

DISTRIBUTABLE (1)

Judgment No. 1/2012
Civil Appeal No. SC 99/11

AMERICAN FRIENDS SERVICE COMMITTEE
v IRENE CHAUKE

SUPREME COURT OF ZIMBABWE
GARWE JA, OMERJEE AJA & GOWORA AJA
HARARE, JANUARY 16, 2012

D Ochieng, for the appellant
L Zinyengere, for the respondent

GARWE JA: This is an appeal against the decision of the Labour Court confirming a determination by an arbitrator that there existed an employer/employee relationship between the appellant and the respondent and awarding damages to the respondent for unlawful termination of the contract of employment.

Although in its notice of appeal the appellant has stated a number of grounds of appeal it attacks the decision of the Labour Court on two bases. The first is that the court *a quo* misdirected itself in coming to the conclusion that a contract of employment existed between the two parties and the second is that the court *a quo* erred in confirming the award of damages made by the arbitrator.

Although inelegantly worded, the first and second grounds of appeal raise one issue. That issue is whether the court *a quo* misdirected itself in coming to the conclusion that, on the facts, the respondent was an employee of the appellant. I therefore consider that the issue is not simply one of fact as suggested by the respondent and that the appeal is properly before this Court.

The facts of this case are largely common cause. There is no need to restate them in any detail. The respondent was initially employed by the appellant on fixed term contracts until September 2007. It is common cause after this period she continued to render services to the appellant. Her employment was extended on several occasions until June 2009 when it was terminated. At the time of termination she had been on a monthly salary of US\$1 500 and was required to work five (5) days per week and eight (8) hours per day. The respondent was also required to carry out the functions of office co-ordinator and programmer and was also required to report on her activities to the regional office based in South Africa.

On a careful consideration of these and other facts I agree that the court *a quo* did not misdirect itself in coming to the conclusion that the respondent was an employee of the appellant. That ground of appeal must fail.

The second issue for determination is whether or not the court *a quo* misdirected itself in confirming the award made by the arbitrator on the quantum of damages due to the respondent. The record shows that there was no evidence upon which

the arbitrator based his award other than an unsubstantiated statement of claim by the respondent. The Labour Court accepted the claim on the basis that the appellant had not opposed it.

There can be no doubt that the Labour Court fell into error in coming to this conclusion as it is settled law that damages in these circumstances must be properly proved by the party seeking the same. Indeed, Mr *Zinyengere* for the respondent did concede that both the arbitrator and the court *a quo* had erred in this respect.

Accordingly, this ground of appeal must succeed.

In view of the fact that there is need for the quantum of damages to be properly proved, the issue ought to be remitted to the court *a quo* for determination after evidence has been adduced.

On the issue of costs it seems to me that since the appellant has only been partially successful, each party should be made to meet its own costs.

Accordingly, it is ordered as follows:

1. The appeal succeeds to the extent that the award of damages be and is hereby set aside.
2. The matter is remitted to the court *a quo* for the quantification of damages to be done after evidence has been adduced.

3. Each party is to pay its own costs.

OMERJEE AJA: I agree

GOWORA AJA: I agree

Coghlan Welsh & Guest, applicant's legal practitioners

Mutumbwa, Mugabe & Partners, respondent's legal practitioners