

MBERIKUNASHE MASVIBO & 14 OTHERS**Versus****TN HARLEQUIN LUXAIRE LIMITED**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 3 JUNE & 6 OCTOBER 2016**Opposed Application***S. Chamunorwa* for the applicants
F. Girach for the respondent

MAKONESE J: The applicants seek a declaratory order that the termination of their contracts of employment by the respondent was unlawful. Upon the granting of such a declaratory order, the applicants seek an order for their reinstatement to their posts without loss of salary and benefits. The application is resisted by the respondent who contends that the basis of the order is flawed. Further, and in any event, it is argued on behalf of the respondent that the applicants were offered new contracts where their remuneration would be related to their performance. The applicants refused to sign these new contracts. A dispute arose and subsequently, the respondent terminated the applicants' contracts of employment. The applicants argue that the purported termination is an unlawful circumvention of the Labour Act (Chapter 28:01) and its regulations relating to retrenchment.

Background

All the applicants were employed by the respondent on contracts without limit of time as defined in section 12 of the Labour Act. A dispute has arisen between the applicants and the respondent. On the 10th and 11th June 2015 the respondent wrote to each of the applicants indicating an intention to terminate their contracts and to replace them with new contracts. The letters which were similarly worded were crafted in the following terms:

“NOTICE OF TERMINATION OF CURRENT CONTRACT AND OFFER OF NEW CONTRACT”

The macro-economic challenges facing the country are seriously hampering the viability of the company.

Particular reference is made to the poor performance of the company as reflected by the month on month sales figures from last year to date. The sales figures are well below operating costs. These figures show that it is impossible for the economy to maintain a fixed or invariable salary structure. It is therefore, important for the company to adapt the way it does business to its operating environment to ensure that it survives. The costs of the company must be aligned and positively correlated to productivity.

Your current contract of employment was concluded when the environment was not as hostile on manufacturers as it is now. At the time that we concluded the employment contract, we agreed that the contract can be terminated on notice other than through dismissal. Because we still require your services, we now wish to terminate your contract on notice and replace it with one that provides for remuneration based on productivity. We hereby give you three months notice for the termination of your current contract of employment. At the same time, we hereby offer you a new performance contract which aligns your remuneration to your productivity. Your new contract if accepted, shall become effective on the date that the termination of your current employment contract becomes effective. Should you want to bring forward the effective date of your new contract, you will be required to waive the notice required to terminate your current contract of employment.

During that period of notice, you shall not enter into any other employment on a full time, part time or consultancy basis.”

The applicants did not accept the offer of the new contracts, which they viewed as an attempt to retrench them without following the rules and regulations on retrenchment.

In a letter dated 23 June 2016, the applicants instructed their legal practitioners to reject the offer. The letter reads in part in the following terms:

“Our clients’ view is that since you are terminating more than 5 employees, you are obliged to comply with the provisions of section 12C of the Labour Act (Chapter 28:01). In this regard, you cannot purport to act in terms of section 12 (4) of the same Act because in your letter giving notice of termination, you specifically advise the employees that you are terminating employment due to the unfavourable economic conditions. It is clear therefore that the termination is being done on an individual basis per se with respect, the Labour Act provides in section 12D, thereof that were an employer is facing financial challenges, the options available to them are to:

- (a) place employees on short-time work; and or*
- (b) institute a system of shifts*

it is clear, with respect, that the employer is not at liberty to simply terminate all its employees and thereafter offer to them fixed term contracts. That is not a special measure contemplated by section 12D of the Act ...

In the result, the termination of the employees’ employment contracts in the manner that you have done is manifestly unlawful and liable to be overturned by a competent tribunal. It is clear that your true intentions are to vary the employees’ contracts without their consent ...”

The letter by the applicants’ legal practitioners encapsulates the legal arguments that are being put forward by the applicants in this matter.

The issues for determination by this court are essentially these:

- (a) whether or not the relief sought in paragraph 1 of the applicant’s draft order is *sensu stricto* for a *declarator*.
- (b) Whether or not the termination of the applicants’ employment contracts was an unlawful circumvention of the provisions of the Labour Act and its regulations relating to retrenchment.
- (c) Whether or not the respondent was entitled to terminate the applicants on the grounds of repudiation.

Declaratory Order

In determining whether the order sought is strictly a *declarator* it is necessary to have regard to the provisions of section 14 of the High Court (Chapter 7:06). It is provided under this section as follows:

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

In *Johnsen v AFC* 1995 (1) ZLR 65 (H) it was held as follows:

“The condition precedent to the grant of a declaratory order under section 14 of the High Court Act 1981 is that the applicant must be an “interested person”, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment the court. The interest must concern an existing, future or contingent right ...”

I am satisfied that the circumstances of this particular application would warrant the granting of a declarator, in the exercise of my judicial discretion.

Whether or not the applicants’ termination on notice is unlawful

It is clear that the starting point is to examine the meaning and purpose of the respondent’s letter dated 10 June 2015. It is evident from the preamble to the letter that in consequence of economic factors affecting the viability of the company and poor sales, a fixed salary structure was no longer tenable. Respondent required salaries to be linked to productivity and performance. The applicants placed reliance on the authority of *Mutare Board Paper Mills (Pvt) Ltd v Kodzanai* 2000 (1) ZLR 641 (S).

In this matter, the management of the appellant company decided that it had to reduce its work force. This decision was considered to be necessary as a cost-cutting measure that was essential to maintain the financial viability of the company. It decided that it would reduce the workforce by retiring all its male employees who were 55 years of age or over. The respondent,

along with several other employees of the appellant, was compulsorily retired after reaching the age of 55. The rules of the pension fund provided that the normal retirement was at the age of 65, but an employee could retire early or be retired at the employer's instance. The respondent argued that what was being effected was retrenchment and the procedures applicable to retrenchment should have been followed. The court ruled that it was clear that the object of the exercise was retrenchment. This was shown by the fact that the employer suddenly and simultaneously required large numbers of employees of the same class by age to proceed to early retirement, and the fact that the reason given for this step was the need to reduce the strength of the workforce.

It is my view that the termination of the employees' contracts of employment, and the proposed replacement with new contracts was informed by the alleged macro-economic challenges. The fact that the company was re-organising its workforce is also evident in the notice of termination of current contracts.

The definition of retrenchment as set out in the Act is as follows:

“retrench, in relation to an employee, means terminate the employee's employment contract for the purpose of reducing expenditure or costs, adapting to technological change, re-organising the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed.”

It is my view, that whatever name the respondent has chosen to call the wholesale termination, it is apparent, that in terms of the law it was conducting an unlawful retrenchment exercise.

In the case of *Mutare Board Paper Mills (Pvt) Ltd v Kodzanai*, (*supra*)

The Supreme Court held that:

“Even though an employer may have the right to resort to termination ... if the object and effect of such action is to retrench, then the applicable regulations must be complied with.”

It is not disputed that the respondent terminated or sought to terminate its employees' contracts *en masse* citing viability and re-organisation as its reasons. In its letter dated 14 August 2015, the respondent made it clear that the applicants' employment would end on 12 September 2015. The new contracts offered were separate contracts from the contracts sought to be terminated. This is more evident in that the “new” contracts would replace the “old” contracts. The applicants were advised that they would serve three months notice. If it was intended to be continuous employment, then the employee would not have been required to serve notice.

I am satisfied that the actions of the respondent amounted to an unlawful termination of the applicants' contract of employment.

Whether or not the respondent was entitled to terminate the contracts on grounds of repudiation

The respondent contends that the applicants have repudiated their employment contracts by failing to report for work and making themselves available for work. This is denied by the applicants who allege that the argument of repudiation is merely based on letters written by applicants dated 19 and 21 September 2015. The applicants contend that these letters were written after the applicants had issued their application and served it on the respondent. These letters are worded in the following terms:

“Repudiation of contract

At the closure of your Branch you rejected our offer of a new contract in line with our branchless strategy. We would have expected you to continue rendering your services pending determination of the legality of the termination of your old contract. You neither tendered nor rendered your services.

Your actions constitute repudiation of your employment contract. We hereby accept the repudiation. In the result you have ceased to be our employee with immediate effect.”

In support of its argument that the applicants had repudiated their contracts by failing to make themselves available to perform their services, the respondent relied on the case of *Zimbabwe Sun Hotels v Lawn* 1988 (1) ZLR 143.

I am not satisfied, on the facts, that the applicants repudiated their contracts. The letters addressed to the applicants were authored after this application had already been instituted.

Disposition

The applicants seek a declaratory order to the effect that the termination or variation of the applicants' contract is unlawful. I have already come to the conclusion that the purported variation or termination was not done in terms of the law. The applicants have established that the respondent sought to retrench each of the applicants. The conduct of the respondent amounts to an illegality. The variation of the old contract with a new “performance” based contract was designed to circumvent the retrenchment regulations.

In the result it is ordered as follows:

1. The termination or variation of the applicants' contracts of employment by the respondent be and is hereby declared unlawful.
2. The respondent be and is hereby ordered to reinstate the applicants to their employment without loss of salary and benefits.
3. In the event that reinstatement is no longer an option, the respondent be and is hereby ordered to pay the applicants' damages to be determined by an arbitrator appointed by a Senior Labour Officer.
4. The respondent is ordered to pay the costs of suit.

Calderwood Bryce Hendrie & Partners, applicants' legal practitioners
Mtewa & Nyambirai, respondent's legal practitioners