REPORTABLE ZLR (38)

Judgment No. SC 44/05
Civil Appeal No. 342/03

ZIMBABWE PHOSPHATE INDUSTRIES LIMITED

vs

(1) ELIAS MATORA (2) CHAMUNORWA MBEU (3) NKOSANA MARUFU (4) K. JANI (5) CHENJERAI MUTANGADURA (6) SADSON TAYENGWA (7) HUPENYU MUTANDIKO

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JANUARY 27 & OCTOBER 10, 2005

G V Mamvura, for the appellant

G T Chapwanya, for the respondents

MALABA JA: This appeal raises the question whether upon a true construction of s 47(5) of the Labour Relations Amendment Act No. 17 of 2002 ("Act 17") the intention of the Legislature in enacting s 97(3) repealing and substituting s 97(3) of the Labour Relations Act [*Chapter 28:01*] ("the principal Act") was to retrospectively take away rights vested in an appellant in an appeal noted in terms of the appropriate provisions of the principal Act and pending determination by the Labour Court on the date Act 17 was promulgated.

The question has to be determined on these facts:

The appellant instituted disciplinary proceedings against the respondents who were its employees, in terms of the employment Code of Conduct. The allegation made

against the respondents was that they had engaged in unlawful collective job action. They were found guilty by the Disciplinary Committee and dismissed from employment. An appeal to the Appeals Committee of the Employment Council for the Chemicals and Fertilizer Manufacturing Industry ("the Appeals Committee") by the respondents was upheld on 25 November 2002 and their reinstatement ordered.

On 5 December 2002 the appellant appealed to the Labour Relations Tribunal ("the Tribunal") in terms of s 97(1) of the principal Act which gave a person aggrieved by the determination or decision of a disciplinary body acting under a registered Code of Conduct a right to appeal against the determination or decision to the Tribunal within such time and in such manner as may be prescribed.

At the time the appeal was noted s 97(3) of the principal Act provided that:

> "An appeal in terms of subsection (1) shall have the effect of suspending the determination or decision appealed against".

On noting the appeal against the decision of the Appeals Committee the appellant acquired the right not to reinstate the respondent pending determination of the appeal by the Tribunal.

On 7 March 2003 and whilst the appeal was pending before the Tribunal, Act 17 was promulgated. Section 83 of the principal Act which had established the Tribunal was repealed and substituted with s 84(1) establishing a new court called the Labour Court. Section 97(1) of the principal Act was repealed and

substituted with a section bearing the same number, the provisions of which also gave a person aggrieved by a determination or decision made under an employment Code of Conduct the right to appeal against such determination or decision to the Labour Court within such time and in such manner as may be prescribed.

Section 97(3) of the principal Act now provided that:

> "An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against".

Section 47(5) of Act 17 which formed part of the savings and transitional provisions enacted that:

> "Any proceedings that were commenced in terms of Part XII of the principal Act before the date of commencement of the Labour Relations Amendment Act 2002, or were pending before the Labour Relations Tribunal on that date, shall be deemed to have been commenced in terms of the appropriate provisions of the principal Act as amended by the Labour Relations Amendment Act 2002 and shall be proceeded with accordingly".

It is common cause that the appeal noted by the appellant against the decision of the Appeals Committee was a proceeding pending before the Tribunal on the date of the commencement of Act 17. On 31 July 2003 the respondents applied to the Labour Court for an interim order directing the appellant to reinstate them in employment without loss of salary and benefits pending determination of the appeal against the decision of the Appeals Committee.

The basis of the application was the construction of the new s 97(3) of the principal Act by the respondents as having been intended to operate retrospectively and take away the right vested in the appellant at the time it noted the

appeal against the decision of the Appeals Committee, not to reinstate them pending determination of the appeal.

On 22 October 2003 a panel of three Presidents of the Labour Court was persuaded to accept as a correct statement of the law, the contention that s 97(3) of Act 17 retrospectively took away the right vested in the appellant not to reinstate the respondents pending determination of the appeal and granted them the interim order. The learned President who wrote the judgment of the court said:

> "The argument by Mr *Chapwanya* that the legislature intended s 97(3) to have retrospective effect thereby taking away existing rights is supported by the words used by the legislature. In this section and again in s 47(5) the words used are clear and unambiguous and admit of no other meaning other than that the Legislature intended retrospectivity. While the cases cited by Mr *Mamvura* support the position that there is a general presumption against a statute being construed as having retrospective effect, all these cases have a proviso that the general presumption can be rebutted where a statutory provision is expressly stated to be retrospective in its operation. In our view s 47(5) clearly expressed this as the intention of the Legislature…
>
> It is our finding therefore that s 97(3) as read with s 47(5) has retrospective effect".

At the appeal hearing Mr *Mamvura* argued that there was nothing in the language of s 47(5) of Act 17 to support the construction adopted by the court *a quo*. Although Mr *Chapwanya* for the respondents, presented a spirited argument in support of the decision appealed against, the contention that the true construction of s 47(5) does not reveal an intention on the part of the Legislature to have s 97(3) operate retrospectively and take away the right not to reinstate the respondents pending determination of the appeal is correct.

The principles applicable in the determination of the question whether or not a statute is intended to operate retrospectively and take away accrued rights have been stated in numerous cases.

In *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 INNES CJ said:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation".

In *Bell v Voorsitter Van Die Rasklassifikasieraad En Andere* 1968(2) SA 678(A) which is in Afrikaans the head note states that:

> "It is clear that our law accepts the rule that, where a statutory provision is amended, retrospectively or otherwise, while a matter is pending, the rights of the parties to the action, in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time of the institution of the action".

In *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338 G – 339A GUBBAY JA (as he then was) stated the general rule as follows:

> "It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the Legislature intends to deal only with future events and circumstances".

Lastly in *Nkomo and Anor v Attorney-General and Ors* 1993 (2) ZLR 422 (S) GUBBAY CJ at 429 C said:

> "Care must always be taken to ensure that retrospectivity is confined to the exact extent which the section of the Act provides".

In holding that s 47(5) expressed as being the clear intention of the Legislature that the retrospective effect of the new s 97(3) of the principal Act 17 was to take away the right vested in the appellant at the time of its promulgation not to reinstate the respondents pending determination the of appeal the court *a quo* overlooked the structure of s 97 of the principal Act.

Section 97(1) was a separate provision from s 97(3). Its provisions gave a person aggrieved by a determination or decision of a disciplinary body the right to appeal to the Tribunal. The new section 97(1) of the principal Act also gave a similar right in respect of appeals to the Labour Court. Except for the body to which the appeal lay there was no difference in the substance of the right created by s 97(1) to the extent that in s 47(5) of Act 17 the Legislature provided that appeals which were pending before the Tribunal on the date of the commencement of Act 17 were to be deemed to have been commenced in terms of the appropriate provisions of the principal Act as amended. The only appropriate provision of the principal Act as amended in terms of which the appeal pending before the Tribunal could be deemed to have been commenced before the Labour Court was s 97(1).

Section 97(3) of the principal Act before and after the amendment did not deal with commencement of proceedings or the noting of appeals to the Tribunal.

Section 97(3) of the principal Act before it was amended gave the appellant a clear right not to reinstate the respondents in their employment pending

determination of the appeal. In my view s 47(5) which dealt with the commencement of proceedings or the noting of appeals in terms of s 97(1), was not intended to affect the rights vested in the appellant in terms of s 97(3) of the principal Act at the time of the commencement of Act 17. An obligation was now imposed on an appellant to act in accordance with the requirements of the determination or decision appealed against pending determination of the appeal.

One cannot construe the provisions of s 97(3) dealing with substantive rights and obligations of an appellant as the "appropriate provisions of the principal Act as amended" by Act 17 in terms of which proceedings pending before the Tribunal at the commencement of Act 17 were to be deemed to have been commenced. The language of s 47(5) of Act 17 does not support the contention that it was the intention of the Legislature to have the retrospective effect of s 97(3) of the principal Act as amended take away the right vested in the appellant not to reinstate the respondents pending determination of the appeal.

On the question of costs Mr *Mamvura* conceded that each party pay its own costs.

The appeal is allowed. It is ordered that the decision of the Labour Court dated 24 October 2003 be and is hereby set aside and substituted with the following order:

"The application is dismissed with each party paying its own costs".

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Tizirai-Chapwanya & Mabukwa, respondents' legal practitioners