REPORTABLE ZLR (16)

Judgment No. SC 14/07
Civil Appeal No. 313/05

BUSINESS EQUIPMENT CORPORATION v FARAI MTETWA

SUPREME COURT OF ZIMBABWE
SANDURA JA, GWAUNZA JA & GARWE JA
HARARE, JANUARY 15, & JULY 16, 2007

H Zhou, for the appellant

The respondent in person

GWAUNZA JA: This is an appeal against a judgment of the Labour Court, in terms of which the appellant's application for rescission of an earlier default judgment against it, was dismissed.

The background to the dispute is as follows. The respondent was dismissed from the appellant's employ for misconduct ('the first dismissal'). He appealed against his dismissal to the Negotiating Committee, which ordered the appellant to reinstate him without loss of pay or benefits. No alternative order for damages in *lieu* of reinstatement was made.

The appellant, aggrieved at the order to reinstate the respondent, appealed against such order to the Labour Court, which however, dismissed the appeal and upheld

the Negotiating Committee's decision for the appellant to reinstate the respondent without loss of salary or benefits.

When the respondent subsequently presented himself for duty, he was handed a letter in which it was stated that the appellant was going to file an appeal to the Supreme Court. He thereafter stayed away from work but proceeded to file an appeal to the Supreme Court against the order of reinstatement without the alternative of damages. It is not clear from the evidence when the appellant abandoned its appeal to the Supreme Court. Nor is it clear when the respondent, who initially had exhibited a willingness to return to work in compliance with the Labour Court's order, had decided to opt for damages instead. What is clear is that it took the appellant a period of some seven months to demand from the respondent that he report for duty or face dismissal. Significantly, the appellant knew by then that the respondent had - correctly or otherwise – filed his appeal to the Supreme Court.

In that appeal, the respondent sought an order for payment of damages as an alternative to reinstatement. As indicated, pending the hearing of appeal by this Court, the respondent did not report for work. It was then of the view that the noting of the appeal against the order of reinstatement had the effect of suspending its enforcement. The appellant, being of a different view, directed the respondent to report for work, and when he did not do so, instituted disciplinary proceedings against him. These culminated in the respondent being dismissed from his employment with effect from 14 May 2002 ('the second dismissal'). The respondent thereafter appealed against such dismissal - but

unsuccessfully - to the Local Joint Committee and later, the Negotiating Committee. He then appealed to the Labour Court. On the date of hearing of the matter, the appellant *in casu* was in default, and the Labour Court, which was satisfied notice of the hearing had properly been served on the appellant's legal practitioners, proceeded to consider the matter on the merit. The court found that the respondent *in casu* had a reasonable excuse for failing to report for work during the pendency of his appeal to the Supreme Court, and accordingly upheld the appeal. The appellant later sought rescission of that judgment and, having failed in its quest, has now appealed to this Court.

In the meantime, the respondent's appeal to the Supreme Court, in which he sought an order for damages in lieu of re-instatement, was dismissed (SC 25\04). The basis of such dismissal is set out in the Supreme Court judgment as follows:

> "The question of the breakdown of the relationship between the parties was never raised by the appellant in the lower *fora.* Indeed, as stated in the notice of appeal, it was in the closing submissions by counsel at the end of the hearing before the (Labour) Tribunal that this point was first taken. No evidence of the breakdown of the relationship having been led, there was no evidence upon which the Tribunal could find that the relationship between the parties had broken down and consider making an order in terms of the *proviso.* Accordingly, the appeal is devoid of merit and it is dismissed with costs."

From the foregoing it is evident that two separate court proceedings were at one time being pursued by the parties. There is however no doubt that the finding of the Supreme Court in the matter concerning the respondent's first dismissal has a bearing on the dispute concerning his second dismissal.

As already pointed out, the respondent successfully challenged his first dismissal before the Negotiating Committee, which ordered his reinstatement. When the appellant sought to have the Negotiating Committee's determination reversed on appeal to the Labour Court, the respondent, who had neither filed a cross appeal against the Negotiating Committee's determination, nor placed before the Labour Court evidence indicating a breakdown in the relationship between the parties, left it until the stage of closing submissions to mention, for the first time, that he preferred damages to reinstatement. The Labour Court correctly disregarded this belated claim, if such it was, and upheld the Negotiating Committee's decision to reinstate the respondent. Quite clearly, the respondent's appeal to the Supreme Court was doomed to failure.

It is against this background that the respondent's second dismissal must be considered.

The appellant contends that, contrary to the finding by the court *a quo,* it was not in wilful default when it failed to attend the hearing of this matter in the court *a quo*. The appellant disputes the court *a quo's* finding that proper service of the notice of hearing had been effected through the appellant's legal practitioners. It is also argued that the court *a quo* erred in finding, as it did, that there was proof on record that the appellant had been properly served with the notice of hearing. Further, that the court gave no indication of the type of service referred to.

I find there is merit in these contentions. The court *a quo,* referring to the issue of the notice of set down, noted as follows on p 2 of the judgment:

> "The record shows that the notice of set down was date stamped 23 July 2004. Service was effected 'B/H' ie 'by hand' on the applicant's legal practitioners."

However, as correctly stated in the appellant's heads of argument, while the notice of set down may have been date stamped 23 July 2004, the appellant's legal practitioners, almost two weeks later on 6 August 2004, indicated in a letter to the respondent's legal practitioners, that such notice had not been received by them. The letter read in part as follows:

> "We have your letter of 2 August 2004 and wish to point out that we have not as yet been served with any notice of further set down of this matter. We will naturally deal with the matter in the event that it is indeed set down for finalization."

It is pertinent to note that the observation by the court *a quo* concerning the date stamp of 23 July 2004, and service by hand, does not indicate whose date stamp it was nor whether someone at the appellant's legal practitioners' office had signed the notice of set down to indicate acknowledgement of receipt. The appellant's legal practitioner, Mr *Mahlangu,* in his affidavit denied ever receiving the notice of set down. I find, too, that the letter from the appellant's legal practitioners to the effect that they would "deal with the matter" once they received notice of set down, did not accord with an intention to wilfully default in attending the hearing.

Given these circumstances, I find that the finding by the court *a quo* that the appellant was in wilful default is not supported by the evidence before the court. There is no evidence, in other words, to suggest that the appellant deliberately, and with full knowledge of the date of set down, took the decision not to attend the hearing in question.

The appellant contends further that the court *a quo* should have rescinded the judgment in question, given that it, (appellant) had proved the *bona fides* of its defence on the merits, which carried prospects of success.

I do not find merit in this argument.

In its default judgment upholding the respondent's appeal (against his second dismissal) the Labour Court ruled as follows:

> "The employee had a reasonable excuse for his failure to report for work. He was waiting the outcome of an appeal. As such the decision of the Negotiating Committee is set aside. The appeal is accordingly upheld. The parties are to await the outcome of the appeal which was noted with the Supreme Court."

The Supreme Court duly dismissed the respondent's appeal, an outcome whose effect was to confirm the earlier orders of the Negotiating Committee and the Labour Court, for the appellant to reinstate the respondent without the option of damages.

The court *a quo* in its judgment cited authorities to support the proposition that under common law the noting of an appeal has the effect of suspending the decision appealed against[1] where the Legislature was silent on the effect of an appeal. Nowhere in its papers does the appellant deny that the respondent had properly noted an appeal with this court. Far from denying it, the appellant filed opposing heads of argument to that appeal. The appeal was registered as such by this Court, and all relevant processes to have it heard were followed. It was duly heard albeit at the end of the hearing, dismissed.

In other words, it was an appeal considered to be properly before the Court. The appellant, while stating that the respondent sought to appeal against an order that was, in fact, in his favour, has advanced no argument to justify a departure from the law concerning the effect of an appeal on the judgment appealed against. It has not been suggested, for instance, that the leave of the court to execute the judgment pending an appeal against it, had been granted.

There was another pertinent consideration. The appellant does not deny that it addressed a letter to the respondent to the effect that it wished to file an appeal against the Labour Court's determination that he should be reinstated without loss of salary or benefits. Nor was the respondent's averment that he was given that letter on the day he sought to attend duty, disputed. The record also shows that it took the appellant almost seven months to inform the respondent that he should attend duty, and that during that period he was not informed of the appellant's change of heart regarding its proposed

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[1] Among others, *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45

appeal to the Supreme Court. His own appeal aside, the respondent could not, therefore, have reasonably been expected to know that he would be welcomed back to work.

Against this background, the finding by the court *a quo* that the respondent had reasonable cause to stay away from work pending the determination of his appeal to the Supreme Court cannot be faulted. His dismissal on that basis was therefore unjustified.

I find, in the final analysis, that while the court *a quo* may have erred in its finding that the appellant was in wilful default, it was correct in its finding regarding the *bona fides* or lack thereof, of the appellant's defence on the merits. The appeal must, therefore, fail.

For the avoidance of doubt, the respondent is entitled to reinstatement to his former employment with the appellant, without loss of salary or benefits, that being the effect of the judgment of this Court in case SC 25/04.

In the result, the appeal is dismissed with costs.

SANDURA JA: I agree

GARWE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners