FARAI MBIRA
and
ZIMBABWE INSURANCE BROKERS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE,10 February 2004 and 10 November 2004

Opposed Court Application

Miss *N Moyo*, for the applicant
Mr *S Hwacha*, for the respondent

GOWORA J: The applicant was for a number of years employed by Zimbabwe Reinsurance Company. By some arrangements the exact nature and details of which are not relevant to this dispute he was, in May 2002, transferred to Zimbabwe Insurance Brokers (hereinafter referred to as "ZIB") as an Information Technology manager, although the letter was signed by the parties in July of the same year. In the letter from ZIB it was stated that he was being offered employment on the same terms and conditions as those pertaining to his contract with his former employer with the exception of a few differences, the details of which are again not pertinent for the resolution of this dispute.

Sometime in September of the same year the applicant was requested to work on a Saturday. He refused and cited his religion as a Seventh Day Adventist as his reason for so refusing. On 30th October 2002 he received a memorandum from the General Manager (Finance and Services) of ZIB dismissing him from employment with effect from 1st November 2002. This memorandum was however withdrawn by the respondent's Managing Director. Although the date on the latter's memorandum appears as 16 October 2002, it stands to reason that it must have been subsequent to that of Makaya so the date is incorrect, and in any event nothing turns on the date as that is not the subject matter of the dispute. A meeting was held with the applicant by the Managing Director on 31st October and this resulted in another memorandum from Makaya dated 4 November 2002, advising the

applicant that following the withdrawal of the dismissal letter he was required to report for work.

On 11 November 2002, the applicant received a letter from J Mapani who described himself as Designated Officer. In it he advised the applicant that he had been appointed by the Managing Director to investigate an alleged breach of contract by the applicant. He then outlined the specific details of the alleged offence and invited the applicant to attend a hearing the next day at 10.30 a.m. The applicant was advised that he could bring a representative who was a member of management. That this letter was received by the applicant the following day at 8.30 a.m. is not disputed by the respondent, who however states that the applicant had received an electronic copy of the letter on the 10th November. The hearing does not appear to have achieved much as the findings, if there were any, do not appear *ex facie* the record nor were they communicated to the applicant. However, on 12th November 2002, the Managing Director addressed a letter to the applicant in the following terms:

Your refusal to work on Saturdays as stated in your previous correspondences constitutes a breach of your contract of your Employment Contract.

Your memorandum of the 5th November 2002 gives clear evidence that you have other various issues that you are not happy with regarding your conditions of service at ZIB. It is this memo that has prompted the ZIB Executive that you cannot be kept in ZIB employ any more.

You have been relieved of your duties as an employee of ZIB with effect from 12 December 2002. You are therefore serving a notice period for a month in line with your Contract of Employment. You will serve your notice period from home.

The company vehicle should therefore be surrendered to me by end of day today. Cash in lieu of vehicle use amounting to $15 000.00 will be payable to you together with your terminal benefits by end of day today.

Both parties to the dispute are in agreement that the contract of employment between ZIB and the applicant was in fact terminated on notice. As relief against the termination, the applicant seeks that the dismissal by 'Respondent be and is hereby set aside' and that ZIB pays the costs of the application.

ZIB has raised a point in *limine* that the application being an application to review the decision to terminate the applicant's employment with ZIB, does not comply with Rule 257 of the High Court and is therefore defective for want of form. The respondent submits that the applicant, despite the requirement that the *application state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the relief prayed for*, has lumped up all possible grounds of review in the body of the founding affidavit. The respondent submits that this is improper and renders the application fatally defective.

The applicant counters the criticism of the respondent by stating that there has been due compliance with the provisions of r 257. Reference is, made in this connection to the contents of para 30 to the founding affidavit in which the applicant states;

'It is clear from the facts outlined above that there was gross irregularity in the manner in which the whole issue was handled, and that the decision to terminate my contract was grossly irregular as it was made unilaterally by management in sheer defiance of respondent's Code of Conduct'.

The applicant contends that it is clear therefore that he is seeking that his dismissal be set aside on the ground that it was secured or effected contrary to the provisions of the Code of Conduct, and that the attempt to argue that the application does not comply with the rules is without merit. In addition the applicant contends that in the event that the application does not so comply with the rules, then this is a proper case to condone such a technical failure. I was referred to the case of *Moyo v Forestry Commission*[1] for this contention.

[1] 1996 (1) ZLR 173 (H)

In *Minister of Labour & Ors v PEN Transport (Pvt) Ltd*[2], GUBBAY JA as he then was discussed the rule in the following terms;

The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularized in an annexed draft order, which was that the determination be set aside and the dismissal of the employee confirmed. I am bound to reiterate the stricture of GREENFIELD J in Utterton v Utterton 1969 (2) RLR 404 (GD) at 409F-G; 1969(4) SA 391 R) that the requirement of rule 227(2) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears ex facie *the notice. But there was a far more serious defect in the preparation of the application. Although the existence of two grounds of review were urged upon the court a quo` only the second, that the labour relations officer had declined to hear the employer's accountant, Mr MacKenzie, and had also failed to investigate from other employees the circumstances surrounding the dismissal, was alleged in the founding affidavit. The first ground was not disposed of at all. It was that the labour relations officer had no jurisdiction to make the determination he did because it had been orally agreed that the employee would serve a probationary period of three months, thereby permitting termination pursuant to s 2 (1) c) of the Regulations. That omission amounts to to non-compliance with Rule 257 of the High Court Rules, which provide that the notice of motion (in the wide sense of embracing the supporting affidavit)-*

'shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected'"

It is correct as stated by the applicant that his founding affidavit makes reference to the alleged irregularities in not following the provisions of the Code of Conduct. The fact of the matter is that the applicant's founding affidavit was most inelegantly drafted and one has to search for the grounds for review which as aptly pointed out by Mr *Hwacha* are lumped together making it rather difficult to ascertain what those grounds are. However by

[2] 1989 (1) ZLR 293 (S) at p 295F-296D

dint of searching diligently one finally ascertains what those grounds are. There also seems to be an additional ground for relief based on an alleged failure to observe rules of natural justice on the part of Mapani and ZIB in general. At the hearing the applicant's counsel did not dwell on the alleged irregularities, probably in my view, from an appreciation that the dismissal was not in terms of the Code of Conduct but from notice within the terms of the contract.

The respondent has raised yet a second point *in limine* that the applicant has not exhausted his domestic remedies before approaching the court for relief. It is contended by the respondent that the heads of argument filed on behalf of the applicant do not address the issue that a labour officer had in terms of s 96 of the Labour Relations Act [*Chapter 28:01*], which has since been amended, various remedies including damages available to employees. It was contended in the event the matter should not have been brought to the High Court.

Miss *Moyo* countered the argument of Mr *Hwacha* by submitting that the Code provides for an appeal after a disciplinary hearing. However, the applicant was never advised of the outcome of the hearing. The designated officer did not impose a penalty upon the applicant, which according to her view, should have been a warning as provided for in the Code. Management itself should have advised the applicant of the results of the disciplinary

Although there was a 'hearing' on 12th November 2002, the findings of that hearing were never made known to the applicant, nor was it ever the contention of the respondent that the applicant had been found guilty and thus dismissed due to such misconduct. In fact it is the position that the applicant was dismissed on notice in terms of his contract of employment. Clearly therefore the respondent did not, in terminating the contact of employment proceed in terms of the Code. In my view the applicant could only have proceeded in terms of the Code following a decision that the applicant had been found guilty of misconduct, irrespective of whether or not the procedures outlined in the Code had been adhered to. I agree with the submission in the applicant's heads of argument that in view of the fact that the applicant's dismissal was outside the code the appeal process provided therein was not available to him.

In addition it is contended that the appeal procedures in the Code do not confer on the applicant 'better and cheaper benefits' than the remedy of approaching this Honourable Court. It was further contended that that the appeal process to the Minister of Public Service Labour and Social Welfare and to a higher authority presumably the Labour Tribunal under the Code did not provide a faster, cheaper and more effective remedy. It was argued that the appeal process seemed laborious and also did not provide for a rehearing of the matter.

A court will not insist on an applicant exhausting domestic remedies where the appeal system created by the Code of Conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined the domestic remedies themselves, for example, where the tribunal had no power to make the decision in question. *Fisher &Ors v Air Zimbabwe Corporation* HH 306/88; *Mabuza v Tjolotjo District Council (supra); Sibanda & Anor v Mugabe & Anor* HH 102/94 [3]

The applicant was not in my view precluded from approaching this court without having exhausted his domestic remedies. Such domestic remedies as would be available under the Code would not amount to a rehearing nor would they have been better or cheaper than what this court could afford him.

I find myself in agreement with the submission by Miss *Moyo*. The disciplinary hearing did not appear to have been concluded in that the results of the same were not communicated to the applicant. It would be most absurd therefore for him to pursue an appeal in terms of the Code in a situation where there had been no finding of guilt on which his dismissal would have been predicated. In terms of the Code an employee who is aggrieved by the decision of the designated officer or investigation committee may appeal to the employer. Where it is the employer's decision which is being appealed against, the employee may appeal to the Ministry of Public Service, Labour and Social Welfare. It is clear therefore that in order for there to be the right to appeal, there must be a decision, which is a source of grievance. In this case there was no decision and so the issue of

[3] per MALABA J in Moyo v Forestry Commission 1996 (1) ZLR 173 (H) at 192B-C

whether or not the applicant should have exhausted his domestic remedies does not arise.

On the merits Mr *Hwacha's* contention was that where a Code of Conduct has been registered an employer can terminate a contract of employment on notice if the contract provides for such termination. His submission was that no formalities were necessary before such termination. There was in addition no requirement on the employer to prove or allege fault on the part of the employee. It was his view that the rules of natural justice do not apply to contractual obligations. Therefore, according to him, there was nothing unlawful in the termination. As regards the disciplinary proceedings, he submitted that the only duty upon completion of duty by the designated officer was to surrender the findings to the employer.

Both parties are in agreement that the applicant was dismissed on notice. The question to be determined is whether the dismissal was invalid and unlawful thus justifying an order setting it aside. Paragraph 10 of the applicant's contract of employment provides;

'One calendar month's notice is required on either side'

An examination of the letter in terms of which the applicant was dismissed from employment makes it clear that the applicant was not dismissed because of some misconduct, as none is alluded to. The reason for the termination is a memo written by the applicant to his former employer listing his grievances with ZIB. It was indicated in the letter of dismissal that the memo showed that the applicant was not happy with his conditions of service at ZIB, and that this had prompted the executive to decide to dispense with his services. The decision to terminate his employment was therefore not a disciplinary one.

The contention on behalf of the applicant is that he could not have been lawfully dismissed on notice since the Code of Conduct does not envisage dismissal on notice. It was further submitted that the principle that it was unlawful to dismiss an employee outside the framework of the provision of an applicable Code of Conduct was of equal force to those situations where the employee's contract of employment provided for termination on notice since the effect to the existence of the Code of Conduct, which applied to that employee was to supercede the provisions of that employee's contract

to the extent that the contract may allow termination on notice. It was contended further that the only exception was, firstly, where the Code of Conduct itself envisaged that notice may be included in individual contracts or, where the employee concerned was not covered by the Code of Conduct in that there was no provision in the Code for the dismissal of the employee. Therefore, it was submitted, outside these exceptions the dismissal of an employee could only be lawfully secured under and in terms of the provisions of a Code of Conduct even where the employee's contract contained a notice clause.

The applicant then sought comfort in the provisions of S.I.371of 1985 as amended by S.I.370 of 1990. Thus it was submitted that the clear intent behind the 1990 amendment was to transfer the procedures for the dismissal of those employees who would have negotiated a Code of Conduct with their employers from the dismissal procedures contained in S.I.371 of 1985 to whatever procedures were contained in the negotiated and registered Code. It was argued that it could not have been the intention of Parliament to place some employees outside the protective provisions of S.SI.371 of 1985 as well as outside the provisions of the relevant Code of Conduct. Ultimately, what it meant was that an employee could not be dismissed in terms of a notice clause in his contract unless that was provided for in the Code of Conduct.

The fundamental dispute between the parties however is that the applicant was dismissed on notice in terms of his contract of employment. The applicant's position is that in dismissing him on notice for an alleged misconduct, outside the framework of a Code of Conduct or in violation of its provisions, such dismissal is *ipso facto* unlawful. The applicant further contends that unlike the situation postulated in *Chivinge v Mushayakarara & Anor* [4] where the Supreme Court implied that it might be possible to terminate a contract by notice where the contract provided as such and where the Code of Conduct itself envisages or anticipates that notice may be included in individual contracts, that was not the same as the Code of Conduct in *casu* did not provide likewise. It was the concluding submission by the applicant that an employee to whom a Code of Conduct applied could not be dismissed in terms of a notice in his or her contract unless that is

[4] 1998 (2) ZLR 497 (S)

provided for in the Code of Conduct. Needless to say the respondent holds a contrary view to that of the applicant.

This question has vexed our courts many a time. The question was finally put to rest in the case of *Chirasasa & Ors v Nhamo N.O. & Anor*[5] . What was at issue in that judgment as in the present is the import of the amendment to S I371/85 by s I 377/90 which inserted a section 1 A reading as follows;

Sections 2 and 3 shall not apply to employees to whom the provisions of an employment Code of Conduct registered in terms of section 3 of the Labour Relations Act (Employment Codes of Conduct) Regulations 1990 apply.

At pp 10 to 11 of the cyclostyled judgment MALABA JA stated thus;

'So when it removed the obligation to obtain the prior written approval of the Minister as a procedural requirement for the termination of a contract of employment on notice, s 1A of the Regulations introduced the procedures contained in the employment Code of Conduct as the method of termination of the contract of employment where the disclosed or undisclosed reason thereof was misconduct on the part of the employee.

Where there was no allegation of misdemeanour, the effect of s 1 A of the Regulations was that the employer had a right to terminate the contract of employment on notice, as long as the employee was one to whom the provisions of the registered Code of Conduct applied. The legal effect of s 1 A of the Regulations was that a contract of employment could be terminated on notice for any reason other than those relating to misconduct.'

We are concerned here with the law as it was when the dismissal took place so that the reference by the applicant to S.I. 130/03 need not detain me as our law does not apply with retroactive effect. It is accepted by the applicant himself that he was dismissed from his employment on notice and that the letter of dismissal itself does not make any reference to an act of misconduct on the part of the applicant. It is further accepted that the

[5] S C 135/02 per MALABB JA.

designated officer did not make a finding that the applicant had been found guilty of misconduct so that the dismissal was predicated on notice in terms of the contract. The applicant was dismissed in terms of his contract of employment and in my view was properly dismissed.

The application is therefore dismissed. The applicant is ordered to pay the respondent's costs.

Coghlan Welsh and Guest, the applicant's legal practitioners
Dube Manikai & Hwacha, the respondent's legal practitioners