

RAMIOUS CHAGONDA
versus
CIVIL SERVICE COMMISSION & 2 OTHERS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 4 December 2015 & 2 August 2017

Opposed Application

D Muzavazi, for the applicant
H Magadure, for the respondent

CHITAPI J: Judgment in this matter has delayed because of my reassignment to the criminal division soon after I had heard and reserved judgment in this and several other opposed applications. It has been a challenge to get time to devote to writing the reserved judgments as the criminal court has been busy and kept me on my toes. The delay is however regretted and was not intended.

In this application the applicant seeks the following relief as set out in his draft order:

IT IS ORDERED THAT:

1. The respondents be and are hereby interdicted from interviewing and or appointing any person to the post of Secretary to Liquor Licensing Board as the applicant is holding the post.
2. Costs of suit be borne by the first respondent.

The applicant obtained judgment in his favour in the Labour Court under Case No

LC/H/39/12. A full text of the judgment is annexed to the applicant's founding affidavit marked annexure A. The parties to the Labour Court judgment aforesaid were the applicant herein as applicant therein; the Ministry of Public Service as first respondent and the Minister of Local Government, Rural & Urban Development as the second respondent. The operative part of the order granted by the Labour Court in the case referred to above was to the following effect:

“IT IS ORDERED THAT

1. The applicant be and is hereby confirmed as Secretary of the Liquor Licensing Board with effect from 30 January 2003
2. The applicant be paid all salary and benefits due from January 2003 to date of payment
3. The respondents pay costs jointly and severally, one paying the other to be exonerated.”

The Labour Court judgment was handed down on 27 January 2012.

Consequent upon the handing down of the judgment aforesaid, an application for leave to appeal against the above judgment to the Supreme Court was filed by the Public Service Commission and the Minister of Local Government, Rural and Urban Development as first and second applicants. The applicant herein was cited as the respondent. In a judgment referenced LC/H/482/13, a copy of which is attached to the applicant's founding affidavit *in casu*, as annexure 'C', the judge of the Labour Court dismissed the application. In a brief judgment the Labour Court judge ruled that the application for leave to appeal was a nullity for the reason that the applicants were not party to the judgment which they sought leave to appeal against. The application for leave to appeal aforesaid was dismissed on 11 October 2013.

Subsequent to the dismissal of the application for leave to appeal as above detailed, the Civil Service Commission which is cited as the first respondent in this application flighted an internal job vacancy notice No. 25 of 2014. The vacancy notice was referenced A/GEN/13/14 XREF: A/GEN/14/14; XREF: G4/1. The notice was to be deemed as having been issued on 24 July 2014 and had a deadline of 23 August 2014. The notice listed 10 posts or vacancies to which intending or prospective candidates wishing to be employed in those posts could apply. A copy of the notice is attached to the applicants affidavit marked annexure D. The 10 posts were all available in the Ministry of Local Government, Public Works and National Housing. The

Ministry aforesaid has been cited by the applicant in this application as third respondent. The second respondent is of course the Minister of Public Service.

With respect to the 10 posts or vacancies advertised, the 9th vacancy described in the notice reads as follows “Post 1: 1 x Secretary, Liquor Licensing Board (E4)”. The duties and responsibilities of the person sought to be employed in the said post was described in the notice as;

“POST 1: 1 X SECRETARY TO LIQUOR THE LICENSING BOARD (E4)

DUTIES AND RESPONSIBILITIES

1. Take overall charge of the day to day running of the Liquor Licensing Board Secretariat.
2. Respond and answer to correspondences regarding any queries that may arise from time to time on Liquor Licensing Board’s behalf.
3. Convene Board meetings in consultation with the Chairperson of the Board and keeping record of all proceedings of such meetings.
4. Advise the Board on policy matters on liquor licensing.
5. Compile, maintain and update of the register of all liquor outlets, in terms of:
 - Every licence issued or renewed.
 - Every removal, transfer, suspension or cancellation of a license.
 - Every permit issued.
6. Enforce standards and by-laws as stipulated in the Liquor Licensing Act.
7. Cross examine building plans submitted together with new applications.
8. Issuance of liquor license once the Board has approved.

QUALIFICATIONS, EXPERIENCE AND ATTRIBUTES

- A degree in Public Health or Environment Health.
- Must be conversant with the Liquor Licensing Act and any other Statutory Instruments that govern the selling of Liquor.
- Must be able to interpret building designers (plans)
- A high degree of competency, honesty, reliability and self-directing.

- Minimum of 2 years experience as a Chief Inspector of Premises or equivalent grade.
- Possess good leadership qualities.

In respect of all the 10 posts as advertised, the following requirements were listed.

B. Applications must be accompanied by performances appraisal reports for the last full cycle. A detailed C.V. with contact details and copies of national I.D. card, birth certificate and qualifications should be attached to the application. the C.V. must contain following details:-

- Full names
- Full residential address
- Present Ministry
- Present Grade and date of appointment thereto
- Work experience

C. Please be advised that applications should be submitted to the Civil Service Commission in triplicate through the Head of Ministry. Applications that would not comply with the above requirements will not be processed.

N.B. Eligible female candidates are encouraged to apply.

The vacancy notice was signed by Mrs P Sunguro, Secretary: Civil Service Commission.

In his founding affidavit and as more specifically appears in paragraph 7, 8 and 9, the applicant averred that he is and has been the Secretary to the Liquor Licensing Board since January 2003. He stated that he has been carrying out the duties enumerated in Post 1 since the said date and has signed all liquor licenses issued to date. In short, the applicant avers that Post 1 has an encumbent in the person of himself. Consequently as the post is not vacant, it is not available to be filled and should not be advertised. The applicant also averred that by advertising the post, the respondents were in contempt of the order of the Labour Court judgment which confirmed the applicant as the lawful encumbent and Secretary of the Liquor Licensing Board.

The applicant averred further that he stood to suffer prejudice if the process of inviting applicants for the post he occupies was left to go ahead. The applicant therefore seeks an order

interdicting the respondents from “convening interviews or appointing anyone to the post of the Secretary of Liquor Licensing Board as that position is not vacant.”

The respondents filed a notice of opposition and an opposing affidavit sworn to by George Sipihlapi Mlilo, the permanent secretary in the third respondent ministry. Although the notice of opposition purported that it was prepared and filed on behalf of all the three respondents, the affidavit filed and deposed to by the third respondent’s permanent secretary only related to the third respondent. In essence therefore, the first and second respondents did not file any opposing affidavits. They therefore did not oppose the application.

The third respondents’ position is aptly set out in the permanent secretary’s opposing affidavit in paragraphs 5 and 6 as follows:

“. Ad paragraph 4 – 6

The applicant is currently discharging the duties of the Executive Officer (secretary for the liquor licensing Board) in an acting capacity and has not been confirmed to that post by the employer. The post of the Secretary for the Liquor Licensing Board is handled at the Civil Service Commission Level and as such the Ministry is guided by the same in all matters regarding the status of that post.

6. Ad paragraph 7

The applicant should not be allowed to assume that the mere signing of liquor licenses is a confirmation to the post of Secretary for the Liquor Licensing Board because the post has since been professionalized. The applicant has got the opportunity also to apply for the post as advertised” (own underlining).

The third respondent’s permanent secretary also averred in the affidavit that the applicant had failed to satisfy the requirements for an interdict since he did not demonstrate a clear right nor shown injury committed or reasonably apprehended including the absence of similar protection or any other remedy. The affidavit does not however suggest what similar protection or other remedy would be available to the applicant.

In the answering affidavit, the applicant denied that he was working in an acting capacity of Secretary for the Liquor Licensing Board. He also deposed that a competent court had already pronounced on the applicant’s status and that the judgment or pronouncement was extant. He deposed further that he stood to suffer injury and prejudice in terms of his salary and benefits if someone was appointed to his office. He stated that he was already prejudiced because he was not being paid according to the correct grade.

At the hearing, Mr *Magadure* for the respondents submitted that this court had no jurisdiction to determine this application because it was a labour matter in which the law had given exclusive jurisdiction to the Labour Court to determine. He referred to s 89 (6) of the Labour Act, [*Chapter 28:01*] which provides as follows

“No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).

I will therefore quote section 89 (1) of the same Act. It reads as follows:

“89 Functions, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions-

- (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
- (b) hearing and determining matters referred to it by the Minister in terms of this Act; and
- (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
- (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section ninety-eight to hear and determine an application;
- (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;

[Paragraph inserted by section 29 of Act 7 of 2005]

It is therefore important to keep in mind that the provisions of s 89 (6) of the Labour Act apply only to the matters or instances referred to in s 89 (1). It is clear that the grant of an interdict is not covered specifically in s 89 (1). Mr *Magadure* in his heads of argument and before me submitted that there was nothing in the Labour Act which ousts the jurisdiction of the Labour Court to grant an interdict. He gave an example of rule 34 of the Labour Court rules which grants power to a judge of that Court or the Labour Court itself to order a stay of execution of an order, decision or determination which has been registered in terms of s 92B (3) of the Labour Act. Counsel argued that this was one example in which the Labour Court could grant an interdict.

The respondents’ counsel with respect has missed the point. The starting point is to appreciate that the Labour Court is a creature of statute. It can only exercise such powers as are granted to it by the Labour Act which creates it. The High Court on the other hand enjoys unlimited original jurisdiction over criminal and civil matters in Zimbabwe in terms of s 171 (1) (a) of the Constitution and the only limitations to its jurisdiction are those imposed by the High Court Act, any other enactments or the Constitution. I have previously expressed my views that I

did not consider that the High Court had unfettered jurisdiction which transcended areas where a specific enactment denies the court jurisdiction. The matter has been debated in other cases which have been argued before the court. The consensus appears to be that since s 171 (1) (a) derives from the Constitution; it must override all laws which appear to be in conflict with it. This therefore would include s 89 (6) to the extent that it seeks to oust the jurisdiction of the High Court from determining cases of the nature listed therein and in any event labour cases generally since they are civil matters.

At the risk of digressing, the proponents of the interpretation that the High Court jurisdiction now transcends over Labour cases in which the High Court jurisdiction was previously ousted argue that s 171 (1) (a) of the Constitution has resulted in a position where the High Court and the Labour Court exercise concurrent or parallel jurisdiction. So far as I am aware the Supreme Court still has to make a decision on the point so that the competing judgments of this court are rationalized to avoid uncertainty of interpretation by this court.

Despite the competing arguments, my view in this matter is that the jurisdictional argument should fail. The respondents' counsel argued that there was no provision in the Labour Act to preclude the said court of power to grant an interdict. The short and simple answer to this argument as I have already pointed out is that the Labour Court can only exercise the functions and jurisdiction conferred upon it by the enabling Act. It cannot assume jurisdiction in a matter on the basis that there is no provision stopping it from assuming jurisdiction over such a matter. Simply put, the Labour Court being a creature of a statute must find an enabling provision in the Labour Act or other enactment giving it power to grant an interdict in the circumstances of any given case. Where such provision does not exist, then the Labour Court cannot lawfully exercise jurisdiction. Section 172 (2) of the Constitution specifically provides that the Labour Court jurisdiction extends only to those employment and labour matters as "may be conferred upon it by an Act of Parliament." The example given by counsel of rule 34 of the Labour Court Rules on stay of execution of a judgment which has been registered as an example of the jurisdiction of the Labour Court to grant an interdict is not applicable in the circumstances of this case for the simple reason that the relief being sought in this application is not a stay of execution of a decision, determination or order registered in terms of s 92 B (3) of the Labour Act.

See generally, *Christmas Mazarise v Old Mutual Shared Services (Pvt) Ltd* HH 187/14; *Surface Investments (Pvt) Ltd v Maurice Chinyani* HH 295/14; and cases cited in both cases.

Therefore the second argument that there is nothing in the Labour Act which provides that the labour court, cannot grant an interdict as sought herein has no merit. Such argument applies to the exercise of jurisdiction by the High Court, which exercises original jurisdiction over all civil and criminal matters.

As regards the Labour Court, where the statute creating it has not provided for its jurisdiction in relation to a particular relief, the court cannot assume jurisdiction on the basis that its enabling statute is silent in relation to that relief. In short the Labour Court cannot exercise any other functions nor grant any other relief other than what the mother act empowers for it to do.

Mr *Magadure* sought to bring an ingenious argument on the miscitation of parties in the Labour Court. His argument which he sought to introduce as a point of law was that the Public Service Commission as predecessor of the Civil Service Commission, the first respondent herein was not a party to the Labour Court proceedings under Case No. LC/H/39/12. The point which counsel advanced was that because the secretary to the Liquor Licensing Board is appointed by the Civil Service Commission in terms of s 7 of the Liquor Act, [*Chapter 14:12*], to the extent that the appointing authority and its predecessor were not cited in the Labour Court proceedings, the applicants' judgment was a *brulmen fulmen*. It was argued that the applicant was therefore trying to enforce a *brulment fulmen* order through the back door because the Labour Court judgment was of no concern to the first respondent. Counsel further argued that he did not know why the first respondent sought leave to appeal against the labour Court judgment. Counsel referred to the case *Dynamos Football Club (Pvt) Ltd & Anor v ZIFA and Ors* 2006 (1) ZLR 346 (S). I failed to appreciate the relevance or applicability of the ratio *decidendi* in that case to the issue raised by counsel. As I understand the aforesaid case, all that his hardship MALABA JA (as he then was) emphasised on was that when a court is dealing with an unincorporated voluntary association in the nature of a social club, the contract between the association and its members determines the parties relationship. Where a dispute arises between the association and its members regarding issues arising from rights and obligations between them, it is to the contract

between them that a court must have regard to. The aforesaid case does not therefore assist counsel in supporting the point he raised.

A consideration of the Labour Court judgment shows that the learned judge traced the applicant's employment history in the Liquor Licencing undertaking including the various Ministries which managed the undertaking. The issue at stake was the declaration that the applicant was the lawful incumbent secretary to the Liquor Licensing Board, the post provided for in s 7 of the Liquor Act. Simply put, a competent court declared that the position is presently not available. There is no vacancy in that position so to speak. There is no need as suggested by counsel for the applicant to apply to join the first respondent to the Labour Court case. On the contrary, if the first respondent considered that it was adversely affected by the judgment of the Labour Court, it ought to have sought its rescission in terms of s 92 C of the Labour Act. Counsel ill-advised the first respondent to seek leave to appeal instead of applying for a rescission of judgment. In terms of the same section, that is 92 C, aforesaid, the first respondent would have been entitled to apply for a suspension of the determination sought to be rescinded pending the determination of the application for rescission.

The respondents' counsel also raised in his heads of argument the issue of the misjoinder of the second respondent. The second respondent did not oppose this application and thus did not care whether he or she was joined as a party or not. Therefore, I do not consider that it is necessary that I be detained to deal with the issue of the joinder of the second respondent as he or she is not only barred but has suffered no prejudice as he or she ignored the application. No order is sought against the second respondent. I also note in passing that in terms of r 87 (1) of the High Court Rules (1971) the misjoinder or non-joinder of any party to a matter before the court does not defeat the cause or matter under determination. I will therefore determine the cause or matter as against the parties properly joined in so far it affects their rights and interest. The issue of joinder is therefore without merit and must fall by the wayside.

I must therefore determine whether or not to grant the interdict prayed for by the applicant. The relief sought by the applicant is in the nature of a final prohibitory interdictory relief. The requirements for the grant of a final interdict are well known and have been set out as follows:

- (a) A clear right on the part of the applicant established on a balance of probabilities.

- (b) Irreparable harm committed or apprehended.
- (c) Absence of adequate or similar protection.

See *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511;
Setlogelo v Setlogelo 1914 AD 22 at 227.

The third respondent has made a bald denial that apart from the applicant not having a clear right, he has not shown injury committed or reasonable apprehended, or the absence of similar protection. I do not agree. The clear right has been established. The applicant holds a court declaratur that he is the incumbent secretary to the Liquor Licensing Board. He can only be removed therefrom by due process of the law. The applicant is justified to seek the protection of the law to safeguard his position. The first respondent by calling for candidates to fill up the post occupied by the applicant in violation of a court order constitutes an injury which has been committed or is reasonably contemplated. The third respondent's affidavit has not suggested that there is similar protection or an alternative remedy if the applicant's post is filled by another employee whilst the applicant still occupies the post. On the contrary, the third respondent has submitted that the applicant is free to apply for the post. Such belligerent attitude shows a total disdain and contempt of the Labour Court declaratur by the third respondent. Courts frown upon such conduct especially if it is promoted by a public officer. The rule of law is one of the founding values and a principle on which the country is founded as provided in s 3 (1) (a) of the Constitution. Court orders must be respected by everyone because no one is above the law. Courts are specifically mandated in terms of s 165 (1) (a) to safeguard the rule of law.

In terms of s 65 of the Constitution, the applicant is entitled to the guarantee of fair labour practices and standards. To seek to recruit another person to fill or occupy a position at work where there is an incumbent who lawfully occupies it amounts to an unfair labour practice and standard. In terms of s 44 of the Constitution, the court among other institutions of State has a duty to protect, promote and fulfil the right and freedoms granted by the declaration of rights. The first respondent's actions are in violation of the applicant's rights guaranteed by s 65 of the Constitution. The applicant is therefore entitled to the final interdict he seeks. The first respondent did not file any opposing papers save for its inclusion in the notice of opposition. The third respondent as the Minister responsible for administering the Liquor Act, which created the position occupied by the applicant has unreasonably opposed the application. An order of costs

against the second respondent as prayed for by the applicant is therefore justly merited. The applicant is granted the following relief:

IT IS ORDERED THAT;

1. The first respondent as the appointing authority designated as such by virtue of the provisions of s 7 of the Liquor Act , [*Chapter 14:12*] be and is hereby interdicted from interviewing and/or appointing any other person as Secretary of the Liquor Licensing Board for as long as the applicant continues to hold the post as decreed by the Labour Court in judgment LC/H39/12
2. The second respondent to pay the costs of this application.

Mtombeni, Mukweshi & Muzawazi & Associates, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners