ISOQUANT INVESTMENTS PRIVATE LIMITED t/a ZIMOCO v MEMORY DARIKWA CCZ 6/20

Judgement by MALABA CJ, with the full bench of the Constitutional Court concurring.

Date of issue 30 May 2020

FACTS

This matter came as a referral to Constitutional Court of a matter in the LC in terms of s175 (4) of the Zimbabwean Constitution. Facts are that sometime during the period 21 July 2015 and 14 August 2015[1], Isoquant Investments (Private) Limited t/a Zimoco terminated contracts for 17 employees on notice. The employees through their union demanded payment of retrenchment packages in terms of s12 C (2) of Labour Act (Chapter 28:01) [*hereinafter the 'Labour Act'].* Zimoco ignored the request. Employees approached NEC for the Motor Industry with a complaint of failure to pay retrenchment packages and long service awards in line with company policy. Memory Darikwa was appointed Designated Agent [*hereinafter 'DA'*] to redress the dispute by the NEC on 22 September 2015.

On 12 October 2015, the employees filed a statement of claim filed to the "conciliator". Zimoco responded without disputing the claim on the merits but argued that s18 as read with 12 C (2) of the LA is unconstitutional in retrospectively requiring the payment of a package to

[1] This was before Labour Amendment Act, No 5 of 2015

employee whose contracts had been lawfully terminated in exercise of its vested right to terminate on notice at a time when such termination did not require such compensation.

The DA issued a Ruling/Determination in the dispute on 8 April 2016. She found that in the absence of payment of a higher agreed package, there was need to pay the minimum package. She ordered payment of same in her ruling and that payment ought to be made from 8 April 2016 to 31 July 2016.

She did not issue a **Certificate of No Settlement.** She then applied to have the matter confirmed by the LC. It is in that court where the constitutional questions were by consent referred to the Constitutional Court.

DISPOSITION

It was held that;

a. The dispute between the parties had been definitively **redressed** by the DA in terms of s63 (3a) of the LA and could not have been brought to the Labour Court for confirmation in terms of s93(5) of the LA except if it had been an appeal or review for which it was not.
b. No attempt was made to **redress the dispute** as to activate the provisions of s93 of the Labour Act. No certificate of no settlement had been issued or was capable of being issued.
c. The proceedings before the Labour Court were a nullity. No Constitutional question could arise. The application failed on that score as the referral to the Constitutional Court was equally blighted by the same irregularity.

d. NB- Though no order was made in this regard, effectively the DA's order remained extant and the employees were entitled to payment of the said packages.

KEY LEGAL ISSUES ARISING

1. Compulsory conciliation in s93(1) of the Labour Act is based on the presumption that the labour officer and the parties will appreciate the obligation placed on them to act in accordance with the procedure of conciliation.

2. The role of a conciliator is more intense and involving that the window dressing shows we witness every day. "*It is not a mechanical chairing of the meetings between parties in dispute by an independent party*." **That it is not mechanical means the LO is flexible with regard to the choice and use of steps and procedures ordinarily associated with a conciliation process. A labour officer engaged in conciliation must follow a systematic approach in the process in seeking consensus between the parties on the matters in dispute. He must adopt measures which are conducive to the resolution of disputes through conciliation.** The conciliation process is in the discretion of the Labour Officer but usually involves four broad stages i.e. introduction, storytelling, dispute analysis and problem solving. This is not however exhaustive.

3. Here is what the stages entail;

I. ***Preparation***

- Take time before commencement of the process to have a preliminary understanding of the nature and possible causes of the dispute between the parties. Prepare beforehand, read the complaint and a response if there is one.
- Also study the law on the area which forms the subject matter.
- Understand the dispute and prepare for only that and nothing else.
- It is that dispute that will be adjudicated by the Labour Court and not any other. The Labour Court will only entertain it if it has first been properly conciliated.
- Ensure that there are facilities that can keep parties in the dispute separate from each other to let off steam and prevent physical and other confrontations before, during and after the hearing.
- Venue should be big enough for comfortable seating during the proceedings.
- Side meeting rooms should be large enough to accommodate each party. **These should be at a distance apart or well insulated to ensure that parties do not overhear one another when in side-meetings.**
- Labour Officer's fairness, effectiveness and independence should never be compromised through the process.

II. ***Introduction***

- Since parties did not participate in your appointment to be a Labour Officer in their case, you have to start by **introducing** yourself.
- Lay down ground rules for the conciliation process

- Develop trust and rapport with both parties and make parties feel comfortable, confident of your independence and lack of interest in the matters in dispute [ie make a **declaration of absence of conflict of interest and check with parties if anyone has any objection to Labour Officer's standing]**
- Labour Officer must explain the import of the conciliation process and distinguish it with adjudication, make sure parties understand the process before them so that they manage their expectations
- Make sure parties understand that Labour Officer will not be an adjudicator and therefore will not impose the outcome on parties but that your role is to help parties to reach a mutually acceptable agreement.

III. ***Story telling***

- Using either side meetings or a joint meeting, Labour Officer must invite each of the parties to narrate as much of their side of the story as they are comfortable to make at this stage. Allow them to release anger or emotion.
- Get the full background of the dispute, issues that each party considers to be in contention between them and understand each party's position on each issue.
- **Understand the legal personality of the parties before you so that the dispute relates to persons capable of suing and being sued before you proceed.**
- While it is common cause that a Labour Officer doesn't have jurisdiction to deal with matters which are within the purview of a DA, a Labour Officer must not simply decline to entertain such a

dispute if it is referred to him/her. He/she must redirect it to the correct employment council.

- Try and use effective inter-personal skills, such as building rapport, listening, paraphrasing, summarizing, dealing with emotion including anger and threats and helping people save face
- Use side meetings efficiently and appropriately, determine info which is meant to be confidential and not for the other party. Obtain clear authority from each party to relay any information they tell you in confidence.
- Assist parties to make or obtain admissions of fact as well as discovery of all relevant documents and in some cases applicable legal instruments e.g. Company code, internal policy documents, CBA etc.
- Ensure that further particulars are properly sought and provided and also get them.

III. ***Dispute analysis***

- Where possible this must start with both parties being excused.
- Once all information is in from both parties, take time to fully analyse the dispute for fuller understanding.
- Do your best to understand and appreciate the nature of the dispute [right or interest] and the underlying/hidden causes of the dispute [direct or indirect]
- Be very clear of each party's position on each issue and their expectations from the conciliation process.

- After this then call back the parties and repeat your analysis of the case in their hearing.
- Help parties to explore alternatives to their way of seeing things or their expected end game to the matter
- Ask parties probing and testing questions to establish the causes, positions, expectations, needs, values and priorities which the parties place on each position.
- Don't directly pressurise a party to settle by threat of an imminent Labour Court loss, ask parties to consider for themselves the consequences of a no settlement. Parties remain masters of their case.

IV. ***Problem solving***

- Explore options for settlement – assist parties to develop and consider a wide and creative range of options for a possible settlement.
- **Do not pronounce on the merits of each respective party's case even if you are advising, don't brow beat parties to a settlement.**
- Assist parties to consider moderation of their positions and expectations, harmonise their needs, to find joint gains and mutually beneficial needs – the aim is to make parties achieve win/win outcomes.
- **Assist parties to agree on a solution to the dispute which is practical, cost effective and which maximises the mutual satisfaction of the parties' needs.** This is the end game.

- Then issue a **CERTIFICATE OF SETTLEMENT** and have both parties sign.
- If no agreement is reached, then issue a **CERTIFICATE OF NO SETTLEMENT**, and then go ahead to **prepare a draft ruling on the strength of the submissions made during the exhaustive conciliation process** - itself a product of your detailed analysis of the dispute.
- Note that your ruling is not binding and unenforceable at this stage **–** It **cannot be appealed or reviewed**.
- This marks the end of **conciliation** and commences that of **adjudication**. **The CERTIFICATE OF NO SETTLEMENT is a critical legal document signifying the lawful completion of an exhaustive conciliation process envisaged by law.**
- Now apply for confirmation to the LABOUR COURT and cite both sets of parties involved in the dispute.

---

4. The remarks in **Drum City v Garudzo** to the effect that a ruling against an employee cannot be brought for confirmation were made obiter and do not represent the law [*the ratio is that a successful employee litigant at conciliation should be joined to confirmation proceedings in which he/she retains an interest*]. Every draft ruling properly made in terms of s93 (5) should be brought for confirmation.

5. The Labour Court should decline to jurisdiction in a matter where the conciliator does not show that he /she attempted to conciliate the dispute conscientiously resulting in a Certificate of No Settlement [and a draft ruling].

6. Conciliators are not adjudicators. They do not determine or redress disputes. Procedures such as hearing of oral submissions or production of written submissions by the parties and determination of disputes, typical of an adjudication process, are alien to conciliation. The proceedings are uniquely flexible and informal to the parties with the end goal of brokering settlement between parties.

7. There is a reason why the Labour Officer is required to make an application supported by an affidavit to the Labour Court. Its purpose is to place the matter in dispute and the evidence before the Labour Court for hearing and determination. The Labour Court does not rubber stamp the draft ruling. The Court thoroughly investigates the matter in line with applicable law and procedure. It conducts a "hearing" in the ordinary sense of the word. Once a hearing is done there must be a determination which is capable of enforcement or execution.

The Role of the Designated Agent

8. Section 62(1) (a) of the LA gives NECs power to settle disputes between employers and employees. They do so through Designated

Agents duly appointed by Registrar in terms of s63(3a) of the Labour Act.

9. A designated agent exercising his/her jurisdiction in terms of the Act does not have power to determine a constitutional matter, He only determines disputes of right that fall within his/her jurisdiction arising from employment relationships.

10. Section 63 (3a) gives Designated Agents dual powers, either to **redress** or **attempt to redress** disputes. A Designated Agent has to choose one of the two, he/she can't do both.

11. **Redress** means "*remedy or set right an undesirable or unfair situation*". A Designated Agent offers remedy or sets right an unfair situation. He/she makes a final decision as to the rights of the parties. Where a DA redresses disputes, the matter is decided definitively and cannot be brought to the Labour Court for confirmation in terms of Section 93 (5) but can be challenged on **appeal** or review. The Labour Court's power to deal with such appeal or review is in **s89(1**). After redressing a dispute as was the case in this matter, DA cannot purport to issue a **certificate of no settlement** because the matter has been disposed of to finality**.**

12. Where a Designated Agent **attempts to redress** a dispute they do so through conciliation in terms of Section 93(1) and unlike a Labour Officer, a Designated Agent **does not consult a senior ostensibly because s63 (3a) says s93 should be applied "with the necessary**

changes''. They should issue a Certificate of No Settlement before the matter can be taken for confirmation to the Labour Court.

13. The issuance of the **certificate of no settlement** brings the matter to Labour Court in terms of s93(5)

REFLECTIONS FOR DISCUSSION

The above is just my exposition of what the judgment of the Constitutional Court says. These questions however arise for discussion and will be dealt with in a separate article meant to critique the full judgement.

a. *If s93 is not applicable, in terms of which procedure is this "redressing" done? – section 63 (3a) says the provisions of s93 shall apply?*
b. *In terms of which provision of the LA is an appeal provided against a determination made by a DA? Review yes but for appeal? S89(1) gives no such right*]
c. *Is the DA prohibited from attempting to broker a settlement between the parties first before redressing the dispute, whether by conciliation or other means? Whither throwing away ADR?*
d. *What is the yardstick to decide which procedure to take between the two options of dealing with the matter?*
e. *If DA does conciliation why are they excluded from consulting superior wher eon eexists e.g. NECs with a Chief DA? Malaba CJ says that's the meaning of mutatis mutandis, really?*
f. *Equal protection of law between employees covered by NECs and those not covered by NECs?*

g. *The minister has power under s172(2) of the Act to make rules regulating the practice and procedure for the resolution of disputes through conciliation. Have these ever been made?*

Another article on these and other questions will be served in due course. In the meantime please note that COvid-19 is real. Please stay safe, wash or sanitise your hands, maintain social distancing, wear a mask covering both your mouse and nose at all times and also stay at home if you do not have to go out.