

DISTRIBUTABLE (12)

INTER-AGRIC PRIVATE LIMITED
v
ALLAN MUDAVANHU AND 12 OTHERS

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & HLATSHWAYO JA
HARARE, OCTOBER 18 2013 & MARCH 10, 2015

Z.T. Chadambuka, for the appellant

Respondent in person

GOWORA JA: The respondent (“hereinafter referred to as Mudavanhu”) was employed by the appellant as the head of its clothing factory division. As part of his contract of employment, the respondent undertook to source for external garment making contracts to supplement the workload in the factory, for which he would receive a commission. On 11 July 2006, he was charged with acts of misconduct as follows: persistent poor time-keeping; habitual absenteeism without permission; failure to meet required standards of work produced, (*sic*); failing to meet set targets in the production in the factory (*sic*) and unilaterally increasing the number of employees in his division without authority. Following a disciplinary hearing the respondent was found guilty on all charges and was dismissed from employment with effect from 16 July 2006.

On 14 July 2008, alleging an unfair dismissal, he filed a grievance with a labour officer, and failing conciliation between the parties, the labour officer referred the matter to compulsory arbitration. The arbitrator upheld the respondent’s claim of unfair

dismissal and gave an award in his favour. Included in the arbitrator's award were twelve former employees of the appellant. The appellant unsuccessfully appealed to the Labour Court which upheld the award in respect of the Mudavanhu and the other twelve. Aggrieved by the dismissal of that appeal, the appellant has noted this appeal.

Before delving into the merits of the appeal, it is appropriate to dispose of the dispute in relation to the twelve others herein. It was contended on behalf of the appellant that the Labour Court and the arbitrator in turn, made a determination with wide implications in relation to the second to thirteenth respondents. The contention was based on the undisputed fact that the only time the claims in relation to the twelve others were alluded to was in the arbitrator's award. The appellant argued that the arbitrator had placed an onus on the employer to show that the departure of the other twelve from employment was procedural.

A perusal of the record of proceedings before the arbitrator points to the fact that the only evidence of unfair dismissal placed before the learned arbitrator was in relation to Mudavanhu. The only reference to the other twelve is to the effect that they were made to resign after they refused to be moved from the factory to work in the fields. None of the so called twelve others appeared before the arbitrator. However, the record contains affidavits, attested to by nine of those respondents, in which authorisation is granted to Mudavanhu to speak on their behalf in the dispute with the appellant.

The arbitrator accepted the claim by Mudavanhu that he was legally permitted to represent his fellow employees on a right provided for in s 4 of the Labour (Settlements of Disputes) Regulations S.I. 217 of 2003 ("the Regulations"). The arbitrator was pleased to

find that Mudavanhu was properly authorised and that, consequently, his former workmates were properly before the learned arbitrator.

Clearly he erred. Firstly, s 4 of the Regulations allows a party to a matter before a labour officer to be represented by a fellow employee, an official of a trade union, employer's organisation or a legal practitioner. The Regulations do not define who a labour officer is. A definition is found in the Labour Act, [*Chapter 28:01*] ("the Act"), where the labour officer is defined as "a labour officer means a labour officer referred to in para (b) of subsection (1) of s 101." Reference to s 101 reveals the following definition in relation to labour officers:

"such number of labour officers and employment officers as may be necessary for carrying out the functions assigned to such officers in terms of this Act".

There is a clear distinction between a labour officer and an arbitrator and their respective functions under the Act. Appearance before a labour officer cannot be read or stretched to mean appearance before an arbitrator. It is my considered view that Mudavanhu was not empowered to represent his former workmates at the hearing before the arbitrator. The arbitrator erred at law in permitting him to do so.

In addition, at law, the arbitrator was only competent to determine the dispute between such parties as had been referred to him by the labour officer. Thus, he was confined to his terms of reference. He had no mandate beyond that which had been referred to him. It is not in dispute that the said respondents were not subjected to disciplinary procedures. It is also not in dispute that the matter of the first-mentioned of these respondents is in the arbitral process. The second to thirteenth respondents were therefore not properly before him. There was no claim for the arbitrator to adjudicate on and the award

was irregularly made. In addition, the arbitrator proceeded to award damages to the twelve in the absence of a claim or evidence to substantiate the award of damages as they never appeared in person. The award granted in their favour has no legal basis.

As a consequence, the court *a quo* misdirected itself in upholding, the finding by the arbitrator that the other twelve respondents were properly before him. In addition the court should have found that Mudavanhu could not legally represent them before the arbitrator. Taking these irregularities into account, the court *a quo* should have found that the award in respect of the other twelve had been granted without lawful basis and ought therefore to have set it aside. The court *a quo* misdirected itself in upholding that part of the award.

I turn now to the merits in relation to Mudavanhu. The main issue for determination before the court *a quo* was concerned with the applicable Code of Conduct, whether it was the one under the agriculture industry as contended by the appellant, or the clothing industry as contended by the respondent. The learned President of the Labour Court concluded that the issue of which industry the respondent was employed in involved issues of fact, and, found accordingly that it was an issue that could not properly be brought before the court on appeal.

Mudavanhu claimed before the arbitrator that the employer was using the wrong Code of Conduct in the calculation of his salary or wages. His contention was that in terms of the contract of employment he should have been paid in accordance with the salary rates applicable to the clothing industry as opposed to the agricultural industry. His position

therefore was that in considering his complaint the arbitrator had to have recourse to the code of conduct for the clothing sector.

On the substance of the dispute before him, the first issue for consideration by the arbitrator was whether or not the Disciplinary Committee was properly constituted, and, if it was, whether or not the respondent had been given adequate notice of the hearing.

The arbitrator did not make a specific finding as to which of the two sectors, agricultural or clothing, he considered as being the correct one. However, in considering the alleged procedural irregularities on the part of the Disciplinary Committee of the appellant, he made reference to the Collective Bargaining Agreement: Agricultural Industry S.I. 323 of 1993, which Code of Conduct governs the agricultural sector. The award in favour of the respondent and his co-employees was also made in terms of the provisions of S.I 323 of 1993. The only logical conclusion is that the arbitrator found that the agricultural sector code of conduct was the applicable one.

Consequently, I am of the view that by making reference to the Code of Conduct of the agricultural sector, the arbitrator in fact decided that the relationship between the parties fell to be determined under that code of conduct.

In my view the court *a quo* was correct in deciding that the issue of which sector the respondent and Mudavanhu fell in was a question of fact. In order to resolve the question as to which sector they belonged to the court would have had to hear evidence. In any event, it was an issue that should not have been brought on appeal as the arbitrator appeared to have resolved it in favour of the appellant. The court *a quo*, correctly in my

view, did not upset that finding and went on to decide the matter on the same Code of Conduct.

In view of the reliance by that court on the Collective Bargaining Agreement: Agricultural Industry, S.I. 323 of 1993, it is found that the court *a quo* decided that S.I. 323 of 1993 was the relevant instrument. Undoubtedly the court *a quo* was correct in proceeding in the manner it did.

The arbitrator found that the appellant had given the respondent less than two days' notice of the hearing contrary to the requirements of S.I. 323 of 1993. It was the finding of the arbitrator that the respondent had been given less than the required notice in complete disregard of the notice period required under the Code of conduct. He had also found that the claim had not prescribed. Having found that the dismissal of Mudavanhu was unlawful an award for his re-instatement was issued. In the alternative if reinstatement was no longer possible the appellant was to pay damages in United States dollars.

The Labour Court found that;

“the arbitrator made a finding that the employer had not followed the court procedures I therefore find that the arbitrator did not err in his finding.”

The court *a quo* did not set out the basis upon which it found that the arbitrator had made the correct decision. Further to this, the court did not set out the facts upon which it relied in coming to the conclusion that the arbitrator was correct in finding that the Disciplinary Committee had not followed the correct procedure. It would have been in order for the court *a quo* to find that the evidence of Mudavanhu that he had not been given adequate notice prior to the hearing was confirmed by the record. The court did not do this. It is not appropriate for an appeal court to confirm that there was no error on the part of a lower

tribunal without setting out the basis for its finding of correctness on the part of the lower tribunal.

A perusal of the record however reveals that the finding by the arbitrator is not borne out by the facts. The dispute between the respondent and the appellant's Managing Director occurred on 7 July 2006 and it was the basis of the complaint against Mudavanhu. That altercation is given as one of the reasons for the termination of his employment contract. The disciplinary hearing was conducted on 11 July 2006. The allegation that he was given inadequate notice is not established on the record.

As for the contention that the Disciplinary Committee was not properly constituted, there was no indication before the arbitrator or indeed the Labour Court as to how it was inappropriately constituted. The arbitrator observed that the Disciplinary Committee did not have equal representatives. In the letter of complaint written on behalf of the respondent and his co-respondents, Mudavanhu is referred to as a "Factory Manager". The minutes of the disciplinary hearing show that apart from two witnesses, there were also present, the Human Resources Manager and a Head of Department, the exact nature of which is not specified.

It seems to me that in making a finding that the Disciplinary Committee had been improperly constituted the Labour Court merely paid lip service to the findings of the arbitrator. By its failure to interrogate the basis upon which the arbitrator concluded that the committee had been improperly constituted the Labour Court grossly misdirected itself.

Turning to the award of damages, it should have been obvious to the learned President in the court *a quo* that there was no evidence of damages led before the arbitrator. It is well settled that in the assessment of damages for unlawful dismissal, an arbitrator or a court is not entitled to pluck figures from the air, and that any award of damages must be premised on evidence of actual earnings by the dismissed employee. See *Redstar Wholesalers v Mabika* SC 52/05.

In the case in point not only was there no evidence of any earnings in Zimbabwe dollars, there was no attempt to justify the award in United States dollars. Thus, there was no enquiry on the issue of quantum. In *Redstar Wholesalers v Mabika*, (*supra*) this Court reiterated the settled principle that in assessing damages flowing from the loss of employment, a court is not entitled to simply pluck figures from thin air and make them the basis of an award. Instead, the court is required to hear evidence before assessing such damages.

Further to the above, an award of damages for thirty six months was issued. It is trite that when considering the length of time a dismissed employer is likely to take before finding alternative employment, the court must hear evidence from the affected employee. It is not in dispute that in this case no evidence was adduced as to the length of time Mudavanhu would be expected to reasonably take to find employment. An employee who has been dismissed is legally obliged to mitigate his damages by finding alternative employment at the earliest opportunity. The arbitrator failed to take this principle into account in his assessment of the damages claimed by the respondent. The Labour Court in turn misdirected itself by failing to give effect to the stated principle and confirmed the award

despite the error on the part of the arbitrator. See *Nyaguse v Mkwadini Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S).

Mudavanhu and his co-respondents were awarded back pay in United States dollars. It is settled that an employee can only be compensated by an amount which should be calculated on the rate applicable at the time of dismissal.

In this case, it is obvious that there was a complete disregard by the arbitrator of established law and principles which the Labour Court failed to take note of in considering the appeal before it. The failure to take cognisance of legal principles and apply them to the matter before it constituted a gross misdirection on the part of the court *a quo*. The appeal has merit and must succeed.

In the result the court makes the following order.

It is ordered that:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and is substituted with the following:
 - (i) The appeal is allowed with costs.
 - (ii) The arbitrator's award is set aside.
 - (iii) The decision of the disciplinary committee dismissing the respondent from employment is upheld.

MALABA DCJ: I agree

HLATSHWAYO JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Respondent in Person