DISTRIBUTABLE (29)

Judgment No. S.C. 75/98
Civil Appeal No. 40/97

JOSHUA MURIRE v NATIONAL SOCIAL SECURITY AUTHORITY

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, MAY 5 & 26, 1998

P Nherere, for the appellant

F Girach, for the respondent

SANDURA JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's application for an order declaring that his contract of employment with the respondent had not been lawfully terminated and directing the respondent to reinstate him in his position as the respondent's senior financial analyst without any loss of salary or other benefits.

The facts of the case are as follows: In February 1995 the appellant was appointed as the respondent's senior financial analyst. About a year later he was sent on forced leave pending investigations into allegations of misconduct against him. Subsequently the respondent decided to conduct an enquiry into the said allegations but the disciplinary enquiry, scheduled for 15 May 1996, did not take place. Instead, the appellant and the respondent entered into negotiations with a view to arriving at a mutually agreed termination of the appellant's employment. The

negotiations took place at a meeting held on 15 May 1996. At that meeting the respondent was represented by Mr C K Ncube ("Ncube"), its director for human resources, and Mr George Makings ("Makings"), its labour consultant. The appellant attended the meeting with his legal practitioner, then Mr George Chikumbirike ("Chikumbirike"). The dispute between the parties pertains to what, precisely, was agreed upon at that meeting.

According to the appellant, it was agreed that he would consider the matter and tender his resignation in writing. He averred that as he had not tendered his resignation in writing his contract of employment had not been lawfully terminated.

However, according to the respondent, it was agreed as follows:

1. That the respondent would withdraw the misconduct charges;

2. That the appellant would resign from his employment with immediate effect;

3. That the respondent would pay to the appellant three months' salary;

4. That the appellant would be given a three months' moratorium on the repayment of certain loans which had been advanced to him by the respondent; and

5. That the appellant's legal practitioner would reduce the agreement to writing and send a copy to the respondent for its records.

Mr *Nherere*, who appeared for the appellant, submitted that the court *a quo* erred in holding that the appellant resigned from his employment with the respondent on 15 May 1996. That was his main argument. In support of that argument he made a number of submissions: First, he submitted that the learned judge erred in finding, as a fact, that a verbal agreement was concluded between the appellant and the respondent at the meeting held on 15 May 1996, in terms of which the appellant resigned. He added that the probabilities favoured the appellant's version, which was that there was an understanding that he would consider the matter and then tender his resignation, in writing, after the meeting.

This submission is untenable. It is not supported by Chikumbirike's letter to Makings dated 11 June 1996, which favours the respondent's version. It reads as follows:-

> "I refer to our meeting on the 15th April (May) 1996. After our meeting I had promised that I would put down in writing what the parties had agreed upon. However, it turned out when I was taking further instructions from my client with a view to writing (to) you as promised, it turned out that the parties whom we represent were at cross purposes. My client had understood the agreement differently from the way I had understood it and also from the way, I have no doubt, (in) which you had understood it. It would, therefore, appear that the matter has to be started afresh, either with a hearing being convened or alternatively fresh negotiations to reach some other agreement. I apologise for the inconvenience this might cause but these are the instructions I have been advised to convey."

It is clear from this letter that Chikumbirike understood the agreement in the same way as Makings did. In other words, he understood the agreement to mean that the appellant had resigned at the meeting, and not that he would consider the offer made and then tender his resignation, in writing, at a later stage. It is significant that

Chikumbirike is a legal practitioner of many years' standing and would have made sure that the appellant clearly understood the agreement reached.

Furthermore, on 16 May 1996, the day after the meeting, the respondent started processing the appellant's terminal benefits, and clearing him of any outstanding indebtedness to it. A memorandum (annexure M) annexed to the respondent's opposing affidavit shows how the appellant's terminal benefits were calculated on 16 May 1996. Another memorandum, annexure N, shows that on 16 May 1996 the appellant was cleared of any outstanding indebtedness to the respondent by the heads of the respondent's various departments. Part of that annexure reads as follows:-

> "The above-named employee is terminating his/her services with the Authority and need(s) to be cleared for the items listed below before he/she can be paid out from payroll."

Dealing with the two annexures in his answering affidavit, the appellant averred that the documents were probably prepared in anticipation of his resignation. However, in my view, it is more probable that they were prepared because the appellant had resigned than that they were prepared because it was anticipated that he would resign.

Another aspect of this case which tends to support the respondent's version of what happened at the meeting is set out by the respondent's general manager in para 7 of the respondent's opposing affidavit, which reads as follows:-

> "Subsequently, the applicant, in the company of his former legal practitioner aforesaid, came to my office to bid me farewell. During our meeting the applicant and his lawyer confirmed that all had been settled and that an agreement had been reached. In fact, I remember quite well that amid our most cordial discussions the applicant expressed the hope that a certain draft

> policy document which he had initiated would be implemented even though he was leaving. The applicant and his lawyer then left after promising to submit the written agreement and the letter of resignation."

Dealing with these allegations in his answering affidavit the appellant said the following:-

> "It is denied that my legal practitioner and I went to the deponent's office for the purpose of bidding him farewell. I went to the deponent's office because he had called me there, and, in view of the relationship between myself and the deponent, (the) respondent's general manager, I requested my legal practitioner to accompany me there. It is denied that either I, and/or my legal practitioner, confirmed that everything had been settled and that agreement had been reached."

It is significant that the appellant does not say what was discussed when he and his former legal practitioner, Chikumbirike, met the respondent's general manager in his office. It is also very significant that the appellant did not annex to his papers any affidavit from Chikumbirike supporting his version of what happened at the meeting on 15 May 1996 and at the subsequent meeting in the general manager's office. In my view, the averments by the general manager are most probably true, and support the respondent's contention that at the end of the meeting held on 15 May 1996 a valid and binding agreement was reached, and that the arrangement to reduce the agreement to writing was merely for convenience and record purposes.

The second submission made by the appellant's counsel was that even if the appellant verbally resigned at the meeting held on 15 May 1996, the purported resignation was of no force or effect because it was not reduced to writing. He submitted that it was the intention of the parties that the termination of the appellant's employment would not take place until the agreement to terminate the same had been

reduced to writing. This submission is untenable in view of the clear evidence already referred to, which indicates that at the end of the meeting held on 15 May 1996 the parties concluded a valid and binding agreement, and that the arrangement to reduce the agreement to writing was merely for convenience and record purposes. Indeed, if the parties had agreed that the agreement would not be binding until it had been reduced to writing Chikumbirike would have said so in his letter dated 11 June 1996.

The third submission made by counsel for the appellant was that even if the appellant failed to prove that the parties intended that the agreement would not be binding until it was reduced to writing, the appellant's purported resignation would still be null and void because it did not comply with s 23(1) of the respondent's Conditions of Service, which reads as follows:-

> "23. (1) An employee who wishes to resign shall give written notice to his head of office of his intention to resign in accordance with the following provisions:
>
> (a) in the case of a permanent employee in managerial grade he shall give not less than three calendar months' notice;
>
> (b) …
>
> (c) …".

In view of these provisions, it was submitted by counsel for the appellant that as the appellant did not give three months' notice in writing the purported resignation was null and void. I disagree. The appellant resigned, not in terms of the Conditions of Service, but in terms of the settlement reached by the parties at the meeting held on 15 May 1996. As the dispute between the parties was settled, the appellant cannot

rely upon the provisions of the Conditions of Service in order to avoid the consequences of that settlement. In this regard, the headnote in *Van Zyl v Niemann* 1964 (4) SA 661 (AD) at 661 F-G is relevant. It reads as follows:-

> "A settlement has the same effect as *res judicata*, and accordingly it excludes an action on the original cause of action, except where the settlement expressly or by clear implication provides that, on non-compliance with the provisions thereof, a party can fall back upon his original right of action."

In the present case there is no basis on which the appellant can fall back on the Conditions of Service.

Finally, counsel for the appellant submitted that even if his argument based on the requirements of s 23(1) of the Conditions of Service did not succeed, the purported verbal resignation by the appellant was, in any event, invalid because it did not comply with s 2(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 ("the Regulations"). Section 2(1) reads as follows:-

> "2. (1) 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) he and the employee mutually agree, in writing, to the termination of the contract; or
>
> (c) the employee was engaged for a period of fixed duration or for the performance of a specific task, and the contract of employment is terminated on the expiry of such period or on the performance of such task; or
>
> (d) …".

Relying upon s 2(1)(b), counsel submitted that as the agreement to terminate the appellant's contract of employment was not in writing, it followed that the termination of the appellant's contract was invalid. I disagree because s 1A of the Regulations provides as follows:-

> "1A. Sections 2 and 3 shall not apply to employees to whom the provisions of an employment code of conduct registered in terms of section 3 of the Labour Relations (Employment Codes of Conduct) Regulations 1990, apply."

It was common cause that at the relevant time the respondent did have a duly registered code of conduct. In my view, the code clearly applied to the appellant. It therefore follows that the appellant cannot rely upon the provisions of s 2(1)(b) of the Regulations. Counsel's submission that the provisions of the code of conduct did not apply to the appellant because they only applied to employees facing disciplinary measures and not to those resigning is untenable. I can find nothing in s 1A of the Regulations which restricts the meaning of the provisions of that section in the manner suggested by counsel. In my view, S 1A of the Regulations is very clear. It simply provides that ss 2 and 3 of the Regulations shall not apply to employees to whom a duly registered code of conduct applies. Counsel's argument cannot, therefore, succeed.

In the circumstances, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gula-Ndebele & Partners, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners