

REPORTABLE (99)

COLCOM FOODS LIMITED
v
TARUVA TARUVA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & MATHONSI JA
HARARE: JUNE 18, 2020 & JULY 28, 2020

T. Mpofu, for the appellant.

A. Chimhofu, for the respondent.

MATHONSI JA: This is an appeal against the whole judgment of the Labour Court handed down on 1 June 2018 dismissing, with costs, an appeal made by the appellant against an arbitral award made by an arbitrator on 18 July 2017.

FACTUAL BACKGROUND

The appellant is a holding company with subsidiaries which include Ballantyne Butchery (Private) Limited t/a Dan Meats and Triple C (Private) Limited. From August 2007, it employed the respondent as the Finance Manager of Ballantyne Butchery (Private) Limited t/a Dan Meats. About January 2009 the appellant reassigned the respondent to another subsidiary, Colcom Trading (Private) Limited, as Finance Manager on the same employment conditions. He was again moved to Colcom Services (Private) Limited on the same conditions in 2011.

The fortunes of the appellant took a down turn about March 2013. As a result, a restructuring exercise was undertaken the effect of which was to include the respondent in a list of those who were to be retrenched from employment. Thereafter the parties haggled for some time about the terms of retrenchment. During the course of that exercise, an opening occurred when the Finance Manager of Triple C (Private) Limited, another subsidiary of the appellant, immediately resigned leaving the post vacant.

The appellant seized the opportunity and by letter dated 11 March 2013, it offered the post to the respondent. As the position was the same grade as that held by the respondent, the transfer to Triple C (Private) Limited was said to be a lateral one. The offer letter written to the respondent made it clear that the appellant would gladly “clarify any clause in the contract” which the respondent felt needed clarification.

The employment letter containing the terms and conditions of employment was attached and a request was made for the respondent to signify his acceptance by signing an acceptance slip at the end of the letter. The respondent had misgivings, about the terms contained in the letter and endorsed his reservations of what he termed “varied terms and conditions” in long hand at the bottom of each page of the appointment letter. Notwithstanding his reservations, the respondent signed the “acceptance of new contract” slip on 23 May 2013. He however indicated that he would continue reporting at his old station “under protest.”

The respondent was advised to report for duty at Triple C (Private) Limited on 27 March 2013. He did not do so insisting on remaining at his former station from where he had been transferred. In fact he lodged a complaint of an unfair labour practice with a Labour Officer. By letter dated 27 May 2013, the group Human Capital Director of the appellant put

the respondent on terms to report for duty at his new employment station. The letter reads in relevant part:

“RE: YOUR FAILURE TO REPORT FOR DUTY AT TRIPLE C

It has come to our notice that you have not reported for duty at Triple C as per the letter of transfer which you signed for in acknowledgment of receipt on 23rd May 2013 and indicated therein that you were to report for duty as required of you but under ‘protest.’ Your ‘protest’ arises from what you term ‘variation of terms and conditions’ of your employment.

While we were in the process of attending to the ‘issues’ you raised as alleged variations of terms and conditions of employment, we note with regret that you have already lodged a claim of unfair labour practices with the office of a Labour Officer on the same issues. In the circumstances, our due consideration of your ‘concerns’ has been rendered irrelevant by you.

However, in the meantime, please note that we expect you to report at Triple C and exercise your duties as Finance Manager than to sit idle in your office as you are doing. Should you fail to do so by 0800 hours on 29th May 2013, your conduct will be a repudiation of your employment to which we will accept your wishes and pay you your terminal benefits.

Please therefore be guided accordingly.

Kind regards
Z.Matsika
Group Human Capital Director.”

The respondent again defied the order to report for duty at Triple C (Private) Limited. The appellant then served the respondent with a notice of termination of the employment contract on 30 May 2013. He was advised that his terminal benefits together with three months’ notice pay would be processed and paid into his bank account.

The respondent was unhappy with that turn of events. He had already reported a case of unfair labour practice by the appellant alleging material variation of his contract, repudiation of the employment contract and non-payment of benefits and arrears. In due course

the Labour Officer issued a certificate of no settlement. Resultantly, the dispute was referred to arbitration.

The arbitrator found in favour of the respondent. In the arbitral award issued on 18 July 2017 the arbitrator found that the appellant was the respondent's employer.

He found that the employment contract had been unlawfully terminated and that there had been a unilateral variation of its terms. Reinstatement or damages *in lieu* of it were ordered in the event that reinstatement was no longer possible. The arbitrator also ordered the appellant to pay damages for contractual breaches in the sum of US\$29 686,39 for profit share and reimbursement of US\$1 200,00 in school fees.

The appellant was aggrieved and took to the Labour Court on appeal. The appellant contended that the respondent's failure to report for duty as directed amounted to a repudiation of the contract of employment and that there was no unilateral variation of the contract on its part. It was the court *a quo*'s finding that the appellant unlawfully terminated the employment contract which it had unilaterally varied. The fact that no disciplinary hearing was conducted violated the respondent's right to be heard. The appeal was dismissed. It is against that judgment of the court *a quo* that this appeal was lodged.

GROUNDS OF APPEAL

The appellant raised the following grounds of appeal.

1. The court *a quo* (erred) in not finding that the respondent had sued the wrong party as his employer and accordingly that the arbitrator had, in not finding that

Triple C (Private) Limited was the respondent's employer, committed an error in law.

2. The court *a quo* erred in coming to the conclusion that there had been an unlawful variation of the terms of respondent's contract of employment and so erred in not considering the circumstances under which he had been transferred and also the fact that an employment relationship cannot remain static.
3. The court *a quo* erred in not coming to the conclusion that respondent had, by not reporting for duty after his transfer, repudiated his employment and that the acceptance of such repudiation by the employer did not constitute unfair dismissal.
4. *A fortiori* the court *a quo* erred in coming to the conclusion that appellant ought to have brought disciplinary proceedings against the respondent.

At the commencement of the hearing of the appeal Mr *Mpofu*, who appeared for the appellant, abandoned the first ground of appeal. He indicated that he would motivate the appeal on the basis of the remaining three grounds. Accordingly the first ground is struck out and will not be related to in this judgment.

ISSUE FOR DETERMINATION

While there are still three grounds of appeal, they all dovetail to only one issue for determination in this appeal. It is whether or not the respondent's contract of employment was lawfully terminated.

SUBMISSIONS ON APPEAL

Mr *Mpofu* submitted that the respondent's employment was lawfully terminated on notice after he refused to assume duty at Triple C (Private) Limited. He submitted that there is a distinction between a dismissal from employment which follows disciplinary proceedings and a termination of employment on notice. Both the court *a quo* and the arbitrator, so the argument goes, fell into grave error in making a finding that the appellant was required to institute disciplinary proceedings against the respondent before terminating his employment.

It was further argued on behalf of the appellant that the offer to employ the respondent at Triple C (Private) Limited came in the context of retrenchment proceedings which were ongoing at the time. Indeed, according to the minutes of a meeting held by the parties on 25 March 2013 to negotiate a retrenchment package, it is the respondent himself who made a proposal "to be given right of first refusal of new jobs if they arise." The respondent had made the request because, according to him, "there (were) no jobs out there." When the Finance Manager of Triple C (Private) Limited resigned, an opportunity presented itself to avoid retrenching the respondent by offering him the job as requested.

According to the appellant, the respondent accepted the offer of the job, *albeit* under protest. His concerns were still being looked into but he was expected to report for duty. He refused to do so preferring to remain idle. Mr *Mpofu* submitted that the stance taken by the respondent left the appellant in a quandary because it had nowhere else to deploy him. It was the intransigence of the respondent in continuing to report at his former station where there was no work to be performed which invited the termination of his contract of employment on notice. Mr *Mpofu* maintained that the appellant was entitled at law, to terminate the employment on notice. He placed reliance on a number of authorities to make that submission.

Mr *Chimhofu*, who appeared for the respondent, took the view that there are two issues that are dispositive of the appeal. The first one is whether or not the appellant unilaterally varied the employment contract. In that regard he made reference to the letter of transfer dated 21 May 2013 which made it clear that the transfer was a lateral one. This meant that the respondent would continue to enjoy the same benefits he enjoyed prior to being transferred.

The view taken by the respondent is that the appellant tinkered with the conditions of his employment thereby repudiating it. The second one is whether the subsequent termination was lawful. In that regard, the court *a quo* correctly found that the employment contract was unlawfully or unfairly terminated. In fact the court *a quo* was of the view that a disciplinary hearing should have been conducted in terms of the appellant's code of conduct. In arriving at that position the court *a quo* relied on s 12 B(1) of the Labour Act [*Chapter 28:01*] which provides that an employee is unfairly dismissed if the employer fails to show that he, she or it dismissed the employee in terms of an employment code.

ANALYSIS

It is common cause that no disciplinary proceedings were instituted against the respondent and that he was not charged with any act of misconduct for which he could be dismissed from employment. It is also common cause that when the parties reached a deadlock about the respondent assuming duty at a new base to which he had been transferred, the appellant served him with a notice of termination of employment. The issue for determination is the lawfulness of that course of action.

In considering the lawfulness of the appellant's actions, it is important to start from the standpoint that upon the respondent being transferred to Triple C (Private) Limited, he

signed the letter of appointment on the space provided for “acceptance of new contract.” He then registered his concerns with the appellant as he was entitled to do. The respondent also went on to report a dispute to a Labour Officer. This was also proper and the dispute would have been dealt with according to the law. His biggest undoing was the dogged refusal to report for duty assigned to him. It meant that the parties could not contractually move forward together.

The appellant did not opt to charge the respondent with misconduct and certainly did not dismiss him for misconduct. I agree with Mr *Mpofu* that termination of employment does not amount to dismissal all the time and that while dismissal results in termination of employment there may be termination without dismissal. Dismissal ordinarily arises from disciplinary proceedings while termination may be done on notice. Indeed s 12 of the Labour Act [*Chapter 28:01*] deals with “Duration, particulars and termination of employment contract” while, on the other hand s 12B is on “Dismissal.” That, on its own means a lot. The two sections provide for two different methods of bringing an employment contract to an end. The first method is through termination while the second, is through dismissal.

It is now settled in our jurisdiction that despite the provisions of s 12B of the Act dealing with dismissal of an employee from employment in terms of an employment code of conduct, an employer retains the right to terminate employment on notice as provided for under the common law. Section 12B does not concern itself with the general termination of employment by means other than in terms of a code of conduct be it an employer’s code of conduct or the national code of conduct.

It is s 12(4) which deals with the concept of termination of employment on notice. It regulates the period of notice to be given for such termination. In *Chirasasa v Nhamo N.O. and Anor* 2003 (2) ZLR 206 (S), the court upheld the termination of employment where the parties had failed to agree on new conditions of employment. It was stated:

“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 months’ notice and could exercise it without obtaining prior written approval of the Minister.”

The above reasoning was followed by this Court in *Colcom Foods Limited v Kabasa* SC 12/04 where the following passage appears:

“In this case it was conceded that there was no allegation of misconduct levelled against Kabasa. He was not being retrenched. It was his refusal to accept that his status was that of Human Resources Manager that caused the decision to terminate his employment with Colcom on notice. On the authority of *Chirasasa’s* case *supra*, Colcom was entitled to terminate Kabasa’s employment on notice.”

The court went on to state in that case that as it was not an act of misconduct for the employee to refuse to accept the change in his conditions of service, the employer was not bound to terminate his employment in terms of the disciplinary procedure laid down in the employment code of conduct. On the basis of that authority, it is clear that the court *a quo* was wrong in drawing the conclusion that the appellant should have conducted a disciplinary hearing following the respondent’s refusal to report for duty. There was no need to proceed in terms of a code of conduct.

Quite recently in the case of *Nyamande and Anor v Zuva Petroleum (Private) Limited* 2015(2) ZLR 186 (S), this Court reiterated the correctness of the assertion that an

employer has the right to terminate employment on notice. CHIDYAUSIKU C J endorsed it in these words at p 188B-

“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 s 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 an event, the provisions of s 12(4) of the Act are clear and allow no ambiguity as also the provisions of s 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 learned Chief Justice went on at p 190 A-B to make the following pronouncement:

“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.”

Having come to the conclusion that the appellant was entitled to terminate the employment without invoking the employment code of conduct by giving the respondent notice of termination, it becomes superfluous to relate to the issue of the alleged variation of the terms and conditions of employment. The authorities I have cited make it clear that a deadlock in negotiations over new terms of employment may entitle the employer to terminate on notice. See *Colcom Foods Limited, supra*.

I have said that the respondent shot himself in the foot by refusing to comply with transfer instructions especially after he had accepted a new contract by signing it. If he was aggrieved by what he regarded as a unilateral alteration of his contract, he should have pursued his grievance while reporting for duty. By his intransigence he opened himself up for termination on notice. On the other hand, the appellant had a lawful right to abandon discussions with the respondent and opt for termination on notice. There was no requirement for a disciplinary hearing because it was not an act of misconduct for the respondent to refuse to take up the new employment.

The judgment of the court *a quo* is wrong. It ignores all the rich authorities on the subject of termination on notice. It ought to be vacated. Regarding the issue of costs, I see no reason why the costs should not follow the result.

In the result, it is ordered that:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be and is hereby set aside and in its place be substituted the following:

“The appeal is hereby allowed and the arbitral award set aside with costs.”

GWAUNZA DCJ : I agree

GUVAVA JA : I agree

Chinawa Law Chambers, appellant's legal practitioners

Matsikidze Attorneys-At-Law, respondent's legal practitioners