REPORTABLE (14)

KUNDAI MAGODORA AND OTHERS
v
CARE INTERNATIONAL ZIMBABWE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, PATEL JA & GUVAVA JA
HARARE, OCTOBER 29, 2013 & MARCH 25, 2014

M. Gwisai, for the appellants

A. Mugandiwa, for the respondent

PATEL JA: The appellants in this matter were engaged by the respondent on fixed contracts of nine (9) months duration. The last such contract was fixed from 1 October 2006 to 30 June 2007. By letter dated 27 March 2007, the respondent purported to terminate the appellants' contracts of employment before their scheduled date of expiry. The contracts were to terminate on 31 March 2007 and the appellants were to be paid one month's pay in lieu of notice. Clause 21 of the contracts required the application of retrenchment procedures in the event of premature termination.

Subsequently, after taking legal advice, the respondent reconsidered its position and accepted that the early termination may have been unlawful. By letter dated 25 May 2007 from its lawyers, it cancelled the termination and reinstated the contracts of

employment with full pay up to 30 June 2007, at which date the fixed term contracts would expire without being renewed.

The matter was then referred to arbitration. The arbitrator held that the appellants had not been retrenched and that the respondent was entitled to act as it did. On appeal to the Labour Court, the arbitrator's decision was upheld. The court found that, even if the contracts had been prematurely terminated, the appellants were only entitled to their pay for the duration of their fixed term contracts, that is up to 30 June 2007, and that they were not entitled to any further payment.

The appellants now appeal against that decision. In their revised grounds of appeal, they seek an order declaring them to have been unfairly dismissed. They also seek an order deeming them to be permanent employees on contracts without limit of time and without loss of salary and benefits, reckoned from the time of dismissal. In the alternative, they should be deemed to have been re-employed for a further period of nine (9) months from the date of dismissal, on the same terms of employment and without loss of salary and benefits. At the hearing of the appeal, the additional claim for the payment of retrenchment packages, in the event of reinstatement not being possible, was abandoned on the basis that such relief was not competent as it was inconsistent with the primary relief sought.

Unfair Dismissal and Legitimate Expectation

Section 12B of the Labour Act [*Cap 28:01*], as amended, regulates dismissal from employment:

"(1) Every employee has the right not to be unfairly dismissed.

(2) An employee is unfairly dismissed –

(*a*) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or

(*b*) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9).

(3) An employee is deemed to have been unfairly dismissed –

(*a*) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;

(*b*) if, on termination of an employment contract of fixed duration, the employee –

(i) had a legitimate expectation of being re-engaged; and

(ii) another person was engaged instead of the employee.

(4) In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee."

Mr *Gwisai* for the appellants submits that the real reasons for the termination of the appellants' contracts were the impact of budgetary constraints and the consequent need to restructure the respondent's operations. This appears from the notices of termination sent to the appellants on 27 March 2007. Because this premature termination was a disguised retrenchment, it constituted unfair dismissal contrary to s 12B(1) as read with ss 2A(1) and 2A(2) of the Labour Act. Reliance is placed in this regard on the decisions in *Mabhena* v *PG Industries* HH 115-2002 and *Machaya & Others* v *Circle Cement (Pvt) Ltd & Another* HH 115-2003.

Mr *Gwisai* further submits that the repeated renewals of the appellants' contracts changed their status to that of permanent employees. They had a legitimate expectation of permanency or renewal of their contracts on similar terms. This is so despite the express provision in their contracts stating that there would be no legitimate expectation of further employment beyond the stipulated date of termination. He relies for this proposition on various decisions of the Zimbabwean and South African Labour Courts and contends that the seemingly contrary decision of this Court in UZ-UCSF Collaborative Research Programme in *Women's Health* v *Shamuyarira* 2010 (1) ZLR 127 (S) is distinguishable in this respect. Moreover, he argues that s 12B(3)(b) of the Labour Act is not exhaustive in its application of the doctrine of legitimate expectation and must be applied in conjunction with the protection against unfair dismissal afforded by s 12B(1).

Mr *Mugandiwa* for the respondent submits that the respondent did not violate the appellants' right not to be unfairly dismissed under s 12B(1) of the Act by terminating their fixed term contracts with effect from the stipulated date of their expiry. He further submits that the legitimate expectation provisions of s 12B(3) only apply where another employee is engaged in place of the employee whose fixed term contract is terminated. In the instant case, no one else was employed and the appellants' jobs have effectively been abolished. In any event, the express provision of each of the appellants' contracts was that there was no legitimate expectation of renewal or extension.

I see no reason to disagree with Mr. *Mugandiwa's* submissions. Having purported to prematurely terminate the appellants' contracts in March 2007, the respondent realised that it had acted unlawfully. It then remedied its breach in May 2007 by cancelling the earlier termination and reinstating the appellants with full pay up to 30 June 2007. By so doing, the respondent did not terminate the contracts of employment, but simply allowed them to lapse by effluxion of time without further extension or renewal. The question of compliance with retrenchment procedures and the payment of retrenchment packages, in terms of clause 21 of the contracts, would only have come into play had the respondent persisted with its premature termination. In this regard, the cases dealing with disguised retrenchment that are relied upon by Mr *Gwisai* are clearly distinguishable. They do not support his argument because they are concerned with the termination of periodic contracts of indefinite duration as opposed to fixed term contracts.

Although the appellants were not called back to work, they were paid the salary and benefits that were due to them until the expiry of their fixed term contracts. The respondent was clearly entitled to do so by virtue of the express duration of the contracts of employment and cannot therefore be said to have acted in breach of contract. In my view, the appellants were duly compensated, without having worked for three (3) months, and cannot claim to have been unlawfully dismissed within the contemplation of s 12B(1) of the Act.

I now turn to the argument that the continual renewal of fixed term contracts over a period of time creates a legitimate expectation of re-employment or

permanent employment. This position, in its essence, was rejected by this Court in the *Shamuyarira's* case (supra), the material facts of which are virtually identical to those in the present matter. My reading of s 12B(3)(b) of the Act does not give me any ground for departing from that decision. The plain meaning of that provision is that the employee on a contract of fixed duration must have had a legitimate expectation of being re-engaged upon its termination <u>and</u> that he was supplanted by another person who was engaged in his stead. These requirements are patently conjunctive and the mere existence of an expectation without the concomitant engagement of another employee does not suffice. I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an Act of Parliament. See s 111B of the former Constitution and ss 326 and 327 of the current Constitution.

Apart from the clear wording of s 12B(3)(b), we cannot avoid the explicit provisions of the contracts *in casu*. The opening paragraph of each of the contracts stipulates that "*This contract shall in no way whatsoever lead to a legitimate expectation of further employment beyond the contract's date of termination*." This in itself, as was recognised by Ziyambi JA in *Shamuyarira's* case, indisputably undermines and renders untenable the appellants' contention of having been unfairly dismissed. They are surely

bound by the express terms that they have agreed to and cannot then complain, notwithstanding those terms, that they had a legitimate expectation of being re-engaged.

In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H.

In the premises, none of the arguments proffered on behalf of the appellants grounding their claim for permanent employment or re-employment can be sustained in the present case.

Relief Sought

Apart from the demerits of the appeal, there is a more fundamental obstacle to the appellant's case. As I have stated earlier, the relief sought on appeal is either that of permanent employment or re-employment for a further nine (9) months. From the outset, the appellants' case was that the letter of 27 March 2007 amounted to premature termination and was therefore subject to their being retrenched in accordance

with clause 21 of their contracts of employment. The terms of reference before the arbitrator primarily revolved around this question and the relief sought was that the matter be referred to the Retrenchment Board. The grounds of appeal to the Labour Court were also centred on retrenchment, challenging the arbitrator's decision for having declined the application of retrenchment procedures and praying for an order compelling the respondent to comply with clause 21.

It is abundantly clear, therefore, that the appellant's case did not involve any claim for permanent employment status or re-employment. In essence, the relief that they pray for on appeal to this Court is completely different from what they sought hitherto. In this respect, the appellants are effectively inviting this Court to sit as a court of first instance and to adjudicate a matter that was not ventilated before or determined by the Labour Court.

As was aptly observed by Korsah JA in *ANZ Grindlay Bank (Zimbabwe) (Pvt) Ltd* v *Hungwe* 1994 (2) ZLR 1 (S) at 5A-B, it would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which are properly cognisable in a court of first instance but have not been canvassed before that court. The same position was adopted by Cheda JA in *Total Marketing Zimbabwe (Pvt) Ltd* v *Pollylamp Investments (Pvt) Ltd* 2007 (2) ZLR 60 (S) at 62G. It was held that it would be wrong for this Court, as if it were a court of first instance, to consider the merits of an urgent application before the High Court where

those merits were not considered by that court following its decision that the matter was not urgent.

In casu, the merits of the primary relief sought by the appellants were never debated or considered by the court *a quo* and, consequently, they cannot be entertained or determined by this Court. In other words, the Court has no remit to exceed its jurisdiction and powers on appeal as prescribed by ss 21 and 22 of the Supreme Court Act [*Cap 7:13*].

In the result, the appeal cannot succeed, both on the merits and on jurisdictional grounds. It is accordingly dismissed with costs.

MALABA DCJ: I agree.

GUVAVA JA: I agree.

Matikidze & Mucheche, appellants' legal practitioners

Wintertons, respondent's legal practitioners