REPORTABLE (39)

(1) DON NYAMANDE (2) KINGSTONE DONGA

v

ZUVA PETROLEUM (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GWAUNZA JA, GARWE JA, HLATSHWAYO JA & GUVAVA JA
HARARE, FEBRUARY 3 & JULY 17, 2015

L Madhuku, with him *C Mucheche*, for the appellants

T Mpofu, for the respondent

CHIDYAUSIKU CJ: This is an appeal from a judgment of the Labour Court delivered on 28 March 2014 allowing termination of the appellants' employment contracts on notice.

The facts of this case are common cause. They are as follows. The appellants were employed by BP Shell as supply and logistics manager and finance manager. BP Shell sold its services as a going concern to Zuva Petroleum, the respondent. A transfer of undertaking was done in terms of s 16 of the Labour Act [*Chapter 28:01]* (hereinafter referred to as "the Act") and an agreement of sale concluded. The appellants were transferred to the new undertaking without derogation from the terms and conditions of employment that they enjoyed when they were under BP Shell.

On 21 November 2011 the respondent offered its employees, who included the appellants, a voluntary retrenchment package which was declined. On 15 December 2011 the respondent served each of its employees, including the appellants, with a compulsory notice of intention to retrench. The appellants and the respondent could not agree on the retrenchment terms. Having failed to agree on the terms of retrenchment, the parties referred the dispute to the Retrenchment Board. On 16 May 2012 the Ministry of Labour and Social Services directed the parties to carry out further retrenchment negotiations for another twenty-one days. On 18 May 2012, and before the expiry of the twenty-one days, the respondent wrote letters to the appellants, terminating their contracts of employment on notice, as was provided for in the contracts of employment signed by both parties, with effect from 1 June 2012.

The respondent paid the appellants cash *in lieu* of notice and thus terminated the employment relationship. The appellants approached a labour officer, contending that their employment contracts had been unlawfully terminated. The labour officer failed to resolve the matter and referred it to compulsory arbitration. The arbitrator concluded that the termination of the contracts of employment was unlawful because the appellants had not been dismissed in terms of a code of conduct.

The respondent appealed to the Labour Court. The Labour Court allowed the appeal. In its judgment the Labour Court had this to say:

> "In my view, therefore, the submission that section 12B came to do away with the possibility of terminating a contract of employment on notice is a misunderstanding of the law as it stands. In any event, the provisions of section 12(4) of the Act are clear and allow no ambiguity as also the provisions of section 12B. None of the sections have the effect of doing away with the termination of a contract of employment on notice."

In essence, the Labour Court came to the conclusion that neither s 12B nor s 12(4) of the Act abolished the employer's right to terminate employment on notice. I respectfully agree with this conclusion.

The appellants were aggrieved by the judgment of the Labour Court and now appeal to this court on the following grounds:

> "The Labour Court erred and seriously misdirected itself on a question of law by upholding the termination of the appellants' contracts of employment on notice and failing to find such termination to be unfair dismissal.
>
> The Labour Court erred and seriously misdirected itself on a question of law in failing to realise as it should have done that section 12(4) of the Labour Act [*Chapter 28:01]* does not provide for the termination of a contract of employment on notice and that any such purported termination is contrary to section 12B of the Labour Act [*Chapter 28:01*].
>
> The Labour Court erred at law in allowing termination on notice as that amounts to allowing an employer to terminate employment for no justifiable and valid cause."

The appellants seek the setting aside of the Labour Court judgment and its substitution with that of the arbitrator.

It would appear on the papers that the bone of contention between the parties is the legal status of the employer's common law right to terminate an employment relationship on notice. Counsel are agreed that once upon a time both the employer and the employee had a common law right to terminate an employment relationship on notice. The point of departure appears to be that the appellants, while acknowledging that the employer's right once existed, argue that it has since been abolished. The respondent contends that the employer's right has not been abolished and still subsists.

It was contended for the appellants that s 12B of the Act abolished the employer's common law right to dismiss an employee on notice.

On the other hand, the respondent argued that the common law right to dismiss an employee on notice has not been abolished by s 12B of the Act and is extant. The respondent further argued that s 12(4) of the Act reinforces its contention that that right exists, and that section regulates the exercise of the right.

The critical issue that falls for determination in this matter is therefore what meaning should be ascribed to ss 12B and 12(4) of the Act. In particular whether s 12B of the Act, on a proper reading of that section, abolishes the employer's common law right to terminate employment on notice.

The appellants, in para 2 of their heads of argument, made the following submission:

> "2. In enshrining the concept of unfair dismissal in section 12B, the Labour Act [*Chapter 28:01*] is outlawing any termination of employment for no reason. Accordingly, the purported termination of the appellant's contracts of employment was unlawful on account of being a contravention of section 12B of the Labour Act [*Chapter 28:01*]."

Section 12B of the Act, the subject of the contested interpretation, provides as follows:

> **"12B Dismissal**
>
> (1) Every employee has the right not to be unfairly dismissed.
>
> (2) An employee is unfairly dismissed —
>
> (*a*) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
>
> (*b*) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9).
>
> (3) An employee is deemed to have been unfairly dismissed -
>
> (*a*) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
>
> (*b*) if, on termination of an employment contract of fixed duration, the employee -

(i) had a legitimate expectation of being re-engaged; and

(ii) another person was engaged instead of the employee.

(4) In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee."

As I have already stated, it is common cause that once upon a time both the employer and the employee had a common law right to terminate an employment relationship on notice. That common law right in respect of both the employer and the employee can only be limited, abolished or regulated by an Act of Parliament or a statutory instrument that is clearly *intra vires* an Act of Parliament.

I am satisfied that s 12B of the Act does not abolish the employer's common law right to terminate employment on notice in terms of an employment contract for a number of reasons.

The time-honoured and golden rule of statutory interpretation is that you give the words of a statute their primary meaning. See *National Railways of Zimbabwe Contributory Pension Fund v Edy* S-141-88; *Madoda v Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (S); *S v Masivira* 1990 (1) ZLR 373 (HC); *Maxwell on The Interpretation of Statutes* 12 ed at p 28; *Nyemba and Watunga v R* 1961 R & N 688 (SR) at 691C-D; *Mike Campbell (Pvt) Ltd v Minister of Lands and Anor* 2008 (1) ZLR 17 (S) at 33-35; and *Mawarire v Mugabe NO and Ors* CCZ-01-2013.

Applying this golden rule of statutory interpretation, I see no words in s 12B of the Act that either expressly or by necessary implication abolish the employer's common law right to terminate an employment relationship by way of notice.

It is also a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying so explicitly.

This principle finds authority in the case of *Phiri and Ors v Industrial Steel Pipe (Pvt) Ltd* 1996 (12) ZLR 45 (S) at 49, wherein the following was stated:

> "There is a presumption, in the interpretation of statutes, that Parliament does not intend a change in the common law, unless it expresses its intention with irresistible clearness or it follows by necessary implication from the language of the statute in question that it intended to effect such alteration in the common law; for 'construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction …': *per* LORD HALSBURY LC in *Bank of England* v *Vagliano* [1891] C AC 107 at 120."

See also *PTC* v *Mahachi* 1997 (2) ZLR 71 (H); *Mushaishi* v *Lifeline Syndicate and Anor* 1990 (1) ZLR 284 (H) at 287D; and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811.

Section 12B of the Act, as the main heading of that section reveals, deals with dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The section also sets out in some detail what constitutes unfair labour practice which it outlaws. Termination of employment on notice is not among the conduct that s 12B of the Act outlaws as unfair labour practice.

The section that deals with termination of a contract of employment on notice is s 12(4) of the Act. I shall revert to this section later in this judgment.

It is also instructive to note that s 8 of the Act sets out in some detail conduct that is outlawed as unfair labour practice.

Section 8 of the Act provides as follows:

"**8 Unfair labour practices by employer**

An employer or, for the purpose of paragraphs (*g*) and (*h*), an employer or any other person, commits an unfair labour practice if, by act or omission, he -

(*a*) prevents, hinders or obstructs any employee in the exercise of any right conferred upon him in terms of Part II; or

(*b*) contravenes any provision of Part II or of section *eighteen*; or

(*c*) refuses to negotiate in good faith with a workers committee or a trade union which has been duly formed and which is authorized in terms of this Act to represent any of his employees in relation to such negotiation; or

(*d*) refuses to co-operate in good faith with an employment council on which the interests of any of his employees are represented; or

(*e*) fails to comply with or to implement -

(i) a collective bargaining agreement; or

(ii) a decision or finding of an employment council on which any of his employees are represented; or

(iii) a decision or finding made under Part XII; or

(iv) any determination or direction which is binding upon him in terms of this Act; or

(*f*) bargains collectively or otherwise deals with another trade union, where a registered trade union representing his employees exists; or

(*g*) demands from any employee or prospective employee any sexual favour as a condition of —

(i) the recruitment for employment; or

(ii) the creation, classification or abolition of jobs or posts; or

(iii) the improvement of the remuneration or other conditions of employment of the employee; or

(iv) the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; or

(v) the provision of facilities related to or connected with employment; or

(vi) any other matter related to employment; or

(*h*) engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the workplace."

It is apparent from the above section that termination of employment on notice is not among the conduct outlawed by s 8 of the Act.

It is also very clear that, on a proper reading of s 12B of the Act, it deals with the method of termination of employment known as "dismissal". While dismissal is one method of termination of employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment.

In this regard, s 12C of the Act provides for the method of termination of employment known as "retrenchment". Termination of employment by way of retrenchment is not a dismissal.

This court has held that termination of employment can be effected in other ways than dismissal. In the case of *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S) at 349E-G, this court made the following observation:

> "It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship - one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer."

In the *Commercial Careers College* case *supra* it was common cause that the personal relationship between the applicants and the respondent was totally destroyed. The applicants' stance was simply that the respondent, the employer, cannot terminate their employment contracts on notice at law, but they can resign from employment willy nilly. That proposition was rejected.

The same proposition that where the relationship between the employer and the employee has deteriorated to untenable levels through no fault of either party the relationship can be terminated was accepted in *Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S).

Quite clearly, the appellants' case is predicated on the proposition that dismissal means all forms of termination of employment. Put differently, all terminations of employment are dismissals. This proposition is not tenable on the authority of the above cases. That proposition is clearly erroneous.

The proposition that there are other methods or forms of terminating employment apart from dismissal was clearly articulated in the case of *Samuriwo* v *Zimbabwe United Passenger Company* 1999 (1) ZLR 385 (H), wherein GARWE J (as he then was) had this to say at 388E:

> "The code, in compliance with s 101 of the Act, steers clear of other matters that have nothing to do with misconduct, such as termination for other reasons. Whilst it must be accepted that the code makes no provision for the managing director himself to be the subject of disciplinary proceedings, it seems to me that this is irrelevant as the termination in the present case is not sought on the basis of the code but *in terms of the contract of employment*." (the emphasis is mine)

Samuriwo's case *supra* places beyond dispute the fact that there are other ways of termination of employment different from dismissal in terms of codes of conduct following disciplinary proceedings as provided for in the codes of conduct.

The proposition that an employer has a right to terminate an employment relationship on notice in circumstances other than dismissal for misconduct finds further support in the case of *Gertrude Kwaramba* v *Bain Industries (Pvt) Ltd* SC 39/01, where this court accepted the employer's right to terminate the employment contract on notice in no fault situations.

This case was followed in *Chirasasa and Ors v Nhamo NO and Anor* 2003 (2) ZLR 206 (S) where this court held that:

> "In this case, the appellants agreed that there was no act of misconduct alleged against them. The parties had failed to agree on the new terms and conditions of employment proposed by the second respondent to meet the operational requirements of its business. The second respondent had a right to terminate the contracts of employment with the appellants by giving them one calendar month's notice and could exercise it without obtaining prior written approval of the Minister. The decision in *Kwaramba's* case *supra* is, in my view, correct, whilst that in *Masundire's* case *supra* is wrong."

I am satisfied s 12B of the Act does not deal with the general concept of termination of employment. It concerns itself with termination of employment by way of dismissal in terms of a code of conduct. It sets out that which must be followed or done in terms of either an employment code of conduct or a national code of conduct. It does not concern itself with termination of employment by ways other than dismissal.

Section 12(4) of the Act is the section that deals with the concept of termination of employment on notice in terms of a contract of employment. It regulates the period of notice. It provides as follows:

"12 Duration, particulars and termination of employment contract

(4) Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of the contract of employment to be given by either party shall be —

(*a*) three months in the case of a contract without limit of time or a contract for a period of two years or more;

(*b*) two months in the case of a contract for a period of one year or more but less than two years;

(*c*) one month in the case of a contract for a period of six months or more but less than one year;

(*d*) two weeks in the case of a contract for a period of three months or more but less than six months;

(*e*) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work."

The wording of s 12(4) of the Act is so clear that it leaves very little room, if any, for misinterpretation. It governs the time periods that apply when employment is being terminated on notice. It stands to reason that the notice periods do not apply when an employee is dismissed. In instances of dismissal no notice is required. The periods of notice referred to in s 12(4) of the Act can only apply where there is termination of employment in terms of a process involving the giving of notice provided for in a contract of employment.

I accept the appellants' contention that s 12(4) of the Act does not create a right to terminate employment on notice. Indeed, this contention appears to be accepted by the respondent.

The respondent's case is that the right to terminate employment on notice is created by common law and not by statute or s 12(4) of the Act. It contends that s 12(4) of the Act simply regulates the exercise of that right conferred on the employer by common law.

Section 12(4) of the Act explicitly applies to both the employer and the employee. There is no possible explanation, and none has been advanced, why, despite the explicit

language of the section, it should apply to the employee only and not to the employer; or why the section should exist to regulate a non-existent right. As Mr *Mpofu* aptly submitted, providing "for a time period for a right that does not exist is a puerile exercise, one which could never have been engaged in by a sane legislator". The presumption is that Parliament must be taken to have intended its enactments to have meaning.

Section 12(4) of the Act can only have meaning if there is a substantive right, in this case the common law right to terminate employment on notice, to which it pertains. This is especially so when one considers that all that s 12(4) of the Act does is to facilitate the exercise of an existant common law right.

It is for these reasons that I agree with the conclusion of the Labour Court that the respondent was entitled at law to give notice terminating the employment of the appellants in terms of the contracts of employment between the parties.

Accordingly, the appeal fails and is hereby dismissed with costs.

GWAUNZA JA: I agree

GARWE JA: I agree

HLATSHWAYO JA: I agree

GUVAVA JA: I agree

Matsikidze & Mucheche, appellants' legal practitioners

Atherstone & Cook, respondent's legal practitioners