<u>REPORTABLE</u> **(67)**

ZIMBABWE PLATINUM MINES PRIVATE LIMITED
v
PHILLIP MARUTA

SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MUSAKWA JA
HARARE: 13 SEPTEMBER 2023 & 19 JULY 2024

K Maguchu for the appellant

T Nyamucherera for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) wherein it upheld the respondent's appeal and set aside the decision of the designated agent who found that the termination of the respondent's employment by the appellant was lawful.

Appellant prays for the following relief;

1. The appeal succeeds with costs.

2.1 The judgment of the court *a quo* be and is hereby set aside for lack of jurisdiction on the court *a quo*.

Alternatively,

2.2 The judgment of the court *a quo* be and is hereby set aside and is substituted with the following:

"The appeal be and is hereby dismissed with costs."

BACKGROUND

The respondent was employed by the appellant as a general hand. In 2016, he developed chronic back pain which periodically prevented him from fulfilling his duties. As a result, he was granted intermittent statutory sick leave. On 27 April 2016 Doctor Berejena examined the respondent and recommended that he be medically retired as according to the doctor, he could not carry out his normal underground duties. It is pertinent to note that Ngezi Physiotherapy Clinic where the respondent went for treatment recommended that he be assigned light duties. Pursuant to the doctor's report, and on 6 May 2016, a meeting was held between the appellant, the respondent and members of the workers committee during which the respondent was informed that he was being retired on medical grounds as recommended by Doctor Berejena. Following that meeting, the appellant terminated the respondent's employment with effect from 6 May 2016.

The respondent was aggrieved by the termination and approached the designated agent in terms of s 63 (3) (a) of the Labour Act [*Chapter 28:01*] (the Labour Act). Both parties subsequently appeared before the designated agent and presented arguments. The issues for determination by the designated agent were;

i) whether or not the termination was lawful.

ii) if the termination was unlawful the remedy thereof.

The respondent submitted that the notice of termination given to him was not in terms of para 6 (a) of the contract of employment. Paragraph 6 (a) of the contract of employment provides that:

> "6. Termination of Employment
>
> a) Notice to terminate your employment with the Company after probation shall be three months served in writing by either party, effective from the date of presentation."

The respondent argued that the termination of employment was not in compliance with s 14 of the Labour Act. The respondent further argued that he was still availing himself for work when he was medically retired. The respondent also argued that dismissal for incapacity would only be considered fair if it complied with the requirement for substantive fairness. The respondent's prayer was for the retirement to be declared unlawful and for him to be reinstated to his former position without loss of salary and benefits or to be paid damages in lieu of reinstatement.

On the other hand, the appellant submitted that the respondent's employment had been lawfully terminated in terms of s 14 (4) of the Labour Act and that the respondent had used up 85 days of his sick leave without showing signs of improvement. The appellant further submitted that the decision to place the respondent on medical retirement was made only after recommendations by Doctor Berejena on 27 April 2016 when the respondent showed no signs of recovery or possibility of improvement in his health.

After an analysis of the issues, the designated agent dismissed the respondent's claim and ordered that each party bears its own costs. Aggrieved by the determination, the respondent lodged an appeal in the court *a quo* on several grounds.

PROCEEDINGS BEFORE THE COURT *A QUO*

The respondent submitted that the designated agent erred in dismissing his claim when it was clear that the appellant had failed to comply with s 14 (4) regarding termination on medical grounds, firstly, in relation to the issue of notice and secondly, in relation to the issue that he had not exhausted all the sick-leave days as accorded him under the provisions of s 14 (4) of the Labour Act.

On the other hand, the appellant justified its conduct on the basis of the letter by Doctor Berejena recommending retirement. The appellant further contended that the respondent had agreed to retire on account of ill-health.

The court *a quo* identified two issues for determination from the grounds of appeal, namely:

1. Whether the designated agent erred in finding that termination of employment was proper.
2. Whether the respondent had an obligation to give the appellant notice of termination.

The court *a quo* found that the designated agent erred and misdirected himself on the interpretation of the provisions in s 14 of the Labour Act. The court *a quo* further found that

the appellant had breached the provisions of s 14 of the Act. It also found that notice of termination of employment was not needed in the circumstances since the appellant had not complied with the prescribed procedural steps and substantive requirements of s 14.

In the result, the court *a quo* upheld the respondent's appeal and set aside the decision of the designated agent and substituted it with the order upholding the respondent's claim.

PROCEEDINGS BEFORE THIS COURT

Disgruntled by the court *a quo's* decision the appellant noted the present appeal on the following grounds:

> "1. The court *a quo* erred at law in hearing an appeal over which it had no jurisdiction.
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> 2. The court *a quo* erred at law in finding that respondent was retired on medical grounds in a manner that violates the law.
>
> 3. The court *a quo* erred at law in finding that respondent's acquiescence to his retirement could not be raised as a bar against his claim for unlawful termination of employment.
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> 4. The court *a quo*, as a court of equity, erred at law in conclusively determining that respondent be reinstated with no loss of salary and benefits without determining the live dispute on respondent's ability or otherwise to continue in employment."

Before this Court, the parties made the following submissions:

APPELLANT'S SUBMISSIONS

Mr *Maguchu*, counsel for the appellant submitted that the court *a quo* lacked jurisdiction to hear an appeal against the decision of a designated agent. He submitted that s 89

(1) (a) does not provide for a right of appeal against the decision of a designated agent and that such right should exist in some other provision of the Labour Act. Counsel referred to the case of *National Railways of Zimbabwe* v *Zimbabwe Railways and Artisans Union and Others* SC 08/2005. Counsel for the appellant further submitted that the respondent's contract was terminated on grounds of incapacitation. He submitted that in terms of the common law, where there is incapacitation, it is considered as a supervening impossibility. Thus, according to counsel, a supervening impossibility discharges a contract. He further submitted that the respondent's own specialist confirmed his incapacitation. Finally, Mr *Maguchu* submitted that the appellant was willing to pay the respondent for the remaining five days of the maximum 90 days sick leave on full salary as well as half salary for the period beyond ninety days.

RESPONDENT'S SUBMISSIONS

Mr *Nyamucherera*, counsel for the respondent submitted that s 63 of the Labour Act creates the right to appeal against the decision of a designated agent. He, however, failed to pinpoint any provision in the Labour Act, other than s 89 (1), which specifically provides for an appeal against the determination of a designated agent, to the Labour Court. Counsel placed reliance on the case of *Isoquant Investments (Private) Limited t/a ZIMOCO* v *Memory Darikwa CCZ* 6/20 in which at p 30 MALABA CJ had this to say:

> "The meaning of s 63 (3a) as read with s 63 (3b), of the Act is that where the designated agent redresses a dispute by making a final decision as to the rights of the parties, s 93 of the Act does not apply. The decision of the designated agent at that stage is final. There is no need for it to be confirmed in terms of s 93 (5a) and s 93 (5b) of the Act for purposes of execution. The party that is aggrieved by the decision made in terms of s 63 (3a) of the Act can only appear before the Labour Court by way of an appeal or review. The Labour Court can then exercise its powers over that matter in terms of s 89 (1) of the Act."

Mr *Nyamucherera* further submitted that the respondent's contract was terminated on medical grounds before the prescribed sick leave period had elapsed. He submitted that the appellant contravened the provisions of s 14 of the Labour Act. He further submitted that the appellant's offer to pay for the outstanding sick leave days constituted a concession that termination of employment was unlawful. He further argued that in the absence of lawful termination, the parties would revert to the status prevailing prior to termination.

ISSUE FOR DETERMINATION

In our view, the sole issue for determination is as follows:

Whether or not the respondent's employment was lawfully terminated.

APPLICATION OF THE LAW

The issue relating to the jurisdiction of the Labour Court in respect of appeals against a determination by a designated agent need not detain us. It was raised for the first time on appeal and not in the court *a quo*. It is trite that as a general rule an appellate court will not entertain an issue not raised in the lower court. See *Austerlands (Pvt) Ltd* v *Trade and Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (H). That the new point is a legal one and may be raised any time does not entail that it be determined by this Court. The appeal ability or otherwise of a designated agent's determination should first be determined in an appropriate case if the issue arises, by the Labour Court which has all along been hearing such appeals.

Section 14 (4) of the Labour Act provides that:

"**14 Sick leave**
(1) Unless more favourable conditions have been provided for in any employment contract or in any enactment, sick leave shall be granted in terms of this section to an employee

who is prevented from attending his duties because he is ill or injured or undergoes medical treatment which was not occasioned by his failure to take reasonable precautions.

(2) During any one-year period of service of an employee an employer shall, at the request of the employee supported by a certificate signed by a registered medical practitioner, grant up to ninety days' sick leave on full pay.

(3) If, during any one-year period of service of an employee, the employee has used up the maximum period of sick leave on full pay, an employer shall, at the request of the employee supported by a certificate signed by a registered medical practitioner, grant a further period of up to ninety days' sick leave on half pay where, in the opinion of the registered medical practitioner signing the certificate, it is probable that the employee will be able to resume duty after such further period of sick leave.

(4) If, during any one-year period of service, the period or aggregate periods of a sick leave exceed—

(a) ninety days' sick leave on full pay; or
(b) subject to subs (3), one hundred- and eighty-days' sick leave on full and half pay;

the employer may terminate the employment of the employee concerned.

(5) An employee who so wishes may be granted accrued vacation leave instead of sick leave on half pay or without pay."

This Court in *ZIMASCO Pvt Ltd* v *Marikano* SC 6/14 had this to say concerning the above provision:

> "Section 14 (4) has no express conditions attached to it except the requirement as to the amount of sick leave which an employee can take in any one year before the right to terminate can be exercised by an employer."

In casu, it is not in dispute that the respondent only used 85 days of statutory sick leave instead of the total 90 days on full salary as required by the law. The appellant terminated the employment based on Dr Berejena's medical report and recommendation. The recommendation stated that the respondent had not responded to treatment and could not perform his normal duties underground. Therefore, it was recommended that the respondent be retired on medical grounds. In this light, there was no basis on which the appellant could terminate

employment before the expiry of the 90 days. The termination in breach of this statutory period amounts to unlawful termination of employment.

The appellant contends that the respondent waived his rights by accepting the termination of his contract of employment as he did not oppose the termination at the time the same was formalized. The appellant further asserts that an employee who accepts the termination of his contract of employment on the grounds of ill-health cannot subsequently allege that his contract was terminated unlawfully. Waiver or estoppel will be applied against him.

The appellant further argues that the courts should give an interpretation of law based on substance rather than form and that the purpose of the sick leave provisions in the Labour Act is that an employee who has no reasonable prospects of recovering after 90 days may have the contract of employment terminated.

In *Chidziva* v *Zimbabwe Iron and Steel Co Ltd* 1997 (2) 368 (S) it was held that there is a strong presumption against waiver and that a party claiming waiver bears the onus. In that case the court had this to say at p 378 C-E:

> "I am also of the view that the appellants did not, by accepting the retrenchment packages, waive their rights. In the first instance, an allegation of waiver should be specially pleaded. See *Christie The Law of Contract in South Africa* 3ed at 493 where the learned author said:
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> 'An allegation of waiver or anything akin to it should be specially pleaded because close investigation of the facts and surrounding circumstances will almost always be necessary. The court is unlikely to be able to dispose of the matter on affidavits.'"

The court went further to hold that:

> "The cases of *Dole* v *Fun Furs (Pty) Ltd* 1968 (3) SA 264 (O) at 266 E and *de Villiers* v *Pyott* 1947 (1) SA 881 (C) are cited in support of the above proposition. In the present case, there is no special allegation of waiver in the respondent's affidavit. The allegation is only hinted in para 3 (3) of Moyo's affidavit where it is alleged that the appellants accepted the retrenchment packages and are therefore no longer entitled to relief. It is raised in counsel's heads of argument and submissions as was the case in *Dole* v *Fun Furs (Pty) Ltd supra*. This in my view is not satisfactory. The respondent's main contention throughout was that it had complied with the provisions of the said Regulations."

The above remarks apply with equal force to the present case. The appellant never raised the issue of waiver before the designated agent. In the court *a quo*, the appellant merely stated that the respondent had agreed to be retired.

In any event, the respondent's acceptance to retire does not take away a right entrenched by law. This is because the appellant breached the provisions of s 14 of the Labour Act. It is on this basis that a conclusion of unlawful dismissal can be drawn.

The respondent had not exhausted the prescribed sick leave period required before a conclusion of failure to perform duties could be drawn. Thus, the decision by the appellant to terminate the respondent's employment for health reasons was unlawful.

The condition attached to the termination of employment for ill health under s 14 (4) of the Labour Act is that the period of 180 days should have been exceeded, and without that, the right to terminate does not arise. It is apparent that the appellant failed to follow stipulated provisions terminating employment before the mandated period expired. In that regard, it is this court's view that the termination of employment on health grounds was fatally irregular and renders the dismissal unfair and in contravention of s 14 (4) of the Labour Act.

The appellant argues that where an employee is unable to continue with employment, all that the employer can do is to pay for the balance of the unexpired sick leave. The appellant further contends that the implication of the respondent being incapacitated is that he is unable to meet his contractual obligations. Reliance was placed on a neurosurgeon's report dated 6 March 2018 in which was stated that on account of the respondent's chronic back pain, the chances of recovery were dependent on further investigations.

What can be noted from the evidence on record is that due to his chronic back pain, recommendations were made for the respondent to perform light duties on the surface which did not involve the lifting of heavy objects or manual labour. However, the respondent's contention is that at the time his contract was terminated he was performing his duties. There is no evidence that he was not at work when his employment was terminated on 6 May 2016.

In light of the unlawful nature of the termination of the respondent's employment contract, the court *a quo* was correct to order reinstatement or in the alternative, damages in the event of reinstatement being no longer possible.

DISPOSITION

In light of the failure by the appellant to comply with s 14 (4) of the Labour Act, it follows that the termination of the respondent's employment was unlawful. The appeal must fail. Costs will follow the cause.

Accordingly, it is ordered as follows:

"The appeal be and is hereby dismissed with costs."

BHUNU JA : I agree

KUDYA JA : I agree

Maguchu & Muchada, appellant's legal practitioners

Lawman Law Chambers, respondent's legal practitioners