REPORTABLE ZLR (69)

Judgment No. S.C. 128/99
Civil Appeal No. 81/98

FREDERICK MWENYE vs LONRHO ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & SANDURA JA
HARARE, NOVEMBER 23 & DECEMBER 14, 1999

*J James*, for the appellant

*P Nherere*, for the respondent

GUBBAY CJ: At a hearing before the Labour Relations Tribunal, the appellant raised the point *in limine* that the labour relations officer, to whom the matter had been referred by both parties in terms of s 101(6) of the Labour Relations Act [*Chapter 28:01*] ("the Act"), lacked the jurisdiction to determine or otherwise dispose of it in accordance with s 93 thereof. The learned Deputy Chairman disagreed with the submission. He dismissed the preliminary point with costs and directed the registrar to set down the appeal on the merits as soon as possible. It is against that ruling that the appeal to this Court now lies.

In order to decide the jurisdictional issue, persuasively argued for both the parties, it is necessary at the outset to trace the relevant historical events. They were these:

(1) The appellant was employed by the respondent in a managerial capacity in its textile division. His conditions of employment were governed by the registered code of conduct for that industry.

(2) On 17 January 1994 a junior employee, Miss Angela Gwelo, wrote to the respondent's general manager complaining that she had been subjected to sexual harassment by the appellant.

(3) The appellant responded by memorandum dated 31 January 1994, denying Miss Gwelo's allegation.

(4) By letter of 8 February 1994 the appellant was suspended from employment without pay and with immediate effect.

(5) On 8 March 1994, twenty-eight days after his suspension, the appellant referred the matter to a labour relations officer.

(6) Two days later the respondent wrote to the principal labour relations officer informing him that it had suspended the appellant after a formal allegation of sexual harassment had been made against him. The letter continued:

> "The suspension was to allow the company to carry out further investigations in the matter. An independent investigator was tasked to look into the matter and compile sworn statements from those involved. We expected to hear the matter in-house but due to Mr Mwenye's absence from his home this could not be done.
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> In terms of (s 101(6) of the Act) if a matter is not determined within thirty days from the date of notification the matter should then be handed over to a labour relations officer in terms of (s 93) for a determination."

The letter ended with a request that there be a speedy resolution.

(7) The matter was heard by the labour relations officer on 4 May 1994 and a determination made to permit the respondent to terminate the appellant's contract of employment. That determination was confirmed by a senior labour relations officer, to whom the appellant had applied for it to be referred, on 2 August 1994.

(8) Thereafter an appeal was noted to the Labour Relations Tribunal.

The powers of a labour relations officer to deal with labour disputes derive from s 93 of the Act. Section 101(5) of the Act provides:

> "Notwithstanding this Part, but subject to subsection (6), no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code, nor shall he intervene in any such proceedings."

And subs (6) of s 101, to which subs (5) is subject, reads:

> "If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section ninety-three."

Finally, in this legislative recitation, para (e) to s 101(3) stipulates in relevant part that:

> "A code shall provide for -
>
> …
>
> (e) the notification to any person who is alleged to have breached the code that proceedings are to be commenced against him in respect of the alleged breach."

Thus it will be seen that s 101(6) gives to both employee and employer the right to refer a matter to a labour relations officer only if:

(i) the matter has not been determined in terms of the relevant code; and,

(ii) thirty days have elapsed; and,

(iii) notification has been given to the employee that proceedings are to be commenced against him in respect of the alleged breach.

In elaboration of the point *in limine* that the labour relations officer was not vested with jurisdiction to determine the matter, counsel for the appellant relied upon two grounds: The first was that the letter of 8 February 1994 did not amount to "notification" to the appellant that proceedings were to be commenced against him in respect of an alleged breach of the textile industry's code of conduct. In essence, so the argument went, the letter merely advised the appellant that he was being placed under immediate suspension so as to enable an investigation to be undertaken into the veracity of the allegation of sexual harassment. It was for that reason that he was to hand over the keys and not enter the premises until the matter was concluded. No mention was made of proceedings being commenced.

Perhaps the letter could have been drafted in a more explicit manner. Yet this is not to say that it failed adequately to advise the appellant of the pendency of proceedings against him in terms of the code of conduct. A sensible way of testing whether the letter complied with the requirement of notification is to ask what the appellant understood by it. The answer is not open to doubt. The fact that the

appellant referred the matter to a labour relations officer on 8 March 1994 in the belief, albeit mistaken, that the thirty day period had expired on that very day, established that he must have taken the letter to be the form of notification referred to in s 101(3)(e) of the Act. And significantly, the absence of such notification was not raised before the two labour relations officers or even in the notice of appeal to the Labour Relations Tribunal.

The acceptance of sufficient notification on the appellant's part was totally rational. The letter was headed "RE: ALLEGATIONS OF HARASSMENT". It informed the appellant of the nature of the allegation against him by specific reference to the written complaint received from Miss Gwelo, that had been copied to him. He had been called upon to respond to it, which he did on 31 January 1994. Thus the appellant knew exactly what the case against him was. Furthermore, the suspension was without pay, being a strong indication, especially to a managerial employee, that the commencement of proceedings was to follow. If the intention had been merely to conduct an ordinary inquiry into the allegation, the appellant would not have been suspended at all, or would have been suspended with pay. Finally, the use of the phrase "impartial inquiry", in contradistinction to "in house enquiries" referred to in the opening sentence of the letter, was indicative of an official inquiry under clause 4, at p 7, of the code of conduct.

The appellant's alternative argument was that the references of the matter, on 8 and 10 March 1994, pursuant to s 101(6) of the Act, were premature. Insofar as each party was concerned, the thirty day period from 8 February 1994 had not expired. Accordingly, the labour relations officer was not empowered under s 93

of the Act to make a determination. He was precluded from exercising his jurisdiction, for compliance with the provision was peremptory. A shortfall in the period prescribed may not be waived or consented to, even where the parties are agreed that the matter is incapable of resolution under the code of conduct.

It is obvious that in seeking to refer the matter to a labour relations officer both the appellant and the respondent overlooked that February has twenty-eight days and that it would be only by 11 March 1994 that the thirty days elapsed. The appellant's reference was therefore short by three days, and the respondent's by one.

The categorisation of an enactment as "peremptory" or "directory", with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour in our courts. See *Swift Transport Services (Pvt) Ltd v Pittman NO & Ors* 1975 (2) RLR 226 (GD) at 228C-229C; *Macara v Minister of Information, Immigration and Tourism & Anor* 1977 (1) RLR 67 (GD) at 70H; *Ex parte Ndlovu* 1981 ZLR 216 (GD) at 217 F-G; *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) at 301H.

The proper criterion in determining whether there has been compliance is not the quality of the injunction, but the object the legislator sought to achieve by it. The question is simply whether that object is defeated or frustrated by the non-compliance complained of.

Section 93(1) of the Act vests in a labour relations officer a general jurisdiction to deal with any dispute either on his own initiative or on reference to him by one of the parties. Section 101 of the Act (then as s 117A) was introduced, on 1 January 1993, by the Labour Relations Amendment Act, 12 of 1992. It then became possible for an employment code of conduct, binding in respect of a particular industry, undertaking or workplace, to be registered, provided it contained the matters specified in s 101(3) of the Act. Significantly there is no requirement that there has to be a registered code of conduct in existence. This is optional. Disputes between employee and employer may follow the old route of an initial determination before a labour relations officer, or be dealt with internally under the registered code of conduct. Either path taken leads to the Labour Relations Tribunal.

Against this background, it does not seem to me that the legislative objective in introducing the new procedure was to relieve labour relations officers of the burden of determining disputes. It was rather to return to the employee and employer a greater degree of autonomy with regard to the determination of their disputes than previously enjoyed.

Section 101(5) of the Act is, in effect, an exception to s 93. It is a provision designed for the benefit of the parties. As long as the dispute or matter is:

(a) the subject of proceedings under a code; or,

(b) liable to be the subject of proceedings under a code;

no labour relations officer may intervene. His power to determine or otherwise dispose of the matter under s 101(6) is placed in abeyance for a period of thirty days.

This is to afford the parties, should one of them so wish, the opportunity to utilise the internal mechanisms specified in the code. Consequently, if either party were to refer the matter to a labour relations officer before the expiry of the thirty day period, the other could raise s 101(5) as a defence.

On the other hand, where the parties are *ad idem* that their dispute is incapable of resolution under the code, or both deem it more advantageous to have it determined by a labour relations officer, then the dispute or matter is no longer "liable" to be the subject of proceedings under the code. It may be referred immediately to a labour relations officer.

I am in agreement therefore with the respondent's counsel that to hold otherwise would result in an absurdity. It is easy to envisage the situation occurring in which on the first day both the parties accept that their dispute cannot be resolved in terms of the code. It could not have been the intention of the legislator that instead of being entitled to refer the matter there and then to a labour relations officer, they would be required to await the expiry of thirty days.

While *in casu* the appellant and the respondent did not jointly agree to refer the matter to a labour relations officer, they both did so individually before the thirty day period had expired. Clearly they were of the same mind that it was not to be dealt with in terms of the code of conduct.

In such circumstances I do not consider that the shortfall in the period of thirty days deprived the labour relations officer of his power to determine the matter in accordance with s 93 of the Act.

For the reasons aforegoing, it follows that the learned Deputy Chairman was correct in concluding that the point *in limine* was not well taken. Accordingly, the appeal is dismissed with costs.

McNALLY JA: I agree.

SANDURA JA: I agree.

*James, Moyo-Majwabu & Nyoni*, appellant's legal practitioners

*Gill, Godlonton & Gerrans*, respondent's legal practitioners