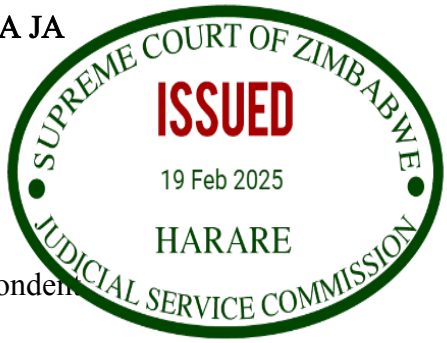
REPORTABLE (13)

MARTIN MATENHERE
v
CORNWAY COLLEGE

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA & MWAYERA JA
HARARE: 10 SEPTEMBER 2024



B. Magogo, for the appellant

Ms *F. Chinwawadzimba,* for the first respondent

MWAYERA JA:

INTRODUCTION

1. On 10 September 2024 after hearing counsel and having considered papers filed of record this Court delivered an *ex tempore* judgment and issued the following order:

    1. The appeal be and is hereby allowed with costs.
    2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

        "(i) The appeal be and is hereby allowed with costs.
        (ii) The decision of the Disciplinary Authority be and is hereby set aside"

    The respondent has requested the written reasons for our disposition. These are they:

FACTUAL BACKGROUNDS

2. The appellant is a former employee of the respondent, having been employed as the school Headmaster on 28 February 2020. The respondent is a private school in Harare.

3. The appellant was charged with misconduct as defined in s 4 (a) of the Labour (National Employment Code of Conduct) Regulations, SI 15 of 2006 (The Labour Regulations). He was facing allegations that he fraudulently allowed a student from Sandringham High School to participate in classes without paying any tuition fees to the school and without informing the respondent.

4. On 21 June, 2022 he was summarily dismissed from employment without pay and benefits. The summary dismissal was successfully challenged by the appellant's lawyers for non-compliance with Labour laws. The respondent reinstated him on 1 July 2022. However, on 4 July 2022 he was suspended without pay or benefits. He was eventually charged with misconduct and tried by a Disciplinary Authority having been notified of the hearing on 8 July, 2022. The hearing continued beyond a period of 30 days from the date he was notified of the misconduct. On 2 September, 2022 the appellant referred the dispute to a Labour Officer for conciliation in terms of s 101 (6) of the Labour Act [*Chapter 28:01*] ("The Act"). This was because the proceedings before the Disciplinary Authority were not concluded within thirty days. Despite having been advised by the appellant of the referral for conciliation, the hearing authority proceeded to render a belated determination on the matter convicting and dismissing the appellant from employment on 12 September 2022.

5. Aggrieved by the decision of the Disciplinary Authority the appellant filed a composite appeal and an application for review in the Labour Court ("court *a quo*") in terms of s 92 (D) of the Act. The appellant noted the appeal on the grounds that the hearing authority grossly erred in finding the appellant guilty of fraudulently allowing an external student to attend classes and learn at the school without paying school fees when there was no evidence on a balance of probabilities to sustain a guilty verdict. Further, that the

Disciplinary Authority erred in dismissing the preliminary point raised by the appellant that the proceedings were predetermined. Lastly that the Disciplinary Authority had lost jurisdiction on referral of the matter to the Labour Officer.

6. The court *a quo* dismissed the appeal and held that the referral of the case to the Labour Officer did not oust the jurisdiction of the Disciplinary Authority. It further, held that it was competent for the Disciplinary Authority to convict on credible evidence of a single witness. It further held that the penalty was appropriate as the employer took a serious view of the misconduct.

7. Dissatisfied by the decision of the court *a quo,* the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred in failing to find that the Disciplinary Authority's jurisdiction had been ousted by operation of s 101 (6) of the Labour Act [*Chapter 28:01*] and thus had no competence to determine the matter.
2. The court *a quo* grossly erred and misdirected itself in upholding the Disciplinary proceedings held against the appellant after the respondent had already substantively engaged another person to replace him in his position as Headmaster and in circumstances where the respondent had already predetermined the matter.
3. The court *a quo* grossly misdirected itself in upholding the finding that the appellant fraudulently allowed a non-student to attend classes in the face of evidence that the appellant's statement to teachers did not relate to class attendance.
4. The court *a quo* grossly erred and misdirected itself in effectively upholding that the student had been registered in the class register when no such evidence was led before it.

RELIEF SOUGHT

8. Wherefore, the appellant prays that the instant appeal succeeds with costs and that the judgment of the court *a quo* be set aside and substituted with the following:-

(i) The appeal be and is hereby allowed

(ii) The Disciplinary Authority's decision is hereby set aside.

(iii) Appellant is hereby acquitted from all charges and is therefore reinstated to his position without loss of salary and benefits with effect from the date of his dismissal.

(iv) If reinstatement is no longer possible, respondent shall pay appellant damages in *lieu* of reinstatement to be agreed between the parties failing which either party may approach this Court for quantification of damages.

ISSUES FOR DETERMINATION

9. Two issues arise for determination:

1. Whether or not the jurisdiction of the Disciplinary Authority had been ousted by referral of the matter to the Labour Officer,
2. Whether or not the conviction of the appellant was competent

SUBMISSIONS BEFORE THIS COURT

10. Mr *Magogo,* counsel for the appellant, submitted that this Court has through its decision in *Marimo* v *National Breweries* SC 125/00 and *Watyoka* v *Zupco (Northern Division)* 2006 (2) ZLR 170 (S), held that by operation of s 101 (6) of the Act, referral of a case not determined within 30 days to the Labour Officer and set down for hearing by the Labour Officer ousts the jurisdiction of the Disciplinary Authority. He submitted that therefore the court erred in upholding the decision of the disciplinary authority.

11. On the contrary, Ms *Chinwawadzimba,* counsel for the respondent, submitted that the cases referred to by Mr *Magogo* do not support his submissions. She argued that the *Marimo* case dicta was *obiter* and is not binding. She further submitted that the wording of the statute is not couched in mandatory or peremptory terms as it uses the word "may" she also further relied on *Watyoka* case where it was held at 173 G that:

> "The thirty days therefore refers to the period after which the party concerned may complain and does not make any determination made after its expiry a nullity."

APPLICATION OF THE LAW TO THE FACTS

Whether the jurisdiction of the disciplinary authority had been ousted by referral of the matter to the Labour Officer.

12. The above issue arises from the first ground of appeal. The appellant averred that the court *a quo* erred by failing to find that the disciplinary authority's jurisdiction was ousted by operation of s 101 (6) of the Act, and had no competence to determine the matter. The appellant submitted that the notification commencing disciplinary proceedings triggered the computation of the thirty day period in s 101 (6) as read with s 101 (3) (c) of the Act. He submitted that such referral before a matter has been determined to finality, ousts the jurisdiction of the hearing authority in favour of that of the Labour Officer. He further submitted, that having lost jurisdiction, it follows that whatever else the hearing officer did was a nullity.

13. *Per contra*, the respondent submitted that the contention that the disciplinary authority lacked jurisdiction was misplaced due to a clear misconception of the provisions of the Act. It was contended for the respondent, that s 101 (6) of the Act does not oust the jurisdiction of the Disciplinary Authority, and it does not render the decision made outside the 30 days a nullity.

14. It is pertinent to look at the provisions of s 101 (3) (e) and 101 (6) of the Act. Section 101 (3) (e) provides that:

> "An employment code shall provide for-
> (a) …
> (b) …
> (c) …
> (d) …
> (e) The notification to any person who is alleged to have breached the employment code that proceedings are to be commenced against him in respect of the alleged breach.
> (f) …
> (g) …"

15. Further, s 101 (6) provides as follows:

> "If a matter is not determined within thirty days of the date of notification referred to in para (e) of subs (3) the employee or employer concerned may refer such matter to a Labour Officer, who may then determine or otherwise dispose of the matter in accordance with section ninety-three"

16. It is trite that in the absence of any ambiguity, the wording of a statute must be given its ordinary grammatical meaning. See *Inamo Investment (Pvt) Ltd* v *Zimra* SC 96/23 at p 15. This was amplified in the case of *Falcon Gold Zimbabwe Limited & Anor* v *The Minister of Mines & Mining Development N.O* SC 99/23, at pp 10-11, wherein it was stated as follows:

> "It is an established principle of law that when interpreting a statute, the first cannon of interpretation to be applied is the golden rule which states that where the language used in a statute is plain and unambiguous, it should be given its ordinary grammatical meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found."

17. This position was clearly stated in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264 D-E wherein MCNALLY JA said the following pertinent remarks:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey* v *Pearson* (1857) to ER 1216 at 1234, unless that would led to some absurdity, or some repugnance or inconsistency with the rest of

the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

18. See also *Madoda* v *Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 377 where this Court emphasized the general principle of interpretation. It held that:

> "The same principle was expressed by this Court in *Endeavour Foundation and Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G to 357 A where GUBBAY CJ said:
>
> > 'the general principle of interpretation is that the ordinary, plain literal meaning of the word or expression, that is as popularly understood is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by context or such other indication as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers Winery Ltd* v *Distillers Corporation (SA) Ltd & Anor* 1962 (1) SA 458 (A) at 476 E-F.'"

The court further stipulated the circumstances under which it may depart from the golden rule as follows:

> "The circumstances in which the court may depart from the golden rule of interpretation were authoritatively laid claim by INNES CJ in *Venter* v *R* 1097 TS 910, at pp 914-915 where he said:
>
> > 'that being so it appears to me that the principle we should adopt may be expressed somewhat in this way when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.'"

19. In light of the general principle of giving provisions of a statute their ordinary grammatical meaning such interpretation of s 101(3) as read with s 101 (6) does not lead to any absurdity. Section 101(3) clearly provides that an employment code must provide for the notification of any person who is alleged to have breached the employment code that proceedings are to be commenced against him, in respect of the alleged breach. Further s 101 (6) then provides that when the notification has been sent the matter has to be

determined within thirty days and if it is not determined within thirty days, the concerned party may refer such matter to a labour Officer. The Labour Officer may then proceed to determine or dispose of the matter in terms of s 93 of the Act.

20. It was Ms *Chinwawadzimba's* submission that s 101 (6) is not peremptory hence the referral to the Labour Officer did not oust the jurisdiction of the disciplinary authority. It is apparent that the provision is directory and this entails that its observance is discretionary. This Court in the case of *Chinganga* v *Shava & Ors* SC 12/22 had this to say:

> "It is trite that "may" is directory in its proper interpretation the sub-rule merely means that this Court may or may not in its discretion determine or dismiss the appeal. In striking off the appeal this Court elected to not determine or dismiss the appeal."

21. In the case of *Mwenye* v *Lonhro Zimbabwe* 1999(2) ZLR 429(S) at p 433 A-C this Court spelt out the import of peremptory and directory language in an enactment. It stated as follows:

> "The categorisation of an enactment as "peremptory" or "directory" with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience on fulfilment will suffice, no longer finds favour in our courts. See *Swift Transport Service (Pvt) Ltd* v *Pitman NO & Ors* 1975 (2) ZLR 226(G) at 228c-229c, *Macara* v *Minister of Information Immigration and Tourism & Anor* 1977(1) ZLR 67 (6D) at 70H, Ex Parte Ndlovu 1981 ZLR 216 (G) at 217 F-G; *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) AT 301H.
>
> The proper criterion in determining whether there has been compliance is not the quality of the injunction, but the object the legislature sought to achieve by it. The question is simply whether that object is defeated or frustrated by the non-compliance complained of." (Underlining my emphasis).

In our view the word "may" ought to be interpreted in the context of the statute. In this case the legislature sought to protect parties from unwarranted and indefinite delays in the determination of disputes. It would be absurd to have the word 'may' in the context

of s 101 (6) as permissive and allowing the exercise of discretion as opposed to it being mandatory. To take the former position of it being permissive and discretionary would defeat the legislative intention aimed at curbing unwarranted delays in the finalisation of disputes. See *Masiiwa* v *TM Supermarket* 1990 (1) ZLR 166 in which the word "may" in a statute, was interpreted to be peremptory in order to buttress the intention of the legislature.

See also *Santo* v *General Accident Insurance Co (Zimbabwe) Ltd* 1995 (1) ZLR 322. In which upon interpretation of statutes it was pointed out that "may" should be construed as peremptory in order to contextualise it.

22. Therefore, the appellant`s argument that since the provision is not peremptory, it did not have an effect on the proceedings before the Disciplinary Authority would render the legislature's intention nugatory. The fact that the matter was referred to the Labour Officer upon the expiration of 30 days without any determination having been rendered by the Disciplinary Authority had some effect. It cannot be taken as a non-event simply because the provision is not couched in peremptory language. In this case the appellant chose to refer the matter to the Labour Officer after the expiration of thirty days before a determination had been rendered. By so doing, the employer could not continue to deliberate the matter already duly placed before another tribunal as this would defeat the intention of the legislature to protect parties from unwarranted delays in finalisation of matters.

23. Section 101 (6) of the Act is pertinent. Its import was outlined in the case of *Munchiville Investments (Pvt) Ltd* v *Mugavha* 2019 (3) ZLR 547 (S) at 557 *D* the court stated that:

> "Subsection (6) of s 101 was considered by this Court in *Watyoka* v *Zupco (Northern Division*) 2006 (2) ZLR 170 at 173B –E, this Court said:

> 'Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if the matter has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour officer is a relief given to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made.
>
> The section should be read as being only permissive and not restrictive in my view, the intention of the legislature is to grant relief to a party who is affected by the delay. The section provides that:
>
> The employee or employer concerned may refer such matter to a labour relations office who, may then determine or otherwise dispose of the matter ... clearly the referral can only be made before a determination.'" (Underling my emphasis)

24. That leeway for referral is given for an affected party to refer a matter whose determination has been delayed to obviate delays. This appears to be the objective of the legislature in enacting s 101 (6). *Mwenye's* case *supra* at p 431 F emphasised this observation by stating as follows:

> "Thus, it will be seen that s 101 (6) gives to both the employee and employer the right to refer a matter to a labour relations officer only if:
>
> (i) the matter has not been determined in terms of the relevant code; and
> (ii) thirty days have elapsed; and,
> (iii) notification has been given to the employee that proceedings are to be commenced against him in respect of the alleged breach."

See also the *Watyoka* case *supra* on p 173 D-E where the following salient remarks were made:

> "It was probably foreseen that in certain cases, one party could frustrate the other by causing delays to the prejudice of the other. That seems to be the reason why the word 'may' is used. The party concerned does not have to refer the matter to the labour relations officer. That party may still wait for the determination to be made even after the thirty days period." (My emphasis)

25. In this case the appellant did not wait after the expiration of thirty days before referring the dispute to a labour relations officer. The appellant was notified of proceedings before the Disciplinary Authority on 8 July 2022 and in terms of the law the proceedings ought to have been concluded by 23 August 2022. They were not concluded thus prompting

the appellant to refer the matter to a Labour Officer on 5 September, 2022. The Labour Officer then proceeded to set the matter down for hearing on 20 September 2022 after serving the respondent with notification of the proceedings on 12 September 2022. The respondent was then prompted into action and rendered a belated determination when the matter was already procedurally before the Labour Officer.

26. The appellant was affected by the delay in the finalisation of the disciplinary proceedings and when he referred the matter to the Labour Officer the matter was still being deliberated on. The effect of such referral is that the parties are obliged to respect and abide by the conciliation proceedings. See the case of *Munchiville Investments (Pvt) Ltd, supra* at 553 C-D, wherein this Court stated the following:

> "As I have already stated conciliation proceedings under s 93 (1) are prescribed by statute. They are essentially quasi- judicial in nature. In my view, the parties engaged in such proceedings are obligated to respect and abide by them as a statutory process and to subject themselves to the jurisdiction of the labour officer concerned until the proceedings are formally terminated, viz, until the disputation between them is either settled through conciliation or referred to arbitration. It follows that it is only the labour officer seized with the matter who has the requisite power and authority to validly conclude and finalize the proceedings in accordance with his statutory mandate. I would venture further to add that depending upon the circumstances, this would be the case even if the controversy before him is overtaken by events or otherwise resolved by the parties. Consequently, neither party, whether it be the employer or the employee, is at large to unilaterally disregard or resile from pending conciliation proceedings." (My emphasis)

27. It follows therefore that parties to conciliation proceedings are obliged to respect and abide by them. The appellant having notified the respondent and referred the matter to the Labour Officer in terms of s 101(6), the Labour Officer had the power to determine the matter in terms of s 93 of the Act which provides as follows:

> "**93 Powers of labour officers**
>
> (1) A labour officer to whom a dispute or unfair labour practice has been referred or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties by reference to arbitration."

28. In this case the Labour Officer was seized with the matter and it was consequently out of the employer`s hands. The disciplinary authority no longer had power to make a determination on the matter. It lost jurisdiction the moment there was notification and referral of the matter to the Labour Officer after the expiration of 30 days from the commencement of disciplinary proceedings with no determination. The referral effectively ousted the jurisdiction of the disciplinary authority thereby rendering the belated determination a nullity because the Labour Officer was already seized with the matter. By allowing referral in terms of s 101(6) the legislature's intention to protect parties from unwarranted delays in the determination of disciplinary hearings is clearly spelt out. To then seek to get in the way of a Labour Officer seized with a matter by purportedly determining a matter in which the disciplinary authority had lost its jurisdiction was a futile exercise on the part of the disciplinary tribunal. It could not adjudicate anything as the determination was a nullity for want of jurisdiction.

29. Having made a finding that the disciplinary authority had no jurisdiction, it is not necessary to determine the other issue earlier identified which relates to whether or not the conviction of the appellant was proper since lack of jurisdiction renders the findings of the Disciplinary Authority a nullity.

30. This Court is satisfied that the disciplinary authority`s jurisdiction was ousted by the referral and set down of the case before a Labour Officer. The purported determination of the dispute between the parties was therefore a nullity. The court *a quo* therefore erred in upholding the decision of the disciplinary authority which was a nullity. The appeal has merit and must succeed.

31. Regarding costs, they follow the result and this Court finds no reason to depart from the general rule.

32. It is for the above reasons that we allowed the appeal with costs and issued an order as reflected in para 1 of this judgment.

UCHENA JA : I agree

KUDYA JA : I agree

Maphosa Mahlangu Attorneys, appellant's legal practitioners.

Nyakudanga Law Chambers, respondent's legal practitioners.