REPORTABLE (47)

RAINBOW TOURISM GROUP
v
RICHARD NKOMO

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA GARWE JA & HLATSHWAYO JA
HARARE, JULY 22, 2014 & JULY 27, 2015

E Matinenga, for the appellant

D Ochieng, for the respondents

ZIYAMBI JA:

[1] This is an appeal against a judgment of the Labour Court which upheld an arbitration award made in favour of the respondent**.** It is necessary to set out the background facts in some detail.

[2] In or about December 2010, the Chief Executive of the appellant was looking for an "international GM at Rainbow Towers Hotel". She was eager to have a "passionate hotelier of [the respondent's] stature to run this place". She emailed to enquire as to whether the respondent was interested or whether he could recommend someone.

[3] The respondent was interested. Besides, he responded via email:

"The family as you know is keen to move to Zim or to the region. Despite the opportunity costs associated with my move out of the US, family values have to take precedence."[1]

[4] Matters moved quickly and, on the 7 December 2010, the appellant, through its Human Resources Manager, addressed a letter of employment to the respondent. It read:

"Dear Richard

RE: **APPOINTMENT TO THE POSITION OF GENERAL MANAGER, RAINBOW TOWERS HOTEL & CONFERENCE CENTRE**

Following discussions held with you this letter serves to appoint you to the position of General Manager for Rainbow Hotel and Conference Centre, a unit of Rainbow Tourism Group.

1. EFFECTIVE DATE
   Your appointment is effective 1 January 2011.

2. REMUNERATION
   See attached schedule

3. JOB GRADE
   This position is Hay (sic) Executive level 3

4. REPORTING
   This position reports to the Chief executive of Rainbow Tourism Group

5. PROBATION
   You will initially be employed on a three months probationary period ending 30 March 2011.

6. EXECUTIVE EMPLOYMENT CONTRACT
   Following successful completion of your probation period you will be on a five (5) year Executive Employment contract which shall be negotiated with yourself along the guidelines of the Employment Conditions, laid down in the RTG Executive employment Contracts.

[1] Record p140

7. ANNUAL LEAVE
   Leave will be granted at a rate of 30 days per annum effective only if you have been with the company for 12 months. Leave will not be granted during our busy periods and cash in lieu of leave is normally not permitted. All employees are required to go on leave annually.

8. All employees enjoy a free 24 hours accident insurance cover.

9. During your contract with Rainbow Tourism Group, you will not take any gainful employment with any other organization. Full and total written disclosure of any business that you may be involved in is required before commencement of service.

10. All the conditions of service and code of conduct are available in booklet form and will be given to you on commencement date.

11. Termination of contract after successful completion of probation will be three months' notice on either side."

The respondent duly commenced employment with the appellant in terms of the letter.

[5] It is common cause that the five year Executive Employment contract referred to in clause 6 of the letter of employment was never negotiated.

[6] By operation of law, therefore, the respondent, upon the expiry of the probationary period on 30 March 2011, became an employee on a contract without limit of time[2].

[7] Cracks in the employment relationship began to surface in about December 2011. The respondent's unit had been audited for the period June 2011 to October 2011 and received an adverse report citing 'violation of the provisions of the (appellant's) Motor Vehicle Loan Scheme and seemingly excessive entertainment expenses by management team'. When asked to respond to certain specific findings in the report, the respondent had

[2] Labour Act [*Chapter 28:01]* s 12 (3)

avoided a direct response and instead alluded to his conditions of service which he complained had not been met. He also made specific reference to "the vehicle scheme and the grossing up of [his] salary relative to the monthly repayment dollar" a benefit allegedly enjoyed by his colleagues, and, in his case, the absence of a housing allowance, 'a benefit that is prevalent to the generality of the group'[3].

[8] This led the Chief Executive to respond by email:

> "I am worried that I am not on the same wavelength with you. Breach of Company Policy is a serious matter that even touches on your values as the leader in Towers. No amount of explanation can justify especially if these matters have been covered by an audit.
>
> If you have issues with company policy and your conditions of service, these have to [be] brought out clearly and addressed not as a result of an audit. We cannot have a situation where grievances are now being brought out due to audit. May I also state that no one including myself is above the law. When auditors report on their findings, unfortunately they cannot separate matters in terms of seniority. My answer to your name having been brought up is that this is what Corporate Governance calls for and unfortunately no one can be spared. So the main issue for me is that just ensure full compliance. I will ensure that I document this issue properly to you to avoid doubt.
>
> In as much as I appreciate your good efforts to bring stability into Rainbow Towers, I cannot be seen condoning noncompliance."

[9] By letter, the Chief Executive Officer further stated:

> "The internal audit report indicated violation of the provisions of the Motor Vehicle Loan Scheme and seemingly excessive entertainment expenses by management team. In your response to the audit issues, you indicated that both the fuel and the entertainment expenses were for business.
>
> Kindly account for all the business that was facilitated by both the fuel and entertainment expenses. May I request that this report be available at my office latest by Tuesday 13 December 2011."

[3] Record p 115

[10] The requested report was placed before the Acting Chief Executive, Mr Changunda, ("Changunda") who on 19 December 2011, requested the respondent:

> "To itemize the business that was facilitated by the fuel that you allocated to both your management team and yourself. As you are aware the motor vehicle loan scheme has no provision for fuel allocation to beneficiaries. Again for entertainment account please report on the expenses incurred and business that was facilitated by the activity."

[11] The respondent was required to reply by the 23 December 2011. He did so on the 27 December 2011. Changunda wrote to him on the 13 January 2012 expressing his expectation that the respondent would "study and understand company policy and ensure strict adherence of policy provisions in your unit". He indicated the company's willingness to assist the respondent in facilitating operational efficiencies in order to improve the image of Rainbow Towers.

[12] On 10 April 2012 the respondent was advised of a salary adjustment "for non NEC category including for Executive positions" effective from 1st April 2012. His performance rating for the year 2011 was a D category and he was awarded a 5% salary increase.

[13] On 22 August 2012, Changunda wrote to the respondent in the following terms:

> "Dear Richard
>
> YEAR TO DATE RAINBOW TOWERS HOTEL & CONFERENCE CENTRE PERFORMANCE

I write to register my concern with your unit performance. As at July 2012 four key performance indices (revenue, profitability, return on sales and cash credit ration) are below budget, a situation the company cannot sustain.

I have summarized for your reference year-to-date performance for your unit (copy attached). The negative position is not sustainable and you are required to turn around this business.

As a way forward I expect you to meet August 2012 forecast of USD962 531 revenue and a profitability of USD31 261. Further I am giving you two months, being September and October to achieve the forecast figures. The figures are shown below

- September 2012 – revenue of $942 558 and a PBT of $16 175
- October 2012 – revenue of $ 904 040, which must result in a break even position.

I will review and discuss your unit performance on a monthly basis (August to October). If this communication is not clear please feel very free to discuss my expectations of your performance with me.

Thank you

P Changunda

ACTING CHIEF EXECUTIVE."

[14] On the same date Changunda wrote another letter. This time it related to the respondent's second quarter of 2012 (Q2 2012) performance review. It read in part:

"You are aware that we have not concluded review of your April to June performance. Ideally this review was due by mid-July 2012. Management has concluded the Q2 report and presented it to the HR Board Committee.
I had no choice but to record a zero for you for Q2 because we have not finalized as I have referred it back to you a number of times and to date not finalized. At your level as General Manager, I expect you to be competent to handle performance reviews.

Going forward I expert your Q2 review which will be due by mid-October 2012 to be handed in on time. I expect it to be done properly so that I do not have to refer it back. If you are facing challenges with the performance review systems

seek assistance from human resources department or the consultant that the group worked with during the course of the year."

[15] On 22 November 2012, the appellant through its Human Resources director wrote to the respondent in the following terms:

"Dear Richard

NOTICE OF TRANSFER

"AS you are aware the company is struggling with Rainbow Towers Hotel performance. Indices indicate that **the unit performance is getting worse. For your reference find attached the unit cash analysis report indicating that year to date, the net cash adequacy has trebled to US$1.1m negative, rendering this business technically insolvent**. The company is convinced this situation may be turned around to profitability.

With this background, it is management's view that you are assigned to a unit without operational problems and acclimatize you to the RTG culture and the Zimbabwean hospitality Industry in general.
The company intends to transfer you to A'Zambezi River Lodge, Victoria Falls at the same level and remuneration of Hotel General Manager. It is the intention of the group to expose you to a resort hotel operation. In addition, in Victoria Falls, the group has a Resident Manager for Victoria Falls Rainbow Hotel who is on skills development to a hotel general manager who needs assistance from an experienced General Manager,(sic) a role the company believes you will be able to execute.

Kindly let me have you views by noon on Friday 23 November 2012."
(Emphasis added)

[16] On 23 November 2012, the appellant received a letter from the respondent's legal practitioners. It was therein alleged that the respondent's employment contract specifically appointed him to the position of General Manager, Rainbow Towers Hotel and Conference Centre and that no provision was made therein for transfer within the group. In addition the appellant, so it was alleged, was aware that the respondent's wife

required specialist medical care and facilities which are not available in Victoria Falls. It was advised that the respondent could not accept the transfer.

[17] On 27 November 2012 the appellant's Human Resources director responded pointing out that while note was taken of the respondent's family circumstances, the appellant's assessment of the business was such that there was need for the transfer and that the respondent would be required to transfer on 1 January 2013. Reference was made to his conditions of employment which it was alleged were contained in the booklet referred to in clause 10 of the employment contract set out above. He was to use the remainder of his working days in November to do a 'handover take over' with the Operations manager and he needed not report for duty in December.

[18] On 28 November 2012 a further letter was written to the respondent by the appellant. In that letter, the Human Resources manager referred to 'follow up discussions' with the respondent and confirmed the terms of the transfer. The respondent was advised of the availability, at Victoria Falls, of a residence for him and a 'disturbance allowance' to be paid to him 'through the January pay run'.

[19] Thereafter, on 29 November 2012, a circular to 'all Associates' advised of the pending transfers of the respondent to A'Zambezi Victoria Falls, as General Manager, and Tichawona Shumba from A'Zambezi to General Manager-ICC both effective 1 January 2013.

[20] On 30 November 2012 the respondent, through his legal practitioners, lodged a claim of constructive dismissal with the Labour Officer. The letter was not copied to the appellant.

[21] The respondent did not report for duty on 1 January 2013.

[22] On 15 January 2013, the respondent's legal practitioners wrote to the appellant's legal practitioners as follows:

> "Re RICHARD NKOMO RAINBOW TOURISM GROUP
> We confirm that subsequent to the reference to arbitration this morning, the **disciplinary hearing scheduled for this afternoon** has been rescheduled to Friday the 18th January at 11.15a.m. We await the requested documents." (Emphasis added)

[23] However, on 30 January 2013, when the notice of the disciplinary hearing was served on the respondent's legal practitioners, the latter wrote to the appellant's legal practitioners:

> "… Your client subsequently delivered a Notice of Hearing to ours. Our client ceased to be an employee of yours when he was constructively dismissed by yours, and accordingly cannot be dismissed by yours…"

[24] The disciplinary hearing was held by the appellant on 1 February 2013. The charge was: Absence from work for 5 or more consecutive days in that the respondent had failed to report for duty on 1 January 2013. The respondent did not attend the hearing but was advised by the Designated Officer, in a letter dated 5 February 2013, that he had been found guilty of misconduct and was invited to tender his 'submissions and evidence for purposes of mitigation' by Friday February 15 2013.

[25] The arbitration referred to in para [22] above, took place on the 12 March 2013. The arbitrator ordered:

> "that the claim of constructive dismissal be upheld and the respondent is ordered to reinstate the claimant".

[26] An appeal by the appellant to the Labour Court was dismissed.

THE ISSUES ON APPEAL

[27] As was submitted on behalf of the respondent, the nub of the dispute was whether or not the court *a quo* was correct in finding that the respondent terminated his employment with the appellant as a result of the latter wrongfully making continued employment intolerable for him. If the answer to this enquiry is in the positive, then the termination falls within the provisions of s 12B (3) of the Labour Act and the respondent was unfairly dismissed.

[28] Section 12B (3) of the Labour Act [*Chapter 28:01*] ("the Act") provides:

> "(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;

[29] I propose to divide the enquiry into two parts, namely,:-

Whether the appellant's conduct was such that it deliberately made employment intolerable for the respondent; and whether the respondent terminated his employment with the appellant because of such conduct.

WHETHER THE APPELLANT'S CONDUCT WAS SUCH THAT IT DELIBERATELY MADE EMPLOYMENT INTOLERABLE FOR THE RESPONDENT;

[30] The stance taken by the appellant was that the respondent was its employee up to the end of January 2013. This is evidenced by his conduct in attending at work during November to do the handover takeover exercise as instructed by the appellant, the

receipt of his salary and allowances including cellphone allowances up to the end of January 2013, the request, as late as 15 January 2013, for documents required to prepare for the disciplinary hearing and the fact that at no stage had the respondent tendered his resignation from employment. Therefore, so it was submitted, by not reporting for duty on the 1st January 2013 the employee committed the misconduct charged and the disciplinary committee had correctly found him guilty as charged.

[31] It was also submitted on behalf of the appellant that the respondent, like all other executive employees, was bound by the transferability clause in the code of conduct governing the appellant and its employees.

[32] On behalf of the respondent however, it was contended that because the appellant had not given to him the booklet mentioned in clause 10 of the agreement[4], an omission which was contrary to the peremptory provisions of s 12 (2) (d)of the Act, he was not bound by its terms and was not transferable. Accordingly, by transferring him to Victoria Falls in breach of the terms of his contract of employment (which terms he alleged were contained in the letter of employment)[5], the appellant had made continued employment with it intolerable.

[33] The letter of transfer explained in clear terms why the respondent was being transferred. The correspondence set out above clearly showed that the respondent was not performing up to standard and that under his watch the hotel had reached a state of near insolvency. This state of affairs covered a period of two years after the appellant was

[4] Para [4] supra
[5] Para [4] supra

hired to 'turnaround' the fortunes of the hotel. In these circumstances I venture to suggest that an employer would be within its rights to terminate the employment contract on notice if so minded. However, the appellant did not adopt that course. The transfer was a lateral one to the A'Zambezi River Lodge which is in the tourism hub of Victoria Falls and which was encountering no operational problems. That posting, the appellant explained, would allow the respondent both to acquaint himself with the Zimbabwe hospitality industry and to share his expertise with the manager of the Rainbow Hotel, Victoria Falls. There was no reduction of benefits. What then about the transfer would make the respondent's continued employment intolerable?

[34] From the arguments presented by the respondent the following are his objections to the transfer. First, he was not transferable as he was employed to the specific post of General Manager of the Rainbow Towers. That amounted to a stipulation that he was to work there and nowhere else in keeping with the principles set out in *Guruva v Traffic Safety Council of Zimbabwe*[6]. Secondly, his wife is an invalid and is in need of specialist medical care which is only available in Harare and the appellant was aware of that fact. Accordingly, the transfer made his continued employment with the appellant intolerable.

[35] Regarding the first objection, in view of the finding above as to the nature of the contract between the parties, namely, a contract without limit of time, I consider that the respondent was bound by the general rules of transferability in the organization. Since

[6] 2009 (1) ZLR 58 at p62

no further contract was negotiated, there cannot be read into that contract, an appointment to a specific post, for a specific period and at a specific place only.

[36] The following words by CHEDA JA in the *Guruva*[7] case are applicable here:

> "It must be accepted that the right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except for good cause shown. Good cause in the circumstances, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any disadvantage. The reasons for transferring the appellant were given in its very first correspondence. It is not as if the reasons were made to counter the appellant's objections. Even if the reasons had not been given in the first correspondence to him, the reasons would still be valid as long as they are genuine.
>
> The employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer wherever such services are required, unless the employment contract stipulates that he is to be employed and remain at a specific place only. See *Ngema & Anor v Minister of Justice, Kwazulu & Anor* 1992 (4) SA 349 (N).
>
> While the respondent may have erred in not giving the appellant a hearing in the very first place, I am satisfied that, since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before re-affirming its previous decision, the requirement of the *audi alteram partem* rule was complied with."

[37] The respondent was the general Manager of the Rainbow Towers and it seems childish to submit, as he did, that he was ignorant of the Code because it was not given to him. In his position, he would have been responsible for drawing the attention of subordinate employees to the code of conduct. It would be an affront to intelligence to say that he

[7] *Supra at note 6*

remained, and was content to remain, blissfully unaware of its contents throughout the period of his employment with the appellant which spanned two years. The same would, in my opinion, apply to any code applicable to executives if that were applicable to the respondent. Accordingly, the respondent cannot take refuge in the defence raised to the effect that: 'I am not bound by it because I did not see it because you did not give it to me'.

[38] As to the second objection, there is nothing in the record either of the respondent's recruitment or in his employment with the appellant to suggest that the respondent's wife was an invalid and, still less, that the appellant was aware of it. When the respondent accepted the offer to take up the position offered by the appellant, he made mention of the opportunity costs which could arise on his leaving the United States. No mention was made of the availability or otherwise of medical and/or specialist facilities for his wife. His later complaint regarding his conditions of service did not include his wife or her needs. I mention these apparently trifling details because of a fruitless search of the record for any suggestion that the appellant might have been aware of the alleged medical condition of the respondent's wife. The only reference to the illness of respondent's wife was made before the arbitrator where respondent indicated that a former director of 'the Sheraton' was aware of his wife's illness.

[39] In any event, unless his contract specifically provided (which it did not) for his employment in Harare and no other location[8] because of his wife's medical condition, that condition could not restrict the appellant in the exercise of its right to transfer the respondent as it deemed fit. The respondent, as an employee, was bound by the

[8] See Guruva's case, supra.

transferability clause in the appellant's code of conduct. Any difficulties which he had with the transfer should have been discussed with the appellant when he was given an opportunity to do so. Instead, when asked for his views, he chose not to discuss the matter personally with his employers but through legal practitioners who indicated that he could not accept the transfer and directed that all future correspondence should be with themselves.

[40] I therefore agree with the submission by the appellant that the respondent did not discharge the onus on him to establish that the appellant's conduct was such that it made the respondent's employment with the appellant intolerable.

WHETHER THE RESPONDENT TERMINATED THE CONTRACT OF EMPLOYMENT

[41] The appellant maintained that the respondent did not terminate the contract of employment in the circumstances set out in s 12B of the Act. It was submitted that the respondent did not immediately allege constructive dismissal and the consequent termination of the employer/ employee relationship and that he was quite content, one and a half months after the transfer letter, to seek particulars for the purposes of defending himself in misconduct proceedings scheduled for the 15 January 2013. His conduct pointed to him being an employee and not to one who had been constructively dismissed.

[42] It has been held that where an employer commits a breach which goes to the root of the employment contract the employee is entitled to treat himself as discharged from further performance. He is constructively dismissed. However he must act promptly.

[43] In *Astra Holdings (Private) Limited v Peggy Kahwa*[9] this court stated the principles governing constructive dismissal as follows:

> "Constructive dismissal is claimable where an employer has committed conduct which as a breach goes to the root of the contract of employment so as to constitute repudiation and by reason of that conduct the employee leaves employment. In *Western Excavating v Sharp* [1978] 1 ALL ER 713 LORD DENNING at 717 d - f said:
> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract." (My underlining)

[44] The respondent in this case availed himself of neither option. He did not leave at the instant nor did he give notice and say he would be leaving at the end of the notice. He continued to attend at work and to do as he was instructed in the letter of transfer. He continued to receive his salary and benefits right up to the end of January 2013. As the appellant submitted, his was not the conduct of one constructively dismissed.

[45] It follows that s 12B (3) of the Act was not shown to apply to the respondent's situation. That being the case, he was properly dismissed for the misconduct of absenteeism following the disciplinary proceedings held by the appellant in default of his appearance. The appeal must therefore succeed.

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[9] SC97/04

[46] In the result, the following order is issued:

1. The appeal is allowed with costs.

2. The Judgment of the Labour Court is set aside and substituted with the following:

"1. The appeal is allowed with costs

2. The Award of the Arbitrator is set aside."

GARWE JA: I agree

HLATSHWAYO JA: I agree

C Kuhuni Attorneys, appellant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners