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Judgment No. S.C. 47/2000
Civil Appeal No. 131/99

LOVELACE TAKAVENGWA SAMURIWO v

ZIMBABWE UNITED PASSENGER COMPANY LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, MAY 18 & JUNE 1, 2000

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

GUBBAY CJ: In February 1982 the appellant was engaged by the respondent, a company in which Government holds a controlling interest, as its senior accountant. He retained that post until 1 November 1991 when appointed managing director. Under clause 6 of the letter of appointment, signed on 19 March 1992, each party was entitled to terminate the employment on the giving of six months' notice.

With the passing of the years the relationship between the appellant and the other members of the respondent's Board of Directors became strained. In 1995 an investigation into the appellant's activities in his capacity as managing director was undertaken by the Criminal Investigation Department. This did not result in any criminal charges being laid. On 12 March 1997 the appellant was placed on paid leave. He complied with a request to answer in writing a report

prepared by a firm of auditors concerning the financial affairs of the respondent. Nonetheless the forced leave was extended from time to time. An invitation to resign was declined by the appellant.

On 21 July 1997 the Chairman of the Board of Directors wrote to the Minister of the Public Service, Labour and Social Welfare seeking approval in terms of s 2(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985 ("the Regulations"), to terminate the appellant's contract of employment. The reply, eventually received on 3 March 1998, advised that the Minister had no jurisdiction to deal with the matter under s 2(1)(a) of the Regulations. It went on to explain:

> "Mr Samuriwo is a managerial employee and as such is covered by ZUPCO's registered code of conduct. This means (the) employer cannot use section 2(1)(a) of S.I. 371 of 1985 in terms of S.I. 377 of 1990 which makes the following provisions: 'sections 2 and 3 of S.I. 371 of 1985 shall not apply to employees to whom provisions of an Employment Code of Conduct registered in terms of the (Labour Relations Employment Code of Conduct Regulations 1990) apply.
>
> The matter is hereby referred back to you in order for the Company (ZUPCO) to apply (the) procedures of their registered Code of Conduct."

In the event, on 27 May 1998 the respondent gave the appellant six months' notice of its intention to terminate his employment with effect from after duty on 30 November 1998. The professed reason was that the directors had lost confidence in the appellant's ability to perform his duties efficiently. The appellant's response was that no absolute right existed to terminate his employment on notice; the respondent being obliged either to obtain the prior written approval of the Minister, or to have the issue resolved under its registered Code of Conduct and Grievance Procedure ("the Code of Conduct"). The respondent expressed

disagreement. It informed the appellant that it would not be paying salary and benefits beyond 30 November 1998 and that he was to return the company motor vehicle in his possession.

The impasse led the appellant to bring an application before the High Court for an order declaring that the respondent was not entitled to terminate his employment on six months' notice, without first obtaining the sanction of the Minister of the Public Service, Labour and Social Welfare.

In his judgment, since reported *sub. nom.* 1991 (1) ZLR 385 (H), GARWE J dismissed the application with costs. He held at 389 B-D that the Code of Conduct applied to the appellant and, that being so:

> "in the light of the very clear language of s 1A of the 1990 Regulations (SI 377 of 1990 which, by amendment, provides that ss 2 and 3 of the Regulations shall not apply to employees to whom the provisions of an employment Code of Conduct applies) the Minister's authority is not necessary before ZUPCO can terminate the applicant's employment. As a corollary therefore the applicant's employment can be terminated in other ways. The parties to this matter have agreed that either party can give six months' notice of termination of employment to the other. The respondent has given such notice … . The protection to which the applicant would have been entitled to under s 2 of the 1985 Regulations was done with once ZUPCO registered a Code of Conduct."

In support of the appeal Mr *Andersen* addressed two main submissions: The first was that the learned judge had erred in holding (to the extent he had) that the Code of Conduct applied to the appellant in his position as managing director; accordingly, the prior written permission of the Minister was necessary to terminate his contract of employment. The second was that even if the appellant was to be regarded as an "employee" for the purpose of the Code of Conduct, its application

was limited to the determination of misconduct and procedures for settling grievances, and not with termination of employment on notice; in the premise, the learned judge ought to have found that s 1A of the Regulations did not relieve the respondent from the obligation to obtain the prior written approval of the Minister for the termination of the appellant's employment.

Per contra, the respondent's contention was that the Code of Conduct applied to the appellant in his capacity as managing director and, that being so, termination on notice was permissible without the Minister's prior written approval. Reliance was placed on what was said in *Chivenge v Mushayakarara & Anor* 1998 (2) ZLR 500 (S) at 504 D-H.

It does not seem to me to be open to doubt that although a managing director normally is the primary organ of the company, he may be an employee as well. Much, of course, depends on the effect of the terms of the contract between the company and himself. See *Moresby-White v Rangeland Ltd* 1952 SR 200 at 201; *Henochsberg On The Companies Act* 4 ed vol 2 at 817. But an abundance of authority reveals that a managing director may hold two distinct positions, the office of director as well as manager; and as manager, the managing director may be employed by the company. See *Boulting & Anor v Association of Cinematograph Television and Allied Technicians* [1963] 1 All ER 716 (CA) at 728 C-D; *Oak Industries (SA) (Pty) Ltd v John NO & Anor* 1987 (4) SA 702 (N) at 704.

In casu the terms of the letter of appointment indicate clearly that the appellant was required to combine the function of director with that of employee.

Yet it does not necessarily follow that though an "employee" of the respondent, the Code of Conduct applied to the appellant. He was, after all, a special type of employee, superior in rank to all others and in overall control of the day-to-day affairs of the respondent and tasked with the administration of its business. Thus a close examination of the provisions of the Code of Conduct is called for in order to decide whether it can be said that the appellant fell within its reach.

The Code of Conduct is divided into two sections, with the first dealing with disciplinary matters and the second with grievance procedures. Clause 1 of section I stipulates that its provisions shall apply to all employees regardless of rank. Given as one of its major objectives is:

> "to encourage both management and ordinary employees to participate in solving disputes thereby ensuring that there is industrial democracy in the work place." (emphasis added).

The distinction is significant because what is recognised are two categories of personnel in the employ of the respondent; on the one side managerial employees, on the other those who do not play a part in management. Clause 2(a) stresses that it is the responsibility of management to ensure that satisfactory standards of discipline are maintained and that the administration of such discipline is conducted in a fair and equitable manner.

Clauses 5 and 6 are the most important in the determination of the present question. They are concerned with the administration of discipline and the constitutions of the various hearing committees. The first disciplinary authority is the

line manager. Depending on the seriousness of the offence the employee is alleged to have committed, the next authority is the disciplinary hearing committee comprising a chairman (being a personnel department official), a departmental manager (or his/her representative) and three members of the workers' committee. An appeal lies from this body to the appeals committee. It is composed of a general manager (as chairman), a personnel manager (as secretary), a department head (alternate) and three members of the workers' committee in the works council or their deputies. The decision of the general manager is final and an appeal therefrom lies directly to the Labour Relations Tribunal.

Clauses 6 (C) and (D) are concerned with superior or managerial employees at the initial and appeal levels. They provide as follows:

> "(C) At Head Office the Disciplinary Committee will be comprised as follows:-
>
> 1. Human Resources Manager - (Chairman)
> 2. Department Head - (Alternate)
> 3. Any two members of the workers committee.
>
> (D) The Head Office appeals committee will be comprised as follows:
>
> 1. Managing Director - (Chairman)
> 2. Human Resources Manager - (Secretary)
> 3. Department Head - (Alternate)
> 4. Any two members of the workers' committee.
>
> The Managing Director's decision will be final and any appeals may be made to the Tribunal.
>
> All disciplinary cases involving Heads of Departments and above e.g. Chief Engineer, Personnel Manager etc. will be held in consultation with the Human Resources Manager."

In my view, it is highly pertinent that, although previously mentioned, the managing director is not one of the senior members of staff listed in the last sentence of sub-clause (D). The omission must be taken as deliberate, and no mere oversight, as his decision is final and an appeal therefrom is to the Labour Relations Tribunal. Even if it could be envisaged that the disciplinary committee, chaired by a human resources manager, was competent to hear and determine an allegation of misconduct brought against the managing director – which would be an invidious practice necessitating an inferior official to discipline a senior – no provision is in place as to who would chair the appeals committee or who would act as alternate to the managing director; and who would make the final decision before an appeal could be lodged with the Labour Relations Tribunal.

In short, while the Code of Conduct makes specific provision for all the other employees both ordinary and managerial, it says nothing about what disciplinary procedure is to be applied to the managing director. I do not think it is an answer, as counsel for the respondent suggested, that as:

> "no Code of Conduct can be so comprehensive as to cover all possible instances of indiscipline"

the respondent has to make the best it can of the situation and adapt the Code of Conduct in the most appropriate manner where the discipline of the managing director is in issue. I must repeat that it seems to me highly improbable that the drafters of the Code of Conduct would have forgotten, were it ever so intended, to include the managing director in the hierarchy of employees to be subjected to disciplinary procedures. After all, the managing director is the most important employee, and as a

director stands on at least equal footing with the other individual directors. It is to the Board of Directors that the managing director bears ultimate responsibility; it is the Board that has authority over him.

The learned judge considered that the omission in the Code of Conduct to make provision for the managing director to be the subject of disciplinary proceedings was irrelevant as the termination was not sought on the basis of the Code of Conduct, but in terms of the contract of employment (see judgment at 388E.) I do not, with respect, agree. It was crucial to determine whether in terms of s 1A of the Regulations the appellant was an employee to whom the provisions of the respondent's Code of Conduct applied. For if such provisions did not apply, then ss 2 and 3 were not exempted by s 1A.

I therefore uphold the argument that the Code of Conduct was not framed to take into account disciplinary proceedings against the appellant as the respondent's managing director. Consequently, as the appellant did not fall within s 1A of the Regulations his employment could not be terminated by the respondent other than in accordance with s 2 or 3 of the Regulations.

This conclusion makes it unnecessary to consider the validity of the alternate submission advanced on behalf of the appellant.

Accordingly, the appeal must be allowed with costs, and the order of the court *a quo* altered to read:

"An order will issue in terms of the draft, being annexure G to the application."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Wintertons, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners