

DISTRIBUTABLE (6)

PETER MAFUNDA
vs
ZIMBABWE ENERGY REGULATORY AUTHORITY

SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, MAVANGIRA JA & UCHENA JA
HARARE, OCTOBER 26, 2015 & MARCH 4, 2016

S. Hashiti, for the Appellant

E. Matinenga, for the Respondent.

UCHENA JA: The appellant Peter Mufunda is a Legal Advisor in the Ministry of Energy and Power Development. The respondent Zimbabwe Energy Regulatory Authority is a statutory successor of the Zimbabwe Electricity Regulatory Commission.

The common cause facts on which the dispute between the parties arose are as follows. The appellant, an employee of the Ministry of Energy and Power Development was, on 20 October 2009, by appointment assigned to perform duties for the Zimbabwe Electricity Regulatory Commission (ZERC), whose functions were taken over by The Zimbabwe Energy Regulatory Authority (ZERA). The appellant played a role in the establishment of ZERA. According to the assigning memorandum he was to play the leading role. ZERA appreciated his role to the extent that when the Ministry sought to withdraw his services to it by memorandum dated 17 November 2011, it asked the Ministry to allow him to continue in that role till it appointed its own Chief Executive officer. The Ministry agreed and extended his assignment to 28 February 2012.

After assuming duty at (ZERC) and thereafter (ZERA) the appellant continued to perform his normal duties as Legal Advisor for the Ministry. He did not sign a contract of employment with either ZERC or ZERA, but was paid an allowance of US\$500.00 per month after he protested against none payment after serving ZERC for some time. He had demanded that he be paid a salary but the Secretary of the Ministry of Energy after initially telling him rather brutally and uncharitably, to “learn to work for nothing” authorised him to arrange with the respondent that he be paid the US\$500.00 per month allowance which the Minister had authorised. The appellant accepted the payments on a without prejudice basis. The parties failed to reach an agreement leading to the appellant referring the dispute over salary and benefits to the Ministry of Labour and Social Services. On 2 September 2013 a certificate of no settlement was issued and the dispute was referred to arbitration. The Arbitrator found that the parties had entered into a valid contractual relationship. He ordered the parties to quantify the award failing which they could revert back to him for quantification.

The respondent noted an appeal to the Labour Court which found in its favour leading to the appellant noting this appeal.

In his two grounds of appeal the appellant alleged the following against the decision of the Labour Court:

1. The court *a quo* erred and misdirected itself in finding that there was no contractual relationship between the appellant and respondent contrary to the dictates of s 14 of the Public Service Regulations SI 1/2000 as read with ss 2 and 12 of the Labour Act (Chapter 28:01).

2. The court further erred and misdirected itself in holding that there was no legal basis for the award of arrear salaries and benefits due to appellant from respondent.

In finding for the respondent the Labour Court on pages 54 to 55 of the record said:

“The Oxford Dictionary defines secondment as a temporary transfer. In other words an employee on secondment remains the employee of the original employer (seconded) during the period of secondment. The Industrial Court of Malaysia in the case of *Bank Simpanan Nasional Finance Bhd & anor v Omar Hashim* (2002) 1 ILR 272 (Award NO. 1013 of 2005) explained the meaning of the term “secondment” as follows:

“The ordinary dictionary meaning of secondment as a temporary transfer has on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other.”

The same court in *Come Services Asia Pacific Region, Miri v Grame Ashley Power* (1987) 2 ILR 34 reinforced the idea of a temporary transfer stating:

“Therefore so long as the contract is not terminated, a new contract is not made and the employee continues to be in the employment of the original employer. Even if the employer orders the employee to do certain work for another person, the employee still continues to be in his employment. The only thing that happens in such cases is that the employee carries out the orders of the master hence he has the right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the period he had hired his services, but that is because of his agreement with his real employer. However, that does not have the effect of transferring the service of the employee to the other employer. The hirer may exercise control and direction in the doing of the thing for which he has hired the employee; or even the manner in which it is to be done. But if the employee fails to carry out his direction he cannot dismiss him and can only complain to the actual employer. The right of dismissal is vested in the employer.

I am persuaded that the above quotation aptly describes the Respondent’s position. **In my view the Respondent’s secondment was informal as no fully detailed secondment agreement was put in place as envisaged by s 14 (2) of S.I 1/2000. Consequently the respondent continued to receive his remuneration as a member of the Public Service. If the appellant was to pay for respondent’s services, in my view, a detailed agreement would have been put in place.** In the case of *Dairibord Zimbabwe Limited v Lazarus Muyambi* SC 22/2002 the terms and conditions of the secondment were set out in a contract of assignment entered into by the appellant and the respondent. Such a contract is missing *in casu*. **I am not persuaded that bit can be implied from the circumstances of this case.”** (emphasis added)

The court *a quo* therefore found that (a) the appellant was not released by his employer, (b) he did not enter into any contract of employment with ZERC nor ZERA, (c) the contract of secondment cannot be inferred from the conduct of the parties and the provisions of ss 2 and 12 of the Labour Act.

The issue for determination by this court is whether or not the court *a quo* correctly summarised the law and applied it to the facts of this case. Mr *Hashiti* for the appellant submitted that there was a contract of employment between the appellant and respondent. He submitted that the provisions of s 14 of the Public Service Regulations S.I 1/2000 as read with s 12 of the Labour Act [*Chapter 28:01*], and the conduct of the parties confirms that there was an agreement.

Mr *Matinenga* for the respondent submitted that there is no valid appeal before the court as there is no appeal on a point of Law. He further submitted that if the appeal is valid there was no contract of employment between the appellant and the respondent.

Mr *Matinenga*'s submission that there is no appeal on a point of Law has no merit. The appeal is against the court *a quo*'s interpretation of s 14 of the Public Service Regulations SI 1/2000 and ss 2 and 12 (2) of the Labour Act. The appellant's first ground of appeal refers to the court *a quo*'s failure to properly interpret the dictates of s 14 of the Public Service Regulations as read with ss 2 and 12 of the Labour Act. That clearly raises a point of law.

Section 14(1) and (2) of the Public Service Regulations S.I. 1/2000, provides for the secondment of civil servants as follows;

“(1) A member may at any time with his consent and at the invitation of the Head of the Ministry or Commission, be seconded by the Commission for a period not exceeding three years to a post in an approved service.

(2)The terms and conditions of service of a member while on secondment shall, subject to any policy directive issued by the Commission, be governed by contract between the member and the approved service concerned.”

Section 14(1) and (2) of the Public Service Regulations requires an employee who is seconded to enter into two contracts. The first contract is with his employer who will offer to second him to an approved service provider, which offer he can accept by giving his consent to the secondment. The secondment to be agreed upon should be “to a post in an approved service”. The second contract is for the employee’s conditions of service which the employee enters into with the approved service provider to which his employer will have released him for secondment.

If the agreement between the seconding employer and the employee to be seconded is for the employee to be released and seconded to a post in the approved service provider, then that institution and the employee must enter into an agreement which will govern the seconded employee’s conditions of service. The need for the second agreement depends on the agreement between the seconding employer and his employee. If for example the seconding employer wants his employee to continue working for it but also wants the employee to render services to a specified institution at its expense there will be no need for an agreement between the service provider and the employee. This is what the court *a quo* attempted to explain in the passage quoted above but unfortunately without fully analysing the provisions of s 14.

The court *a quo*’s decision is correct though it should have adequately analysed s 14 and assessed the facts of this case against it starting from the intention of the

seconding employer. The intention of the seconding employer is clearly explained in its memorandum dated 20 October 2009 on page 159 of the record, in which it explained the reason and nature of the secondment in issue. The memorandum reads;

“To Honourable Minister
From Permanent Secretary
Date 20 October 2009

Appointment of Ministry Officials To Run The Affairs Of Zimbabwe Electricity Regulatory Commission (ZERC)

As you may recall ZERC was dissolved in order to pave way for the establishment of an all-encompassing Energy Regulatory Commission after the passage of the Energy Act by Parliament of Zimbabwe.

As you may also recall **Eng. M. C Munodawafa was appointed to oversee the operations of ZERC.**

Eng M C Munodawafa has since been appointed Chief Executive Officer of the Zambezi River Authority. **Therefore there is need to appoint persons to execute the functions of ZERC until the establishment of the Energy Regulatory Commission.**

I recommend that Mr P Mufunda and Mrs G Ngoma, Legal Advisor and Deputy Director for Policy and Planning respectively **be appointed to administer ZERC.** Mr P Mufunda shall take the leading role.”

The Minister through a hand written endorsement to the Permanent Secretary’s letter agreed with the appellant’s appointment. He said:

“**The Chief Legal Officer may take the proposed role.** While Mrs Ngoma is a good candidate she is a board member of ZESA so please substitute her with another member so that there is no direct conflict in roles” (emphasis added).

The Minister’s directive was implemented through a memorandum dated 21 October 2009 through which Mr Hugh Sagonda was appointed in place of Mrs Ngoma.

It should be noted from these memoranda that the Ministry appointed its officers to carry out roles at ZERC. It did not second them in terms of s 14 (1) and (2) of SI 1/2000. It did not second them to posts within ZERC. An appointment to a role by one’s own employer is not a secondment to a post in the service provider. In terms of s 14 (1) the role of

the employer is to release the employee for appointment into a specified post by the approved service.

The memorandum talks of the appointment of Ministry officials to run the affairs of ZERC. This means the persons being appointed would remain Ministry officials and were to run ZERC's affairs in that capacity. This is confirmed by reference to M. C. Munodawafa having previously been appointed to oversee the operations of ZERC and the appellant being appointed to administer ZERC. These terms are not consistent with one being seconded in the capacity of an employee of the approved service. If that was the employer's intention the post to be occupied in the approved service would have been specified. The employees were therefore not released by the Ministry. In the case of a secondment in terms of s 14 the approved service and not the original employer assigns duties to the employee. In this case it is the Ministry which assigned duties to the appellant. When the original employer assigns duties to be performed for the approved service it will not have released the employee. It will be assigning duties to its employee for the benefit of a third party.

The determinant facts are that the employer did not release the appellant from his position within it. It did not mention a post to which he was to be appointed within ZERC. It clearly states that Ministry officials were to run the affairs of ZERC. The court *a quo* was therefore correct that what happened was an informal secondment because a real secondment can only take place when the employer and employee's agreement is one in which the employer releases the employee to enable him to go and take up employment in a specified post for a period not exceeding that stipulated in s 14.

This explains why the appellant continued to perform duties for the Ministry and receiving his salary from the Public Service Commission.

In view of my finding that the employer did not intend to release the appellant to take up a post in (ZERC) or (ZERA), Mr *Hashiti*'s submissions on the effect of the conduct of the parties and the meaning of ss 2 and 12 of the Labour Act does not warrant consideration. The parties' conduct and the interpretation of ss 2 and 12 of the Labour Act cannot change the clear intention of the employer to assign the appellant a role as opposed to seconding him. They cannot change the appellant's agreement with his employer from that of an informal secondment to a secondment in terms of s 14 of SI 1/2000.

The appellant's appeal against the court *a quo*'s finding that there was no secondment agreement must, therefore, be dismissed.

There is however an injustice caused by the Permanent Secretary. He backdated the allowance approved by the Minister to January 2010, when the appellant had been performing duties at ZERC since 20 October 2009. The appellant is entitled to the US\$500.00 per month allowance for that period. There is no reason why he should not be paid for that period. The appellant raised this issue in the court *a quo* and in this Court. The respondent did not give any reasonable explanation for excluding that period from the authorised payment of allowances. The court *a quo* did not address its mind to this issue. Its decision in this regard must therefore be set aside.

Both parties succeeded in part. Each party will therefore bear its own costs.

In the result the decision of the court *a quo* is set aside and is substituted by the following:

It is ordered that:

1. The appellant's appeal against the court *a quo*'s finding that there was no secondment agreement between him and the respondent be and is hereby dismissed.
2. The appellant's appeal against none payment of the US\$500.00 per month allowance for the period 20 October to 31 December 2009 succeeds.
3. The respondent is ordered to pay the appellant the US\$500.00 per month allowance for the period 20 October 2009 to 31 December 2009.
4. Each party shall bear its own costs.

HLATSHWAYO JA

I agree

MAVANGIRA JA

I agree

Messrs Mtombeni Mukwasha & Muzavazi, Appellant's Legal Practitioners.

Messrs Kantor & Immerman, Respondents Legal Practitioners.