REPORTABLE (47)

DRUM CITY (PRIVATE) LIMITED
v
BRENDA GARUDZO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & MAKONI JA
HARARE, JUNE 26, 2018 & SEPTEMBER 25, 2018

V. Shamu, for the appellant

No appearance, for respondent

GWAUNZA DCJ

[1] This is an appeal against the decision of the Labour Court confirming the draft ruling of the respondent, a labour officer. The ruling was in favour of the appellant's former employee, Ms Umarah Khan whose contract of employment was summarily terminated as from 15 April 2015 on allegations of certain acts of misconduct, including theft.

FACTUAL CONSPECTUS

[2] The decision to dismiss Ms Khan from employment was reached after it was found that she had two earlier written warnings in relation to similar offences. An amount of US$3 986-61 was paid as terminal benefits through her bank account after Ms Khan refused to sign the letter of termination.

[3] Aggrieved by the decision to terminate her employment, Ms Khan filed a complaint of unfair labour practice against the appellant in terms of s 93 of the Labour Act [*Chapter 28:01*], ("the Act"). The dispute was placed before the respondent for a hearing. It was her case that no proper investigations were conducted into the allegations levelled against her and further, that she was not granted the right to be heard before she was summarily dismissed. She thus claimed damages for unlawful dismissal totalling US$23 253-34.

[4] Before the labour officer, the parties did not agree on Ms Khan's monthly salary, as the appellant alleged that it was US$750-00 while Ms Khan argued that it was US$1500 - 00. The respondent ruled in favour of Ms Khan on this point and, having found that her dismissal from employment was unfair, ordered the appellant to reinstate her without loss of pay and benefits. Alternatively, the appellant was to pay Ms Khan damages *in lieu* of reinstatement amounting to a total of US$9000-00.

[5] Subsequently, the labour officer applied to the Labour Court in terms of s 93 (5a) of the Act for confirmation of her draft ruling. In the application, she cited the appellant only as the respondent while Ms Khan, in whose favour the draft ruling was made, was neither cited, nor joined, as a party to the proceedings. The appellant opposed the application but the court *a quo* after hearing oral argument from the appellant, granted an order confirming the ruling.

PROCEEDINGS BEFORE THIS COURT

[6] The appellant was aggrieved by the decision of the court *a quo* and has appealed against it to this Court. It argues in the main that the court *a quo* erred in simply confirming the respondent's award to Ms Khan of US$9 000-00 as damages without fully addressing the principles of law to be applied thereto. It further argued that the respondent made a ruling in favour of Ms Khan despite the fact that she was charged with disobedience of lawful orders, negligence or misuse of company property and in addition, had failed to avail herself for the hearing which led to her dismissal.

[7] The respondent, that is the labour officer, did not file any heads of argument nor did she appear before this Court on the date of hearing. The court observed that the respondent, who was in effect a nominal respondent, had no personal interest in the dispute nor any outcome thereof. Ms Khan, was not cited in the appeal before this Court. Accordingly, a default judgment in this case, whose effect would be to set aside an award made in her favour would be manifestly unjust, given that she would not have been notified of the hearing, nor accorded the right to be heard before such an adverse order is made against her.

SECTION 93(5a) – NEED FOR EMPLOYEE TO BE JOINED IN CONFIRMATION PROCEEDINGS

[8] Counsel for the appellant rightly conceded that the Labour Court could have properly ordered the joinder of Ms Khan to the confirmation proceedings before it. This would have given her the right to defend the application for confirmation of the award made in her favour, both in the court *a quo* and in this Court. Accordingly, he further conceded that the matter be remitted to the Labour Court for Ms Khan to be joined as

a party. The court saw merit in his request for written reasons for the judgment, in order to clarify both the procedure and the law to be applied, in the face of confusion as to the handling of this and other cases brought to the Labour Court in terms of s 93 (5a) of the Act. The need was recognized for that court to follow a procedure that would ensure that all parties who have a substantial interest in the dispute at hand are accorded the right to argue their respective cases before the determination is made as to whether to confirm or not, a labour officer's draft ruling in terms of s 93(5b) of the Act.

[9] It is noted that prior to the Labour Amendment Act No. 5 of 2015, labour disputes of right would go before a labour officer for conciliation, and if conciliation failed and the parties did not reach a settlement, the labour officer would refer the dispute to compulsory arbitration, and both parties would be heard. Where an arbitral award was made, the successful party would then file the award for registration with a relevant court for purposes of enforcement. The losing party on the other hand, had the right to appeal against the award to the Labour Court.

The legislature took the view that this procedure resulted in long delays in the determination of the disputes in question, thus depriving litigants of speedy justice. The enactment of s 93 (5a) and (5b) of the Labour Act was meant to address this mischief.

[10] Subsections 93(5a) and (5b) provide as follows:

(5a) A labour officer who makes a ruling and order in terms of ss (5)(c)[1] shall as soon as practicable-

(a) **make an affidavit to that effect incorporating**, referring to or annexing thereto any evidence upon which he or she makes the draft ruling and order; and

(b) **lodge, on due notice to the employer or other person against whom** the ruling and order is made ("the respondent"), an application to the Labour Court, together with the affidavit and a claim for the costs of the application (which shall not exceed such amount as may be prescribed), **for an order directing the respondent** by a certain day (the "restitution day") not being earlier than thirty days from the date that the application is set down for hearing (the "return day" of the application) **to do or pay what the labour officer ordered** under ss (5)(c)(ii) and to pay the costs of the application.

(5b) **If, on the return day of the application, the respondent makes no appearance** or, after a hearing, the Labour Court **grants the application for the order with or without amendment**, the labour officer concerned shall, if the **respondent does not comply fully or at all with the order by the restitution day, submit the order for registration** to whichever court would have had jurisdiction to make such an order had the matter been determined by it, and thereupon the order shall have effect, for purposes of enforcement, of a civil judgment of the appropriate Court. (*My emphasis*)

[11] My interpretation of the two provisions cited suggests the following procedural steps;

a) the labour officer, after making a ruling in terms s 93(5)(c)(ii) of the Act, makes an affidavit to that effect and attaches to it any evidence on which such ruling is based,

b) the labour officer then gives notice to the employer or any person against whom such ruling and order is made (respondent), of the lodging by him, of an application with the Labour Court for an order directing the respondent to comply with the ruling within a period not less than 30 days from the date the matter is set down for hearing (restitution day).

c) the labour officer then appears before the Labour Court on the date of hearing, as the applicant, seeking an order confirming his or her draft ruling.

d) should the respondent fail to make an appearance, the Labour Court will nevertheless make a ruling confirming the order with or without an amendment.

[1] This paragraph provides in the relevant part that a labour officer, after issuing a certificate of no settlement, may order that the employer pays damages to the employee or that he ceases or rectifies any alleged unfair labour practice that is a dispute of rights

e) on the date of hearing, (and presumably with the respondent in attendance) the Labour Court may also conduct a hearing and grant (confirm) the order sought with or without amendment,

f) thereafter, should the respondent fail to comply with the order of the Labour Court within 30 days of the hearing date, the labour officer will submit to the relevant court, such order, (obtained in default of appearance by the respondent, or after a hearing by the Labour Court), for registration;

g) upon submission of the order to the relevant court for registration, it shall have the same effect for purposes of enforcement, as any civil judgment of that court.

[12] It is to be noted from the above, that only if the labour officer rules against the employer or any person will he or she be required to take the steps outlined in ss (5a) and (5b). In other words, the provisions do not confer on the Labour Court the jurisdiction to confirm a draft ruling made against an employee[2]. That this is the case is left in no doubt by the wording of s 93(5)(c)(ii) which specifically provides for a ruling like the one *in casu* in circumstances where the labour officer finds that the dispute of right in question **'must be resolved against any employer or other person in a specific manner …'**

[13] Without a clear pronouncement to that effect, there can in my view be no doubt that reference to 'any person' in this provision, is not to be read as including the employee in the same dispute. I am satisfied that the import of the provision is to exclude the confirmation and registration of a draft ruling by the labour officer, which is made in favour of an employer and against an aggrieved employee. It follows that the Labour Court has no jurisdiction to entertain such a matter and should on that basis properly decline to hear it.

[2] Such employee would, it seems, have to pursue other avenues to appeal against the draft ruling.

[14] It is noted further that the wording of ss (5b), *albeit* not specifically stating so, excludes the employee concerned from the confirmation proceedings. This is an employee who would have been an active party in, as well as the instigator of, the proceedings that resulted in the draft ruling of the labour officer. This is also the same employee who, having won a draft award, may quite possibly have it set aside by the Labour Court without reference to him or her. In other words, this would happen without the employee being afforded an opportunity to be heard or adduce evidence in defence of the award in question.

[15] It is beyond dispute that such an employee has a direct and substantial interest in the confirmation proceedings before the Labour Court. He or she has the right to be heard in proceedings that may fundamentally affect their interests. Even if the nature of the hearing mentioned in ss (5b) is not clear[3], one may safely assume that in any hearing, all interested parties must be afforded the opportunity to be heard, unless they choose not to be heard. Only then would the Labour Court be in a position to fully determine the matter and render a judgment that meets the justice of the case.

[16] The employee on these grounds can in my view properly apply to be joined to the confirmation proceedings in terms of r 33(2) of the Labour Court Rules, SI 150/17. The joinder of a party *mero motu* by the court is not expressly provided for in r 33, however. I am nevertheless satisfied that this shortcoming is not to be interpreted as ousting the jurisdiction of the Labour Court in a deserving case, to order *mero motu* the joinder of an employee who stands to be affected one way or the other, by the

[3] The hearing is certainly not an appeal against nor a review of, the Labour Officer's ruling. This is because the procedure that is set out in sub-sections (5a) and (5b) is not capable of accommodating an appeal or review process in relation to the labour officer's ruling.

outcome of the confirmation proceedings. Such an order would ensure full compliance with the common law rule, *audi alteren partem.*

[17] The importance of joining an interested party to the proceedings in a court is authoritatively articulated in a number of authorities.

Cilliers AC, Loots C and Nel HC Herbstein and van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Juta &Co Ltd, Cape Town, 2009) vol. 1 at page 215 explain non-joinder by stating as follows:

> "A third party who has, or may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such a person has waived the right to be joined. … in fact, when such person is a necessary party in the sense that the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises." (*my emphasis)*

The meaning of direct and substantial interest is explained at page 217 to 218 as follows:

> "A 'direct and substantial interest' has been held to be 'an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists. For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation but <u>also in the outcome of it.</u>" (*my emphasis*)

[18] It hardly needs emphasis that, *albeit* not applicable *in casu*, an outcome in the confirmation proceedings that has the effect of reversing an award made by a labour officer in favour of an employee would clearly prejudice him or her. The potential of a prejudicial outcome therefore in my view, confers requisite interest upon the

employee, to merit his or her joinder to the proceedings. The employee in any case would still have a legal interest in the outcome even where the ruling of the labour officer is confirmed, with or without amendment. The employee would therefore be perfectly within his or her rights to seek a joinder to the confirmation proceedings. The Labour Court can and should properly grant such an application, or where it is not made, order *mero motu* that the employee be joined to the proceedings, so as to be afforded an opportunity to make submissions in response to those of the respondent.

[19] That the court has the authority to proceed thus is justified on the need to safeguard the interest of third parties in any matter before it as the passage below illustrates;[4]

> "In cases of joinder of necessity, if the parties do not raise the issue of non-joinder, the court should raise it *mero motu* to safeguard the interest of third parties and it should decline to hear the matter until such joinder has been effected, or until the court is satisfied that the third parties have consented to be bound by the judgment or have waived their right to be joined."

When this is related to the circumstances of this case, it cannot in my view be contested that the joinder of the employee, Ms Khan, was necessary.

[20] While it is noted *in casu* that the Labour Court found in favour of the employee and therefore confirmed the draft ruling, the fact cannot be ignored that the court effectively heard evidence from one side of the dispute and not the other, before making its determination. As the judgment indicates, the court heard oral submissions from the respondent in its opposition to the confirmation of the draft ruling. It then essentially weighed the respondent's submissions against what was contained in the affidavit of the labour officer[5], and made its determination. The procedure would have

[4] See Herbstein and van Winsen's 'The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa' (*supra*) at pages 208 to 209.

[5] Before the court *a quo* the labour officer briefly repeated the facts of the dispute and the details of the award she had made.

worked substantial injustice upon the employee if the Labour Court had declined to confirm the draft order, or confirmed it with an amendment, for instance, reducing the *quantum* of the award. Nor, however could the same procedure be said to have been fair on the respondent, who could be forgiven for thinking that the employee had been accorded the unfair advantage of having her case 'argued' for her by the labour officer.

[21] There are further compelling grounds justifying the joinder of the employee to the confirmation proceedings. Firstly, by allowing the respondent to be served with the notice of hearing of the confirmation proceedings, ss (5b) affords the employer an opportunity to oppose the confirmation of the ruling in question. Such opposition may logically be supported by some evidence or arguments that the employee concerned would not be present to counter. It is evident from ss (5b) that before the Labour Court, all that the labour officer is required to do is confirm that the application before the court was submitted by him in his role as, effectively, a nominal applicant. He is in reality not a party to the proceedings since he would have no personal interest in the outcome, whatever its effect. He cannot therefore be expected to defend his ruling in the face of any submissions made by the respondent in opposing its confirmation. Defending the labour officer's ruling should properly be the province of the person directly affected by it, that is, the employee concerned. In my view, the Labour Court's confirmation or non-confirmation of the ruling after effectively hearing one side of the dispute is at best an irregularity and at worst a travesty of justice.

[22] Secondly, the procedure presupposes that a ruling made by the labour officer in favour of an employee will meet that employee's satisfaction. It shuts the door for

instance on an employee who is awarded damages that fall substantially short of what he or she had claimed, who might wish to seek an upward variation of that *quantum*, in confirmation proceedings before the Labour Court. A joinder to the proceedings would accord the employee the opportunity to, as it were 'cross oppose' the confirmation proceedings in the desired respect.

[23] Thirdly, in the case where the draft ruling of the labour officer is not confirmed by the Labour Court for one reason or the other, the employee might wish to take up the matter on appeal. He would however, be hamstrung by the fact that he was not a party to the confirmation proceedings. Further, the employee cannot expect the labour officer to appeal against the non-confirmation of the order, on his or her behalf.

[24] Fourthly, the confirmation proceedings trigger or may trigger various procedural consequences. One such consequence is brought into sharp focus where the employer, being disgruntled at the confirmation of the draft ruling, takes that decision on appeal to this Court, citing only the Labour Officer as the respondent. This is what happened *in casu*. All too often this type of appeal has been set down without any input from the employee or employees concerned, since they were not cited in the confirmation proceedings. They may therefore not even be aware that the matter proceeded to the Supreme Court on appeal. Equally often, the respondent cited in the appeal, that is the labour officer, makes no appearance on the date of hearing, nor does he file any heads of argument. Although vexing, this situation does not come as a surprise to the court, since there is no legal basis set for the labour officer's appearance.

[25] Ordinarily where a party who was properly served fails to appear on the date of hearing, the party present may move for a default judgment against the defaulting party. The point has already been made that the entering of a default judgment where a labour officer fails to attend court would result in one setting aside of the award made in favour of an employee without such employee's knowledge. The injustice of such an outcome needs no emphasis.

[26] Finally, the appearance of the labour officer as the respondent in a few appeals in this Court, and in the absence of the employee concerned, has also presented procedural problems. In such cases the question of the labour officer's competence to so appear has arisen. In particular, the question is asked as to whose interests he would be representing in the appeal, and on what legal basis? It hardly needs mentioning that these questions would not arise if the employee concerned is joined in the confirmation proceedings before the Labour Court. He or she would then be in a position to file papers and attend court on the date the appeal is heard.

[27] Other aspects of the procedure suggested by ss (5a) and (5b) of s 93 of the Act merit some comment. Subsection (5b) makes it clear that the role of the labour officer ends with the submission, by him, of the confirmation order of the Labour Court to a relevant court for registration. The provision is premised on another assumption, which is that the employer will accept as final, the order of the Labour Court pursuant to the confirmation proceedings. That this assumption is misplaced is borne out by the frequent appeals brought to this Court by employers disgruntled at the Labour Court's confirmation of the labour officer's ruling.

[28] Further, while ss (5b) clarifies that registration of the confirmation order with a relevant court is meant to facilitate its enforcement, it is silent as to who would drive the process, in particular, who would take out the requisite warrant of execution. Without being cited as a party, there would be confusion as to whether the 'claimant', that is the employee would have the authority to do it. On the other hand, the labour officer, not being a substantive party to the confirmation proceedings, would lack the requisite *locus standi*, and more so because ss (5b) does not mandate him to do so. The danger of the Labour Court's order being rendered a *brutum fulmen* becomes real.

[29] In conclusion, while one might argue in view of the absurdities chronicled above, that not enough thought was put into the formulation and practical import of these two provisions, I take the view that the absurdities could not have been consciously intended by the legislature. The simple cure for such absurdity, as has already been stressed, is to join the employee concerned to the proceedings before the Labour Court. The legislature might well wish to consider addressing this and the other concerns set out in this judgment.

DISPOSITION

[30] When all is said and done and in view of the foregoing, it is my finding that there was a fatal non-joinder of the employee, Ms Khan, to the proceedings *a quo*. Such proceedings can therefore not be allowed to stand.

In the result, the following order is made:

1. The appeal be and is hereby allowed.
2. The proceedings and judgment of the court *a quo* be and are hereby quashed.

3. The matter is remitted to the Labour Court for a rehearing after the employee, Ms Khan, has been joined to the proceedings.
4. Each party shall bear its own costs.

MAKARAU JA: I agree

MAKONI JA: I agree

Vasco Shamu and Associates, appellant's legal practitioners