

LAZARUS MUCHENJE
versus
SUSAN M. MUTANGADURA
and
PAUL MUPFIGA
and
TENDERO DZVETERO
and
DR BEAULAH CHIRUME
and
CHIDO BOKA
and
NETONE CELLULAR (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 29 December 2020 & 27 January 2021

Urgent Chamber Application

E Mubaiwa with I Chagonda, for the applicant
T Zhuwarara with F Mahere, for the respondents

MUREMBA J: The applicant was employed as the Chief Executive Officer (CEO) of the sixth respondent. The sixth respondent is Net One Cellular (Pvt) Ltd a licensed provider of mobile and related telecommunications services in Zimbabwe. The first to fifth respondent are its directors.

Following a board meeting held on 20 February 2020 a special resolution to suspend the applicant as Chief Executive Officer was passed. The applicant successfully obtained an interim court order suspending that resolution. On 9 July 2020, the sixth respondent's board of directors wrote a letter to the applicant advising him that his suspension pending disciplinary hearing had been withdrawn and that he was now reinstated as Chief Executive Officer with no loss of salary or benefits. In less than 24 hours of reinstatement, a letter terminating the applicant's employment on three months' notice was written by the same board members of the sixth respondent and was delivered to the applicant. Again the applicant successfully obtained an interim court order on 15 July 2020 under case number HC 3611/20 suspending the effectiveness of the letter of termination pending the hearing of the matter and its final determination on 4

August 2020. The interim order has not yet been confirmed or discharged. Judgment is still pending in this court. That notwithstanding, the first respondent on behalf of the sixth respondent wrote a letter to the applicant on 21 December 2020 withdrawing the letter of termination of contract of 9 July 2020 and reinstating him as CEO. On the same date, but in a different letter, the first respondent wrote to the applicant again terminating his employment contract on three months' notice with immediate effect. The applicant was advised that the President of the Republic of Zimbabwe had given his endorsement for his removal from office of CEO of the sixth respondent. The applicant was further advised that he would be paid *in lieu* of the three months' notice as his services were no longer required. It is this letter which prompted the applicant to file the present urgent chamber application.

It is the applicant's averment that the letter of termination of his employment contract is illegal as his contract of employment cannot be terminated on notice or in the manner that the respondents purport to terminate it. Furthermore, there is an interim court order by CHINAMORA J barring the respondents from giving effect to a similar letter which sought to terminate his contract of employment on notice. In this application the applicant is seeking as against the respondents, a prohibitory interdict in the interim and a *declaratur* on the return day. The reliefs are couched as follows.

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

- i. That the letter dated 21 December 2020 authored by the 1st respondent purportedly for and on behalf of the 6th respondent addressed to the applicant be and is hereby declared null and void.
- ii. Any processes taken pursuant to the said letter be and are hereby declared null and void.

That any respondent(s) opposed to the granting of the Final Order be ordered to pay costs, jointly and severally the one paying the others to absolved on a legal practitioner- client scale.

INTERIM RELIF GRANTED

Pending the confirmation of the Provisional Order, the applicant be and is hereby granted the following relief:

- i. That the effect of the letter dated 21 December 29020 drafted by the 1st respondent for and on behalf of the board directors of the 6th respondent be and is hereby suspended as well as any further processes taken in furthering its objects.
- ii. The respondents be and are hereby interdicted from publishing the illegal dismissal of or termination of the applicant's contract of employment in terms of s 11 (2) of the Public Entities Corporate Governance (General Regulations S.I. 168 of 2018) and further

interdicted from advertising applicant position in terms of s 8 of the same Statutory Instrument.

- iii. That the respondents be interdicted from terminating the applicant's employment contract pending the final determination of this matter and case number HC 3611/20.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the respondents or their legal practitioners by the applicant's legal practitioners."

In short, in the interim the applicant wants the respondents barred from terminating his employment contract pending the return date. He also wants the respondents barred from publishing his dismissal or termination of his employment contract and advertising his position. On the return date the applicant will be seeking a *declaratur* that the letter of 21 December 2020 terminating his employment contract is a nullity.

In response to the application the respondents raised some points *in limine* which I deal with hereunder.

Lack of Jurisdiction

The respondents averred that this is a labour matter wherein the applicant is effectively seeking an order setting aside the termination of his employment contract on notice on 21 December 2020. The respondents contended that the applicant should challenge the termination thereof in terms of the Labour Act [Chapter 28:01]. The applicant ought to approach a labour officer who should determine whether or not there is need to follow due process when terminating an employment contract on notice. The ruling should thereafter be submitted to the Labour Court for confirmation or discharge in terms of the provisions of Amendment Act No. 5 of 2015. The Labour Court is set up as a specialist court to deal with employment matters in terms of s 172 of the Constitution. This court has no jurisdiction to determine the applicant's complaint that his contract was terminated without regard to due process. This court has no inherent jurisdiction to deal with purely employment matters, its jurisdiction having been restricted by the Constitution which created the Labour Court as a Specialist Court to handle employment matters. Mr. *Zhuwarara* for the respondents submitted that in *Stanley Nhari v Robert Gabriel Mugabe & Ors* SC 161/20 it was clarified that the High Court does not have jurisdiction to deal with labour matters. He referred to para 47 of the judgment. It reads;

"On a careful interpretation of the Constitution, it is clear that the High Court does not, in fact, have unlimited jurisdiction over all civil and criminal cases in Zimbabwe. The general jurisdiction of the High Court is restricted by the very Constitution itself which has created

specialised courts to handle specific areas of the law. The High Court has no jurisdiction to determine unfair labour practices which, in terms of the Labour Act, should more properly be handled by labour officers appointed in terms of that Act.”

Mr. *Zhuwarara* argued that *in casu* the applicant is claiming that he was unlawfully dismissed. Referring to para 42 of the *Nhari* judgment, he submitted that the procedure for dealing with an unfair labour practice is to be found in s 93 (5) of the Labour Act. Para 42 provides:

“The procedure for dealing with an unfair labour practice is to be found in s 93 of the Labour Act. The unfair labour practice is handled by a labour officer who attempts conciliation. The officer may, by consent of the parties, refer the matter to arbitration or that failing, proceed in terms of s 93 (5) of the Labour Act.”

In response Mr. *Mubaiwa* for the applicant submitted that the *Nhari* judgment that the respondents seek to rely on is not applicable to the present matter. The circumstances are different. He submitted that whilst in the *Nhari* judgment the appellant had approached this court for an order that he be paid monies that were due to him arising out of his employment contract, *in casu* the applicant is seeking an interdict, a prohibitory interdict to be specific. He makes that clear in para 5 of his founding affidavit. The Labour Court cannot grant that relief. It has no jurisdiction to grant interdicts whereas the High Court has jurisdiction to grant such.

Mr. *Mubaiwa* further submitted that in any case the Labour Act is not the applicable statute in the applicant’s case, but the Public Entities Corporate Governance Act [*Chapter 10:31*] and its General Regulations. He submitted that this is in terms of Chapter 9 and more specifically s 197 of the Constitution of Zimbabwe (Amendment Act No. 20) 2013 which provides for terms of office of heads of government controlled entities. S 197 reads,

“An Act of Parliament may limit the terms of office of chief executive officers or heads of government controlled entities and other commercial entities and public enterprises owned or wholly controlled by the State.”

Mr. *Mubaiwa* submitted that the Act of Parliament being referred to in s 197 of the Constitution is the Public Entities Corporate Governance Act, and not the Labour Act. He submitted that s 16 of the Public Entities Corporate Governance Act is the provision which deals with the termination of the term of office of the head of a State Controlled Commercial entity. Mr. *Mubaiwa* further submitted that Chapter 9 of the Constitution and the Public Entities Corporate Governance Act do not prohibit the High Court from exercising jurisdiction in a

matter such as the present one. He further submitted that a reading of s 3 (1) of the Labour Act shows that the Labour Act is not applicable to the applicant who is governed by s 197 of the Constitution. It was his argument that the applicant's conditions of service are provided for in the Constitution by virtue of s 197.

To begin with, it is pertinent to point out that Mr. *Zhuwarara* did not dispute that the Public Entities Corporate Governance Act is the Act that was enacted to provide for the governance of public entities in compliance with Chapter 9 of the Constitution and in terms of s 197 thereof.

To resolve the issue of whether or not this court has jurisdiction in this matter it is necessary to examine the provisions of s 3 of the Labour Act which deals with the application of the Act. It provides,

- “(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”

In *City of Gweru v Richard Masinire* SC 56/18 BHUNU JA interpreted this provision. He stated that it confers jurisdiction of the Act over all employees except those it expressly excludes. And those that are expressly excluded are:

1. Those whose conditions of employment are otherwise provided for in the Constitution.
2. Members of the Public Service.
3. Members of a disciplinary force of the State.
4. Any other employee designated by the President in a Statutory Instrument.

In *casu* I do not believe that the applicant falls in any one of the excluded categories. I am not in agreement with Mr. *Mubaiwa*'s argument that the applicant's conditions of service are provided for in the Constitution by virtue of s 197 of the Constitution. Rather, I am in agreement with Mr. *Zhuwarara*'s argument that the applicant's conditions of service are not found in the Constitution, but in an Act of Parliament, the Public Entity Corporate Governance Act which

was enacted in compliance with Chapter 9 of the Constitution, which chapter includes s 197. One of the purposes of the Act as can be seen from its preamble is to provide a uniform mechanism for regulating the conditions of service of members of public entities and their senior employees. S 197 of the Constitution does not provide any conditions of service for employees of government controlled entities. It simply says that An Act of Parliament may limit the terms of office of chief executive officers or heads of government controlled entities and other commercial entities and public enterprises owned or wholly controlled by the State. Surely this provision cannot by any stretch of imagination be interpreted as providing conditions of service. Clearly, the applicant does not fall within the category of employees that are excluded by s 3 of the Labour Act. The Labour Act is therefore applicable to him.

In the letter of termination of applicant's employment contract dated 21 December 2020, it is not indicated in terms of which law (whether the Labour Act or the Public Entities Corporate Governance Act) the employment contract was terminated. The letter is silent. However, the letter of termination of 9 July 2020 although it was subsequently withdrawn, made it clear that termination had been made in terms of s 12 (4) of the Labour Act. On the other hand, the applicant avers that his contract of employment as read together with s 16 of the Public Entities Corporate Governance Act which provision provides for the dismissal of chief executive officers does not provide for the termination of his employment contract on notice. The point that the applicant was making here was that his employment contract was terminated in terms of the Public Entities Corporate Governance Act which has no provision for the giving of notice. I will not be drawn into making a determination of whether or not the notice was lawfully given. That is not the issue before me. The issue that is before me is simply whether or not this is an employment matter which should be determined in terms of labour law. If it is a labour or employment matter, I will decline jurisdiction on the basis of the *Nhari* judgment that I have already referred to above.

It was Mr. *Mubaiwa's* further argument that even if the Labour Act is applicable to the applicant, this court has jurisdiction to deal with the present application because the applicant is seeking an interdict which only the High Court and not the Labour Court can grant. As was correctly argued by Mr. *Zhuwarara*, in deciding what relief an applicant is seeking, the court must look at the grounds of the application and the evidence adduced in support of the order prayed for. See *Cainos Chingombe & Another v City of Harare* SC 177/2020 para 20. The fact

that the applicant is seeking a particular relief is not itself decisive. In other words what is important or what matters are the grounds on which the application is based rather than the order or relief that is being sought. Regard should be had to the substance of the application and the averments contained therein instead of the relief that is being sought. The relief being sought cannot be the sole decider of whether or not a matter is properly before the Court. The decider is the dispute that has been placed for adjudication before the court.

In casu in para 5 of the founding affidavit, the applicant outlined the purpose of his application. He averred that he is seeking a prohibitory interdict and ancillary relief to the effect that the purported letter of dismissal be declared null and void. From para 16 to 18 he outlined what he termed “the complaint.” In para 16 he averred that, “the letter of termination is illegal and has no force of law in that the applicant’s contract of employment cannot be terminated on notice or in the manner that the respondents purport to terminate it.”

In para 18 he averred that,

“The letter of terminationis illegal and contemptuous in that it seeks to circumvent an extant interim court order ...of this Honourable Court under case number HC 3611/2020...”

In the subsequent paragraphs the applicant went on to make averments which deal with the requirements of an interdict. In para 19 he averred that he has a clear right to lawful process by the respondents which right was wantonly violated. On irreparable harm he averred that in terms of his contract as read together with the Public Entities Corporate Governance General Regulations he cannot be dismissed on notice as purported in the letter of termination. He further averred that assuming that the President gave his endorsement, the decision to dismiss him was illegal, arbitrary and an affront to the laws of natural justice in that he was never invited to make any representations. He averred that most importantly, the essential processes to terminate his contract were not complied with. He averred that he has rights in terms of the interim court order which interdicts the respondents from terminating his contract on notice. He averred that he stands to suffer irreparable prejudice by the unlawful process.

What is clear from the applicant’s averments is that although he avers that he is seeking an interdict, he is basically challenging termination of his employment contract by way of notice, a way which he says is not provided for in his employment contract and in the General Regulations of the Public Entities Corporate Governance Act. He is challenging the legality of the termination process. He says it was unlawful, hence his request for a *declaratur* that the letter of

termination and any processes taken pursuant to the said letter are null and void. I take the view that this is a dispute that relates to the employment relationship between the applicant and the sixth respondent. The dispute is whether or not the applicant's employment contract was lawfully terminated. Such a dispute falls for determination in terms of labour law under the Labour Act and its structures. S 2A of the Labour Act spells out the purpose of the Act as follows.

“2A(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 provided for under Part II;

(b)

[Paragraph repealed by section 3 of Act 7 of 2005]

(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;

(d) the promotion of fair labour standards;

(e) the promotion of the participation by employees in decisions affecting their interests in the work place;

(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.”

S 2 A (1) (f) is pertinent. It seeks to secure a just, effective and expeditious resolution of employment disputes and unfair labour practices. In terms of the Nhari judgment, the High Court has no jurisdiction in labour and employment issues. Clearly this is not a matter for an interdict and a *declaratur*. Under the guise of seeking an interdict and a *declaratur*, the applicant is actually challenging the termination of his employment contract and seeking reinstatement as CEO of the sixth respondent through the back door.

In view of the foregoing, I come to the conclusion that I have no jurisdiction to deal with this matter which is an employment matter. In the result, it be and is hereby ordered that:

1. Jurisdiction is declined
2. The applicant shall pay the respondents' costs.