

REPORTABLE (26)

**Judgment No. SC 31/18
Civil Appeal No. SC 553/13**

ZIMBABWE AGRICULTURAL SOCIETY

v

STUART CHAPMAN

**SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA & MAVANGIRA JA
HARARE, 24 FEBRUARY 2017 & JUNE 7, 2018**

E.T. Moyo, for the appellant

I. Chiwara, for the respondent

GARWE JA

[1] This is an appeal against the decision of the Labour Court dismissing with costs an appeal noted against an arbitral award ordering the appellant to pay to the respondent wages and benefits for the period 1 April 2014 to 31 August 2014.

BACKGROUND

[2] The respondent was engaged by the appellant as operations manager in 2012. Such employment was on fixed term contracts that were continuously rolled over. The last such contract, due to expire on 31 March 2014, forms the basis of the dispute between the parties in this matter. The contract of employment provided, in relevant part, as follows:

“TERMINATION OF EMPLOYMENT

Notice to terminate your employment other than the expiry of the contract shall be 1 (one) calendar month served in writing by either party, effective from the

date of presentation. The notice period may vary as prescribed by the Labour Act from time to time”

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- [3] On 28 February 2014, the appellant, through its chairman of the executive committee, wrote to the respondent advising that his contract was being terminated in accordance with the contract of employment and giving him one month’s notice of such termination. The letter made it clear that he was to be paid his dues for the month of March 2014. The total computed sum of \$4 524.04 was paid into the respondent’s ZB bank account on or about 5 March 2014.
- [4] Believing that his employment had been unlawfully terminated, the respondent registered a claim for unlawful termination of contract. In the absence of conciliation, the matter was eventually referred for compulsory arbitration. Before the arbitrator the respondent’s claim was as follows. Prior to the expiration of his contract, he had been offered a further extension of the contract by the appellant’s Chief Executive Officer, which he accepted, and he therefore legitimately expected the contract to proceed beyond 31 March 2014. He attached a copy of an affidavit by the then Chief Executive to this effect. He claimed that his services were still required and work was always available in the appellant’s organisation but someone else was appointed to act in his position. He therefore sought reinstatement or alternatively damages for loss of employment. The respondent, on the other hand, submitted before the arbitrator that the notice of termination of the contract had been given prior to the expiration of the contract and that such notice complied with the law. Any representations made by the then Chief Executive Officer became irrelevant and could not have removed the employers’ right to terminate on notice.

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- [5] In his award, the arbitrator found that there was no basis for Judgment No. SC 31/13 Civil Appeal No. SC 553/13 respondent on a permanent basis. He found that the respondent had been offered an extension of his contract of employment by the Chief Executive Officer and that the Chief Executive Officer had the authority to do so. He therefore accepted that the respondent had a legitimate expectation that his contract would be extended to August 2014 when the Harare Agricultural Show was to take place. He accordingly ordered that the respondent be paid all his wages and benefits up to 31 August 2014.

PROCEEDINGS BEFORE THE LABOUR COURT

- [6] Dissatisfied with the award, the appellant appealed to the Labour Court on three grounds. The first was that the arbitrator had erred in finding that legitimate expectation had been established. Secondly, that the court erred in finding that the respondent was entitled to remuneration beyond 31 March 2014 when his contract expired. Thirdly, that the arbitrator erred in finding that, by terminating the contract on notice prior to its expiry, the contract had been improperly terminated.
- [7] The appellant, in its heads of argument before the Labour Court, submitted that since the contract of employment had been terminated before it had run its full course, there could have been no question of legitimate expectation because it is only upon its expiry without incident that the respondent may have entertained such expectation. It further submitted that there was no evidence that someone else had been engaged in the place of the respondent and the arbitrator had made no finding in this regard.
- [8] In his submissions before the same court, the respondent stressed that he had been offered an extension by the then Chief Executive Officer. He further argued that,

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following the termination of his contract, his duties had been taken over by his former assistant, one Lovemore Mupotsa who, at the time of the proceedings, was acting operations manager. He also argued that the appellant could not have, in terms of the law, terminated the contract of employment on notice. Lastly he submitted that the award of damages up to 31 August 2014, when the extended contract was set to expire, was proper.

- [9] In its judgment, the Labour court agonized over the interpretation to be given to s 12B of the Labour Act. That section provides, in relevant part, that an employee is deemed to have been unfairly dismissed if, on termination of an employment contract of fixed duration, the employee has a legitimate expectation of being re-engaged and another person is engaged in his stead. The court found that the provision applies to all forms of termination and not only in cases where the contract has run its full course and is not renewed. Put another way, the court found that the doctrine of legitimate expectation applied even in instances where the contract is terminated on notice prior to its expiry. The court also accepted that the parties had agreed to engage each other to the end of August 2014. The court therefore found that the determination by the arbitrator that the appellant pays all salaries and benefits up to the end of August 2014 was correct. It further found that “whether or not a contract can be terminated on notice is not material in *casu*, the issue is statute (*sic*) has provided that even if you terminate on notice, the termination can still be deemed to be unfair dismissal.” It accordingly dismissed the appeal.

PROCEEDINGS BEFORE THIS COURT

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[10] Dissatisfied once again, the appellant appealed to this Court against the dismissal of its

appeal on four grounds. I cite these hereunder:-

- “1. The learned judge of the court *a quo* misdirected herself and erred at law in finding as she did that the question of whether or not a contract of employment could be terminated on giving notice was inapplicable in the circumstances of the matter when it was apparent from the facts that same was the basis on which the contract of employment had been terminated.
2. The learned judge of the court *a quo* misdirected herself and erred at law in upholding the principle of legitimate expectation in the circumstances solely on the basis of an alleged representation made to the respondent and yet in the absence of a specific finding of fact on the conjunctive requirement that someone else had been engaged in place of the respondent upon termination of the respondent’s employment contract.
3. The learned judge of the court *a quo* misdirected herself and erred at law in finding as she did that the principle of legitimate expectation applies at all in the circumstances of the matter in light of the fact that employment contract had been terminated prior to its expiry, and at which stage the question of legitimate expectation of renewal could only have arisen.
4. The learned judge of the court *a quo* misdirected herself and erred at law in upholding an award of damages by the arbitrator in excess of the unexpired period of the respondent’s employment contract.”

[11] In its heads of argument before this Court, the appellant submitted that, in the light of the judgment of this Court in *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd & Anor* 2015 (2) ZLR 186, the finding by the arbitrator and the court *a quo* that it was not lawful for the appellant to terminate the respondent’s contract of employment on notice was patently flawed at law. It argued that if this Court accepts that it was lawful for the appellant to terminate the contract of employment on notice, then that would dispose of the matter. The finding by the court *a quo*, that the question whether or not the contract could be terminated on notice was irrelevant, was wrong because the whole dispute revolved around the lawfulness of the termination on notice.

[12] The appellant submitted further that, as a question of interpretation, legitimate expectation only arises upon the expiry of the contract with no incident. It does not arise where the contract has been terminated on notice prior to its expiry on any other ground. If termination is based on any other ground, then it is the law in respect of that other ground which is applicable and not the doctrine of legitimate expectation. That is so because one cannot have expectation of re-engagement of the contract that has already been terminated other than by effluxion of time. In this case, therefore, it is the law in respect of termination on notice that was applicable. Lastly, the arbitral award and determination of the Labour Court both ignored the conjunctive requirement that, in addition to the existence of legitimate expectation, there must be evidence that someone else was employed in his stead.

[13] In his submissions before us, the respondent, whilst accepting that a fixed term contract can, in an appropriate case, be terminated on notice, argued that if a fixed term contract is terminated on notice but it is subsequently established that the employee not only had a legitimate expectation of being engaged but also that someone else had supplanted him, then such termination would be deemed to be an unfair dismissal. Section 12B refers to termination generally. The termination is not restricted to the expiry of the contract and, further, does not exclude other types of termination, such as termination on notice. The respondent submitted that what the section says is that “upon termination, by whatever means, which is on the face of it lawful, it is deemed an unfair dismissal if the employee had a legitimate expectation of renewal and another person was employed in his stead.” He further argued that it is not, therefore, “the manner of termination *per se* which makes it unfair but rather the fact of termination when the

requirements of s 12B (3) (b) (i) and (ii) are present which make the termination of the contract be deemed an unfair dismissal.”

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- [14] The respondent was clear that he does not take issue with the lawfulness of his contract being terminated on notice but rather the existence, at the time of termination, of the promise of re-engagement made by the Chief Executive Officer and the fact that another person was employed in his stead. In other words the termination on notice would have been lawful but for the promise of re-engagement made by the Chief Executive Officer and the appointment of Lovemore Mupotsa in his place. He submitted that the arbitrator was alive to the requirement that, in addition to the requirement of legitimate expectation, there had to be evidence that the respondent was replaced by another person.

ISSUES ARISING FOR DETERMINATION

- [15] On the basis of the papers before me and, in particular, the heads of argument filed by both parties, as well as oral submissions during the hearing, I am of the view that three issues arise for determination. These are, firstly, whether the termination envisaged in s 12B of the Act includes all forms of termination and, in particular, termination on notice. Secondly, whether the court *a quo* was correct in holding, as it did, that the question of termination on notice was irrelevant. Thirdly, whether the second requirement in s 12B 3(b)(ii) of the Act, namely, whether another person replaced him, was met.
- [16] The parties were agreed that the law does permit the termination of a contract of employment on giving the requisite notice in terms of the contract of employment. The parties were also agreed that an employer can terminate a fixed term contract by

allowing the same to run its course and that the same result can be achieved by a contract made by the employer in respect of the unexpired term of the fixed contract – *Madawo Interfresh Ltd* 2000(1) ZLR 660(H), 666 C; *Magodora v Care International Zimbabwe* 2014 (1) ZLR 397(S), 402 C-D.

WHETHER TERMINATION UNDER SECTION 12B INCLUDES ALL FORMS OF TERMINATION

[17] Section 12B provides, in relevant part, as follows:-

“12B DISMISSAL

- (1) – (Not relevant)
- (2) – (Not relevant)
- (3) An employee is deemed to have been unlawfully dismissed –
 - (a) (not relevant)
 - (b) If, on termination of an employment contract of fixed duration, the employee
 - (i) Had a legitimate expectation of being re-engaged; and
 - (ii) Another person was engaged instead of the employee.”

[18] The interpretation that attaches to the above section lies at the centre of the dispute between the parties to this appeal. The respondent says it is the fact of termination and not the means of termination which is relevant. He argues that the word “termination” has been used in a general sense and that there is therefore no rational basis for restricting its meaning as suggested by the appellant. He further argues that termination on notice is termination all the same. I have no doubt that the respondent is wrong in his interpretation of the section in question.

[19] It is clear that s 12B, which starts with the bald heading “Dismissal”, deals with cases of termination by way of dismissal and that it does not deal with the other forms of

termination that are permissible in terms of the Act. As judgment No. SC 31/18, Civil Appeal No. SC 553/13, “termination” in terms of the section must not be generally construed but must be interpreted in a way that excludes other forms of termination which are regulated by other provisions of the Act. The termination envisaged in s 12B does not, therefore, include termination on notice, since termination on notice is regulated separately in s 12(4) of the Act.

[20] That the above is the correct interpretation there can be no doubt. Indeed, in his book, *Labour Law in Zimbabwe*, Professor L. Madhuku states much the same. He remarks at page 99 of the book:

“Section 12B does not apply to every termination of employment. It does not apply where the Act, in other provisions, is specific about termination. This is the case with retrenchment which is specifically provided for in ss 12C and 12D. Sections 12C and 12D are not made subject to s 12B so that where the retrenchment process is in full compliance with ss 12C and 12D, *cadet quaestio*: the termination is unassailable at law and cannot be challenged on any other ground under the Act.”

[21] Indeed this Court has, in its full bench decision in the Nyamande case (*supra*), stated the same. At pages 190H – 191 A, this Court stated:-

“Section 12B of the Act, as the main heading of that section reveals, deals with dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The Labour Act also sets out in some detail what constitutes unfair labour practice which it outlaws. Termination of employment on notice is not among the conduct that the Act outlaws as unfair labour practice. The section that deals with termination of a contract of employment on notice is s 12(4) of the Act. I shall revert to this section later in this judgment.”

21.1 The court continued, at page 192A, as follows:

“It is also very clear that, on a proper reading of s 12B of the Act, it deals with the method of termination of employment known as “dismissal”. While dismissal is one method of termination of employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment.”

21.2 Further at 192F – G, the court stated:-

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“Quite clearly, the appellants’ case is predicated on the proposition that dismissal means all forms of termination of employment. Put differently, all terminations of employment are dismissals. This proposition is not tenable on the authority of the above cases. The proposition is clearly erroneous.”

21.3 At page 193 D – E, the court also stated that it was satisfied that:-

“... s 12B of the Act does not deal with the general concept of termination of employment. It concerns itself with termination of employment by way of dismissal in terms of a code of conduct It does not concern itself with termination of employment by ways other than dismissal.”

21.4 Finally, at 194 A-B, the court concluded:-

“The wording of section 12(4) of the Act is so clear that it leaves very little room, if any, for misinterpretation. It governs the time periods that apply when employment is being terminated on notice. It stands to reason that the notice periods do not apply when an employee is dismissed. In instances of dismissal no notice is required. The periods of notice referred to in s 12(4) of the Act can only apply where there is termination of employment in terms of a process involving the giving of notice provided for in a contract of employment.”

[22] Clearly therefore, on the basis of decision of this Court in the *Nyamande* case (*supra*), the respondent’s contention that s 12B applies to all forms of termination is wrong. The judgment in *Nyamande* was handed down in July 2015. The respondent appears to have been unaware of its existence as law when his heads of argument were filed in June 2016 – almost a year later.

ISSUE OF TERMINATION ON NOTICE – WHETHER IRRELEVANT

[23] This was the core issue that fell for determination in the resolution of the dispute between the parties. The essence of s 12(4) of the Act and a termination on notice clause in a fixed term contract is to allow for the termination of a contract before its effluxion by time. In this case, the contract of employment provided for the termination of the contract of employment by either party upon giving the other one month’s notice

of such termination. The appellant gave notice of its intention to terminate the employment a month before the fixed contract was set to expire.

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[24] In the *Nyamande* case (*supra*), this Court accepted that the common law position that the employer has a right to terminate an employment contract relationship on notice, in circumstances other than dismissal for misconduct, is part of our law. This Court further accepted that all that s 12(4) of the Act does is to regulate the periods of notice applicable, taking into account the duration of the contract of employment. Indeed the respondent made it clear in his submissions before this Court that he was not contesting the appellant's right to terminate the contract on notice. His contention was simply that, even in this instance, legitimate expectation does apply.

[25] The court *a quo* was therefore wrong in treating as irrelevant the termination of the employment contract on notice. That was in fact the nub of the matter. In the absence of a suggestion that such termination on notice was flawed, the act of terminating the contract on notice had legal consequences and brought the employment relationship to an end.

THAT RESPONDENT SUPPLANTED NOT DETERMINED

[26] Having reached the conclusion that the appellant lawfully terminated the respondent's contract of employment on notice, that really should be the end of the matter. However, the parties exerted much effort to the question whether the second requirement under s 12B (3), namely, whether another person was appointed in the stead of the respondent, was proved. For the sake of completeness, I consider it necessary to determine this issue as well.

- [27] Before the arbitrator, the bald allegation was made that some **Judgment No. SC 30/18**
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in the respondent's position and that the work that the respondent was carrying out is
always available. No further detail was provided before the arbitrator. The arbitrator
thereafter dwelt at length with the question whether the respondent had a legitimate
expectation of his contract being renewed. He, on account of the promise made by the
Chief Executive Officer, concluded that he had such an expectation. However, the
arbitrator made no finding on whether, indeed, the respondent had been replaced by
another person. It was only in heads of argument before the court *a quo* that the
respondent then disclosed, for the first time, that the respondent's duties had been taken
over by one Lovemore Mupotsa who had, hitherto, been the respondent's assistant. It
was made clear that Lovemore Mupotsa had taken over the respondent's duties in an
acting capacity.
- [28] Clearly, on those facts, it was impossible for the court *a quo* to have properly concluded
that the respondent had been supplanted. In the first instance, Lovemore Mupotsa had
been respondent's assistant. His duties were to assist the respondent. When the
respondent's contract was terminated, he was then, presumably, requested to also take
over the respondent's duties. There is no suggestion that his own position as assistant
to the operations manager was taken over by someone else. In the circumstances no
evidence was adduced to show that Mupotsa had replaced the respondent.
- [29] As already noted, the arbitrator made no finding on the question whether or not the
respondent had been supplanted by someone else. On the facts, therefore, the court *a*
quo had no basis for concluding, as it did, that, in fact, the respondent's position had
been taken over by Mupotsa. The failure to prove this aspect was fatal - see *UZ - UCSF*

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127(S), 131 B-C. Unfair dismissal, as defined, had not, therefore, been proved.

DISPOSITION

[30] I am satisfied that both the arbitrator and the court *a quo* were wrong in finding that the respondent was unlawfully dismissed. The appeal must therefore succeed with costs.

[31] It is accordingly ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and in its place the following substituted:-
 - “1. The appeal is allowed with costs.
 2. The award by the arbitrator is set aside and in its place, the following is substituted:
“The claim is dismissed with costs.”

HLATSHWAYO JA: I agree

MAVANGIRA JA: (Indisposed)

Scanlen & Holderness, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners