

MULINDAHABI v. EWSA

[Rwanda SUPREME COURT – SC2013 – RADA0015/13/CS (Kanyange, P.J., Mukandamage and Rugabirwa, J.) November 08, 2013]

Labour Law – Employment contract – The employment status of the public institution employee who is under an employment contract – The employee who is under the employment contract is governed by the labour law instead of being governed by general statutes for Rwanda public service in case he/she does not demonstrate the instrument of appointment – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 2.

Labour law – Employment contract – Probation period – The right to defence – Termination of the employment contract under probation period – The termination of an employment contract for the employee under the probation period does not require to give him/her the notice but damages are awarded in case the employee was not informed about the fault which led to the termination of the contract so that she/he can defend her/himself against it – Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article. 18.

Contracts or obligations law – Procedural expenses and counsel fees – The party to a case should provide evidence for the duties performed by an advocate for which he claims for compensation.

Facts: Mulindahabi entered into an employment contract with EWSA, former RECO RWASCO which included a clause of six month probation period, during which he was dismissed.

Mulindahabi sued EWSA in the High Court arguing that he was unlawfully dismissed and requested for various damages. The Court ruled that he was unlawfully dismissed since he was not notified about the faults committed in order to present his defence against those allegations as provided for by the General Statute for public service. It also held that even though he concluded a contract under probation, he is governed by the General Statute rather than Labour Law because EWSA is a public institution as specified in the contract, thus it decided that he should be awarded damages for the unlawful dismissal. Both parties appealed to the Supreme Court, EWSA adducing that the court disregarded the agreement between the two parties when it held that Mulindahabi was governed by the General Statutes for public service whereas he was governed by the contract, which led to the perception that EWSA faulted. Mulindahabi argues that there was a contradiction in the rulings of the case and also the damages he was awarded were insufficient and the previous Court did not provide any motivation for that.

Held: 1. The employee who is under the employment contract is governed by the labour law instead of being governed by the general statutes for Rwanda public service in case he/she does not demonstrate the instrument of appointment.

2. The termination of an employment contract for the employee under the probation period does not require to be given the notice but damages are awarded in case the employee was not informed about the fault which led to the termination of the contract so that she/he can defend her/himself against it

3. When an employee under probation period is dismissed on the grounds of work performance; the Court cannot examine the issue regarding his/her reinstatement.

4. The party claiming for the counsel fees should demonstrate to the Court the tasks performed by the Counsel.

**EWSA's appeal has merit in part.
Murindahabi's appeal is without merit.
Court fees to both parties.**

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article 18.

Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 19, 27.

Law n° 45/2011 of 25/11/2011 governing Contracts, article 64.

No case referred to.

Doctrine:

Jean Pélissier, et al, "Droit du travail", 2e édition, p.365.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Mulindahabi entered into an employment contract with RECO RWASCO (now EWSA) on 17 November, 2009 and was dismissed on 13 April, 2013, EWSA claims that he was an employee governed by the contract and he was dismissed during the probation period while Mulindahabi claims that he was recruited through the procedure provided for by the General Statute for public service, therefore he was governed by that Statute.

[2] Mulindahabi filed a claim mentioned above in the High Court and in its decision, it was held that the claim has merit and ordered EWSA to pay to him 6,000,000 Rwf for the pecuniary loss he incurred due to the dismissal, 2,000,000 Rwf in damages for defamation and 200,000 Rwf for the procedural fees

[3] The Court's adjudication relied on the fact that even though Mulindahabi concluded an employment contract which provides for the probation period, it should not be considered because EWSA is a government institution, and revisiting article 5 and 6 of the law n° 22/2002 Instituting the General statute for Rwanda public service and considering the organizational structure of EWSA which has the staff in charge of its administration, including Mulindahabi who was the head of planning and strategy section as mentioned in the contract; he was governed by the Statutes rather than the contract.

[4] Concerning his dismissal, the Court found that it was not in conformity with article 90 and 94 of the law n° 22/2002 instituting the Statute mentioned above, because prior to his dismissal, EWSA did not notify him of his faults so that he could defend himself against it or to serve him with the draft of the proposed sanctions so that he provides the explanations. The court found that Mulindahabi should have been reinstated on his post because he was dismissed unlawfully, but as his post had already been assigned to another employee and there is nothing to demonstrate that there is another similar post which is almost on the same level in the organizational structure; he should be paid damages for the loss of his post

instead of paying him the salary arrears for the months he claims because he was not working by then.

[5] It also explained that Mulindahabi should be awarded damages for the embarrassment caused by the injustice of unlawful dismissal basing on the faults which were not revealed before that they were committed, thus causing moral prejudice.

[6] EWSA appealed the judgment to the Supreme Court arguing that the High Court ruled that Mulindahabi was governed by the statute of public service, when moreover he had entered into a contract with RECO RWASCO (EWSA) on 17 November, 2009, that even the claim he initiated relied on that contract he alleges that it was not performed, therefore EWSA should not be charged any damages since it did not commit any fault.

[7] Mulindahabi also filed an appeal alleging that there were contradictions in the ruling of the case, because the Court held that he should have been reinstated and on the other hand that he cannot be reinstated because the post is no longer vacant. He also stated that the Court awarded him 6,000,000 Rwf of damages without any basis and that they are less, and that the damages and procedural fees he was allocated are also less. Furthermore the Court remained silent on 200,000 Rwf he paid the Counsel.

[8] The hearing was conducted in public on 02 July, 2013 and on 01 January, 2013, EWSA represented by Rusanganwa Jean Bosco, the Counsel and Mulindahabi represented by Counsels Habiyambere Aphrodis and Gasasira J. Claude.

II. ANALYSIS OF THE LEGAL ISSUE

APPEAL OF EWSA

1. Whether the Court erred in ruling that Mulindahabi was governed by the General statute for public service.

[9] The Counsel for EWSA state that the High Court held that Mulindahabi entered into an employment contract but disregarded the agreement of both parties and held that he was governed by the general statute for public service. Thus, basing on that, it held that EWSA erred in dismissing him while the contract which should have been relied on stipulates that an employee can be dismissed without notice, and in addition of that, even the claim lodged by Mulindahabi is based on that contract because he alleges it has been violated.

[10] He further states that the cases referred to in the ruling of the appealed judgment are irrelevant to this case of Mulindahabi because the plaintiffs in those cases were not on probation period like Mulindahabi, and the subject matter is different from the subject matter in those cases because the petition was about annulment of the administrative act.

[11] Mulindahabi and his counsels plead that in order for the contract to be valid it should be in conformity with the law as provided for by article 33 of CCB.III which was in force during his dismissal and article 64 of the Law n° 45/2011 of 25/11/2011 regulating the contracts, that even when he was recruited, EWSA had already released a job announcement on its website mentioning that it recruits employees in accordance with the presidential order n° 37/01 implementing the Law n° 22/2002 of 09/07/2002 on general statute for public service, therefore employees recruited through the procedure provided for by that presidential

decree are governed by the general statute for public service, and that the contract he signed which is contrary to the law should be invalidated.

[12] They state in addition that the other element proving that he was subject to the general statute for public service, is that he was appointed to the post which is provided for in the organisational structure and was paid the salary from the public treasury. Regarding other cases relied on; he states that the subject matter is relevant to case because the fact that he claimed that he was unfairly dismissed implies that he requested for the annulment of the decision which dismissed him.

[13] They continue declaring that Mulindahabi would not be held accountable for concluding an unlawful contract due to the EWSA's faults, and asserting that he was on probation is wrong; rather, he was on internship because he completed the probation and joined the public service as he became a civil servant in 1986 and the probation period lasted for two months. They also state that in the claim submissions of Mulindahabi, nowhere is mentioned that he relied on the contract.

THE VIEW OF THE COURT

[14] Concerning the law which should be applicable in the case of Mulindahabi, the case file indicates that he became an employee of RECO-RWASCO (now EWSA) employee after passing the interview as he adduces, and on 17 November, 2009, they concluded a contract which includes a clause of six month probation period. Apart from that contract there is no other instrument that Mulindahabi presented which confirms him as public servant, so that it can be based on to approve that he was governed by the General Statute for Public Service.

[15] The fact that he concluded an employment contract with RECO –RWASCO, implies that he was governed by the law n^o 13/2009 of 27/05/2009 regulating labour, pursuant to its article 2 which provides that this law regulates labour relations between workers and employers (...) as per contract.

[16] Additionally, the fact that Mulindahabi used to be a civil servant governed the General Statute, cannot be relied upon to approve that it is the same context he was appointed to EWSA while he does not produce the instrument he bases on (Appointment order), and he does not even prove how he left the civil service apart from claiming that he requested for leave of absence for non-specified period,` reinstatement should have been done in accordance with article 64 of the Law establishing the General statute of public service, which was not the case for Mulindahabi who concluded a contract which includes a clause of probation period as specified above, and in the investigation carried out by the High Court at EWSA, the explanations given to the Court were that there are other employees who are under employment contract in the Institution.

[17] Therefore the Court finds that, in examining the issue of Mulindahabi's dismissal, the labour law which is stated above should be applied rather than the general statute for public service as decided by the high Court, and the damages requested by Mulindahabi should be analysed pursuant to the provisions of that law.

2. Whether Mulindahali should be awarded damages.

[18] The counsel for EWSA pleads that the damages it was ordered to pay to Mulindahabi amounting to 8,200,000 Rwf are groundless, because the Court ordered them basing on the

fact that Mulindahabi was unfairly dismissed, while it did not err by dismissing him because it based its decision on the probation contract they entered into.

[19] Furthermore, even the way those damages were awarded is not clear because they were awarded under the discretion of the court without any basis while his salary was well known and there is a procedure for evaluating the loss and that, usually the highest damages awarded are six months' salary.

[20] Mulindahabi and his counsels plead that the ground of the damages he was awarded is that he was unlawfully dismissed because he was not notified of the faults he allegedly committed, and that is inconsistent with article 18 of the Constitution together with articles 88, 90, 93 and 94 of the Law n° 22/2002 mentioned above, and that they also rely on the fact that by dismissing him EWASA used defamatory statements which affected him including the failure to find a job.

[21] Concerning the awarding of damages, Mulindahabi argues that he appealed it because it should have been based on his salary until his re-instatement or until his retirement.

THE VIEW OF COURT

[22] As already stated above, the contract concluded between Mulindahabi and RECO RWASCO provided for the probation period of six months, and it was terminated within that period, because the termination letter dates 13 April, 2010 and the contract was signed on 17 November, 2009.

[23] Regarding the termination of the contract during the probation period, the law regulating labour which is stated above is silent on that issue, apart from the notice, whereby article 27 of that law provides that there is no notice in case the employment contract is terminated during the probation period.

[24] Concerning the termination of that contract, law Scholars state that each party can terminate it at any time, and the employer is not under obligation to give the dismissal notice or to give a genuine reason for its termination¹, meaning that there are no damages awarded for that termination. These scholars further explain that though each party has such a right, it should not be exercised in such a way that is prejudicial to each other, thus the employee can be awarded damages, if he presents the evidence that the employer terminated the contract with the purpose of causing prejudice to him and also the employer can be awarded damages by the employee who terminates the contract with the same cause.²

[25] With regard to the ground for the termination of the contract, it was explained in the letter mentioned above that Mulindahabi used to hinder smooth running of the work which

¹ Le trait essentiel, en même temps que la raison d'être de l'engagement à l'essai, est de conférer à chaque partie, sauf stipulation contraire, la faculté de rompre le contrat à tout moment. L'employeur n'a pas à respecter un préavis sauf, bien entendu, si la convention collective applicable a institué un délai d'avertissement avant que la cessation du travail devienne effective: Jean Pélissier, Alain Supiot, Antoine Jammaud, *Droit du travail*, 2e édition, p.365.

² Le droit de rompre le contrat n'est pas pour autant discrétionnaire. Comme tous les droits, le droit de mettre fin à l'essai est susceptible d'abus. Le salarié peut obtenir des dommages et intérêts s'il rapporte la preuve que l'employeur a agi par malveillance à son égard ou avec une légèreté blâmable. Il arrive aussi- même si cela est plus rare- qu'un employeur obtienne la condamnation d'un salarié pour rupture abusive en cours d'essai. Op.Cit p. 366.

was tarnishing the image of the institution and he was characterized by conflict with other departments of the institution.

[26] The court is of the view that for the main reason cited in the letter, it is considered in the context of the performance of the employee and which is the purpose of the probation as stipulated in article 19 of the law n° 13/2009 of 27/05/2009 regulating labour, which states that in that period the employer examines the quality of the worker's services and output while the worker looks at the conditions of work, living, pay, health and security at work as well as the social climate among the institution workers. The law scholars stated above explain that this period is intended for the employer to evaluate the ability and capacity of the employee and the employee to find out if the employment is appropriate for him/her³.

[27] But regarding the second issue in the letter, the court notes that even EWSA accepts that pursuant to the fault committed by Mulindahabi of spreading the conflict between the departments, he should have been notified about it and he defended himself against it, even though the law regulating labour does not provide for it, but no decision can be made against someone without him/her getting a hearing as provided by the Constitution of Rwanda in its article 18.

[28] Basing on the submissions above, the Court finds that EWSA having not informed Mulindahabi the fault he was accused, so that he can present his defence against it, it must pay him damages for it, computed on the on the salary he was remunerated. As it is evident in the above mentioned contract, it stipulates that Mulindahabi's gross salary was 650,000Rwf and it is the one to be based on because his net salary was not demonstrated, therefore he be awarded 1,350,000Rwf of damages equivalent to three months salary.

THE APPEAL OF MULINDAHABI

1. Whether Mulindahabi should be reinstated.

[29] Mulindahabi argues that the Court contradicted itself because on one hand, it held that he should have been reinstated and on the other hand, he cannot be reinstated because the post is no longer vacant without reliable information about it because it was not stated by the parties. He adds that he cannot be liable for EWSA's faults by depriving him of his right to be reinstated. He further states that, the motivation of the Court according to which his post was allocated to others a long time ago is inconsistent with the motivation of Judgement RADA 0124/07/HC/KIG in which the Court held that, when a decision nullifying the dismissal of an employee is made, no matter how many years have elapsed after that post was allocated to other employee; he/ she must be reinstated and it is in this regard that Kabera Pierre Claver was reinstated. Therefore, Mulindahabi should also be reinstated or be instated to another post within the public service, because it is not his fault that the post is no longer vacant.

[30] The counsel for EWSA argues that there is no way the Court could not have contradicted itself because it joined two things which can not fit together, and that the Court could not order the employer to work with an employee who was dismissed for disrespecting his superiors, his dismissal was done to protect the interests of the institution.

³ (...) Pareille pratique présente pour les deux contractants un intérêt. L'employeur portera un jugement mieux éclairé sur la compétence et l'aptitude professionnelle du salarié à tenir l'emploi; ce dernier vérifiera si la tâche confiée lui convient. Op.Cit p.361.

THE VIEW OF THE COURT

[31] The Court is of the view that, there is no ground for examining the issue regarding his request of reinstatement since it has been demonstrated above that Mulindahabi was dismissed when he was still under probation for the grounds including the performance of the employee under probation;

2. Regarding how the damages were awarded.

[32] Mulidahabi argues that he was awarded 6,000,000 Rwf for what could have been earned while his real income was 650,000 Rwf every month in addition to the bonus. Therefore, he should be paid that salary until the time of reinstatement, and if not so, he be paid that salary until his retirement. He states that the ground for the salary being the basis for computation of damages is the Judgment RADA 006/12/CS which was rendered by this Court.

[33] He also states that 2,000,000 Rwf awarded to him for damages for defamation and disgracing him is too little taking into account the consequences they had on him since then and now. Defamation was caused by disgracing words contained in the dismissal letter, and he was not given a work certificate. Consequently, he should be awarded 20,500,000 Rwf of damages pursuant to article 258 CCB.III due to the fact that he was not employed in CHUK and in the Rwanda Housing Authority where he did a job interview but was not recruited.

[34] Mulindahabi states also that the amount of 200,000 Rwf he was awarded for procedural expenses is less in comparison to case follow up expenses on different levels. Therefore, he should be awarded 1,500,000 Rwf he requested at the first instance level in addition to 500,000Rwf he requested at the appeal level and be awarded 2,000,000Rwf for counsel fees as demonstrated by the contract they concluded.

[35] He further states that the court did not adjudicate on the amount of 200,000 Rwf he paid to his counsel while he demonstrated the contract they entered into and a receipt given to him by the counsel.

[36] The counsel for EWSA argues that Mulindahabi should not request to be awarded the salary because it is the compensation of the performed work, and that EWSA did not prevent him from performing another job.

[37] Regarding the statements in the dismissal letter, he argues that there are no defaming words used and that his claim that he was denied a job because of that letter should be substantiated by evidences.

[38] Concerning the procedural expenses, he disputes that he should not request them from EWSA for he is liable of all his legal actions and administrative appeals because they don't value why he made them, save the claim to Public Service Commission, which even submitted that he was dismissed during the probation period. Indeed, he even resides within Kigali City.

[39] Concerning the paid counsel fees, he states that they should not be awarded to him because in the High Court, he appeared himself before the court and the contract he alleges to have concluded with the Counsel in this Court does not engage EWSA, and that he exaggerates even on the amount he is requesting for if considering the counsel fee amount he

states he paid at the first instance level. Therefore, in case they are awarded, the usual procedure used by the Court to determine them should be followed.

THE VIEW OF COURT

[40] As explained above, apart from damages motivated above relying on the fact that he was not given the opportunity to defence before termination of the probation employment contract, there are no other damages he could request for as they are groundless in the context of labour law because the contract Mulindahabi concluded with EWSA was terminated in the course of the probation period.

[41] Regarding the procedural expenses amounting to 1,500,000 Rwf which Mulindahabi claims that he should have been awarded at the first instance level instead of 200,000 Rwf in addition to 500,000Rwf at the appeal level; the Court finds that he was awarded 200,000 Rwf at the discretion of the Court at the first instance level, and he does not demonstrate how it is less through calculations, and he even requested them in a general way too. Hence, the amount of 200,000 Rwf should be sustained for it is in range.

[42] Concerning the 500,000 Rwf of procedural expenses and counsel fees amounting to 2,000,000 Rwf he requests at the appellate level, the Court finds that, since his appeal is without merit, yet EWSA is the one that wins on some claims, they should not be awarded to him.

[43] Regarding the amount of 200,000 Rwf Mulindahabi claims that he was not awarded at the first instance level while he paid it to the Counsel, the Court finds that there is no evidence of the duties accomplished by that Counsel because the documents of the case file and his submissions show that he drafted them and pleaded for himself. Therefore, it finds no ground to award them to him.

III. THE DECISION OF COURT

[44] Decides that the appeal of EWSA has merit in some parts;

[45] Decides that the appeal of Mulindahabi Fidèle is without merit;

[46] Orders EWSA to pay Mulindahabi an amount of 1,350,000 Rwf of damages in addition to 200,000 Rwf of procedural expenses he was awarded in the first instance level, the total being of 1,550,000Rwf.

[47] Orders EWSA and Mulindahabi Fidèle to jointly pay the court fees of 27,600 Rwf, failure to do it within eight days, the money shall be deducted from their assets by Government coercion.