DISTRIBUTABLE (47)

Judgment No. SC 51/04

Civil Appeal No. 311/02

GAUNTLET SECURITY SERVICES (PRIVATE) LIMITED v LAST HLABANGANI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, JULY 1 & SEPTEMBER 9, 2004

A Mugandiwa, for the appellant

H Zhou, for the respondent

MALABA JA: This is an appeal from a judgment of the Labour Relations Tribunal dated 21 August 2002 setting aside the termination of the respondent's contract of employment with the appellant and ordering that he be reinstated into his original position without loss of salary and benefits failing which he be paid damages the quantum of which was to be assessed by the Tribunal.

The respondent (Hlabangani) was employed by the appellant (Gauntlet Security) as a security guard on 5 February 1996. His contract of employment was terminated on 12 September 1997. During the time he was employed by Gauntlet Security, Hlabangani was occasionally unable to perform his duties because of ill-health. He was on sick leave on no less than four occasions during the period of nineteen months he was with the appellant.

The undisputed facts found proved by the National Employment Council from the decision of which he had appealed to the Tribunal were that:

"1. On 28 November 1996, respondent reported sick and was away on sick

leave until 10 January 1997 giving a total of one month and five days.

2. On 4 April 1997 respondent reported sick and was away on sick leave up to 16 April 1997 giving a total of 12 days sick leave.

3. On 29 May 1997 respondent reported sick and was away from work until 5 June 1997, 8 days sick leave.

4. On 8 August 1997 respondent reported sick and was away from duty up to 3 September 1997, about one month."

On 3 September 1997 Hlabangani wrote a letter to Gauntlet Security management asking for financial assistance to pay hospital bills. On 11 September a meeting was held between Gauntlet Security's personnel manager and Hlabangani. The effect that Hlabangani's ill-health was having on the performance of his duties was discussed. The parties also discussed the question whether it was not in the best interests of both of them to have the contract of employment terminated by mutual agreement. It appears that Hlabangani was given until the following day to reflect on the matter.

On 12 September he signed a document in which he said he agreed to terminate his contract of employment on payment by Gauntlet Security of wages in lieu of a month's notice. He admitted that he signed the document containing the terms on which the contract of employment was to be terminated by mutual agreement. He claimed however that he signed the document not with the intention of binding himself under a mutual agreement to terminate the contract of employment but because he wanted to get the terminal benefits. He did not say that he was forced to sign the document nor did he deny that by conduct he led his employer to believe that he was agreeable to a mutual termination of the contract of employment.

After collecting the terminal benefits and using them Hlabangani lodged a complaint of unfair dismissal with the local joint committee of the National Employment Council for the Commercial Sector. He alleged that he had not intended that his contract of employment be terminated. The local joint committee agreed with him and set aside the termination of employment and ordered his

reinstatement. Gauntlet Security appealed to the National Employment Council which found that the parties had terminated the contract of employment by mutual agreement. It held that the parties were entitled under s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85) to terminate the contract of employment by mutual agreement in writing.

Hlabangani appealed to the Labour Relations Tribunal. The facts were largely common cause. The Tribunal failed to understand the facts and give effect to them. It held on no evidence that Hlabangani had not voluntarily resigned from employment because had he done so he would not have lodged the complaint of unfair dismissal with the local joint committee of the National Employment Council for the Commercial Sector. It then found that Hlabangani had been dismissed from employment.

The reasoning of the Tribunal is captured in this passage from the judgment;

> "The applicant had appealed for assistance by letter on page 25 of the record, this was on 3 September 1997. On 11 September 1997 he is called to the office to discuss his ill-health and it is alleged that he accepts to voluntarily resign. He signs the dismissal form on 12 September 1997 and on the same day he applied for a reference letter clearly indicating that he wanted to still try and get employment. On 16 September 1997 he appeals against unfair dismissal. From the above facts I find it highly improbable that the appellant accepted to resign. Had he acted voluntarily he would not have lodged a complaint soon afterwards against dismissal. The reasons why he was called to the office soon after asking for cash in lieu of leave were not given. The only thing that the employer did after calling the appellant to the office was to "agree" to terminate the contract of employment. This seems to be the only reason why the appellant was called to the office. I do not accept that the appellant acted freely and voluntarily. His actions do not show that he was in agreement with the dismissal."

I agree with the submission made by *Mr Mugandiwa* that the finding that Hlabangani was dismissed from employment by Gauntlet Security was irrational. The reasoning of the Tribunal is with respect very confusing. A finding is made that Hlabangani did not voluntarily resign from employment. There had been no allegation of the fact that he had resigned from employment. Terminating employment by tendering resignation and doing so by mutual agreement are two different things. Gauntlet Security alleged that the contract of employment was terminated by mutual agreement. Hlabangani on the other hand said he signed the

document containing the terms of the agreement to terminate the contract of employment. The only difference between the two positions is that Gauntlet Security said the parties were *ad idem* as to the termination of the contract of employment at the time they put their signatures on the document containing the terms of the agreement whilst Hlabangani said he had no intention of terminating employment as such but signed the document with the intention of getting the money to be paid to him as terminal benefits.

A close look at the facts shows that Hlabangani did not suggest that he did not voluntarily put his signature on the document nor did he allege that he did not know that it contained terms of an agreement to have a mutual termination of the contract of employment. He did not in fact allege that he was dismissed from employment. There was no unilateral act of repudiation of the contract of employment by Gauntlet Security. Hlabangani was in fact saying that while he represented to Gauntlet Security by conduct in signing the document that he was agreeable to a mutual termination of the contract of employment and led it to believe that indeed he intended what he had written on the document he in truth did not intend that his signature should have the effect it had. If that is the case he is entirely to blame for having misled Gauntlet Security into believing what he intended it to believe that is to say that the contract of employment was being terminated by mutual agreement. He must have known that he was not entitled to the payment of the money he received as terminal benefits without the contract of employment having been terminated in terms of agreement embodied in the document that he signed. See *Forestry Commission* v *Kujinga* HH-36-92.

The appeal accordingly succeeds with costs. The decision of the Labour Relations Tribunal is set aside and in its place substituted the following:

"The appeal from the decision of the National Employment Council for the Commercial Sector is dismissed with costs."

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Wintertons, appellant's legal practitioners

M V Chizodza-Chineunye, respondent's legal practitioners