HB 17/17
HC 54/17

PHILIMON MATHE & 40 OTHERS

Versus

FORBES & THOMPSON (BULAWAYO) (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 20 & 26 JANUARY 2017

Urgent Chamber Application

P. Ngulube for the appellants
E. Sarimana for the respondent

TAKUVA J: The respondent owns and operates Vumbachikwe Mine in Gwanda District. The appellants were employed at that mine in various capacities. It is common cause that the appellants engaged in a collective job action at Vumbachikwe Mine. Subsequently the 1st, 3rd, 5th, 6th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 30th, 34th, 36th and 40th appellants were subjected to disciplinary hearings in terms of the code of conduct published in SI 152/90 as read with SI 165 of 1992. Notices of disciplinary hearings were issued and delivered individually. Personal service was effected and despite carrying a warning that failure to attend would result in a default judgment the appellants shunned the hearing.

The 17 applicants referred to above were dismissed with effect from 14 December 2016 following disciplinary hearings. They were also ordered to vacate the houses allocated to them by the mine by no later than 7 (seven) days after receiving the letters of termination of their contracts of employment. Aggrieved, they appealed through their Trade Union by letter dated 4 January 2017. They also filed this application seeking the following relief.

> "Interim relief sought
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> That pending the determination of this matter, the applicant is granted the following relief:-
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> 1. Unlawful eviction of the applicants following the letter dated 15th December 2016 is hereby stayed pending hearing of appeal by the respondent."

The basis of this application is that the dismissal is unlawful and irregular in that two union leaders were not "invited" to the disciplinary hearings to represent the applicants' interests.

Secondly, since they had appealed, their appeal suspends the decision appealed against. Put differently, they argued that their appeals should have been disposed of before they could be evicted from the houses they occupy. Thirdly, it was contended that the notice to vacate was unreasonably short and that they do not have any other remedy at law to prevent the respondent from evicting them.

When the matter was argued, applicants' legal practitioner raised two fresh arguments. Firstly, it was argued that since section 74 of the Constitution of Zimbabwe Amendment (No. 20) states that no person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances, applicants cannot be evicted in terms of a Collective Bargaining Agreement. Secondly, it was contended that the dismissals were arbitrary and illegal in that respondent conducted disciplinary hearings before obtaining a show Cause order from the Minister of Public Service, Labour and Social Welfare.

The respondent opposed the application on a number of grounds. It was contended that the application is not urgent at all since the applicants have been aware of the employer's decision as early as 15 December 2016 but did nothing about it. As regards the failure to notify Trade Union representatives the respondent argued that the Code does not require it to give notice to any trade union representative as it is the prerogative of the employee. Further, it was contended that the statement that the effect of "generally noting … an appeal suspends the decision appealed against" is quite simply wrong.

The applicants' belated attempt to seek shelter in section 74 of the Constitution was met within the simple reply that where the law gives parties rights, they can by agreement choose to waive these rights. This is what happened *in casu* and there is no unlawfulness on the part of the respondent since the variation is in accordance with Collective Bargain Agreement (SI 152/90 section 25).

Finally, it was argued that the applicants' criticism of the disciplinary process has no merit in that the disciplinary hearings were conducted in terms of the Code of Conduct. This process is separate and distinct from the procedure outlined in the Labour Act relating to how unlawful job actions are disposed of.

The notice issued in terms of the Code contain *inter alia* the following:

"Please note the following:

1. You are permitted to bring any representative of your choice to the hearing.
2. You may call a witness on your behalf and make the arrangements to make him/her attend the hearing.
3. If you do not attend, the disciplinary hearing shall proceed in your absence." (my emphasis)

Quite evidently, the Code does not require the respondent to notify unionists. In my view this makes sense in that it is the worker who knows which union he/she belongs to at the mine. Also, there is a real possibility that some workers are not members of any union. As indicated in the notices the applicants were supposed to notify their representatives of the date, time and place of the hearing.

As regards the noting of appeal, the Code in para D, section 3 (2) requires "the employee" to note the appeal and to give reasons for the appeal. It follows therefore that because each individual accused would have unique circumstances, have faced different charges and therefore different grounds of appeal, a letter from a union representative raising certain alleged irregularities is not a competent or valid appeal. Be that as it may it is trite that an appeal to the Labour Court does not suspend the decision appealed against – see section 92E (2) of the Labour Act Chapter 28:01 – *Joram Nyahora* v *CFI Holdings Private Ltd* SC-81-14 and *Montclair Hotel & Casino* v *Farai Mukuhwa* HH-501-15.

For these reasons the applicants cannot hide behind their appeals to bar respondent from evicting them from mine accommodation.

It was also contended on behalf of the applicants that the notice period is too short. The proviso to section 24 (2) of the CBA SI 152/90 states:

> "in the case of approved summary dismissal, the employer shall have the right to require the employee to quit mine property immediately and if the employee has been occupying married quarters, to remove his family and possessions from such premises within a period of not less than 7 days". (my emphasis)

It is apparent that no court order is required as quite clearly the respondent is acting in terms of the CBA and the Code. Therefore, there is no question of "arbitrary evictions".

While the Labour Act in section 12 (6) provides that an employee who has been provided accommodation by the employer shall not be required to vacate the accommodation before the expiry of a period of one month after the period of notice, subsection (7) allows the parties to a contract of employment to waive the right to notice. *In casu*, the parties waived their rights and agreed to a shorter period stated in the CBA. This is neither unlawful nor unconstitutional.

Finally, I take the view that it was not necessary and indeed not a legal requirement that respondent should have received a show cause and a disposal order first before embarking on disciplinary hearings. See *Telone (Pvt) Ltd* v *Communications & Allied Services Workers Union* 2006 (2) ZLR 136 (S) where CHIDYAUSIKU C J held *inter alia* that:

> "There was nothing in the language of the Act, either expressly or implied, that codified the proposition advanced by the respondent that once employees were participating in a strike, the code of conduct was *ipso facto* ousted. None of the relevant provisions of the Act barred an employer from disciplining employees engaged in an unlawful collective job action in terms of a code of conduct. Nothing in the Act limited an employer to taking disciplinary action against employees to situations where there is specific prescription of unlawful collective job action in the code of conduct. It was lawful for the appellant to charge the employees with absence from work in contravention of the Code of Conduct. It was open to the employees then to plead participation in a lawful collective job action. This they did not do, and probably could not have done, as they were employed in an essential service." (my emphasis)

It should be noted that the facts *in casu* are on all fours with those in the *Telone* case, particularly in that there was no disposal order in both, and the employers proceeded in terms of the Code of Conduct to discipline striking employees.

Consequently, I find therefore that applicants do not have any lawful entitlement to withhold the possession of the properties. In the result, it is ordered that the application is dismissed with costs.

Sengweni Legal Practice, applicants' legal practitioners
Coghlan & Welsh, respondent's legal practitioners