REPORTABLE (36)

(1) TAFADZWA M. SAKAROMBE N.O (2) WONDER SIMUKA
v
MONTANA CARSWELL MEATS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA & BERE JA
HARARE: OCTOBER 3, 2019

K. Gama, for the first and second appellant

I. Chiwara, for the respondent

GOWORA JA:

[1] This is an appeal against a judgment of the Labour Court dismissing the first appellant's, a labour officer, application for confirmation. The ruling was in favour of the second appellant, a former employee of the respondent, who was dismissed from employment sometime in March 2016 on allegations of certain acts of misconduct including theft and or fraud. At the hearing of the appeal, we allowed the appeal and issued an order in the following terms:

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with no order as to costs.

2. The proceedings before the Labour Officer and the Labour Court be and are hereby set aside.

2.1 The matter is remitted to the Labour Court to be heard as an appeal against the decision of the designated appeals officer in terms of s 92 (1) of the Labour Act.

3. The second appellant herein shall file his notice of appeal to the Labour Court within 15 days from the date of this order.

3.1 Thereafter, the matter shall proceed in terms of the Labour Court Rules.

We indicated that reasons for judgment would follow. These are they.

FACTUAL CONSPECTUS

[2] The second appellant was employed by the respondent as an administration clerk in charge of cash sales. He was in the respondent's employ for a period running from May 1998 until March 2016, when he was dismissed from employment following allegations of misconduct.

[3] The background relating to the dismissal is the following. On 29 February 2016 the second appellant was issued with a charge letter detailing the grounds upon which the misconduct charges were premised. He was charged with theft or fraud in breach of s 4 (d) of the Labour (National Employment Code of Conduct) Regulations, 2006 (S.I 15/2006), also commonly known as the Model Code of Conduct.

[4] It was alleged that sometime in October to November 2015, he was assigned by management to backstop one Shayne Mbizi who was going on leave and, that, during the course of that period the appellant failed to account for R 1780 and USD 600 respectively. The respondent alleged that during the period in issue, the second appellant had:

a. On 29 October 2015, been given a cash sales book together with sales for that day. Among those sales was R 1 780 as per receipt number 018461. The said amount was neither posted onto the daily cash book nor was it banked with the cash office as per the company practice.

b. On 2 November 2015, received USD 1200 in cash sales but had only posted USD 1000 onto the cashbook.

c. In terms of receipt number 018529 received a cash sale of USD 286 but only USD 186 was posted onto the cashbook.

d. On 16 November 2015, posted USD 120 from receipt number 018538 valued at USD 220 and as a result USD 100 was not remitted to the cash office.

e. On 18 November 2015, a receipt number in the name of a client one Thomas Knowledge indicated a cash payment of USD 546 but only USD 446 was posted onto the cash sale.

[5] In response to the charge letter, the second appellant accepted indebtedness of the USD 600 and, as far as the issue of the missing R1 780 was concerned, he requested that further investigations be conducted. Pursuant to the charges, disciplinary proceedings were conducted wherein the second appellant was found guilty and dismissed from employment. An internal appeal was lodged to the appeals committee which upheld the decision of the

disciplinary authority. Thereafter, the second appellant approached the Ministry of Public Service, Labour and Social Welfare with a complaint of unfair dismissal. The parties then appeared before the first appellant for conciliation. They reached a stalemate which led to the subsequent issuance of a certificate of no settlement.

[6] The first appellant, the labour officer, then proceeded to deal with the matter in terms of s 93 (5)(c) of the Labour Act [*Chapter 28:01*]. Before the labour officer, the second appellant raised six grounds of appeal in which he contended that he had been wrongly accused of the said charges. He further argued that the acknowledgment of debt which he is said to have purportedly written was fabricated. In his final submissions, the second appellant argued that these charges were a ploy by the respondent to deprive him of his retrenchment package. The respondent opposed the second appellant's case in all material respects. Following the arguments, the labour officer made a ruling in favour of the second appellant. She overturned the decision of the disciplinary committee on the basis that the respondent had failed to prove its case beyond a reasonable doubt. In arriving at this decision, reliance was placed on the case of *Astra Industries Ltd v Chamburuka* SC 27/12. The labour officer consequently ordered the reinstatement of the second appellant without loss of salary and benefits. It is this ruling which was subject of confirmation before the court *a quo* in terms of s 93 (5a) and (5b) of the Labour Act. The application for confirmation was opposed.

[7] The issue for determination before the court *a quo* was whether or not the second appellant was unfairly dismissed. Contrary to the findings of the labour officer the court *a quo* held that the onus of proof in disciplinary proceedings was on a balance of probabilities. The

court *a quo* held that the labour officer had erred in placing reliance on the case of *Astra Industries Ltd v Chamburuka (supra).* In assessing the charge on a balance of probabilities the court *a quo* found that there was no unfair dismissal and proceeded to dismiss the application for confirmation. Aggrieved by the decision of the court *a quo,* the second appellant noted an appeal to this Court on the following grounds:

> "a. The court *a quo* erred on a point of law in finding that the second appellant (the employee) had the onus to prove the admitted fact that in compiling the electronic cash book he had relied only upon the cashier's handwritten notes.
> b. Further, the court *a quo* erred on a point of law in not finding that the respondent had failed to prove the essential elements of theft or fraud.
> c. Further, the court *a quo* misdirected itself in interfering with the labour officer's factual findings which had not been proved to be irrational or grossly unreasonable."

ARGUMENTS ON APPEAL

[8] Although the labour officer was cited as the first appellant she has not participated in this appeal nor has she filed any documents. That is the proper way of dealing with the dispute as she is not a litigant. She would only have filed the application for confirmation in compliance with the law. She would therefore have no interest in the matter and we heard the appeal in her absence.

[9] In his heads of argument, the second appellant argued that the court *a quo* erred in holding that he, the second appellant, had the onus to prove an admitted fact. The appellant argued that the nature of the court *a quo*'s misdirection in that regard was such that the conclusion arrived at by the court *a quo* was *per incuriam.* The appellant further argued that the court

a quo erred when it failed to make a finding that the respondent had failed to prove the essential elements of theft or fraud. It was his argument that the respondent failed to prove its case even on a preponderance of probabilities and as such the court *a quo* ought not to have found in its favour. In his final submissions the appellant averred that the court *a quo* misdirected itself when it interfered with the factual findings of the labour officer without a finding of irrationality on the part of her decision.

[10] *Per contra*, the respondent argued that the key issue for determination was whether or not the court *a quo* had erred in making its decision. The respondent argued that the burden of proof in labour proceedings was proof on a balance of probabilities therefore the appellant had failed to interpret the position in *Astra Indutries v Chamburuka (supra).* It further argued that what determines where the *onus* of proof lies is the person who makes the allegations. In *casu*, the respondent argued that it was the appellant making the allegations and therefore, on principle, he must be able to prove the point. The respondent further argued that the court *a quo* was not in error as such the appeal ought to be dismissed with costs.

[11] Although the parties have made arguments on the merits, it is our view that a more fundamental issue pertaining to the procedure adopted by the parties, including the labour officer, in the resolution of the matter arises in this case.

[12] It is imperative to note that a claim for unfair dismissal was brought by the second appellant in terms of S.I 15/2006 subsequent to the dismissal of an appeal by the appeals authority.

The court notes that the disciplinary authority, when hearing the matter, made factual findings which were confirmed by the designated appeals officer. It is against this background that the court takes the view that a properly considered critical analysis of the proceedings before the labour officer under s 93 be made to establish whether or not those proceedings in question were properly before the labour officer in the first place.

[13] In that regard the issues that arise for determination are the following:- the ambit of the jurisdiction of a labour officer under s 93 of the Act where a matter is referred to him or her in terms of s 8 (6) of the Labour (National Employment Code of Conduct) Regulations S.I. 15 of 2006, otherwise referred to as the Model Code of Conduct, and consequent thereto whether or not the subsection is consistent with ss 101 and 92D of the Labour Act [*Chapter 28:01*] (the Act) as well as s 12B thereof.

[14] We are indebted to counsel for undertaking further research and submitting additional written submissions to the court so that clarity on this issue may be achieved.

[15] Mr *Gama*, on behalf of the appellant, made the following submissions. He submitted that ss (6) of s 8 of the Model Code of Conduct is inconsistent with ss 92D and 101 (5) of the Act. In this regard he sought reliance on the authorities of *Mwenye v Lonrho Zimbabwe Ltd* 1999(2) ZLR 429 (S), and *Watyoka v Zupco (Northern Division)* 2006 (2) ZLR 170(S). In consequence thereto, he has submitted that due to the inconsistency, ss (6) of s 8 of the Model Code of Conduct should be struck down.

[16] On the other hand, Mr *Chiwara*, counsel for the respondent, has argued an alternative position to that presented by Mr *Gama*. He urged the court to find that there is in fact no conflict between the provisions of the Act and the Model Code of Conduct. Further to the above, counsel has urged the court to find that a labour officer has the requisite jurisdiction to deal with a matter referred to him on the basis that a dismissal has been effected in contravention of s 12B(3) of the Act.

THE ISSUES AND DISPUTES FOR DETERMINATION BY A LABOUR OFFICER FOLLOWING A REFERENCE UNDER S 101 OF THE ACT.

[17] Although the issues for determination in this appeal emanate from a reference of an unfair dismissal under s 8 (6) of the Model Code of Conduct, the enabling legislative provision for such reference is s 101, in particular subss (5) and (6) thereof. The law provides:

> (5) Notwithstanding this Part, but subject to subs (6), no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall he intervene in any such proceedings.
>
> (6) If a matter is not determined within thirty days of the date of the notification referred to in paragraph (*e*) of subs (3), the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three.*

[18] The Labour Act has been subjected to numerous amendments ever since it was initially promulgated as the Labour Relations Act [*Chapter 28:01*], ultimately ending as the Labour Act as it is currently known. For some reason, s 101 has remained in the same format as it

was with minor amendments which are not pertinent for the resolution of this dispute. Subsections (5) and (6) have been considered by this Court in order to ascertain what it is that a labour officer is empowered to do or determine upon reference of a matter to such labour officer in terms of s 101(5) or (6). Section 101(5) under the former Labour Relations Act was considered by this Court in *Mwenye v LONRHO Zimbabwe* 1999(2)429 (S). At 433C-434B, GUBBAY CJ remarked as follows:

> "Section 93(1) vests in a labour relations officer a general jurisdiction to deal with any dispute, either on his own initiative or on reference to him by one of the parties. Section 101 of the Act (then as s117A) was introduced on January 1 1993, by the Labour Relations Amendment Act 12 of 1992. It then became possible for an employment code of conduct, binding in respect of a particular industry, undertaking or workplace, to be registered, provided it contained the matters specified in s 101(3) of the Act.
>
> ……
> ……..
>
> Against this background, it does not seem to me that the legislative objective introducing the new procedure was to relieve labour relations officers of the burden of determining disputes. It was rather to return to the employee and employer a greater degree of autonomy with regard to the determination of their disputes than previously enjoyed.
> Section 101 (5) of the Act is, in effect, an exception to s 93. It is a provision designed for the benefit of the parties. As long as the dispute or matter is:
> (a) the subject of proceedings under a code; or
> (b) liable to be the subject of proceedings under a code;
>
> > no labour relations officer may intervene. His power to determine or otherwise dispose of the matter under s 101 (6) is placed in abeyance for a period of thirty days. This is to afford the parties, should one of them so wish, the opportunity to utilize the internal mechanisms specified in the code. Consequently, if either party were to refer the matter to a labour relations officer before the expiry of the third day period, the other could raise s 101 (5) as a defence.
>
> On the other hand, where the parties are ad idem that their dispute is incapable of resolution under the code, or both deem it more advantageous to have it determined by a labour relations officer, then the dispute or matter is no longer "liable" to be

> the subject of proceedings under the code. It may be referred immediately to a labour relations officer."

[19] The import of this authority is to illustrate the ambit of the jurisdiction of the labour officer under s 93. In other words does a labour officer have *carte blanche* to deal with the matter as he sees fit or is his jurisdiction specific? The import of these provisions was considered by this Court in *Watyoka v Zupco (Northern Division)* 2006 (2) ZLR 170. At p 172F-173D, this Court said:

> "There are, therefore, three important conditions under which such matter can be referred to a labour relations officer:
>
> (a) the matter must not be one that is liable to be the subject of proceedings under a code of conduct;
>
> (b) the matter has not been determined within thirty days of the date of notification; and
>
> (c) where the parties to the dispute request and are agreed on the issues in dispute (s 93(1)(ii)).
>
> In this case there were delays in the determination of the matter due to a number of postponements at the request of the appellant. At one meeting the appellant and his legal practitioner attended without submitting the appellant's response to the allegations. At yet another meeting, the appellant and his legal practitioner walked out before the meeting was closed, as the legal practitioner said he wanted to catch his flight and had other business to do in Harare. When the appellant and his legal practitioner raised the issue of delay, the chairperson did point out to them that it was actually their fault, as they were responsible for the delay.
> Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made." (my emphasis.)

[20] And later at p 173H-174A, the court put the issue beyond any doubt and stated:

> "The section cannot be read as providing for a second determination over and above the one already made by a disciplinary committee. Once there was a determination, the correct procedure was to appeal to the company's management as provided in the code of conduct." (My emphasis)

[21] And later still at p 175B-C:

> "In this case, by the time the matter was entertained by the labour relations officer, two separate provisions had ousted his jurisdiction. They were, firstly, the fact that a determination had been made, and secondly, the dispute had prescribed in terms of s 94(1)(b), in that the allegations of unfair labour practice were raised at meetings held with the disciplinary committee in November 1997 but the labour relations officer only entertained the complaint on 6 August 1999, a period of about eighteen months, and well beyond the period of one hundred and eighty days provided in s 94(1)(b)."

[22] Although this Court has clearly set out the procedures applicable when a matter is referred to a labour officer in terms of s 101, it is evident that the process is fraught with confusion. In fairness to the parties involved in this debacle, the incidence of the Model Code of Conduct and the provisions of s 8(6) and (7) might have to a large extent contributed to the confusion.

[23] It is imperative therefore that the role of a labour officer under the enabling sections be examined.

WHAT IS THE JURISDICTION OF A LABOUR OFFICER UNDER S 93 OF THE ACT

[24] The issue before the court is a simple one, what are the powers exercisable by a labour officer in terms of s 93 of the Act. A labour officer is not a stand-alone court or tribunal

and exercises his or her powers upon reference to him of matters or disputes. Viewed in this context one does not envisage any issue over the exercise of those powers under the Act. The labour officer is a creature of the Act. He is imbued with certain and specified duties and obligations under the Act and perforce his powers are only to be exercised as defined in the Act. Therefore, the jurisdiction that he is empowered to exercise and the nature of the relief that he provides after an exercise of such jurisdiction must be found in the Act. It cannot emanate from any other source.

[25] However, a ticklish question on the exercise of this jurisdiction may arise in this regard mainly emanating from the provisions which stipulate the matters in terms of which the labour officer exercises his jurisdiction and make provision for the reference of such matters to the labour officer. Section 93 is not a standalone provision. It must be read with other provisions in the Act or related provisions from codes of conduct.

[26] It is therefore to the Act that one must look, in particular s 93(1), (2) and (3). S 93 as amended by Act 5 of 2015 reads:

93 Powers of labour officers

(1) A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.

(2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing.

(3) If the dispute or unfair labour practice is not settled within thirty days after the labour officer began to attempt to settle it under ss (1), the labour officer shall issue a certificate of no settlement to the parties to the dispute or unfair labour practice.

[27] The question is what dispute is a labour officer empowered to preside over in terms of s 93(1). The clear principle that emerges from the authorities in which s 93 has been considered is that his mandate is to preside over a fresh hearing wherein a complaint has been lodged against an employer or there exists a dispute between the parties. Consequently, his jurisdiction is limited to matters where there are allegations of unfair labour practices or unfair dismissal. Unfair labour practices are defined in s 8 of the Act and include a whole host of wrongs that an employer may be guilty of in the work place. This is not the complaint here.

[28] On 5 May 2016 the designated Appeals Officer advised the second appellant in writing that his appeal had not been successful. The latter acknowledged receipt on 9 May 2016. On 29 April 2016 he filed a complaint with the Ministry of Public Service Labour and Social Welfare, alleging "an unfair dismissal". On 3 May 2016 the labour officer notified the parties to appear before her for a hearing on 7 May 2016. On 17 May 2016, the labour officer issued a certificate of no settlement. On some unnamed date she advised the parties to file submissions for her consideration.

[29] It is common cause that she issued a draft ruling on 5 September 2016, which ruling was the subject of the application for confirmation which was refused by the Labour Court. She stated therein that she had determined the matter in accordance with s 93(5)(c) of the Act.

[30] In his submissions before the labour officer the second appellant made allegations that there had been a delay in the determination of his appeal, even though at the time he lodged

the complaint he had been notified of its dismissal. I note that he did not seek an appeal before the labour officer.

[31] The respondent filed a response in which it responded to the complaints on the merits. It also feebly raised a point *in limine* on the procedure adopted by the second appellant.

[32] The labour officer was of the opinion that the second appellant had lodged an appeal for determination by her. This is confirmed by the labour officer making reference to the following grounds of appeal as being issues for determination before her:

> "1. Wrongly accused of stealing 1730 Rands (one thousand seven hundred and thirty rands)
> 2. Wrongly accused of stealing/misrepresenting US600(six hundred dollars)
> 3. Withdrawal of police report
> 4. Fabricated acknowledgement of debt
> 5. Report to Ministry of Labour and subsequent courtesy call from M C Meats Human Resources
> 6. Prejudiced of retrenchment package."

[33] The labour officer thereafter proceeded to analyze the facts and consider the applicable law. She then addressed the grounds of appeal. After this exercise she went on to quash the conviction of the second appellant on the misconduct charges and ordered that he be reinstated to his original position without loss of salary and benefits.

In making this ruling she said:

> "It is clear from what has been discussed above that, the Respondent failed to prove its case that the appellant contravened Section 4 (d), theft or fraud (sic) of the National Employment Code of Conduct S. I. 15 of 2006.

> In light of the above, the conviction of Appellant be and is hereby quashed. The Respondent be and is hereby ordered to reinstate the appellant to his original position without loss of salary and benefits from the date of dismissal within 30 days of receipt of the ruling."

[34] A perusal of the ruling issued by the labour officer will tend to show that the proceedings conducted by her were in effect an appeal against the decision of the Designated Appeals Officer dismissing the second appellant's appeal against the findings of guilt by the disciplinary authority and the penalty of dismissal meted out as a result. Undoubtedly she was acting as an appeal tribunal.

[35] A simple reading of the subsections of s 93 set out above gives the reader the impression that when a labour officer deals with a matter or a dispute which has come to him in terms of s 93(1) it is a matter where the labour officer must conciliate on the dispute. At this stage, all that a labour officer is obliged to do under the Act is to attempt to bring the parties to a stage where a settlement is achieved. Thus, the proceedings before the labour officer under s 93(1) of the Act constitute the first step towards achieving a resolution of the dispute. His office is the body under the Act that is tasked with the receipt of the initial complaint of an unfair labour practice or disputes for conciliation as provided under the subsection. There is no suggestion therein that he is empowered to sit as an appeal or review tribunal over completed disciplinary proceedings conducted at the workplace.

[36] In *casu,* since the disciplinary proceedings against the appellant were conducted under the aegis of the Model Code of Conduct it stands to reason that the matter was referred to a

labour officer in accordance with the provisions of the same. Section 8 (6) and (7) thereof provide as follows:

> "(6) A person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or an Employment Council Agent, as the case may be, within seven working days or receipt of such decision.
> (7) The Labour Officer or an Employment Council Agent to whom a case has been so referred shall process the case as provided for under s 93 of the Act."

[37] Section 8 of the Model Code of Conduct is concerned with the respective parties' rights in a disciplinary process to appeal against a determination made in terms of the Code. Provision is made in the section for internal processes of appeal against determinations of formal tribunals at the workplace.

[38] To be fair, a simple reading of the above statutory provisions would appear to suggest that a reference to a labour officer or an Employment Council Agent under the same is an appeal. To place the matter in its proper context regard must be had to the provisions in the Act which permit a reference to a labour officer or an Employment Council Agent as the case may be. Therefore, and in addition, regard must be had to s 101(5) and (6) which empower a labour officer to exercise powers inherent in such officer under s 93.

[39] Section 93(1), (2) and (3) make provision for conciliation. To conciliate is to reconcile or make compatible. Thus, the first duty of a labour officer in conciliation proceedings is to attempt to resolve the dispute within thirty days after he or she began to attempt to settle the dispute. Section 93 as a whole does not give a labour officer the power to act as an

appeal tribunal or to review the decisions of the disciplinary authority and the internal processes attendant thereto.

[40] The finding that the labour officer had no jurisdiction to entertain the matter disposes of the issue. In *casu*, it matters not that the labour officer went on to decide the matter under s 93(5) after which she issued what she termed "a draft ruling". That is not an issue for consideration before the court as nothing turns on that ruling. The method by which she arrived at a draft ruling is as a result of no consequence to the determination of this appeal. The reason I say this is that s 93(5) does not empower a labour officer to examine earlier proceedings and make a determination as to their correctness.

[41] That said, it only remains for me to consider the relationship of s 8(6) of the Model Code of Conduct with s 93 and s 101 of the Act. It seems to me that s8 (6) of the Model Code of Conduct appears to be out of sync with the whole section. It seems to suggest that a party aggrieved by a decision or manner in which an appeal has been conducted has a right of appeal to a labour officer in terms of s 93 of the Act. To my mind this is obviously incorrect, if regard is had to the wording of s 93. The powers bestowed upon a labour officer under the section are confined to disputes related to unfair labour practices or unfair dismissals. A reference under s8 (6) cannot be defined as relating to either an unfair labour practice or unfair dismissal.

[42] Given the scenario related above, what is it that the labour officer was presiding over? What then is the import of s 8 (6) and (7) of the Model Code of Conduct in terms of which

this dispute was referred to the labour officer? Is the reference meant to give the parties an opportunity to present their respective positions to the dispute before the labour officer afresh and for him to make a determination? Is the labour officer exercising review or appeal powers and in accordance with which provision of the Act? If regard is had to the nature of the disputes that a labour officer is mandated to deal with it becomes clear that the jurisdiction is limited to a dispute or unfair labour practice or unfair dismissal. When one has regard to s 8 (6) of the Model Code one may be misled into assuming that even completed disciplinary hearing should be referred to a labour officer. It is not suggested in the Act that the labour officer in this context can exercise powers of appeal or review.

[43] In *casu*, a determination on the merits had been made by the disciplinary authority as provided for in the code of conduct. The reference to the labour officer in terms of s 8 (6) of the Model Code of conduct would as a consequence seem to be in direct conflict with the provisions of s 101(5) and (6). And yet, under the various provisions of the Act and the Model Code of Conduct a labour officer has been imbued with the power to entertain parties to a dispute without any apparent restriction. The nature of the disputes he can entertain is not specifically defined. They have to be construed by reference to s 93(1) in order to achieve clarity. An exercise of power under s 93 must be provided for in terms of the Act itself. Reference must therefore be had to s 101 of the Act, which reads in relevant part:

101 Employment codes of conduct

(5) Notwithstanding this Part, but subject to subsection (6), no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall he intervene in any such proceedings.

(6) If a matter is not determined within thirty days of the date of the notification referred to in paragraph (*e*) of subsection (3), the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three.*

[44] A perusal of the Act will show that the only section providing for reference of a matter to a labour officer for intervention under s 93 is to be found in s 101 (6). And yet when read with ss (5) of the same section it becomes evident that the procedure adopted before the labour officer was not permitted by law.

[45] In this context the implications of what the labour officer did are obvious. First she assumed jurisdiction to entertain a matter which the law did not sanction. An appeal against proceedings under the code can only lie to a court or a tribunal which is empowered by law to act as an appeal court or tribunal. In *casu*, the labour officer assumed unto herself the jurisdiction that is imbued by law in an appellate court or tribunal. A labour officer is not an appeal structure for purposes of s 93 of the Act, nor can that power be read into the section no matter where the referral of a dispute or matter emanates from.

[46] The view I take therefore is that a labour officer is empowered to determine complaints of unfair labour practice and unfair dismissal where there has not been any procedural process that has been completed. His jurisdiction is limited to that of a tribunal of first instance. There is a presumption that the Legislature does not intend to alter the law, whether it is statutory or common law, unless it provides so in specific terms. This presumption is fundamental to the interpretation of statutory provisions. As a result, courts are enjoined as

much as possible to construe statutes in a manner that seeks to reconcile seemingly contradictory provisions. The appellant in this dispute was charged with misconduct in terms of the Model Code of Conduct after which he was dismissed from employment. It is therefore clear to the naked eye that he could not lodge a complaint with the labour officer alleging unfair dismissal. The labour officer would not have the jurisdiction to entertain any complaint from the appellant as what the appellant was seeking was the setting aside of the determination of the disciplinary process.

[47] She also, again without being having the jurisdiction to even hear the parties, set aside findings of fact made by a tribunal of first instance without regard to settled principles by which such findings should be set aside. These same findings of fact reached by the disciplinary authority were confirmed by the appeal structures of the respondent. To describe the process by which this decision was reached as being irregular is mild. It is not only irregular, it was unlawful and nothing can stand on that decision.

[48] The provisions of s 8 (6) and (7) of the Model Code of Conduct must be read together with the Act under which the statutory instrument was promulgated. Where the Code conflicts with any provision of the Act, it stands to reason that the provisions of the Act must prevail. Section 2A (3) provides that the Act shall prevail over any enactment which is inconsistent with it.

DISPOSITION

[49] In my view, the principle emerging from all the authorities referred to above can be summarized by the statement to the effect that a labour officer does not have any jurisdiction under s 93 to entertain a matter once a determination on the merits has been made through a disciplinary process under a registered code of conduct. It is clear that the labour officer presided over a matter over which she did not have any jurisdiction. As stated in *Watyoka's* case (*supra*), once there is a determination on the merits of a dispute a labour officer has no jurisdiction under s 93 of the Act.

[50] Accordingly, the subsequent procedures were a nullity as the labour officer could not subsequently purport to make factual findings on the same matter.

[51] I conclude therefore that the labour officer did not have jurisdiction to hear a complaint from the appellant of whatever nature and therefore the proceedings conducted under s 93 (5)(c) by the labour officer were as a result an irregularity. In addition, the proceedings before the Labour Court to confirm the ruling were also a nullity.

[52] This Court is of the view that the matter should have been brought before the Labour Court as an appeal. Both counsel were in agreement with this position. This finding has necessitated the writing of the present judgment so as to give the position that should obtain where a dispute is dealt with in terms of an employment code of conduct. In addition it is necessary, in order that the apparent confusion that exists between the Act and s 8(6) of the

Model Code as highlighted in this judgment be rectified, that the relevant Minister responsible for the administration of the Act be appraised of the need to call upon the Legislature to align S.I 15/2006 to its parent statute, the Labour Act.

[53] It is for the above reasons that this Court issued an order as described above.

PATEL JA I agree

BERE JA I agree

Gama & Partners, second appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners