

DISTRIBUTABLE (126)
Judgment No SC 142/04
Civil Appeal No 140/04

REDSTAR WHOLESALERS v LIVINGSTONE MUTOMBA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE NOVEMBER 16, 2004 & JUNE 13, 2005

A. Moyo, for the appellant

No appearance for the respondent

CHIDYAUSIKU CJ: The respondent was employed by the appellant as a driver. He was charged with misconduct and suspended from duty with effect from 27 August 1999. An enquiry into the respondent's conduct was instituted in due course and the respondent was dismissed from employment. He appealed against his dismissal to the Local Joint Committee which also dismissed his appeal. The respondent thereafter appealed to the Negotiating Committee of the National Employment Council for the Commercial Sectors which also dismissed his appeal and confirmed his dismissal. He then appealed to the Labour Court.

The Labour Court heard the respondent's appeal on 18 March 2003. At the hearing of the appeal the appellant was absent. Section 17 of Statutory Instrument 30/1993 provides that if a party or a witness fails to appear at its hearing the Tribunal may nevertheless proceed with the hearing in his absence. The Labour Court therefore proceeded in the absence of the appellant in terms of s 17 of Statutory Instrument 30/1993.

The Labour Court having heard submissions from the respondent's legal practitioner allowed the appeal in its judgment of 12 June 2003. In allowing the appeal the President of the Labour Court reasoned as follows:

"Mr *Gumbo* who appeared on behalf of the appellant submitted that the reports against the appellant were false and that the authors of those reports had been coerced into making such false reports against the appellant by the supervisor, one *Warama*. Mr *Gumbo* submitted that there was no independent evidence to corroborate the reports by the assistants. Mr *Gumbo* further pointed out that a person who allegedly telephoned the respondent corroborating the assistants' false reports was working in collusion with the said assistants. Mr *Gumbo* submitted that both the authors of the reports in question are prepared to give evidence in support of the appellant. Mr *Gumbo* also submitted that the hearing committee was improperly constituted and therefore the proceedings were a nullity.

Appellant has always denied the allegations. He is still denying them.

The court took note of the fact that the respondent was duly served with the notice to appear in court but was in default. The court considered the appellant's position. The facts which have been placed before the court, if unchallenged, which they are not, mean there was no wrongdoing on the part of the appellant.

In view of the above the appeal must succeed."
(my emphasis)

It is clear from the judgment of the Labour Court that the appeal was allowed on the basis that the facts alleged by the respondent were not challenged. The probabilities are that the reason why the facts upon which the court *a quo* relied in its judgment were not challenged is because the appellant was not present at that hearing. The record and judgment clearly show that the appellant was not present at the hearing.

The appellant then applied on 1 July 2003 to have the determination of the Labour Court granted in his absence rescinded. The application for rescission was made in terms of s 92C (1) of the Labour Relations Act [Chapter 28:01] ("the Act"). Section 92C(1) of the Act provides that the Labour Court may, on

application, rescind or vary any determination or order which it made in the absence of the party against whom it was made. Thus the Labour Court is required, in terms of s 92C(1) of the Act, to consider the merits of an application for rescission whenever such an application is made by the party that was in default.

The respondent was not present at the hearing of the application for rescission. The Labour Court, after considering the written submissions and hearing the appellant's counsel, issued the following order:

"IT IS ORDERED

That the application be and is hereby denied on the grounds that the judgment entered was on the merits. The matter proceeded in the absence of the other side. It was not a default judgment, an appeal lies to the Supreme Court."

It is not clear from the judgment of the President of the Labour Court why she concluded that the judgment of the Labour Court of 12 June 2003 was not a default judgment. The proceedings were conducted in the absence of the appellant and the judgment itself is very clear on that point. It certainly is a judgment given in proceedings conducted in the absence of one of the parties and in respect of which the absent party can apply for rescission in terms of s 92C (1) of the Act. I am satisfied that the Labour Court was required, in this case, to consider the merits of the application for rescission of the default judgment. In determining whether or not the default judgment should be rescinded or varied the Labour Court should have considered whether good cause had been shown. This is the test generally applied in applications for rescissions of judgment. See *Du Preez v Hughes NO* 1957 R & N 706 (SR); *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S); *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Simbi v Simbi* SC164-90.

Thus the President of the Labour Court, in order to determine whether the judgment of 12 June 2003 should be rescinded, should have considered whether the application for rescission had established a good and sufficient cause. In doing so the court should have considered such factors as: the length of the delay in applying for the rescission, the reason for the default, the prospects of success and the balance of convenience. The Labour Court did not do so but simply dismissed the application on the basis that the judgment in respect of which rescission was sought was on the merits.

The Labour Court clearly misdirected itself on a point of law and on that basis the Labour Court's determination should be set aside and the matter remitted to the Labour Court for the determination of the application for rescission on the merits, that is, whether or not the default judgment of 12 June 2003 should be rescinded.

In the result the appeal is allowed and the matter is referred to the Labour Court for determination of the application for rescission on the merits. The order of the Labour Court is set aside and the following order is made:

- “(a) That the determination granted by the Labour Court on 27 March 2004 be and is hereby set aside.
- (b) That the Registrar of the Labour Court is hereby directed to reset the matter down for determination of the application for rescission on the merits.”

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners