

REPORTABLE (3)

ZIMBABWE REVENUE AUTHORITY
v
CHESTER MUDZIMUWAONA

SUPREME COURT OF ZIMBABWE

CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA

BULAWAYO, 28 JULY 2014

T. Magwaliba, for the appellant

C. Mucheche, for the first respondent

GOWORA JA: This was an appeal against the whole judgment of the Labour Court delivered on 17 May 2012. After perusing the record and hearing the submissions of the parties, this Court allowed the appeal and indicated that the reasons would be availed in due course. The following are the reasons for the order.

The facts arising in this matter are that in 2002, the respondent was employed by the appellant as a Revenue Trainee on a fixed term contract of three years. It specifically stated the following:

“upon successful completion of the probation period the employment contract shall run for a further period of 24 (twenty-four) months after which the authority , may at its sole discretion offer you permanent employment on such terms and conditions as determined by it at the time.”

The literal meaning of that clause is that the respondent’s contract was subject, first to the successful completion of the probation period and then would terminate at the end of 36 month.

In 2005, the respondent was based at the Beitbridge Border post and was charged with failing to uphold ethical and professional standards of behaviour within the workplace as well as carrying out an act inconsistent with the express or implied conditions of the contract of employment. He was arraigned before a disciplinary committee and was found guilty of both charges. He was as a consequence dismissed from employment. He appealed to the appeals committee without success.

The respondent appealed against that decision to the Labour Court which upheld the appeal and held that the he had been unlawfully dismissed. The court *a quo* ordered the appellant to reinstate the respondent without loss of salary or benefits and, in the event that reinstatement was no longer tenable, to pay damages in *lieu* of reinstatement. This decision was not appealed against. Instead, the parties decided to negotiate the *quantum* of damages but failed

to agree resulting in the respondent applying to the Labour Court for quantification. He claimed that when he was dismissed he had not completed his training period but it was common cause that he was going to continue with his job after training and thus he was entitled to compensation as if he was a permanent employee. The appellant opposed the quantification on the basis that the respondent was employed on a fixed term contract and he had failed his examinations and thus the contractual relationship would have ended at the expiry of the 36 months provided in the contract. The Labour Court ruled in favour of the respondent and ordered the appellant to pay:

- (a) US\$ 19 740.16 as back-pay and benefits
- (b) Twelve (12) months' salary that the respondent would have earned in August 2011 minus US\$150.00 earned by the respondent per month for a period of twelve months.

The appellant was aggrieved by the decision and with the leave of this court has appealed the order of the court *a quo*. It is criticized for the following reasons:

- failing to put due weight to the fact that the respondent was employed as a Revenue Trainee on a fixed term contract of 36 (thirty six) months.
- failing to give proper weight to the fact that when the respondent was dismissed he was left with a period of 6 (six) months before expiration of the contract.
- failing to give proper weight to Clause 1.3 of the Zimbabwe Revenue Authority offer of employment which provides that permanent employment could only be offered at the sole discretion of the appellant.
- failing to give proper weight to the submission that even if the respondent had not been dismissed, he would not have been offered permanent employment as he had failed two (2) core courses in November 2004 and supplementary exams in 2005.

- failing to distinguish between a permanent employee and an employee on a fixed term contract in its quantification of damages, especially after finding that the respondent did not have a legitimate expectation to be offered permanent employment.
- in finding that the respondent's entitlement to damages accrued up to the date of the court's judgment.
- in failing to deduct the US\$150.00 earned by the respondent per month for a period of twelve (12) months from the total amount awarded as back pay and benefits.
- in failing to appreciate that the respondent could have easily obtained alternative employment within a period of six (6) months.
- in rejecting the evidence of the appellant's expert witness on the factual issues and accepting that of the respondent and his witness on unclear grounds.

The respondent raised three preliminary objections to the appeal. The objections were respectively that, the notice of appeal did not state the correct date of judgment, the grounds of appeal were not clear and concise and, lastly, that the grounds of appeal did not raise questions of law. The respondent abandoned the first objection after conceding that the notice of appeal in point of fact reflected the correct date of judgment.

The other two points were dismissed by the court. Quite apart from the fact that in mounting the objections, the respondent sought to rely on the Supreme Court Rules, 1964 which are not applicable to appeals from the Labour Court, in attacking the grounds of appeal, the point that the grounds of appeal were not clear and concise had no merit. The respondent was unable to

show to this court in what way the grounds of appeal were not clear and concise. The grounds set out by the appellant may have been inelegantly drafted but they articulate the basis upon which the appeal is founded.

Regarding the point taken that the grounds of appeal were not on a question of law, the court was of the view that the point was improperly taken. The issue of what is a question of law has been addressed in a plethora of cases. See for example, *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) and *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

The respondent submitted that the appellant should have expressly stated in its grounds of appeal that the factual findings of the court *a quo* are gross as to amount to a question of law. In *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01, MUCHECHETERE JA (as he then was), at page 5 to 6 of the cyclostyled judgment, said:

“An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.”

These remarks were qualified by GARWE JA in *Zvokusekwa v Biita Rural District Council* SC-44-15 as follows:

“In my view, the remarks made in Granger’s case (*supra*) need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner.”

The essential principle outlined above is that regard must be had to the substance of a ground of appeal as opposed to its form in order to determine whether it raises a question of law. The court was of the view that the grounds of appeal raised by the appellant in essence attacked the alleged failure by the court *a quo* to consider relevant facts which failure led to an error at law. The grounds complied with the requirements of s 92F of the Labour Act [Chapter 28:01] and therefore the point *in limine* was dismissed.

On the merits the issues which are pertinent in the determination of the appeal are the following:

- (a) Whether or not the court *a quo* correctly applied the principles on fixed term contracts;
- (b) Whether or not the respondent had a legitimate expectation of being offered employment on a permanent basis;
- (b) Whether or not the court drew a distinction between a permanent employee and one on a fixed term contract in its quantification of damages; and
- (c) Whether or not the court grossly misdirected itself in respect of the factual findings it arrived at on the evidence presented.

It was the appellant's contention that the court *a quo* erred in law by quantifying damages as if the respondent was a permanent employee prior to his dismissal, yet it is clear from the contract of employment that he was on a fixed term contract. One of the first categorical statements on the assessment of damages for unlawful dismissal was enunciated by GUBBAY CJ in *Gauntlet Security Services v Leonard* 1997 (1) ZLR 583 (S) in which he said:

“The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his Contract by the employer. He may also be

compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach.”

The remarks by the learned judge show that in assessing damages for unlawful termination of an employment contract, the court has to place the employee in the position he would have been save for the premature termination of the contract. This is in line with the object of damages which is to place a party in the position he or she would have been save for the premature termination of the contract . This position was aptly captured in *Goedhals v Graaff-Reinet Municipality* 1955 (3) S.A 482 in which HALL J, at 487C-E said;

“The general principle upon which damages are to be assessed was laid in *Victoria Falls and Transvaal and Power Co. Ltd v Consolidated Langlaate Mines Ltd* 1915 A.D. at p 22, where it is stated that, so far as possible, the person injured must be placed in the same position as he would have been if the contract had been performed. On this principle it appears to me that the question which the trial court would have to decide in order to assess damages in this case is what would the opportunity of finding water be worth to the plaintiff under the circumstances of the case.”

What is derived therein is that damages are awarded for what can be termed as expectation loss. There was no dispute between the parties regarding the nature of the respondent’s contract of employment with the appellant. Thus his status was never in issue. His was a fixed term contract. Further, it was not in dispute that when he was dismissed his contract only had six months before it was due to expire.

Mr *Mucheche* conceded, properly in my view, that a distinction had to be drawn between reinstatement to a contract without limit of time and one that was of fixed duration. He however, detracted from this concession by submitting that there should be no distinction between

the two when considering consequential damages arising out an unlawful termination of a contract of employment.

In casu, the contract of employment signed by the parties as outlined above, was for a duration of 36 months, which point was conceded by the respondent. This means that the relationship between the parties was expected to expire on the last day of the 36th month. The appellant submitted that based on the principles of law that one is compensated for the loss he suffered as a result of the breach, the respondent was entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of the contract. This is the correct position. Damages for unlawful termination in relation to an employee who was on a fixed term contract ought to be calculated in relation to unexpired period of that contract. This position is fortified in *Myers v Abramson* 1952 (3) SA 121 (C) in which, in relation to damages for breach of a fixed term contract of employment, the court stated the following:

“The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.’ (at 127 D-E).”

The standard in *Myers v Abramson* intimates that an employee will be entitled to his proven actual damages, which is the loss of income for the unexpired period. The court *a quo* awarded the respondent damages in *lieu* of reinstatement for a period of 12 months yet the remaining period was six months. The court *a quo* failed to take cognisance of the fact that damages in lieu of reinstatement, are in fact, a substitute of reinstatement. The question that ought to have exercised its mind is; if the respondent were to be reinstated, what would be the period of

his engagement in terms of the contract? The answer is obviously six months because it is clearly stated in the contract that it was for the duration of 36 months.

The court also accepted the appellant's reasoning that the court *a quo* in making the order it made, actually created a new contract for the parties. That was a violation of the principle of sanctity of contracts. In *Book v Davidson* 1988(1) ZLR 365(S), the sanctity of contracts was discussed as follows:

“There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts ... If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract ... to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.”

The above dictum shows that the principle of sanctity of contracts confines the court only to interpreting a contract and not creating a new contract for the parties. It entails that the court should respect the contract made by the parties and give effect to it.

The dispute between the parties does not and cannot extend beyond the life span of the contract. Clearly, the court *a quo* misdirected itself in extending the dispute beyond the life of the contract. If a contract is for a fixed term it automatically expires at the end of the specified period unless the parties thereto mutually agree to its termination. So too do any obligations entered into for performance by the parties to the contract. By accepting that the dispute of the parties did not extend beyond the life of the contract, Mr *Mucheche* was in effect conceding that there was no

place for a claim for consequential damages. Such claim could only properly arise if there was a legitimate expectation that the respondent would be offered permanent employment, which was never the contention.

What is at issue is the computation of damages for the unexpired period of the contract. In terms of clause 3.1 of the contract the appellant had the sole discretion in deciding whether or not to offer the respondent a permanent position. When the respondent was dismissed the appellant had not exercised that discretion. As a consequence the court a quo ought to have given effect to that clause. Its failure to do so meant that it was extending the period of the contract on its own volition contrary to the wishes of the parties as expressed in the contract. It was therefore a serious misdirection on its part to award damages for a period beyond the date of termination as stipulated in the contract. The court a quo completely ignored the agreement that had been entered into between the parties which stipulated the duration of the relationship between the parties.

It should also be noted that in the absence of a finding that the respondent had a legitimate expectation that he would be given a permanent contract, there was no justification for the method it used to quantify damages. The respondent had not completed his training period at the time that he was dismissed and he had failed two core courses which he resat for examinations in 2005 and failed. He would only be competent to be employed on a permanent basis after successfully completing the training. Paragraph 9 of the Zimbabwe Revenue Authority Staff Training and Development Policy provides:

A Revenue Trainee who fails to successfully complete level 2 and has a negative mentor's report will have his/her contract of employment terminated at the end of the prescribed traineeship period. However, in exceptional cases or on recommendation by a mentor/supervisor, he/she may be given one chance to re-sit the failed subject.

He did not deny that he had rewritten the required examinations and that he had failed a second time. His explanation upon being shown the examination scripts was that he had forgotten having written the said examinations. Against these clear admissions it was therefore a serious misdirection on the part of the court to accept a contention from the respondent that he had only seen the 2005 examination scripts for the first time in court when the appellant produced them. From what is stipulated in the policy, it is clear that the respondent's employment would have been terminated at the end of the 36 months because he had failed the examinations.

There was no basis upon which the respondent could have at law been entitled to more than what he would have earned during the unexpired period of his contract with the appellant and thus there was no legal basis upon which the court *a quo* made the order it did. It is for the above reasons that we allowed the appeal and made the following order:

1. The appeal be and is hereby allowed with costs.
2. The order of the Labour Court is set aside and the following is substituted:
 - (a) The appellant shall pay the respondent the amount of US\$1 470.00 as back-pay and benefits less US\$900.00 earned by the respondent from informal jobs over a period of six months.

CHIDYAUSIKU CJ (Deceased) I agree

MUTEMA AJA (Deceased) I agree