



THE KEMPTON MAKAMURE LABOUR LAW JOURNAL

VOLUME 1 2004

**JURISPRUDENCE AND JURISDICTION
OF THE LABOUR COURT UNDER
THE NEW LABOUR ACT**

**Product of the
Kempton Makamure
Labour Law Lecture Series**

**FACULTY OF LAW
University of Zimbabwe**

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Contents

Acknowledgements	(ii)
The Editor's Note	(iii)
The Legacy of Kempton Makamure <i>T. Sibanda</i>	(iv)
The Legacy of Kempton Makamure <i>M. Gwisai</i>	(v)
The Jurisdiction of the Labour Court Under the New Labour Act – The Dawn of a New Era <i>C. E. Bhunu</i>	1
Setting the Cat amongst the Pigeons: Jurisdiction of The Labour Court under New Labour Act <i>T. Biti</i>	5
Jurisdiction of the Labour Court and Superior Courts: Chikara kununa kudya chimwe <i>M. Gwisai</i>	10
<i>Case Notes</i> <i>Thomas Tuso v City of Harare</i> HH-1-19	26
<i>Mitchell Nongogo v Barbican Holdings</i> LC/H/309/2003	27
Dzimba Pedzisai v Public Service Commission and Anor HC 11031B/02	28

The Kempton Makamure Labour Law Lecture Series and Journal Team

The Kempton Makamure Labour Law Lecture Series has a vision to develop a leading Southern Africa labour law development platform in the service of the toiling masses, consistent with the dialectical and historical materialist world outlook that Kempton held and fought for most of his life.

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4. Legal Practitioners (individuals)
5. Southern Africa Women's Law Centre
6. Zimbabwe Labour Centre
7. Various Legal Practitioners and individuals

To assist, fund, support us and become a Friend of the Kempton Makamure Labour Law Lecture Series please get in touch at:

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FOREWORD

The University of Zimbabwe, Faculty of Law is greatly indebted to the late **Cde Kempton Makamure** for his tremendous effort in the development of contemporary jurisprudence in a variety of topics and in particular, in the arena of Labour laws. Indeed we are honoured to have derived great experience from **Cde Kempton Makamure**, a distinguished scholar who has left an indelible mark in the advancement of Labour jurisprudence in Zimbabwe.

The present day Zimbabwe projects a perplexing picture of political, social and economic upheaval. Indeed there are a host of legislative changes in the labour environment. In these challenging times the conventional wisdoms of orthodox legal thinking in the jurisprudential aspects of labour law become inadequate. The publication of lecture series and journals on the works of **Cde Kempton Makamure**, focuses on the work he did in seeking to transcend the limitations of conventional labour laws discourse and it is hoped that this will keep his legacy alive.

The scope of the analysis of the lecture series and journals will be broad. The series will attempt to break the existing arbitrary divisions between the substantive of Labour law and other jurisprudential aspects which shape the legal framework of our labour environment as articulated by **CDE Kempton Makamure**. The ultimate aim is to provide a platform for legal debate which seeks to strengthen our appreciation of labour laws in Zimbabwe. This publication remains incomplete without the corresponding wide readership and in this respect I thank the reader. At the same time I would like to record my appreciation to colleagues in the Faculty who by launching this initiative which has kept **Cde Kempton Makamure**'s memory alive. This is a fitting tribute to a man for whom we have fond and abiding memory.

Mr E. Magade

Dean of the Law Faculty
University of Zimbabwe

Acknowledgments

The organizers of the Series would like to extend our thanks to the participants of the series who made it possible for us to have ideas to write down as a journal.

Moreso our thanks are extended to Mrs M Mnidwa Legal Aid and Advice Scheme and Ms. Abigail Mawonya, Public Law Department and all stakeholders who helped to make these series a success.

Our thanks specifically also goes to our funders Faculty of Law, Delta Corporation, Labour Lawyers of Zimbabwe, Labour Law Centre, Southern Africa Women's Law Centre and various individuals.

A Note From The Editorial Board

“For who hath despised the days of small things...?”

I have decided to pause this question to you our readers. It just begun as a seminar but we had a vision to have an International Labour Journal a homegrown one, from the Kempton Makamure Labour Law Lecture Series.

Our desire and hope is for the Kempton Makamure Labour law lecture series and the Journal to be internationally recognised. We started small but we are poised for great things. Thanks to our dedicated cadres in the Faculty of Law, to mention a few: -

Our lecturers and the series coordinators, Cde M. Gwisai and Ms S Kanyangarara. We honour them for their undying zeal to see the revamping of the Faculty of Law into a powerhouse of law development in Zimbabwe. Moreover producing students who view law as a ministry, to serve the people, the oppressed to be set free, the workers and employees to be enlightened and be a united family.

Appreciation should go to the organizers and editors of the series for their gallant and heroic efforts to make the series a possibility and show that students have the ability and consciousness to play a meaningful role in the academic and intellectual life of this institution and society.

To our article contributors, and sponsors your commitment forever shall be remembered.

I do hope that this marks but just the beginning and that united we shall produce more of these journals and move from strength to strength to contribute in our small way to the realization of the vision of liberation and liberty of all of humanity that Kempton fought and dedicated his life to.

Yours faithfully



Rodgers Matsikidze
Chief Editor.

Setting the Cat amongst the Pigeons: Jurisdiction of the Labour Court under the new Labour Act

by Hon. T. BitP

It was a great honour for me, to be invited, to give the inaugural lecture for the Kempton Makamure Labour Law Lecture Series.

There is no doubt that the late Kempton Makamure touched in an irreversible manner, all those who came in contact with him and there is no question that the history of the University of Zimbabwe and possibly the recent history of this country would never have been the same but for Kempton's influence.³

My initial invitation was to give a presentation on the following topic:

“Jurisdiction and Jurisprudence of the Labour Court and High Court under the new Labour Act”.

In the process of preparing for this paper it became quite clear that a solid independent paper dealing solely with the issue of jurisdiction was required. Not simply because of the academic issues involved, but rather because of the clear confusion presently existing in the High Court of Zimbabwe. It is quite clear, to every practicing labour lawyer the divided opinion amongst High Court Judges on this issue and there is no question that the same will have to be resolved by the Supreme Court sooner rather than later.

It is clear that before the 7th March 2003, when the Labour Relations Amendment Act No. 13 of 2002 became law, the High Court had entertained all and any labour law matter. A litigant, was free to approach the High Court of Zimbabwe on any labour issue and in the few instances that the High Court declined jurisdiction, it was merely based on the contention that the litigant should have exhausted domestic remedies. Indeed, in some cases, the obligation to exhaust domestic remedies was elevated to a principle of substance, which it is not and the Courts lazily applied it to avoid dealing with labour matter.⁴ A careful perusal of cases dealing with this subject shows such gross inconsistency that betrays and mirrors the current state of academic kwashiorkor that perverts the legal profession in this country at present.

The genesis of the conclusion with regards to the High Court's jurisdiction in labour matters, is of course the enactment of **Section 89(6)** of the Labour Relations Act Chapter 28:01 (the Act). Thus any debate on jurisdiction of the High Court would have to center around as interpretation of **Section 89** of the Act.

In dealing with the issue of jurisdiction it must be emphasized that the High Court of Zimbabwe is a superior court with original jurisdiction. On the contrary, the Labour Court is not a superior

court and does not have any inherent jurisdiction. The difference between the Courts is that the High Court can do anything except that which is specifically prohibited by law whereas on the other hand the Labour Court can only do those things that it is specifically permitted by law. This distinction is important and was well captured in the leading cases of **Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd 1963 (1) SA 737 (SR) at 739 and (1962) R & N 799;** **Samuel v Pargadia, 1963(3) SA 45; Hydrauma (Pty) Ltd v Pearl Oyster Shell Industry (Pty) Ltd, 1976(2) SA 384(C).** Compare also the case of *City of Harare v Lesley Gwindi, HH-147-03.*

The *locus classicus* on the question of a lower body being permitted to do only those things that are defined within the four corners of the legislation is obviously the case of *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd*, supra. At page 802 A-B of the Rhodesia and Nyasaland Law Report, Maisels J stated as follows:

"It has repeatedly been stated that the magistrate's court is a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior courts and may claim no authority which cannot be found within the four corners of its statute. Connoly v Ferguson (1), 1909 T.S 195 at p198".

Comparatively and most interestingly, the Labour Court in South Africa established by the Labour Relations Act, No. 66/1995 is a superior court with inherent powers. **Section 151(2)** of the South African Labour Relations Act read as follows:-

"The labour court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction".

The jurisdiction of the superior courts is something with which the superior courts themselves jealously guard. The general principle of the law is that there is a presumption against the ouster of the court's jurisdiction unless this legislature states so in very clear terms. In the famous case of *De wet v Deetlefs, 1928 AD 286 at 290* Solomon CJ stated as follows:-

"It is a well-recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature"

Clearly, any provision in any statute or contract that purports to oust the jurisdiction of the courts is restrictively interpreted.⁵ It is therefore important to carefully consider the provisions of **Section 89(6)** and see whether it can be said beyond any reasonable doubt that legislative intention was to oust the jurisdiction of the High Court or alternatively, even if Parliament may have intended the ouster, whether in fact that is achieved in the wording of the statute. The answer in both scenarios it is submitted, is a no.

There are two cases in Zimbabwe thus far, which have debated the issue of the competing jurisdiction of the Labour Court and the High Court. These are *Thomas Tusso v City of Harare H-H-1-04⁶* (hereinafter the Tusso matter) and the case of *Martin Sibanda and Another v Benson Chinemhute*

N.O and *Martindale Trading (Private) Limited t/a Lyons H-H-131-04* (hereinafter the *Martin Sibanda* matter) With respect, the two judgments are completely different in the scope of their analysis. In the *Martin Sibanda* matter, this Honourable Court accepted the two tenets that have been advanced above. Namely:-

- (a) The High Court will jealously guard its inherent jurisdiction;
- (b) That jurisdiction of this Honourable Court can not be implicitly be ousted.

Those issues were not debated in the *Tuso* matter. The *Tuso* matter simply paid a cursory view of *Section 89(6)* and *Section 89(1)* of the Act without much debate. This will be done in casu.

It will be recalled that *Section 89(6)* of the Act reads 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 in subsection (1)”

Our Courts accept that at first instance, the Court must resort to a literal meaning of the words used in the *Section*. This is trite but see *Martin Sibanda* supra at *page 3* of the cyco-styled judgment. See also *Gordon N.O Rennie N.O v Standard Chartered Bank Ltd and Others 1984 (2) SA 519 (C)*

It is thus submitted that the jurisdiction of any other Court has been ousted in respect of those applications and appeals that are defined in the Labour Act. Put simply, the legislature has created the Labour Court as a creature of statute. It has defined in the same Act certain appeals and applications it can hear. In respect of those applications and appeals, the Legislature has clearly state that no other Court has jurisdiction. It could not be much clearer.

The words “*any other enactment*” calls for further special attention. As indicated above, it is a phrase that is of general wide application. It can mean every enactment in Zimbabwe. But surely it could never have been the intention of the legislature that the legislature intended to provide jurisdiction to the Labour Court in respect of any litigation covered in any other enactment. It is submitted that the wide and general meaning of the phrase “*any other enactment*” must be limited and restricted in its ordinary meaning, by the words that precede or succeed the same that is the phrase “*hearing and determining applications and appeals in terms of this Act*” and the subsequent phrase “*hearing and determining matter which referred to by the Minister in terms of this Act*”. The critical and most limiting phrase is “*In terms of this Act*”. This phrase means that the jurisdiction of the Labour Courts is only restricted to those issues that are specifically referred to in the Labour Relations Act. Therefore “any other enactment” must be restricted to those matters in any other statute that are specifically restricted to the business of the Labour Court. The words on the application of the *ejusdem generis* rule those their wide and generous meaning.⁷

IDENTIFYING THE SPECIFIC APPLICATIONS AND APPEALS IN TERMS OF THE LABOUR ACT

What then are those applications and appeals that the Labour Court has exclusive jurisdiction. These are well defined in the Act and include the following:-

- (a) the right to go to the Labour Court against a decision made in terms of a Code of Conduct (**Section 97(1)(b)**);
- (b) an appeal against a decision of a Minister in terms of **Section 25,40,41,71 and 82)Section 97(1)(a)**).
- (c) an appeal against the determination of a Labour Relations Officer **Section 97(1)(c)**);
- (d) an appeal on a question of law from the decision of an Arbitrator in terms of **Section 98(10)** of the Act.

The fact that in determining appeals in terms of the Labour Court the same can exercise review powers does not mean that the review jurisdiction of the High Court is taken away. The appeals in terms of the Labour Court remain appeals in terms of the same even though the court has got review powers appeal includes a review element.

Similarly, the Labour Court hears many applications as permitted by the Act and these include:-

- (a) an application for interim reliefs provided for in terms of **Section 97(4)**;
- (b) an application for rescission of judgment in terms of **Section 92(c)** of the Act; and
- (c) an application for reference of the matter to the Labour Court in terms of **Section 93(7)** of the Act.

It is submitted that it is only these appeals and applications in respect of which the Labour Court is specifically empowered to deal with that no other court has got jurisdiction at first instance.

REVIEW OF DECLARATOR

The net effect of the finding of the *Tuso* matter is that the High Court no longer has review jurisdiction in labour matters. The court in *Martin Sibanda* supra refused to express an opinion on this point but indeed held decisively that the High Court still has jurisdiction to issue a declaratory order. Two things arise. The powers of the High Court to review matters is derived from the Common Law as codified by **Section 27 and 28** of the High Court Act. Nothing in **Section 89(6)** takes away the right of an employer or employee of approaching the Honourable Court for review, except in respect of those applications and appeals that are specifically provided for in the Labour Act.

Furthermore, the Court in *Tuso* ignored the fact that the Labour Court does not have general powers of review. Whilst it is clear that the High Court has general powers of review as specified in **Section 27 and 28** of the High Court Act, the review powers of the Labour Court are limited to appeals that are specifically pending before the same. In other words one cannot make an application for review in the Labour Court. However if there is an appeal that is pending before the Labour Court, then the Labour Court has a right to exercise its review power.

The Labour Court itself has accepted the correctness of this position in *Mitchell Nongogo v Barbican Holdings Judgment LC/H/309/03* here Ladyship President Mhuri G. stated as follows:-

“The use of the word appeal in this section clearly indicates that for a matter to be reviewed by this Court, it has to be pending on appeal before it. The word appeal is further repeated in section 97(2) which reads, “an appeal in terms of section 1 may (b) seek a review of the determination or decision on any ground on which the High Court may review it”. It is therefore clear that a matter can not be brought straight to this Court on review unless it has come through the approved procedures”.

Clearly therefore and with the greatest respect, the findings of Mr Justice Bhuni in the *Tuso* matter are cataleptic.

In the *Martin Sibanda* matter, Justice Makarau held that this Court’s powers of issuing a declaratory order has not been ousted by the Labour Relations Act Chapter 28:01. This is an unassailable finding. There was no specific provision in the Labour Relations Act that ousted the High Court’s powers and rights to invoke *Section 14* of the High Court Act. By parity of reasoning, there is nothing in the Labour Relations Act Chapter 28:01, which specifically ousts the High Court’s powers of review in *Section 27* and *Section 28* of the High Court of Zimbabwe. Therefore it follows a fortiori that once this Honourable Court makes the finding that it still have powers of issuing a declarator in terms of *Section 14* of the High Court Act of Zimbabwe then the power of review still exists.

CONCLUSION

It is quite clear that *Section 89(6)* of the Act has not ousted the High Court’s inherent jurisdiction in labour matters. The confusion currently existing is thus difficult to fathom. The issue is as clear as a pike staff.

Notes

1. Member of Parliament for Harare East (MDC) and a former student of Kempton Makamure, who is also now a leading labour law practitioner.
2. Many of the outstanding leaders of present day in Zimbabwe were his students or protégés. These include Lovemore Madhuku, Arthur Mutambara, Welshman Ncube to name a few.
3. *Girgac Services (Pvt) Ltd v Mudzingwa* 1999(1) ZLR 243, *Chikonye and Another v Peterhouse* 1999 (2) ZLR 329(S) *Dzikiti v United Bottlers* 1998(1) ZLR 389 (H).
4. See the cases *the Christopher Sibanda, the National Premier Soccer League v Leo Mugabe* and another, HH-102-95, *Reid-Dally v Hickman and Others* 1980 (1) ZLR 201.
5. Judge Bhunu who wrote this judgment was the Senior Judge of the Labour Tribunal (now Labour Court) at the time that the Government prepared the amendment Act. He had pushed for exclusive Jurisdiction of the Labour Court in Labour Law matters.
6. See *R v Chitsa*, 1962(2) SA 34 (RAD); *Sacks v City Council of Johannesburg*, 1931 TPD 443; *Director of Education (Transvaal) v McCagie*, 1980 AD 623.



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