

DISTRIBUTABLE (12)

MOSES MAWIRE
v
RIO ZIM LIMITED (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GOWORA JA; PATEL JA; MAVANGIRA JA
HARARE: MARCH 9, 2018

T.T.G. Musarurwa, for the appellant

T. Mpofu, for the respondent

MAVANGIRA JA: After hearing the parties on the 9 March 2018, the court was of the unanimous view that the appeal was devoid of any merit and accordingly ordered as follows:

“The appeal be and is hereby dismissed with costs. Full reasons will be available in due course.”

The following are the reasons.

BACKGROUND FACTS

The appellant was employed by the respondent as a Human Resources Superintendent on 1 November 2006. He was based at the Head Office in Harare. In February 2009 he was transferred to Renco Mine. His contract of employment provided for, amongst other things, locality allowance, leave bonus and a company vehicle which was to be fuelled and maintained by the company.

In February 2009, as happened nationwide, the respondent shifted from the use of the Zimbabwean dollar to the United States dollar when the Zimbabwean dollar became moribund. On the 19 February 2009, the respondent wrote a letter to the appellant notifying him that, following the adoption of the United States dollar, his salary would be US\$4,147.43 per month. The letter was silent on allowances.

On 21 March 2009, through an office memorandum, all the respondent's employees were notified of the changes in their salaries and allowances. The memorandum provided that the respondent had implemented salary scales based on regional 'SADC' rates for employees in all grades. Consequently, transport and meals allowances together with leave bonus payable when employees proceeded on annual leave were to fall away with effect from 1 March 2009 for all employees in grade 10 and above. Transport and meals allowances were also removed for employees in grade 10 and above. The respondent further indicated that the employees would be kept abreast of further changes.

Following the adoption of the United States dollar, the appellant was being paid a globular salary without any allowances. The respondent did not provide the appellant with the motor vehicle, but rather supplied him with fuel and paid for the maintenance of his personal car. This was regardless of the fact that the respondent's contract of employment stated that he was entitled to allowances and a motor vehicle maintained by the company.

In June 2014, the appellant raised a complaint of unfair labour practice with the Labour Officer. He demanded payment of the following:

1. Outstanding locality allowance for the period from February 2009 when he was transferred to Renco Mine up to the time when he made the complaint in June 2014,

2. Leave bonus from 2009 to 2013, and
3. Mileage for use of his personal motor vehicle from 1 March 2007 up to the time of the making of the claim.

At conciliation, the parties failed to reach a settlement and the matter was referred to arbitration.

Before the arbitrator, the appellant argued that he was entitled to payment of outstanding locality allowances and leave bonus and to a motor vehicle coupled with its maintenance and repairs. The appellant had been using his personal vehicle for the respondent's business as the respondent had failed to provide the motor vehicle. For this reason, he claimed compensation on the mileage of his vehicle on the same basis as if it was on hire to the respondent. The appellant also contended that the respondent had unilaterally varied the contents of the contract of employment.

The respondent raised a preliminary point. It was to the effect that in the event that the appellant's contract was found to have been violated, the appellant's claims had prescribed in terms of s 94 (1)(b) of the Labour Act [*Chapter 28:01*] (herein after referred to as 'the Act'). The respondent also argued that none of the respondent's contractual benefits were being violated.

The arbitrator dismissed the preliminary point. In his award he made the finding that all the claims made by the appellant had been sustained. He thus ordered the respondent to pay the sum of US\$197 563.00 for compensation as had been claimed by the appellant. This

was to be paid in two equal monthly instalments of US\$98 781.50 with the final payment being paid not later than the 1 October 2014.

APPEAL TO THE LABOUR COURT

Dissatisfied with the arbitrator's ruling and award, the respondent appealed to the Labour Court. A number of grounds of appeal were raised. The court *a quo* summarized them to amount to:

1. That prescription applied to the claims and those claims that were older than two years had prescribed in terms of s 94 (2) of the Labour Act [*Chapter 28:01*].
2. That the contract of employment was varied by the office memorandum and by conduct and that the arbitrator therefore erred at law in his interpretation of the facts.
3. That there was no prejudice to the employee's remuneration as occasioned by the new method of payment.
4. That the arbitrator had grossly misdirected himself in the relevant findings of fact so much as to amount to a misdirection at law.

After hearing parties, the Labour Court allowed the appeal and set aside the arbitral award. The Labour Court accepted the argument presented by the respondent. It came to the conclusion that once an infraction has occurred and becomes known by the affected party, it prescribes if it is not actioned within two years from the date when the dispute first arose. The court ruled that all the outstanding claims that were more than two years when the claim was instituted by the appellant had prescribed.

On whether or not there was unilateral variation of the contract, the Labour Court found that the contract had been unilaterally varied by the respondent. In its judgment the Labour Court stated that although there was unilateral variation of the contract by the respondent, for five years the appellant received his salary without any complaint. By so doing, the appellant, who was a human resources practitioner, had demonstrated by conduct, that he accepted the new salary structures. As a result, the allowances claimed by the respondent were no longer claimable as there was now a new contract in existence.

The Labour Court further found no merit in the appellant's claim which was based on the contention that he had been hiring out his personal motor vehicle to the respondent. The court *a quo* found that there was no standing agreement between parties to that effect, and therefore, to say that the appellant had hired out his vehicle to the respondent would amount to overstressing the contract.

THIS APPEAL

The appellant was aggrieved by the judgment of the court *a quo* and appealed against its decision on the following grounds:

1. The Labour Court fundamentally misdirected itself on a question of law in failing to find that the claims of the Appellant had not prescribed, they being claims arising from unfair labour practices of a continuing nature covered by s 94 (2) of the Labour Act.
2. The Labour Court further erred on a question of law in finding that the contract of employment between the Appellant and the Respondent had been varied such that the appellant would not be paid the claimed allowances.

3. The Labour Court further erred in law in failing to award the Appellant compensation in respect of the usage of his motor vehicle for the business purposes of the respondent.

At the beginning of the hearing, Mr *Musarurwa* for the appellant indicated that he was abandoning the 3rd ground of appeal which related to the issue of the motor vehicle. Notably, this ground formed the bulk of the appellant's claim. He therefore restricted his argument to the first two grounds which relate to the claims for outstanding locality allowance and leave bonus.

SUBMISSIONS ON APPEAL

Mr *Musarurwa's* contention was that the Labour Court erred in ruling that the appellant's claims had prescribed and he placed reliance on s 94 (2) of the Act. He argued that the unfair labour practice commenced in March 2009 and continued until the matter was brought to the attention of the Labour Officer and to the Labour Court. The gravamen of his argument is that the dispute was of a continuous nature and therefore on the basis of s 94 (2) of the Act no prescription could run.

He further contended that the appellant's rights conferred by the Labour Act were "frozen" during the period of his employment. Therefore, any infractions of these rights could only be actioned after termination of the employment relationship.

On variation of the contract of employment, the contention was that the introduction and operation of multi-currencies in February 2009 did not operate to vary the contracts of employment in any way. The respondent remained indebted in respect of the

appellant's allowances. Secondly, the memorandum issued in March 2009 was a unilateral act by one party to a contract of employment and did not have the effect of validly taking away vested rights.

Mr *Mpofu* for the respondent submitted that the rights accorded by the Labour Act are not "frozen" as there are remedies provided by the Act for any infraction of the rights. He described the appellant's contention as "judicial heresy."

Mr *Mpofu* further submitted that s 94 of the Labour Act must be read together with s 8 of the same Act. Section 94 limits itself to unfair labour practices and these the appellant had not been able to identify. For this reason, he submitted, the protection of s 94 was not available to the appellant. The kind of infractions that the appellant complained about are infractions that gave him a full and competent cause of action within a period of two years. He submitted that the appellant's suggestion that the two year period must be counted starting from after the end of the employment relationship is not worthy of any notice due to its frivolity.

ISSUES FOR DETERMINATION

The issues for determination by this court are:

1. Whether or not the appellant's claim had prescribed in terms of s 94 of the Labour Act
2. Whether or not the contract of employment had been varied.

THE LAW

Section 94 of the Labour Act provides as follows:

"94 Prescription of disputes

- (1) Subject to subsection (2), no labour officer shall entertain any dispute or unfair labour practice unless-
- (a) it is referred to him; or
 - (b) has otherwise come to his attention;
- within two years from the date when the dispute or unfair labour practice first arose.
- (2) Subsection (1) shall not apply to an unfair labour practice which is continuing at the time it is referred to or comes to the attention of a labour officer.”

A literal reading of the above provision is that adjudication of any dispute of unfair labour practice is restricted to disputes that will have occurred within two years from the date when the dispute or unfair labour practice first arose. However the exception to that rule is that, if an unfair labour practice is continuing at the time it is referred, or comes to the attention of the labour officer, then the two year prescription period in subs (1) does not apply.

The appellant’s submission is that when he first complained of the non-payment of the locality allowance and motor vehicle allowance, the unfair labour practice was ‘continuing’ and therefore none of his claims had prescribed.

The term “cause of action” was defined in *Peebles v Dairiboard (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 54E – F wherein MALABA J (as he then was) stated:

“A cause of action is defined by Lord Esher MR in *Read v Brown* (1888) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.”

In other words, a cause of action arises when there is an entire set of facts which entitle one to make a claim. In light of that, *in casu* a new cause of action would have arisen every month when the respondent failed to pay the appellant’s locality allowance and every year when it failed to pay the leave bonus. Whenever an arrear of locality allowance accumulated, that would have constituted an entire set of facts which could give rise to a cause of action and which would have entitled the appellant to successfully file a claim against the respondent.

Thus, the appellant would have had a legitimate cause to raise a complaint with the Labour Officer each time the allowances were not paid in terms of the contract and each time when the annual bonus was not paid in terms of the contract. Each non-payment on its own would be enough to constitute a cause of action which entitled the appellant to file a claim.

Whenever there was non-payment of the appellant's perceived dues, that would be a complete infraction. For that reason, it cannot be said that the unfair labour practice would have been continuous in nature and therefore not subject to prescription. A continuous unfair labour practice was outlined in the South African judgment of *National Home Builders Registration Council v Nehawu obo Siza Nghulele & 2 Ors* (JR 2020/13) 2016 ZALCJHB 209 wherein it was stated:

“[7] In respect of the first point, it was held in *SABC Ltd v CCMA & Others* that: “While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination, in the latter case, has no end and is, therefore, ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.” Although in this instance, the employee's claim to higher grading and remuneration was squarely based on the applicability of the applicant's Career Path and Retention Strategy for Technical Staff policy, the principle of the continuous nature of the alleged unfair labour practice in my view is indistinguishable from that in the *SABC* case. Accordingly, he was entitled to raise the claim not only within 90 days of not receiving the advancement but for so long as he was denied it. Consequently, the first in limine point must fail.”

See also *South African Broadcasting Corporation Ltd v The Commission for Conciliation Mediation and Arbitration & 2 Ors* (JA 36/07) [2009] ZALAC 13; [2010] 3 BLLR 251 (LAC).

In casu the claims would not have been dependent on each other so as to render them to be continuous in nature.

The cause(s) of action in the present matter, if existent, would have been subject to prescription just like any other debt. If a claim was not made within the defined time lines, it would have prescribed. The appellant would have had a complete cause of action entitling him to make a claim whenever there was non-payment of allowances and bonus. There was no reason for the appellant to wait until there was termination of the employment relationship. The Labour Act is not frozen during the subsistence of an employment relationship as was stated by the appellant. A breach of rights conferred by the Labour Act can be remedied during the subsistence of the employment relationship and within the two years from the date of commencement of the unfair labour practice.

The claim against the respondent is that it did not pay locality allowances and leave bonuses since March 2009. The appellant only filed his claim in June 2014. In light of the principles discussed above, each of the monthly locality allowance arrears and leave bonus payments would have been subject to a prescription period of two years.

Mr *Musarurwa* for the appellant submitted before us that this court could consider the claims that were less than two years old and had thus, according to him, not prescribed as at the time of the raising of the claims in June 2014. In response thereto Mr *Mpofu* for the respondent submitted that the court could not do so as that was never the appellant's case in any of the proceedings *a quo*, whether before the arbitrator or the Labour Court. It is trite that a litigant cannot argue on appeal a case different to that presented in the proceedings *a quo*. He further submitted that the submission by Mr *Musarurwa* was made on the mistaken assumption

that the variation of the contract of employment was unlawful. The contract having been varied five years earlier, there was no basis for the claims made for the allowances. In any event, by the time that he raised the complaint with the labour officer, the two year prescription period had long since elapsed for all the claims.

In our view, the Labour Court was therefore correct in holding that once an infraction is complete and is known, it prescribes within two years if it is not actioned within the given period.

However, if the contract was varied as alleged by the respondent, there can be no debate or question of a continuing unfair labour practice at the time that the appellant raised his complaint, as he would have had no cause of action anyway by virtue of the variation of the contract in terms of which variation such allowances were no longer part of his contract. He could not, five years later, claim that the contract was unilaterally varied when for five (5) years before then he acquiesced with the implementation of the new conditions and quietly accepted remuneration on the new terms without raising any complaint.

1. Whether or not the contract of employment was varied.

The question must of necessity therefore be answered whether or not the contract was in fact varied unilaterally.

The appellant submitted that the change in currency following the adoption of the use of the United States dollars did not alter the contract of employment. He further contended that he was still entitled to the car loan as per the contract of employment which was operative during the time when Zimbabwean dollar was in use. Mr *Mpofu* on the other hand submitted

that the local dollar contract could not have had its terms transposed into the US Dollar period. It was his contention that in order to successfully advance the contention that there had been variation of the contract, the appellant had to first identify the contract expressed in United States Dollars, set out its terms and then show how it was unlawfully varied by the respondent.

As already mentioned earlier, the respondent issued out an internal memorandum on 21 March 2009 following the adoption of the United States dollar currency. This memorandum had the effect of altering the appellant's contract of employment. Following the memorandum, the appellant, who was the Human Resources officer, accepted his new salary in terms of the memorandum. He was receiving a salary in terms of the memorandum and for the five years, he never raised any complaint nor did he challenge the new salary scale.

It is trite that consent can either be express or implied. In the case of *Smith v Hughes* L.R 6 Q.B 597 at p 607, it was stated that:

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

For five years the respondent accepted a salary, in terms of a memorandum which had no provision for any allowances. By such conduct he accepted the variation of the terms of his contract of employment. If he genuinely felt that the memorandum breached his contractual rights, he ought not to have accepted the salaries and ought to have mounted his challenge at the pertinent time or within the permitted period. In the absence of any challenge to the variation of the contract, it is clear that after variation of the contract of employment, there was acquiescence by the appellant.

If there was acceptance of the variation, as there was, there was no claim to be prescribed. It follows that by his conduct, the appellant impliedly consented to the variation of his contract. In such circumstances, he could not claim any benefits flowing out of the contract that had been varied. The court *a quo* thus correctly found that the contract of employment was varied with the consent of the appellant and therefore the allowances claimed by the appellant were no longer claimable under the contract ushered in by the memorandum.

It is for these reasons that we found that the appeal had no merit and proceeded to grant the order that we did as recorded at the beginning of this judgment.

GOWORA JA I agree

PATEL JA I agree

Saratoga Makausi Law Chambers, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners