REPORTABLE (11)

Judgment No. SC. 8/05

Civil Appeal No. 62/04

NATIONAL RAILWAYS OF ZIMBABWE v

(1) ZIMBABWE RAILWAY ARTISANS UNION
(2) RAILWAYS ASSOCIATION OF ENGINEMENT
(3) ZIMBABWE AMALGAMATED RAILWAYMENT UNION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA
HARARE, JANUARY 17 & MAY 16, 2005

E T Matinenga, for the appellant

T Biti, for the respondents

ZIYAMBI JA: This is an appeal from a judgment of the Labour Court. It raises three points of law, namely –

(a) Whether the participants in an unlawful job action are entitled to receive payment of their salaries for the period during which their labour was withheld from their employer;

(b) The jurisdiction of the Labour Court to entertain an application for an interdict; and

(c) The interpretation of court orders.

It is common cause that members of the respondents embarked upon a

collective job action towards the end of August 2003. On 4 September 2003 the Labour Court issued a disposal order by consent of the appellant and the respondents. The order was issued in the following terms:

> "(i) That in the event that any employees persist with the Collective Job Action in defiance of the Collective Bargaining Agreement the applicant (i.e. the National Railways of Zimbabwe) reserves the right to deal with them in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*];
>
> (ii) That each party is to bear its own costs."

Withholding of Salaries and Wages

At the end of October 2003 the appellant did not pay the employees for the period during which they participated in the collective job action. As a result, the respondents brought an urgent application in the Labour Court seeking the following order:

> "1. The respondent (i.e. the National Railways of Zimbabwe) be and is hereby interdicted forthwith from making any deductions or set offs against the salaries and wages of its employees consequent to the collective job action of 25th of (*sic*) 28th August 2003 until a competent court has ruled otherwise.
>
> 2. In the event that the respondent has already done its payroll, the respondent be and is hereby ordered to reverse any and all such deductions or set offs either electronically or manually to enable its employees to receive their full entitlements on their salaries and wages on the 28th of October 2003. …"

The Labour Court gave its judgment on 13 February 2004. It took the

view that it was being required to interpret its order – the disposal order. It did so and concluded:

> "I agree with the applicants' (now the respondents) interpretation of the first term of the Disposal Order. The term is quite clear and unambiguous.
>
> For the respondent (now the appellant) to invoke the provisions of s 107(3)(a) in general and in particular subpara (i) there must have been persistence on the part of the applicants' members with the Collective Job Action after its termination on the 29th August 2003. In the absence of any persistence, the respondent did not have a right to make any deductions from the applicants' members' salaries."

It ruled:

"In the result, the application is granted with costs. The respondent is hereby ordered to reinstate the salaries and wages it deducted from the applicants' members' October salaries."

The appellant contended before us, as in the court below, that the salaries were withheld on account of no work having been done and that this had nothing to do with the disposal order, which was a separate matter altogether.

A close look at the wording of para (i) of the disposal order reveals that it authorises the employer to take certain action against the employees should they persist in the collective job action, that is, should they continue with the job action after the date of the order. In the event that such collective job action was not continued after the date of the order, the right conferred on the employer to take

action in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*] ("the Act") fell away. The order dealt with the future action of the employees.

The disposal order did not, however, deal with the actions of the employees prior to the date of its issue, namely their actions in engaging in an unlawful collective job action. In connection with the latter, the finding by the Labour Court that:

> "By agreeing to invoke s 107(3) it can correctly be concluded, though there was no declaration to that effect, that the parties were agreeing that the Collective Job Action was illegal",

has not been challenged.

With regard to illegal collective job actions, s 107(3) of the Act provides as follows:

> "(3) Without derogation from the generality of the powers conferred upon the Labour Court in terms of subsection (2) to make a disposal order, such order may provide for –
>
> (a) in the case of an unlawful collective job action other than a lock-out –
>
> (i) discharge or suspension of an employer's liability to pay all or part of the wages or benefits due to specified employees or categories of employees engaged in the unlawful collective job action, in respect of the duration of such collective job action or part thereof;

(ii) the employer, in his discretion, to dismiss summarily, or lay off or suspend with or without pay, specified employees or categories of employees engaged in the

unlawful collective job action;

(iii) the lay off or suspension, with or without pay, of specified employees or categories of employees not engaged in the unlawful collective job action for such period as may be specified where such lay off or suspension is necessitated by the collective action;

(iv) the dismissal of specified employees or categories of employees engaged in the unlawful collective job action;

(v) the prohibition of the collection of union dues by any trade union concerned for such period as may be specified;

(vi) the suspension or rescission of the registration of the trade union involved in the collective job action;

(b) in the case of an unlawful collective job action consisting of a lock-out –

(i) where wages or benefits due to employees have been withheld or suspended, the payment of such wages or benefits;

(ii) the resumption of the normal operations of the undertaking concerned;

(iii) where any employees have been laid off, suspended or dismissed, the reinstatement of such employees with all necessary wages, compensation and other

related benefits;

(iv) the suspension or dismissal of specified managerial employees who are responsible for or have provoked, or contributed to, the lock-out."

At common law the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do. Thus, in *The Law of Master and Servant in South Africa* by Norman Scoble at p 203, the author states:

> "The legal obligation of an employer to pay wages is dependent entirely on the servant having performed his part of the contract in rendering the services stipulated for by the parties. The basis is 'no work no pay' (unless the master is to blame for failing to provide any work for the servant to perform) (*Vadasz v Cohen*, 1993 TPD 100)."

See also Christie *Business Law in Zimbabwe* pp 310-311.

The common law position as set out above is restated in s 108(4) of the Act, which provides as follows:

> "An employer is not obliged to remunerate an employee for services that the employee does not render during the lawful collective job action except where the employee's remuneration includes payment in kind by way of accommodation, the provision of food and other basic amenities of life, in which event the employer shall not discontinue such payment in kind unless the employee declines such remuneration:
>
> Provided that, at the conclusion of the collective action, the employer may recover the monetary value of such remuneration by action instituted in the Labour Court."

Thus, an employee who participates in a lawful collective job action is not entitled to his salary unless that remuneration was being paid in the form of services, in which case the remuneration must be paid but may be recovered by the employer by action instituted by him in the Labour Court for this purpose. The point being made here is that the striking employee is not entitled to remuneration even where the "strike" is lawful.

What the appellant did in this case was to withhold salaries from the respondents who had engaged in an unlawful collective job action. The principle is the same – no work no pay. If a participant in a lawful collective job action is not entitled to his salary, then even more so should a participant in an unlawful collective job action have no entitlement to salary. There is a presumption that the legislature does not intend a departure from the common law – see Devenish *Interpretation of Statutes* 1 ed at pp 159-160.

The interpretation sought to be placed on s 107 of the Act by the respondent would, apart from giving rise to an absurdity when regard is had to the provisions of s 108(4) *supra*, amount to a departure from the time-honoured legal principle that the legislature is presumed not to depart from the common law unless it expressly legislates against it.

Accordingly, the appellant was well within its rights when it withheld payment from the respondents' members for the period during which they had not

worked.

On this basis alone the appeal can be upheld.

The Application for an Interdict

It was contended by the appellant that the Labour Court erred in dismissing the point *in limine* raised by the appellant, namely, that the Labour Court had no jurisdiction to entertain an application of this nature, which was for an interdict. The Labour Court dismissed the point *in limine* on the basis that in terms of s 89(1)(a), as read with s 89(2)(d), of the Act, it was empowered to hear the application.

There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of s 89 of the Act, endowed with jurisdiction to entertain all applications brought before it.

Section 89(1)(a) of the Act provides:

"(1) The Labour Court shall exercise the following functions-

a) hearing and determining applications and appeals in terms of this Act or any other enactment;". (emphasis added)

Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to

bring. See *PTC v Zvenyika* SC 108-04. In that case, it was pointed out that an application brought in terms of s 93(7) of the Act would correctly be termed an application "in terms of this Act".

Section 92C of the Act, (which provides for applications for rescission or alteration by the Labour Court of its own decisions) is a further example of an application that can be brought in terms of the Act.

Section 89(2)(d) of the Act, in my view, emphasises the point sought to be made. It provides that the Labour Court may -

> "(d) in the case of an application other than one referred to in paragraph (b) or (c), or a reference, make such determination or order or exercise such powers as may be provided for in the appropriate provision of this Act;" (emphasis added).

Thus, the application and the remedies obtainable thereby must be authorised in the Act or the enactment authorising the application to the Labour Court.

Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a quo,* nor have I been referred to any enactment authorising the Labour Court to grant such an order.

Accordingly, the court *a quo* was wrong in dismissing the point raised *in limine*.

Interpretation of the Disposal Order

The third ground of appeal raised by the appellant was that the court erred in entertaining the application on the basis that it was an application to interpret its order.

This was not an application for an interpretation by the Labour Court of its order. It was an application for an interdict based on the respondents' interpretation of the disposal order granted by the Labour Court.

Even assuming, however, that the application was one in which the court was being asked to interpret its order, the court was obliged to apply the basic principles of interpretation and could not ascribe to the order a meaning beyond its plain and ordinary meaning.

What the Labour Court ordered by consent was a termination of the collective job action and, in doing so, gave guidelines to the appellant (the employer) as to its future conduct in response to members of the respondents who flouted the consent order.

No mention was made in the order of the appellant's right (or lack of it) to withhold payment from those respondents who had participated in the collective job action. When the appellant did withhold payment from the striking respondents, it was within its rights, as I have demonstrated above, to do so. It was not acting in defiance or contempt of the Labour Court's order, because there was no order directing it to pay salaries to the participants in the collective job action for the period

during which they participated therein.

The Labour Court, in ordering as it did, *supra,* did not merely interpret its order. It ascribed an interpretation to the order that not only altered "the sense and substance" thereof but contradicted the plain meaning of the order. This it cannot do. See Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 686 where the authors state as follows:

> "The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus* officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases."

In the result, the appeal is allowed with costs. The order of the court *a quo* is altered to read:

"The application is dismissed with costs".

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners