

REPORTABLE (36)

THANDEKILE ZULU
v
ZB FINANCIAL HOLDINGS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, HLATSHWAYO JA,
GUVAVA JA & UCHENA JA
HARARE, OCTOBER 5, 2016 & JULY 27, 2018

M. Gwisai, for the appellant

T. Mpfu, with him *G.R.J. Sithole*, for the respondent

HLATSHWAYO JA: This is an appeal against the entire Judgment delivered by the Honourable Justice G. Musariri in the Labour Court at Harare on 31 May 2013.

The facts of this matter are common cause. The appellant was employed as a clerk by the respondent from 2 September 1991 to 31 October 2009. In January 2009, the appellant fell ill and was granted paid sick leave from 22 January 2009 to 8 February 2009. Thereafter, the leave was extended by 15 days covering the period from 10 February 2009 to 24 February 2009. The appellant then submitted another sick leave application for an indefinite period from 24 February 2009 onwards. By August 2009, the appellant had not yet reported to work and upon enquiry by the respondent, she produced a letter from her medical doctor which confirmed his advice to her to take bed rest from February 2009 onwards.

Come October 2009, the appellant had still failed to report for work and upon enquiry she indicated that she was not feeling well and was unsure as to when she would return to work. As at 30 October 2009, the appellant's cumulative period of absence amounted to 251 days. By letter dated 2 December 2009, the respondent unilaterally terminated the appellant's employment with effect from 31 October 2009.

The termination was in terms of s 14 (4) of the Labour Act. The appellant challenged the dismissal as unfair and in contravention of s 14 (4) of the Act. The matter went before a labour officer who issued a certificate of no settlement and referred it for arbitration. The arbitrator upheld the respondent's claim that the matter had prescribed but nonetheless held that the dismissal was in terms of s 14 (4) of the Labour Act and therefore it was lawful.

Aggrieved by this decision, the appellant appealed to the Labour Court against the decision of the arbitrator. At the hearing in the Labour Court, the respondent's attorney conceded that the matter had not prescribed. The issue that remained for determination by the court was the interpretation of s 14(4) of the Labour Act. The court interpreted a period of one year to mean one calendar year and dismissed the appellant's appeal on the basis that she had exceeded the prescribed number of sick leave days. The appellant appealed to this Court on the following grounds:

1. The Labour Court erred in law in its interpretation of the phrase "any one-year period of service" under s 14 (4) of the Labour Act [*Chapter 28:01*] to refer to a calendar year and in holding that any interpretation of the phrase based on the employee's employment anniversary date would lead to an absurdity. Whereas the correct interpretation of the phrase that accords with social justice at the workplace and principles of fair dismissal includes computation based on the employee's anniversary

date, use of the calendar year in fact potentially results in an absurdity of breaking up the continuous period of sick leave by calendar year demarcations which are not provided in the Labour Act and that potentially leads to gross prejudice to the interests of the employer by unduly extending the sick leave.

2. The court *a quo* and Arbitrator Kabasa , erred in law by misinterpreting s 14 (4) of the Labour Act so as to grant an employer unfettered authority to automatically terminate the contract of employment on the expiry of the 180 sick leave days , as a consequence thereof the court *a quo* and the arbitrator wrongfully failed to consider the appellant's submission that despite the expiry of any 180 days of sick leave, the dismissal was still unfair because of the failure by the employer to consult her on whether continued employment was possible and that she had sought, and believed was granted, unpaid sick leave. Given that the illness arose out of pregnancy complications and miscarriages, such failure was a gross misdirection as employees are protected from unfair discrimination on the basis of pregnancy and gender.

From the papers, it appears that the two issues arising from this appeal are whether the court *a quo* erred in its interpretation of s 14 (4) of the Labour Act and whether or not an employer has an unfettered right to terminate employment under s 14 (4) of the Labour Act. I shall consider them in turn below.

1. Whether the court *a quo* erred in its interpretation of section 14 (4) of the Labour Act

It was contended for the appellant that the court *a quo* misinterpreted s 14 (4) of the Labour Act. The provision is couched as follows:

“If , during any one year period of service, the period or aggregate periods of sick leave exceed-

- (a) Ninety days' sick leave on full pay; or

(b) Subject to subsection (3) , one hundred and eighty days' sick leave on full and half pay;
The employer may terminate the employment of the employee concerned ”

Appellant's counsel submitted that the phrase “one year period of service” ought to be construed to mean a period of twelve months calculated from the date on which the appellant commenced employment with the respondent, that is, a period running from 2 September to 1 September the following year, or “anniversary date/period” while the court *a quo* interpreted the phrase to mean “a calendar year” and a third meaning of “a period of twelve months” is another possible literal meaning of the phrase.

The rules of statutory interpretation dictate that the words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. In the case of *Venter v Rex* 1907 TS 910, INNES CJ said the following at 914-5:

“it appears to me that the principle we should adopt may be expressed somewhat in this way: that when to give plain words of a statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, as shown by the context or by such other consideration as this court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature”

This approach was followed by MCNALLY JA in *Chegutu Municipality v Manyara* 1996 (1) ZLR 262 (S) at 264 D-E, where he said:

“There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, ‘unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified as to avoid that absurdity and inconsistency, but no further”

But what if the literal interpretation, the grammatical or ordinary sense of the words, yields two or more meanings, which literal meaning is to be preferred? For, there can conceivably be more than one grammatical meaning of words, as this case clearly demonstrates: a “year” literally could mean “a period of 12 months” or “an anniversary period” or “a calendar year” – all with different computational consequences. In my view, the “absurdity” or “repugnance” principle may be applied to select a literal meaning that does not lead to “some absurdity, or some repugnance or inconsistency with the rest of the instrument”. In other words, the “absurdity or repugnancy” principle, while ordinarily applied vertically to justify a departure from the literal meaning, may, in my view, be deployed horizontally, in specific circumstances, to facilitate a selection of the most appropriate among competing literal meanings.

The *Collins Dictionary of the English Language (1979)* defines “year” as “1. a period of time, the calendar year, containing 365 days or in a leap year 366 days ... and is reckoned from January 1 to December 31. 2. a period of twelve months from any specified date ...”. Thus, this definition encompasses all the three possible meanings indicated above.

In *casu*, the literal interpretation of the provision as suggested by the appellant to mean 12 months calculated from each employee’s anniversary date of engagement, does lead to an absurdity. This means that the respondent, in the present case, would be forced to reinstate an employee who spent 251 days away from work, a period which is outside the statutory limit of 180 days. Such wildly unreasonable result can never have been the intention of the legislature. There is also the added administrative inconvenience of having to calculate the sick leave days based on each employee’s anniversary date of engagement and the consequent inconsistencies from one employee to the other. There is, therefore, adequate reasons for discarding the “anniversary year” literal meaning as suggested by the appellant.

The interpretation given to the phrase by the court *a quo* also leads to an absurdity. It interpreted a period of one year to mean one calendar year, i.e. 1 January to December 31,

and that certainly would create an absurd situation. For instance, if an employee falls sick on 1 July and takes their 180 days of sick leave on full and half pay till 31 December, he or she would still be entitled to apply for sick leave again on 1 January the following year because they would have entered another sick leave cycle. The number of days that the employee would thus spend on sick leave would amount to a period of one year or 365/366 days – a period more than twice the statutory 180 days and, certainly, a situation which could never have been intended by the legislature.

The most appropriate interpretation of the phrase, in my view, should be drawn from s 33 (6) (d) of the Interpretation Act [*Chapter 1:01*] which states that in any enactment, a reference without qualification to a year shall be construed as a reference to a period of twelve months. It logically follows that the year in s 14 (4) means a period of twelve months from the date on which the employee fell sick. In this case, the appellant's sick leave cycle commenced on 22 January 2009 and would end on 21 January the following year. This interpretation is in line with the intention of the legislature to give each employee one hundred and eighty days of sick leave. The appellant clearly exceeded the number of days an employee is entitled to because she was on sick leave for two hundred and fifty-one days instead of one hundred and eighty days. I therefore find that the court *a quo* erred in its interpretation of 'one year period' under s 14 (4) of the Act.

Although the appellant's preferred interpretation has been found to be leading to as much absurdity as the respondent's, she must be viewed as having been successful in challenging the interpretation adopted *a quo*, and, thus, successful on the point in the appeal.

2. Whether the Respondent had an unfettered right to terminate employment under section 14 (4) of the Act

Section 14(4) of the Act permits an employer to terminate the employment of an employee who has exhausted the sick leave prescribed in the Act. The appellant's counsel argued that the provision, however, does not give an employer an unfettered right to terminate such employment. He relied on the decision of this Court in *Zimasco v Maynard Marikano* SC 6/14 where, in that case, it was argued by the appellant that s 14 (4) of the Act gives an employer the absolute right to elect to terminate the employment of the employee who has exhausted the maximum sick leave period specified in the Act. It had been further contended that the right to terminate is not subject to compliance with any particular procedures. These submissions were rejected by that court. At page 8 of the judgment, GARWE JA said:

“since the decision to terminate an employment contract has far reaching consequences, one should assume that before such a decision is taken the employer would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s 14 (4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. In my view, it would not be proper for an employer to invoke the provisions of s 14(4) of the Act and, without notice to the employee, proceed to terminate his contract of employment. In short, the *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void.”

In essence, what these remarks mean is that the respondent ought to have given notice to the appellant that it intended to terminate her employment due to the fact that she had exceeded the number of sick leave days specified in the law. However, it is important to point out, with respect, that the above remarks by GARWE JA were *obiter*. The *ratio decidendi*, in my view, was that the group policy and procedures were not complied with by the appellant in that case. The learned judge held that since s 14 (1) of the Act provides that unless more favourable conditions are provided for in an employment contract, sick leave shall be provided

for in terms of s 14 of the Act, and the appellant ought to have followed what was stipulated in the policy and procedures that were incorporated in the employment contract.

I turn now to address the question whether the employer has an unfettered discretion to terminate employment under s 14 (4) of the Act. It is important to restate the provision:

“If, during any one-year period of service the period or aggregate periods of sick leave exceed –

(a)...

(b) subject to subsection (3), one hundred and eighty days’ sick leave on full and half pay: the employer may terminate the employment of the employee concerned”

A reading of this section shows that it is silent on the requirement for the employer to give notice to the employee before terminating employment under the section. In the absence of such a requirement, to hold that the employee ought to have been afforded a chance to be heard before dismissal is tantamount to “reading into” and altering the clear language of the statute.

The remarks of GUBBAY JA (as he then was) in *Nxumalo & Ors v Guni* 1987 (1) ZLR 1 (SC) are apposite:

“The language used is plain and unambiguous and the intention of the Law Society is to be gathered there from. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used.”

In this case, the Act gives the employer the discretion to terminate the employment of the employee and does not go further to state that the employee should be notified of the impending dismissal. This provision codifies the common law principle that an employer is entitled to terminate employment due to incapacity. This common law principle is entrenched

in our law and there is a presumption that a statute cannot alter the common law without saying so explicitly. This principle finds authority in the case of *Phiri and Ors v Industrial Steel Pipe (Pvt) Ltd* 1996 (2) ZLR 45 (S), wherein the following was stated at page 49:

“There is a presumption, in the interpretation of statutes, that Parliament does not intend a change in the common law, unless it expresses its intention with irresistible clearness or it follows by necessary implication from the language of the statute in question that it intended to effect such alteration in the common law; for ‘construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction ...’: *per* Lord Halsbury LC in *Bank of England v Vagliano* [1891] C AC 107 at 120.”

In light of the above, I am of the view that the provision does not take away the employer’s unfettered discretion to terminate employment due to incapacity. It would be a gross miscarriage of justice to impose an onerous obligation on the employer where the clear language of the statute does not provide such an obligation.

In the present case it would be unjust for the respondent to be compelled to keep the appellant in employment even after she has been away for an unreasonable period. In *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 SC at p246 the court said:

“... Nonetheless, the fact that the employee is incapacitated by a cause beyond his control - by an act of God, if you like - does not deprive the employer of the right to terminate the contract where the absence was unreasonable. Non-performance by the employee of his duties for an unreasonable time justifies the employer in refusing to perform his part of the contract and considering his obligation at an end. “

The above authority clearly justifies the respondent’s decision to terminate the appellant’s employment after she had been on sick leave for a protracted period.

Furthermore, there is merit in the respondent’s argument that the appellant conducted herself in such a manner as to repudiate the contract of employment. This is so

because it is the employer who sought after her to enquire about the progress of her recovery whilst she made no effort to indicate that she was still interested in returning to work. It would be unreasonable to expect the employer to keep making enquiries when the appellant who had indicated that she was unfit for duty had neither reported recovery nor requested a further period of recuperation after the expiry of 251 days. As was stated in the case of *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR):

“...if the disability persists for a period which, judged on the circumstances of the particular case, renders it unreasonable that the other party should continue bound whilst receiving no benefit from the contract, such party is entitled to terminate the contract..”

In the specific circumstances of this case it would have been onerous to expect the employer to have taken further steps to remind the employee that the period prescribed in the Act had lapsed when it is clear that she herself took no steps to indicate to the employer that she wanted the contract of employment to subsist. That aside, the requirement to give notice, though laudable, is likely to import uncertainties into the clear provisions of the Act. Does the employer notify the employee in anticipation of, or upon, the expiry of the sick leave days? If the former, how is a reply that the employee would be ready to resume work slightly after the expiry of the leave to be treated? If the latter, would that not amount to extending the statutorily stipulated period of sick leave? I therefore find that there was no requirement under s 14 (4) of the Act for the employer to notify the employee before dismissing her from employment. Any miscalculation of the periods of leave that may occur in any given case can safely be dealt with through a challenge of the dismissal.

The appeal, while partially successful in upsetting the reckoning of the sick leave days adopted by the court *a quo*, ought on the whole to be dismissed as that success had no

impact on the outcome of the appeal and may only be considered in assessing the question of costs. This outcome, therefore, requires each party to bear its own costs.

Accordingly, the following order shall issue:

This appeal is dismissed with each party bearing its own costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

GUVAVA JA: I agree

UCHENA JA: I agree

Munyaradzi Gwisai & Partners, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners