject to the approval of the Minister responsible for health in terms of s 11 of the Public Health Act [*Chapter 15:09*].”

Subsections (3), (4) and (5) provide for an elaborate disciplinary procedure for the dismissal of senior employees other than the town clerk on grounds of misconduct. They provide as follows:

- 3) If it appears to a town clerk that any other senior official of the council has been guilty of such conduct that it is desirable that that official should not be permitted to carry on his work, he—
  - (a) may suspend the official from office and require him forthwith to leave his place of work; and
  - (b) shall forthwith notify the mayor or chairman of the council, as the case may be, in writing, of such suspension.
- (4) Upon receipt of a notification of suspension in terms of subsection (3) the mayor or chairperson shall cause the suspension to be reported at the first opportunity to the council.  
[Subsection substituted by section 27 of Act 1 of 2008.]

- (5) Where a council has received a report of a suspension in terms of subsection (4), the council shall without delay—
- (a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension; and
  - (b) after considering the results of the inquiry, decide whether or not—
    - (i) to lift the suspension; or
    - (ii) to do any one or more of the following—
      - A. reprimand the senior official concerned;
      - B. reduce the salary any allowance payable to the senior official;
      - C. transfer the senior official to another post or grade, the salary of which is less than that received by him or her at the date of the imposition of the penalty;
      - D. impose a fine not exceeding level five or three months' salary, which fine may be recovered by deductions from the salary of the senior official;
      - E. subject to subsection (2), discharge the senior official.

It must be noted that while s 140 of the Act confers jurisdiction on the Town Clerk to initiate disciplinary proceedings against other senior Council employees, it makes no provision for the initiation of any disciplinary action against the Town Clerk. The mayor only comes in after the Town Clerk has instituted the disciplinary proceedings.

While the Urban Councils Act provides for the dismissal of a Town Clerk, it makes no provision for the procedure to be followed to effect such dismissal. Thus no disciplinary action could have been initiated against the respondent in terms of the Urban Councils Act because the Act does not confer jurisdiction on any other employee or authority to institute disciplinary proceedings against the Town Clerk.

It would have been absurd if not ridiculous to expect the Town Clerk to have instituted disciplinary proceedings against himself, particularly in circumstances where he was denying the charges.

It is this *lacuna* in the Act that must have prompted the appellant to turn to the National Model Code for redress. The learned author CH Mucheche in his book *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe* (2<sup>nd</sup> ed African Dominion Publications, Harare,) opines that resort to Model Code S.I 15 of 2006 is permissible if there is no applicable domestic code of conduct. Quoting Professor Madhuku the learned author states as follows:

“According to Professor *Lovemore Madhuku* both section 12B (2) of the Labour Act and section 5 (b) of SI 15 of 2006 compel the use of SI 15 of 2006 in the absence of a registered code of conduct. The expression, ‘in the absence of’ must be interpreted purposefully. The mere existence of a registered code of conduct is not sufficient to oust resort to SI 15 of 2006. There must be a registered code of conduct applicable to the case in question. Where there is a registered code of conduct which is inapplicable to the circumstances of the case, there is, ‘the absence of an employment code’ for purposes of section 12B of the Labour Act and section 5 (b) of SI 15 of 2006... One cannot apply a metal straight jacket and conclude that in every situation where an employment code of conduct exists, it automatically follows that such a code of conduct should solely be used to the exclusion of the National code of conduct”.

This is the sort of case which the learned author had in mind when he made the above remarks. The domestic code of conduct being inapplicable to the case at hand, ways had to be found of resolving the labour dispute confronting the parties.

This then brings me to the question of whether the Labour Act is applicable as a disciplinary vehicle over a Town Clerk in his capacity as a Senior Official of an Urban Council.

Section 3 of the Labour Act confers jurisdiction on the Act over all employees except those it expressly excludes. It reads:

**“Application of Act**

- (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution. (*My emphasis*).
- (2) For the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [*Chapter 16:04*].

- (3) This Act shall not apply to or in respect of—
- (a) members of a disciplined force of the State; or
  - (b) members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State; or
  - (c) such other employees of the State as the President may designate by statutory instrument”.

Upon a proper reading of the above section, it is self-evident that the Labour Act applies to all employees except those in categories that are expressly excluded therein.

These are:

1. Those whose conditions of employment are otherwise provided for in the Constitution.
2. Members of the Public Service as read with s 26.
3. Members of a disciplinary force of the State.
4. Any other employee designated by the President in a statutory instrument.

The respondent not falling under any one of the above excluded categories, it follows that the Labour Act applies to him. The employer was therefore perfectly within its rights to resort to the Model code SI 15 of 2006.

For that reason, the court *a quo* misdirected itself and fell into error when it nullified the prior proceedings on the basis that the Labour Act was not applicable to senior urban council employees.

Section 12B of the Labour Act Provides for laid down procedures for the dismissal of any employee falling within its jurisdiction as follows:

**“12B Dismissal**

- (1) Every employee has the right not to be unfairly dismissed.

(2) An employee is unfairly dismissed –

- (a) If, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
- (b) In the absence of an employment code, the employer shall comply with the model code made in terms of section 101 (9).

[Paragraph substituted by section 7 of Act 7 of 2005]

(3) An employee is deemed to have been unfairly dismissed

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- (a) If the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
- (b) If, on termination of an employment contract of fixed duration, the employee

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- (i) had legitimate expectation of being re-engaged; and
- (ii) another person was engaged instead of the employee.

(4) In any court proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employees previous disciplinary record, the nature of the employment and any special personal circumstances of the employee. (My underlining)

[Section substituted by section 10 of Act 17 of 2002].”

The Labour (National Employment Code of Conduct) Regulations SI 15 of 2006 is the model code envisaged in s 12B (2) (b) above. Ordinarily it is meant to provide a platform for settling labour disputes where there is no internal or domestic disciplinary code of conduct at the work place.

Considering that it is undesirable for parties to a dispute to be left without an appropriate mechanism of resolving their labour disputes, like professor *Madhuku* and *CH Mucheche*, I consider that s 12B (2) (b) should be given a broad purposeful interpretation to include circumstances where an existing internal code of conduct or dispute resolution

mechanism cannot for justifiable reasons apply to a particular case. It therefore appears to me that the legislator intended the model code of conduct to be a fall-back labour dispute resolution mechanism where it is impossible or inappropriate for good reason to apply any other dispute resolution mode. To that extent it is a universal disciplinary code of conduct fitting all circumstances according to the exigencies of each case within the confines of the Labour Act.

The cardinal question which then arises for determination is whether the Urban Councils Act excludes the jurisdiction of the Labour Act in the dismissal of senior council employees such as the respondent in this case.

Historically, prior to 2005 this court had consistently held that senior employees of Urban Councils were not susceptible to dismissal in terms of the Labour Act. See the leading case of *City of Mutare V Matamisa* 1998 (1) ZLR 512.

Following the decision in the *Matamisa* case and a host of others based on the law prior to 2005 the lawmaker in its wisdom amended the law in two fundamental respects under the Labour Amendment Act, 2005 as follows:

1. It made the Labour Act superior to all other enactments inconsistent with it. In other words, it takes precedence and overrides any other subordinate statutes in conflict with it.
2. The Act now applies to all employees save those it expressly excludes from its ambit.

Sections 2A and 3 of the Labour Act as amended now read:

**“2A. Purpose of Act**

- (3) This Act shall prevail over any other enactment inconsistent with it.

### 3. Application of Act

- (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution.
- (2) For the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [*Chapter 16:04*].
- (4) This Act shall not apply to or in respect of—
- (a) members of a disciplined force of the State; or
  - (b) members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State;  
or
  - (c) such other employees of the State as the President may designate by statutory instrument”  
(My underlining)

The section is couched in clear and unambiguous peremptory terms, such that the problem of interpretation does not arise at all. All that the lawgiver is saying is that the Labour Act applies to all employees except those it expressly excludes from its domain. In other words, the Labour Act applies to all employees except those whom the legislator has expressly excluded from its application.

It must however be noted that the Public Service Act [*Chapter 16:04*] is different from the Urban councils Act in that it expressly confers appellate jurisdiction on the Labour Court under s 26 in respect of matters initially determined in terms of the Public service Act [*Chapter 16:04*].

Now, for the respondent to escape the omnibus application of the Labour Act, he must show that he is one of those employees expressly excluded under s 3 of the Labour Act.

It is plain that the respondent in the court *a quo* dismally failed to prove on a balance of probabilities that he is one of those employees expressly excluded from the application of the Act. His argument was that the Labour Act does not apply to him because his contract of employment is exclusively governed by the Urban Councils Act.

That line of argument is defective and unsustainable at law, because the Urban Councils Act is subservient to the Labour Act. In terms of s 2A of the Labour Act the Legislator has decreed it to prevail over any other enactment inconsistent with it.

What this means is that whatever the provisions of the Urban Councils Act might be, they cannot exclude the application of the Labour Act to any employee. It is only the Constitution and the President by statutory instrument that can override the application of the Act over any employee.

While the cases decided before the advent of the Labour Amendment Act, 2005 were correct at that time in holding that the Labour Act was inapplicable to Senior Urban Council employees, those judgments have since been overtaken by events. For that reason, since the promulgation of the 2005 Amendment they have ceased to be valid and binding going forward.

That being the case, the court *a quo* fell into error and misdirected itself when it upheld the respondent's appeal on the basis that the proceedings in terms of the labour Act

were a nullity. The proceedings in terms of the Labour Act were valid notwithstanding the provisions of the Urban Councils Act because the Respondent did not have a registered code of conduct and the disciplinary procedures laid down in the Urban Councils Act were inapplicable to the appellant in his capacity as Town clerk.

For the foregoing reasons the appeal can only succeed. The judgment of the court *a quo* will have to be set aside thereby clothing it with the necessary jurisdiction to determine the appeal in terms of the Labour Act. The merits and demerits of the appeal are exclusively within the jurisdiction of the Labour Court.

There being no reason to depart from the general rule that costs follow the result, the general rule shall prevail.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The Labour Court judgment number LC/MT/92/12 be and is hereby set aside.
3. The matter is remitted to the Labour Court for it to proceed to hear and determine the appeal under case number LC/MT/120/2011 on the merits.

**GWAUNZA DCJ**

I agree

**MAVANGIRA JA**

I agree

*Danziger & Partners* appellant's legal practitioners

*Messrs J Mambara & Partners* respondent's legal practitioners