Judgment No S.C. 103\2002
Civil Appeal No. 229\2001

ONISIMO CHIKUWE & 38 OTHERS v (1) GURUVE RURAL DISTRICT COUNCIL (2) ZEKIS RABVU N.O. (3) DILLION MVURWI N.O.

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE SEPTEMBER 17 & NOVEMBER 26, 2002

H. Simpson, for the appellants

P. Nherere, for the respondents

ZIYAMBI JA: The first appellant was the Chairman of the Workers Committee of the first respondent. He and the 38 other respondents were, on the 15th May 2000, issued with letters of suspension from duty pending the grant of authority, by the Ministry of Labour, for their dismissal.

Briefly, the events giving rise to the suspensions were as follows. In or about the 19th March 2000, the Works Council of the first respondent, which is composed of equal numbers of management and employee representatives decided to award to all the appellants, a salary increment of 69-75% on a sliding scale with effect from the 1st January 2000. However, on the 29th March 2000, the full council met and decided that it could not afford such increases and instead awarded an across-the-board increase of 35% reviewable in June 2000. On the same day, the Workers Committee advised the Council that workers would go on strike on the 11th April 2000 should they not have received the recommended 75% increase in salary. At the

end of March, the Council awarded a 35% increase and the workers went on strike on the 12th April 2000.

On the 28th April 2000, the 3rd respondent who is the Labour Relations Officer at Mvurwi, issued an order referring the dispute to compulsory arbitration and ordering the employees to return to work pending the decision of the arbitrator. This order was ignored by the employees and on the 9th May 2000 a show cause order was issued by the Minister of Public Service Labour and Social Welfare requesting the employees to show cause on the 12th May 2000, and to return to work forthwith. Again, this order to return to work was ignored. On the 12th May the hearing to show cause was attended by representatives of the appellants. At this hearing it was agreed as follows:-

> "1. Workers must return to work on Monday 15th May 2000.
>
> 2. Mr Sangarwe will relay the agreement to the Workers Union representatives for their confirmation and adopting.
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> 3. The workers must report for work not later than 10:am on Monday 15th May 2000, before which time the Union Representatives must have confirmed the agreement to the workers and the full Council meeting on the same day will be satisfied that the workers have returned to work."(My underlining).

On the 15th May 2000, the appellants gathered on the Council grounds. According to them, they were willing to return to work but had no keys to their offices. However the respondents' evidence was that the appellants had not returned to work by 10 am so they were suspended without pay pending approval for their dismissal. The evidence for the respondent, which was believed by the trial Court, was that the appellants were gathered under a tree some distance from the Council offices at about 8.30 am. They were chanting, holding up placards and beating drums as they had done since the first day of the strike. Their attitude was hostile. When

the Council meeting began at 10.30 am to debate the strike they had not gone to their offices and the Council resolved to suspend them pending approval by the Minister of Labour, for their dismissal.

At the trial, the issue for determination was whether the appellants had complied with the agreement reached by the parties at the Labour Relations Office, Mvurwi, on the 12th May. The Court found that the appellants had not so complied. A reading of the record of the proceedings does not persuade me to a different view. If the appellants had no keys to their offices one would have expected them to wait quietly outside their offices (certainly not waving placards, chanting and beating drums!) and to send one of their number to fetch the keys. Their behaviour cannot be said to evince an intention to return to work.

Although ten grounds of appeal were raised in the Notice of Appeal only one ground was addressed in the appellants' heads of argument and advanced before us by Mr *Simpson* on behalf of the appellants, namely, that the learned Judge erred in dismissing the appellants' evidence that they returned to work on Monday 15th May 2000 "simply because they were allegedly singing and drum beating under a tree". The appellants, he submitted, gathered around a tree because their offices were locked.

However, the first appellant's evidence that the keys were held by Jaji and that he could not get them from him as he was locked in a meeting with the Provincial Administrator, Erica Jones, was correctly dismissed by the learned Judge. The appellants were already gathered under the tree at 8.30 am when Miss Jones arrived for the Council meeting which was scheduled for 10 am. Jones said she sat in Jaji's office to while away the time as they waited for the meeting to commence.

Assuming it to be true that Jaji had all the keys to the offices, there was sufficient time for the appellants to get the keys from him if they so wished as the evidence established that Jaji arrived at his office between 7.30 and 7.45 am and the appellants, who included the messengers who cleaned the offices, were already gathered under a tree at the Council premises. In any event, the learned Judge found, and correctly so in my view, that the appellants were in possession of keys for their offices. Both Jaji and Tauro gave evidence for the respondents and were found to be credible witnesses. Indeed, no argument was advanced by the appellants against this finding. The following passage from Tauro's evidence appears at p 323 of the record:-

> "Q. And finally, the workers say they could not have resumed work on the 15th because the keys to the offices were locked what do you say to that?
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> A. My lord our offices are situated outside the chamber, the main chamber and the reception most of the officers here they had their keys with them and so if they were to resume work they would have gone to their offices without problems save for someone who would have come to the section only. All heads of department had their keys to their offices, that means the junior staff would also have went (sic) to their offices to start working. So they did not dare to start work not that they did not have the keys."

The evidence clearly supports the finding of the learned Judge that the appellants did not return to work. The appeal ought, therefore, to be dismissed.

Mr *Nherere*, urged the Court to deal with the issue raised in the first two paragraphs of the Grounds of Appeal notwithstanding that they were not pursued by the appellants.

Paragraphs 1 and 2 read as follows:

"1. The appellants were suspended by the 1st Respondent on 15th May 2000 with effect from 4th May 2000 without benefits and they applied to the court *a quo* for an order setting aside the suspension, not against their dismissal as it was common cause between the parties that the appellants were only suspended and not terminated.

2. The Learned Judge erred and misdirected himself in holding that the appellants were dismissed or dismissed themselves as dismissal was not an issue before his Lordship in the court *a quo*."

It was submitted by Mr *Nherere* that the finding by the learned Judge that the workers were dismissed is impossible to support on any version of the facts. The issue before the trial court he submitted, was what occurred on the 15th May 2000, namely, whether the suspensions were unlawful.

There is merit in this submission. The issue before the Court was the legality of the suspensions. The order sought by the appellants was that the letters of suspension be declared null and void. No averment of dismissal was made. Not only was there no evidence to justify the finding of dismissal, but the learned Judge was not called upon to decide the issue of dismissal. It simply was not an issue before him. The letters of suspension clearly show that the intention and decision of Council was to suspend the workers pending approval for their dismissal. That was common cause at the trial.

It seems to me that instead of referring to the appellants as having been suspended from employment the learned Judge erroneously referred to them as having been dismissed. Nevertheless his finding that, "by refusing to return to work the plaintiffs repudiated their contracts of employment" does not amount to a misdirection since their refusal to return to work was the basis on which the appellants were suspended from employment pending the grant of authority to dismiss them.

In the result, the appeal is dismissed with costs.

SANDURA JA: I agree.

MALABA JA: I agree.

Mushonga & Associates, appellants' legal practitioners

Chihambakwe, Mutizwa & Partners, respondents' legal practitioners