REPORTABLE (39)

PIONEER TRANSPORT (PRIVATE) LIMITED
v
ELIZABETH ANA DA SILVA

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & PATEL JA
HARARE; OCTOBER 24, 2017 & MAY 27, 2019

T. Zhuwarara with *R. Zhuwarara*, for the appellant

T.W. Nyamakura with *M. Mbuyisa*, for the respondent

GARWE JA

[1] At the conclusion of arbitral proceedings, the arbitrator upheld the respondent's claim for unlawful dismissal and ordered her reinstatement or alternatively payment of damages *in lieu* of reinstatement. An appeal against the award to the Labour Court was dismissed with costs. The present appeal is against that order.

FACTUAL BACKGROUND

[2] The respondent was employed as Finance Director by the appellant on a 3-year contract, renewable subject to satisfactory performance, commencing on 1 April 2013. Having successfully completed her period of probation, she was confirmed as Finance Director by letter dated 2 August 2013. In a letter dated 12 February 2014, the managing director of the appellant wrote to the respondent expressing his displeasure at what he perceived to be incompetent performance of duty on her part. In the letter, the managing director warned her

against such poor performance and indicated that the three months that were to follow would be decisive of her continued tenure as finance director.

[3] On 18 July 2014, the managing director wrote to the respondent, terminating her contract of employment with effect from 31 August 2014. The letter stated as follows:

> "Pursuant to discussions held on 30th June 2014, ref your performance and the restructuring that is ongoing, you are hereby given 2 (two) months notice of the termination of your contract of employment. The notice period will run effectively from 1st July to 31st August 2014 …"

[4] On 28 July 2014, the respondent wrote to the managing director disputing the lawfulness of the decision to terminate the contract of employment and pointing out the failure on his part to follow due process before such termination. The matter was subsequently referred to a labour officer who, after issuing a certificate of no settlement, referred the matter to arbitration on the issue whether the termination of the contract was lawful and, if not, what the appropriate remedy was in the circumstances.

[5] In her statement of claim, the respondent submitted that the letter of 12 February 2014 which contained a warning over alleged poor performance on her part was authored without due regard to due process. She further submitted that the basis for the termination of the contract of employment was the alleged poor work performance and restructuring of the company. In these circumstances, a disciplinary hearing should have been held prior to the decision to terminate her contract of employment. The failure to do so meant that the termination was improper. She accordingly sought an order for her reinstatement and, in *lieu* thereof, damages.

[6] In its statement of defence, the appellant stated as follows. On or about 30 June 2014, the respondent met with the appellant's managing director during which meeting the parties discussed the respondent's performance and the restructuring exercise that the company had embarked on to reduce its operating costs. During that meeting, the respondent and the appellant's managing director "agreed that the respondent was going to leave the employ … at the end of the month on 31 July 2014 subject to a proper hand over take over process having been concluded. It was also agreed that the claimant would be paid cash in *lieu* of the notice. In other words the parties agreed to terminate their relationship." The appellant further indicated in its statement of defence that it intended to lead oral evidence from the managing director to show that the termination was pursuant to an agreement between the parties and in particular pursuant to "her own agreement to end her employment" with the appellant. It further averred that the letter written by the managing director on 18 July 2014 was written at the instance of the respondent to confirm the earlier discussion.

[7] The appellant denied that the respondent had been unlawfully dismissed, adding that the circumstances clearly showed that the parties had agreed "to end their relationship with the claimant leaving her employ upon being given notice." The appellant admitted that initially the respondent was given only two months' notice as provided in her contract of employment. However, in a letter dated 25 August 2014, the respondent was advised that she was going to be paid cash in *lieu* of three months' notice due to her.

[8] In his assessment of the facts, the arbitrator found that the appellant had been inconsistent in its defence. It had claimed that the termination was effected pursuant to an agreement and, in the same breath, was arguing that the termination was by notice. The arbitrator remarked that "termination by notice is not the same as termination by mutual

consent. Where the employer terminates by notice, the employer makes a unilateral act. It is not mutual termination …. In any event … mutual termination … ought to be in writing." The arbitrator found that the termination of employment in this case was inextricably linked to performance and the restructuring of the company. In these circumstances, the appellant should have either instituted disciplinary proceeding or engaged the employee to agree on a termination package. Consequently, the arbitrator found that the termination was neither mutual nor lawful. He accordingly upheld the claim for unlawful dismissal.

PROCEEDINGS BEFORE THE LABOUR COURT

[9] Dissatisfied, the appellant appealed to the Labour Court. It argued before that court that the arbitrator had erred in holding that it (i.e. the appellant) could not, in the circumstances, terminate the respondent's employment contract on notice and that the finding that the contract was terminated on account of performance or restructuring was a gross misdirection.

[10] It further submitted that since it was a term of the contract of employment that the employment could be terminated on notice, the appellant was within its rights to terminate the contract on notice. There was no obligation to give reasons justifying such termination on notice. There was therefore no need for the appellant to resort to a Code of Conduct. It is worth noting that before the Labour Court the appellant did not rely on the agreement allegedly reached between the parties to mutually terminate the employment relationship.

[11] The Labour Court found that the notice of termination was predicated on the respondent's alleged poor performance and that the arbitrator had been alive to the law which provides for termination of employment on notice. It accordingly found no merit in the appeal and dismissed it with costs.

PROCEEDINGS BEFORE THIS COURT

[12] Unhappy once again, the appellant noted an appeal against the decision of the Labour Court upholding the arbitral award. In seeking an order setting aside the arbitral award, the appellant relies on three grounds, namely:-

> "1. The court *a quo* grossly misdirected itself in holding that the Respondent's contract had been terminated on notice on account of poor performance or incompetence. The Court did not turn its mind to the fact that the Notice to Terminate delivered by the Applicant to the Respondent did not at any point state that such termination was motivated or actuated by the respondent's poor performance or incompetence.
> 2. The Court *a quo* also erred at law in failing to hold that the Respondent had been validly terminated on notice and therefore the arbitral award before it was anomalous in this regard. At the relevant time a contract of employment could have been validly terminated with one party giving the other notice of intention to terminate the contract. Prior attempts at termination or disciplinary measures are irrelevant considerations on adjudicating on the validity of such termination.
> 3. The Court *a quo* also fell into serious error when it conflated the requirements of a dismissal and termination on notice. Termination on notice is a distinct and legally legitimate manner of ending an employment relationship quite distinct from dismissal for some infraction or breach of contract."

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[13] In its submissions, the appellant argued that the issue for determination is whether the appellant's right to terminate on notice was properly exercised, bearing in mind that at the relevant time, the law allowed the termination of an employment contract on notice. The court *a quo* had made constant reference to dismissal when the matter before it related to termination on notice. The letter of 18 July 2014 clearly articulated that the contract was terminated on notice. The law permitted the appellant to terminate the contract for any reason or no reason with no obligation to communicate or justify such a course. The finding by the court *a quo* that that the termination was premised on allegations of incompetence is a misconception. Whilst the letter of termination recalls other issues discussed on 30 June 2014, the termination that followed was not based on incompetence or poor performance. The notice of termination was issued on the understanding that the employment relationship had to end and the finding

that the respondent was dismissed for under performance was a clear misdirection. Mr *Zhuwarara,* during submissions, accepted that the respondent's contract of employment made no provision for termination on notice.

RESPONDENT'S SUBMISSIONS ON APPEAL

[14] In her submissions, the respondent argues that the issue requiring determination is whether termination on notice is available as an option where the underlying basis for termination is disciplinable conduct. In other words, the question is whether the general provisions which regulate termination on notice can override the specific provisions dealing with termination on account of misconduct. In her view, the appellant adopted a wrong form of termination, rendering such termination unlawful. At arbitration, the argument by the appellant was that the termination was effected through mutual agreement, an argument that was inconsistent with the argument adopted in the court *a quo* that the termination was done unilaterally, on notice. Respondent argued that the right to terminate on notice was never the appellant's argument before the arbitrator. For that reason, the appellant should have resorted to the disciplinary process before terminating the employment contract. Further, the letter of termination written by the appellant makes it clear that performance was the motivating factor in the decision to sever its relationship with the respondent. The respondent argued further that the general provisions of s 12(4) of the Act cannot be used in place of s 12B of the same Act. Lastly, she submitted that the belated submission by the appellant that it relies on a termination on notice is an attempt to ride on the judgment of this Court in *Don Nyamande v Zuva Petroleum (Private) Ltd* SC 43/15. The appellant must have wrongly believed that it was entitled to terminate the contract of employment on notice despite the fact that the underlying reason related to poor work performance.

ISSUE FOR DETERMINATION BEFORE THIS COURT

[15] The simple issue before this Court is whether the court *a quo* correctly dismissed the appeal against the award made by the arbitrator upholding the claim for unlawful dismissal and reinstatement. In order to resolve this question, there is need to determine what the appellant's case at arbitration was, and thereafter its case before the Labour Court and lastly what its case is before this Court.

[16] In its statement of defence, the appellant stated as follows:-

> "During the meeting of the 30th June 2014 it was agreed by the Claimant and Mr. Smuts representing the Respondent that the Claimant was going to leave the employ of the Respondent at the end of the month on the 31st July 2014 subject to a proper hand over take over process having been concluded. It was also agreed that the Claimant would be paid cash *in lieu* of the notice. In other words the parties agreed to terminate their relationship."

[17] The appellant continued:-

> "Pursuant to the meeting, the Claimant approached Mr Smuts and requested that she be given written confirmation of her termination, which confirmation was given to her under cover of the letter dated 18th July 2014. It must be stressed that the termination of the claimant's contract was not premised on poor performance. The respondent has indicated to this tribunal that it intends to lead oral evidence from Mr. Smuts who represented it during the meetings with the Claimant."

[18] Although in the statement of defence the appellant indicated that the employment relationship was to terminate with effect from 31 July 2014, in the letter written on 18 July 2014, the appellant made it clear that the notice period was in fact to run until 31 August 2014. The letter did not refer to the agreement allegedly reached on 30 June 2014 to mutually terminate the employment relationship. Instead it refers to discussions regarding the respondent's performance and the restructuring of the company.

[19] It is important to stress that, before the arbitrator, the appellant's position was that the termination of employment was pursuant to an agreement and that such termination was to be effective on 31 July 2014. It is clear from the statement of defence that the letter of 18 July 2014 was written at the instance of the respondent to confirm this position. It seems to me, therefore, that before the arbitrator, it was not the appellant's case that it had invoked the provisions of s 12(4) of the Labour Act which, at that time, stipulated the length of the notice of termination to be given in cases where either party may have wished to terminate the contract on notice to the other.

[20] The earlier decision by the appellant to call evidence to prove the existence of an agreement was abandoned notwithstanding the clear position of the respondent in her replication before the arbitrator that she had not verbally agreed to a termination of her employment. She even challenged the appellant to show how such an agreement would, in any event, have been lawful in view of the requirement that the agreement should be in writing.

[21] My understanding of the position of the appellant, at the stage of arbitration, is that the appellant was saying the claim for unlawful dismissal should be dismissed on account of the fact that the parties had agreed that her employment be terminated with effect from 31 July 2014, which date appears to have been altered to 31 August 2014. It was for this reason that the appellant intimated its intention to call Mr Smuts, its managing director, to prove the existence of such agreement.

[22] The arbitrator, in his award, commented on what he perceived to be uncertainty in the appellant's defence. I quote his remarks in this regard:-

> "The Respondent seemed to clutch at straws on which defence to rely on. In another angle, Respondent suggest (sic) that termination was by notice. I believe, even if one

> were to argue along those lines, termination by notice is not the same as termination by mutual consent. Where the employer terminates by notice, the employer makes a unilateral act. It is not a mutual termination. This line of argument … contradicts … submissions that there was a mutual agreement to terminate the employment relationship at the meeting of 30 June. In any event, the facts of this case are argued on the basis of mutual termination, which ought to be in writing or alternatively Claimant would have tendered her resignation, which is a unilateral act by the employee ….”

[23] Based on that summation, the arbitrator was convinced that there had been no agreement to terminate the agreement between the parties. In any event, as already noted, the respondent had, in her replication, denied the existence of such agreement. In the absence of such a mutual termination, the arbitrator found that the decision by the appellant terminating the employment relationship on 18 July 2014 was therefore improper and unlawful. The arbitrator also found, as a consequence, that no mutual termination having been proved, the reference in the letter to performance and restructuring meant that the appellant had two options at that stage. These were either to institute disciplinary proceedings or to agree on an exit package. In the absence of either, the termination was therefore unlawful.

[24] It is clear that before the Labour Court, the appellant completely abandoned the argument that the termination of the contact of employment had been mutually agreed. The appellant’s argument before that court was, in the main, that the arbitrator had erred in failing to hold that, at law, the appellant had the right to terminate the contract of employment on notice. Needless to say, the court *a quo* upheld the arbitral award declaring the termination of the employment contract to be unlawful.

[25] Before this Court, the appellant again changed tact. It argued that it never relied on poor performance as a basis for termination of the contract. It submitted that indeed the parties agreed at the meeting of 30 June 2014 to terminate the employment. However, because the

respondent reneged on that agreement, the appellant had then decided to invoke the provisions of s 12(4) of the Labour Act to terminate the employment contract on notice. Mr *Zhuwarara*, for the appellant, stated that the letter of termination dated 18 July 2014 was not predicated on the agreement reached on 30 June 2014 but rather was a unilateral decision by the appellant to terminate the contract of employment in terms of its common law right to do so by giving the notice periods reflected in s 12(4) of the Labour Act.

[26] I have considerable difficulty with the submissions made by the appellant before this Court. It was never its case before the arbitrator that the respondent reneged on the mutual termination discussed on 30 June 2014 and that it had, as a consequence, been forced to invoke its common law right to terminate on notice. Rather, its position before the arbitrator was that the parties had agreed that the contract be terminated with effect from 31 July (or August) 2014. It was its claim that the respondent requested that this development be confirmed by letter, which was done by letter dated 18 July 2014. The appellant expressed the desire to call evidence to prove the existence of the agreement. This begs the question: why call evidence to prove a decision made unilaterally to terminate the agreement on notice in terms of s 12(4) of the Act? It certainly was not its case before the arbitrator that the termination effected on 18 July 2014 was a unilateral act on its part.

[27] The shift in appellant's defence belies its belated attempt to rely purely on its common law right at that time to terminate the employment contract on notice. Clearly, therefore, once the arbitrator found that the defence of mutual termination had not been proved, he had no option but to find, as a corollary, that the termination was, in the circumstances, unlawful.

DISPOSITION

[28] In all the circumstances, therefore, I am not persuaded that the arbitrator misdirected himself in any way or that the Labour Court erred in dismissing the appeal against the arbitral award.

[29] In the result, it is ordered as follows:-

"The appeal be and is hereby dismissed with costs."

GOWORA JA: I agree

PATEL JA: I agree

Mawere & Sibanda, appellant's legal practitioners

Mtetwa & Nyambirai, respondent's legal practitioners