

REPORTABLE (4)

**AGRICULTURAL AND RURAL DEVELOPMENT AUTHORITY
v
FRANCIS BAURENI AND 18 OTHERS**

**SUPREME COURT OF ZIMBABWE
GARWE JA, PATEL JA & MAKONI JA
HARARE, OCTOBER 29, 2018 & FEBRUARY 26, 2019**

F. Mahere, for the appellant

S. Hashiti and *C. Takaendesa*, for the respondents

PATEL JA: This is an appeal against the judgment of the Labour Court dismissing an appeal and review application instituted by the appellant against a decision of the Retrenchment Board (the Board). The decision was communicated to the parties on 28 April 2017.

Background

The respondents were employed by the appellant in various capacities. Their contracts were terminated on three months' notice in November 2015 without the payment of any terminal benefits. They lodged a complaint with the Ministry of Labour on 6 September 2016. The parties filed their submissions before a labour officer and the matter was set down for hearing on 21 February 2017. On that date, the appellant applied for the

hearing to be rolled over to 7 March 2017. This request was granted. In the intervening period, at some stage before the end of February 2017, the appellant filed an application with the Board for an exemption from having to pay the minimum retrenchment packages stipulated by statute.

On 3 March 2017, the Board called the parties to notify them that the matter had been set down for hearing on 9 March 2017. The hearing was conducted as scheduled on that day and the Board then directed the parties to file further submissions. That directive was duly complied with by the respondents on 15 March 2017 and by the appellant on 16 March 2017. The Board made its determination on 30 March 2017 but only communicated that decision to the parties on 28 April 2017. It ordered the appellant to pay to each respondent the equivalent of one month's salary for every two years served. Half of the respective amounts due was to be paid by 30 April 2017, while the remainder was to be paid over six months from May to October 2017. The appellant then noted an appeal and an application for review to the Labour Court. The court found in favour of the respondents which prompted the present appeal.

Labour Court Judgment

As regards the substance of the Board's determination, the court *a quo* noted that the appellant had previously applied to retrench some of its workforce. At that time, in June 2015, there was a letter from the chairman of the appellant's works council intimating that the proposed retrenchment was due to a change in the appellant's business model and strategy. The issue of its financial incapacity was only raised in 2017.

The court *a quo* further noted that the appellant's audited financial statements that were on record only went up to 31 December 2013. Moreover, its unaudited financial statements for 2014, 2015 and 2016 were not on record. Thus, when the Board sat on 30 March 2017 to decide the application for exemption, the appellant's financial position was not known. In those circumstances, the appellant having failed to demonstrate its inability to pay the retrenchment packages as at the time when it applied for exemption, the Board's determination could not be faulted as having been grossly unreasonable.

The court *a quo* also rejected the appellant's argument that its application for exemption must be deemed to have been granted by operation of law, in terms of s 12C(3) of the Labour Act [*Chapter 28:01*], because the Board had failed to respond to the application within 14 days after it was lodged. The court found that the provision did not require the Board to determine the application within 14 days. What was required was that the Board should respond to the application within that period and it had effectively done so by calling the parties on 3 March 2017 to appear for a hearing on 9 March 2017.

The final issue raised before the court *a quo* was an attack against the Board for having awarded packages based on a provision contrary to the Constitution of Zimbabwe. Since this aspect was not elaborated by the appellant in its heads of argument or oral submissions before the court, it was considered as having been abandoned. In the event, the court dismissed with costs both the appeal and the review application before it for lack of merit.

Grounds of Appeal

The first ground of appeal challenges the constitutionality of the provision introduced by the Labour Amendment Act No. 5 of 2015, stipulating the retrospective payment of minimum retrenchment packages to employees who were dismissed on notice. At the hearing of the appeal, Ms *Mahere*, for the appellant, conceded that this ground could not be persisted with in light of the decision of the Constitutional Court in *Greatermans Stores (1979) (Pvt) Ltd & Ors v Minister of Labour CCZ 2/2018*. She quite correctly agreed to abandon this ground.

The second ground of appeal relates to the argument that the appellant's application for exemption must be deemed to have been granted by operation of law because the Board's response was made more than 14 days after receiving the request for exemption. This ground hinges on the correct interpretation of s 12C(3) and related provisions of the Labour Act.

The third and fourth grounds of appeal are intimately interrelated and will be treated and dealt with accordingly. They pertain to the appellant's financial capacity to pay the minimum retrenchment packages. In essence, the appellant's position is that it placed authentic evidence before the Board to demonstrate its financial incapacity and that the Board, without demanding further proof in that regard, made a determination that was grossly unreasonable in light of all the evidence placed before it.

Deemed Grant of Exemption by Operation of Law

Section 12C of the Labour Act, which was introduced by s 5 of Act No. 5 of 2015, regulates the process of retrenchment and compensation for loss of employment on retrenchment or in terms of s 12(4a), *i.e.* upon termination on notice. In subss (3) and (4), which are relevant for present purposes, it states as follows:

“(3) Where an employer alleges financial incapacity and consequent inability to pay the minimum retrenchment package timeously or at all, the employer shall apply in writing to be exempted from paying the full minimum retrenchment package or any part of it to—

- (a) the employment council established for the undertaking or industry; or
- (b) if there is no employment council for the undertaking concerned, to the Retrenchment Board;

which shall respond to the request within fourteen days of receiving the notice (failing which response the application is deemed to have been granted).

(4) In considering its response to a request for exemption in terms of subsection (3) the employment council or Retrenchment Board—

- (a) shall, where the employer alleges complete inability to pay the minimum retrenchment package, be entitled to demand and receive such proof as it considers requisite to satisfy itself that the employer is so unable, and if so unable on the date when the notice of termination of employment takes effect, may propose to the employer a scheme to pay the minimum retrenchment package by instalments over a period of time;
- (b) shall, where the employer offers to pay the minimum retrenchment package by instalments over a period of time, consider whether the offer is a reasonable one, and may propose an alternative payment schedule;
- (c) may inquire from the employer whether he or she has considered, or may wish to consider, specifically or in general, the alternatives to termination of employment provided for in section 12D.”

The crisp issue for determination *in casu*, as I perceive it, is this: Do the words “respond” and “response”, as used in s 12C(3) as read with s 12C(4) of the Labour Act, mean “definitively decide or determine” within the prescribed period of 14 days, or do they mean something entirely different in keeping with the ordinary usage of those words?

Ms *Mahere*, for the appellant, submits that to respond in the context of s 12C is to give a final answer or determination. The intention is to ensure that every application for exemption is determined expeditiously. Section 12C(4) highlights the factors that have to be considered before delivering a response, *i.e.* a final determination under s 12C(3). The language of the latter provision is peremptory and the courts cannot allow any extension of the stipulated 14 day period. In the instant case, the final determination was made well beyond that period and, therefore, the exemption sought by the appellant must be deemed to have been granted by operation of law.

Mr *Hashiti*, for the respondents, submits that the ordinary meaning of respond is that the Board must communicate its receipt of the application for exemption. Section 12C(4) allows the Board to demand further proof and consider other matters. It is clear that a response means something other than a final determination. In any event, a 14 day period is simply not enough for all the necessary processes and decisions to be concluded. Mr *Hashiti* also notes that the appellant responded on 16 March 2017 to the Board's directive for further submissions to be made. The appellant thereby accepted that the directive complied with the law. If it believed that its application had been granted, it ought to have protested and refused to comply with the directive. Furthermore, the appellant itself delayed its submissions to the Board and, therefore, cannot complain that the Board failed to comply with the law.

The word "respond", in its ordinary connotation, means "to say or do something as a reaction to something that has been said or done" (*per* the Cambridge

English Dictionary). The word clearly does not denote anything akin to a final or definitive decision on anything raised by one person for a response to be given by another. Rather, it signifies an exchange of words or conduct between one or more individuals.

In the present context, the ordinary meaning of “respond” necessitates that the Board should react to an application for exemption within 14 days. In considering its response, the Board is vested with the power to demand and receive such proof as it considers requisite to satisfy itself that the employer concerned is completely unable to pay the minimum retrenchment package. It is also entitled to propose a scheme to pay the package by instalments or an alternative payment schedule and to request the employer to consider other available alternatives to termination of employment. My reading of s 12C(4) is that it provides a guiding template for the Board in considering its response to an application for exemption. In my view, it does not, as is contended on behalf of the appellant, operate to transmute the ordinary meaning of “respond” into one necessitating that the Board make a final and definitive determination within 14 days.

It is trite that the words used in any statutory enactment must be given their plain and grammatical signification, unless to do so would lead to some manifest absurdity, inconsistency or repugnancy. The interpretation of ss 12C(3) and 12C(4) that I am inclined to adopt is entirely concordant with the plain meaning of the words “respond” and “response” as used in those provisions. It certainly does not entail any absurd, inconsistent or repugnant eventuality or outcome.

On the other hand, the interpretation advanced on behalf of the appellant would lead to several possible absurdities and anomalies. First and foremost, it would require the Board to analyse and evaluate all the relevant facts and figures pertaining to the solvency of the employer and the relevant records of the employees affected within a very short span of two weeks. Secondly, the employer himself would be constrained to provide the requisite proof of its inability to pay, if such is demanded by the Board, and may well fail to do so to the satisfaction of the Board within that short period. By the same token, he would certainly need more than two weeks to meaningfully consider and react to any alternative payment scheme or schedule or possible alternatives to termination of employment that might be proposed by the Board.

In the final analysis, I take the view that the legislature could not possibly have intended that the complex processes enjoined in the orderly and equitable implementation of s 12C should be concluded and finalised within the limited time frame of only 14 days. To obligate both the Board and the employer concerned to make hurried and ill-considered choices and decisions would certainly not serve the interests of justice at the workplace as contemplated by s 2A of the Labour Act. As I have already indicated, a liberal and expansive interpretation of s 12C is in the best interests not only of the employees but also of the employer.

To conclude on this aspect, it is common cause that the Board called the parties within the prescribed period of 14 days to convene a hearing, which hearing also appears to have taken place within that period. It is also common cause that at that hearing

the Board, as it was entitled to do, directed the parties to file further submissions. It follows that the Board duly complied with its obligation to respond to the appellant's application for exemption within the stipulated 14 days. It also follows that the application cannot be deemed to have been granted by operation of law by dint of any alleged failure to timeously respond to the application.

Evidence of Financial Incapacity

The evidence presented by the appellant to the Board to establish its incapacity to pay the respondents comprises two CBZ Bank statements and its financial statements from 2009 – 2015. However, the appellant's audited financial statements only go up to 31 December 2013. For the period thereafter, only unaudited financial statements were produced, apparently because the appellant had failed to pay its erstwhile auditors. Moreover, before the Labour Court, even the unaudited financial statements were not produced or filed of record.

As regards the appellant's bank statements, the first statement covers the period from 1 December 2016 to 3 January 2017 and reflects a negative balance of \$1,045,267.83. The second statement ranges from 1 December 2016 to 31 January 2017 and shows a negative closing balance of \$6,960.61. According to Ms *Mahere*, the appellant claims that these statements relate to its only two bank accounts and this claim has not been disputed.

Turning to the appellant's financial statements, the last audited statement for 2013 reveals an operating loss of \$5,720,825.00. It also shows a bank overdraft of \$6,838,990.00. For the period thereafter, *i.e.* from 2014 – 2016, there are no audited financial statements. In this respect, Ms *Mahere* contends that the Board did not ask for audited statements and that it was reasonable for the appellant to provide what it had. The unaudited statements for 2014 – 2016 were placed before the Board but were rejected for having been unaudited. As I have already indicated, these unaudited statements do not form part of the record and Ms *Mahere* was unable to proffer any explanation for their omission from the record.

Mr *Hashiti* submits that the CBZ Bank statements do not show the aggregate of the appellant's assets. Furthermore, the first statement alluded to above shows several substantial credits to the bank account and there may have been further credits after the last stated entry for 31 December 2016. Mr *Hashiti* also refers to a letter dated 3 June 2015 from the chairman of the appellant's works council written to the Board in support of the proposed retrenchment of 18 employees. The reason given then for that retrenchment was stated to be the fact that the appellant "has totally changed its Business Strategy and Operating Model". There is nothing in that letter to indicate that the appellant was unable at that time to pay the proposed retrenchment packages or to viably conduct its financial affairs.

Having regard to the totality of the evidence before us, it is abundantly clear from the record that the appellant has dismally failed to justify its claim of its incapacity to

pay, both before the Board and in the Labour Court. This is compounded by the fact that even its unaudited financial statements for 2014 to 2016 were not availed to the court *a quo*. Worse still, they inexplicably do not form part of the appeal record.

I fully agree with counsel for the respondents that the two CBZ Bank statements do not in themselves support the appellant's position. At best, they evince a temporary current account illiquidity. More telling is the last available audited financial statement for 2013. Although this statement reflects a significant operating loss and large bank overdraft, it also reveals a substantial asset base vested in the appellant. This consists of non-current assets amounting to \$131,265,466.00 and current assets in the sum of \$14,696,626.00, rendering a grand total of \$145,962,092.00. This is obviously counter-balanced, as a matter of accounting practice, by the appellant's equity and liabilities, but that does not detract from the appellant's considerable and sizeable assets as at the end of 2013. And there is nothing on record to indicate that those assets have been depleted or dissipated in the intervening period leading up to the events of 2017.

The onus clearly lay on the appellant to show that it should be exempted from paying the minimum retrenchment packages due to the respondents. As I have already stated, it failed to produce any meaningful evidence to substantiate its claim of insolvency or incapacity to pay the paltry sum of \$55,000.00 that was ordered by the Board to be paid, partly as lump sums and partly by way of instalments. It clearly failed to discharge the evidential onus that squarely fell upon it.

Disposition

In the result, I am amply satisfied that there was nothing erroneous let alone irrational in the decision of the Board declining to grant the exemption sought by the appellant from having to pay the respondents the minimum retrenchment packages to which they were lawfully entitled. By the same token, there is no basis for impugning the judgement of the court *a quo* upholding the decision of the Board. In my view, none of the grounds of appeal mounted by the appellant is legally or factually sustainable.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

GARWE JA: I agree.

MAKONI JA: I agree.

Mlotshwa & Company, appellant's legal practitioners

Charamba & Partners, respondents' legal practitioners