

DISTRIBUTABLE (65)

EX TEMPORE

TEL ONE (PRIVATE) LIMITED
vs
MARUFU A. CHIGAAZIRA

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, MAVANGIRA JA & UCHENA JA
HARARE: OCTOBER 17, 2017

G. Chingoma, for the appellant

L. Uriri with *O.O. Takaindisa*, for the respondent

Judgment No. SC 70/17
Civil Appeal No. SC 162/17

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MAVANGIRA JA: This is the unanimous decision of this court.

This is an appeal against the decision of the Labour court upholding the appellant's appeal against the arbitrator's finding that the respondent had legitimate expectation for the renewal of his fixed term contract.

PRELIMINARY POINT

At the onset of proceedings Mr *Uriri* raised a preliminary point which we dismissed after hearing both parties on it. We indicated that our reasons for the dismissal would be given in our main judgment.

The preliminary point was to the effect that the appellant's Notice of Appeal was fatally defective on the basis that it fell foul of the provisions of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975 which require, in Rule 7, that the date on which the decision appealed against was given must be stated in the Notice of appeal. The Notice of Appeal was attacked for stating the date of the decision appealed against as 6 March 2017 contrary to the date appearing on the face of the judgment; that date being 20 February 2015.

The Notice of Appeal in question was filed pursuant to an order by ZIYAMBI JA dated 1 March 2017, which order was issued with the consent of both parties. The order, *inter alia*, granted leave to the appellant "to appeal against the judgment of the Labour Court handed down on 6 March 2015". 6 March 2015 is the date stated on the Notice of Appeal that the respondent now seeks to be nullified. In our view, despite the face of the Labour Court judgment reflecting 20 February 2015 as the date on which it was given, both parties understood that the order (by consent) related to the judgment that is the subject of this appeal.

There is no justification for the contrary attitude now adopted by the respondent. Neither has it been alleged or shown that the respondent is prejudiced by the date stated in the Notice. According to the parties this date is the date reflected on the date stamp of the Registrar of the Labour Court. It is not a "thumb sucked" date for which there is no explanation as to how it came to be referred to. In any event, as already stated, the order by consent refers to that date.

We accordingly dismissed the preliminary point.

THE MERITS

The appellant gave the respondent notice of both the expiry and the non-renewal of his 5 year fixed term contract. The appellant went on to advertise for the post of Commercial Director, a title which was previously held by the respondent.

Despite this advertisement, it is not in dispute that no one was employed to take up this position.

Given these circumstances, the respondent was of the view that he was unfairly dismissed in view of the provisions of s 12 B(3)(b) of the Labour Act, [*Chapter 28:01*]. His main contention was that he had a legitimate expectation that his contract would be renewed. The arbitrator and the Labour court agreed with his view. Judgment No. SC 70/17
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However, s 12(b)(3)(b) of the Labour Act requires that for an employee to be deemed to have been unfairly dismissed in terms of that provision, he must not only establish that he had a legitimate expectation of being re-engaged, but also that another person was engaged in his stead.

This court has held in the case of *Magodora & Others v Care International Zimbabwe*, SC 24/14 that these two requirements are conjunctive and the mere existence of an expectation without the concomitant engagement of another employee does not suffice.

Applied to the circumstances of this case, it is evident that even if this court were to find that the respondent had a legitimate expectation of his contract being renewed, his claim would fall on the basis that the second requirement was not met.

In this respect we find that Mr *Uriri*'s submission that this issue should be determined on the basis of the doctrine of fictional fulfilment is without merit.

Accordingly, the appeal has merit and ought to be upheld. In view of this finding we find it unnecessary to consider the appellant's other grounds of appeal.

It is in the result ordered as follows:-

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with

the following:-

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“1. The appeal is allowed.

2. The arbitral award rendered by P. Chawira on 25 January 2012 be and is hereby set aside.”

GWAUNZA JA: I agree

UCHENA JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Matsikidze & Mucheche, respondent's legal practitioners

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