

**IN THE LABOUR COURT OF ZIMBABWE
HARARE ON 21ST JANUARY, 2014
AND 31ST JANUARY, 2014**

**JUDGMENT NO. LC/H/48/14
CASE NO. LC/H/549/12**

In the matter between

RUSIKE PRIMARY SCHOOL – APPELLANT

And

MUSONI MARGRET - RESPONDENT

Before The Honourable P. Muzofa J.

For Appellant : Mr C. Kachere (Legal Practitioner)

Respondent : In Person

MUZOFA J,

This is an appeal against an arbitral award made in favour of the Respondent. The Appellant was ordered to reinstate the Respondent with payment of damages in lieu of reinstatement as an alternative.

The background of the case is as follows:-

Respondent was employed by the Appellant as a clerk. According to the Appellant, Respondent was employed on a fixed term contract from the 1st of May 2010 renewable after four months. At the expiration of the four months the Respondent would re-apply and she would sign a new contract. Subsequently on the 31st of May 2011 Appellant wrote to Respondent advising her that her contract was to expire on the 30th of June 2011. The month of June was to be the notice period. Dissatisfied by the decision to terminate her contract she approached a Labour Officer. The parties failed to agree and the matter was referred to an Arbitrator. The Arbitrator made a finding that the Respondent was unlawfully dismissed and ordered reinstatement. As a result of the finding the Appellant noted an appeal to this court.

The grounds of appeal as amended are as follows:-

1. The Arbitrator *aquo* erred in fact and law by finding that the Appellant had failed to prove on a balance of probabilities that Respondent was on a fixed term contract yet the requisite

documents had been tendered and he messed up by erroneously placing them in a wrong file relating to Miriam Banda Rusike.

2. The Arbitrator *aquo* erred in finding that the Respondent's contract had been unlawfully terminated yet she was on a fixed term contract and adequate notice was given prior to the termination.
3. The Arbitrator *aquo* erred in granting the arbitral award in favour of the Respondent when there was no legal justification and same had failed to prove her claim.
4. The Arbitrator *a quo*'s order of reinstatement was granted in error by virtue of the fact that it was proved that she was on a fixed term contract and ordinarily her entitlement if any, should be payment of salary for the unexpired term of that contract.
5. The Arbitrator *aquo* misdirected himself and fell into gross factual errors that amount to an errors (sic) at law warranting the setting aside of his ultimate decision.

I will deal with the grounds of appeal in turn.

That the Appellant failed to produce the signed fixed term contract.

According to the Arbitrator's analysis of evidence the Appellant had undertaken to produce the initial contract signed by the Respondent but failed to do so. On that basis the Arbitrator accepted the Respondent's version that she had not signed any contract therefore she was employed as a permanent worker. It was submitted on behalf of the Appellant that the said contract was later provided to the Arbitrator but the document was misfiled in one Miriam Rusike's file. As a result the Respondent's contract was used to determine Miriam Rusike's case. The arbitral award and the grounds of appeal filed by Miriam Rusike, also appealing against the same Arbitrator's finding were filed with this Court. A perusal of the grounds of appeal by Miriam Rusike show that indeed the Arbitrator mixed up some documents. The grounds of appeal partly are as follows:-

"The Arbitrator fidgeted with the evidence I gave and gave judgment on me using Margret Musoni's submissions.

Submissions in the Arbitrator's analysis of the submissions made (sic) article five clearly reflect that of Margret Musoni who was my successor fired in the same manner with me and she also reported her case with NEC. I am aware of the proceedings because I was an SDC member by the time she was employed. "

The relevant part of paragraph 5 in the arbitral award for Miriam Rusike is as follows:-

"However, on the other hand, a perusal of the record indicates that the Applicant was engaged on a fixed term contract on the 1st May 2010 and signed an agreement/contract to that effect. Part of the agreement reads '..... with effect from 1 May 2010 on a contract basis renewable after 4 months i.e. a term"

The quoted part is indeed exactly the introductory part of the contract that was produced by Appellant before this Court, as the contract that was filed with the Arbitrator. Clearly the Arbitrator referred to wrong documents thereby coming to a wrong decision. There is no way the Appellant could have signed the same contract with two different people that is Miriam Rusike and Margret Musoni the Respondent. There was a lack of diligence on the part of the Arbitrator in this case. The Court therefore accepts the fact that there was an initial contract signed between the parties.

The Respondent submitted that she indeed signed the contract but it was a contract for probation thereafter she was to become a permanent worker. This argument is untenable. I say so because, before the Arbitrator she submitted that she had not signed a contract therefore she was on a contract without limit. Respondent's statement show that she was not being candid with the Court. Further to that the contract does not refer to any probation period, it refers to a period within which she was to work and that it was renewable termly or in (4) four months. I accordingly reject the Respondent's explanation, she signed the fixed term contract.

The ground of appeal succeeds, the Arbitrator erred in making a finding that there was no fixed term contract between the parties.

That the contract was unlawfully terminated.

According to the Appellant the Respondent signed the first contract on the 1st May 2010 which was to expire in August 2010. She was supposed to reapply upon expiration of the contract. Respondent signed another one for the period September to December 2010, then another one for the period January to April 2011. However when she re-applied in May 2011 she was served with a notice of termination with one month's notice. Respondent's employment was therefore to terminate at the end of June 2011. The Appellant could not produce the subsequent renewals but only relied on the letters of application for re-employment by the Respondent. Appellant submitted that the Respondent was the custodian of the subsequent contracts and she had destroyed the contracts. This was denied by the Respondent and there was no evidence to support the said submission. According to the Respondent she signed the first contract being one for probation thereafter she did not sign any contract because she was a permanent worker.

There are two application letters made by the Respondent to the Appellant for the post she held. One letter is dated the 2nd of December 2010 wherein she applied for re-appointment for the year 2011. A second letter dated 24th May 2011 wherein she applied to

fill the position of a clerk. Respondent tried to explain why she submitted these applications although she was still employed in the same post she held. I believe the Appellant's explanation that she was to apply termly although there was no evidence of the September 2010 application. In that regard this Court's finding is that the Respondent was on a termly contract and she applied accordingly and was offered the job until May 2011.

I would want to deal with the issue of the legality of the termination. Taking Appellant's submissions the last contract between the parties was to expire by the end of April 2011. This therefore means in the month of May she had no contract. It was only on the 31st of May that a letter was written to Respondent couched as follows:-

“This is to notify you that your contract will expire with effect from after work on 30 June 2011. Be advised that you will be working and serving your notice of termination duration from 1 June to 30 June 2011.”

In my view Appellant advised that the contract was to expire in June. However according to the submissions made before this Court the contract had expired in April 2011. It is not true that it expired in June. Infact when Respondent continued to work in May 2011, it was the commencement of another four month contract with the same terms and conditions as the previously signed contracts see *Gumbo v Air Zimbabwe 2000 (2) ZLR 126 H*. In *casu* therefore by terminating the Respondent's contract before the expiration of the said four months was unlawful. There was no allegation of misconduct leveled against Respondent therefore she is entitled to p

ayment of the remainder of her contract period which is two months' salary. This ground of appeal is therefore dismissed.

I believe grounds of appeal 3, 4, and 5 have been subsumed in grounds of appeal 1 and 2 above. The appeal partially succeeds accordingly the following order is made.

1. The arbitral award by the Honourable Y. Malama be and is hereby set aside.
2. The Appellant is ordered to pay the Respondent two months' salary being the equivalent of the unexpired period of the contract between the parties within 30 days of receipt of this order.
3. Each party to bear its own costs.