

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATE

Court of Appeal Civil Appeal No.14/96
Industrial Court, Case No. IC 20/95

In the matter between:

**GREEN INDUSTRIAL ENTERPRISES
CORPORATION (PTY) LTD**

Appellants

and

**KEDIBONYE BEN
MOROTSI SIISI**

**1st Respondent
2nd Respondent**

Mr. E. Khan and Mr. M. L. Mogobe for the Appellants
Mr. K. Ben in person for the Respondents

J U D G M E N T

CORAM: Schreiner JA.
Lord Cowie JA.
Lord Allanbridge JA.

LORD COWIE JA:

This is an appeal from the Industrial Court of Botswana at the instance of Green Industrial Enterprises Corporation (Botswana) (Pty) Ltd. a firm of building civil engineering and electro mechanical contractors, (hereinafter referred to as "the Appellants") against a determination of that Court dated 20th December 1995. The determination of the Court was that the contracts of employment of two of their employees Kedibonye Ben and Morotsi Siisii (hereinafter referred to as "the Respondents") were unfairly terminated on 12th July 1994. Accordingly the Court ordered the appellants to pay compensation to the Respondents and also a sum by way of severance benefit. No order was made as to costs.

The case which the Respondents made in the Industrial Court is set out in the Record of proceedings at page 34 and is in the following terms:-

"Statement of the case IC 20/95"

The Applicants were employed by the company GIEC on the 17 August 1987 and 2nd March 1988 respectively.

The first Applicant; K. Ben was a plumbing foreman and the second M. Siisii was a concrete foreman.

On the 13th July 1994 we were informed that our services were no longer required by the company. We were then paid leave pay each and a one month notice pay each.

We now pray to this court to order the respondent to pay us for an unfair dismissal from work and for gratuity.

We were paid at an hourly rate of P3.70 for nine hours each of the seven days of the week."

It is said in the statement of case that the Respondents were informed on 13th July 1994 (my underlining) that their services were no longer required, but in the light of the evidence that date should have been either 13th or 15th June 1994. Be that as it may, the thrust of the Respondents' case was that they had been unfairly dismissed and were entitled to compensation and severance benefit. On the other hand the Appellants' case was that the Respondents had been retrenched, or, if the Respondents were held to have been dismissed, they had been fairly dismissed. In any event, the Appellants maintained that they were not entitled to the severance benefit, which the Court had ordered the Appellants to pay. It will be seen therefore that at least in relation to the first two parts of the Appellants' defence to the Respondents' case they depended to a large degree on questions of fact, and as it turned out on the credibility of the witnesses. The third part involved the interpretation of the provisions of a Statute. It is perhaps worth noting that in the present case the proceedings began before the Judge of the Industrial Court and two Assessors, one as a representative of the Unions and one of an employers'

organisation. The case could not be completed in one day and had to be adjourned to a later date. On that date the Union representative failed to appear, and the proceedings continued before the Judge of the Court and the employers' representative. This was perfectly proper but it is of interest that the final determination and the reasons for it did not just reflect the views of the Judge of the Court but also the assessor representing an employers' organisation.

The other matter which I would like to mention at this stage is that the evidence in this case as it appears in the Record of proceedings is not always easy to follow and this may, in part, be due to faulty transcription. However, it is clear from the judgment of the Court that the members believed and accepted the evidence of the Respondents and to a major extent found the evidence led for the Appellants to be unsatisfactory and in one instance, fabricated. In this connection it cannot be emphasised too strongly that, however difficult the evidence is to follow, the members of the Court had the advantage of seeing and hearing the witnesses, and assessing their credibility. Against that background, it is clear, that, because the members of the Court believed the evidence of the first Respondent, they found the following facts proved in relation to him, namely:-

"That he started working for the Respondent as a plumber foreman on 17 August 1987. On 8 June 1994 whilst working on the F.O.C. project near Francistown, the North Pipeline project, he fell ill and was hospitalised for 3 days. On his return to work on 11 June 1994 when he handed the site manager his sick leave form for the said 3 days, he was told that he has been dismissed. On 15 June 1994 he received a letter dated 10 June 1994 which read as follows:

"This is to inform you that our work at site F.O.C. is coming to completion. We regret to inform you that your services as from 13-07-94 will therefore no longer be required.

You will serve notice from 13-06-94 to 12-07-94."

The First Applicant obtained permission from the general foreman, John Nagel to go for a check up to the hospital on 15 June 1994, the day he received his letter of termination. After having gone for his check up he took this letter of termination to the District Labour Officer, who gave him a letter to hand to his employer. The next day, he handed this letter from Labour to John Nagel who told him and the Second Applicant that they are "no

longer" required on site and that they must leave. This happened during their notice month.

The two Applicants then left Francistown and went to Respondent's head office in Gaborone where they told the Personnel Manager what had happened and he told them that it is correct because the company was busy retrenching workers.

The First Applicant said his illness was work related as his work also entailed working close to a trench digging machine which kicked up a lot of dust and caused him to suffer from a lung problem. He said he is 50 years old and it is difficult to find other work."

For the same reason as regards the second Respondent the members of the Court found the following facts proved, namely:-

"That he commenced working for the Respondent on 1 March 1988 as a concrete fore man. He was also allocated to the F.O.C. project and he was also suffering from the same lung problem as the First Applicant because of the dust from the trench digging machine. At the beginning of June 1994 he was hospitalised for a week and then returned to work but because he was still short of breath he was given a further few days sick leave. On his return to work one Marcelle, the site manager, who was senior to John Nagel, told him that he, Marcelle was going to dismiss the Second Applicant. On 13 June 1994 the Second Applicant received a letter of termination in exactly the same terms as the one received by the First Applicant.

He went with the First Applicant to the District Labour Officer, who gave them a letter to take to the Respondent. As to what happened on 16 June 1994, when John Nagel chased them off the site the Second Respondent corroborated the evidence of the First Applicant."

It follows that it was on the basis of those facts that the Court made the determination which it did, and unless it can be shown that the Court was not entitled to find those facts proved, or that no tribunal acting reasonably could have found them proved, this Court cannot interfere with its determination.

In the Court a quo the Appellants led evidence purporting to establish that the Respondents were retrenched and not dismissed. Mr. Makhura the Personnel Manager gave evidence that about a week before the Respondents were sent their notices of termination a discussion was held at his office to discuss their position. The site agent wanted them retrenched because the work on the pipeline was not getting done timeously due to the Respondents' absence

from work through ill-health. Mr. Makhura said that he wrote to the Commissioner of Labour and Social Services on 8 June 1994 informing him of the decision of the Respondents in relation to the two Appellants. Thereafter the Respondents were sent their notices of termination.

It is clear from the Judgment of the Court that the members did not consider his evidence very satisfactory. What they said was:-

“The evidence of the Personnel Manager, Makhura, was also very general except as regards the retrenchment procedure followed in respect of the two Applicants, which evidence is questionable as the Court will point out hereunder.”

The Court then proceeded to analyse that evidence and give reasons why it was not acceptable. One of the significant reasons was that the document alleged to have been sent to the Commissioner of Labour dated 8 June 1994 was fabricated.

I do not find anything irrational or unreasonable in those reasons and so I am unable to hold that they were not entitled to reject that evidence as they must have done in order to arrive at the conclusion which they did. In my opinion the question whether the Respondents were retrenched or dismissed was a pure question of fact for the Court to decide. It considered all the relevant evidence, including the fact that retrenchment was unlikely when the project still had about five months to run, and determined in favour of the Respondents. In my opinion that determination can not be overruled by this Court unless the members of the Court a quo have failed to take into account some material factor or it can be shown that no Industrial Court properly constituted could reasonably have reached that determination

In the appeal before this Court, although the Appellants put forward a whole series of grounds of appeal, most of which were duplicated, Counsel, in effect, submitted that the determination of the Court a quo was wrong for the two above reasons.

I have considered the matter carefully in the light of those submissions and I can find no justification for taking that view, and interfering with the determination of the Court a quo on the

question whether the Respondents were retrenched or dismissed. Accordingly, on that matter, the appeal cannot succeed.

A further submission was made by counsel for the Appellants which was to the effect that, contrary to his principal submission, if the Respondents were dismissed, their dismissal was not unfair, because the Appellants had followed the proper procedure for dismissal.

In my opinion there is absolutely no merit in this submission. In the first place it does not lie comfortably with the Appellants' principal submission; in the second place there was, in my opinion, insufficient evidence relating to the procedure in such a situation; and, in the third place, and most importantly, since the Respondents' evidence was accepted by the members of the Court as truthful, it is quite impossible to hold that the manner of their dismissal was fair. The evidence which was accepted was that they were given notices of termination of their employment around 13 th June 1994. When they queried those Notices with the Personnel Officer, he told them to go back to work; when they went back to work, they were ordered off the site by a man called John Nagel. No reason was given for their dismissal, although the Respondents themselves believed that it was due to their absences through ill-health. The undisputed evidence however was that they were only off work through ill-health for a short period. In these circumstances I am completely satisfied that the Respondents dismissal was unfair and the appeal on this alternative ground must also be rejected.

The final point in this appeal relates to the order made by the Court a quo to the effect that a payment in respect of severance benefit should be paid by each of the Respondents. This is a matter of some general importance, and depends entirely on the proper interpretation to be put on the provisions of Section 28[1] and [2] of the Employment Act 1982 as amended by Act 26 of 1992.

Those provisions are in the following terms:-

"28[1] Without prejudice to Section 31, on the termination of a contract of employment, whether by reason of the death or retirement of the employee or for any other reason, the employer shall pay to an employee who has been in continuous employment with him for 60 months or more, a severance benefit at the rate prescribed; Provided that -

- [i] severance benefit shall be payable at the conclusion of each period of 60 months continuous service by the employee, or at the termination of his employment, at the option of the employee;**
 - [ii] where, upon the date of payment of any severance benefit, the employee, or his dependent or beneficiary, is at that date or some future date entitled to payment of a gratuity or pension or both a gratuity and pension in respect of the period of employment under the contract, no severance benefit which would otherwise be payable in terms of this section to the employee or his dependent or his beneficiary shall be payable; and**
 - [iii] where the continuous employment began at any time before the commencement of this Act, that employment shall be deemed, for the purposes of this section, to have begun at the commencement of this Act.**
- [2] For the purposes of calculating the severance benefit payable in accordance with this section -**
- [a] In subsection [1]**
 - [i] "month", in relation to the first 60 months of continuous employment, means a complete month and, in relation to continuous employment thereafter, means a complete month or any fraction thereof; and**
 - [ii] "basic pay" means the basic pay payable to the employee at the time of the termination of the contract of employment; and**
 - [b] where, at the time of the termination of the contract of employment, any leave is due to the employee or he has any other right of absence under this Act, the period of that leave or other right of absence shall be deemed to be part of his period of continuous employment."**

Each of the Respondents had been in continuous employment with the Appellants for more than five years when their employment was terminated. The first Respondent had been continuously employed by the Appellants since 17th August 1987 and the second Respondent since 1st March 1988. Both of them had claimed and been paid severance benefit for the first 5

year period of their employment, but the question then arose, whether not having completed a second five year period of continuous employment with the Appellants, they were entitled under the provisions of Section 28 to a pro rata payment of severance benefit from the date of completion of the first five year period until the date of termination of their employment on 12 July 1994.

The Court a quo decided that they were so entitled under the provisions of section 28 and calculated the sum due to each Respondent on that basis. The actual calculations are not challenged by the Appellants, if a pro rata payment is due, but the Appellants have appealed against the Court a quo's order for a pro rata payment of severance benefit, on the ground that the Court erred in its interpretation of the provisions of Section 28 of the Act as amended. Counsel submitted that on a proper interpretation of Section 28[1][i] it is clear that severance benefit is only payable if, in the first instance, a period of 60 months continuous service has been completed by the employee and, thereafter, only in respect of each completed period of 60 months of continuous service. In his view a proportion of a 60 month period does not qualify for severance benefit. His argument was based on the use of the words "each period of 60 months" in the subsection and he maintained that that showed that no severance benefit for lesser periods was payable under the Act. In addition he founded strongly on the fact that nowhere in the section is it provided that severance benefit is payable pro rata in respect of a part of a second or further five year period.

The Court a quo rejected those submissions and dealt with the matter as follows:-

"Section 28 does not specifically say that a severance benefit shall be paid pro rata in the second or further 5 year period. The Court must therefore analyse all the subsections of Section 28 as well as other relevant provisions to establish what the intention of the legislature was.

On an analysis of sub section 28[2][a][i] it is clear that the legislature has made provision for two separate situations. Firstly, in relation to the first period of 5 years a "month" means a complete month, which means that for an employee to qualify for his first severance benefit he must have 60 complete months of continuous employment. Secondly, in relation to further periods thereafter a "month" means a complete month or any fraction thereof. The court finds that, that clearly indicates that a second or further period need not be 60 complete months. If a period of 60 complete months was also required for a second severance benefit, how could you ever get a fraction of a month."

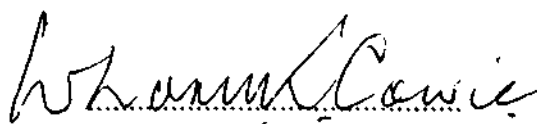
In my opinion the Court is correct in the decision which it has reached on this matter, and for the reasons which it gives. Accordingly I find it quite unnecessary to add anything except to say that although there is no specific provision that severance benefit shall be payable after the first 5 years on a pro rata basis, the provisions of Section 28 read as a whole make it quite obvious that that was the intention of the legislature.

Although it is strictly irrelevant to say so, in my opinion, any other interpretation would not only be wrong but manifestly unfair. The interpretation favoured by the Appellants would mean that an employee who has nine years and eleven months continuous employment would only get 5 years severance benefit, while someone who has ten years continuous employment would get severance benefit for the second five year period.

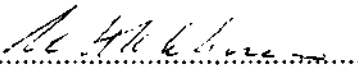
For the reasons given by the Court a quo therefore, with which I entirely agree, this part of the appeal must also be rejected.

In all these circumstances the appeal is dismissed with costs.

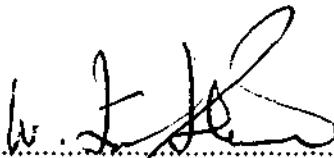
Delivered in open Court this th 28 day of January 1997


LORD L. K. COWIE
Judge of Appeal

I agree


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W.H.R. SCHREINER
Judge of Appeal

I agree


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LORD W.I. S. ~~ALLANBRIDGE~~
Judge of Appeal