REPORTABLE (30)

Judgment No. SC 46/09
Civil Appeal No. 367/06

BORDER TIMBERS INTERNATIONAL (PRIVATE) LIMITED v

(1) THE EXPORT PROCESSING ZONES LABOUR BOARD
(2) DENIS VETERAI (3) LEONARD MAFUTA
(4) WELLINGTON MAPIYE (5) TALKMORE NYASHEGA
(6) ALLAN MUKODZANI (7) JOHN SITHOLE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, NOVEMBER 17, 2008 & NOVEMBER 5, 2009

A Mugandiwa, for the appellant

No appearance for the first respondent

J Bamu, for the second, third, fourth, fifth, sixth and seventh respondents

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant's application for the review of a decision made by the first respondent in a labour dispute was dismissed with costs, on the ground that the High Court did not have the jurisdiction to hear the application.

The background facts are as follows. At the relevant time, the appellant company ("the company") was an export-oriented door manufacturing company, licensed by the Zimbabwe Export Processing Zones Authority. The first respondent ("the Labour

Board") was a body established in terms of s 24(1) of the Export Processing Zones (Employment) Rules, 1998, published in Statutory Instrument 372 of 1998 ("the Rules"). Its main function was to resolve labour disputes within the area of its jurisdiction. The second to the seventh respondents ("the employees") worked for the company.

After a prolonged wage dispute between the company and its employees, the employees wrote to the company on 20 July 2005 threatening to resort to collective job action on 3 August 2005.

On 1 August 2005 the company's factory manager responded as follows:

> "… the proposed work stoppage/sit-in threatened to be carried out on 3 August 2005 is illegal. Accordingly, you are required to write a withdrawal letter before 12 pm tomorrow, 2 August 2005. Should you fail or refuse to comply with this instruction, and proceed with the sit-in, management will be left with no option but (to) take disciplinary action. A sit-in amounts to collective job action, and in terms of the Export Processing Zones Employment Rules, collective job action is a dismissible offence … ".

Thereafter, when the threat to resort to collective job action was not withdrawn, the company, which did not have a registered Code of Conduct, suspended the employees and charged them with the act of misconduct specified in s 28(c)(iii) of the Rules, i.e. any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment. The particulars of the charge were stated as follows:

> "1. Organising or instigating an illegal/unlawful collective job action.
>
> 2. Threatening to engage in an illegal/unlawful collective job action.

3. Refusal to follow a lawful instruction."

Internal disciplinary proceedings were subsequently conducted and all the employees were found guilty as charged, and their dismissal was recommended. The internal appeals which followed were dismissed.

The company then applied to the Labour Board, in terms of s 28(a) of the Rules, for the authority to terminate the employees' contracts of employment. In due course, the Labour Board heard the applications and dismissed them, having concluded that no act of misconduct had been established. Accordingly, it ordered that all the employees be reinstated in their posts without loss of pay and other benefits. That decision was communicated to the parties on 25 November 2005.

Aggrieved by the Labour Board's decision, the company filed a court application in the High Court on 18 January 2006, seeking a review of the Labour Board's decision and an order setting it aside.

In due course, the court application came before the learned Judge in the court *a quo*, who dismissed it with costs, on the ground that in terms of s 89(6) of the Labour Act [*Cap. 28:01*] ("the Labour Act") the High Court did not have the jurisdiction to hear and determine the application. Dissatisfied with that result, the company appealed to this Court.

Only one ground of appeal is set out in the notice of appeal, and that is that the court *a quo* erred in finding that it had no jurisdiction to deal with the matter. The main issue in this appeal is, therefore, whether in January 2006, when the company filed the court application in the High Court, the High Court had the jurisdiction to hear the application.

However, before dealing with that issue, I would like to set out the relevant provisions of s 89 of the Labour Act.

Before the Labour Amendment Act No. 7 of 2005 ("the Amendment Act") came into force on 30 December 2005, s 89 of the Labour Act, in relevant part, read 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) hearing and determining matters referred to it by the Minister (of Justice) in terms of this Act; and
>
> (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; and
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application; and
>
> (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.

(2) – (5) …

(6) 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 subsection (1)."

In my view, subs (6) is very clear. It gives the Labour Court exclusive jurisdiction in the first instance to deal with all the matters set out in subs (1). Had the legislature intended leaving the High Court with the jurisdiction to deal with the matters set out in subs (1), subs (6) of s 89 would have been worded as follows:

"No court, other than the Labour Court and the High Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."

It must be emphasised, however, that the exclusive jurisdiction in the first instance given to the Labour Court in terms of subs (6) is to deal with "any application, appeal or matter referred to in subsection (1)", and not to deal with all labour matters in the first instance as the learned Judge in the court *a quo* stated.

In passing, I wish to state that the Rules did not provide a procedure in terms of which a party dissatisfied with the Labour Board's decision could challenge that decision.

In addition, it is pertinent to note that before the Amendment Act came into force on 30 December 2005, the Labour Act did not apply to licensed investors

operating in export processing zones, and to persons employed in such zones. That was so because s 56(1) of the Export Processing Zones Act [*Cap 14:07*] provided as follows:

> "**56 Chapter 28:01 not to apply**
>
> (1) The Labour Act [*Chapter 28:01*] shall not apply in relation to licensed investors operating and employees employed in an export processing zone."

In this matter it was common cause that the company was a licensed investor operating in an export processing zone, and that its employees were employed in that zone. Consequently, the Labour Act did not apply to the company and its employees before 30 December 2005.

That being so, the Labour Court, which was established in terms of the Labour Act, had no jurisdiction over labour disputes between the company and its employees before 30 December 2005. As a result, the company could not have challenged the Labour Board's decision in the Labour Court before that date.

However, the company was not without a remedy. In order to challenge the Labour Board's decision before 30 December 2005, the company could have instituted review proceedings in the High Court before that date, relying upon s 26 of the High Court Act [*Cap 7:06*], which reads as follows:

> "**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."

It was common cause that the company filed the review application in the High Court on 18 January 2006, after the Amendment Act had come into force. A different situation then prevailed. The Amendment Act had repealed s 56 of the Export Processing Zones Act [*Cap 14:07*], with the result that the Labour Act became applicable to the company and its employees.

In addition, s 29 of the Amendment Act had amended subs (1) of s 89 of the Labour Act by the insertion of the following paragraph after para (d):

> "(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters."

In my view, the addition of this paragraph to the paragraphs in subs (1) of s 89 means that the areas in which the Labour Court enjoyed exclusive jurisdiction in the first instance were increased by the inclusion of review proceedings in labour matters.

However, there can be no doubt that both before and after the coming into effect of the Amendment Act, the Labour Court enjoyed exclusive jurisdiction in the first instance to hear and determine all the matters set out in subs (1) of s 89.

I now come to the main issue in this appeal, which is whether in January 2006, when the company instituted the review application in the High Court, the High Court had the jurisdiction to hear and determine the application. The learned Judge in

the court *a quo* answered that question in the negative. In my view, that answer was correct.

However, Mr *Mugandiwa*, who appeared for the company, submitted as follows in his heads of argument:

> "19. As at the 25th of November 2005 and prior to the coming into operation of (the Amendment Act) on the 30th of December 2005, (the company) … had the right to bring on review to the High Court the proceedings of (the Labour Board) within eight weeks of the 25th of November 2005.
>
> 20. – 21….
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> 22. It is common cause that (the company's) application for review was filed on the 18th January 2006, within eight weeks of the 25th November 2005.
>
> 23. The effect of the High Court judgment is that the repeal of section 56 of the Exports (*sic*) Processing Zones Act extinguished the right to bring on review to the High Court the proceedings of (the Labour Board) within eight weeks of the termination of the proceedings, which right (the company) had as at the 25th November 2005.
>
> 24. There is a presumption at common law against interpreting a statute in such a way as to make it apply retrospectively. …
>
> 25. The presumption against legislative interference with vested rights has also found expression in statute. The provisions of section 17(1) of the Interpretation Act [*Chapter 1:01*] are in line with the common law position. …
>
> 26. It is accordingly submitted that any rights that accrued to (the company) as at the 25th November 2005 were not extinguished by the repeal of section 56 of the Export Processing Zones Act, which was repealed with effect from 30th December 2005. The accrued rights could be exercised after 30th December 2005.
>
> 27. It is submitted that (the company's) application for review was properly before the High Court and that the High Court had the jurisdiction to hear and determine same. The law that should have been applied in the matter was the law as at 30th November 2005 …".

The real issue here is whether on 25 November 2005 the company acquired a vested right to institute review proceedings in the High Court within eight weeks from that date, challenging the Labour Board's decision. I do not think it did.

I say so because it is an established principle that a person cannot have a vested right in matters of procedure. Thus, *Craies on Statute Law* 7 ed states the following at 401:

> "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied. … For it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, it will be held to apply *prima facie* to all actions, pending as well as future."

With regard to the content of matters of procedure, KOTZÉ JA said the following in *Bezuidenhout v A.A. Mutual Insurance Association Ltd* 1978 (1) SA 703 (AD) at 711 B-C:

> "Questions relating to what courts and within what time proceedings are to be instituted are questions of procedural law (*Salmond on Jurisprudence* 11 ed, p 504)."

I respectfully agree with that statement.

In casu, there can be no doubt that the issue as to which court the company could institute review proceedings in on 25 November 2005 was an issue concerning procedure, and in respect of which the company could not have acquired a vested right.

Consequently, whilst it is correct, as already stated in this judgment, that the company could have instituted review proceedings in the High Court before the Amendment Act came into operation on 30 December 2005, it could not do so after that date. A different situation then prevailed because in terms of s 89(6) of the Labour Act the Labour Court had exclusive jurisdiction to deal with the matters set out in subsection (1) of s 89, which then included exercising "the same powers of review as would be exercisable by the High Court in respect of labour matters".

Quite clearly, by repealing s 56 of the Export Processing Zones Act, and thereby transferring from the High Court to the Labour Court the hearing of review proceedings in labour matters from export processing zones, the Amendment Act merely dealt with procedure and did not affect the substantive rights of the parties. The Amendment Act, therefore, applied to all actions, pending as well as future.

In the circumstances, the High Court did not have the jurisdiction to hear and determine the company's application for the review of the Labour Board's decision.

In his submissions Mr *Mugandiwa* relied heavily upon the case of *Minister of Public Works v Haffejee N.O.* 1994 (3) SA 49 (NPD). The facts in that case were as follows –

1. On 29 April 1986 the Minister of Public Works ("the Minister") expropriated an immovable property belonging to the respondent ("Haffejee"), in terms of the Expropriation Act 63 of 1975 ("Act 63 of 1975"), and offered him compensation which he rejected.

2. On 1 May 1992 the Expropriation Amendment Act 45 of 1992 ("the Amending Act") came into operation. It repealed all relevant provisions in Act 63 of 1975 relating to the compensation court and provided that compensation would be determined by the Provincial or Local Division of the Supreme Court of South Africa.

3. On 6 August 1992 Haffejee filed an application in the compensation court against the Minister claiming compensation in the sum of R80 410.

4. On 30 April 1993 the Minister filed an application against Haffejee in the Natal Provincial Division, seeking the following declaratory orders –

    (a) that the Amending Act had abolished the compensation court;

    (b) that Haffejee's application for compensation filed in the compensation court was, therefore, a nullity; and

(c) that in terms of s 10(5) of Act 63 of 1975 Haffejee was deemed to have accepted the Minister's final offer of compensation.

5. Haffejee filed a notice of opposition, in which he submitted that the Amending Act did not have retrospective effect, and that it did not, therefore, affect compensation claims which had arisen before 1 May 1992, whether or not such claims were actually pending in the compensation court on that date.

The matter came before P C COMBRINCK J who found for Haffejee, and dismissed the Minister's application with costs. He found that the Amending Act did not retrospectively affect vested rights, and that as Haffejee had rejected the Minister's final offer before 1 May 1992 he had acquired a vested right to lodge an application for compensation in the compensation court.

Dissatisfied with that result, the Minister appealed to the Appellate Division of the Supreme Court of South Africa, which upheld the appeal with costs. See *Minister of Public Works v Haffejee N.O.* 1996 (3) SA 745 (AD). Mr *Mugandiwa* did not mention the Appellate Division decision in his heads of argument, and was probably unaware of it. Had he been aware of it, he would not have relied in his heads of argument upon the decision of the Natal Provisional Division, which had been reversed.

In the Appellate Division decision *supra* MARAIS JA said the following at 753 B-E:

> "In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not.
>
> *In casu* the relevant amendments were undoubtedly procedural provisions. Their only effect was that an application for compensation in an amount of less than R100 000 was thenceforth to be initiated in a forum different from the one in which such an application had to be brought in terms of the unamended Act. And, as was said in *Bezuidenhout v A.A. Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 711 B-C, questions relating to in what courts proceedings are to be instituted are questions of procedural law.
>
> Furthermore, should the amendments be given retrospective effect it will entail nothing more than the application of a new procedure to the respondent's pre-existing right to compensation; the only difference being that, as from 1 May 1992, the respondent had to enforce that right to compensation in the Natal Provincial Division instead of a compensation court. There would be no adverse impairment of any pre-existing substantive right to compensation."

And at 754G the learned JUDGE OF APPEAL continued as follows:

> "I find no indication, clear or otherwise, in any of this that a claim such as the respondent's was to continue to be maintainable in a compensation court."

I respectfully agree with the learned JUDGE OF APPEAL. His reasoning is unassailable and supports the conclusion I have reached in this appeal.

In the circumstances, the appeal is dismissed with costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Wintertons, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, second, third, fourth, fifth, sixth and seventh respondents' legal practitioners