

DISTRIBUTABLE (57)

MISHECK MUBVUMBI
v
CITY OF HARARE

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & PATEL JA
HARARE MAY 29, 2018 & 22 OCTOBER 2018

R Mabwe and C Mafongoya, for Appellant

L Uriri, for Respondent.

MAKARAU JA: This is an appeal against the entire judgment of the Labour Court handed down on 13 November 2015. In that judgment, the court *a quo* dismissed an application for review, brought by the appellant against the decision by the respondent summarily retiring him from employment at age 60.

Aggrieved by the decision, the appellant raised 6 grounds of appeal. These grounds of appeal raise three main issues as follows:

1. Whether the appellant's retirement age from employment was 60 or was 65 years;
2. Whether or not the summary retirement of the appellant at 60 years was in essence a retrenchment; and

3. Whether the respondent discriminated against the appellant in retiring him at 60 years when other employees were allowed to retire beyond that age.

THE FACTS

The facts giving rise to this dispute are largely common cause. I set them out hereunder.

The appellant was employed by the respondent in 1981 as a Junior Treasury Officer. It was a specific term of his contract of employment that his conditions of service would be governed by the provisions of the Industrial Agreement Salisbury Municipal Undertaking: General Conditions of Service Agreement contained in SI 147 of 1981. That statutory instrument provided in s 19 thereof, that the normal age of retirement of an employee would be 65 years.

Statutory Instrument 147 of 1981 was repealed and replaced by various subsequent statutory instruments. These subsequent instruments were all collective bargaining agreements between the respondent and its employees providing for one or more aspects of conditions of service.

In particular and of relevance to this appeal, SI 135 of 2012 reduced the normal retirement age for the respondent's employees from 65 to 60 years.

In addition to the various collective bargaining agreements governing their conditions of service, the parties also contributed to the Local Authorities Pension Fund which had its own regulations. These regulations provided for various ages of retirement from the

fund by contributors, ranging from 55 to 65 years, and effectively mirrored the retirement ages provided for in SI 135 of 2012.

It is not in dispute that the appellant was a member and contributed to this pension fund.

On 18 March 2014, the respondent wrote to the appellant, advising him that he had reached normal retirement age and was being retired with immediate effect. The appellant approached the court *a quo* on review, contending that the actions of the respondent were unlawful and that he had a legitimate expectation to be retired at 65. The application was opposed with the respondent arguing that the appellant had attained the normal retirement age in line with the provisions of the governing collective bargaining agreement in force (i.e. SI 135/2012) and the regulations of the Pension Fund.

THE ISSUE

The issue between the parties before the court *a quo* was therefore a crisp one. It was whether or not the decision by the respondent to retire the appellant at age 60 as fixed by the collective bargaining agreement and the pension fund was lawful.

THE DECISION OF THE COURT A QUO

In holding that the decision by the respondent to retire the appellant at 60 was lawful, the court *a quo* found that whereas there had been many changes to the various collective bargaining agreements governing the conditions of service of the Harare City Undertaking, the provisions of the pension regulations had remained constant and these are

what the respondent resorted to in summarily retiring the appellant. The court *a quo* then proceeded to find that because the appellant had not “told” the court that he was not a contributor to the pension fund, his retirement was governed by the scheme.

Was the appellant’s age of retirement from employment fixed by the pension fund regulations? I think not.

THE LAW

The legal position presents itself clearly to me that the regulations of any pension fund do not fix the age at which the employee will retire from employment unless, expressly or impliedly, the employer and the employee agree that this be so.

The setting up and administration of pension funds in this jurisdiction is governed by the provisions of the Pensions and Provident Funds Act [*Chapter 24.09*]. The Act provides for pension and provident funds to make their own rules or regulations.

It is trite that the rules and/or regulations of a pension fund, provided for in s 7 of the Act, invariably fix the age at which contributors retire from making contributions to the fund. The Local Authorities Pension Fund, the fund in issue in this appeal, did. This age is also referred to as the retirement age. The Act however clearly provides that such an age may be attained with or without the termination of employment.

I therefore read the Act in this regard as providing that one may be regarded as having retired for the purposes of the Act and therefore eligible to receive a pension, without

necessarily having retired from employment. In other words, retiring from the pension fund does not always mark an employee's retirement from employment. The two retirements can occur on different dates. Thus, in my view, one may clearly and lawfully attain retirement age for the purposes of the Act whilst still in employment. Whilst my understanding of the law in this regard is not directly relevant to the facts of this appeal, in my view, it underscores the clear legal position that the retirement age fixed by the pension scheme is not, in the absence of consent by both parties to that effect, necessarily the same age at which one must retire from employment.

Where, therefore, the employer intends to apply the retirement age that is fixed by the pension fund for the purposes of retiring employees from employment, it must import this age, with the consent of the employees, into the conditions of service.

In casu, the respondent, perchance being alive to this legal requirement, aligned the retirement age of the rest of its employees to the age fixed by the pension fund by way of SI 135 of 2012.

It is not in dispute that SI 135/12 is inapplicable to the appellant by reason of his position. The statutory instrument applies to all employees in grades 16 to 5. It therefore expressly excludes persons employed in grades 1 to 4. The appellant is employed in a grade 2 position.

The court *a quo* correctly found that the statutory instrument does not apply to the appellant. It however erroneously proceeded to find that the retirement age as fixed by the pension scheme regulations then becomes applicable. As discussed above, the regulations of

the pension fund, not being an agreement between the employer and the employee, cannot fix the employee's retirement age from employment.

It is therefore my finding that mere membership of a pension fund, without other evidence tending to show that the parties agreed to import the retirement age as fixed by the pension scheme into the contract of employment, is not adequate basis for holding that the age of retirement as fixed by the pension fund is the same as the age of retirement from employment.

With respect, it does not appear that the court *a quo* was alive to the need to first find that there was agreement between the parties that the age of retirement as fixed by the pension fund would be the age of retirement from employment. The court appears to have proceeded on the basis that retirement from the pension fund is synonymous with retirement from employment. Thus, the court *a quo* did not search for any evidence tending to show that there was such an agreement between the parties.

There is no such evidence on record.

In disposing of the matter as it did, the court purported to rely on the decision of this Court in the matter of *Athol Evans Hospital Home v Monica Maruta* SC 66/05. Such reliance is with respect an incorrect reading of the *ratio decidendi* in the case.

In the *Athol Evans Hospital* case, the respondent and the appellant were contributors to a pension scheme, (the Southampton Scheme), that set the retirement age at 60 years. The retirement age set by the pension scheme was consistent with the National

Security Social Authority Scheme (“NSSA Scheme”) retirement age at the time. The NSSA Scheme retirement was subsequently amended to 65 years. When retired at 60, the respondent challenged her retirement at that age, alleging that she should have been given an option to elect to retire at 65 in terms of the NSSA Scheme.

Quite clearly, the respondent in the *Athol Evans Hospital* case did not challenge the applicability of the retirement age as fixed by the Southampton Scheme to her. She was of the view that she should have been given an opportunity to agree to be bound by the NSSA scheme instead.

It was in rejecting that contention that this Court held that the respondent had made her election to join the Southampton Scheme in terms of which she was retired as the two schemes were in operation at the time she made the election. In the passage cited by the court *a quo* in its judgment, this Court held that by joining the Southampton Scheme, the respondent accepted to retire at the age of 60.

The *Athol Evans Hospital* case is clearly not authority for the proposition that the regulations of a pension scheme, in the absence of express or implied agreement of the parties to that effect, will fix the retirement age from employment. The case was simply decided on the employee’s election to be bound by one and not the other of the two schemes that operated at the same time. I read the judgment as taking it as understood that both parties had agreed to the retirement age fixed by the Southampton Scheme. The changes introduced by the NSSA Scheme later were of no moment as the parties had not agreed to be bound by those later changes expressly or impliedly.

Having found that the respondent failed to show that it had acted lawfully in retiring the appellant at 60, the court *a quo* erred in dismissing the appellant's review application.

The first issue raised by the appellant's grounds of appeal must be answered in favour of the appellant. There is no basis upon which the respondent retired the appellant at 60. It was neither a specific term of the contract of employment between the parties nor a provision of any collective bargaining agreement that applied to him.

The first ground of appeal is with merit and must be upheld. In view of that finding, it becomes unnecessary to deal with the other grounds of appeal giving rise to the second and third issues.

Regarding costs, no basis exists to depart from the general rule that they follow the cause.

In the result, I make the following order:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is hereby set aside and substituted with the following:

“a) The application for review is granted with costs.

b) The decision of the respondent to summarily retire the applicant at 60 is hereby set aside.”

HLATSHWAYO JA: I agree

PATEL JA: I agree

J Mambara & Partners, appellant's legal practitioners

Chihambakwe Mutizwa & Partners, respondent's legal practitioners.