ELIZABETH CHITIGA
versus
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 May 2019 & 5 June 2019

Opposed Application

M T Rujuwa, for the applicant
T Mpofu, for the respondent

MATHONSI J: Until 6 April 2018 when her employment contract was abruptly and unceremoniously terminated by letter written to her by the Acting Board Chairperson, the applicant was the General Manager of the respondent, an authority established in terms of the National Social Security Authority Act [*Chapter 17:04*]. She had been employed in terms of a 3 year fixed term contract signed on 23 June 2016 which took effect on 1 July 2016 and would have expired on 30 June 2019 by effluxion of time unless renewed by mutual agreement.

The employment contract was not allowed to run its course in that on 6 April 2018 the respondent, acting through its Acting Board Chairperson, terminated it without notice. The letter reads:

> "RE: NOTICE OF ACCELERATION OF EXPIRY OF EMPLOYMENT CONTRACT
>
> We refer to the above subject. Given the current issues, which you are aware of, the Board has decided to bring forward the expiry of your fixed term employment contract. The National Social Security Authority (NSSA) will pay you the balance of your contract which is the equivalent of 15 months' salary and benefits and any other terminal benefits that would be due to you upon the expiry of the contract subject to deductions of any amounts due to NSSA. The Board is looking forward to signing all the necessary paperwork and agreements relating to the termination, payments and any deductions in order to quickly put closure on this subject. This means that with immediate effect you will no longer be the General Manager of NSSA. Kindly note that as NSSA, we reserve all our rights in respect of any and all issues around the subject."

Thereafter the parties briefly engaged each other on the terms of disengagement which engagement came to naught. Meanwhile the respondent had instructed its security guards manning the entrance to its premises not to allow the applicant to enter and when she tried to report for duty she was barred from entering the work place. As she did not accept the unilateral termination of

her employment and finding herself with no sense of solution, the applicant launched this application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. The relief that she seeks as set out in the draft order is:

> "IT IS HERERBY ORDERED THAT:
> 1. The applicant's application for a declaratory order succeeds.
> 2. Consequently, it is hereby declared that the contract of employment entered into between the applicant and the respondent on the 23rd June 2016 and as extended by the parties remains extant, with full rights and obligations flowing therefrom until lawfully terminated.
> 3. The respondent shall pay costs of suit."

The applicant's case is simply that the manner in which her employment was terminated is unlawful. She was not consulted and yet an employment contract is just like any other contract where neither party can unilaterally terminate it without the consent of the other. It matters not that the contract was for a fixed term because its expiry date had not come and a cabinet decision had been taken, which she should benefit from, to the effect that the tenure of office of all Chief Executive Officers of parastatals be rationalized in order to allow them to serve for at least 5 years. In that regard she had a legitimate expectation that her employment would run up to July 2021.

It is the applicant's argument that her employment could not be terminated without giving reasons and without following the due process of the law. The employer cannot be allowed to take prejudicial decisions without engaging the affected employee. In addition, as a public entity, the respondent is bound by the Administrative Justice Act to take administrative decisions that are reasonable, rational and substantively and procedurally fair as well as to give reasons for such decisions. The one taken by the respondent to dismiss her in the manner that it did offends the dictates of administrative fairness enshrined in that Act.

In opposing the application, the respondent, took the view that it was entitled to bring forward the expiry of the applicant's contract as long as it paid all that would have been paid to the applicant in terms of the employment contract. In fact, clause 1.3 of the contract entitles either party to terminate the contract upon giving the other at least 3 month's notice of termination. Given that the respondent paid the applicant the entire balance of 15 months which remained on her contract as opposed to 3 months, it was magnanimous and the applicant should not be heard to complain.

According to the respondent, it had no obligation to provide work to the applicant and cannot be compelled to keep her in employment against its will. All it had is an obligation to remunerate the applicant in return for the tender of services. It was entitled to dispense with the applicant's services upon payment of what would have accrued to the applicant during the tenure

of the contract. The applicant therefore has not suffered any prejudice. Given that the contract was not terminated for cause, there was no need for any due process and the accelerated expiry does not contravene any statute or other law.

The grant of a declaratory order is a remedy provided for in s 14 of the High Court Act [*Chapter 7:06*]. In terms of that section, this court may, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation. Authorities which have interpreted that provision make it clear that the approach of the court involves a two stage inquiry. In the first stage the court inquiries into whether the applicant is an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) at 343 G, 344A-E, *United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels & Anor* 1972 (4) SA 409 (C) at 415, *Milani & Anor* v *South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902 G-H.

The direct and substantial interest of the applicant in the subject matter of the suit cannot be doubted at all. It is her employment that was terminated the way it was thereby affecting her rights in a practical and definitive way. She therefore has a vested interest in the determination of whether the termination was proper and lawful.

The second stage requires the court to decide, notwithstanding the finding in the first stage that the applicant has a direct interest, whether or not the case in question is a proper one for the exercise of the court's discretion under s 14 of the Act. WILLIAMSON J in *Adbro Investment Co Ltd* v *Minister of the Interior of Ors* 1961 (3) SA 283 (T) at 285B-C (quoted with approval by GUBBAY CJ in *Munn Publishing (Pvt) Ltd, supra,* described what constitutes a proper case for the exercise of the court's discretion under s 14 in the following:

> "I thing that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of merely academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

See also *Johnsen* v *Agricultural Finance Corp* 1995 (1) ZLR 65 (H), *Bulawayo Bottlers (Pvt) Ltd* v M*inister of Labour, Manpower Planning and Social Welfare & Ors* 1988 (2) ZLR 129 (H).

The applicant is seeking effectively to be reinstated to the position of General Manager of the respondent, a position she would have held until 30 June 2019 had it not been brought to an

end prematurely on 6 June 2018. In bringing forward that expiration of the employment contract, the respondent offered to pay her all salary and other benefits, not for 3 months, as it would have been entitled to pay in lieu of notice if it had chosen to terminate on notice as provided for in clause 1.3 of the contract, but for the entire duration of her employment. In seeking that relief the applicant has not sought any alternative relief of damages, if any, in lieu of reinstatement.

Mr *Rujuwa* who appeared for the applicant submitted that the termination of the applicant's employment was unlawful because it was not in terms of the contract entered into between the parties and also not in terms of any common law principle or any statute. He submitted further that the law does not provide for an accelerated termination of a fixed term employment contract. For that reason, the applicant is entitled to the relief of a declaratory order sought. On the fact that even if it had not been terminated, the contract would still expire by effluxion of time in a month's time on 30 June 2019, Mr *Rujuwa* submitted that it can be renewed because there is a provision for its renewal.

Mr *Mpofu* for the respondent submitted that this is not a matter with which this court can relate in terms of s 14 of the High Court Act because the applicant would like to be reinstated to a position which is already occupied by someone else. An employer cannot be compelled to provide employment to an employee it has dismissed. If aggrieved an employee should seek damages in lieu of reinstatement, which is purely a labour issue to be determined by the Labour Court. Having elected to come to this court and without seeking the alternative relief of damages, the applicant has created a problem which cannot be solved by this court. This, together with the fact that the matter is now of academic interest the expiration date being nigh and the applicant having been paid for the duration of the contract, this court cannot exercise its discretion in favour of granting a declaratory relief. I agree.

What should be appreciated is that employment is not a marriage. It is not an engagement in perpetuity and has this knack of coming and going. Neither of the parties can be tied to the relationship forever and against their will. While it is accepted that invariably the employment contract and indeed labour law would have provisions for disengagement or termination of employment, where one of the parties is aggrieved by the manner in which the agreement is terminated they must approach the court mindful that reinstatement may not be possible and seek alternative remedies.

It is settled in this jurisdiction that an employer is not obliged to provide actual work to its employee, but is obliged generally to remunerate the employee. For that reason and in recognition

of that legal premise, which has been hallowed by repetition over many years, an employer who sends the employee home while paying the required remuneration does not offend the law. Of course there may be exceptional cases where the performance of work is a prerequisite. This case does not belong to those. In embracing that proposition the courts have accepted that there may be instances where an employment contract may be termination in no fault situations. There are instances where the relationship between the parties would have deteriorated to untenable levels through no fault of any of the parties. In such an event the contract may be terminated by either party on notice. See *Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S).

In *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S) at 349 E-G the court made the seminal pronouncement:

> "It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship – one which makes it impossible for the employee to perform his duties either to his own satisfaction or to that of the employer."

That passage was quoted by GUBBAY CJ in *Winterton, Holmes & Hill, supra,* at p 74 D-E and by CHIDYAUSIKU CJ in *Nyamande & Anor* v *Zuva Petroleum (Pvt) Ltd & Anor* 2015 (2) ZLR 186 (S) at 192 C-D. Its importance to the present case is not that there has been loss of trust between the parties or that their relationship has deteriorated to untenable levels but that the law recognizes that an employment contract can be terminated even where none of the parties is at fault and that an employer has no obligation to provide work to an employee in those circumstances. See also *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S); *ZETDC (Pvt) Ltd* v *Israel & Ors* HH-289-16.

To the extent that an employer is not obliged to provide work and is entitled to terminate an employment contract even where the employee is not at fault, it must follow that where that has happened, the employee cannot lawfully seek the remedy of a declaratory order the import of which would entitle the employee to report for duty. In fact an employer must be taken to be entitled to buy out an employment contract for a fixed period.

It is not like the employee has no other relief. The law recognises that if the employee exercises the option to terminate employment the employee is entitled to claim damages. These may be damages in lieu of notice, where notice of termination has not been given, or damages in

lieu of reinstatement where reinstatement is no longer possible. In the present case the applicant has not made such a claim and it is one which could be properly ventilated in the Labour Court.

I therefore agree with Mr *Mpofu* for the respondent that this is not a case in which this court should exercise its discretion reposed by s 14 of the High Court Act. In fact even if I were wrong in concluding that the employer had a right to accelerate the termination, I would still not exercise my discretion in favour of the applicant for yet another reason. It is that the employer tendered to pay the entire value of the employment contract, including all the benefits which would have accrued to the employee and as it is now, the contract expires by effluxion of time in a few weeks' time. No prejudice has been suffered by the applicant, at least none has been established to my satisfaction and declaring the accelerated expiry of the contract unlawful would be an academic exercise at this stage.

In considering whether to exercise its discretion in terms of s 14, the court would generally refrain where the result is merely of academic interest and nothing more. As stated in *Adbro Investment Co Ltd, supra* some tangible and justifiable advantage must flow from the grant of a declaratory order sought. There is absolutely none in this case. The application must fail.

In the result, it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall bear the costs of suit.

Mtetwa & Nyambirai, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners