

REPORTABLE (18)

CHEMCO HOLDINGS (PRIVATE) LIMITED
v
L TENDERE & 24 ORS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA, & MAVANGIRA JA
HARARE, NOVEMBER 22, 2016 & MARCH 13, 2017

E T Matinenga, for the appellant

F Chiwashira, for the respondents

APPEAL FROM A DECISION OF THE LABOUR COURT

ZIYAMBI JA:

[1] It appears that the respondents named in the proceedings both in the Labour Court and before this Court are L Tendere and 17 Others. The names listed in the proceedings differ from those listed in Annexure A which is the list submitted by the Trade Union¹. Only 18 of the respondents listed in Annexure A are named in these proceedings. This judgment relates to those 18 respondents. For avoidance of doubt their names are listed in the addendum to this judgment.

[2] The respondents are former employees of the appellant. In terms of an agreement signed on 20 September 2012, the appellant sold its timber building supplies division, T S Timbers, to

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Rutimba Housing (Pvt) Ltd (“Rutimba”), as a going concern. It was expressly stated in the agreement that the transfer of the undertaking would be on terms not less favourable to the employees than those enjoyed by them as employees of the appellant. It was further stated that the transfer would be effective from 1 June 2012.

[3] Some 10 months later and on 9 July 2013, the respondents, then in the employ of Rutimba, and acting through the Zimbabwe Federation of Trade Unions, (ZFTU), registered a complaint with the labour inspectorate of the Ministry of Public Service Labour and Social Welfare, alleging a case of ‘alleged unlawful transfer of undertaking’. Thereafter, on the 10 July 2013, the ZFTU wrote to the Minister of Labour requesting an investigation and inspection of:

“a transfer of undertaking alleged to have taken place between (TSL) CHEMCO HOLDINGS and RUTIMA HOUSING between June and September 2012 in order to stop the suffering the workers are being subjected to.”

They alleged:

“What has prompted us to make this application is the way workers are being treated by Rutimba Housing. They are being arbitrarily dismissed, reshuffled and demoted which is a contravention of section 16 of the Labour Relations Act Chapter 28:01.

Efforts to engage Rutimba Housing in an effort to look into the workers’ grievances have yielded nothing as the company is not forthcoming and does not attend hearings. They have even attempted to have the employees sign new contracts commencing 1st day April 2013 without terminating the existing contracts see Annexure B.

All former TSL (CHEMCO) employees have had some allowances and conditions they used to enjoy scraped (sic) without explanation and yet Rutimba Housing has improved conditions or increased salaries/wages for other employees except former CHEMCO (TSL) Holdings employees...”

Clearly the grievance of the employees, (the respondents), was against their new employer. However, that notwithstanding, proceedings were instituted against their former employer, the appellant.

[4] The matter was referred to conciliation on the 21 July 2013 and a certificate of no settlement issued on the 21 August 2013. It was then referred to an arbitrator for compulsory arbitration.

The arbitrator's terms of reference were stated to be:

- “(1) Whether or not the transfer of undertaking by TS TIMBERS was lawful;
- (2) To determine the appropriate remedy.”

The terms of reference contained an inaccuracy. It is common cause that TS Timbers was a trading division of the appellant and was sold to Rutimba in terms of the agreement. The terms of reference incorrectly stated the transfer to have been made by TS Timbers. The transferor was the appellant.

[5] The arbitrator found that the transfer was unlawful for failure to consult the respondents before it took place. He said:

“The effective date according to evidence at hand was the 1st of June 2012. For this reason alone based on the claimants' grievance of not being consulted, the respondent was supposed to consult the claimants regarding their status in line with the transfer.

The minutes of the meeting held by the works council held on the 24 July 2012 cannot be taken seriously for the following reasons: -

- i. The meeting took place after the effective date of sale between the purchaser and the seller.
- ii. The minutes were not signed by the works council thereby making them questionable and put the respondent to the strictest proof regarding the authenticity of those minutes.

It is absurd for an employer to consult employees after the transfer. The very act of unilateral act (sic) of invoking section 16 of the Labour Act [CAP 28:01] by the respondent constitutes unfair labour practice.”

He awarded:

“AWARD

Wherefore after reading documents filed of record and submissions of both parties it is ordered that:

1. The claimant's claim is hereby considered in the context that respondent Chemco Holdings (Pvt) Ltd committed unfair labour practice and it is the opinion of this tribunal that the respondent is severally liable for the employees. In light of this, parties to negotiate quantum of terminal benefits due to the claimants up to the date

of unlawful transfer, failure of which either party to approach this tribunal for quantification for of terminal benefits entitled to the claimants.”

[6] The appellant appealed, unsuccessfully to the Labour Court which upheld the award.

[7] The grounds of appeal before this Court raise three issues for determination. They are:

- Whether the Arbitrator had the jurisdiction to make the determination referred to him by the Labour Officer;
- Whether the Arbitrator correctly found the appellant to have committed an unfair labour practice;
- Whether the award of terminal benefits to the respondents was competent;

Whether the Arbitrator had the jurisdiction to make the determination referred to him by the Labour Officer

[8] It was submitted on behalf of the appellant that in making a declaration as to the lawfulness or otherwise of the transfer the Arbitrator exceeded his jurisdiction. Mr Chiwashira for the respondent, however submitted that the arbitrator acted within his jurisdiction and the appeal ought to be dismissed for lack of merit.

The jurisdiction of an arbitrator appointed in terms of the Labour Act is confined to determining disputes or unfair labour practices in terms of s 93 of the Labour Act [*Chapter 28:01*] (“the Act”). With regard to such disputes s 98(9) of the Act provides:

“(9) In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court.”

It seems to me that the Arbitrator’s error stemmed from the terms of reference issued by the Labour Officer. In essence what was being requested of him was to review the procedure by

which the transfer of the undertaking was effected and to make a declaration as to the legality of the transfer.

It has been held that the Labour Court does not have the jurisdiction to issue a declaratory order. That jurisdiction is reposed in the High Court.² It follows that the arbitrator did not have the jurisdiction to pronounce on the alleged lawfulness or otherwise of the transfer.

[9] In any event, I hold the view that the arbitrator's finding that the transfer of the undertaking was a nullity is wrong. This finding was based on the alleged lack of consultation with the works council before transfer of the undertaking. The relevant provision in the Labour Act is s 25(5). It provides:

- “(5) Without prejudice to the provisions of any collective bargaining agreement that may be applicable to the establishment concerned, a works council shall be entitled to be consulted by the employer about proposals relating to any of the following matters—
- (a) the restructuring of the workplace caused by the introduction of new technology and work methods;
 - (b) product development plans, job grading and training and education schemes affecting employees;
 - (c) partial or total plant closures and mergers and transfers of ownership;
 - (d) ...
 - (e) ...
 - (f) ...
- (6) Before an employer may implement a proposal relating to any matter referred to in subsection (5), the employer shall—
- (a) afford the members of the works council representing the workers' committee a reasonable opportunity to make representations and to advance alternative proposals;
 - (b) consider and respond to the representations and alternative proposals, if any, made under paragraph (a) and, if the employer does not agree with them, state the reasons for disagreeing;

² S 14 of the High Court Act [Chapter 7:06]; *Agribank v Machaingaiifa & Anor* 2008 (1) ZLR 244; Labour Act [Chapter 28:01] s 89 (6);

- (c) generally, attempt to reach consensus with the members of the works council representing the workers' committee on any matter referred to in subsection (5).

[Section inserted by section 15 of Act 17 of 2002]”.

[10] The provision requires the employer intending to transfer ownership to afford, to members of the works council representing the workers committee, an opportunity to make representations and advance alternative proposals. The employer is placed under no obligation to accept the proposals. He simply has to give reasons for disagreeing with them. No power of veto is given by the statutory provision to the works council or to the employees. That is to say, s 25 does not authorise the works council or the employees to stop the transfer of ownership. It does not nullify a transfer which has taken place in the absence of consultation. It imposes no sanction for non-compliance.

[11] This may well be because the legislature has, in s 16 of the Labour Act, provided adequate recourse for employees affected by a transfer of an undertaking. In the end, the aim is to ensure that the tenure and conditions of employment enjoyed by the employees under their former employer are not reduced or diminished by the new employer without their consent. Section 16 which is set out below, provides that assurance.

[12] **“16 Rights of employees on transfer of undertaking**

- (1) Subject to this section, whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted.
- (2) Nothing in subsection (1) shall be deemed—
 - (b)....
 - (c) to affect the rights of the employees concerned which they could have enforced against the person who employed them

immediately before the transfer, and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer;

- (3) It shall be an unfair labour practice to violate or evade or to attempt to violate or evade in any way the provisions of this section.” (My emphasis)

[13] Further, it is apparent from the record that the issue of non-consultation was wrongly resolved in favour of the respondents. The arbitrator appeared to be labouring under the view that the consultation alleged to have been done by the appellant was done after the transfer. By this he meant after the effective date as set out in the agreement of transfer. That was his main reason for holding that the consultation did not comply with s 25.³

[14] As stated above, the agreement of transfer was signed on 20 September 2012. The date on which the contract was signed was the date on which its provisions took effect. This includes the clause which stated the effective date to be 1 June 2012. As at that date, it appears negotiations were still in progress and, according to the appellant, its employees were being consulted and advised of their rights.

[15] In my view any consultation done before the agreement was signed on 20 September 2012 would have been done before the transfer.

2. Whether the Arbitrator correctly found the appellant to have committed an unfair labour practice

[16] The arbitrator was required to enquire into the lawfulness of the transfer and the remedy. He found the transfer to be unlawful and void and declared the appellant to be guilty of an

³ See para [5] supra

unfair labour practice. In my view he exceeded his terms of reference which terms did not require him to determine whether or not an unfair labour practice had been committed.

[17] In any event, as discussed above, unlike the position which obtains with a breach of s 16, a failure to observe s 25 is not, in terms of the Act, an unfair labour practice. Actions constituting unfair labour practice are set out in ss 8 and 16(3) of the Act. There was no finding, and indeed the record reveals no evidence, that the appellant had violated, evaded, or attempted to violate or evade any of the provisions of s 16. The award was premised solely on a finding of failure to consult in terms of s 25 of the Act. In my view, no unfair labour practice was shown to have been committed by the appellant and the Labour Court erred in law when it confirmed the finding by the arbitrator that the appellant had committed an unfair labour practice.

3. Whether the award of terminal benefits to the respondents was competent.

[18] Quite clearly the respondents were transferred, with the undertaking, to another employer. Their employment was not terminated. In terms of the contract and also by operation of s 16 of the Act, the respondents were transferred to Rutimba on terms not less favourable than they enjoyed in the employ of the appellant. At the very least, they were transferred on the same terms. From the date of transfer, they were employed by Rutimba to whom all grievances concerning their employment were to be addressed. Rutimba, the new employer, stepped into the shoes of the former employer for all purposes.

[19] The respondents continued in the employment of Rutimba and, as at the date of their approach to the Labour officer for the institution of these proceedings, were employees of Rutimba.

In the letter of complaint addressed to the Department of Labour it was alleged:

“What has prompted us to make this application is the way workers are being treated by Rutima Housing. They are being arbitrarily dismissed, reshuffled and demoted which is a contravention of s16 of the Labour Act [*Chapter 28:01*]”⁴

Their submissions to the arbitrator as articulated on 24 September 2013 by the Trade Union which represented them, read, in part: -

“They (the respondents) had some allowances scrapped and conditions changed by the new employer without any explanation;
There was ‘arbitrary dismissal of workers’ by the new employer:..”.
(My emphasis)

[20] Once the respondents moved from one employer to the other the latter, in terms of both the contract and s 16 of the Act, assumed all responsibility for the respondents. Rutimba, being the new employer, was obligated by s 16 to ensure that the conditions of service enjoyed by the respondents were no less favourable than those they enjoyed with their former employer, the appellant. The respondents’ cause of action, if any, lay against Rutimba, not against the appellant.

[21] While Section 16 (2) (c) of the Act grants the right to the respondents to proceed against both the former and current employers, this right can only be exercised in respect of a cause of action which arose, and could have been enforced against the former employer, before the transfer of ownership took place. However, in this case, the respondents’ alleged claim arose after the transfer of ownership. The option to proceed against their former employer was therefore not available to them.

[22] It follows from the above that no legal basis existed for the award made by the arbitrator and the Labour Court erred in upholding the award which was evidently wrong.

[23] The appeal is, therefore, upheld. No order for the costs

⁴ Record p 89

of this appeal was prayed in the Notice of Appeal and no order of costs will be made.

[24] It is ordered as follows:

1. The appeal is allowed.
2. The judgment of the Labour Court is set aside and substituted as follows:

“The appeal is allowed with costs.

The award of the arbitrator is set aside.”

GWAUNZA JA: I agree

MAVANGIRA JA: I agree

C Kuhuni Attorneys, appellant’s legal practitioners

L Tendere & 24 Ors c/o J Mtausi, Zimbabwe Federation of Trade Unions, respondents’ legal practitioners

ADDENDUM

CHEMCO HOLDINGS (PRIVATE) LIMITED

v

L TENDERE & 24 ORS

LIST OF RESPONDENTS

L TENDERE	1 ST RESPONDENT
ARGINERO M	2 ND RESPONDENT
CHIHWIZA J	3 RD RESPONDENT
GAKAKA I	4 TH RESPONDENT
KUHUDZEWE M	5 TH RESPONDENT
KWARAMBA M	6 TH RESPONDENT
MACHANJA R	7 TH RESPONDENT
MACHEKA M	8 TH RESPONDENT
MAFUSINI O	9 TH RESPONDENT
MAHARA U	10 TH RESPONDENT
MAROWA T	11 TH RESPONDENT
OLOMANI S	12 TH RESPONDENT
MEYA P	13 TH RESPONDENT
MISHI H	14 TH RESPONDENT
MUCHEMWA E	15 TH RESPONDENT
MUROIWA G	16 TH RESPONDENT
MUTERO K	17 TH RESPONDENT
WHITE M	18 TH RESPONDENT