REPORTABLE (31)

CLIFORD MABIKA
v
WISE OWL GROUP OF SCHOOLS

SUPREME COURT OF ZIMBABWE
MAKONI JA, CHITAKUNYE JA & MWAYERA JA
HARARE: 12 JULY 2024

The appellant in person

R. Mabwe, for the respondent.

MWAYERA JA:

INTRODUCTION

[1] On 12 July 2024, after hearing the parties and considering the papers filed of record, the Court dismissed the appeal with costs and indicated that full reasons for this decision would be availed in due course. These are they.

FACTUAL BACKGROUND

[2] The appellant was employed by the respondent as an accountant on a five-year contract from 16 January 2017 to 31 December 2022. The contract provided among other terms, that the parties could terminate it by mutual agreement. A dispute involving termination of the appellant's contract arose between the parties. This dispute was then placed before a designated agent for resolution.

[3] The appellant alleged that there was unlawful termination and unilateral variation of the terms of his contract of employment. The respondent on the other hand, argued that the

parties had mutually terminated the contract of employment and entered into a new contract. The new contract *inter alia*, provided that the appellant would be employed as an independent contractor for a period of three months which would expire in July 2017. This arrangement was mutually reached after the respondent found out that the appellant, who was once employed at Kriste Mambo School had left the school after allegations of an improper romantic relationship with a student.

[4] The Designated Agent held that the respondent had unfairly dismissed the appellant and ordered that he be reinstated.

PROCEEDINGS BEFORE THE COURT *A QUO*

[5] Dissatisfied by the decision of the Designated Agent, the respondent noted an appeal in the Labour Court ("the court *a quo*"). It relied on the following four grounds of appeal.

"1. The designated agent misdirected herself at law in making the finding as she did that the respondent was unlawfully dismissed when the totality of the evidence on record established that the employment relationship between the parties was mutually terminated in March 2017.

2. The designated agent misdirected herself at law in finding as she did that the respondent was unlawfully dismissed when the evidence placed before her shows that the fixed term contract executed by the parties was supplanted by the Accounting contract subsequently concluded by the parties. (sic)

3. The tribunal *a quo* erred and misdirected itself in making a finding that the respondent is entitled to $7 368.00 from salary shortfalls, fees and fuel benefit or no evidence for to make a finding on no evidence is to err at law. (sic)

4. At any rate, the decisions of the designated agent is defective and a nullity at law as it granted the alternative remedy of damages in excess of the fixed term duration of the contract contrary to law." (sic)

SUBMISSIONS BEFORE THE COURT *A QUO*

[6] In motivating the grounds of appeal, the respondent submitted that the designated agent misdirected herself in making a finding that the appellant was unlawfully dismissed, when the totality of evidence on record established that the relationship between the parties was mutually terminated in March 2017. The respondent further submitted that the designated agent misdirected herself as the evidence before her showed that the fixed term contract executed by the parties was supplanted by the accounting contract subsequently concluded by the parties. In addition, it submitted that the fact that the appellant entered into a new contract with the respondent showed that the parties had mutually terminated the employer-employee relationship. It was the respondent's contention that the parties conducted themselves in a manner which evinced that the employer's contract had been mutually terminated.

[7] Further, the respondent submitted that the allegations of unlawful termination and underpayment only arose after the expiration of the independent accounting services agreement and the respondent's election not to renew it. The respondent also submitted that the designated agent erred by making a finding that the appellant was entitled to the salary shortfalls, fees and fuel benefits. It was its submission that the parties' employment relationship ended in March 2017, hence from May 2017 to July 2017, the parties' relationship was regulated in terms of an accounting agreement. Basically, the respondent's argument was that the appellant was no longer an employee but rather an independent contractor.

[8] On the other hand, the appellant submitted that there was no proof that the fixed employment contract was mutually terminated. He submitted that the unsigned mutual termination contract did not constitute any implied meeting of the minds. He further submitted that the respondent's continued payment of his accommodation implied that there was never a break in employment. He also submitted that the independent contract did not replace the employment contract.

FINDINGS OF THE COURT *A QUO*

[9] The court *a quo* found that although the agreement to terminate the contract was not signed by the appellant, the parties entered into another contract. It held that the five-year contract was novated by the three months' contract signed by both parties. It further held that since the client-provider agreement took effect from 1 May 2017, the claims from May 2017 were not sustainable as they fell outside the contract of employment. Consequently it upheld the respondent's appeal.

[10] Dissatisfied by the decision of the court *a quo*, the appellant noted an appeal in this Court on the following grounds of appeal:

GROUNDS OF APPEAL

"1. The court *a quo* seriously misdirected itself on the facts by finding that the appellant's six-year employment contract was mutually terminated when in fact it was not. Such a finding was not supported by documentary evidence presented before the court *a quo*. It is a gross misdirection on the facts that is so serious such that no reasonable court applying its mind to the facts would have arrived at such a decision. (sic).

2. The court *a quo* erred in determining that the appellant's six year employment contract was terminated by signing a three months independent contract, contrary to the laws that govern the replacement of contracts." (sic)

[11] The appellant sought the following relief:

"1. The appeal be and is hereby allowed with costs.

2.The judgment of the court *a quo* in LC/H/122/22 judgment number LC/H/58/24, be and is hereby set aside, and in its stead, substituted with the following:

"The appeal be and is hereby dismissed."

SUBMISSIONS BEFORE THIS COURT

[12] At the hearing of the appeal, the appellant submitted that the court *a quo* erred in holding that the fixed term contract between the parties was mutually terminated. He averred that the court *a quo* disregarded the evidence of bank statements which indicated that by May 2017, he was still employed by the respondent, contrary to the finding that his fixed term contract was terminated in March 2017.

[13] *Per contra*, Ms *Mabwe,* counsel for the respondent submitted that the fixed term contract had been mutually terminated by the parties entering into an independent contract. She contended that the contents of the independent contract were clear that the appellant was to be regarded as an independent contractor at all times. She submitted that the new independent contract was binding on the parties.

ISSUE FOR DETERMINATION

[14] The sole issue that presents itself for determination in this case is whether or not the court *a quo* erred by finding that the appellant's initial fixed term contract was terminated by the signing of a new independent contract.

APPLICATION OF THE LAW TO THE FACTS

[15] The appellant contended that the court *a quo* erred when it held that the independent contract novated the five year contract of employment. However, the appellant does not dispute that he entered into an independent contract with the respondent. It is a settled principle of law that, that which is not denied, is taken to have been admitted. In the cases of *Shumba & Anor* v *Zec & Anor* 2008 (2) ZLR 65 (S) at 706-H, *Minister of Lands & Ors* v *Commercial Farmers Union* 2001 (2) ZLR 457 (S) at 494 C-D and *Nhidza* v *Unifreight* SC 27/99 the simple rule of law that what is not denied in affidavits must be taken to be admitted was underscored. In light of this settled legal position the parties entered into an independent contractor agreement. Once that is accepted it follows that the new agreement novated the old agreement.

[16] Novation involves the substitution of an old contract by a new one. The new contract extinguishes the rights and obligations of the parties held under the old contract. The principle of novation was explained with clarity by ZIYAMBI JA (as she was then) in the case of *Mupotola* v *Southern African Development Community* SC 6/07 where she stated as follows:

> "Novation means replacing an existing obligation by a new one the existing obligation being hereby discharged. See *The Law of Contract in South Africa* Third ed by R.H Christie at p 498. The above definition presupposes that both the existing obligation and the new one arise out of valid contracts. 'When parties novate they intend to replace a valid contract by another valid contract' …"

[17] See also the case of *Swadit* v *Dyke N.O* 1978 (1) SA 928 (A) in which the court in relating to novation emphasized that when parties novate they intend to replace one valid contract by another valid contract. The court related to two forms of novation namely *necessaria* compulsory novation which takes place by operation of law on the one hand and *novation voluntaria,* that is, voluntary novation which involves intention and consensus when parties intend to replace a valid contract on the other hand. See also *Chiswa* v *Car Rentals Services & Anor* SC 74/20. It is clear from the above cited cases, novation can be summarized as replacing an existing obligation by a new one, the existing obligation being thereby discharged. The central aspect really being whether the new contract is intended to replace the old one.

[18] *In casu,* the parties had an employer-employee relationship. The respondent after having made a finding that the appellant was fired from his previous work place for improper association with a student, terminated the employment contract. After doing so the respondent and appellant entered into a new agreement. The appellant was engaged as an independent contractor. It is evident from the record that in this new capacity the appellant would continue to provide services as before. It is therefore apparent that, there was a novation of the contract. See also the case of *Mannock Technical Services & Anor v Nyamadzawo* SC 38/09.

> "A novation, like other forms of contract can be subject to a condition. For as long as the conditions of the new contract are not violated, the aggrieved party has no recourse in the terms of the first agreement. The aggrieved party will have such recourse when the conditions of the new agreement have not been met." (Underlining my emphasis)

[19] It can be deduced from the above cited authorities that novation arises where there are two contracts with the new one seeking to replace the old one. In the instant case, there was an old 5 year contract and a new service provider contract. The 5 year contract was

novated by the coming in of the client provider agreement which brought new terms between the parties. From the record it is clear the Designated Agent acknowledged that there was another contract besides the employer -employee contract. Having made such a pertinent acknowledgment, and finding, the Designated Agent ought to have done the needful that is to ventilate on the effects of having the second contract in place. By virtue of the appellant and respondent entering into a second contract, offering the same services the parties' novated the 5 year employment contract by the service provider contract agreement.

[20] The court *a quo* can therefore not be faulted for holding that by agreeing to work for the client as an independent contractor, the appellant effectively agreed to terminate the earlier employment contract. In that regard, the finding that the new agreement novated the old agreement is unassailable. It is trite that the appellate court will only interfere with factual findings of a lower court in circumstances where they are grossly unreasonable, or constitute a gross misdirection of law.

[21] *In casu*, it is therefore clear the appellant and respondent entered into a new agreement which replaced the earlier five-year employment contract. To this extent the appeal therefore, lacks merit, and it ought to be dismissed.

[22] Regarding costs, the general rule is they follow the result.

[23] It is for these reasons that we issued an order dismissing the appeal with costs.

MAKONI JA : I agree

CHITAKUNYE JA : I agree

Chimuka Mafunga Commercial Attorney, respondent's legal practitioners.