REPORTABLE ZLR (64)

Judgment No. SC. 76/05
Civil Appeal No. 09/04

MARONDERA RURAL DISTRICT COUNCIL v

DOUGLAS MORRIS AND TWENTY-SIX OTHERS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & MALABA JA
HARARE, OCTOBER 18, 2005 & JANUARY 16, 2006

T Batasara, for the appellant

L Uriri, for the respondents

SANDURA JA: This appeal arose out of a labour dispute which was decided by the Labour Court in favour of the respondents.

The relevant facts are as follows. The respondents ("the employees") were employed by the appellant ("the Council"). On 6 March 2000 the employees, acting in terms of s 104(2) of the then Labour Relations Act [*Chapter 28:01*] ("the Act"), gave to the Council fourteen days' written notice of their intention to resort to collective job action if their grievances were not addressed.

The notice specified four grievances, as follows –

"* Employees want 100% year 2000 salary increment … .

* Employees who were underpaid January to March 1994 need their back pay … .

* The four days' pay that was withheld after exaggeration that employees went on industrial action must be refunded … .

* House Rents – employees are not satisfied with criteria used in dictating (*sic*) $30.00 per room from all employees …".

In an attempt to address the above grievances, the Council held meetings with the employees' representatives on 10 and 16 March 2000, and with all the employees on 18 March 2000. The minutes of the meeting held on 10 March 2000 are not part of the record in this appeal, but the minutes of the other two meetings are. However, the accuracy of the minutes of the meeting held on 18 March 2000 was in dispute.

According to the Council's minutes, which for some unknown reason were not signed by the person who chaired the meeting on 18 March 2000, the parties reached an agreement in terms of which the employees undertook not to go ahead with the proposed collective job action on 20 March 2000. The relevant part of the minutes reads:

> "After a lengthy debate the workers agreed to the Council's request that the already awarded 30% salary increase by Council form part of a further salary increase to be discussed in June 2000 and be paid out in July backdated to January 2000. It was agreed that in view of the above agreement the intended strike on 20/03/00 be terminated."

However, according to the minutes prepared by the employees no agreement was reached by the parties at the meeting held on 18 March 2000. The relevant part of the minutes reads as follows:

> "The Council Vice Chairman told the house that after the review of (the) budget in June 2000, if Council managed to have a surplus of ten dollars that ten dollars shall be shared equally among Council employees.
>
> The Council Chairman refused to promise employees the percentage which they are expecting the Council to award employees after the review of the budget in June 2000.
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> The employees raised their hands to ask, hence the Council Chairman declared the meeting closed without any agreement signed between Council and its employees.
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> The meeting ended unceremoniously closed at 1.30 pm."

In passing, it is pertinent to note that the only issue that was discussed at the three meetings was the salary increment demanded by the employees. That was obviously the most important of all the issues.

Subsequently, on 20 March 2000 the employees turned up for work. However, after working for a few hours, and having been addressed by a Mr Nyadenga ("Nyadenga"), an official of the Zimbabwe Rural District Councils Workers' Union ("the Union"), the employees commenced their collective job action. They locked up all the gates to the Council's offices and turned away many ratepayers who wanted to settle their accounts with the Council.

Thereafter, the Council wrote to all the employees informing them that their grievances were still being considered, and appealing to them to resume their

duties by 7 April 2000. Only seven employees turned up for work as a result of that plea, but the rest stayed away.

Consequently, on 10 April 2000 the Council wrote to the striking workers as follows:

> "Dear Sir,
>
> RE: SUSPENSION FROM DUTY PENDING DISMISSAL
>
> In terms of Statutory Instrument No. 371 of 1985, section 3(a), please be advised that Council has suspended you from duty pending dismissal with immediate effect. The grounds upon which the suspension are based (*sic*) are as follows –
>
> (a) On the 18th of March 2000 Council held a meeting with all the workers so as to discuss on the year 2000 wage and salary increments. At this meeting all the workers agreed with Council that the 30% wage and salary increment awarded by Council in January 2000 be regarded as the negotiated wage for (the) year 2000 on condition Council was going to consider further wage and salary increases which will be backdated to January 2000. As a result of this agreement you had also agreed and promised Council that you were no longer going to go on a collective job action on the 20th of March 2000 as intended. However, on Monday the 20th of March 2000, instead of reporting for duty, you chose to go on strike and thereby disrupted Council operations. Council invited you to have this matter discussed further through the Labour Office but you refused. Further to that Council wrote to you appealing that you report for duty by 7 April at 0800 hours and again you did not turn up. As a result Council is now left with no option but to suspend you from duty pending dismissal.
>
> (b) During the period of suspension you shall not be entitled to any remuneration and/or allowance."

On the same day, i.e. 10 April 2000, the Council wrote to the Principal Labour Officer, Mashonaland East, seeking the authority to dismiss all the employees on strike. The letter, in relevant part, reads as follows:

> "Council would like to apply for authority to terminate contracts of employment of all employees participating in the ongoing collective job action

in terms of Statutory Instrument No. 371 of 1985, Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations of 1985 section 3 subsections (a), (b) and (f) (*sic*).

Council would like to dismiss the following employees (see attached list) since we believed that they are guilty of acts and or conducts (*sic*) inconsistent with the fulfilment of the express or implied conditions of their contracts as follows –

(i) … the employees and Council had agreed to terminate the strike … . On Monday 20th March 2000 all employees briefly reported for duty and acting under the influence of their Union representative, Mr Nyadenga, decided to go ahead with their intention to go on strike. The employees' conduct clearly shows that at a meeting held on the 18th of March they failed to negotiate in good faith and as such we feel they are guilty of an offence under s 3(a).

(ii) … By refusing to holding (*sic*) further negotiations in the absence of their Unionist the workers showed no respect of their employer whom they have entered into contracts of employment with and not the Union. Hence, we believe they are also guilty of an offence by breaching section 3(a) in that they acted in a manner inconsistent with the fulfilment of the express or implied conditions of their contracts of employment.

(iii) … the workers … locked all entrance gates to the Council Offices in order to prevent management from attending to clients coming to Council … . They also turned away numerous ratepayers who had intended to settle their accounts with Council. This resulted in Council losing substantial sums of revenue … . As a result of this action we also believe these employees are guilty of an offence under section 3(a).

(iv) Council wrote to all striking workers appealing to them to report for duty by the 7th of April 2000 … .

A total of seven employees responded to the plea by Council and the rest of the employees decided to continue with the strike … . We believe these workers (who continued with the strike) are also guilty of an offence under section 3(b) since they wilfully disobeyed to follow to a lawful order (*sic*) given to them by Council.

(v) By failing to report for duty for a period of more than five days without a reasonable excuse we believe the workers are also guilty of an offence under section 3(f) … ."

Subsequently, the Council's application for the authority to dismiss the employees was heard by a labour relations officer on 15 June, 13 July and 10 August

2000. And on 29 September 2000 the application was granted. In granting the application, the labour relations officer said:

> "It was not disputed in (at) the hearing by (the) respondents that an agreement had been reached on 18 March 2000 to call off the intended strike of 20 March 2000. It was also not disputed by (the) respondents that they briefly reported for duty on 20 March 2000 and then downed tools. It seems to (me) that the parties had reached an agreement which was going to lead to the final settlement of the dispute after further review in June 2000. That agreement was binding on the parties and failure to honour the agreement amounted to conduct or omission inconsistent with the express or implied conditions of the respondents' contract(s) … .
>
> It does not make sense for (the) respondents to say that they downed tools on 20 March 2000 because their grievances had not yet been resolved when they had entered into an agreement with Council on 18 March 2000 and agreed to call off the intended strike … ."

Following the determination by the labour relations officer, the matter was referred to a senior labour relations officer who dismissed the appeal. The employees then appealed to the Labour Relations Tribunal (now the Labour Court) and were successful.

The Labour Court held that the employees had embarked upon a lawful collective job action as they had given the requisite notice to the Council in terms of s 104(2) of the Act. It also held that the Council should not have proceeded in terms of the Labour Relations (General Conditions of Service) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985 ("the Regulations") (now repealed), but should have applied for an order in terms of s 106(1) of the Act, calling upon the employees to show cause why a disposal order should not be made in terms of s 107 of the Act.

Aggrieved by that decision, the Council appealed to this Court.

In my view, there are four main issues to be determined by this Court. The first is whether, at the meeting held on 18 March 2000, the parties reached an agreement in terms of which the employees agreed to call off the collective job action planned for 20 March 2000.

The second is whether the collective job action was lawful.

The third is whether the grounds on which the dismissal of the employees was sought were different from the grounds on which the employees had been suspended.

And the fourth is whether, instead of dealing with the employees in terms of the Regulations, the Council should have applied to the Minister of Public Service, Labour and Social Welfare for an order in terms of s 106(1) of the Act, calling upon the employees to show cause why a disposal order should not be made in relation to the collective job action.

I shall deal with the four issues in turn.

DID THE EMPLOYEES AGREE TO CALL OFF THE COLLECTIVE JOB ACTION?

As already stated, the Council's minutes of the meeting held on 18 March 2000 clearly indicate that the employees agreed to call off the collective job action which had been planned for 20 March 2000.

On the other hand, the minutes prepared by the employees indicate that no such agreement was reached, and that the meeting in question ended unceremoniously.

However, it is clear from what the labour relations officer said in her determination that when the parties appeared before her the employees did not dispute the fact that on the day in question they had agreed to call off the collective job action. The relevant part of the determination reads as follows:

> "It was not disputed in (at) the hearing by (the) respondents that an agreement had been reached on 18 March 2000 to call off the intended strike of 20 March 2000. It was also not disputed by (the) respondents that they briefly reported for duty on 20 March 2000 and then downed tools."

In the circumstances, the question posed above is answered in the affirmative.

WAS THE COLLECTIVE JOB ACTION LAWFUL?

I have no doubt in my mind that it was not. I say so because s 104(3)(a)(ii) of the Act, which was in force at the relevant time, but which was repealed by the Labour Relations Amendment Act No. 17 of 2002, which came into operation on 7 March 2003, provided as follows:

> "Subject to subsection (4), no collective job action may be threatened, recommended or engaged in by –
>
> (a) any employees, workers committee or trade union –
>
> (i) …
>
> (ii) unless redress in respect of the dispute concerned has been sought in terms of Part XII; or …".

Subsection (4) of s 104 of the Act is irrelevant to the collective job action in which the employees participated.

At the relevant time, Part XII of the Act consisted of sections 93 to 101, and dealt with the determination of disputes and unfair labour practices by labour relations officers, senior labour relations officers and the Labour Relations Tribunal.

In the present case, it is clear that before resorting to the collective job action on 20 March 2000 the employees did not seek redress in respect of the dispute concerned in terms of Part XII of the Act. That being the case, the inescapable conclusion is that the collective job action was clearly unlawful.

While it is correct that the Council did not rely upon the provisions of s 104(3)(a)(ii) of the Act in the court *a quo*, it was entitled to raise the point for the first time on appeal. The general rule is that a point of law may be raised for the first time on appeal provided that it is covered by the pleadings and its consideration would not be unfair to the other party.

As INNES J (as he then was) said in *Cole v Union Government* 1910 AD 263 at 272:

> "The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the

> record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

In the present case, as already stated, it is clear beyond doubt that before resorting to collective job action the employees did not seek redress in respect of the dispute between them and the Council in terms of Part XII of the Act. In addition, there is no basis for thinking that further evidence would have been produced by the employees had the point of law been raised in the court below.

WERE THE GROUNDS ON WHICH THE DISMISSAL OF THE EMPLOYEES WAS SOUGHT DIFFERENT FROM THE GROUNDS ON WHICH THE EMPLOYEES HAD BEEN SUSPENDED?

This issue is important because in *Standard Chartered Bank Zimbabwe v Matsika* 1996 (1) ZLR 123 (S), this Court held that where an application for an order terminating a contract of employment is made forthwith after the suspension of the employee, the ground on which the application is based should not be different from the ground on which the employee was suspended.

In the present case, the letter of suspension and the application for authority to dismiss the employees, setting out the grounds relied upon, have already been set out in this judgment.

Although both documents were not as elegantly worded as they might have been if they had been prepared by a legal practitioner, a perusal of both documents indicates that the essence of the main ground relied upon in the letter of suspension and in the application for the authority to dismiss the employees was the allegation that the employees were guilty, in terms of section 3(a) of the Regulations,

of an act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of their contracts of employment, in that, having given an undertaking to the Council that they would call off the proposed collective job action, they subsequently reneged on that agreement for no good reason.

In my view, the fact that the application for the authority to dismiss the employees relied upon additional grounds, such as wilful disobedience to a lawful order and absence from work for five or more working days without reasonable excuse, which were not in the letter of suspension, makes no difference.

In any event, the main ground on which the labour relations officer authorised the dismissal of the employees was the fact that they had reneged on their undertaking to the Council that they would call off the collective job action. The labour relations officer concluded that such conduct was inconsistent with the fulfilment of the express or implied conditions of the employees' contracts of employment. I entirely agree with that conclusion.

In the circumstances, although the application for the authority to dismiss the employees included grounds not set out in the letter of suspension, the main ground relied upon in the letter of suspension was the same as the main ground relied upon in the application.

WAS THE COUNCIL OBLIGED TO APPLY FOR A SHOW CAUSE ORDER IN TERMS OF S 106(1) OF THE ACT?

I have no doubt in my mind that the answer to this question is in the negative. A similar question was considered by this Court in *Cargo Carriers (Pvt)*

Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S), and the Court concluded that the employer in that case could have applied for a show cause order in terms of s 106(1) of the Act or, alternatively, it could have proceeded in terms of the Regulations and applied to a labour relations officer for the authority to dismiss the workers. At 619 D-G GUBBAY CJ said the following:

> "In considering the applicability of the Code of Conduct to the mass collective job action resorted to by 322 employees …, it is clear to me that the provisions of the Labour Relations Act, headed 'Collective Job Action', were designed to deal with precisely the situation that confronted the appellant. It should have waited for the issue of a show cause order. If the Minister had refused to grant it, the appellant, as a person aggrieved, could have appealed to the Labour Relations Tribunal pursuant to s 110(1)(a) of the Act. Had the Minister issued it, the appropriate authority on the return day would have been empowered to dismiss as many of the 322 employees as found warranted.
>
> Alternatively, it was open to the appellant … to have suspended the 322 employees without pay on the ground specified in either subs (a) or (b) of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), and applied to a labour relations officer for an order or determination terminating the contract of employment of each of them."

In the circumstances, the Labour Court seriously misdirected itself when it determined that the Council should have applied for an order in terms of s 106(1) of the Act, calling upon the employees to show cause why a disposal order should not be made in relation to the collective job action, instead of proceeding in terms of the Regulations.

In addition, the Labour Court erred when it concluded that the collective job action was lawful. As already indicated, the collective job action was undoubtedly unlawful. In my view, participating in an unlawful collective job action constitutes conduct inconsistent with the express or implied conditions of the contract of employment.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

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

"The appeal is dismissed with costs".

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Madanhi & Associates, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners