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ANDREW MACHAYA v FARM AND CITY CENTRE

SUPREME COURT OF ZIMBABWE
GARWE JA, OMERJEE AJA & GOWORA AJA
HARARE, FEBRUARY 22 & MARCH 13, 2012

K Gama, for the appellant
S Njerere, for the respondent

OMERJEE AJA: This is an appeal against the judgment of the Labour Court in which the Court allowed an appeal against an award made by an arbitrator, set aside the award and directed that the matter be set down for quantification before the Court.

The background relevant to the determination of this matter is as follows. The respondent was employed by the appellant as a personnel manager. In or about 2003 the respondent suspended the appellant on allegations of misconduct. A hearing to determine those allegations was aborted when it was realised that the code of conduct under which the appellant was charged was inapplicable. No determination was made in respect of the allegations of misconduct.

In June 2000, the appellant approached the Ministry of Labour complaining firstly that he had been unlawfully suspended and secondly of other unfair labour practices. On 22 August 2001 a labour relations officer determined that the respondent had not made an application in terms of the provisions of s 2 of S.I 375/85 for the dismissal of the appellant. He consequently ordered the respondent to pay the appellant the equivalent of four months salary as compensation for loss of employment. On 3 September 2001 the appellant appealed

to the senior labour relations officer against that decision and the respondent cross-appealed on 11 October 2001.

The senior labour relations officer on 27 November 2003 determined that no application to dismiss the appellant had been made by the respondent. Without inquiring into the merits, he then ordered the reinstatement of the appellant without loss of pay and benefits from the date of suspension. In the alternative he ordered that the appellant be paid his salary and benefits from the date of suspension to the date of determination and damages in lieu of reinstatement in a sum to be agreed to by both parties.

On 31 January 2003 the respondent appealed to the Labour Relations Tribunal against that decision but then withdrew that appeal on 26 March 2003.

On 11 June 2003 the appellant was paid his arrears in respect of salaries and benefits in the sum of Z$1 62 516.19 by the respondent. In due course the matter was referred to an arbitrator who awarded the appellant thirty months salary in lieu of reinstatement and back pay from the date of suspension to 26 March 2003 being the date when the respondent informed the appellant of its decision to pay damages. The respondent then appealed to the Labour Court, which made the determination which forms the subject matter of this appeal.

The Labour Court in its determination made a number of findings. Firstly, that the arbitrator had erred in quantifying damages in the absence of evidence justifying such award. Secondly, that the arbitrator erred in finding that the only position the appellant could have taken was that of a personnel manager. Thirdly, that the arbitrator erred in finding that the damages payable to the appellant were to be based on wage rates prevailing at the time of the award.

On the issues raised by the appellant and in particular that he had been wrongfully suspended by the respondent, the court *a quo* found that this was an "after thought" on his part as it had not been raised before the arbitrator. The record of proceedings before the senior labour relation officer had not been placed before the court *a quo* by the parties.

It is apparent from the record that although the respondent claims that an application to dismiss the appellant was made in terms of S.I. 371/85, no such application appears to have been received by the Minister and consequently no approval for the dismissal of the appellant was given by the Minister. It is common cause that at the relevant time the appellant could only have been dismissed in terms of the provisions of S.I. 371/85.

The papers filed of record reveal that at all times the appellant complained that he had been unlawfully suspended and that he remained an employee of the respondent. Indeed one of the issues raised by the appellant before the senior labour relations officer and the arbitrator was the status of his contract of employment. However neither of them made a determination of this issue.

In light of the observations I have just made, the finding by the Labour Court that the question of the respondent's employment status had not been raised in proceedings before the arbitrator is a misdirection.

The issue of the employment status of the appellant was consistently raised by him and was an important matter. It is clear that the labour relations officer, the senior labour relations officer, the arbitrator and finally the Labour Court made no finding on this issue. It is evident from the record that at no time was the appellant properly suspended and dismissed. The respondent's counsel has conceded as much before this Court. Therefore, in

the absence of the appellant having been properly dismissed, the question of damages and reinstatement does not arise.

It is clear from the facts of this case that the appellant had been improperly suspended on allegations of misconduct in terms of a code of conduct which, it is common cause, was inapplicable in this matter. The suspension of the applicant was therefore *void ab initio*. The appellant's contract of employment could only have been terminated in terms of the provisions of S.I. 371/85. It is also not in dispute that permission to dismiss the appellant was not granted by the Minister in terms of the aforementioned regulations. There was therefore no valid suspension or dismissal of the appellant from employment. The labour officer, the senior labour officer and the arbitrator therefore had no jurisdiction to determine this matter. In the exercise of the review powers of this Court, the proceedings before these three bodies must be set aside.

The law is clear that every thing that transpired from the time of the appellant's suspension was a nullity. In the circumstances there is no doubt that at all times the contract of employment between the appellant and the respondent remained extant and binding upon the parties.

Accordingly, the appeal succeeds and it is therefore ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The judgment of the Labour Court be and is hereby set aside.
3. The proceedings before the labour officer, the senior labour officer and the arbitrator be and are hereby set aside.

GARWE JA: I agree

GOWORA AJA: I agree

Madzivanzira, Gama & Associates, appellant's legal practitioners

Messrs Honey & Blackenberg, respondent's legal practitioners