REPORTABLE ZLR (107)

Judgment No. SC 121/02
Civil Appeal No. 292/01

RETRENCHED EMPLOYEES OF NATIONAL BREWERIES LIMITED as represented by NATHAN MUDONDO

v (1) NATIONAL BREWERIES LIMITED
(2) THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE N.O.

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE, SEPTEMBER 24, 2002 & MARCH 6, 2003

H Zhou, for the appellant

P Nherere, for the first respondent

No appearance for the second respondent

CHEDA JA: Although several grounds of appeal were given in the notice of appeal, at the hearing of this appeal the parties agreed that the grounds fell under the following two heads –

1. Whether there is one or more retrenchees before the court.

2. Whether the retrenchment was lawful.

Mr *Zhou*, for the appellants, conceded that he could not challenge the decision on which retrenchee is before the court.

The issue of the representation of the parties was dealt with in detail by the court *a quo* in its judgment of 5 September 2001.

In his founding affidavit Nathan Mudondo ("Mudondo") said he was bringing the application for and on behalf of the employees of the first respondent who were retrenched at the end of April 1999. He attached a list of the employees concerned whom he said appointed him to make the affidavit on their behalf. He said he was also bringing the action in his capacity as chairman of the workers' committee which represented the employees concerned in the run up to the purported retrenchment.

There is not even a single supporting affidavit from any of the employees concerned. It is just his word to that effect. This is certainly insufficient. There should be a proper mandate to represent parties in an action of this nature.

The trial court pointed out that even under the provisions of rule 89 of the High Court Rules, 1971, he should produce evidence to establish his claim that he is properly authorised to represent the parties concerned. This is very essential, especially where the authority to represent another party is challenged, as in this case. In addition, the court must be satisfied that such party authorised the other to represent it, as an order for costs could be made against the losing party, including the party that is represented.

In challenging Mudondo's authority, the first respondent points out that the employees accepted their packages and left, while others actually retired. This makes it even more important for Mudondo to prove his mandate. He has not done so. How could the two people who have retired authorise him to represent them

in challenging the retrenchment which is not applicable to them? There should have been affidavits from each employee, even brief ones; as stated by BARTLETT J in *Barry Thomas Prosser and Thirty-Five Ors v Zimbabwe Iron and Steel Company* HH-201-93.

I should point out that this is different from a class action, and that even in a class action one cannot just allege that he or she has been authorised by others to represent them. The authority to represent others will have been given by a judge in a court application.

In the absence of proof, the court *a quo* was correct in holding that only Mudondo was before the court.

Turning now to the retrenchment, it has been submitted that the first respondent unlawfully retrenched the employees concerned.

The Labour Relations (Retrenchment) Regulations, 1990, ("the Regulations") set out the procedure to be followed when retrenching employees. "Retrench" is defined in the Regulations as follows:

> "'retrench' in relation to an employee, means to terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, re-organising the undertaking in which the employee is or was employed, or for similar reasons".

The Regulations then set out the steps to be followed. I understand this retrenchment to be a move taken by an employer against the employees and discussed with the various organs referred to before it is effected.

In this case, it is clear that the steps set out in the Regulations were not followed.

The workers did not leave employment according to the above arrangement. In fact, where there is retrenchment, the consent of the employee or employees is not the controlling factor. What is important is to follow the procedure laid down and obtain the necessary authority, because while an attempt to reach agreement with the employees concerned should be made, the retrenchment does not depend on their consent or refusal.

The Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, provides as follows:

> "**Termination of contract of employment**
>
> 2 (1) No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless –
>
> (a) …
>
> (b) he and the employee mutually agree, in writing, to the termination of contract; or …".

This is a completely different situation from retrenchment. In other words, if an employer and an employee decide and agree to part, for whatever reasons, and the agreement is in writing, then retrenchment procedures fall away. There is no need to go through the steps laid down for retrenchment. There is no need to obtain the authority of the various organs referred to, including the Minister of Public Service, Labour and Social Welfare. In this matter the Minister's authority was given.

According to the papers, this is what happened in this case. Even if initially the employer intended to retrench but failed to follow the laid down procedures, once the employees concerned decided to resign the need to follow the retrenchment steps fell away. The employees concerned made written applications for voluntary resignation. The matter had been discussed at meetings. Circulars had been distributed to them. They were made aware of how the packages were to be calculated. They were represented at the meetings held. Mudondo attended the various meetings.

The documents that were signed by the employees concerned stated as follows:

> "I (name) acknowledge receipt of your memorandum of 19 February 1999, which I have read and understood. I therefore wish to be considered for voluntary retrenchment on the Voluntary Retrenchment Package offered by the Company.
>
> Subject to the acceptance of my application by Management, I hereby freely tender my resignation from National Breweries with effect from 1 May 1999."

Mudondo signed a similar document, opting for the resignation and citing medical grounds.

In my view, this is exactly the situation referred to in the Regulations contained in Statutory Instrument 371 of 1985. The resignation became effective once the employer accepted or granted the application by the appellant for resignation.

I do not consider it open to Mudondo in such a situation to turn around and claim that he was retrenched unlawfully. He tendered his resignation from the first respondent freely, as stated in the document, and collected his package. That ended his employment with the first respondent.

There was certainly no basis for appealing on the ground that the retrenchment was unlawful. Otherwise, the appeal was based on a point that was conceded.

The court *a quo* conceded that the employer did not follow the retrenchment procedure. In other words, if the employees were retrenched, the retrenchment would have been held to be unlawful.

However, the court pointed out, and determined the matter on the basis, that the employees concerned resigned.

I find no merit in the appeal and it is dismissed with costs.

GWAUNZA AJA: I agree.

SANDURA JA: I have read the judgment prepared by CHEDA JA but respectfully disagree with it. In this matter, an application by the appellants for an order setting aside their retrenchment by the first respondent was dismissed with costs by the High Court.

The background facts are as follows. At the relevant time the appellants were employees of the first respondent ("Natbrew"). On 19 January 1999 Natbrew's managing director ("Nhete") issued a memorandum to all Natbrew employees, informing them that because of the prevailing economic situation in the country the company would be restructured and some of the employees would be retrenched.

A month later, on 19 February 1999, Nhete issued another memorandum, advising the employees of the progress in the restructuring exercise, and informing them that those employees who were not accommodated in the new structure were being offered a voluntary retrenchment package in order to minimise the adverse effects of losing their jobs. The details of the package were set out in a document annexed to the memorandum, and payment of the package was to be made on 30 April 1999 when the employees in question were to be retrenched.

Thereafter, on 23 February 1999, a meeting was held at Kadoma to clarify various issues pertaining to the voluntary retrenchment package and the restructuring exercise. The meeting was attended by the members of Natbrew's national workers committee and national salaried staff committee. Various concerns

over the retrenchment package were expressed but the chairman did not deal with them because he said that the purpose of the meeting was to clarify issues, and not to add to or delete anything from the package.

Subsequently, about three hundred and sixty-eight employees (including the appellants) who had not been accommodated in the new structure, and whose employment was to be terminated on 30 April 1999, were asked to apply for a voluntary retrenchment package by completing an application form, which was in the form of a letter prepared by Natbrew. The application form, in relevant part, is set out below:

> "Dear Sir,
>
> APPLICATION FOR VOLUNTARY RETRENCHMENT
>
> "I, … acknowledge receipt of your memorandum of 19 February, 1999, which I have read and fully understood. I therefore wish to be considered for voluntary retrenchment on the Voluntary Retrenchment Package offered by the Company.
>
> Subject to the acceptance of my application by Management, I hereby freely tender my resignation from National Breweries with effect from 1 May 1999.
>
> Yours faithfully,
>
> ……
>
> Approved/Declined by Management."

After completing the application forms and submitting them to Natbrew, the appellants consulted their lawyer who, on 30 April 1999, wrote to Nhete informing him that the purported retrenchment was a nullity because the Labour Relations (Retrenchment) Regulations, 1990, published in Statutory Instrument 404 of

1990, ("the Regulations") had not been complied with. The letter, in relevant part, reads as follows:

> "We are … instructed that despite your memorandum referring to a voluntary retrenchment scheme, the reality on the ground has in fact been different as your organisation unilaterally proceeded to draw (up) a list of the reorganised structure which excluded those employees you wished to discard. … In effect, you proceeded to compulsorily retrench the affected employees by excluding them from the company structure without their consent and without following the laid down procedures relating to compulsory retrenchment. …
>
> We are instructed that the employees have already completed the forms provided by yourselves but as no formal acceptance has been provided by the company, there is yet to be a formal contract and it is the employees' wish that consideration of the forms be suspended pending negotiations on the outstanding issues.
>
> Should your organisation seek to proceed without taking into account our client's sentiments as set out above, it is their intention to accept whatever packages you will offer on a without prejudice basis whilst compliance with the Regulations governing compulsory retrenchment is sought …".

The above letter did not provoke an immediate response from Nhete. Nevertheless, the reply eventually came from Natbrew's lawyer in a letter dated 9 June 1999. The letter, in relevant part, reads as follows:

> "… we advise that our client offered packages to those employees who had been identified as being redundant and who were prepared to accept firstly their redundancy and secondly the packages offered.
>
> All the employees who accepted packages –
>
> 1. made written applications for voluntary retrenchment pursuant to the offer made by our client.
>
> 2. The applications were considered by our client and all of them were approved in writing.
>
> 3. The employees in writing expressed their acceptance of the packages. …"

In the circumstances, Natbrew was of the view that the appellants had been retrenched in terms of the law. Consequently, the appellants filed a court application in the High Court against Natbrew and the Minister of Public Service, Labour and Social Welfare ("the Minister"), in his capacity as the Minister responsible for the administration of the Labour Relations Act [*Chapter 28:01*] ("the Act"), seeking the following order:

> "1. That the retrenchment of the employees set out in Annexure 'A' be and is hereby set aside.
>
> 2. That the respondents pay the costs of this application."

When the application was heard, the learned judge in the court *a quo* identified the following as the issues for determination:

> "(a) whether or not condonation should be granted for filing of this application out of time;
>
> (b) whether or not the applicant (i.e. Nathan Mudondo) can represent the other applicants in terms of Rule 89 of the High Court Rules;
>
> (c) whether or not the applicants were retrenched in accordance with the provisions of the Labour Relations (Retrenchment) Regulations, SI 404/90. … If not, did they resign from employment?".

The first issue was determined in favour of the appellants, and the delay in filing the application was condoned. This is not an issue in this appeal.

The second issue was determined in favour of the respondents, and the learned judge ruled that the only applicant properly before him was Nathan Mudondo. Although the appellants indicated in their notice of appeal that this ruling would be challenged, their counsel in this Court conceded the correctness of the learned judge's

ruling. It is, therefore, not an issue in this appeal, and consequently there is only one appellant before us.

The third issue was determined in favour of the appellant, in that the learned judge ruled that the purported retrenchment was null and void because the Regulations had not been complied with. However, notwithstanding that finding, the learned judge dismissed the application with costs on the ground that, in his view, the appellant had resigned from his job. Aggrieved by that decision, the appellant appealed to this Court.

The main issue in this appeal is whether the appellant resigned from his job or was retrenched. If what happened was a retrenchment, then, as the learned judge correctly found, the retrenchment was a nullity, and the learned judge ought to have granted the order sought.

However, before determining that issue, I would like to deal with two matters. The first concerns the meaning or meanings of "resign" and "retrench"; and the second is the purpose of the Regulations.

Although the word "resign" is not defined in the Act or Regulations, the *Concise Oxford Dictionary of Current English* 8 ed, gives several meanings of the word. In my view, the most appropriate meaning in the context of the present appeal is: "give up office, one's employment, etcetera". It goes without saying that the resignation must be voluntary and not due to pressure exerted by the employer on the employee.

The word "retrench" is defined in the Regulations as follows:

> "'retrench' in relation to an employee, means to terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, re-organising the undertaking in which the employee is or was employed, or for similar reasons".

I now wish to state the purpose of the Regulations. The Regulations were made by the Minister in terms of s 17(1) of the Act for the purpose of affording protection to employees by regulating and restricting the circumstances in which employers may retrench their employees.

In this regard, s 10 of the Regulations provides that any retrenchment of an employee which does not comply with the Regulations will be a nullity. It reads:

> "For the avoidance of doubt, it is declared that any purported retrenchment of an employee which is carried out otherwise than in accordance with an approval granted in terms of these Regulations, shall be of no effect whatsoever."

In view of the purpose of the Regulations, if what the employer wants to do is to retrench his employee or employees he is obliged to follow the procedure set out in the Regulations. He cannot circumvent that procedure by resorting to some other device.

That issue came before this Court in *Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai* 2000 (1) ZLR 641 (S). The facts of that case and this Court's decision in the matter are accurately stated in the headnote, which reads as follows:

> "The management of the appellant company decided that it had to reduce its workforce. This decision was considered to be necessary as a cost-cutting measure that was essential to maintain the financial viability of the company. It decided that it would reduce the workforce by retiring all its male employees who were 55 years of age, or over. The respondent, along with several other employees of the appellant, was compulsorily retired after reaching the age of 55 years. The rules of the pension fund provided that normal retirement was at the age of 65, but an employee could elect to retire early or be retired at the employer's instance. The respondent argued that what was being effected was retrenchment and the procedures applicable to retrenchment should have been followed.
>
> *Held*, that even though an employer might have the right under the pension fund regulations to terminate employment, if the object and effect of termination is to retrench, then the regulations governing retrenchment must be complied with. An employer who wants to retrench employees cannot defeat the essential purpose of the retrenchment regulations by purporting to terminate the contracts of workers by requiring them to take early retirement under the pension fund rules.
>
> *Held*, further, that it was clear that retrenchment was the object in the present case. This was shown by the fact that the employer suddenly and simultaneously required large numbers of employees of the same class by age to proceed on early retirement, and the fact that the reason given for this step was the need to reduce the strength of the workforce."

In the present case, Natbrew made it clear right from the beginning of the exercise that it intended retrenching some of its employees. That point was made in the two memoranda issued by Nhete and which were addressed to all Natbrew employees. It was also made at the meetings which were held for the purpose of explaining the voluntary retrenchment exercise and the retrenchment package being offered. In the circumstances, the termination of the appellant's employment should have been in terms of the Regulations.

However, the learned judge found that the appellant had resigned from his job, and dismissed the appellant's application on that basis. He said the following:

> "The applicant signed Annexure 'L' (the application for voluntary retrenchment). In my view, the Regulations do not render null and void a resignation from employment by an employee in consideration of a package which, in essence, is what the applicant did. He consulted a legal practitioner before signing the document. He must have been advised by his legal practitioner that the retrenchment was a nullity by reason of the retrenchment exercise's failure to comply with s 3 of the Regulations. With this knowledge he signed a document which explicitly states he was voluntarily resigning from the first respondent with effect from 1 May 1999 in consideration of the payment of a package."

In my view, the learned judge erred in finding that the appellant signed the application for voluntary retrenchment after consulting a legal practitioner. Quite clearly, that was not the case. As can be seen from the letter to Nhete written by the appellant's lawyers on 30 April 1999, which I have already set out in this judgment, the appellant signed the application for voluntary retrenchment before consulting his lawyer. In that letter the appellant's lawyer said:

> "We are instructed that the employees have already completed the forms provided by yourselves …".

The forms referred to were the applications for voluntary retrenchment.

However, the major error was the finding by the learned judge that by signing the document in question the appellant had in fact resigned as opposed to being retrenched.

What happened in this matter was not really in dispute. It was in fact set out in Natbrew's opposing affidavit as follows:

> "… those employees who had been rendered redundant through the creation of the new structure had an option either to apply for a voluntary retrenchment

> package or to contest the retrenchment exercise in accordance with the relevant regulations. …"

In addition, it was common cause that a decision had been taken by Natbrew that those employees who had been identified as no longer needed by the company, and the appellant was one of them, were to be retrenched on 30 April 1999, whether they liked it or not. That decision was taken long before the appellant signed the document in question "applying" for the voluntary retrenchment package and tendering his resignation. Quite clearly, the document was a smokescreen designed to disguise Natbrew's unlawful retrenchment exercise.

In the circumstances, when the appellant was offered a retrenchment package, what in effect he was being told was - "If you do not accept the package and tender your resignation, you will, nevertheless, be retrenched on 30 April 1999". In my view, this is akin to being told - "If you do not resign, you will be dismissed on 30 April 1999".

In considering whether the appellant resigned or was retrenched, the issue to determine is whether the contract of employment was terminated by the appellant or by Natbrew. As SIR JOHN DONALDSON, M.R. stated in *Martin v MBS Fastenings (Glynwed) Distribution Ltd* [1983] IRLR (Industrial Relations Law Reports) 198, when the matter came before the Court of Appeal:

> "The Industrial Tribunal had to make up its mind whether, on the evidence, the reality of the situation was that the employer terminated Mr Martin's employment or that Mr Martin did. Plainly the fact that Mr Martin signed a letter of resignation is a factor and an important factor in reaching a conclusion on this issue, but it cannot be conclusive. … whatever the respective actions of the employer and employee at the time when the contract

> of employment is terminated, at the end of the day the question always remains the same, 'Who really terminated the contract of employment?'."

See *Labour Law: Cases and Materials* by Benedictus and Bercusson at pp 301-2.

Similar opinions have been expressed by a number of authors of textbooks on labour law.

Robert Upex has this to say at p 35 of *Termination of Employment* 2 ed:

> "A resignation will be treated as a dismissal if the employee is invited to resign and it is made clear to him that, unless he does so, he will be dismissed."

Similarly, Selwyn says the following at p 272 of *Law of Employment* 7 ed:

> "The fact that the employer invited the employee to resign may, however, constitute a dismissal, for the alternative may be expressed or implicit in the request. In *Robertson v Securicor Transport Ltd* [1972] IRLR 70, the applicant had broken a company rule by signing for a container which had not been received. When this was discovered, he was given the alternative of resigning or being dismissed, and he chose the respectable course. It was held that he had been dismissed nonetheless."

I find the above authorities very persuasive and, therefore, intend to apply the principles set out therein in the determination of this appeal.

Applying these principles to the facts of the present case, there can be no doubt that the appellant's contract of employment was terminated by Natbrew and not by the appellant. That is so because when the appellant was offered the

retrenchment package and asked to resign, it was made clear to him that if he did not accept the package and resign, he would, nevertheless, be retrenched on 30 April 1999, as the decision had already been made.

Consequently, as the termination of the appellant's contract of employment was not in accordance with the Regulations, it was a nullity and the learned judge ought to have granted the order sought.

In line with this Court's decision in *Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai*, *supra*, it follows that the other employees unlawfully retrenched by Natbrew when the appellant was retrenched, and who are not parties to these proceedings, should obtain the same relief as the appellant.

In the circumstances, I would have made the following order –

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside, and the following is substituted –

"The application is granted with costs".

Kantor & Immerman, appellant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners