

REPORTABLE (37)

EASTERN HIGHLANDS PLANTATIONS
v
FARAI MAPETO & 136 OTHERS

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & GUVAVA JA
HARARE, MARCH 28 2014

C. Maanda, for the appellant

No appearance, for the first respondent

T. Mapangure, in person

S. Mwatsiya, in person

No appearance, for rest of the respondents

GOWORA JA: After reading papers filed of record and hearing counsel in this matter we allowed the appeal with costs, set aside the judgment of the court *a quo* and remitted the matter for a determination on the merits. We indicated that our reasons for judgment would be available in due course. These are they.

The appellant is a tea grower and owns a vast plantation in Honde Valley in the Eastern Highlands. Perforce it has a huge workforce due to the nature of its activities. The respondents were employed by the appellant in various capacities.

On dates extending from 16 to 22 October 2001 the entire workforce which included the respondents took part in an illegal strike. The appellant sought and was granted a

disposal order in terms of s 106 of the Labour Relations Act [*Chapter 28:01*], (now repealed).

In issuing the disposal order the Labour Officer noted as follows:

- a) The six day strike by Eastern Highlands Plantation Limited workers was illegal and, that
- b) The employer reserves the right to pay or not pay for the days the employees were on strike and, that
- c) The employer reserves the right to institute disciplinary measures against the employees.

On 12 November 2001, before the appellant had instituted any disciplinary measures in respect of the illegal strike in October, the employees again went on strike. The strike was destructive. Two company vehicles were burnt. A guest house, club house and plantations were also burnt in the melee. Three company houses were looted and damaged.

The matter was referred to another Labour Officer who made a determination that the collective job action was illegal. Again the Labour Officer determined that the appellant had the right to pay or not pay for the days on which the employees were on strike, and further to institute disciplinary measures against the employees.

The appellant attempted to institute disciplinary actions against the employees in accordance with its Code of Conduct. The workers committee that assumed office after the strike refused to take part. In terms of s 101(6) of the repealed Act, where a matter has not been determined within thirty days of the notification of alleged breach of a code of conduct, the employee or employer, as the case may be, may refer such matter to a labour officer. As a consequence of the refusal by the workers committee to participate in disciplinary

proceedings, the appellant had no choice but to refer the matter to a labour officer in terms of s 101(6) aforesaid. Pursuant to such referral, the appellant sought permission in terms of s 2(2) of the Labour Relation Disciplinary (Regulations) S.I 371/85(repealed) to terminate the contracts of employment of the affected employees.

The matter was assigned to a labour officer B. Runhare for determination. He then caused notifications to attend hearings to be issued and served on the first respondent and 136 others on the following charges:-

- “(i) inciting and/or participating in an illegal strike from 16 to 22 October 2001, in terms of Section 104 of the Labour Relations Act [*Chapter 28:01*],
- (ii) conduct inconsistent with the fulfilment of the express or implied conditions of your contract of employment contrary to Table A (1) of the Code of conduct in that there was an unlawful detention of four managerial employees by the involved employees.
- (iii) absence from work for more than five or more consecutive days without reasonable cause contrary to Table A (6) of the Code of Conduct.
- (iv) fighting/violence at work contrary to Table A (10) of the Code of Conduct in that a watchman Shepherd Bonzo was assaulted on 16 October 2001.
- (v) wilful and unlawful destruction of employers properly property contrary to Table A (3) in that on 12 November 2001 they participated in the damage or destruction of employers property worth millions of dollars during an illegal strike.”

The employees were divided into two separate categories. The first group of 45 comprised committee members in the employ of the company. The rest, 93 of them, were considered as the ringleaders of the strike action.

The respondents were charged individually. They were summoned to the hearings individually and on separate days. All were served with notices to attend the hearings. Some attended, others defaulted. Of those who attended, the matters were heard on the merits of the dispute. Evidence was led and they were duly convicted as charged. The ones who defaulted were convicted in *absentia*. The Labour Relations Officer gave the appellant permission to dismiss all the respondents.

The respondents were unable to appeal their convictions due to the amendment and repeal of the Labour Relations Act. The matter was, as a result, referred to conciliation. At conciliation both parties agreed that the matter be referred to compulsory arbitration. V Musola was appointed as arbitrator.

The arbitrator found that the respondents had participated in an illegal strike. He confirmed that both collective job actions were illegal. He accepted that the entire workforce participated in the strike extending from 16 to 22 October 2001. He confirmed that property worth millions of dollars was destroyed in the strike that took place on 12 November 2001. The arbitrator found that there was no evidence indicating the specific acts perpetrated by each of the employees in the orgy of violence that characterised the strike of 12 November 2001. The arbitrator found that the appellant's action in charging the respondents only was a selective blanket dismissal given the fact that the whole workforce had participated in the strike.

He however refused to uphold the decisions to have the respondents dismissed from their employment with the appellant. Instead the arbitrator issued an award in the following terms:

“Having considered all the evidence of the parties, I hereby find that the dismissal of F. Mapeto and 137 others was unfair. I accordingly order that F. Mapeto and 137 others be reinstated by Eastern Highlands Plantation Limited into their former positions on the same terms and conditions that existed prior to their dismissal, with such reinstatement to take effect from date of dismissal. Alternatively, Eastern Highlands Plantation Limited is ordered to pay F. Mapeto and 137 others their pay and benefits up to the date of the award, to pay three months’ notice, leave days and two months’ salary for each year of completed service as damages.”

The appellant was aggrieved by the award and appealed to the Labour Court.

The grounds of appeal were the following:-

- i) The arbitrator wrongly based his decision on charges related to violence thereby excluding the other charges laid against the respondents;
- ii) The arbitrator wrongly found that the appellant waived the right to discipline the respondents when it sought to punish them by withholding wages for the period of the strike;
- iii) The arbitrator wrongly held that the appellant sought a selective application of the law by excluding other employees involved in the collective job action; and
- iv) The arbitrator erred in finding that the dismissals were a blanket dismissal rather than individual dismissals, based on the case against each respondent.

In its consideration of the appeal, the Labour Court had regard to the disciplinary proceedings conducted by B. Runhare. The court found that Runhare had considered the cases against the respondents in the two categories referred to earlier in the judgment. Even though the court accepted that the matters were dealt with according to the

categories, it was nevertheless the finding of the court *a quo* that Runhare had dealt with the matter globally on the basis of the categories and that he did not consider each of the cases on its own merits. On that basis the court *a quo* came to the conclusion that the arbitrator was correct in finding that Runhare had ordered a blanket dismissal of the respondents. The court said:

“... Yet it is clear that some deserved dismissal whilst others did not. Some fell out of the picture by resignation like David Anderson. Runhare failed to give sufficient consideration to each employee’s case. On that basis, I consider that the Arbitrator’s finding that there were blanket dismissals was justified. However the order to reinstate all the respondents works unfairly in this case as the appellant was forced to reinstate some respondents who should have remained dismissed. I shall remit the matter to the arbitrator for a reconsideration of the case against each individual employee. In other words the arbitrator shall do what Runhare should have done.”

Consequent to this finding the court *a quo* set aside the award by V. Musolo and remitted the matter to the arbitrator for a determination of the matter based on the individual acts of misconduct as alleged in respect of each employee. Each party was ordered to pay its own costs.

This appeal is against the order of remittal to the arbitrator by the court *a quo*.

It was contended that in considering an appeal under s 89 of the Labour Act [Chapter 28:01], (“the Act”), the court *a quo* did not have the power to remit a matter to an arbitrator. It was argued that this power could only be exercised in terms of s 93 of the Act.

Section 89(2) provides for the powers that the Labour Court may exercise in the performance of its functions under the Act. The subsection reads:

2. “In the exercise of its functions, the Labour Court may—
 - (a) in the case of an appeal—
 - (i) conduct a hearing into the matter or decide it on the record; or

- (ii) confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order; or
- (iii)repealed
- (iv).....repealed
- (b) in the case of an application made in terms of subparagraph (i) of subsection (7) of section *ninety-three*, remit it to the same or a different labour officer with instructions directing that officer to attempt to resolve it in accordance with such guidelines as it may specify;
- c) in the case of an application made in terms of subparagraph (ii) of subsection (7) of section *ninety-three*, make an order for any of the following or any other appropriate order—
 - (i) back pay from the time when the dispute or unfair labour practice arose;
 - (ii) in the case of an unfair labour practice involving a failure or delay to pay or grant anything due to an employee, the payment by the employer concerned to the employee or someone acting on his behalf of such amount, whether as a lump sum or by way of instalments, as will, in the opinion of the Labour Court, adequately compensate the employee for any loss or prejudice suffered as a result of the unfair labour practice;
 - (iii) reinstatement or employment in a job:

Provided that—

- (i) any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment;
- (ii) in deciding whether to award damages or reinstatement or employment, onus is on the employer to prove that the employment relationship is no longer tenable, taking into account the size of the employer, the preferences of the employee, the situation in the labour market and any other relevant factors;
- (iii) should damages be awarded instead of reinstatement or employment as a result of an untenable working relationship arising from unlawful or wrongful dismissal by the employer, punitive damages may be imposed;
- (iv) insertion into a seniority list at an appropriate point;
- (iv) promotion or, if no promotion post exists,
- (v) pay at a higher rate pending promotion;
- (vi) payment of legal fees and costs;
- (vii) cessation of the unfair labour practice;

- (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;
- (e) subject to subsections (3) and (4), make such order as to costs as the Labour Court thinks fit.”

The Labour Court is created in terms of the Act. I have set out the provisions of s 89(2) extensively in order to show the extent of its powers. As a creature of statute the Labour Court can only exercise those powers that the Act makes provision for.

What was before the court *a quo* was an appeal and in the exercise of its appellate jurisdiction it is not empowered to remit a matter to the arbitrator to adduce evidence on the merits of a dispute. The court overlooked the fact that in terms of ss 2(a)(i) it had the power to call for evidence or decide the appeal on the record. Having found that Runhare had not dealt with the employees cases individually, instead of remitting the matter as it did, the court *a quo* ought to have called for the adduction of the necessary evidence before it.

Notwithstanding the above remarks, the Labour Court does have the power under the Act to remit a matter to an arbitrator but this is a power which is only available when the court is considering an application under s 93(7)(a)(i) of the Act. The section reads:-

- “7) If, in relation to any dispute or unfair labour practice —
- (a) after a labour officer has issued a certificate of no settlement in relation to the dispute or unfair labour practice, it is not possible for any reason to refer the dispute or unfair labour practice to compulsory arbitration as provided in subsection (5); or
 - (b) a labour officer refuses, for any reason, to issue a certificate of no settlement in relation to any dispute or unfair labour practice after the expiry of the period allowed for conciliation under subsection (3) or any extension of that period

under subsection (4); any party to the dispute may, in the time and manner prescribed, apply to the Labour Court—

- (i) for the dispute or unfair labour practice to be disposed of in accordance with paragraph (b) of subsection (2) of section *eighty-nine*, in the case of a dispute of interest; or
- (ii) for an order in terms of paragraph (c) of subsection (2) of section *eighty-nine*, in the case of a dispute of right.”

In terms of s 89(2)(b), when considering an application such as envisaged in s 93(7)(i), the court may remit the matter to the same or a different labour officer with instructions directing that officer to attempt to resolve it in accordance with such guidelines as the court may specify. That is not what the court *a quo* did in this case. The matter was remitted to the arbitrator for a “reconsideration of the case against each respondent”. (my underlining.)

It is clear that the order for remittal was not competent. As a consequence, a remittal could only be ordered in terms of s 89 (2)(b) and for the express purpose provided for in the section. The court *a quo* was not empowered to order a remittal outside those perimeters. It assumed a power it did not possess. To that extent the court *a quo* misdirected itself.

In the grounds of appeal the appellant had sought that the appeal be allowed on the merits. Mr *Maanda* who appeared for the appellant accepted that this was untenable on the very basis that the court *a quo* did not determine the matter on the merits. This concession was proper in our view.

The alternative prayer sought that the matter be remitted to the court *a quo* for determination on the merits of each of the respondent’s cases on an individual basis.

The two respondents who appeared in court were not opposed to the remittal of the appeal to the court *a quo* for the determination of the matter on the merits. In the event, the court issued an order by consent in the following terms:

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed.
2. The judgment of the court be and is hereby set aside.
3. The matter is remitted for a determination of the appeal on the merits.
4. There shall be no order as to costs.

GARWE JA I agree

GUVAVA JA I agree

Maunga, Maanda & Associates, appellant's legal practitioners