REPORTABLE (162)

(1) CAINOS CHINGOMBE (2) TENDAI KWENDA
v
(1) CITY OF HARARE (2) MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING (3) HOSEA CHISANGO N.O (4) GEORGE MAKINGS N.O (5) CHENAI GUMIRO N.O

SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & MAKONI JA
HARARE, JULY 5, 2019 & DECEMBER 7, 2020

L. Madhuku, for the appellants

C. Kwaramba, for the first and third respondents

No appearance for the second, fourth and fifth respondents

GOWORA JA:

[1] Following their suspension from employment by the first respondent, the appellants, on 2 February 2018, filed an application with the High Court seeking a declaratur to the effect that such suspension was unlawful as well as consequential relief. On 3 October 2018 the High Court dismissed the application with each of the parties being made to pay its own costs. This appeal is against that judgment.

BACKGROUND FACTS

[2] The first respondent is a municipal authority constituted in accordance with the provisions of the Urban Councils Act [*Chapter 29:15*]. It is the authority responsible for

running the affairs of Harare. The second respondent is the government official tasked with the administration of the Act. The third respondent is cited in his official capacity as the acting Town Clerk for the first respondent. The fourth and fifth respondents were members tasked with the hearing of disciplinary proceedings against the two appellants.

[3] The two appellants are senior officials within the employ of the first respondent, ("City of Harare"). Such appointments are governed by s 134 and 135 of the Urban Councils Act.

[4] Following allegations of gross mismanagement in the affairs of the City of Harare, the government caused a special audit to be conducted into the affairs of the municipality. On 20 December 2017, a special meeting was convened by councilors to receive the report on the special audit. Following upon the meeting aforesaid, the third respondent was directed by a resolution passed at the meeting of the council to write letters of suspension to the appellants. On 31 December 2017, the third respondent addressed letters to the appellants advising them of their suspension from employment with immediate effect and without pay and benefits in terms of s 6 (1) of the Labour (National Employment Code of Conduct) Regulations, 2006, S.I. 15/2006 (the "National Code of Conduct"). On 5 January 2018, the appellants were invited to attend a disciplinary hearing on 15 January 2018 to enquire into the alleged offences detailed in the letters of suspension.

[5] On 10 January 2018, the appellants launched an application with the High Court under urgent cover to interdict the conduct of the disciplinary proceedings. The matter was deemed not urgent and was not heard. The applicants then launched the proceedings which are the subject matter of this appeal.

PROCEEDINGS BEFORE THE HIGH COURT

[6] Before the High Court, the appellants contended that the Urban Councils Act rigidly regulates the appointment and conditions of service of senior officials. To that end, any aspect involving the appointment, discipline, and dismissal of senior officials contrary to the Act was void and of no effect.

[7] They contended that s 140 is specific and mandatory and that, in terms of its provisions a senior official facing suspicion of misconduct cannot be suspended by councilors. It was averred that, in terms of s 140, only the Town Clerk had the mandate to place a senior official on suspension. It was suggested that the reliance by the first respondent on S.I. 15 of 2006 in effecting the suspension and the consequent disciplinary proceedings pursuant thereto was wrong and unlawful.

[8] Turning to the appointment of the disciplinary committee, the appellants contended that there was no scope within s 140 of the Urban Councils Act for the mayor to appoint a disciplinary committee. His decision to do so and the appointment itself were therefore illegal. As a result, the failure to comply with the provisions of s 140 rendered the entire process an illegality.

[9] The application was opposed by the first and third respondents who took a preliminary point. The respondents contended that the High Court did not have the requisite jurisdiction to determine the application. It was submitted that, although disguised as an application for a declaratur, what the appellants were seeking was a review of the suspension.

[10] As regards the merits, the respondents averred that the employer was the City of Harare and not particular individuals who were also employees of the same. The councilors represent the City of Harare and it was their mandate to make the decision to suspend the two appellants. In that regard, the City of Harare had acted within the confines of the law when it suspended the appellants in terms of the Labour Act [*Chapter 28:01*] and the National Code of Conduct. The respondents denied that the suspension and the scheduled disciplinary proceedings were unlawful and prayed that the application be dismissed with costs.

[11] The learned judge in the court *a quo*, based on the relief sought in the draft order, was of the considered view that the High Court had the requisite jurisdiction to determine the application. This was because, as he stated, the relief sought was that of a declaratory order, and the Labour Court was not empowered in terms of its enabling Act to grant declaratory orders. He discounted the contention by the respondents that what the appellant's draft order sought was an order for their reinstatement disguised as a declarator. I am inclined to believe that the learned judge erred, in that he then proceeded to determine the matter on the merits as to whether the applicable law was the Labour Act or the Urban Councils Act.

[12] The court *a quo* found that the appellants were employees as defined in s 2 of the Labour Act. The learned judge concluded that the only employees who were excluded from the Labour Act were those whose conditions of service were covered by the Constitution and the appellants did not fall in that category. It was common cause that the City of Harare did not itself have a code of conduct providing for the discipline of its employees and accordingly, in terms of s 12B of the Labour Act, in the absence of a code of conduct the National Code of Conduct was the default code for disciplining employees. The court dismissed the application.

[13] On the issue of costs, it was the view of the learned judge that given the two pieces of legislation seemingly providing for the discipline and dismissal of employees in the employ of the City of Harare, it was to be expected that the appellants would bring an application to court for the determination of their right to administrative conduct that is lawful. In addition, he surmised that the matter raised important legal issues. Accordingly, he ordered that each party should bear its own costs.

THE APPEAL

[14] Aggrieved by the dismissal, the appellants have brought this appeal on two grounds. It is contended that the court erred in law:

- in finding that s 140 of the Urban Councils Act [*Chapter 29:15*] had been repealed by s 2A of the Labour Act [*Chapter 28:01*];
- in not finding that the suspension of, and the disciplinary proceedings against, the appellants were null and void and of no force or effect for being in contravention of s 140 of the Urban Councils Act [*Chapter 29:15*].

[15] The appellants pray that the appeal be allowed with the judgment of the court *a quo* being set aside to allow the grant of the application. They also pray for consequential relief in the form of the declarator sought in the court below.

ISSUE(S) ARISING FOR DETERMINATION

[16] The sole issue for determination on appeal, therefore, is whether the court *a quo* erred in finding that s 140 had been implicitly repealed by the Labour Act. However, before determing the merits of the appeal it is necessary to determine whether or not the court *a quo* was correct in assuming jurisdiction over the matter in the first place.

WHETHER THE COURT *A QUO* CORRECTLY ASSUMED JURISDICTION

[17] Subsequent to the promulgation of the 2013 Constitution, there has arisen within the jurisdiction some confusion on the extent of the jurisdiction enjoyed by the High Court as a court of first instance, especially as relates to matters concerned with employment disputes. The Supreme Court has determined in *Nhari v Mugabe & Ors* SC 161/20 that the High Court has no jurisdiction in issues of labour and employment and that such issues fell to be determined under the Laabour Act.. In that case the court had to consider whether under s 171 of the 2013 Constitution the High Court could be said to enjoy original jurisdiction over all civil and criminal matters throughout Zimbabwe. In this exercise, the Supreme Court had to construe the provisions of ss 171 and 172 of the Constitution which specifically made provision for the jurisdiction of the High Court and the Labour Court respectively. The court said:

> "[30] The same Constitution that conferred original jurisdiction on the High Court over all civil and criminal matters also made provision for the creation of other specialised courts, whose jurisdiction over specialised areas of the law and the exercise of such jurisdiction was left entirely to Acts of Parliament. In other words, it is the Constitution itself which has permitted the establishment of these specialised courts and, in the same breath, provided for the issue of jurisdiction and exercise of such jurisdiction to be left to an Act of Parliament. Section 172 of the Constitution which establishes the Labour Court is not made subject to s 171 which creates the High Court. The two sections are in *pari materia* and must therefore be construed together. In making provision for the establishment of specialised courts in Acts of Parliament, the Constitution has not in any way attempted to fetter or restrict the jurisdiction that is to be conferred upon such courts, or to make such jurisdiction subject to s 171 which creates and provides for the jurisdiction of the High Court.
>
> [31] It could not, therefore, have been the intention of the legislature that the High Court would have jurisdiction in all civil and criminal cases without exception. An interpretation that the High Court has unlimited jurisdiction in all cases would clearly lead to an absurdity. The High Court would then have jurisdiction to determine matters that are in the province of say, the Military Courts. The High Court could, in these circumstances, be called upon to deal with petty cases involving the application of customary law at first instance or discipline at the work place. Were the High Court to have jurisdiction to hear and determine every case in Zimbabwe, it would get bogged down in matters over which it may have very little expertise or in petty matters that should ordinarily not detain the court. It would cease being the High Court as we know it. Such an absurdity could not have been in the contemplation of the legislature when it provided for the jurisdiction and exercise of such jurisdiction by the court in s 171 of the Constitution."

[18] In the context of this case, the court *a quo* assumed jurisdiction on the premise that the appellants were seeking relief in the form of a declaratur and that the Labour Court was not empowered to grant declaratory orders. The learned judge found that the matter was properly before him on the sole premise that the relief sought was that of a declarator as opposed to an application for reinstatement. It is a settled position in our law that, as a creature of statute, the Labour Court has not been imbued with the power to issue declaratory orders. The manner in which the relief was framed did indeed suggest that the appellants were seeking declaratory orders. In order to decide whether or not the matter was properly before the High Court I must have regard to the premise upon which the appellants approached the court. In other words the resolution of the question on jurisdiction is hinged on the dispute that was placed for adjudication before the court *a quo*.

[19] The contention made on behalf of the appellants was that the City of Harare had, in effecting their suspensions and seeking to disciplne them, used the wrong law and that, to that extent, they were entitled to a declaration of rights, thus imbuing the High Court with the necessary jurisdiction. This, it was argued, was due to the fact that the Labour Court, being a special court set up in terms of the Labout Act, was a creature of statute and could only do that which its eanabling Act provided for.

[20] In deciding whether or not a litigant is seeking a declaratur or some other relief, a court must be guided by the grounds upon which the application is made and the evidence in support of the order prayed for. In *Geddes Ltd v Tawonezvi* 2002(1) ZLR 479(S), at p 484G-485D, MALABA JA(as he then was), stated:

> "In deciding whether an application is for a declaration or a review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks declaratory relief is not in itself proof that the application is not for review. In *City of Mutare v Mudzime* & Ors 1999(2) ZLR 140 (S),

MUCHCHETERE JA quoted with approval from *Kwete v African Publishing Trust & Ors* HH-21-98, where at p3 of the cyclostyled judgment SMITH J said:

> "It seems to me with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal, the provisions of r 259 of the High Court rules should be complied with, one should look at the grounds on which the application is based, rather than the order sought…..It seems to me anamolous that one should be permitted to file an application for review out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review."

In this case, the respondent was not attacking Mrs Madyara's decision to suspend him from work, the disciplinary proceedings she presided over, or the decision of the employer to dismiss him from employment. He was in fact treating these decisions and proceedings as a nullity. In other words, they were as good as not having happened and there was no route leading to them upon which they could be reviewed. The ground on which he was treating these decisions and proceedings as a nullity, was that Mrs Madyara had no legal authority or jurisdiction to make the decisions and institute disciplinary proceedings against him.""

[21] Contrary to the remarks of the learned MALABA JA(as he then was) above, the appellants argue that in suspendeing them and preferring charges of misconduct, the City of Harare had failed to give effect to the provisions of s 140 of the Urban Councils Act rendering such conduct illegal. They contended that the employer was not at large to ignore the specific provisions of the Act and find comfort in S.I. 15 of 2006. The order sought by the appellants in the court *a quo* was to the following effect:

1. "That it be and is hereby declared that the suspension of the applicants pursuant to resolutions by a special Council meeting of the first respondent held on 20 December 2017 and communicated to the applicants by letters of the third respondent dated 31 December 2017 is in contravention of s 140 of the Urban Councils Act [*Chapter 29:15*] and is null and void and of no force and effect.

2. That it be and is hereby declared that the disciplinary proceedings against the applicants flowing from the aforesaid resolutions by a special Council meeting of the first respondent held on 20 December 2017 and implemented by letters of the 3rd respondent dated 5 January 2018 are in contravention of s 140 of the Urban Councils Act [*Chapter 29:15*] and are null and void and of no force and effect.

3. That, as a consequence, of 2 above, it be and is hereby declared that the disciplinary proceedings presided over by the fourth and fifth respondents are in contravention of s 140 of the Urban Councils Act [*Chapter 29:15*] and are null and void and of no force and effect.

4. That it be and is hereby declared that in respect of senior officials of a council, non-compliance with s 140 of the Urban Councils Act [*Chapter 29:15*] cannot be remedied merely by resorting to the use of the procedures set out in the Labour (National Employment Code of Conduct) Regulations 2006, S.I. 15/2006.

5. That for the avoidance of doubt, it be and is hereby declared that the first and second applicants are still the Human Capital Director and Finance Director respectively of the first respondent.

6. The respondents (if any oppose this order) shall pay the costs of this application on a legal practitioner and client scale."

[22] The appellants seek to challenge their suspension under what they term an illegal process not provided for by law. In my view, they were challenging the choice of law by the employer and the legality of the entire process.

[23] The starting point in my view must be the Labour Act. It sets out which employees and employers are subject to its provisions in the determination of disputes in the workplace. Sections 2A and 3 and are pertinent in this regard. Section 3 provides as follows:

> **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*].
>
> (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.

[24] I begin this inquiry with a consideration of s 3. In ss(1) it states in unequivocal terms that the Labour Act shall apply to all employers and employees except for those whose conditions of employment are governed by the Constitution. In subs (2) and (3) members of the Public Service and the disciplined forces are specifically excluded from the application of the Act. The appellants have not argued that they fall within the category of employees whose conditions of employment are excluded from the application of the Labour Act.

[25] In turn, section 2A is in the following terms:

> **2A Purpose of Act**
> (1) The purpose of this Act is to advance social justice and democracy in the workplace by—
>
> (***a*) giving effect to the fundamental rights of employees**
>
> (*b*) (repealed)….
>
> (*c*) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
> provided for under Part II;
>
> (*d*) **the promotion of fair labour standards;**
>
> (*e*) the promotion of the participation by employees in decisions affecting their interests in the workplace;
>
> (***f*) securing the just, effective and expeditious resolution of disputes and unfair labour practices.**
>
> (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subs (1).
>
> **(3)This Act shall prevail over any other enactment inconsistent with it.** (my emphasis)

[26] A perusal of the section makes it clear to the reader that the intended purpose is to ensure that employees are accorded the legal framework for the enforcement of their rights within the workplace as guaranteed by law. However, for present purposes s 2(1)(f) is the

pertinent provision as it seeks to ensure the securing of a just, effective and expeditious resolution of disputes and unfair labour practices.

[27] In *casu*, the dispute centres upon which statute the City of Harare should have resorted to in disciplining the appellants. The City of Harare contends that s 140 of the Urban Councils Act is inconsistent with the Labour Act and to that extent is inapplicable in the determination of labour disputes within its workplace. The appellants do not dispute that there is no code of conduct in existence governing the discipline and dismissal of senior employees within the workplace of the City of Harare. Their contention is that s 140 of the Urban Councils Act affords them all the protection they require as employees and that to depart from the specific provision of the said section and discipline them in terms of any other law is to perpetuate an illegality. Section 140 reads:

> **140 Conditions of service of other senior officials**
> (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 Government 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 section 11 of the Public Health Act [*Chapter 15:09*].
> (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.
>
> (5) Where a council has received a report of a suspension in terms of subs (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.

[28] Subsection (1) above makes for uncomfortable reading as it seems to suggest that the council can summarily dismiss an employee on the grounds of misconduct, dishonesty, negligence, or any other ground in law that would justify such discharge without notice. In his judgment, the learned judge in the court *a quo* stated that Mr *Madhuku* had conceded that s 140 contained repugnant provisions authorizing the Council to summarily dismiss an employee and that this would inevitably be inconsistent with the Labour Act, protecting as it does, social justice within the workplace and safeguarding the rights of employees against unfair dismissal. This provision is not only inconsistent with s 2 (1) of the Labour Act but is also in violation of the *audi alteram partem* principle. It is particularly inconsistent with ss (1)(f) of the Labour Act which ensures that an employee is afforded a just and effective legal framework for the resolution of disputes in the workplace.

[29] Before this Court, Mr *Madhuku* accepted that the provision is inimical to the interests of the employee at large. He suggested that the court not have regard to subs (1) of s 140 of the Urban Councils Act. In a somewhat novel submission, he argued that ss (2) and (3) of s 140 of the Urban Councils Act must be read with the provisions of the National Code of Conduct.

[30] I venture to suggest that this departure in position on the initial submissions would tend to suggest that he has accepted that the reliance by the City of Harare on the National Code as

opposed to s 140 of the Urban Councils Act was lawful. It is also an acceptance of the position that the appellants stand to be disciplined in accordance with the provisions of the Labour Act as they are employees to whom the Labour Act applies and that the absence of a code of conduct within the workplace of the City of Harare results in the National Code of Conduct being the default code of conduct for disciplining employees, whether they are junior or senior employees.

[31] This shift in position must dispose of the appeal. I cannot envisage a situation where a tribunal would, in the course of conducting a disciplinary hearing, move from one legislative instrument to another in an effort to find those provisions that best suit the employee. A tribunal can only have regard to one instrument recognizable at law as being the applicable law. In this instance for all the reasons stated above, the Labour Act as read with S.I. 15 of 2006 is the law applicable in the disciplining of the two appellants herein. The appellants have not justified their exclusion from the provisions of the Labour Act in the determination of the allegations of misconduct laid against them.

[32] Section 2(3) provides that the Labour Act shall prevail over any enactment or provision inconsistent with it. Section 12B requires that an employee be dismissed in accordance with the provisions of a code of conduct. It provides 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).

[33] It is common cause that the City of Harare does not have a code of conduct for discipline purposes within the workplace. It has always relied on the provisions of the Urban Councils

Act. Such reliance in the light of the clear provisions of the Labour Act is misplaced. The City of Harare is subject to the Labour Act and must comply with its provisions in all respect. It does not belong to the category of employers exempted from the application of the Labour Act. In the premises, in the light of the provisions of s 12B above, the City of Harare must have resort to the National Code of Conduct in the resolution of employment disputes. It cannot have recourse to s 140 of the Urban Councils Act, which, as admitted by Mr *Madhuku,* is not a code of conduct.

[34] As a consequence, the view I take is that what was before the court *a quo* was an issue dealing with an employment relationship and that is a dispute that falls for determination under the Labour Act by the Labour Court and the other structures below it.

[35] The issue as to whether the High Court is empowered to exercise jurisdiction as a court of first instance is now settled –see *Nhari*'s case *(supra).*

[36] I respectfully associate myself with the remarks by GARWE JA in the above decision. In this appeal, in order to resolve the dispute between the parties, the court *a quo* had to delve into the contentious issue of the applicable law. It had to decide whether or not the appellants were emplyees as defined in s 2 of the Labour Act. It had to decide whether or not the same Act applied to the appellants or whether they were exempt from its application. It had to consider whether or not the suspensions were illegal.

[38] It stands to reason that, *in casu*, the High Court misdirected itself in assuming jurisdiction in this matter. Although the court ultimately came to the correct conclusion that it was the National Code of Conduct that applied to this matter, it should have declined

jurisdiction on the same basis resulting in the matter being struck off the roll for want of jurisdiction.

DISPOSITION

[39] When one has regard to the substance of the application and the averments contained therein, the unmistakable conclusion is that the appellants were seeking to challenge their suspensions on the basis that the wrong law had been applied in suspending them. That argument speaks to a process of review as opposed to a declaration of rights. The law being impugned was the Labour Act. The issue for determination was whether or not the appellants were suspended according to law and, if not, were the suspensions illegal entitling them to the setting aside of the suspension. The fact that they clothed the application as a declarator is not material. The result they sought is what guides the court. The dispute lends itself to adjudication under thr Labour Act which specifically empowered the Labour Court to review the decisions or actions by employers within the workplace. The Act also empowers labour officers to deal with unfair labour practices dismissals. See s 93 of the Act.

[40] That being the position, the High Court had no jurisdiction to issue a declaratur in respect of issues of labour and employment. Section 2A of the Labour Act makes it clear that, notwithstanding the powers of the High Court to issue declaraturs, the Labour Act prevails over all other laws inconsistent with it. Accordingly, in my view, the issue of the jurisdiction of the High Court fell for determination first. But I also accept that the issue of which law is applicable is inextricably tied up with the question of jurisdiction.

[41] For the additional reason that this was not in fact a declaratur but an employment and labour matter, the High Court clearly had no jurisdiction to entertain the claim in the first place.

The High Court was wrong in assuming jurisdiction in a matter where the issues for determination involved the resolution of an employment dispute. It should have declined jurisdiction.

[42] Although the High Court had no jurisdiction, it made a determination on the merits. That determination cannot be allowed to stand. It has to set aside as being an irregularity. The Supreme Court is empowered, in terms of s 25(2) of the Supreme Court Act [*Chapter 7:13*] and in the exercise of its powers of review, to set aside any irregular proceedings. In this instance, the court must exercise those powers and set aside the proceedings as being irregular.

Accordingly, the following order will issue.

IT IS ORDERED THAT:

1. The appeal be and is hereby dismissed with costs.
2. In the exercise of the powers of review of the Supreme Court in terms of s 25(2) of the Supreme Court Act [*Chapter 7:13*], the proceedings of the High Court under HC Number 991/18 be and are hereby set aside for want of jurisdiction on the part of the High Court.

GUVAVA JA **:** I agree

MAKONI JA : I agree

Lovemore Madhuku, Lawyers appellants' legal practitioners

Mbidzo, Muchadehama & Makoni, 1st and 3rd respondents' legal practitioners