DISTRIBUTABLE (118)

(1) ELISHA TSHUMA (2) KHAUHELO MAWANA (3) AUSTIN WAMEDZA (4) PETROS SHANEWAKO
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA, & BHUNU JA
HARARE, 29 MAY 2020 & 18 OCTOBER 2021

R Matsikidze with *S Bhaira*, for the appellants

S Banda, for the respondents

BHUNU JA: This is an appeal against the whole judgment of the Labour Court (the court a *quo*) handed down at Harare on 27 April 2018. The appeal contests the Court *a quo's* order which overturned the Arbitrator's award deeming the appellants to have been employed by the respondent as permanent employees together with the corollary relief granted thereof.

BACKGROUND OF THE CASE

Prior to 2007, the appellants were employed by the respondent as co-ordinators on contracts without limit. As such they were permanent employees under category Career Level 8 in terms of their respective written contracts of employment.

Sometime in 2007 the respondent embarked on a restructuring exercise. The restructuring exercise culminated in the voluntary termination of the appellants' respective contracts of employment on 20 February 2007. They were paid their severance packages. Subsequent to the termination of their contracts of employment, the respondent reemployed

them on three (3) year fixed term contracts as investigations officers under category Career Level 8 from 1 March 2007 to 28 February 2010.

On 12 June 2007, the respondent's Commissioner General wrote individual letters to the appellants advising them that the respondent had altered their employment status. They had now reverted to their original status prior to February 2007 as permanent co-ordinators. That being the case, they were required to refund the money paid to them as severance packages. The letters read in part:

> **"Please be advised that the Zimbabwe Revenue Authority Board has directed that "ZIMRA shall with immediate effect revert back to the structure/organogram that was in place pre-February 2007**" (for) practical purposes the effective date of the directive is Wednesday 20 June 2007, from which you will cease to be INVESTIGATIONS OFFICER in Career Level 8 and revert back to CO-ODINATOR in CARREER Level 8.
>
> **You will cease to be on a fixed term 3-year performance contract and revert to being a permanent employee. You are required to repay the Authority the compensation for loss of tenure prepaid in relation to the termination of the contract we are reverting to."** (Emphasis provided).

The appellants proceeded to work in terms of the new terms spelt out in the letter.

On 26 June 2007, the respondent issued a general memorandum to all its employees confirming the above changes with regard to the appellants and other concerned employees.

The respondent however subsequently had a change of heart and on 10 June 2009 it issued individual memoranda to the appellants through its Commissioner General purporting to withdraw its previous stipulations conferring permanent employment status of Co-ordinators Level 8 on the appellants. The memoranda read in part:

> "**RE ZIMRA RESTRUCTURING**

My letter of 21 June 2007 refers.

By copy of this letter I wish to withdraw in totality my letter to you on the above subject which was dated 21 June 2007 which was never implemented.

This means that you will remain INVESTIGATIONS OFFICER(S) career level 8 on a 3 year fixed term performance contract that took effect on 1st of March 2007.

Any inconvenience caused is sincerely regretted."

The above memoranda sowed the seeds of controversy. The appellants refused to acknowledge the above memoranda contending that they were now employed as permanent Co-ordinators Career Level 8 by virtue of previous correspondence to that effect. The respondent however took the position that the letter of 21 June 2007 did not have the effect of nullifying the appellants' 3-year fixed term contracts because its endeavour to restore the appellants' status as permanent Co-ordinators Level 8 was never implemented.

The parties having reached a deadlock the dispute was referred to the Labour Officer for conciliation and ultimately to the arbitrator on a certificate of no settlement for resolution of the dispute.

THE ARBITRATOR'S AWARD.

The agreed issues for determination by the Arbitrator were as follows:

"1. Whether or not the matter was properly referred to the Labour Officer.

2. Whether or not the employees should be deemed permanent employees by effect of the contents of the letters directives dated 12 to21 June 2007

3. Whether or not the employer's letter dated 10 February 2009 amounts to:

   (a) unilateral variation of the employees' contract(s) of employment.

   (b) commission of an unfair labour practice or breach of the Labour Act.

4. To determine the effect of the circular of 26 June 2007 to the letter of 21 June 2009."

The arbitrator to a large extent resolved the above issues in favour of the appellants. He decided that the matter was properly referred to him and proceeded to hold as a matter of fact that the respondent had offered the appellants permanent employment as Co-ordinators Level 8. The appellants had accepted the offer thereby concluding valid contracts of employment. Having come to that conclusion he determined that the respondent was in breach of the valid contracts of permanent employment when it unilaterally altered the appellants' respective contracts of employment. Consequently, the arbitrator issued the following award:

> "1. Accordingly, the variation of the Claimants' contracts is hereby set aside and declared null and void until a mutual agreement is reached between the parties through negotiation.
>
> 2. The Claimants are hereby ordered to pay back severance settlement (s) paid to them in 2007 at a rate to be agreed upon by the parties
>
> 3. The Claimants' claim for back payment of benefits of arrears accrued to the original contracts is hereby dismissed for lack of merit.
>
> 4. If parties are unable to reach an agreement they must approach this court for quantification of damages.
>
> The cost of Arbitration is borne by the parties on equal shares."

Aggrieved by the arbitrator's award, the respondent appealed to the court *a quo* for relief. For the purpose of the appeal hearing the parties placed before the court *a quo* a statement of agreed issues duly signed by both counsel. The issues for determination are recorded at p 3 of the court *a quo's* cyclostyled judgment appearing at p 389 of the record of proceedings. The statement reads:

> "1. Whether the second variation of contracts without limit of time to fixed contracts by the appellant was lawful?
>
> a. if not, were any damages suffered by the respondents?
> b. if so, the quantum thereof.
>
> 2. What order should be made as to costs if any?"

The wording of the cardinal issue number one agreed to by the parties makes it clear that there was indeed a second batch of contracts without limit concluded by the parties. The contracts were varied by the respondent. The only dispute between the parties was whether the admitted variation was lawful.

Despite the parties' agreement that they entered into second contracts of employment without limit of time, the learned judges *a quo* allowed the appeal on the basis that the parties did not enter into second contracts without limit because there was no novation of the original contract without limit. At p 5 of the judgment the learned judges *a quo* had this to say:

> "For novation to occur there must be an existing and valid agreement. In *casu* the fixed term agreement is the old agreement. However, we are of the view that no new agreement was created and therefore there was no novation. As stated above there is no proof of the acceptance of the proposed new contract."

On those facts the appellants have raised the preliminary issue as to whether the court *a quo* created and determined its own issues. I now turn to determine that issue which is potentially dispositive of all the other issues.

Whether or not the court *a quo* created and determined its own issues.

It is needless to say with respect, that the judges *a quo* fell into grave error and strayed into the wilderness of irrationality when they held that there were no second contracts without limit when the parties were in agreement that they concluded such contacts and the only dispute pertained to the legality of their variation.

It is trite and a matter of elementary law that what is admitted need not be proved. In *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Exise & Ors* 1993 (2) ZLR 121 at p 127 McNALLY JA had this to say:

> "The simple rule of law is that what is not denied is taken to be admitted."

Once the respondent admitted and the parties agreed on the existence of the second set of contracts without limit, it was not within the court's discretion to find otherwise. The Learned Judges' reliance on the doctrine of novation was therefore misplaced and irrational in light of the parties' agreement that they concluded the second set of contracts without limit.

We accordingly hold that the court *a quo* committed a fatal error in raising and determining its own issues contrary to the issues raised by the parties. That approach is untenable and contrary to the dictates of procedural law, see *Nzara v Kashumba* SC 18/18 which chides judicial officers not to go on a frolic of their own when sitting in judgment over given issues.

DISPOSITION

The learned judges having acted on a wrong principle of law in arriving at the impugned defective judgment it cannot stand. The court accordingly upholds and sustains the point *in limine* raised by the appellants. While that ruling is dispositive of the procedural issues, it does not dispose of the substantive issues. This is because the court *a quo* did not determine the substantive issue placed before it. The court of necessity invokes its review powers under s 25 of the Supreme Court Act [*Chapter 7:13*] for the sake of substantive justice between the parties. Costs follow the result. It is accordingly ordered that:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be and is hereby set aside.
3 The matter be and is hereby remitted to the court *a quo* for a hearing *de novo* before different judges.

GUVAVA JA : I agree

MAVANGIRA JA : I agree

Matsikidze Attorneys-at-Law, the appellants' legal practitioners.

Sinyoro and Partners, the respondent's legal practitioners.