SHADRECK MOYO & 13 ORS
v
(1) J L HOFFMAN (2) CENTRAL AFRICAN BATTERIES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMERJEE AJA
HARARE, SEPTEMBER 17, 2012 & JUNE 19, 2013

The appellant in person

Mrs *N Moyo*, for the respondent

MALABA DCJ: At the end of hearing argument for both parties the appeal was dismissed with costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

On 26 November 2009 the appellants issued out summons in the High Court claiming against the respondents payment of damages, in the sum of US$3 500 000.00, a further sum of US$3 500 000.00 for outstanding wages and salaries and compensation for loss of earnings for a period of 12 years, interest on these sums at the rate of 30 per cent per annum and costs of suit. On 16 February 2012 the High Court granted a judgment of absolution from the instance. This caused the appellants to approach this court for redress.

The appellants were employees of the second respondent which is a company duly registered in terms of the laws of Zimbabwe. The first respondent is the director of the

company. On 3 and 4 December 1997, the appellants participated in an unlawful collective job action.

On 5 January 1998 the appellants were suspended from employment without pay or benefits in terms of s 3(1) (a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, S.I. 371 of 1985, pending an application to the Ministry of Labour for authority to dismiss them.

On 6 January 1998, the second respondent, applied to the Labour Relations Officer for an order terminating the employment of 15 employees who had embarked on the unlawful collective job action. A hearing was held. On 20 July 1998, the Labour Relations Officer ordered the reinstatement of all the employees without loss of pay and benefits. The second respondent appealed to a Senior Labour Relations Officer. On 11 January 1999, the Senior Labour Relations Officer allowed the appeal. The determination made by the Labour Relations Officer was set aside in its entirety. The employer was granted permission to dismiss the appellants with effect from the date of suspension and was ordered to pay their terminal benefits within 14 days of receipt of the order.

The appellants appealed to the then Labour Relations Tribunal which dismissed the appeal save for one employee whose appeal was upheld. He was reinstated. The fourteen(14) employees appealed to the Supreme Court, which dismissed their appeal in its entirety on 18 June 2002 in judgment No. SC 66/02. The effect of the dismissal of the appeal by the Supreme

Court was that the employees stood dismissed from employment with effect from the date of suspension which is 5 January 1998.

The appellants took the view that the effect of the dismissal of the appeal by the Supreme Court was a grant of authority to the employer. In their understanding the effect of the order of dismissal of the appeal was not that they were dismissed by the court's decision. They argued that they remained in employment until dismissed by the employer.

The appellants aver that they only became aware that their appeal was dismissed by the Supreme Court on 3 September 2009. The basis for the claim against the respondents was that the second respondent failed to write letters of dismissal to the appellants after the dismissal of the appeal by the Supreme Court.

In the court *a quo* the appellants made reference to the provisions of section 13(1)(a)-(d) of the Labour Act [Cap. *28:01*]. The argument was that when an employer has not paid terminal benefits the employee remains under employment. Section 13 of the Act provides as follows:

> "13 Wages and benefits upon termination of employment
> (1) Subject to this Act or any regulations made in terms of this Act, whether any person-
> (a) is dismissed from his employment or his employment is otherwise terminated; or
> (b) resigns from his employment; or
> (c) is incapacitated from performing his work; or
> (d) dies;
> he or his estate, as the case may be, shall be entitled to the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation of death, as the case may be, including benefits with respect to any outstanding vacation and notice period, medical aid, social security and any pension, and the employer concerned shall pay such entitlements to such person or his estate, as the case may be, as soon as

reasonably practicable after such event, and failure to do so shall constitute an unfair labour practice.

(1a) Wages and benefits payable to any person or to his or her estate in terms of this section shall not form part of or be construed as a retrenchment package which an employee is entitled to where his or her employment has been terminated as a result of retrenchment in terms of s 12C.

(2) Any employer who without the Minister's permission withholds or unreasonably delays the payment of any wages or benefits owed in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) The court convicting an employer of an offence in terms of subsection (2) may order him to pay-

(a) To be employee concerned; or

(b) To any person specified by it for the benefit of the employee concerned; in addition to any other penalty which it may impose, an amount which, in its opinion, will adequately compensate the employee concerned for any prejudice or loss he has suffered as a result of the contravention concerned, within such period and in such instalments as may be fixed by such court.

(4) The court may at any time on the application of the employer, employee or specified person concerned, for good cause shown, vary an order made in terms of subsection (3).

(5) Sections 348 and 349 of the Criminal Procedure and Evidence Act [Chapter 9:07]l shall apply, mutatis mutandis, in relation to the amount specified in an order in terms subsection (3) as if such amount were a fine referred to in those sections.

(6) Nothing contained in this section shall be construed as precluding a person referred to in subsection (1) or his representative or the executor of his estate, as the case may be, from claiming over and above any wages or benefits to which he or his estate is entitled in terms of subsection (1), damages for any prejudice or loss suffered in connection with such dismissal, termination, resignation, incapacitation or death, as the case may be."

At the commencement of trial, the only plaintiff in attendance was the first appellant. The rest of the appellants were in default. The trial proceeded on the basis that only one plaintiff was before the court. This affected the claim in the summons, the amounts claimed were reduced to US$275 375.08 for outstanding salaries and benefits and US$500 000.00 for general damages. Only first appellant's claim was considered and determined. The claim of the rest of the appellants has not been dealt with hence they are not properly before this Court.

The first appellant alleged that he never received his terminal benefits. He contended that he never received a letter of dismissal from the employer. He said he was entitled to damages in respect of lost earnings computed by using the salary scale of an employee in his grade as at 30 October 2010. He used the same salary to calculate his leave pay for 12 years that he said he has been on suspension. He also used the same measure to calculate the bonus he claimed he was entitled to during the period of 12 years. The claim for general damages was based on the alleged prejudice that he claimed he suffered as a result of failing to educate his children.

The court *a quo* correctly dismissed the claim by the appellant on the ground that it was based on a deliberate misinterpretation of the provisions of s 13 of the Act. The learned judge at pages 3-5 of the cyclostyled judgment said:

> "The first ground calls for an interpretation of the order of the Senior Labour Officer. The plaintiff averred that the second defendant was obliged to write to him informing him that he stood dismissed from the date of suspension and thereafter pay him his terminal benefits within two weeks of the receipt of the order. He contended that the failure to write the letter of dismissal means that he remained an employee. Mr Chiurayi contended that he was dismissed *by* the senior labour officer from the date of suspension."

Section 2(1) of the Labour Regulations in question read:

> "No employer shall summarily or otherwise terminate a contract of employment with an employee unless-
> (a) He has obtained the prior written approval of the Minister to do so or
> b) …….. not relevant
> c) …….. not relevant
> d) The contract of employment is terminated in terms of section 3"

Section 3 reads:

> "3(1) where an employer has good cause to believe that an employee is guilty of-

a) Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract.
b) ___ (i) not relevant

The employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

Section 2(1) and 3(1) (a) replaced the common law right of an employer to summarily dismiss an employee. Instead the authority to dismiss an employee was given to the Minister or his delegatee. The second defendant complied with the requirements of this section as demonstrated by the letter of 6 January 1998. In that letter, the second defendant applied for an order terminating the plaintiff's employment. The senior labour officer granted an order terminating the plaintiff's employment with effect from the date of his suspension. The date of suspension was 5 January 1998. It was not necessary for the second defendant to formally write to the plaintiff that it was terminating his employment from the date of suspension. The contention by the plaintiff that he remains an employee until he formally receives a letter terminating his employment does not make sense. This is because if the second defendant was to write such a letter, it would simply state that he was dismissed from the date of suspension. He would not be entitled to claim earnings from the date of suspension cum dismissal to the date the letter is written. The plaintiff's further submission that section 13(1) of the Labour Act [Chapter 28:01] maintains the employer-employee relationship where terminal benefits have not been paid is incorrect. All it does is to criminalize unreasonable delay in payment and make it an unfair labour practice."

Further, the court *a quo*, correctly held that the first appellant deliberately misconstrued the effects of the judgments which dismissed the appeal in order to justify his view that he remained an employee of the second respondent. As a result the court *a quo* held that the appellant had not produced evidence to be rebutted by the respondents at the close of his case. Absolution from the instance was granted.

In granting the application for an order of absolution from the instance the judge said at pages 5-6 of the cyclostyled judgment:

> "…. I see no basis for declining to determine the issue at the close of the plaintiff's case. The plaintiff's action flowed from the determination of the senior labour officer. He misinterpreted the determination wrongly claimed for damages and loss of earnings arising from a period after he ceased to be an employee.
> I am satisfied that he had no cause of action against the second defendant other than the payment of his terminal benefits up to 5 January 1998. He however, did not claim, quantify or prove those terminal benefits. It is not feasible to grant terminal benefits he has not sought or proved."

The appellants put before the court broad allegations as grounds of appeal against the judgment of the court *a quo*. Upon careful consideration and having heard Mr *Moyo* who argued the matter on behalf of 13 others the court unanimously dismissed the appeal with costs.

It is clear that the claim presented to the court *a quo* by the appellants was based on the belief that they were still employed by the respondents for the past 12 years from the date of suspension. It was the appellants' contention that they were never dismissed from employment because they did not receive letters of dismissal. The appellant's position clearly ignores the effect and meaning of the judgments dismissing the appeals. The effect of those judgments was that the appellants were dismissed from employment with effect from 5 January 1998. The appellants had no right to claim payment of salaries against the respondents since they were no longer employed by the same.

Under s 3 of S.I. 371 of 1985, there is no requirement for an employer to inform the employee in writing of the decision of a labour officer that he has been dismissed with effect from the date of suspension. The appellants were by operation of law dismissed with effect from the date of suspension once the Senior Labour Relations Officer upheld their dismissal. The termination of employment was not dependent on a subsequent letter of dismissal.

Further there is evidence on record which shows that on 25 January 1999 the second respondent wrote to the appellants advising them to come forward and collect their terminal benefits within 14 days. Some collected but others chose not to. The appellants did not dispute receipt of the letter. This alone is proof that the appellants were made aware of the termination of their employment contracts. The second respondent as the employer duly complied with the order of the Senior Labour Relations Officer.

The appellants never claimed terminal benefits in the court *a quo*. They claimed terminal benefits payable up to an unspecified future date. They were not entitled to payment of such amounts. Their claim was properly rejected by the court *a quo.* In the absence of any claim for payment of terminal benefits the court *a quo* was correct in granting an order of absolution from the instance.

In terms of s 13(6) of the Act, the appellants would have been entitled to claim money that they had not been paid by the respondents before the date of their dismissal. There is nothing in the record of proceedings to show that the respondents' indebtedness to the appellants went beyond the payment of salary arrears and benefits as at 5 January 1998. The appellants were entitled to claim terminal benefits accrued up to 5 January 1998, they did not claim them in the court *a quo*.

It is for these reasons that the appeal was dismissed with costs.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Coghlan Welsh & Guest, respondent's legal practitioners