Limbe Leaf Tobacco Ltd v. Chikwawa and others

Judgment

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice Banda SC, CJ., The Honourable Justice Mtegha, SC, JA, The Honourable Justice Unyolo SC, JA
Cause Number:	MSCA Civil Appeal Number 24 of 1994
Date of Judgment:	August 23, 1996
Bar:	Mr. Msiska, Counsel for the Appellants Mr. Chisanga, Counsel for the Respondents

This is an appeal against the judgment of the High Court delivered on 30 August 1994. The material facts lie in a narrow compass. The appellants, as the name shows, are a tobacco company. They buy tobacco and process it for export. For this purpose, the appellants employ a large number of seasonal labourers each year to handle the tobacco. These labourers work in various departments, such as the auction department, the green leaf receiving, the storage and stacking department and the stripping department, to mention but a few. Each season runs from about April to September or December, depending on the availability of tobacco. Normally the appellants make an announcement on the radio,

advising seasonal labourers of a particular section or particular sections, and to report for duties on a given date. There are other job seekers who just go to the appellants' premises, and if they are fortunate, they are employed.

The respondents did, at one time or another, work for the appellants in the stripping department. Some of them actually worked for the appellants for over 10 years, year in and year out.

The respondents brought an action against the appellants in the court below for breach of contract of employment. Their case was that, in about April/May 1993 when the tobacco season for that year commenced, they were summoned by radio to report for duties. They said that they duly reported to the appellants' premises for two days, but were told that they should go back as the company had engaged other persons instead. They contended that having responded to the radio call, the appellants were legally obligated to employ them or pay each of them wages for one month in lieu of notice. They also claimed, inter alia, a refund of transport expenses incurred to travel to and from the appellants' premises and a subsistence allowance for the two days they had stayed there.

The appellants, on their part, denied, in the year 1993, having made any radio announcement calling the respondents, or anyone previously employed in the stripping department, to come and start work as alleged by the respondents. The appellants said that the only call they made by radio during that year was one on 29 March, when they summoned seasonal labourers who were previously employed in the auction and green leaf departments. Further, the appellants

denied that the respondents had reported for duties. They contended that if the respondents did so, they acted on their own initiative. It was the appellants' case that 1993 was a bad year for the tobacco industry because of the drought and, as a result, they did not need many strippers, hence there was no need to make a radio call for this category of labourers. The appellants said that very few strippers were employed in that year, towards the very end of the season, from among the people who came to the gate of the factory on their own accord to look for employment. Finally, the appellants contended that they were under no contractual obligation to re-employ the respondents or any seasonal labourers in subsequent years.

After considering the proffered evidence and the submissions made thereon by Counsel, the learned Judge believed the respondents and found, as a fact, that the appellants did call the respondents by radio announcement to report at the company for duties. He held that by the said radio call, the appellants made an offer to employ the respondents and that the respondents duly accepted the offer when they appeared and presented themselves at the gate of the appellants' premises. The learned Judge held that a contract of employment was thereupon concluded between the appellants and the respondents on these facts. He said that the appellants were in breach of the contract when they refused to give the respondents work. Finally, the learned Judge made a declaration that each respondent was entitled to a month's pay in lieu of notice, a refund of transport expenses incurred in travelling from their respective homes to the appellants' premises and back and K200-00 subsistence allowance for the two days they had stayed there. It is against this decision that the appellants now appeal to this Court.

Several grounds of appeal were submitted. These can be condensed into three broad grounds. Firstly, it is contended that the learned Judge erred in finding that the respondents were summoned by radio to come and start work. Secondly, it is contended that the learned Judge erred in finding that a contract of employment was concluded between the appellants and the respondents and that the appellants were in breach of the contract. Finally, it is contended that there is no basis for the declaration made by the court below in favour of the respondents or for the sums of money awarded to them.

We will deal with the first ground of appeal first. Counsel for the appellants submitted that the finding by the lower court that the respondents were summoned by a radio announcement to report for duties cannot be supported, having regard to the evidence proffered. He contended that the respondents failed to adduce credible evidence to support the allegation. Counsel pointed out that the appellants tendered evidence which showed that the only radio announcement they caused to be made was for labourers employed in the auction and green leaf departments, and not for labourers, such as the respondents, who worked in the stripping department. Counsel pointed out that indeed the appellants did produce documentary evidence, exhibit LWC4 and exhibit LWC5, to support their case on this aspect. Counsel submitted that it was upto the respondents to produce similar documentary evidence to prove, as was alleged, that they were called to work through a radio announcement. Counsel argued that the respondents would have obtained such documentary evidence from the Malawi Broadcasting Corporation, right here in Blantyre.

Counsel for the respondents argued, on the other hand, that there was overwhelming evidence that the respondents were summoned by a radio to report for duties. He submitted that there must be another document, apart from exhibit LWC4 and exhibit LWC5, in relation to the radio announcement of the respondents. It was Counsel's submission that the burden was on the appellants to produce and tender this document. Finally, Counsel argued that the respondents, all of them, would not have turned up as they did unless they had heard the radio announcement.

We have considered Counsel's arguments and submissions with care. The first observation to be made is that the appeal on this point turns, as we have already indicated, on a question of fact. It is now settled law that an appeal lies against a finding of fact if it is shown that the trial court was wrong in its decision or conclusion. The oldest English case law authority on this point seems to be Savage v Adams (1895) WN 109. The correct approach to the matter which has been adopted by this Court is that laid down in Coghlan v Cumberland [1898] 1 Ch 704, where Lindley MR put it thus:

"Even where . . . the appeal turns on a question of fact the court has to bear in mind that its duty is to re-hear the case and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, to carefully weigh and consider it, and not shrinking from overruling it, if on full consideration, it comes to the conclusion that it is wrong."

It is also to be observed that the onus of showing that the trial court was wrong in its decision as to the facts lies on the appellant. See Colonial Securities Trust Co v Massey [1896] 1 QB 38, per Lord Esher MR at 39.

Referring to the present case, it is to be noted that it was the respondents who made the assertion that the appellants had summoned them by radio announcement to report for duty. It is also significant that the assertion was made by the respondents in their pleadings, and it is clear that this particular assertion formed the crux of their case. The call by radio announcement, if proved, would constitute an offer of employment on the part of the appellants and the respondents turning up in response to the radio announcement would constitute an acceptance of the offer, thereby giving rise to a legally enforceable contract of employment. In other words, the argument that the respondents were summoned by radio announcement by the appellants was a point in issue and it is a trite rule of evidence that any point in issue is to be proved by the party who asserts the affirmative, according to the maxim *ei incumbit probatio qui dicit, non qui negat.*

Referring to the present case, the onus lay on the respondents to prove the assertion in issue, namely, their assertion that they were summoned by radio announcement to report for duty. Of course, we are referring here to proof on a preponderance of probabilities.

We have indicated that the appellants produced in evidence two documents, exhibit LWC4 and exhibit LWC5, which showed that the radio announcement which they caused to be made on the Malawi Broadcasting Corporation radio related only to labourers working in the auction and green leaf departments, and not those who were previously employed in the stripping department, as the respondents were. It is significant, in our judgment, that the appellants brought up the said documents at an early stage, with their affidavit, before the matter came up for trial. It will be seen from this that the appellants had made it abundantly clear to the respondents, right from the very outset, that the issue of the alleged radio announcements was hotly contested. The appellants had further shown that if the respondents were serious about the said radio announcements the Malawi Broadcasting Corporation should have the documents upon which the announcements were founded. We would agree with Counsel for the appellants in his submission that, on these facts, the respondents were naturally and logically expected to obtain the said documents and tender them in evidence. We would further agree with Counsel for the appellants that it was very easy for the appellants to obtain the documents or secure their production, if need be, through a notice served in the usual manner on the Malawi Broadcasting Corporation, or whoever. All in all, we are inclined to believe that there were no such radio announcements, otherwise the respondents, who, it is to be noted, were represented in the lower court as they are in this Court, would have produced the said documents or at least have made an effort to have them produced. Another point which made the respondents' case suspect was the fact that there was a discrepancy in their evidence as regards when, precisely, the radio announcement was made. In one breath they said that the radio announcement was made in March, yet in another breath they said it was made in May. It is also to be observed that the appellants emerged firm in their contention that they employed only very few strippers during the 1993 tobacco

season. They gave a cogent explanation for this, namely, that 1993, as it has already been indicated earlier, was a bad year for the tobacco industry because of the drought that had hit the country, so that they needed only very few strippers. It is also to be noted that the appellants emerged unshaken in their evidence that they recruited very few strippers from among the people who turned up at the gate on their own to look for work. It is to be noted further that the appellants' case was supported and reinforced in all material, respects particularly by DW2 who was one of their previous employees.

On the totality of the evidence, we are of the firm view that the respondents failed to prove the assertion that the appellants called them by radio announcement to report for duties. We are, therefore, satisfied that the appellants have shown that the lower court's finding on this aspect was wrong. We said earlier that this was the crucial point in the appeal. It is clear that the matters raised in the remaining grounds of appeal depended upon whether or not it was proved that the respondents were summoned by radio announcement to report at the appellants' factory to start work. Having held that it was not so proved, there was no contract of employment. It is, therefore, not necessary to deal with the remaining grounds of appeal.