REPORTABLE ZLR (8)

FREDA REBECCA GOLD MINE HOLDINGS LIMITED
v
M NHLIZIYO & 180 ORS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & OMERJEE AJA
HARARE, JULY 16, 2012 & JUNE 3, 2013

T Magwalimba, for the appellant
A Muchadehama, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the Labour Court. The point of law to be determined is whether the Minister's decision in terms of s 12C(9) of the Labour Act [*Cap. 28:01*] (hereinafter referred to as ("the Act")] constitutes a termination of the employment contracts of the affected employees.

THE BACKGROUND

The respondents are all former employees of the appellant. In or about April 2007, upon consideration of its financial viability due to reduced production levels, the appellant decided to retrench the respondents so as to reduce its operational costs and notified the respondents of its intention to do so. Negotiations then took place in terms of the procedures laid down by the Labour Act culminating in the approval, in terms of s 12C of the Act, of the retrenchment on 19 July 2007, by the then Minister of Public Service Labour

and Social Welfare, ("the Minister"). The retrenchment was approved on the following terms and conditions:

a. Service pay 2 months' salary for each year worked
b. Severance pay 3 months' salary
c. Relocation allowance 3 months' salary

The net effect of the Minister's decision was that the appellant was to pay a total of ZW$28 billion to the respondents.

On 24 July 2007, the appellant's General Manager wrote to each of the respondents in the following terms:

> "Management advises that due to the high costs of the retrenchment as approved by the Ministry of Labour, the process is deferred until further notice.
>
> As a consequence of these developments, you are now required to report back to work on Monday 30 July 2007.
>
> On resumption of duty, you will revert to the previous rotational duties i.e. if you were on short time work before proceeding on paid leave pending finalization of the retrenchment process you will be expected to resume work on a short time basis. Please note that paragraph two (2) of the internal memorandum notifying you of the retrenchment exercise clearly stated that you remain an employee until the finalisation of the exercise."

On 30 July 2007, he also wrote to the Secretary for Social Welfare advising that the appellant had decided to defer the retrenchment to a later date. The relevant part of the appellant's letter reads as follows:

> "We advise that the reason for the retrenchment is the dire situation in which the mine finds itself in as it embarks on the rehabilitation of the plant. The situation remains critical and the magnitude of the problem can only become worse because of the size of the retrenchment package approved. The total bill is in excess of ZW$28 billion, and unaffordable by Freda Rebecca Mine.

> In view of this situation, Freda Rebecca Mine management has decided to defer the Retrenchment to a later date.
>
> In the meantime, all the employees have been called to resume work while the company maps the way forward on this matter."

All the respondents signed acknowledging receipt of letters requesting them to resume work. They reported for work for about two days and declined to work thereafter, asserting that their contracts had been terminated by reason of their retrenchment. An Internal Memorandum from the appellant's General Manager dated 3 October 2007, again reminded the respondents to report for duty on 8 October 2007. On 16 October 2007, the respondents, who had not reported for duty, were summarily dismissed in terms of the Collective Bargaining Agreement for the Mining Industry Code of Conduct, Statutory Instrument 165 of 1992. They were charged with disobedience to a lawful order and failing to report for work for a period in excess of five (5) days. The respondents received and signed for their terminal benefits. Thereafter they filed an application in the Labour Court seeking an order in the following terms:

> "**IT IS ORDERED THAT:**
>
> 1. Application be and is hereby granted with the following terms:
>
> (a) The Minister's decision of 19 July 2007 is still binding on both parties.
>
> (b) The purported dismissal of the Applicants by the Respondent be and is hereby declared void.
>
> (c) The Respondent be and is hereby ordered to pay out the retrenchment packages of each respective Applicant in United States Dollars or its lawful equivalent in South African Rand (ZAR) through direct deposit into Applicant's Legal Practitioners Trust Account within 20 days of this order.
>
> 2. The Respondent be and is hereby ordered and directed to pay to the Applicant a total amount of US$1 475 055.59 or its lawful equivalent in South African Rand (ZAR)
>
> 3. The respondent to pay costs of suit."

The application found favour with the Labour Court. It ruled that the respondents remained employees of the appellant only up to the date of the Minister's approval of the retrenchment, that is, 19 July 2007. It found that since the respondents had ceased to be employees of the appellant on 19 July 2007, the appellant had no right to recall the respondents to work or to institute disciplinary proceedings against them leading to their dismissal. It further ruled that the respondents could approach the Minister for the alteration of the quantification which was done in United States Dollars. It issued the following order:

> "1. The applicants remain retrenchees of the respondent and are entitled to their retrenchment package as per the Minister's decision of 19 July 2007.
>
> 2. The respondent is ordered to pay retrenchment packages as per the Minister's decision by 31 August 2010.
>
> 3. The applicants can approach the Minister for alteration in quantification.
>
> 4. There be no order as to costs."

The main ground of appeal advanced by Mr *Magwaliba* is that the court *a quo* erred and misdirected itself in finding that the Ministerial approval of the retrenchment of the respondents was the effective retrenchment of the respondents and that it bound the appellant to such extent that the appellant could not require the respondents to return to work. It is my view that a determination of this ground in favour of the appellant would dispose of the appeal. I deal with it, hereunder, in two parts.

WHETHER THE MINISTER'S LETTER CONSTITUTED THE EFFECTIVE RETRENCHMENT AND THEREFORE A TERMINATION OF THE CONTRACTS TO EMPLOYMENT

A contract of employment is concluded by an employer and employee and can only be terminated by one or other of them. The Minister not being a party to the employment agreement could not terminate it.

Section 12C of the Act in subs (9), gives to the Minister the following powers.

> (9) The Minister shall *consider* without delay any recommendation submitted to him by the Retrenchment
> Board and, having regard to the factors referred to in subs (11), shall—
>
> *(a)* approve the proposed retrenchment, subject to such terms and conditions as he may consider necessary or desirable to impose; or
>
> (b) refuse to approve the proposed retrenchment,
> and shall cause the Retrenchment Board, the works council or employment council, as the case may be, to notify the employer and employees concerned in writing of the decision in the matter.

The *proposed* retrenchment can either be refused by the Minister or approved subject to terms and conditions which the Minister deems fit to impose. Thereafter the Minister must cause his decision in the matter to be conveyed to the employer and the other parties mentioned in subs (9).

Thus, in approving a proposed retrenchment the Minister is in effect saying, "You may proceed with the retrenchment but only on these conditions." The Minister's directive is not constitutive of the retrenchment nor does it terminate the contracts of employment of the proposed retrenchees. It merely sets the conditions upon which the employer, if still so minded, can proceed to retrench. The contract is terminated by the employer when it proceeds with the retrenchment. In this connection the provisions of s 12C (5) are relevant. Subsection 5 provides:

"(5) No employer shall retrench any employee without affording the employee the notice of termination to
which the employee is entitled ……"

Accordingly, I hold the view that where, as in this case, the employer decides not to retrench, the employment contracts remain in force.

WHETHER THE EMPLOYER COULD REVOKE ITS INTENTION TO RETRENCH AND RECALL THE EMPLOYEES AT WORK

It was submitted by Mr *Magwaliba* that where the retrenchment package set by the Minister would have the effect of worsening the financially precarious situation of the employer, the very purpose of the retrenchment was defeated. Further, since the retrenchment exercise was for the benefit of the appellant, the appellant could revoke its intention to retrench and invite the respondents back to work. I agree with these submissions. They are in keeping with the spirit of ss 12C and 12D of the Act. It should be noted that the Act places no obligation on an employer to retrench its employees. Indeed, the clear intention of Parliament which emerges from ss 12C and 12D of the Act is that every effort should be made to *avoid* retrenchment wherever possible. Thus s 12C (11) provides:

"(11) In deciding whether or not to approve the retrenchment of employees in terms of this section, due regard shall be paid—

(*a*) To the following general considerations—

(i) that the retrenchment of employees should be avoided so far as possible, where this can be done without prejudicing the efficient operation of the undertaking in which the employees concerned are employed;

(ii) That the consequences of retrenchment to employees should be mitigated so far as possible;

(*b*) To the following considerations in particular cases—

(i) The reasons put forward for the proposed retrenchment; and

(ii) The effect of the proposed retrenchment upon the employees involved, including their prospects of finding alternative employment and the terminal benefits to which they will become entitled."

As I understand it, the letter written by the appellant to the Minister was merely stating that the onerous conditions imposed by the Minister were more detrimental financially to the appellant than the retention of the employees. After all, it was to avoid financial collapse that the appellant sought to take the drastic measure of retrenchment in the hope that it would be able to carry on its business.

In *Continental Fashions (Pvt) (Ltd) v Mupfuriri* & *Ors* 1997 (2) ZLR 405 (S), the company (the employer) had, during the course of a retrenchment exercise, sought to withdraw the retrenchment notice. The withdrawal was not accepted by the Principal Labour Relations Officer. McNALLY JA at pp 412-413A had this to say:

> "The principal labour relations officer dealing with the matter decided to ignore the "purported withdrawal". I cannot understand how such an attitude can be adopted. It seems to me to promote form above substance, procedure above reality, red tape above common sense. The whole purpose of legislation about retrenchment is to mitigate the effect of retrenchment upon those declared redundant. However good the retrenchment package, it must normally be second prize. The first prize must be a withdrawal of the redundancy notice. How an official can reject that first prize when it is offered is incomprehensible. Did he do so on behalf of the workers, and if so, on what authority."

And at p 407F:

> "But where, as here, the purpose of retrenchment is to avoid the collapse and liquidation of the company, the wellbeing of the retrenchees cannot be the only consideration. The survival of the company is the motivating consideration. The purpose of the exercise is to save the company. In so doing, care must be taken to cushion the blow to the workers. But to say, as the Tribunal has done in this case, that it is almost irrelevant whether or not the company can afford the package, is a fundamental misdirection. The immediate objective of retrenchment remains the saving of the company and of the jobs of the remaining employees. Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion –

> the bottom line. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what the retrenchment exercise was designed was designed to avoid."

These remarks are equally applicable to the present case where the retrenchment packages set by the Minister are unaffordable to the employer. Clearly in these circumstances an employer is not obliged to retrench on the conditions imposed, to its financial detriment.

In my view, until the appellant notified the respondents of the termination of their employment by virtue of the fact that the proposed retrenchment was going to be effected by the appellant, the respondents remained in the employ of the appellant who was entitled to recall them back to work. Their failure to respond positively to the command by the appellant to return to work constituted misconduct on their part. They were accordingly properly charged with misconduct and dismissed by the appellant.

The appeal is therefore allowed with costs.

GOWORA JA: I agree

OMERJEE AJA: I agree

Magwaliba & Kwirira, appellant's legal practitioners

Messrs Kajokoto & *Company*, respondent's legal practitioners