DISTRIBUTABLE (41)

Judgment No. SC. 50/05
Civil Appeal No. 271/01

WATTLE COMPANY (PRIVATE) LIMITED vs

WILBERT VUMISANI AND ONE HUNDRED AND SIX OTHERS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 22 & OCTOBER 17, 2005

*R M Fitches*, for the appellant

*L Mazonde*, for the respondents

MALABA JA: This is an appeal from a judgment of the then Labour Relations Tribunal ("the Tribunal") dated 28 August 2001, setting aside the dismissal of the respondents from employment and ordering their reinstatement without loss of salary and other benefits.

The appellant is a private company carrying on the business of timber processing and selling. The respondents were employed by the appellant at its Durban Road Depot in Mutare. On 21 July 1998 the workers' committee wrote a letter to the appellant's divisional manager demanding the removal of the Durban Road Depot manager, against whom the respondents had a number of grievances. The letter gave notice that workers intended to stage what was called "a peaceful protest" on the day the depot manager, who was on leave, returned to work.

On 4 August 1998 the respondents went on strike, demanding the removal of the depot manager. They returned to work on 5 August 1998, following intervention by officials from the Commercial Workers Union, the Zimbabwe Furniture, Timber and Allied Workers Union and the Ministry of Labour ("the Ministry"). Officials from the Ministry undertook to carry out investigations into the grievances the respondents had against the depot manager who temporarily moved to the appellant's head office to facilitate the investigations.

A senior labour relations officer conducted thorough investigations into allegations of corruption, nepotism, victimisation and insensitivity to workers' interests levelled against the depot manager by the respondents. He gave the parties the opportunity to submit representations orally or in writing. The determination made by the senior labour relations officer on the facts established by the investigations was that the allegations against the depot manager were without substance.

The respondents refused to accept the determination. On 10 September 1998 they went on strike, vowing not to return to work until the depot manager, who had moved back into his office, was removed. Officials from the Commercial Workers' Union persuaded them to return to work and they did so on 14 September 1998. The following day the respondents were served with letters of suspension from work without pay pending application to a labour relations officer for an order terminating their contracts of employment in terms of s 3(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371/85 ("the Regulations").

The application was indeed made on 16 September 1998, on the ground that the respondents had engaged in an unlawful collective job action on 10 and 11 September 1998 and as such had committed an act inconsistent with the fulfilment of the express or implied conditions of their contracts of employment. The application was addressed to a "principal labour relations officer", as opposed to a "labour relations officer" as was the requirement of s 3 of the Regulations.

On 30 September 1998 a "labour relations officer" nonetheless heard the application and determined that the respondents had engaged in an unlawful collective job action. In other words, he found that the ground of suspension of the respondents had been proved by the appellant. The labour relations officer did not, however, make the order terminating the respondents' contracts of employment as he was required to do under s 3(2)(a) of the Regulations. He ordered that the respondents be reinstated in their jobs without loss of salary and other benefits. The labour relations officer believed that although the respondents had engaged in an unlawful collective job action the procedure under the Regulations in terms of which the appellant sought to have their contracts of employment terminated was not appropriate in a case of *en masse* dismissal of workers accused of having engaged in an unlawful collective job action.

The appellant appealed to a senior labour relations officer, who also found on 4 November 1998 that the respondents had engaged in an unlawful collective job action. He too did not serve on them the order terminating their contracts of employment. His reason was that the application, which had been heard

and determined by the labour relations officer, was a nullity because it had been addressed to a "principal labour relations officer". The senior labour relations officer, however, made an order that the respondents were to remain on suspension without pay and other benefits until the question of their dismissal from employment was determined.

The appellant applied to the High Court for a review of the decision of the senior labour relations officer but withdrew the application on 14 June 1999, before making another application to a labour relations officer for an order terminating the respondents' contracts of employment on the same ground, that they had committed an act inconsistent with the fulfilment of the express or implied conditions of their contracts of employment by engaging in an unlawful collective job action on 10 and 11 September 1998.

The labour relations officer who heard the application also held that the respondents had engaged in an unlawful collective job action. Having found that the grounds of suspension had been proved, the labour relations officer made the order terminating the respondents' contracts of employment. He, however, made an order that the appellant should pay the respondents their salaries and other benefits for the period from 18 December 1998 to 14 June 1999, on the ground that the appellant had delayed the finalisation of the case by applying for review of the senior labour relations officer's decision to the High Court.

On 15 October 1999 the appellant appealed to the senior labour relations officer against the "compensatory order", whilst the respondents cross-

appealed against the order of dismissal. They contended that the letter of 21 July 1998 constituted written notice to the appellant of their intention to resort to collective job action on 10 and 11 September 1998. They argued that the collective job action they engaged in was lawful as the written notice they were required to give to their employer under s 104(2) of the Labour Relations Act [*Chapter 28:01*] ("the Act") had been given. The senior labour relations officer dismissed both the appeal and the cross-appeal.

On appeal and cross-appeal to it, the Tribunal held that the collective job action engaged in by the respondents on 10 and 11 September 1998 was a continuation of the collective job action they had resorted to on 4 and 5 August 1998. The learned chairman of the Tribunal was of the opinion that the second collective job action was made lawful by the letter of 21 July 1998. He also accepted the contention by the respondents that the application made to the labour relations officer on 14 June 1999 for an order terminating their contracts of employment had not been made "forthwith" after their suspension on 15 September 1998, as was required by s 3 of the Regulations.

It appears to me that the decision of the Tribunal was not only clearly wrong as a matter of fact but was unnecessary. The decision had been made by the labour relations officer on 30 September 1998 that the respondents had committed an act inconsistent with the fulfilment of the express or implied conditions of their contracts of employment, in that they had engaged in an unlawful collective job action on 10 and 11 September 1998. Once the labour relations officer was satisfied that the ground of suspension of the respondents had been proved, he had no choice but to

serve them with the order terminating their contracts of employment with effect from the date of suspension.

There was no appeal against the decision of the labour relations officer that the respondents had engaged in an unlawful collective job action which was in itself conduct incompatible with the continuation of an employer and employee relationship. As was stated by GUBBAY CJ in *Chisipite School Trust (Pvt) Ltd v Clarke* 1999 (2) ZLR 324 (S) at 327D, termination of the respondents' contracts of employment arose: "… automatically upon proof of any of the specified acts of misconduct alleged against" them.

Section 3(2) of the Regulations provided that:

> "Upon application being made in terms of subsection (1), the labour relations officer shall investigate the matter and may, according to the circumstances of the case, -
>
> (a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the labour relations officer; or
>
> (b) serve a determination or order on the employer concerned to remove the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer."

The effect of s 3(2)(a) of the Regulations upon a finding by a labour relations officer that a ground of suspension of an employee had been proved to his satisfaction was considered by McNALLY JA in *Masiyiwa v TM Supermarket* 1990 (1) ZLR 166 (S) at 170H-171A. The learned JUDGE OF APPEAL said:

> "Thus, in the case of s 3(2), the labour relations officer has to determine whether the grounds of suspension are proved or not proved. If they are proved, he must proceed in terms of subpara (a); if they are not proved, he must proceed in terms of subpara (b). To put it another way, he has a choice, but that choice is governed, not by his discretion, but by his finding. If he finds the grounds proved, he must choose (a); if not proved, (b)."

See also *Zimbabwe Mining and Smelting Co Ltd v Mafuku* S-246-92 at pp 4-5 of the cyclostyled judgment; *Caltex Oil Zimbabwe (Pvt) Ltd v Mutsvangwa* S-95-93 at p 4 of the cyclostyled judgment; and *Chisipite School Trust (Pvt) Ltd v Clarke supra* at 327 E-F.

The respondents were automatically dismissed from employment with the appellant from the date of their suspension once the labour relations officer found that the allegation that they had committed an act inconsistent with the fulfilment of the express or implied conditions of their contracts of employment by engaging in an unlawful collective job action had been proved by the appellant. He had no power to make the order of their reinstatement. A proper application for an order terminating the respondents' contracts of employment had been made to him forthwith after their suspension from work without pay and other benefits. The achievement of the object of the Regulations was not in any way hindered by the application having been addressed to a "principal labour relations officer" – see *Sterling Products International v Zulu* 1988 (2) ZLR 293 (S).

It must follow from the fact that the respondents' contracts of employment automatically terminated upon the finding by the labour relations officer on 30 September 1998 that the ground of their suspension had been proved to his satisfaction that the other orders subsequently made by the senior labour relations

officers and the application of 14 June 1999 had no legal effect on the question of their dismissal. The only valid order required by the case was the termination of the respondents' contracts of employment from the date of their suspension.

In the result, the following order is made –

"The appeal is allowed with costs and an order terminating the respondents' contracts of employment with effect from the date of suspension, that is to say, 15 September 1998, is granted."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

*Henning, Lock, Donagher & Winter*, appellant's legal practitioners

*Mbidzo, Muchadadehama & Makoni*, respondent's legal practitioners