Judgment No. SC 15/05
Civil Appeal No. 162/04

CITY OF GWERU v JOSEPHAT MUNYARI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 1 & JUNE 2, 2005

A M Gijima, for the appellant

The Respondent in person

ZIYAMBI JA: In accordance with its internal procedures the appellant advertised for the post of Deputy Chief Security Officer. Interviews were conducted on 6 September 1994, the respondent and one Mashavare being among the interviewees. It is common cause that the respondent scored the highest points during the interview and he was recommended by the panel for the post. Mashavare scored the second highest number of points.

In keeping with the appellant's procedures the recommendations and results of the interviews were forwarded to the manager or immediate superior of the department concerned for final decision as to which of the candidates should be appointed to the post. The immediate superior selected Mashavare. He was appointed to the post of Deputy Chief Security Officer.

The respondent was aggrieved by the appointment. He took the view that having scored the highest points at the interview and having been recommended for the post by the panel, he was unfairly treated when the appellant appointed a person less qualified for the post than he was. He lodged a complaint with his head of department and a grievance panel was convened on 30 November 1994. The panel ruled against him. He appealed to the Management Committee which also ruled against him on 1 February 1995. Not satisfied with the result, the respondent appealed to the General Purpose Community and Services Manpower Committee on 25 April more than two months later. That committee upheld the previous decisions.

The respondent approached the Minister of Local Government Rural and Urban Development on 8 December 1995. He wrote a letter of complaint. That Ministry, by letter dated 28 February 1997, referred the matter to the Ministry of Public Service Labour and Social Welfare for adjudication.

The Labour Relations Officer gave a determination on 4 March 1999. He found that the dispute was prescribed since it arose in 1994 and should have been reported within 180 days. (See s 94 (1) (b) of the Labour Relations Act [Chapter 28:01] (now the Labour Act)). He dismissed the application. The respondent appealed to the Senior Labour Relations Officer who confirmed the determination of the Labour Relations Officer in the following words:-

> "The glaring truth about this matter is that it is as a matter of fact prescribed. Accordingly the Labour Relations Officer was correct in dismissing the matter on those grounds. In the circumstance, I find no convincing arguments from Appellant's grounds of appeal that could lead to a different decision.

> Even if the matter was to be entertained and determined on its merits it is highly improbable that the decision would be in his favour for the following reasons.
>
> Firstly, the matter is one where the Labour Relations Officer has no jurisdiction over. Who to promote and who not to promote is entirely the discretion of the employer. Apart from oral interview results the employer has many other factors to consider before promoting anyone, working relationships being one of them.
>
> Secondly, therefore, the matter does not need the intervention of a third part, (*sic*) it is purely an in house matter, which was adequately dealt with, by the grievance panel on 30 November 1994, the Management Committee on 1 February 1995, the General Purpose Community and Services Manpower Committee on 25 April 1995 and the Ministry of Local Government.
>
> Apparently, irrespective of volumes of documents attached to this matter, none of them carries appellant's prayer. It is not known how he wants the matter redressed apart from saying that he wants the matter solved by City of Gweru. While on the other hand, City of Gweru argues that the matter was dealt with and concluded on 25 April 1995.
>
> It is unfortunate that appellant lost at all stages but feels that, simply because the matter was not decided in his favour, justice was not done to it (*sic*).
>
> In any case, however, because of prescription the matter cannot be entertained by a Labour Relations Officer or a Senior Labour Relations Officer. In the circumstances the matter is hereby dismissed. Accordingly the determination of the Labour Relations Officer is hereby confirmed".

Undaunted by this the respondent appealed to the Labour Relations Tribunal (now the Labour Court). This time he met with some measure of success. The Labour Court ignored the issue of prescription, and found that the appellant had acted unfairly in preferring Mashavare over the respondent. The Labour Court set aside the promotion of Mashavare and remitted the matter back to the council for setting up a fresh and independent panel to conduct interviews for the post. The judgment was given on 29 April 2004 close to 10 years after the event.

It is against this judgment that the appellant appeals.

The main contention advanced by Mr *Gijima* for the appellant is that the learned President of the Labour Court erred in adjudicating upon an alleged unfair labour practice or dispute which had prescribed in terms of s 94 of the then Labour Relations Act. The alleged unfair labour practice having occurred in 1994 was only referred to the Labour Relations Officer in 1998 long after the 180 days prescribed by s 94 of the Act had lapsed.

The appellant's contention is of course correct. S 94 of the Act before its amendment by the s 31 of the Labour Relations Act No. 17 of 2002 provided as follows:

> **Prescription of disputes**
>
> (1) Subject to subsection (2), after the 1st January, 1993, no labour relations officer shall entertain any dispute or unfair labour practice which-
>
> (a) arose before 1st January, 1993, unless it is referred to a labour relations officer within one hundred and eighty days from 1st January, 1993, and any debts arising therefrom have not been prescribed in terms of the Prescription Act [*Chapter 8:11*];
>
> (b) arises after 1st January, 1993, unless it is referred to a labour relations officer within one hundred and eighty days from the date when such dispute or unfair labour practice first arose.
>
> (2) Subsection (1) shall not apply to an unfair labour practice which is continuing at the time it is referred to or comes to the attention of a labour relations officer.
>
> (3) For the purpose of paragraph (h) of subsection (1), a dispute or unfair labour practice shall be deemed to have first arisen on the date when-
>
> (a) the acts or omissions forming the subject of the dispute or unfair labour practice first occurred; or
>
> (b) the party wishing to refer the dispute or unfair labour practice to the labour relations officer first became aware of the acts or omissions referred to in paragraph (a), if such party cannot

> reasonably be expected to have known of such acts or omissions at the date when they first occurred.

The Labour Court got it wrong. It had no jurisdiction to entertain the matter which had long prescribed. On this ground the appeal succeeds.

The alternative contention advanced by Mr *Gijima* was that the learned President of the Labour Court erred in finding that the appellant's conduct amounted to an unfair labour practice.

It is common cause that the decision not to promote the respondent was reviewed and upheld at various times by the Grievance Panel convened by the respondent's head of department, the Management Committee and the General Purpose Community and Services Manpower Committee. There is no allegation or evidence that any of these bodies acted partially or improperly. The sole contention advanced by the appellant was that he was entitled to the promotion because he scored the highest points at the interview and was recommended for the post by the panel who placed Mashavare in the second place.

As the Senior Labour Relations Officer found, the decision to promote or not to promote lies within the discretion of the employer. Indeed clause 7 of the Conditions of Service of the appellant which is applicable to all its employees, provides that:-

> "No person may claim appointment to the fixed establishment as a right by reason of fulfilment of the qualifying conditions".

In terms of these conditions the respondent has no right to claim a promotion or appointment. Promotion is the province of the employer who is not obliged to promote the most suitable person for the job and failure to promote the respondent was not an unfair labour practice.

The respondent argued that his appointment was not made by the Management Team but by a Head of Department in violation of the Conditions of Service. However although clause 3 states that :

> "An appointment, transfer or promotion to a post within grade 11 to 7 shall be made by the Management Team".

Clause 4 contains the proviso that:

> "… The employer reserves the right to add to, subtract or in any other way amend the delegation conferred in clauses 3 and 4".

The appellant was empowered by this clause to delegate that task to any person of its choice. Accordingly, no valid ground of complaint arises from the fact that the Head of Department and not the Management Team made the promotion.

For the above reasons the appeal is allowed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Danziger & Partners, appellant's legal practitioners