REPORTABLE ZLR (34)

Judgment No. SC. 87/05
Civil Appeal No. 23/04

MONDAY WATYOKA v

ZUPCO (NORTHERN DIVISION)

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA JA
HARARE, OCTOBER 24, 2005 & SEPTEMBER 25, 2006

Z Lunga, for the appellant

L Mazonde, for the respondent

CHEDA JA: This is an appeal from a decision of the Labour Court, which allowed the respondent's appeal against the decision of a senior labour relations officer.

The appellant was employed by the Zimbabwe United Passenger Company Ltd (ZUPCO), hereinafter referred to as "the Company". The main business of the Company is the carrying of passengers travelling to various destinations within and outside Zimbabwe by means of buses. The Company has a Code of Conduct for its employees.

On assuming duty, although the letter of the contract of employment was not produced, it is common cause that the appellant signed a letter in which he

was barred from conducting any business that was in direct competition with his employer.

During the course of his employment, it was alleged that the appellant was found to have purchased and operated two minibuses. He was charged with misconduct and dismissed from employment.

The appellant referred the matter to a labour relations officer, who determined the matter in his favour and ordered his reinstatement. The matter was referred to a senior labour relations officer, who upheld the decision of the labour relations officer.

The respondent appealed to the Labour Court, and that court set aside the decision of both labour relations officers. The appellant now appeals against that judgment.

The appellant's grounds of appeal are fragmented into twelve grounds, but a careful reading of the grounds reveals three main issues that the appellant refers to in his heads of argument. These main issues are –

1. The jurisdiction of the labour relations officers to hear the matter;

2. The determination being made outside the time limits specified;

3. That the merits were not considered and the misconduct was not proved.

I shall deal with each of these issues in turn.

Lack of jurisdiction

Section 101 of the Labour Relations Act [*Chapter 28:01*] ("the Act") provides as follows:

> "**101 Employment codes of conduct**
>
> (1) – (4) …
>
> (5) 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.
>
> (6) 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."

There are, therefore, three important conditions under which such a matter can be referred to a labour relations officer or senior labour relations officer –

(a) the matter must not be one that is or is liable to be the subject of proceedings under a Code of Conduct;

(b) the matter has not been determined within thirty days of the date of notification; and

(c) where the parties to the dispute request it and are agreed on the issues in dispute. (Section 93(1)(ii).

In this case there were delays in the determination of the matter due to a number of postponements at the request of the appellant. At one meeting the appellant and his legal practitioner attended without submitting the appellant's response to the allegations. At yet another meeting the appellant and his legal practitioner walked out before the meeting was closed, as the legal practitioner said he wanted to catch his flight and had other business to do in Harare. When the appellant and his legal practitioner raised the issue of delay, the chairperson did point out to them that it was actually their fault, as they were responsible for the delays.

Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made.

The section should be read as being only permissive and not restrictive. In my view, the intention of the legislature is to grant relief to a party who is affected by the delay. The section provides that:

> "… the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter … "

Clearly, the referral can only be made before a determination is made.

It was probably foreseen that in certain cases one party could frustrate the other by causing delays to the prejudice of the other. That seems to be the reason why the word "may" is used.

The party concerned does not have to refer the matter to the labour relations officer. That party may still wait for the determination to be made even after the thirty days period.

Accordingly, the period of thirty days does not refer to the time within which a valid determination should be made. The section does not say the determination should be made within the thirty days period. All it does is to restrict any concerned party from rushing to refer the matter to a labour relations officer before the expiry of the thirty days.

It follows that where the thirty days have lapsed the concerned party can choose to refer the matter to a labour relations officer or wait for a determination to be made.

The thirty days therefore refers to the period after which the party concerned may complain, and does not make any determination made after its expiry a nullity.

In this case, the appellant continued to attend the proceedings even after the period of thirty days had expired. He clearly intended to wait for the determination to be made. The section cannot be read as providing for a second

determination over and above one already made by a disciplinary committee. Once there was a determination, the correct procedure was to appeal to the Company's management, as provided in the Code of Conduct.

The suggestion that no letter of dismissal was issued and that the appellant was prevented from appealing in time does not assist him, as the decision was made in his presence. According to the minutes, he was informed and there is no indication that his legal practitioner requested the letter of dismissal or the record for the purpose of appeal.

It is also clear that there was no agreement between the parties to refer the matter to a labour relations officer, as required by s 93(1)(ii) of the Act.

Worse still, s 94 of the Act provides as follows in relevant part:

> "**94 Prescription of disputes**
>
> (1) Subject to subsection (2) after the 1st January 1993 no labour relations officer shall entertain any dispute or unfair labour practice which –
>
> (a) …
>
> (b) arises after the 1st January 1993, unless it is referred to a labour relations officer within one hundred-and-eighty days from the date when such dispute or unfair labour practice first arose."

I should point out that Amendment Act 17/2002 came long after and does not affect this case.

This matter commenced with a letter dating as far back as 13 October 1997. The appellant started complaining about being sent on leave at the meeting

held in November 1997. At this meeting he complained that he was being victimised. He also raised what he called "unfair labour practices" because the misconduct was not investigated by the personnel department, although the record and the minutes filed show that the appellant attended preliminary meetings with his legal practitioner.

The notification to the employer was dated 13 October 1997.

When the thirty days expired before the matter was determined, the appellant did not raise any complaint. At a meeting held on 21 November 1997, which was already after the expiry of the thirty day period after the notification, the appellant and his legal practitioner asked for a postponement.

At the meeting of 4 December 1997 the appellant and his legal practitioner said they wanted the author of a certain document to be called. It is clear that they still wanted to proceed with the hearing and required a postponement.

It cannot be said that the chairperson should have refused the appellant's request for a postponement because the thirty day period had expired.

Both parties referred to the case of *Mwenye v Lonrho Zimbabwe Ltd* 1999 (2) ZLR 429. That case clarified the provisions of s 101(6) of the Act. It also made the point clear that both parties had agreed on the referral of the dispute to a labour relations officer.

In this case, by the time the matter was entertained by the labour relations officer, two separate provisions of the Act had ousted his jurisdiction. They were, firstly, the fact that a determination had been made; and, secondly, the dispute had prescribed in terms of s 94(1)(b), in that the allegations of unfair labour practice were raised at meetings held with the disciplinary committee in November 1997 but the labour relations officer only entertained the complaint on 6 August 1999, after a period of about eighteen months, and well beyond the period of one hundred and eighty days provided in s 94(1)(b).

The merits

The appellant also raised a complaint about the composition of the disciplinary committee, but it was not shown that there was any bias or prejudice at all. The composition of the committee is a technicality that cannot be allowed to nullify the proceedings which, according to the record, reflect that he had a fair hearing.

The minutes of the different meetings, at which the appellant was legally represented, indicated that the

hearing was conducted properly and that evidence was led in his presence on the merits. He failed to challenge the evidence from his own secretary regarding the preparation of a project document that was used to obtain the loan and the typing by his secretary of waybill tickets.

It was established beyond doubt that he was involved in the operation of the minibuses, the very act that was prohibited by the letter of appointment that he had signed.

Accordingly, I see no merit in the appeal and it is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Legal Aid and Advice Scheme of the University of Zimbabwe, appellant's legal practitioners

Muzangaza, Mandaza & Tomana, respondent's legal practitioners