

HH 10-03
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AGGAY MICHAEL NYAMAINASHE
versus
THE MINISTER OF TRANSPORT
AND COMMUNICATIONS N.O.
and
TEL-ONE (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 8 November, 2002 and 29 January, 2003

J B Colegrave for applicant
C Muchenga for first respondent
N B Nagar for second respondent

CHINHENGO J: The applicant was employed by the Posts and Telecommunications Corporation (hereinafter called "the PTC") before the PTC was unbundled into three separate companies, Zimpost, Tel-One and Net-One. Tel-One (Pvt) Ltd, the second respondent, is therefore one of the successor companies of the former PTC. The applicant's contract of employment was terminated on 31 May 2001. In this application the applicant sought a declaration that his contract of employment was unlawfully terminated. He therefore prayed for an order that the respondents pay his salary and any employment benefits due to him from "1 June 2001 to the date when applicant's contract of employment is lawfully terminated". He also claimed for interest on the amounts due and for costs of suit.

The applicant was employed by the PTC in 1993. As at 1 June 1999 he had risen through the ranks to become the General Manager, Secretariat, of the PTC. His appointment as General Manager Secretariat was for a period of three years to 30 June 2002. In terms of the applicant's contract of employment, Annexure A, it was envisaged that the PTC may be privatised. Clause 9 of the contract provided that -

"In the event of the Corporation being privatised during the period of this contract, the General Manager (applicant) shall not be entitled to any special

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termination of service benefits. He/she shall, instead, be entitled to terminal benefits available to other members of staff in his/her position. Termination of the contract prior to the end of the contract shall be in accordance with the law of Zimbabwe".

In terms of the Postal and Telecommunications Act [Chapter 12:05] (Act No 4 of 2000) (hereinafter called the Act), the Minister administering the Act was empowered by s 108 of the Act to take steps under the Companies Act [Chapter 24:02] to secure the formation of one or more companies limited by shares as successor company or companies to the PTC. In terms of s 108 of the Act the Minister was empowered to fix a date on which the assets and liabilities of the PTC would be transferred to the successor companies as appropriate. Once the assets and liabilities of the PTC were transferred every employee of the PTC was, in terms of s 111 (2) of the Act, to be transferred to one or other of the successor companies on terms not less favourable than those enjoyed by him immediately before his transfer. The Minister was empowered by s 111 (3) of the Act to determine, before the date on which the employees were to be transferred who among the employees of the PTC were not to be so transferred but to be transferred to the Postal and Telecommunications Authority established by s 3 of the Act. The applicant was not one of those referred to in s 111(3).

Section 112 of the Act provides as follows -

- 1) **Notwithstanding anything contained in the Posts and**

Telecommunications Corporation Act [Chapter 12:03], the Minister may

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give the Board of the Corporation directions in writing in order to ensure the proper transfer of the assets and liabilities of the Corporation to the appropriate successor company, and the Board shall, without delay, comply with every such direction.

- 2) Without derogation from subsection (1), directions given under that subsection may provide for -
- a) the cessation of all or any functions of the Corporation and any person;
 - b) the termination of any contract entered into between the Corporation and any person:

Provided that no such direction shall authorise the Corporation to commit an unlawful breach of any such contract;
 - c)
 - d)"

On 25 June 2001 the Acting Secretary of the first respondent wrote a letter to the Acting Chief Executive of the PTC advising that the Minister had approved "exit packages" for the applicant and other employees named in the letter. The exit packages were said to have been approved in terms of Rule 47 of the Posts and Telecommunications Pension Fund. The details of the package were given in the letter. This letter was availed to the applicant sometime in early May 2001. On 9 May 2001 the Acting Secretary of the first respondent wrote to the applicant directly advising him of the abolition of the applicant's office because the PTC had been re-organised into three successor companies. In the relevant part of the letter reads -

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"Reference is made to the reorganisation of the Posts and Telecommunications Corporation into three successor companies. It had been established that as a result of this restructuring exercise your post is now excess to requirements.

Accordingly, the Minister of Transport and Communications, the Hon. Dr. S T Mombeshora, has approved that your office be abolished in terms of Rule 47 of the Posts and Telecommunications Pension Fund, and that you be offered the exit package detailed below".

The applicant's entitlements upon termination of his employment were again detailed in this letter. The letter went on to invite the applicant to make any representations related to the exit package if he so wished, within 14 days. He was advised further that the date of termination of his employment was to be agreed between him and the PTC. This letter also said that it was cancelling and replacing the writer's earlier letter to the Acting Chief Executive dated 25 April, 2001.

On 30 May 2001 the Secretary of the first respondent C. Katsande sent another letter to the applicant. In the relevant part the letter reads:

"Abolition of Office : Mr A M Nyamainashe

Reference is made to the -re-organisation of the Posts and Telecommunications Corporation into three successor companies. It has been established that as a result of this restructuring your post is now excess to requirements. As you are aware your post was dissolved in the year 2000.

On 9th May, 2001, you were given an opportunity to make representations on the exit package proposed by the Corporation within 14 days. Given that the 14 days have expired and no submissions were received from yourself, the Ministry has found it prudent to conclude the matter on the basis of the Corporation's submissions and the dictates of natural justice.

Accordingly the Minister of Transport and Communications, the Hon Dr S T Mombeshora, has approved that your office be abolished in terms of Rule 47 of the Posts and Telecommunications Pension Fund, and that you be offered the exit package detailed below :

.....

The effective date of termination of the contract is 31 May, 2001".

The applicant did not accept that it was right that his contract of employment

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should be terminated in this manner or at all. On 3 May 2001 he had written to the Secretary of the first respondent and explained why he was not making any representations on the exit packages and generally expressing his unhappiness at the treatment he was receiving from the PTC.

In his founding affidavit the applicant advanced two arguments as to why the termination of his contract of employment was unlawful. The first argument was that the Minister was not empowered to terminate the applicant's contract other than in terms of the Act, *in fine*, s 111 to which I have already referred. The second argument was that if it is accepted that his contract was terminated by the former board of directors of the PTC that board had acted in bad faith as it had no valid reason or other justification to abolish his post except perhaps a desire to victimize him.

The first respondent's position was that the applicant's post of General Manager, Secretariat was abolished "in the year 2000" by the PTC board after an organizational restructuring exercise. It averred further that when the PTC board's term of office expired at the end of February 2000 the Minister had the task of merely advising the applicant that his post had been abolished and of proposing an exit package which he considered to be fair having regard to Rule 47 (2) of the PTC Pension Fund Rules.

The second respondent's position was that if the applicant's post had not been abolished and his contract of employment had not terminated as stated by the first respondent he would have been transferred to its employ. The second respondent averred

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that the applicant was not transferred to its employ because his post had been abolished before any transfer of staff took place. The second respondent thus supported the Minister's averment that the applicant's post was abolished by the PTC board before its terms of office expired. It averred that because of that abolition it was not possible for applicant to have transferred to any of the successor companies. The second respondent accepted that it was its responsibility of the finalizing the applicant's claims against the PTC. In para 5 of the opposing affidavit the second respondent stated that -

"In the light of the fact that the Board had prior to its dissolution approved the abolition of the applicant's post it was not possible for applicant to transfer to a successor company. I deny that after the abolition of his post Applicant ought to have been retrenched or transferred. The correct steps were to follow Rule 47 of the PTC Pension Fund Rules. Tel-One has pursued the latter option and it appears Applicant is not happy with it".

Both respondents share the view that the applicant's post was abolished by the Board of the PTC before its dissolution and that the Minister merely implemented the earlier decision of the PTC Board. It seems to me that with these reasons by the respondents for their opposition to the relief sought by the applicant it is not really necessary to deal with the applicant's second basis for challenging the termination of his contract. The only issue which has to be determined is whether the applicant's employment was lawfully terminated either in terms of the PTC Pension Fund Rules as averred by the respondents or otherwise. The position of the respondents is quite clear. It is that the applicant's contract of employment was terminated in terms of the PTC Pension Fund Rules. The question is whether this was a lawful way of terminating the applicant's contract.

The law with regard to termination of contracts of employment is provided in regulations made under the Labour Relations Act [Chapter 28:02]. It is contained in the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (S I 371/85) and in the Labour Relations (Retrenchment) Regulations, 1990 (S I 404/90). In the particular case of

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employees of the former PTC the law with regard to their treatment is in s 111 of the Act. It seems to me that the Minister and even the PTC Board did not have regard at all to all these laws.

Statutory Instrument 371 of 85 provides that no employer may terminate the contract of employment of any of its employees without the approval or consent of the Minister of Labour unless the employer proceeds in terms of a registered employment Code of Conduct or in terms of the provisions of a fixed term contract of employment upon its expiration. Statutory Instrument 404 of 1990 provides the circumstances and procedures in which employees may be retrenched. In s 111 the Act, as I have already stated, provides that all employees of the former PTC were to be transferred to one or other of the successor companies. The provisions of the Act, of which s 111 is a part, came into operation on 1 September 2000 a long time before the Minister terminated the applicant's contract.

The regulations and the provisions of the Act which I have referred to take precedence over any internal company procedures for terminating contracts of employment. In this case it is quite clear that the first respondent did not comply with Statutory Instrument 375 of 1985 or Statutory Instrument 404 of 1990. Thus whether or not the former PTC Board had abolished the applicant's post, the PTC or any successor company or authority would have had to comply with the provisions of one of the Statutory Instruments above. That was not done and as such the termination of applicant's contract could not have been valid.

It is well worth quoting s 111 of the Act. It reads:

"(1) In this section

'excepted employee' means an employee of the Corporation referred to in subsection (3).

- 2) With effect from the transfer date every person, other than an excepted employee, employed by the Corporation immediately before that date, shall be transferred to the service of the appropriate successor company on terms not less favourable than those enjoyed by him prior to his transfer,
- 3) The Minister shall, as soon as practicable after the fixed date, but not later

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than the transfer date, determine who among the employees of the Corporation employed in the department known as the 'frequency management unit' are necessary for the performance of the functions of the Authority under this Act, and direct the Corporation or appropriate successor company as the case may be, to notify each such employee in writing accordingly.

- 4) Until such time as conditions of service are drawn up by the appropriate successor company and the Authority, as the case may be -
 - a) the terms and conditions of service applicable to employees of the Corporation shall continue to apply to every person transferred to the appropriate successor company as if every such person were still in the service of the Corporation; and
 - b) every excepted employee shall with effect from the transfer date, be transferred on terms not less favourable than those enjoyed by him immediately prior to his transfer".

The position of all employees of the Corporation was secured by this provision.

The provision did not envisage the laying off of any employees upon the establishment of the successor companies. The letters written by the Acting Secretary and the Secretary of the first respondent indicate beyond any doubt that the applicant's contract was terminated because of the reorganization of the PTC into three successor companies. In terms of s 111 of the Act the PTC had no option but to transfer the applicant to one of the successor companies, Tel-One in this case.

I referred to and quoted s 112 of the Act because at the hearing counsel for the first and second respondents submitted that the Minister had acted in terms of that section. They had argued that s 112 (2)(b) empowered the Minister to give directions terminating any contract entered into between the Corporation and any person and that that was what the Minister had done in respect of the applicant. This was a completely misplaced argument and both counsel were correct to concede later during the hearing that this was so. Section 112 is concerned with the Minister's directions which were intended to ensure the proper transfer of assets and liabilities of the PTC. Any directions which he could give under s 112 (2)(a) or (b) would have related only to the transfer of assets and liabilities referred to in subsection (1). The position of employees is covered only by s 111 and not by s 112 of the Act.

To sum up, it must be noted -

- a) that the applicant's contract was not terminated in terms of any regulations made under the Labour Relations Act.

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- b) **The first respondent did not produce any credible evidence that the board of the PTC had abolished the applicant's post, and even if he had, that would still not have made the termination lawful as there was no compliance with the regulations made in terms of the Labour Relations Act.**
- c) The Act envisaged the continued employment of all PTC employees by the successor companies or by the Authority. There is no authority given to anybody to terminate any of the employees' contracts or employment.

It is therefore quite clear that whichever way it is viewed, the applicant's contract was unlawfully terminated.

The applicant sought an order that he be paid his salary and benefits upto the time that his contract is lawfully terminated. That cannot be correct. His contract of employment was a fixed term contract. It was due to expire on 31 May 2002. His claim can only be for the period upto 31 May 2002. The application largely succeeds however and I order that -

1. The respondents shall pay jointly and severally the one paying the other to be absolved, the applicant's full salary and benefits from 1 June 2001 to 30 June 2002.
2. **The respondents shall, in terms of paragraph 1 hereof pay interest at the prescribed rate of interest on each salary or benefit (monetary benefit) from the date when such salary or benefit became due to the date of payment in full.**
3. **The respondents shall pay in terms of paragraph 1 hereof the costs of suit.**

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Gill, Godlonton & Gerrans , applicant's legal practitioners