

REPORTABLE (64)

DIAMOND MINING CORPORATION
v
(1) PETER TAFU (2) DAURE TRUST (3) SHACKY
MUTUMBA (4) CHIVHIMA ZEPHANIAH

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & BHUNU JA
HARARE, OCTOBER 16, 2015**

N M Phiri, for the appellant

No appearance for the respondents

ZIYAMBI JA

[1] This is an appeal against a judgment of the Labour Court upholding an arbitral award made in favour of the respondents.

PRELIMINARY

[2] The judgment was given in default of appearance by the respondents. The notice of set down of the matter for hearing was served by the Deputy Sheriff at the address of service given by the respondents' Legal Practitioners of record James Makiya Legal Practitioners. An attempt was also made to serve the notice at the address given by the first respondent in Eastlea but the residents there had no knowledge of the first respondent. There being no notice of change of address or renunciation of agency by the legal practitioners of record, the notice was deemed to be properly served upon the respondents.

THE BACKGROUND

[3] The respondents were employed by the appellant on 3 month contracts which were to expire on 30 September 2011. Before the expiry of the contracts they were relieved of their duties. They were paid their terminal benefits which included overtime, 2 weeks' notice pay, cash *in lieu* of leave days and their salary for the month of September 2011. They acknowledged receipt of the said benefits by signing letters from the appellant in which were set out details of the payments made to them, inclusive of overtime calculated according to the rates set in the relevant Collective Bargaining Agreement for the Mining Industry. The letters were dated 30 September 2011.

[4] The next development recorded is the arbitration award. It relates that the matter was referred to the Arbitrator for compulsory arbitration in terms of s 93 of the Labour Act¹. The hearing took place on 2 December 2011 and the parties made oral submissions on the basis of which the award was made. The Arbitrator's terms of reference were:

“To establish whether the employees were unfairly dismissed and to determine the remedy thereof”.

[5] The respondents submitted before the Arbitrator that they were employed by the appellant as security guards on probationary contracts 'sometime in February 2011'. The probationary contracts were to endure for 3 months. At the end of that period they were 'surprised' to be given 3 months contracts which they were 'forced' to sign instead of being conferred with permanent employment status. Their contracts were prematurely terminated in September 2011. They were aggrieved by the appellant's conduct and approached a Labour Officer for redress. They now sought to be reinstated without loss of salary or benefits and submitted a schedule showing what was owing to each of them by the appellant.

¹ [Chapter 28:01]

[6] The appellant, on the other hand, submitted that the respondents were employed on 3 months contracts which, they admitted, were terminated before their expiry. However, the respondents were given adequate notice, as prescribed by law, and had been paid, in full, their salaries for the unexpired terms of the contracts as well as all benefits owed to them. The payments had been accepted, and signed for, by the respondents. There had been no unfair labour practice and the matter should be deemed closed.

[7] The Arbitrator found that the respondents were not dismissed in terms of a code of conduct and for this reason:

“One would say that the employees were unfairly dismissed. What is however interesting is that the contracts of the employees were terminated two weeks prior to the expiry of their contracts. The unexpired period of the employees’ contracts were (sic) paid by the respondent. The applicants accepted the terminal benefits and then complained later. Although in terms of the law the employees would be deemed to have been unfairly dismissed, the payment of two weeks’ salary as notice became a remedy in this matter since in any event the contracts were going to end after two weeks.”

He continued:

“There was an argument submitted by the employees that their initial contracts stipulated that they had to undergo a probationary period of three months and thereafter be deemed to be permanent upon successful completion of the contract. *The initial contracts were not furnished in the hearing and even if this had been the case, by entering into a three months renewable contract, the employees waived whatever rights they had in the initial agreement. The fact that they signed for a three months contract implied that they agreed to whatever terms were availed to them.*” (Italics is mine for emphasis).

He nevertheless concluded:

“In short, the termination of the employees’ contracts was unfair and since they were paid for the unexpired period, they must only be paid back pays (sic) where applicable, overtime allowance, Night allowance and for the Public Holidays they worked.”

[8] He then made the following award:

“Wherefore after hearing this case, I make the following order:

1. That the employees were unfairly dismissed and that they be paid for the unexpired period of their contract.
2. That Peter Tafa be paid \$1 605.29, Daure Trust \$1 605.29, Shacky Mutumba \$2 312, and Chivhima Zephaniah \$2 539.40 to cover for overtime allowances, back pay where applicable, night allowance.
3. In total that \$8 061.98 be paid to applicants less statutory deductions and any payments already made.
4. That both parties share the cost of this arbitration.”

[9] The appellant was aggrieved by the award. It appealed, unsuccessfully, to the Labour Court which Court upheld the Arbitrator’s finding that the respondents were not dismissed in terms of a Code of Conduct and were accordingly unfairly dismissed. The Labour court went on to calculate the overtime and other benefits due to the appellants and found that the respondents’ claims were fair.

ISSUES ON APPEAL

[10] It was contended on behalf of the appellant that the court *a quo* had erred in concluding that the respondents had been unfairly dismissed since the contracts were lawfully terminated. In any event, not only had the Arbitrator and the court *a quo* ignored the fact that the respondents had received their terminal benefits, but no evidence was led justifying the claims by the respondents, and the consequent award to them by the arbitrator, in respect of overtime, night allowance and public holidays.

THE TERMINATION OF THE CONTRACTS

[11] The respondents did not produce copies of the alleged probationary contracts nor was evidence led of the duress allegedly exerted upon them to force them into signing the fixed term contracts. Against their bald and unsubstantiated allegations of duress, was the appellant’s assertion that the contracts were of fixed duration (a fact accepted by the

Arbitrator) and the respondents had been given due notice of termination as provided by s 12(4) (d) of the Labour Act (“the Act”). The provision reads:

- (4) Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of the contract of employment to be given by either party shall be—
- (a) three months in the case of a contract without limit of time or a contract for a period of two years or more;
 - (b) two months in the case of a contract for a period of one year or more but less than two years;
 - (c) one month in the case of a contract for a period of six months or more but less than one year;
 - (d) two weeks in the case of a contract for a period of three months or more but less than six months;**
 - (e) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work. (The emphasis is mine).

[12] The Arbitrator found as a fact that the respondents were, at the time of the termination of their contracts, employed on 3 month contracts which would come to an end on 30 September 2011 and that at the time of termination, the contracts had yet two weeks to run.

[13] It appears to me that the notice given to the respondents was in compliance with the provisions of the Act. It is to be noted that the Arbitrator found that the payment by the appellant to the respondents of two weeks’ notice pay “became a remedy in this matter since in any event the contracts were going to end after two weeks”. In other words, all that was owed to the respondents at the time of the termination of the contracts was payment for the unexpired portion of their contracts and any benefits which may have accrued to them by virtue of the conditions of their employment.

[14] The conclusion by the Arbitrator, upheld by the Labour Court, that the respondents were unfairly dismissed appears to stem from a misinterpretation of s12B of the Act. As will be shown below, not every termination of employment made outside a code of conduct is, in terms of the Act, unfair.

THE QUESTION OF UNFAIR DISMISSAL

[15] Section 12B of the Act provides:

“12B Dismissal

(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).” (Underlining is mine for emphasis)

The requirement for dismissal in terms of an employment code is subject to the provisions of subsection (3) which 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;

(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.

This was a case of termination of a contract of fixed duration. The termination could only be deemed an unfair dismissal if it occurred in the circumstances described in subsection (3)(a) or (b). The requirement in (2) (a) that the dismissal be in terms of an employment code did not apply in this case and the respondents, not having alleged, or established, that the

provisions of subsection (3) were applicable in their circumstances, consequently failed to establish that they were unfairly dismissed. The Labour Court therefore erred in upholding the Arbitrator's finding that the respondents were unfairly dismissed.

THE AWARD OF OVERTIME AND TERMINAL BENEFITS

[16] No evidence was led by the respondents before the Arbitrator of the details of their claims for overtime and terminal benefits. There were, however, before the Arbitrator, the letters of termination signed by the respondents and containing detailed calculations of the terminal benefits awarded to, and accepted by, them. What the respondents did was simply to set out what they believed was owing to them. For example the first respondent's claim was set out as follows:

“PETER TAF		
Overtime	:	\$706.73
Night allowance	:	\$761.73
Public Holidays	:	\$12.02
Two weeks' notice	:	\$125
Total	:	\$1 605.29

The other three respondents set out their claims in similar fashion with varying amounts. No evidence was produced before the Arbitrator as to the rates used by the respondents in the calculation of the allowances claimed and no cognisance was taken either by the Arbitrator or the Labour Court of the payments already received by the respondents in respect of those allowances. The amounts claimed by the respondents were clearly arbitrary and without any legal foundation. Yet the Arbitrator accepted the figures claimed and awarded them without question. The Arbitrator ought to have heard evidence in support of the claims because the onus lay on the respondents to establish them.

[17] The Labour Court, in upholding the Arbitrator's award, also ignored the letters of termination which showed the payments already made by the appellant. It chose not to hear evidence on the question of damages, as it was empowered to do, and declared the respondents to be entitled to damages for an arbitrary period of twelve months. It said:

“The respondents have clearly stated that during the (6) six months they were overworking as they would work (12) twelve hours instead of (8) eight hours. Appellant has not stated the money that was paid as night allowance. They have not disputed that the guards also performed night duties. In the circumstances therefore the respondents' claim stands the appellants should not benefit from their wrong doing. Back-pay has been defined in the case of *Madyara v Globe & Phoenix Industries (Pvt) Ltd* 2002 (2) ZLR 269 as follows:

“Back-pay will be limited to a period from the date of wrongful dismissal to a date by which she could with reasonable diligence, have obtained alternative employment.”

In this case the respondents were employed in February 2011. They were dismissed in September 2011. Given the state of the economy this court is of the view that they would be expected to secure alternative employment within (12) twelve months.

If they were earning \$250-00 per month it would mean that in twelve months they would earn US\$250-00 x 12=US\$3 000-00. This therefore means that their claims of US\$706-73 and US\$575-00 are very moderate.

The appellant has not given any reasons why they could be disputing Public Holiday Allowances. The claims that have been made by the respondents are in this court's view reasonable. The appellants cannot benefit from its unlawful actions. They have to pay the penalty for the unlawful dismissal. The respondents signed contracts of termination of contracts under unfavourable conditions.”

[18] Two issues arise for comment. The first is that since the respondents were not unfairly dismissed they had no claim against the appellant who had already paid them all that they were lawfully entitled to.

The second is that the Labour Court could not, without hearing evidence, arbitrarily decide how long it would reasonably take the respondents to find employment. This was a matter on

which the Labour Court was required to hear evidence from both parties after which it could arrive at a conclusion based on that evidence.²

In the circumstances no legal justification existed for the upholding, by the Labour Court, of the award made by the Arbitrator.

[19] It is for the above reasons that after hearing submissions by Mr *Phiri*, we allowed the appeal and issued the following order:

“The appeal is allowed with costs.

The judgment of the Labour Court is set aside and substituted as follows:

‘The appeal is allowed.

The award of the arbitrator is hereby set aside.’”

GOWORA JA: I agree

BHUNU JA: I agree

Mvingi & Mugadza, appellant’s legal practitioners

² *Ambali v Bata Shoe Co Ltd* 1991 (1) ZLR 417 (S); *Redstar Wholesalers v Edmore Mabika* SC 52/05; *Heywood Investments (Pvt) Ltd t/a GDC Hauliers v Pharaoh Zakeyo* SC32/13.