ECONET WIRELESS
versus
THE MINISTER OF PUBLIC SERVICE LABOUR AND SOCIAL WELFARE
and
THE REGISTRAR OF LABOUR
and
NATIONAL EMPLOYMENT COUNCIL COMMUNICATIONS AND ALLIED SERVICES

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 23 May 2013 and 18 March 2015 & 01 April 2015

Opposed matter

F Girach, for the applicant
Ms K warinda, for the 1st and 2nd respondents
L Uriri with *C Mucheche* for the 3rd respondent

MAKONI J: The applicant is engaged in the cellular communications industry. On 9 December 2010, the applicant received a letter from the third respondent which advised it that as result of the variation of the scope of third respondent's coverage, it requires the applicant to register with it. To the letter was attached a Certificate Of Registration Of An Employment Council: Change Of Name Certificate (The certificate). Also attached was membership form for the applicant to complete. On perusal of the letter, the applicant noted that it recited that the third respondent had been registered with its new name by the respondent in terms of s 65 of the Labour Act [*Chapter 28:01*] (The Act). It also recited that the scope of National Employment Council (NEC) had been varied in terms of s 67 of the Act with effect from 25 October 2010. The applicant noted that the sections referred to in the letter were repealed in 2002, and that the second respondent could not have acted in terms of those sections. The applicant, in a letter dated 5

January 2011, addressed a letter to the third respondent where it sought clarification whether the third respondent had been registered in terms of the Act. The third respondent, by their letter dated 6 January 2011, advised the applicant that it deemed itself lawfully registered and its cope of coverage lawfully varied. The third respondent followed this letter with another one dated 13 January 2011 where in it attached a "corrected certificate of registration". The certificate had been altered to reflect s 59 of the Act as the section in terms of which its change of name had been effected. It however continued to reflect that the changes had been made on 27 May 2007.

It also reflected s 61 of the Act as the section in terms of which the scope of registration of the third respondent had been varied. It however bore a date stamp of 25 October 2010 as the date when the scope had been varied. The applicant addressed a further letter to the third respondent raising the above concerns. The third respondent refereed the applicant's letter to the second respondent with a complainant that the applicant claimed that the "certificate is not genuine". The second respondent wrote to the applicant on 8 April 2011, confirming that the certificate had been issued by it. The applicant then made a decision to refer the matter to its legal practitioners who wrote to the second respondent seeking to be advised the basis upon which the certificate had been corrected. The second respondent advised applicant's legal practitioners that it had power to rectify minor errors and that the errors did not affect the third respondent's scope of coverage. The legal practitioners addressed a further letter to the second respondent, dated 4 July 2011. That letter was not acknowledged neither was it responded to. As a result, the applicant assumed that the issues that had been raised by their legal practitioners were being attended to and that a response would be sent to their legal practitioners in due course.

On 9 January 2012 the applicant received a letter from the third respondent advising it of the promulgation of Statutory Instrument 1 of 2012 being a Collective Bargaining Agreement in the Communications and Allied Industries (CBA), the council which happens to be the third respondent which would be responsible for administering to CBA. It provided that employees in the industry covered by the CBA were obliged to register with the council. It imposed an obligation on employers and employees to whom the

CBA applied to pay dues and penalties to the council. The applicant formed the view that the second and the third respondent had colluded to manipulate the provisions of the Act to ensure the promulgation of SI by the first respondent in order to accord a cloak of legality to the acts of the second respondent.

The applicant wrote another letter dated 10 February 2012. No response was received. The applicant then instituted the present proceedings in terms of s 3 of the Administrative Justice Act [*Chapter 10:28]* seeking a review of the second respondent's decision to ignore the complainants raised by the applicant concerning the validity of the change of name and scope of variation of the coverage of the third respondent and to register a CBA with terms which require the applicant to register with the third respondent when it was aware that the legality of the registration of third respondent had been raised but not resolved.

The applicant also seeks a review of the decision of the first respondent to publish a CBA as statutory instrument having regard to the fact that the second respondent registered the CBA which contains provisions which are contrary to the Act.

The basis for seeking such relief is four fold

(i) That the certificate was issued in terms of s 65 of the Act on 27 May 2007 when the section had been repealed in 2002.

(ii) That the certificate varying the scope of the third respondent dated 25 October 2010 was issued in terms of s 67 of the Act. There is no such section and the purported variation is contrary to the law.

(iii) The second respondent recalled and corrected the certificate. I had no authority to do that.

(iv) The second respondent registered the CBA and in terms of sections 33-36 of the CBA, third respondent is made the responsible person and yet third respondent was not validly registered.

The applicant also sought condonation for late filing of the application for review, out of an abundance of caution. It was its view that it was not necessary to make such an application but if the court were to rule that it was necessary then the application can be considered. Its basis for so applying is that it was advised by the third respondent, on

9 Jan 2012, that SI 1/12 had been promulgated on 6 Jan 2012. It engaged the third respondent through a letter dated 10 February 2012. There was no response to that letter. A decision was then made to institute the present proceedings and they were filed on 9 March 2012. The applicant averred that the application was filed within a period of eight weeks from the date the applicant was made aware of the publication of S I/2012. However if the court is of the view that it should have been filed by 2 March 2012, that is within 8 weeks of the publication of S I 1/2012, the applicant prayed that it be granted condonation on the basis that the delay cannot be described as excessive. It had a reasonable explanation in that its legal practitioners and itself engaged the second and third respondent regarding the validity of the registration of the third respondent and the promulgation of SI 1/12 appointing the third respondent as body responsible for the administration of the statutory instrument.

The application was opposed by all the respondents and they all took points *in limine*.

The first and second respondent raised two points *in limine* viz

(i) That the application was filed out of time for the applicant to file an application

(ii) That the application, despite whatever name the applicant calls its; application, it is an application for review. In terms of s 89 of the Act, the High Court has no jurisdiction, in the first instance to hear and determine this application.

On the merits the first and second respondent opposed the application on the basis that the third respondent is properly registered in terms of the Act. The errors that the applicant refers to were corrected. The second respondent made an inadvertent error by issuing the certificate of registration and variation of scope respectively from forms prescribed in SI 31/93 which reflect the repealed sections.

The process was started afresh from where the second respondent had gone wrong. This was communicated to the applicant. The correction was done procedurally. The applicant did not object to the process of changing of name and the variation of scope of the third respondent. The processes were gazette through General Notice 227/2006 and 106 of 2010 respectively. The dates on the certificate remain the same (25 May 2007) is the date when the decision to change the third respondent's name was made. 25 October 2010 is the date the decision to vary its coverage was made. They could not change the

dated when the decisions were made.

The third respondent also raised, *in limine*, the point that this court has no jurisdiction to determine this matter as the cause of action emanates from the Labour Act. It also raised *in limine* that:

(i) That it was improper to file an application for condonation at the same time with the court application before being granted condonation.

(ii) That the so called application for a declaration is in fact a disguised application for review of the first and second respondent's decisions in terms of the Act.

On the merits the third respondent advances the same averments as those made by the first and second respondent and it will not be necessary to repeal them.

The third respondent, in its heads of argument also raised another point *in limine viz* that the applicant is approaching the court with dirty hands in that the applicant has evaded a lawful directive that it registers with the third respondent and pays dues in terms of the law.

I propose to deal with the points *in limine* in the following manner. The question of whether this court has jurisdiction is dependant on the nature of the application before me. Is it an application for a review or an application for a declaratur. If it is on review does the High Court have jurisdiction to deal with the issue at hand. If it has, was the application to be filed in terms of Order 33. If it is an application for a declaratur, does the Labour Court have jurisdiction to deal with the matter.

Mrs *Warinda* submitted that in terms of s 89 of Labour Act [Chapter 28:01] this court has no jurisdiction. Mr *Uriri* submitted that the issue was whether the application was properly before me. He contended that I must not look at the form but at the substance of the application. He contended that although reference has been made to a declaratur and to contraventions of the Administrative Act, the grounds that have been put forward betray the application for what it is i.e. one for review. The word review is used several times in the application therefore Order 33 of the High Court rules applies. The application must have been brought within eight weeks of notice having been given of the conduct complained of. After the eight week period one cannot file an application

before seeking condonation and must make out a case for condonation, before the substantive application is before the court.

On the other hand Mr *Girach* submitted that the respondents misconceive the application that it before the court. The applicant seeks a declaratur. The applicant's contention is that the third respondent's scope of operation was not only improperly but was wrongfully extended. The second respondent did not have jurisdiction to do what he did. It is a nullity. It is a question of jurisdiction and not of procedure. In the alternative the matter can be reviewed by this court in terms of the Administrative Act. It would be an application for review and the applicant is not bound by Order 33. In the event that the court finds that it is, then it applies for condonation.

The issue of whether an application is an application for review or an application for declaratory relief has been subject of much debate in our courts. One of the leading cases on the subject is *Kwete* v *Africa Community Publishing and Development Trust to Ors* HH226/98. At p 3 of the cyclostyled judgment, Smith J had this to say.

> "It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation as long as a declaratory order is sought. A declaratory order is after all merely one species of relief available on review, one can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation which is refused. All then he has to do is to institute a fresh application for review, but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round the provisions of order 33 of the High Court Rules 1971 that easily? I think not."

This position was adopted by the Supreme Court in *Mutare City Council* v *Madzime* 1999 (2) ZLR 140 (SC) at 143 D. See also *Marasha* v *Old Mutual life Assurance Co Ltd* 2000 (2) ZLR 197 (H) *Edwin Mushoriwa* v *Zimbabwe Banking Corporation* HH 23/08 p 2 and p 6-6.

What is coming out of these authorities is that a declaratory order is merely one of the species of relief available on review.

What distinguishes the present application from the authorities referred to above is that, *in casu*, the application for a declaratur is brought in terms of s 4 of the Act. The question that arises is whether Order 33 of the rules apply to such an application.

As was correctly submitted by Mr *Girach*, there is a death of authority on this point. The only case that e referred to, where there is mention of how such an application can be

brought, is *Mudisi & 4 Ors* v *Tomana & Ors* HH 121/12 where Hlatshwayo J, in *obiter dicta* on p 9, opined as follows:

> "The matter was bought on an urgent chamber application for the indication of rights under the Administrative Justice Act. It should, however, have been brought as a court application in terms of Order 33 Rule 258."

I am of different view. The Act has its objective to provide for one right to administrative action and decisions that are lawful, reasonable and procedurally fair and to provide for relief by a competent court against an administrative action or decisions contrary to the Provisions of the Act.

Section 4 of the Act allows any party aggrieved by the failure of an administrative authority to comply with s 3 to approach this court for relief.

The Act is silent on the manner in which an approach to this court, in terms of the Act ought to be bought.

Section 2 (2) of the Act gives some insight on this issue. It provides

> "The provisions of this court shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or apply for any form of relief in respect of any administrative action to which this Act applies." (my own underlining)

The section is expansive. Over and above other forms of relief that are available such as a review and appeal, an aggrieved person can approach this court in terms of s 4 of the Act. In any event, if the legislature intended that an approach to this court be made in terms of Order 33, it would have specifically provided for that. Applications made in terms of s 4 of the Act are therefore *sui generis*.

What this means is that the applicant is not proceeding in terms of 0rder 33 of the rules. It was therefore not obliged to apply for condonation for late filing of an application for review. The applicant is proceeding in terms of the Act and in terms of s 4 of the Act, only the High court has jurisdiction to entertain the matter. The Labour Court is not empowered to deal with such issues. In any event the applicant seeks a declaratur and only the High Court can grant declaraturs. This disposes of the points *in limine* whether this court has jurisdiction to entertain this matter and whether the application is properly before the court.

Dirty Hands Doctrine

Mr *Uriri* contended that the CBA was promulgated in accordance with law. The applicant is obliged to conduct himself in terms of the law and it has not done so. The applicant continues to evade the lawful directive that it registered with the third respondent and pays dues to it. He urged the court to decline jurisdiction until the applicant purged its non-compliance with the law.

Mr *Girach* submitted that the respondents must establish *mala fides* on the part of the applicant and none has been alleged. He referred to *Chikadaya* v *Chikadaya & Anor* 2000(1) ZLR 343 H It was further submitted that the Act permits this court to review the action loading to the promulgation of the S.I. so that persons are not subjected to arbitrary, unfair and unlawful decisions under the guise of these having been made law.

The law on this point is settled. In *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 S at 548 B-D Chidyausiku CJ made the following remarks

> "This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is requires to do is submit itself to the law and approach this court with clean hands on the same papers.
> Compliance with the law does not necessarily mean submission of an application for registration to carry on the activities of a mass media service. It certainly means desisting from carrying on the activities of a mass media service illegally."

I agree entirely with the position taken by the CJ in the above matter. Not to do would result in chaos and anarchy. As was correctly pointed out by the CJ in a matter involving the same parties reported in 2005 (1) ZLR 222 S the applicant had a number of options available to it. The applicant could have challenged the process of promulgation of the CBA. The applicant was given notice through the Government Gazette of 1 September 2006 General Notice No 227/06 and 28 May 2010 General Notice No. 106/10 and an opportunity to make representations. The applicant did not. The applicant could

have registered with the third respondent and remitted the dues while at the same time mounting the present challenge. The applicant chose to totally disregard the law.

The *Chikedaya* case *supra* can be distinguished from the present matter. The question of *malafides* does not arise when it comes to the question of compliance with law. The contention that Act permits the court to review the action leading to the promulgation of the law does not assist the applicant. The Act does not go further to provide that pending the determination of the review of the process leading to the promulgation, the law is suspended. As long as the law remains in the statute books it must be complied with.

In view of the above findings, this court will withhold its jurisdiction until such time as the applicant submits itself to the law.

The respondents prayed for costs on a higher scale. I see no reason of denying them their prayer. I therefore make the following order:

1) The point *in limine* raised by the respondents succeeds.
2) This court withholds its jurisdiction until such time of the application complies with the law.
3) The applicant to pay the respondent's costs on an attorney-client scale.

Mtetwa & Nyambirai, applicants' legal practitioners
Civil Divison of the Attorney General's Office, 1st and 2nd respondent's legal practitioners
Messrs Matsikidze & Mucheche, 3rd respondent's legal practitioners