

REPORTABLE (66)

SIMBI (STEELMAKERS) (PRIVATE) LIMITED
v
M. SHAMU & OTHERS

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & PATEL JA
HARARE, 18 JUNE & 20 NOVEMBER 2015

J. Masango, for the appellant

O. Shava, for the respondent

PATEL JA: This is an appeal against the decision of the Labour Court dismissing an appeal against the award of an arbitrator made in favour of the respondents.

Background

The respondents, who are forty-three in number, were employed by the appellant on monthly contracts that were continuously renewed. In the longest instance, the employee's contract had been renewed for six years. On 19 May 2010 the appellant terminated all forty-three contracts on notice without giving any reason other than that the contracts had expired.

The dispute between the parties was referred to arbitration. The respondents claimed that they had become permanent employees in terms of s 12(3) of the Labour Act [*Chapter 28:01*]. The arbitrator upheld the respondents' claims and ordered their reinstatement or the payment of damages *in lieu* of reinstatement. The appellant then appealed against that award to the Labour Court.

Decision of the Labour Court

In arriving at its decision, the Labour Court referred to various international labour standards that require safeguards against the recourse to fixed term contracts that are designed to avoid the protection of employees from the termination of their employment without valid reason. The court found that the relevant provisions of the Labour Act conform with these standards in order to protect workers from short term contracts generally. In particular, where a short term contract is repeated for more than six weeks in any period of four consecutive months, it becomes a contract of permanent employment by virtue of s 12(3) of the Act.

The court further held that the practice of repeated short term contracts constitutes casualisation of labour prohibited by the Act as read with the governing international standards and that this is buttressed by s 46(1) of the Constitution, which enjoins the courts to take international law into account, and by s 65(4) of the Constitution, which requires the implementation of equitable and satisfactory conditions of work.

With respect to the final ground of appeal relating to the arbitrator's adjustment of the allowances payable to two of the respondents, the court found that the arbitrator's award was grounded in the information that was presented to him and did not involve any gross misdirection on the facts. Therefore, there was no basis for interfering with that part of the award.

The appeal was accordingly dismissed in its entirety with each party being ordered to bear its own costs.

Grounds of Appeal and Submissions by Counsel

The grounds of appeal herein are somewhat prolix and repetitive. In summary, they aver that the court *a quo* erred in the following respects:

- interpreting the provisions of the Labour Act to mean that the respondents had become permanent employees
- holding that the renewal of fixed term contracts *in casu* amounted to the casualisation of labour
- misinterpreting and misapplying the relevant international labour standards
- not holding that the respondents' claims had prescribed, such claims having been made more than two years after the initial contracts had expired.

At the hearing of the appeal, Mr *Masango*, for the appellant, abandoned the last ground of appeal relating to prescription, presumably on the basis that this issue was not raised before the arbitrator or the Labour Court. In any event, I take the view that

this concession was properly made, having regard to the principle that prescription does not ordinarily begin to run until the claimant's cause of action has fully crystallised.

In relation to the substantive grounds of appeal, Mr *Masango* submits that international instruments cannot avail where the domestic law is clear and the court *a quo* clearly misdirected itself in importing the concept of casualisation of labour. By the same token, the court's reliance on the historical context was unnecessary and misplaced because the relevant provisions of the Labour Act are clear and do not entail any absurdity. The Act draws a clear distinction between casual employment and fixed term employment and expressly allows the creation, renewal and termination of fixed term contracts, even on a monthly basis. This is buttressed by s 5(d) of the Labour (National Employment Code of Conduct) Regulations 2006 (S.I. 15/2006) which stipulates that a fixed term contract may be lawfully terminated at the expiry of its fixed duration.

Mr *Shava*, for the respondent, accepts that the Labour Act differentiates between fixed term and casual employment and also contemplates the renewal of fixed term contracts. He submits that this accords with the literal interpretation of the relevant provisions of the Act. He further submits that the court *a quo* correctly proceeded beyond this literal interpretation to consider the mischief aimed at by s 12(3) of the Act. In this regard, the historical context shows that the legislature intended to protect employees against the abuse of fixed term contracts where permanent employment is available. The literal application of s 12(3) leads to the absurdity of rejecting the casualisation of labour and yet allowing the renewal of fixed term contracts.

Relevant Statutory and Constitutional Provisions

Section 12(3) of the Labour Act, the interpretation of which constitutes the crux of this appeal, regulates the duration of a contract of employment that does not specify its duration or date of termination. It provides as follows:

“A contract of employment that does not specify its duration or date of termination, other than a contract for casual work or seasonal work or for the performance of some specific service, shall be deemed to be a contract without limit of time:

Provided that a casual worker shall be deemed to have become an employee on a contract of employment without limit of time on the day that his period of engagement with a particular employer exceeds a total of six weeks in any four consecutive months.”

I note in passing that s 12 was recently amended by s 4 of the Labour Amendment Act 2015 (No. 5 of 2015) in several respects appertaining to the continued subsistence of fixed term contracts and contracts for casual, seasonal or piece work. The amendment also deals with the termination of contracts by notice and the payment of compensation for loss of employment. By virtue of s 18 of the amending Act, s 12 of the principal Act as amended “applies to every employee whose services were terminated on three months’ notice on or after the 17th July, 2015”. These retrospective changes to the Labour Act were obviously designed to address the stark implications of the landmark decision of this Court in *Nyamande & Donga v Zuva Petroleum (Pvt) Ltd* SC 43/15. At any rate, they do not apply to the respondents *in casu* as their contracts of employment were terminated in May 2010. Ironically, presumably as an incident of hastily crafted legislation, the intended benefits of the amended provision also do not extend to the appellants in the *Zuva Petroleum* case, as they too were discharged before the stipulated date of 17 July 2015, that being the date when judgment was handed down in that case.

Turning to the relevant constitutional provisions, the learned judge *a quo* invoked s 65(4) as read with s 46(1)(c) of the Constitution to fortify his interpretation of the Labour Act. Section 65(4) of the Constitution declares that:

“Every employee is entitled to just, equitable and satisfactory conditions of work.”

Section 46 governs the interpretation of Chapter 4 of the Constitution, being the Declaration of Rights. With particular reference to international law, it provides that:

“When interpreting this Chapter, a court, tribunal, forum or body –
(a);
(b);
(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
(d);
(e);
in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.”

Also relevant for interpretive purposes is s 327 of the Constitution relating to international conventions, treaties and agreements. The salient provisions are contained in ss (2) and (6) as follows:

“(2) An international treaty which has been concluded or executed by the President or under the President’s authority –
(a) does not bind Zimbabwe until it has been approved by Parliament; and
(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.”

“(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to

an alternative interpretation inconsistent with that convention, treaty or agreement.”

Fixed Term Employees or Casual Workers

It seems reasonably self-evident that the relevant provisions of the Labour Act draw a clear distinction between casual or seasonal workers and employees on fixed term contracts. The term “casual work” is defined in s 2 of the act to mean “work for which an employee is engaged by an employer for not more than a total of six weeks in any four consecutive months”, while “seasonal work” means “work that is, owing to the nature of the industry, performed only at certain times of the year”. On the other hand, fixed term contracts are specifically distinguished in s 12(2)(b), which requires the employer to provide written particulars of “the period of time, if limited, for which the employee is engaged”, and in s 12B(3)(b), which relates to the consequences of “termination of an employment contract of fixed duration” in certain circumstances.

The distinction is pointedly captured and articulated in s 12(3) itself. This provision recognises three different and distinct categories of employment, *i.e.* a contract of fixed duration, a contract for casual, seasonal or piece work, and a periodic contract without limit of time. In the first category, the duration or date of termination of the contract is clearly stipulated, whereas in the third category it is not expressly specified. Ordinarily, the same would apply to contracts for casual, seasonal or piece work, being contracts the duration of which cannot be specifically delimited due to the nature of the work that they involve. However, once a contract for casual work exceeds the prescribed

period of a total of six weeks in any four consecutive months, it is deemed to have become a contract of employment without limit of time.

The critical question for determination *in casu* is whether the categories of casual work and fixed term employment are mutually exclusive. In this regard, the distinguishing characteristics of the two categories are instructive. First and foremost, a fixed term contract expires automatically upon the effluxion of its stipulated period, whereas the duration of a contract of casual work will depend upon the nature of the work involved and the circumstances under which it is to be carried out. It is this indeterminate nature of its duration that entails the deemed conversion of a casual contract into one of indefinite employment in terms of the proviso to s 12(3). On a literal and grammatical interpretation of s 12(3), and without any attendant absurdity, the proviso clearly does not apply to an employee on a fixed term contract.

There are other equally significant distinguishing features as between the two categories of employment:

- In terms of s 12(4) of the Act, the periods of notice required to terminate contracts of employment vary according to the duration of the given contract, being only one day in the case of casual or seasonal work.
- Section 12(5) of the Act stipulates different periods of probation and different notice periods during probation in respect of casual or seasonal work as compared with all other contracts of employment.

- Generally speaking, a casual worker is not entitled to the minimum conditions of employment laid down in the Labour Act or in subsidiary regulations or collective bargaining agreements – which is the reason why a casual worker usually receives remuneration at a rate that is higher than the minimum rate so as to compensate for the loss of other prescribed benefits.
- The Consolidated Collective Bargaining Agreement: Engineering and Iron and Steel Industry 1990 (S.I. 282/1990), which regulates the sector *in casu*, specifically differentiates the two forms of employment in s 3(1), by defining a casual worker as one “who is not engaged as a contract worker” and a contract worker as one “who is engaged for a specified period, task or project”.

In the final analysis, having regard to the relevant provisions of the Labour Act and its subsidiary legislation, I take the view that the court *a quo* patently misdirected itself in concluding that the respondents were casual workers and that they subsequently graduated to the status of employees on indefinite or permanent contracts of employment.

Concept of Casualisation of Labour

The learned judge *a quo* held that the repeated re-engagement of employees on short term contracts, where work of a permanent nature is available, constitutes the “casualisation of labour”. He reasoned that the legislature intended to proscribe this unfair labour practice through s 12(3) of the Labour Act. In arriving at this proposition, he relied upon earlier decisions of the Labour Court and the injunction in the Act to construe it “in such manner as best ensures the attainment of its purpose” as

declared in s 2A(2) of the Act, *i.e.* “to advance social justice and democracy in the workplace”. He also relied upon ss 65(4) and 46(1)(c) of the Constitution (cited above) as well as the applicable international labour standards on the subject. (I shall revert to this latter aspect later in this judgment).

The avowed object of s 12 of the Labour Act is to regulate the duration and termination of employment contracts. As I have already stated, the proviso to s 12(3) is confined to casual workers and cannot be construed to extend to employees on fixed term contracts. In my view, s 12(3) does not, whether explicitly or by necessary implication, prevent an employer from engaging employees for successive fixed terms, provided that they continue to enjoy the full rights and benefits that are accorded under Part IV of the Act and to which they are entitled as fixed term employees. By the same token, employers cannot be burdened or penalised by having fixed term employees foisted upon them on a permanent basis. In this regard, the Labour Court cannot invoke its equitable jurisdiction, on the basis of advancing social justice in the workplace, to insinuate into s 12(3) an interpretation that is simply not supported by its unambiguous language. To do so involves the double sin of doing violence to what Parliament itself has enacted as well as rewriting the terms of a contract that has been freely and voluntarily entered into, by altering something so fundamental as its agreed and intended duration. In short, the concept of casualisation of labour does not form part of s 12 as originally framed, *i.e.* before its amendment by Act No. 5 of 2015.

Impact of International Labour Standards

In interpreting the Labour Act so as to avoid or minimise the casualisation of labour, the court *a quo* relied upon two instruments formulated under the auspices of the International Labour Organisation, namely, the Termination of Employment Convention 1982 (No. 158) and its supplementary Termination of Employment Recommendation 1982 (No. 166). In particular, the court invoked Articles 2.3 and 4 of the Convention. Article 2.3 enjoins Member States to provide adequate safeguards against recourse to fixed term contracts the aim of which is to avoid the protection afforded by the Convention. Article 4 sets out the principal form of such protection by proscribing the termination of employment unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the employer. Paragraph I.3 of the Recommendation reiterates the injunction to provide safeguards against recourse to fixed term contracts and elaborates the measures to be taken for that purpose, including the deeming of contracts for a specified period of time to be contracts of employment of indeterminate duration, particularly when they are renewed on one or more occasions.

Although the court *a quo* might have correctly interpreted the substantive protection accorded by these international labour standards, it appears to have overlooked or disregarded two critical aspects bearing upon their application to the case before it. Firstly, Article 2.2 of the Convention and Paragraph I.2(b) of the Recommendation explicitly entitle Member States to exclude certain categories of employed persons from all or some of their provisions. These categories include workers engaged under contracts

for a specified period of time or for a specified task, workers on probation or a qualifying period of employment, and workers engaged on a casual basis for a short period. Secondly and more significantly, the learned judge *a quo* clearly misconceived the principles governing the application of international law in the domestic sphere. As was observed in *Magodora & Others v Care International Zimbabwe* SC 24/14, at p. 6 of the cyclostyled judgment:

“I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an Act of Parliament.”

This common law position is firmly entrenched and codified in the relevant provisions of the Constitution that I have cited earlier. In terms of s 46(1)(c), courts are enjoined when interpreting the Declaration of Rights to take into account all treaties and conventions “to which Zimbabwe is a party”. More pointedly, s 327(2) declares that an international treaty “does not bind Zimbabwe until it has been approved by Parliament” and “does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament”. By virtue of s 327(6), the duty of the courts to interpret legislation in a manner that is consistent with any international convention, treaty or agreement is expressly confined to an instrument “which is binding on Zimbabwe”.

According to the ratification lists for International Labour Organisation conventions, as at 30 September 2015, Zimbabwe has not ratified the Termination of

Employment Convention 1982 (No. 158). Accordingly, as is explicitly recognised in Article 16 of the Convention, it is not binding upon Zimbabwe, notwithstanding its status as a Member of the International Labour Organisation.

What all of the foregoing means is that the provisions of Convention No. 158, as supplemented by Recommendation No. 166, cannot be invoked as definitive or decisive aids to the interpretation of our legislation. Moreover, unless and until those provisions are specifically domesticated, they can be nothing more than persuasive guides in interpreting and applying the law. And even then, they certainly cannot be applied so as to override or negate clear provisions embodied in Acts of Parliament. In the instant case, the court *a quo* manifestly misdirected itself in applying the provisions of Convention No. 158 to interpret s 12(3) of the Labour Act in a manner that exceeded the bounds of its express and unambiguous language.

Disposition

In the result, I take the view that the appeal is merited and must be allowed on the three grounds adverted to above. In arriving at this conclusion, I am not oblivious to the basic socio-economic reality that pervades the labour market, not only in this country but also almost everywhere else. The markedly unequal bargaining power of prospective employers on the one hand and aspirant employees on the other more often than not entails the latter having to succumb to the dictates of the latter insofar as concerns the material terms and conditions, including the duration, of their contracts of

employment. But this is an evil that the legislature is best placed and empowered to combat through the enactment of legislation clearly designed to achieve that purpose.

As regards costs, I do not think that this is an appropriate case in which costs should follow the cause. The respondents' contracts of employment were terminated in May 2010 and it has taken over five years for this matter to be finally resolved. More pertinently, the position taken by the respondents was not entirely unarguable or indefensible in light of previous decisions of the Labour Court that were predicated on considerations of equity.

One final aspect concerns the decision of the court *a quo* relating to the adjustment of the allowances payable to two of the respondents. The appellant did not challenge this finding on appeal to this Court and it therefore remains intact.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:
 - “(1) The appeal is partially allowed with no order as to costs.
 - (2) The arbitrator's award dated the 15th of October 2010 is set aside in respect of his rulings on casualisation of labour and unfair dismissal.
 - (3) The termination of the respondents' contracts of employment be and is hereby upheld.”

GARWE JA: I agree

GOWORA JA: I agree

Murambasvina, Tizirai-Chapeanya Legal Practitioners, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners