

CALEB MUSODZA
versus
TURNALL HOLDINGS LIMITED
and
CONSTANCE KADENGA N.O.

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 3 February & 27 April 2023

Court Application

Adv. G Madzoka, for the applicant
Adv. T Zhuwarara, for the 1st respondent
No appearance for the 2nd Respondent

MHURI J: Applicant approached this court in terms of s 92B (3) of the Labour Act [*Chapter 28:01*] (The Act) seeking that, the judgment of the Labour Court in case number LC/H/585/21 handed down on 8 April 2022 as judgment number LC/H/89/22 and as varied by the Supreme Court Order SC 380/22 handed down on 28 October 2022 be registered as a judgment of this court.

At the hearing of this application, first respondent's counsel raised a point *in limine* on the jurisdiction of this court to hear and determine this application. The argument was that the application was brought by the applicant in his personal capacity to register a ruling by second respondent which was confirmed by the Labour Court, such an application can only be brought by second respondent. If second respondent is not the one approaching the court, then this court has no jurisdiction. The court can only register a confirmed Labour ruling which is brought under s 93 (5b) of the Act and only second respondent can approach this Court for registration of the Labour ruling.

First respondent's prayer was to have the application struck off for lack of jurisdiction by this Court and each party to bear its own costs, unless the point is opposed applicant to bear costs on a higher scale.

In response to the point raised, it was applicant's counsel's submissions that applicant averred in his founding affidavit that he is entitled to seek registration of the two Courts' orders in terms of s 92 B (3) despite the provisions of s 93 (5b) of the Act which confers the labour officers the right to seek registration of confirmed rulings.

This averment was not denied by first respondent in its notice of opposition and what is not denied in affidavits is taken as having been admitted.

It was submitted that in terms of s 69(3) of the Constitution of Zimbabwe applicant is entitled to approach this Court for determination of his rights and or obligations and also that the High Court has inherent jurisdiction over all persons unless there is a specific provision that ousts it. As a party in terms of s 92B(3) and also as a person, in terms of s 69(3) of the Constitution, he is entitled to approach this Court as such the point *in limine* should not have been raised and ought to be dismissed with costs, so argued applicant.

The factual background which is common cause is that:-

- applicant was in first respondent's employ as Managing Director. His services were terminated on 29 September 2016.
- upon termination of his services he was not paid his terminal benefits as per clause 31 of his contract and s 13 of the Labour Act.
- as a result of non-payment of his terminal benefits, applicant approached the Ministry of Public Service, Labour and Social Welfare complaining of an unfair labour practice whereupon second respondent dealt with the matter and issued a draft ruling in favour of applicant, i.e. ordering first respondent to pay the terminal benefits.
- second respondent then approached the Labour Court in terms of s 93(5a) seeking confirmation of her draft ruling.
- the Labour Court declined to confirm the draft ruling and remitted the matter to second respondent for assessment of the amounts to be paid.
- first respondent appealed to the Supreme Court against the Labour Court's judgment and an order by consent was issued.
- upon remittal again, second respondent quantified applicant's benefits and issued a draft ruling on 21 October 2021 which was confirmed with some amendments by the Labour Court.

- not satisfied with the Labour Court judgment, applicant approached the Supreme Court which upheld the appeal and issued an order setting aside part of the Labour Court judgment that ordered payment of monetary and non-monetary benefits payable in Zimbabwe dollars at a rate of 1:1 to the US\$.

It is this Labour Court judgment as varied by the Supreme Court that applicant seeks registration by this Court.

Section 92B of the Act in terms of which applicant made this application provides as follows:

- “(1) The Labour Court may fix the date from which any decision, order or determination made by it shall operate, which date may be an earlier or later date than the date of the decision, order or determination.
- (2)
- (3) any party to whom a decision, order or determination relates may submit for registration the copy of it furnished to him in terms of subsection (2) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or if the decision, order or determination exceeds the jurisdiction of any magistrate court, the High Court.
- (4)
- (5)
(emphasis added)

The above section is clear and unambiguous in that it relates to decisions, orders or determinations made by the Labour Court. It is these decisions, orders or determinations made by the Labour Court which any party may submit for registration. This is clear.

Section 93 provides for Powers of labour officers in relation to disputes or unfair labour practices referred to him/her, one of which is to make a ruling on the dispute or unfair labour practice.

Subsection (5a) of the said section provides as follows:

- “A labour officer who makes a ruling and order in terms of subsection (5)(c) shall as soon as practicable –
- (a) make an affidavit
 - (b) lodge on due notice to the employer or other person against whom the ruling and order is made, an application to the Labour Court, for an order directing the respondent by a certain day to do or pay what the labour officer ordered under subsection (5)(c) (i) and to pay costs of the application.”

Subsection (5b) which first respondent referred to provides as follows:-

“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 which ever 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.”
(emphasis added)

Equally couched in a clear and unambiguous manner is the above subs (5b). It is the labour officer who is mandated to submit for registration the Labour Court order where the matter has proceeded in terms of s 93(5a) (conciliation, draft ruling and application to Labour Court). The provision, unlike s 92B(3) does not refer to, any party. If the Legislature intended that any party submits for registration the Labour Court order, it would have said so in express terms as it did in s 92B(3). One wonders why the Legislature made this distinction. Be that as it may however, it is clear from both provisions that the High Court has jurisdiction to entertain the application for registration i.e. whether it has been brought by any party in terms of s 92B(3) or by the labour officer in terms of s 93(5b).

Reference was also made to s 69, right to a fair hearing, in particular subs (3) which reads:
“Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.”

This provision is also clear, applicant has the right of access to the courts, this is not in doubt. It was not the argument before me that the provision of s 93(5b) is in contravention of the above constitutional provision by providing that the labour officer and not any party is the one to submit the Labour Court order for registration.

It was further argued that first respondent by not denying in its notice of opposition applicant’s averment that he is entitled to approach the court in terms of s 92B(3) he cannot now deny this, this is tantamount to approbating and reprobating.

Indeed the law is established that what is not denied in affidavits is taken to be admitted.

See –

FAWCETT SECURITY
versus
DIRECTOR OF CUSTOMS 1993 (3) ZLR 121

This non denial or admission cannot in my view confer jurisdiction on a court where such court has no jurisdiction to entertain a matter. Parties cannot consent to confer jurisdiction on a court, this is trite. See –

MUTUKWA
versus
NATIONAL DAIRY CO-OPERATIVE LTD 1996 (1) ZLR 341 S

The argument was also made that by virtue of its inherent jurisdiction the High Court has jurisdiction over all persons and matters and therefore has jurisdiction to entertain this application. On this point, the applicant was alive to the rider that the court has inherent jurisdiction unless there is a specific provision that ousts that jurisdiction.

As submitted by first respondent, correctly so in my view, jurisdiction is the power vested in a court to adjudicate upon, determine and dispose of a matter. Accepted this Court has inherent jurisdiction. It is noted however that this jurisdiction may often be limited, for example by statute or common law. *Herbstein and Van Winsen*, The Civil Practice of the High Courts and Supreme Court of South Africa 5th ed (2009) at p 52 states:-

“Generally speaking limitations may be placed upon the power of a court in relation to factors such as territory, subject matter, amount in dispute, and parties”

He further states:-

“The limitations upon the jurisdiction of the High Court and the Supreme Court of Appeal are mainly statutory, though the common law also imposes some limitations”
(emphasis my own)

In casu, the issue of jurisdiction is a point of law and can be raised *mero motu* and at any time. This is trite, see the case of *Mutukwa v National Dairy Co-operative* (supra).

By invoking its jurisdictional powers under ss 92 B(3) and 93(5b), the High Court will be exercising powers conferred to it by statute (statutory power). This statutory jurisdiction is limited by one of the factors stated by *Herbstein and Van Winsen* (supra) to wit parties.

As I stated earlier, if registration proceedings are being brought under s 92 B(3), they can be brought by any party and if they are being brought under s 93(5b) it is the labour officer who is the applicant.

In the present matter, it is the applicant who brought these proceedings in terms of s 92B (3) when the proceedings which are the basis of the order to be registered were done in terms of s 93 and therefore falling under s 93(5b) under which it is the labour officer who should submit the order for registration.

Under the circumstances this court cannot exercise its statutory jurisdiction as the application has been brought by the wrong party under a wrong provision.

In the result it is ordered that:-

1. The application be and is hereby struck off the roll with costs on the ordinary scale.

Wintertons, applicant's legal practitioners

Sinyoro and Partners, first respondent's legal practitioners