

DISTRIBUTABLE (2)

Judgment No. SC 2/05
Civil Appeal No. 40/04

MUTARE BOARD & PAPER MILLS v JAMES HOWARD
MUTSAKA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA
HARARE, JANUARY 20 & FEBRUARY 10, 2005

R Fitches, for the appellant

T A Toto, for the respondent

GWAUNZA JA: This is an appeal against a decision of the Labour Court, in terms of which the appellant was ordered to reinstate the respondent to his job with no loss of salary or benefits, or alternatively, pay him damages in *lieu* of reinstatement.

The background to the dispute is as follows:

The respondent started working for the appellant as the driver of a motorcycle, in June 1995. Thereafter he worked variously as a transport sales clerk, a production costing clerk, and a stores issuing clerk.

On 24 August 1999, the respondent was informed by his immediate supervisor that he was to be transferred to another section of the appellant's Stores Department, to work as a yard clerk. This direction was formally transmitted to the respondent through a letter worded in these terms:

“Re: Job Description

As discussed with you on 18 August, 1999 in the Human Resources Manager's Office regarding your transfer from Reclamation Stores to Central Stores, herewith are two copies of the job description. Kindly sign both copies and return to the undersigned before end of business on Wednesday 25 August 1999.

Please note that failure to respond will be disobeying a lawful instruction from management”.

The letter was signed by P.U. Mupfumbu (“Mupfumbu”) who was the Stores Controller.

The job description referred to listed the duties the respondent would be carrying out as a yard clerk. One of the duties read:

“Accompany the driver on deliveries and collections”.

The respondent objected to this duty and indicated that he would not consent to taking up the position of yard clerk. He also refused to sign the job description, prompting another letter from Mupfumbu, which read:

“The memorandum dated 24 August 1999 refers.

This office expected you to sign your job description on 24 August 1999 but you did not.

You are hereby instructed to report to work on Monday 30 August, 1999 and you are to commence your duties as a yard clerk. You are also kindly asked to sign the job description before 8.00 am on 30 August 1999.

Please report to the undersigned office at 7.30 am on 30 August, 1999 so you will be induced on your new job.”

The respondent, as he had done from the outset, refused to take up the position of yard clerk. He responded as follows to the various requests made for him to do so:

“I disagree with the fourth duty - messengering or accompany (*sic*) driver on deliveries and collections. Therefore I don't accept. Please try another offer.”

He elaborated on his refusal, as follows, in another written response:

“The job is against my will and skills in life. It's a non office job, non clerical. It means I will be spending $\frac{3}{4}$ of my day's work messengering door to door. Moreover, I do nose bleed a lot when exposed to the sun.”

The respondent was thereafter charged with disobeying a lawful instruction and asked to appear for a disciplinary hearing. At the conclusion of the hearing, he was found guilty and dismissed from his employment with effect from 14 September 1999. The dismissal was in terms of the appellant's Code of Conduct. He immediately lodged an appeal against his dismissal, to the Appeals Committee which, however, upheld the decision of the Disciplinary Committee to dismiss him.

The respondent as already indicated, successfully appealed against this decision, to the Labour Court.

During the hearing of this appeal the argument was advanced on behalf of the respondent that his transfer from issuing clerk to yard clerk amounted to a demotion. Also, that what the appellant had charged the respondent with, was, in effect, refusal to sign a new contract. Such an instruction, it was argued, was not lawful, since it was the respondent's right to sign or not to sign the contract.

I am not persuaded by these arguments.

At the time the dispute arose, the respondent was working as an issuing clerk. His proposed new assignment was yard clerk. It is not disputed that both positions fell under one department, i.e. Stores. It is also common cause that the positions were equal in terms of remuneration and other conditions of service. The respondent's averment that the transfer would have been a demotion, therefore, is without foundation.

The evidence before the court shows there was a clear distinction between a clerk's contract of employment and his job description. The latter simply listed the specific duties the clerk had to do to perform his contract of employment. The signing of the job description by the respondent would not have had the effect of converting it into a new contract of employment. The evidence also shows that the respondent's contract of employment was to work as a clerk in the stores department, that is, to perform clerical duties necessary for the efficient operation of the

department. The respondent has tendered no evidence to show this was not the case. Certainly he has not filed a copy of the contract that the court *a quo* referred to as having been unilaterally changed by the appellant.

There is therefore, in my view, no merit in the argument that the respondent was required to sign a new contract of employment, nor that the real reason for his dismissal was his refusal to sign such contract

The court *a quo* found that the respondent's contract of employment was synonymous with the job description of issuing clerk. After comparing the respondent's duties as an issuing clerk with those he was to perform as a yard clerk the court *a quo* noted as follows in its judgment,

“.....clearly the job description is different. This was a unilateral variation of the contract. It is an unfair labour practice..... In the present case the stores controller was rationalizing his department and saw it fit to transfer the appellant. However, in so doing, he changed the terms of the appellant's contract”

The court rejected the contention made on behalf of the appellant, that the respondent's proposed new job was still clerical in nature and that by failing to take up the job as ordered, the appellant had deliberately refused to obey a lawful instruction. The learned President noted that the appellant had “unilaterally” changed the appellant's contract, a circumstance that, in her view, entitled him to “hold” his employer to the original contract.

For the reasons already stated, I am satisfied that the court *a quo* misinterpreted the facts before it on this point, and therefore misdirected itself.

It is pertinent to note that, as stated in the respondent's job description as an issuing clerk, his immediate supervisor, the Stores Controller, had the authority to assign to the respondent any other responsibilities outside those specifically listed in the job description. The respondent therefore fully appreciated that his immediate supervisor, the stores controller had this authority. That the duties he proposed to assign to the respondent were set out in a different job description, in my view, did not detract from that authority. The instruction to transfer the respondent to another section of the same department, can also be seen in this light.

I am satisfied the instruction did not interfere with the respondent's general conditions of service, or his contract. It was therefore a lawful instruction.

It is evident the respondent misunderstood the nature of his proposed new duties. He took exception to the one duty that required him, in the course of his work, to accompany the driver on deliveries and collections. His perception of this duty was that it was a messenger's job. It is correctly pointed out by the appellant that, since the word 'messenger' did not appear in the job description, there was no basis for the respondent to regard that duty as that of a messenger. The respondent went further to estimate that the duty that he regarded as 'messengering' would take up seventy-five percent of his day's work. The duty in question was one of five listed in the job description. As no breakdown is given in that job description, of the time each task would take up in any particular day, it is, again, not clear how the

respondent arrived at this estimation. The point must also be made that had the appellant wished the respondent to carry out a messenger's duties, it would have come up with a job description for a messenger.

It is in my view also correctly argued for the appellant, that even though as a principle of common law, an employee may not be degraded to an inferior capacity, thereby changing his status, in *casu*, the status of the respondent's job remained the same. He was to remain a clerk, and was not going, as a result, to be perceived differently by his workmates. Indeed, his status at the company was not going to be affected by the move from one section to another within the same department. Instead of refusing to perform the new job and sign the job description, the respondent, even if he believed the order to be unlawful, should have obeyed it and then sought redress in terms of the Code.

His refusal to follow the order was therefore unlawful. Consequently, the penalty of dismissal was justified.

In the premises the appeal is allowed with costs.

The order of the Labour Court is set aside and substituted with the following:

“The appeal be and is hereby dismissed.”

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Henning Lock Donagher Winter, appellant's legal practitioners

Toto & Makoni, respondent's legal practitioners