REPORTABLE (100)

Judgment No. SC 117/02

Civil Appeal No. 300/01

ALFORD RUTUNGA AND ONE HUNDRED AND ONE OTHERS

v (1) CHIREDZI TOWN COUNCIL
(2) TABVANGEI MACHIZO N.O.

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE, SEPTEMBER 5, 2002 & FEBRUARY 18, 2003

C Selemani, for the appellants

J Dondo, for the respondents

GWAUNZA AJA: The appellants were first suspended, and then dismissed, from their jobs with the first respondent. This followed what the first respondent regarded as unlawful collective job action taken by the appellants on 29 and 31 May 2000.

During the period between their suspension and dismissal the appellants filed an application with the High Court for an order: (i) setting aside the letters of suspension served on them and (ii) reinstating them to their jobs without loss of salary or benefits. They also claimed costs against the respondents.

The High Court having dismissed their application with costs, the appellants now appeal against that decision.

The background to the dispute is as follows.

The appellants were employed by the first respondent, which was a part of the Chiredzi Rural District Council until 1 April 2000. With effect from that date, and by virtue of Proclamation No. 3 of 2000 (SI 59/2000), the first respondent was established as a Town Council under the provisions of the Urban Councils Act [*Chapter 29:15*]. The Town Council's affairs have since that date been run by five commissioners pursuant to Proclamation No. 2 of 2000 and SI 60/2000.

I shall refer to the first respondent as the "Council".

At the time that the Council was separated from the Chiredzi Rural District Council, there was tension between the parties arising from the appellants' dissatisfaction with their salaries, and the alleged ill-treatment of them by the Council's administration officer, one Elias Chingoma.

Although this is disputed by the Council, and the appellants have not produced a copy thereof, the appellants aver they wrote a letter dated 4 April 2000 to the Council, indicating their intention to go on collective job action if these two grievances were not addressed. The appellants assert that the threatened collective job action was averted following negotiations that resulted in the Council undertaking

to increase the salaries of the workers and to investigate the grievance concerning the administration officer. According to the appellants, when this latter grievance remained unresolved, they, on 26 May 2000, wrote a letter to the Council, which read in part as follows:

> "Workers are requesting for the stepping down of the A/SEO (Chingoma) from this post, failure to that workers are to go on a peaceful demonstration on 29 May 2000."

Significantly this letter did not make any reference to the alleged earlier communication of 4 April 2000. It has thus not been possible to establish whether the threatened peaceful demonstration was to be held on the strength of that communication or notice.

Be that as it may, and whether one calls it a peaceful demonstration, as the appellants do, or unlawful collective job action, as the respondents do, the appellants, acting in pursuance of their letter of 26 May 2000, duly withdrew their labour for a few hours on 29 May 2000. They assert that as a result of this action they were later that day verbally suspended, with immediate effect.

Neither side has, however, indicated whether, following upon this suspension, the appellants stayed away from work for the rest of that day and the next, i.e. 29 and 30 May 2000.

Although the appellants dispute authoring a further letter to the Council dated 31 May 2000, threatening to withdraw their labour from 8.30 am of the

same day, it is not in dispute that some gathering of the workers took place on that day. The appellants insist the workers had simply gathered to receive their May salaries, while the Council charges that the workers engaged in another unlawful collective job action. The appellants do, in fact, challenge the latter assertion on the technical ground that since they had been suspended from their jobs with effect from 29 May 2000, they could not, on 31 May 2000, have properly gone on any collective job action, lawful or otherwise. I will revert to this issue later.

The Council did indeed address a letter to individual appellants, dated 1 June 2000, which for various reasons I find pertinent to reproduce:

> "RE: SUSPENSION WITHOUT PAY PENDING DISMISSAL: CHIREDZI TOWN COUNCIL WORKERS
>
> The commissioners appointed in terms of section 90 of the Urban Councils Act [*Chapter 29:15*] to run the affairs of Chiredzi Town hereby have resolved to suspend you without pay pending their application to dismiss you to the Ministry of Public Service, Labour and Social Welfare.
>
> The reason and decision for suspending you without pay pending dismissal has been taken following your participation in illegal demonstrations on Monday 29/05/2000 and Wednesday 31/05/2000. Thus you willingly absented yourself from work without any reasonable cause resulting in the Council losing one-and-a-half hours and four hours of production respectively. The action resultantly is tantamount to insubordination, hence (the) commissioners' decision to take the above stated action with effect from Monday 29/05/2000.

Application for your dismissal has already been submitted to the Ministry of Public Service, Labour and Social Welfare." (the emphasis is my own)

The Council also took other action. It duly wrote to the Ministry of Public Service, Labour and Social Welfare for permission to dismiss the striking

workers, but withdrew the letter a few days later, on 6 June 2000, upon realising that the authority sought from the Ministry of Public Service, Labour and Social Welfare was not necessary as the matter could be dealt with in terms of the Urban Councils Act [*Chapter 29:15*]. The Council then commissioned a labour relations officer to conduct a full investigation into the demonstrations. It was the labour relations officer's finding that the work stoppages of 29 and 31 May 2000 constituted unlawful collective job action for want of compliance with the provisions of s 104 of the Labour Relations Act [*Chapter 28:01*].

The appellants aver that on 5 June 2000 another labour relations officer, a Mr Mutero, held meetings with representatives from both sides, after which he made a determination to the effect that the demonstrations were a constitutional matter, and that consequently the suspensions of the appellants were null and void.

I am not persuaded this is a correct representation of that event. I agree with the learned trial judge that the labour relations officer, Mr Mutero, could not have made a determination that the suspension of the appellants was invalid, nor ordered the Council to reinstate them. As correctly observed by the learned trial judge, had the labour relations officer determined the matter in terms of s 93 of the Labour Relations Act, he would have given his determination in writing or filed an affidavit to support the appellants' assertion. No such document was submitted.

While awaiting the outcome of the labour relations officer's investigations, and upon being served with the High Court application the appellants had filed on 16 June

2000, the Council conducted its own investigations. It invited all those workers who had been suspended to attend a hearing to be conducted on 19, 20 and 21 June 2000. Some of the workers attended the hearings while others did not. It is averred that those who did not attend the hearings were of the view that the matter had now been taken out of the Council's hands, since the application which is the subject matter of this appeal had already been filed with the High Court.

After the hearings, the Council resolved to reinstate thirty-six of the one hundred and twenty-six appellants originally suspended. It went on to dismiss the remaining ninety, who are the present appellants. The Council was satisfied, in deciding to take this action, that the thirty-six reinstated employees had either not taken part in the industrial action or had been coerced through peer and other pressure to participate in it.

I agree with the learned trial judge that in this process the probabilities were evenly balanced, that peer pressure was brought to bear on the workers who, after participating in it, later disassociated themselves from the collective job action, and that the same workers who disassociated themselves from the action did so when they were promised reinstatement. This, however, does not alter the fact that the number of applicants, now appellants, was effectively reduced to ninety.

In dismissing the ninety appellants, the Council intimated in its letter of dismissal that, having satisfied itself that the collective job action in question was unlawful having regard to the provisions of subss (2) and (3) of s 104 of the Labour Relations

Act, it was now dismissing the workers "summarily" with effect from the date of their suspension. The Council indicated this was in accordance with s 141(2)(b) of the Urban Councils Act. It indicated further that the workers' engagement in unlawful collective job action constituted an act of misconduct that "in law" justified their discharge without notice.

Even though the summary dismissal had the effect of superseding the affected workers' suspension, they persisted with their application for the setting aside of their suspension. That action elicited the following comments from the learned trial judge:

"The relief which the applicants herein seek is that the suspension letters be declared null and void. It must be emphasised that the applicants persisted in seeking this relief well after the respondent had taken further steps in the matter and actually dismissed them. It was therefore idle for the applicants to persist with this application after their dismissal. They should instead have withdrawn this application and filed another one challenging their dismissal.

> By persisting with this application the impression is created, and rightly so, that the applicants are relying on technicalities relating to their suspension and not on the merits and that they are unwilling and unprepared to deal with their dismissal on the merits. This tends to weaken their case grievously."

I agree with the learned trial judge. The correctness of his sentiments, as expressed in the second paragraph, is borne out by the appellants' contention that their suspension was not "proper" since there was nothing in the record indicating that they had been suspended in terms of the Urban Councils Act. They contend as follows in their heads of argument:

> "The mere fact that the (first) respondent ended up withdrawing the application it had made to the Ministry of Public Service, Labour and Social Welfare is clear testimony that (the first) respondent conceded not to have complied with the mandatory provisions of the Urban Councils Act in seeking to suspend the appellants from employment. Having conceded that these suspensions were not in terms of the Urban Councils Act, (the first) respondent should simply have lifted these suspensions, reinstated the appellants and then sought to suspend them again in terms of the Urban Councils Act. (See *Standard Chartered Bank v Matsika* 1996 (1) ZLR 123 at 133)."

I find no merit in this reasoning.

As correctly contended for the first respondent, s 141(2)(b) of the Urban Councils Act does not require that there be a suspension prior to dismissal. Nor can one read into that section an injunction against the dismissal of a worker who, prior to that dismissal, happened to have been on suspension. I am satisfied that there was no need to "lift" the suspension of the appellants before summarily dismissing them in terms of the Urban Councils Act. The letters of suspension sent to the appellants stated clearly that the Council had resolved to suspend the workers concerned, pending an application to dismiss them, to the Ministry of Public Service, Labour and Social Welfare. The authority that was to be sought from the Ministry of Public Service, Labour and Social Welfare was to dismiss the appellants not suspend them. The suspension was to remain effective until the authority referred to had been obtained. The realisation that such authority was not necessary, and the subsequent withdrawal of the application for it, could not of itself have affected the suspension. Nor did it preclude the taking of other appropriate action by the Council in lieu of that

originally and mistakenly intended, as long as such action could properly inform the decision of whether or not to dismiss the appellants. The action that the Council took was to conduct investigations through its own officials' agency and that of a labour relations officer, Ms Sithole. Having satisfied itself on the unlawfulness of the appellants' action, the Council proceeded to summarily dismiss the appellants in terms of s 141(2)(b) of the Urban Councils Act. That section gives a council the right to discharge an employee other than a senior official "summarily on the ground of misconduct, dishonesty, negligence or on any other ground that would in law justify discharge without notice".

The appellants' ground of appeal that challenges their suspension on the basis that it was done contrary to s 141 of the Urban Councils Act must, therefore, fail.

The appellants challenged their suspension on another ground, that is, that the peaceful demonstration of 29 May 2000 did not constitute collective job action, lawful or otherwise. They do not deny that the demonstration was resorted to as a means of forcing the Council to dismiss from employment one of its senior officials. Having made this concession, it is, in my view, difficult to see how the appellants can distinguish the action they took from collective job action. This is particularly so when regard is had to the following definition of such action, as contained in the Labour Relations Act:

> "an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment and includes strike, boycott, lock-out, sit-in or other concerted action".

The appellants not only took the action they did in order to persuade the Council to accede to their demand that a senior official be dismissed, they also, in the process, withdrew their labour for a few hours on that day.

Having determined that the action taken by the appellants on 29 May 2000 amounted to collective job action, what is to be determined is whether or not it amounted to conduct justifying the action that the Council took, or was unlawful.

Interpreted in terms of s 141(2)(b) of the Urban Councils Act, there can be little doubt that the action taken by the appellants on 29 May 2000 amounted to misconduct. The appellants withdrew their labour for a couple of hours without permission. In addition, those among them engaged in work within the essential services acted in direct contravention of s 104(3) of the Labour Relations Act. Essential services are defined to include health, hospital or ambulance services, as well as supply and distribution of water. It is significant that the appellants in their answering affidavit did not dispute that many of them were engaged in essential services.

The denial that many of the appellants were engaged in essential services was made rather late in the day and from the bar, so to speak, by counsel for the appellants, Mr *Selemani*. The impropriety of such a submission hardly needs mentioning.

In the light of such unlawful conduct, the Council cannot be faulted for having decided to take disciplinary action against the appellants.

The ground of appeal that the action taken by the appellants on 29 May 2000 did not amount to misconduct justifying the action taken by the Council must, therefore, also fail.

The appellants submit that even if interpreted in terms of s 104 of the Labour Relations Act, the action taken by them did not amount to unlawful collective job action, since such action was preceded by proper notice duly given to the respondents. It should be mentioned here that the application of the Labour Relations Act's definition of collective job action to the case at hand is, in my view, proper. As correctly contended for the first respondent, s 3 of the Labour Relations Act provides that the Act shall apply to all employees except those whose conditions of employment are otherwise provided for by and under the Constitution of Zimbabwe. The appellants' conditions of employment were not provided for under the Constitution. Collective job action in terms of the Labour Relations Act can either be lawful or unlawful. Among the reasons that it may be unlawful is that inadequate or no notice of the intention to embark on such action was given to the employer.

It is contended for the respondents that no such notice was given. On their part, the appellants, while alluding to a notice to go on collective job action having been given by them on 4 April 2000, submitted neither a copy of the letter nor any other proof of it having been written, much less received by the Council. The

existence of this letter would have been useful in determining –

(i) whether or not the appellants had given proper notice to the Council of their intention to go on collective job action, as required by s 104 of the Labour Relations Act; and

(ii) whether, despite the undertaking to resolve the wages dispute, which was later not honoured, that notice remained good for the purposes of the alleged unlawful job action.

In the latter respect, the appellants relied on the test enunciated in *Cole Chandler Agencies (Private) Limited v Twenty-Five Named Employees* SC-161-98 to contend that a fresh notice of the collective job action was not necessary since the collective job action was based on the same issues for which notice had been duly given previously. They contend that because the grievance concerning their alleged ill-treatment by the senior Council official had not been addressed despite assurances that it would be attended to, it should be found that the demonstration of 29 May 2000, to the extent that it was regarded as unlawful collective job action, was carried out on the strength of the notice earlier given on 4 April 2000.

I am not persuaded by that argument, given the circumstances *in casu*. What distinguishes the authority cited from the case at hand is that *in casu* the existence and service of the original notice is disputed. The appellants have not helped matters by failing to produce a copy of such notice.

In the light of the Council's denial of the existence of the letter, the

appellants have failed to prove, as indeed the learned trial judge found, that fourteen days notice to embark on a collective job action, as required by s 104(2) of the Labour Relations Act, was given.

The Council's determination that because, among other grounds, no such notice was given, the collective job action was unlawful cannot, under these circumstances, be faulted. As correctly stated by the learned trial judge, it was not for the court to decide whether or not the Council was entitled to rely on the Labour Relations Act for that determination when it was, in the final analysis, taking action pursuant to the Urban Councils Act. It sufficed that the Council properly considered that the collective job action was illegal, and acted accordingly.

This ground of appeal must, likewise, fail.

Two issues invite comment.

The first issue relates to the dispute of fact concerning whether or not the appellants demonstrated unlawfully on 31 May 2000. The learned trial judge was satisfied that the appellants did indeed withdraw their labour on 31 May 2000. He dismissed as "a lame and technical excuse *ex post facto*" the contention by the appellants that they could not, technically speaking, have embarked on a collective job action on that day as they were on suspension following upon a verbal notification to that effect on 29 May 2000.

I am not persuaded that the appellants' contentions are as devoid of merit as the learned trial judge seems to suggest. The letters of suspension sent to all the striking workers by the Council, dated 1 June 2000, clearly stated that the suspension of the workers concerned was with effect from 29 May 2000. The reference to that date would seem to support the assertion by the appellants that the Council had responded to the demonstration of 29 May 2000 by suspending those workers suspected of having taken part in the demonstration, with immediate effect.

What is, however, not clear, because none of the parties made any averments in that respect, was whether or not the appellants reported for work for the rest of 29 and on 30 May 2000. If they did not report for work, the inference can safely be drawn that they took the verbal suspension seriously. If they did report for work, then two things can be assumed – firstly, that they ignored the verbal warning and, secondly, that the first respondent condoned such disregard of the suspension. It is only in the latter event that the appellants could properly be said to have engaged on a collective job action on 31 May 2000. If indeed they did not work for the rest of 29 and the whole of 30 May 2000, their argument that they could, technically, not have engaged in a collective job action when they were on suspension has some merit. In the absence of evidence concerning whether or not the appellants reported for work after the alleged verbal suspension, I am not persuaded this dispute of fact could be resolved on the papers before the court. It is for this reason that I have been careful in this judgment not to refer to the action of 31 May 2000 as justifying the suspension of the appellants from their jobs.

This has, however, not affected my final determination of this matter since I am satisfied that, on its own, the action taken on 29 May 2000 by the appellants was unlawful and merited disciplinary action on the part of the Council.

The second issue relates to the relief sought in the application in the court *a quo* and in this appeal. The appellants chose to persist with their claim for the setting aside of their suspension, irrespective of the fact that by the time the matter was heard they had already been dismissed. I have determined, as did the learned trial judge, that the suspension of the appellants was lawful. The appellants, as correctly contended for the first respondent, have really not challenged their dismissal beyond asserting that such dismissal was null and void *ab initio* because it followed a defective suspension, that is, one effected in terms of the Labour Relations Regulations. I have already indicated I find no merit in this argument. As has already been said, s 141 of the Urban Councils Act, in terms of which the appellants were dismissed, does not require that the summary dismissal be preceded by suspension of the worker concerned. Effectively, therefore, the appellants have not challenged the procedure adopted by the first respondent to dismiss them in terms of s 141 of the Urban Councils Act.

In the light of the foregoing, I am satisfied that the suspension of the appellants from their jobs was justified and properly effected. The appeal must accordingly fail.

I therefore make the following order –

"The appeal is dismissed with costs".

SANDURA JA: I agree.

CHEDA JA: I agree.

Muzenda & Maganga, appellants' legal practitioners

Bere Brothers, respondents' legal practitioners