

DISTRIBUTABLE (46)

ST. GILES MEDICAL REHABILITATION CENTRE
v
LAMBERT PATSANZA

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & UCHENA JA
HARARE, 23 September 2016

S. Banda, for the appellant

W. Jiti, for the respondent

GUVAVA JA: This is an appeal against a judgment of the Labour Court dated 27 September 2013.

After hearing argument we made an order allowing the appeal in part and indicated that the reasons thereof would be availed in due course. The reasons for that decision are set out below:

BACKGROUND FACTS

The appellant engaged the respondent as a Finance and Administration Manager. The contract was subject to a three months' probationary period. The period of probation was effective from 28 February 2012 and was to end in May 2012.

On 31 May 2012 the respondent was advised that his position was not going to be confirmed as his evaluation had not been satisfactory. The appellant however decided to extend the probation period by one month. This was in an attempt to allow the respondent to remedy the inconsistencies which had been noted by the appellant during his evaluation which had taken place at the beginning of May 2012. The respondent refused to accept an extension of the period of probation, arguing that he had successfully completed the accounts for 2011 and that he had subsequently been issued with a company car. It was his argument that the issuance of the company car confirmed that he was now a permanent employee. In spite of his protestations, the respondent continued to work for the duration of the extension.

On 21 July 2012 the appellant wrote to the respondent advising him again that his probationary period had not been successful and gave him two weeks' notice to terminate his services.

The respondent declined to accept the two-week period of notice and argued that the termination amounted to an unfair dismissal. He argued that as a "permanent employee" he was entitled to three months' notice of the termination of his employment.

As the parties were unable to resolve the dispute, it was referred to an Arbitrator who found that the extension of the probationary period was unlawful. The arbitrator made an award on 31 January 2013 in the following terms:

1. back-pay of salary and benefits from 1 July 2012 to the date of the award,

2. the value of six months' basic salary for compensation for unlawful termination of the employment contract,
3. three months' salary as notice pay which would incorporate cash *in lieu* of leave days; pension contributions; compensation for loss of the company vehicle; and 100 litres of fuel per month for the period from July 2012 until the date of the award.

The appellant was dissatisfied with the award and approached the court *a quo* seeking the setting aside of that determination and the confirmation of the termination of the respondent's employment. The appeal was opposed by the respondent.

The court *a quo* upheld the Arbitrator's award and dismissed the appeal. The appellant noted an appeal against the decision of the court *a quo* on four grounds, namely:-

- “1. The court *a quo* erred on a point of law by holding that section 12(5) of the Labour Act does not confer a discretion to the employer (*sic*) to extend an employee's probationary period and further that according to Labour Act, a probation period cannot be extended
2. The court *a quo* erred on a point of law by holding that by extending the probationary period, the employer had made the employees position permanent by operation of the law. The extension of probation does not amount to an election to permanently employ an employee on probation, where such extension has been explicitly communicated.
3. The court *a quo* misdirected itself by completely ignoring that the parties' employment relationship was governed by a contract of employment and that according to that contract of employment confirmation into a substantive position was to be done in writing and subject to a successful medical examination.
4. The court *a quo* erred on a point of law by holding that the respondent was entitled to three (3) months' notice, when he was in fact not a permanent employee.”

ISSUES BEFORE THE COURT

It seems to me that three issues present themselves for determination. These are:-

1. The purpose of a period of probation.

2. Whether s 12 (5) of the Labour Act permits an extension of a period of probation.
3. The status of an employee who continues to work after the probationary period has elapsed.

I propose to deal with each of the issues in turn.

(1) The purpose of a period of probation

The main reason for having a period of probation is now generally accepted. A probationary period is designed to function as a time when an employer can evaluate a “potential” employee before opting to accept him or her as a full time employee. During this period the employee is assessed and evaluated to determine his suitability for permanent employment. Professor Lovemore Madhuku in his book “*Labour Law in Zimbabwe*” at page 44 states as follows with regards to the purpose of probation:

“A probationary employee is one who is in the initial period of his or her employment where his skill and abilities are being assessed. **The probationary employment contract is separate from the second employment contract**, which is conditional on successfully completing the probation”

CHINHENGO J in *Madawo v Interfresh Limited* 2000 (1) ZLR 660 at 882 remarked as follows:

“Probation is defined in the New English Dictionary as “The action or process of testing or putting to the proof ... the testing or trial of a person’s conduct, character or moral qualification; a proceeding designed to ascertain these ... for some position or office. I think these words very well describe the process of probation as commonly undergone by accepted candidates”

Probation was expressed by NDOU J in the case of *Commercial Bank of Zimbabwe v Kwangwari* HH79/2003 as follows:

“Probationary clauses provide for a trial period during which the reciprocal periods of notice required for termination are shorter, and which purportedly give both parties the right either to confirm or not to confirm the contract at the conclusion of the probationary period”

It is apparent from the above that firstly, the employee must successfully complete the period of probation before he can be permanently employed. Secondly, that the probationary period is a separate and distinct contract. Thirdly, the contract of permanent employment only comes into operation once an employee has successfully completed the period of probation and finally, it is reciprocal in nature. In other words if an employee is dissatisfied with the employer he may also terminate the employment by giving the requisite notice.

(2) Whether the Labour Act permits an extension of a period of probation

Section 12(5) of the Labour Act [*Chapter 9:16*] regulates issues of probation in the workplace. The section reads as follows:

“A contract of employment may provide in writing for a single, non-renewable probationary period ...”

This provision is clear and requires no interpretation. It seems to me that the provision provides that where an employer decides to include a probationary period in the contract of employment then that period is not renewable. The court *a quo* in my view correctly found that the use of the word “may” in the above section relates to the employer’s discretion to engage an employee either on probation or immediately into a substantive position. Once a probationary period is given by an employer then it can only be a “single, non-renewable” period. In this regard Professor Madhuku states:

“This means that at the end of a probationary period the employer has two choices: either allow the probationary contract to lapse and let the employee go, or enter into a second employment contract with the employee. **There is no room for renewal of the probationary contract.**”

This position was also set out in the case of *Kazembe v the Adult Literacy Organisation* SC 173/1994, where the court stated that once a probation period ends and the employer is dissatisfied with the probationer’s performance, all that the employer needs to do is to inform him that his services are no longer required and that would be the end of the matter.

There are two ways in which an unsuccessful probationary employee can be dismissed. The first is to allow the probation period to expire naturally wherein the employee is released at the end of that period. The second is to release the probationary employee before the end of the probation period. Where the probationary period is cut short then the issue of notice arises and he must be given notice in terms of the contract. (see *Time Bank of Zimbabwe v Nkosana Moyo* HH26/02.)

I do not accept Mr *Banda*’s submission that the appellant could extend the probationary period. The appellant relied on the position in *Kwangwari v Commercial Bank of Zimbabwe* (*supra*) where the court allowed the employer the discretion to extend a probationary period without the employee assuming substantive appointment to a permanent position. It is apparent that at the time that NDOU J dealt with the *Kwangwari* case, s 12(5) of the Labour Act had not come into operation. This case came before the High Court in 2002. Section 12(5) of the Act was only enacted by amendment 17/2002 which was published and came into operation on 7 March 2003.

In view of the above, it is therefore apparent that the appellant committed two errors.

It erred in extending the period of probation. It also erred in dismissing the respondent on two weeks' notice which was not provided for in the contract of employment.

(3) What was the respondents' employment status at the time of termination of the contract?

It seems to me that the appellant, having failed to dismiss the respondent during the period of probation, the question that arises is the status of the respondent after the three months probationary period. Applying s 12(5) of the Labour Act, it is apparent that the respondent was no longer on probation as the contract stipulated a three month period of probation.

Clearly, therefore, in these circumstances the court *a quo* was correct in finding that the respondent had become a permanent employee.

However I am not satisfied that the respondent was entitled to the total award made by the Arbitrator. As the respondent was now a permanent employee, the consequence of his dismissal which the Arbitrator found to be unlawful should have been reinstatement. The remedy was not to dismiss him on three months' notice.

It was on the basis of the above that the appeal was allowed in part and the following order made:

1. The appeal against the judgment of the Labour Court be and is hereby allowed in part, with each party paying its own costs.

2. The judgment of the court *a quo* is amended to read as follows:-

- (a) The appeal is allowed in part, with each party paying its own costs.
- (b) The award of the arbitrator in respect of the monetary award is set aside.
- (c) The award is amended to read as follows:
 - (i) “The termination of the employment of the claimant is unlawful and is set aside.
 - (ii) The respondent is ordered to reinstate the claimant into his former position without loss of salary and benefits.
 - (iii) In the event that reinstatement is no longer possible, the respondent is to pay damages to the claimant as agreed upon between the parties or, that failing, as determined before me upon application.
 - (iv) Each party pays its own costs.”

GARWE JA: I agree

UCHENA JA: I agree

Mambara & Partners, appellants’ legal practitioners

Musendekwa – Mtisi, respondents’ legal practitioner