CAINOS CHINGOMBE
and
TENDAI KWENDA
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
HOSEA CHISANGO N.O.
and
GEORGE MAKINGS N.O.
and
CHENAI GUMIRO N.O.

HIGH COURT ZIMBABWE
MATHONSI J
HARARE, 25 September 2018 and 3 October 2018

Opposed application

L Madhuku, for the applicants
C Kwaramba, for the 3rd respondent

MATHONSI J: Of course the first and third respondents took a point *in limine* challenging the jurisdiction of this court to determine this matter on the ground that it is purely a labour dispute to which the Labour Court enjoys exclusive jurisdiction by virtue of the ouster provision contained in s 89 (6) of the Labour Act[*Chapter 28:01*], but this application centres around the validity of the suspension of the 2 applicants, who are senior officials of the first respondent having been employed as Human Capital Director and Finance Director respectively. It evolves around the determination of which employment law is applicable to the disciplinary action taken against the applicants, between the relevant provisions of the Urban Councils Act [*Chapter 29:15*] and the Labour Act [*Chapter 28:01*] with its attendant Labour (National Employment Code of Conduct) Regulations, S.I. 15 of 2006.

The first respondent is a municipal authority constituted interms of the Urban Council Act and charged with the responsibility of running the affairs of the capital city, Harare. It has been cited herein along with the second respondent, the Minister under whose portfolio the

municipality falls as well as the current Town Clerk, the third respondent, and 2 gentlemen who were put together to constitute a disciplinary committee to preside over the proceedings wherein the applicants are facing charges of misconduct. They complete the cast as fourth and fifth respondents but saw no reason to oppose the application. The second respondent, in typical Pilate style, submitted a letter through the Civil Division of the Attorney General's Office stating that he is not opposed to the order sought and will abide the decision of this court. This left the first and third respondents to their devices as the only contestants.

The facts are generally common cause. They are that sometime in 2016 the then Minister of Local Government, Public Works and National Housing commissioned an audit conducted by the Ministry's Internal Auditors whose brief was, among other things, to ascertain the level of compliance by Harare City Council with a directive the Minister had issued directing Local Authorities to rationalise salaries and allowances of their employees. Following the special audit conducted from 14 April 2016 to 21 June 2016 the auditors submitted a report dated 30 June 2016 which made certain findings including that the 2 applicants as well as the Chamber Secretary had negative audit observations:

> "Where the Minister should, through the council, cause them to show reason why the three should not be charged with misconduct, suspended from duty and further investigations to be carried out."

Following that damning Ministerial audit, the first respondent was jolted into action constituting its own special tribunal led by Justice Leslie George Smith (Retired) whose very wide terms of reference included the establishment of whether there was any abuse, embezzlement or other irregularities with the disbursement of Council funds from August 2015, assessment of the quantum of financial and other prejudice to council and the amount attributed to each senior executive, establishment of the nature of the offence committed by each senior executive and whether in the interests of residents and the public, they are still fit and proper to hold office. As an indictment against the 2 applicants the special tribunal made several findings of impropriety drawing the drawing conclusion;

> "The Tribunal found that, almost invariably, the activities falling within the subject areas of its Terms of Reference were conducted contrary to relevant statutes or in the absence of sanctioning council resolutions or in direct violation of extant council resolutions or in direct violation of extant council resolutions or contrary to written contracts of employment or in direct violation of Council policies. Much of the activities bear demonstrable traits of fraud, corruption, criminal abuse of office and even forgery….. Almost all the senior executives under review acquiesced, or were complicit, in these activities. This would obviously be because they were all beneficiaries of the patent departures. The City continued to suffer prejudice and will possibly continue to do so."

At a Special Council Meeting held on 20 December 2017 which received the report of the Special Tribunal, it was resolved that the report be accepted and adopted and that 4 senior executives including the 2 applicants be suspended and that an Acting Town Clerk be appointed given that one of those to be suspended was the then Acting Town Clerk. The new Acting Town Clerk was to then suspend the applicants and cause them to appear before a disciplinary committee appointed by the Mayor. The third, fourth and fifth respondents were subsequently appointed in pursuance of that Council resolution. The third respondent immediately swung into action dishing letters of suspension dated 31 December 2017 to the applicants in terms of which they were advised that their suspensions were in terms of s 6 (1) of the Labour (National Employment Code of Conduct) Regulations, S.I 15 of 2006. By similar letters dated 5 January 2018 the 2 were required to appear before a disciplinary committee comprising of the fourth and fifth respondents on 11 and 15 January 2018.

The applicants would have none of it. Acting in league they brought this application before this court seeking a declaratur and consequential relief. The draft order containing that relief reads:

"IT IS ORDERED:

1. That it be and is hereby declared that the suspension of the applicants pursuant to resolutions by a special council meeting of the 1st respondent held on 20th December 2017 and communicated to the applicants by letters of the 3rd respondent dated 31 December 2017 is in contravention of section 140 of the Urban Councils Act [*Chapter 29:15*] and is null and void and of no force or effect.

2. That it be and is hereby declared that the disciplinary proceedings against the applicants flowing from the aforesaid resolution by a special council meeting of the 1st respondent held on 20th December 2017 and implemented by letters of the 3rd respondent dated 5th January 2018 are in contravention of section 140 of the Urban Council Act [*Chapter 29:15*] and are null and void and of no force or effect.

3. That, as a consequence of 2 above, it be and is hereby declared that the disciplinary proceedings presided over by the 4th and 5th respondents are in contravention of section 140 of the Urban Councils Act [*Chapter 29:15*] and are null and void and of no force or effect.

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

5. That, for the avoidance of doubt, it be and is hereby declared that the 1st and 2nd applicants are still the Human Capital Director and Finance Director respectively of the first respondent.

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

The gravamen of the applicants' case is that in their capacities as Human Capital Director and Finance Director respectively they are each classified as senior officials of the first respondent as defined in s 131 of the Urban Council Act. As such their conditions of service including discipline and dismissal are regulated by ss 139 and 140 of that Act and not by the Labour Act [*Chapter 28:01*] in terms of which the National Employment Code, 2006 under which they are being disciplined was promulgated. As their suspensions were instigated by councillors at a Special Meeting of 20 December 2017 and implemented by the third respondent in terms of the Labour Act, the entire process is contrary to the Urban Councils Act and therefore null and void. They are therefore entitled to reinstatement.

The application, as I have said, is opposed by the first and third respondents, the Minister who received the initial recommendation from auditors for the suspension of the applicants' having departed, the current Minister says he is not opposed to the application. The respondents' case is that the application is essentially for a review of the first respondent's decision to suspend the applicants and is disguised as one for a declaratur. For that reason it is a labour dispute to which the Labour Court enjoys exclusive jurisdiction to the exclusion of this court. I must say that the respondents had taken another point *in limine* on the ground of *lis pendens* after the applicants had earlier made another application in HC 210/18. Mr *Kwaramba* who appeared for the respondents promptly withdrew that point *in limine* at the commencement of the hearing. He was satisfied that the application had been withdrawn.

On the merits the respondents assert that it is council which is the employer and not individual employees of it. Therefore Council was at liberty to instigate the suspension of its employees on suspicion of misconduct. In that regard, the first respondent acted within the confines of the law when it suspended the applicants in terms of the Labour Act as read with the National Employment Code. That legislation, which exists parallel to the Urban Councils Act, applies to every employer and employee of this country not specifically excluded thereby entitling the first respondent, as such employer, to utilise its provisions and not the Urban Councils Act, s 140 (3) of which does not override the Labour Act. To the extent that the disciplinary proceedings are being conducted in terms of the applicable law they cannot possibly be unlawful.

The respondents further argue that if the applicants contend that senior council officials can only be disciplined in terms of s 140 of the Urban Councils Act, that means there are inconsistencies between the 2 Acts given that the Labour Act also applies. In that event the Labour Act prevails by virtue of its s 2A. Apart from that, the Labour Act should be the preferred choice given its progressive provisions which not only advance social justice but also guarantee better protection to the rights of employees. Indeed the applicants have not suggested that resort to the National Employment Code is prejudicial to them.

I have made reference to the point *in limine* taken by Mr *Kwaramba* on perceived lack of jurisdiction. It is a point now routinely seized by legal practitioners each time anything resembling a labour dispute rears its head.

This may well arise out of the fact that the High Court itself has, for quite sometime dating back to 2004 when BHUNU J (as he was then) declined jurisdiction in *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H), given conflicting signals in a number of cases Other judges have declined jurisdiction in certain cases (*ZBC Retrenches* v *Zimbabwe Broadcasting Holdings* HH183-17) while others have exercised jurisdiction creating fertile ground for legal practitioners to continue raising the issue. In this matter the parties agreed that the court should determine the issue together with other issues.

I however do not intend to be detained by the issue of jurisdiction in this matter which is clearly an application for a declaratory order. It says so and the relief that is sought which I have reproduced earlier in this judgment says so and I do not agree with Mr *Kwaramba* that it is an application for reinstatement disguised as a declaratur. To that extent, the Labour Court has no jurisdiction to grant declaratory orders which have been held not to be "in terms of this Act or any other enactment" providing the Labour Court with exclusive jurisdiction. See *UCSF Collaborative Research Programme in Women Health* v *Shamuyarira* 2010 (1) ZLR 127 (S) at 130 D. I will therefore exercise jurisdiction without further ado.

On the merits I am required to decide the question I have already related to at the commencement of this judgment, namely the validity of the suspension of the applicants in terms of s 6 (1) of the National Employment Code in light of them being senior officials of the municipality as defined in s 131 of the Urban Councils Act. This is because as senior officials, s 140 of that Act regulates the disciplinary proceedings against them. At the same time the Labour Act also applies to them as employees. Mr *Madhuku* for the applicants submitted that s 140 of the Urban Councils Act is still part of our law and has not been repealed . To that extent the applicants should have been dealt with in terms of its provisions. He submitted

further that s 2A of the Labour Act has no application given that there is no inconsistency between the 2 statutes.

In fact the 2 statutes are reconcilable by following the procedure set out in s 140 (3) all the way up to s 140 (5) of the Urban Councils Act. If following an inquiry provided for therein, one decides to discharge a senior official that is still possible without resort to the Labour Act as provided for in s 140.

Mr *Madhuku* conceded that s 140 contains repugnant provisions authorizing Council to summarily dismiss an employee which would inevitably be inconsistent with the Labour Act protecting as it does, social justice and safeguarding the rights of employees against unfair dismissal. To that effect he conceded that the provisions relating to summary dismissal must be taken to have been impliedly repealed by the Labour Act. The rest of the provisions are still part of our law and must be complied with. Therefore the first respondent should proceed in terms of s 140 of the Urban Councils Act.

Those submissions were strongly contested by Mr *Kwaramba* who took the view that the matter turns on whether the applicants were suspended in terms of a law that is applicable to them or not. Section 140 is inconsistent with the Labour Act and has therefore been impliedly repealed by it. He relied on the authority of *Tamanikwa & Ors* v *Zimbabwe Manpower Development Fund* 2013 (2) ZLR 48 (S) in advancing the argument that the Labour Act applies to this matter and has therefore done away with any requirement to discipline senior officials in terms of s 140 of the Urban Councils Act. The question therefore is which statute takes precedence over the other?

Section 140 provides:

> "<u>140 Conditions of service of other senior officials</u>
> (1) Subject to subsection (2) and to the conditions of service of the senior officials concerned, a council may at any time discharge a senior official-
> (a) upon notice of not less than three months; or
> (b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice
> (2) A council shall not discharge a senior official unless the discharge has been approved by the Local Government Board;
>
> Provided that the discharge of a medical officer of health shall, in addition, be subject to the approval of the Minister responsible for health in terms of section 11 of the Public Health Act [*Chapter 15:09*].
>
> (3) If it appears to a town clerk that any other senior official of the council has been guilty of such conduct that it is desirable that that official should not be permitted to carry on his work, he -

a. may suspend the official from office and require him to leave his place of work; and
b. shall forthwith notify the mayor or chairman of the council, as the case maybe in writing, of such suspension.

(4) Upon receipt of a notification of suspension in terms of subsection (3) the mayor or chairperson shall cause the suspension to be reported at the first opportunity to the council.

(5) Where a council has received a report of a suspension in terms of subsection (4), the council shall without delay –

a) conduct an inquiry or cause (an) inquiry to be conducted into the circumstances of t he suspension; and

b) after considering the results of the inquiry, decide whether or not –

i. to lift the suspension; or

ii. to do any one or more of the following –

A. reprimand the senior official concerned;
B. reduce the salary, any allowance payable to the senior official;
C. transfer the senior official to another post or grade, the salary of which is less than that received by him or her at the date of the imposition of the penalty.
D. impose a fine not exceeding level five or three month's salary, which fine may be recovered by deductions from the salary of the senior official;
E. subject to subsection (2) discharge the senior official."

It is significant that Mr *Madhuku* for the applicants was careful not to advance the enforcement of subsections (1) and (2) of s 140 which contain the power to summarily dismiss a senior official. He readily conceded that subsection (1) has been repealed by implication by the Labour Act. It has not escaped my observation that even the elaborate procedure in subsections (3), (4) and (5) advocated for by the applicants only adverts to an inquiry which is undefined. That procedure does not provide for a disciplinary hearing which recognizes the rules of natural justice, in particular the *audi alteram partem* rule.

Against these provisions should be juxta-posed what is contained in the Labour Act [*Chapter 28:01*]. Certain telling amendments to that Act were introduced by Act No. 7 of 2005 which also inserted s 2A. It provides in relevant part;

"2A Purpose of Act

1) The purpose of this Act is to advance social justice and democracy in the work place by –
   a) giving effect to the fundamental rights of employees provided for in Part II;
   b) ……
   c) …….
   d) the promotion of fair labour standards;
   e) ……
   f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.
2) …….
3) This Act shall prevail over any other enactment inconsistent with it." (The underlining is mine).

In a carefully written and comprehensive judgment written for it by GOWORA JA in *Tamanikwa & Ors* v *Zimbabwe Manpower Development Fund*, *supra*, the Supreme Court interpreted most of the relevant provisions of the Labour Act having a bearing on the present matter. In fact it would be fair to say that almost every pronouncement in that judgment touches on the issues for determination in this matter. By virtue of the doctrine of *stare decisis* this court is bound by the decisions of the Supreme Court and has to apply them as a matter of course. Dealing with s 2 A (3) that the Labour Act prevails over any other enactment whose provisions are inconsistent with its own, the court remarked at 54F;

> "There is a general rule of statutory interpretation that where two statutes are in conflict with each other, the latter statute, by virtue of the principle of *lex posterior derogate e priore*, is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the legislature passes the latter Act it is presumed to have knowledge of the earlier Act."

Another amendment introduced by Act 7 of 2006 is s 3 of the Labour Act which has also been soundly dealt with by the Supreme Court in the *Tamanikwa* case, *supra*. It reads:

> "3. Application of Act
>
> 1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the constitution.
> 2) For the avoidance of doubt, the conditions of employments 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."

This provision is very clear and admits of no other interpretation than that the Labour Act now applies to all employers and employees in this jurisdiction except those that it specifically excludes and for the avoidance of doubt, sets out therein. So, by clear and quite unambiguous language the lawgiver made the Labour Act applicable to all employers and employees except civil servants and indeed members of the uniformed forces. In interpreting that all embracing provision the Supreme Court was emphatic in the *Tamanikwa* case, *supra* at 52F-G, 53A – B;

> "As is evident from the provisions of s 3, the Act applies to all employers and employees except for those whose conditions of employment are governed by the constitution or the

Public Service Act [*Chapter 16:04*]. The precursor to the Labour Act, the Labour Relations Act 16 of 1985, provided in s 3 thereof:

> '3. Application of Act
> This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for by or under the constitution.'

As a consequent of the above provision, prior to its amendment, in construing the section, courts within this jurisdiction concluded that the Act was not of universal (application) to all employees in Zimbabwe. See *City of Mutare* v *Matamisa*1998 (1) ZLR 512 (S), wherein despite the wording of the section providing that the Act applied to all employees, this court held that it was not obligatory for the City of Mutare to obtain the approval of the Minister as provided for in s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations S.I. 371 of 1985. Effectively, therefore the court found that employees of urban councils were not covered by the Act. Subsections 2 and 3 of the current Act were promulgated by Act 7 of 2005 and as a consequence, with the exception of those specifically excluded by the section, all employees were brought under the umbrella of the Act."(The underlining is mine)

The Supreme Court having pronounced that the Labour Act applies to all employees except those specifically excluded, there is really nothing for this court to do anymore in that regard. This court is bound by that pronouncement. It was not suggested that the applicants fall within the category or a group of employees that are specifically excluded by s 3. They are mere council employees and therefore fall within the umbrella expression "all employers and employees" used in s 3 (1) of the Act. I therefore agree with Mr *Kwaramba* that the applicants were indeed suspended in terms of a law that is applicable to them. As such the suspensions cannot be said to be unlawful.

I am aware that Mr *Madhuku's* approach has been that the 2 statutes must be interpreted in order to give effect to both of them unless one has been repealed in specific terms or impliedly and that this court must construe s 140 in such a way as to exclude only the provisions in subsection (1) allowing for summary dismissal and save the other provisions setting out the procedure for suspension and the conduct of an inquiry. Indeed it is a principle of our rules of statutory interpretation that statutes must be read together and the language of both construed as far as possible to be consistent with the other as long that other does not, in express terms, modify or repeal the other. However, there is certainly no way the 2 statutes forming the basis of the present litigation can be reconciled. This is because s 3 of the Labour Act is worded in such clear language which cannot be construed in any other way than that it applies to the applicants and the first respondent. It is a provision which is so inconsistent with or repugnant to s 140 of the Urban Councils Act that the two cannot stand together. See *Kent N.O* v *South African Railways and Anor* 1946 AD 398 at 405; *Wendywood Development (Pty) Ltd* v *Rieger*

& Anor 1971 (3) SA 29 (A) at 38 A-C (both quoted with approved in *Tamanikwa & Ors, supra).*

As if that was not enough, there is another sweeping provision which militates against any attempt to enforce s 140. It is s 12 B which says:

> "(1) Every employee has the right not to be unfairly dismissed.
> (2) An employee is unfairly dismissed—
> (a) if subject to subs (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
> (b) in the absence of an employment code, the employer shall comply with the model code made in terms of s 101 (9)"

It is common cause that the model code referred to therein is the Labour (National Employment Code) Regulations, 2006 S.I 15/06. It is the very code under which the applicants have been suspended, the one which the applicants have urged of me the finding that a suspension under it is null and void. The Labour Act which I have found to apply to the parties herein requires, in very emphatic language that an employer to which it applies, should only dismiss an employee either in terms of an employment code or in terms of S.I. 15/06. The present employer has not yet dismissed the employees but has shown that it has suspended them in terms of the latter code. That is lawful.

The respondents have urged of me the dismissal of the application on the superior scale. In my view there is no basis for such an award. In fact the application raises quite important legal issues which needed to be settled. We have 2 pieces of legislation emanating from the same law maker which set out procedures for disciplinary employees. The applicants were therefore more than entitled to bring the application for a pronouncement on their rights. This is a case where each party should bear its own costs.

In the result it is ordered that;

1. The application is hereby dismissed.
2. Each party shall bear its own costs.

Lovemore Madhuku Lawyers, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners