REPORTABLE (2)

INNSCOR AFRICA (PRIVATE) LIMITED
v
TERRENCE GWATIDZO

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & PATEL JA
HARARE, SEPTEMBER 25, 2014 & FEBRUARY 19, 2015

B. Peresu, for the appellant
D. Mwonzora, for the respondent

PATEL JA: This is an appeal against the decision of the Labour Court, setting aside the respondent's dismissal from employment and ordering his reinstatement. The pertinent facts of the matter are as follows.

The respondent was employed as a pastry maker in the appellant's Pie Division. On 9 October 2005, the appellant requested its employees to report for emergency overtime duties. Except for the respondent, who was on authorised time off, all of the other employees reported for duty. Upon the respondent's return to work, his supervisor asked him to write a report stating why he had not reported for emergency duties. The respondent refused to do so, arguing that his time off had been properly sanctioned and, therefore, there was no need for him to write a report on his time off.

The respondent was later charged with two acts of misconduct, *i.e.* refusal to work overtime in case of emergency and wilful disobedience of a lawful order given by his

superior. The appellant's Disciplinary Committee acquitted the respondent on the first charge but found him guilty on the second charge. It then ordered his dismissal with effect from 26 October 2005 and its decision was subsequently upheld by the appellant's Appeals Committee.

On appeal by the respondent against his dismissal, the Labour Court found that, because it was known that the respondent was on authorised time off, the order to write a report was so unreasonable as to be unlawful. Therefore, the respondent's refusal to comply with that order was not an act of insubordination. The court allowed the appeal and ordered the appellant to reinstate the respondent or pay damages in lieu of reinstatement.

The grounds of appeal herein are essentially twofold: that the court *a quo* applied the wrong test in holding that the order given to the respondent was so unreasonable as to be unlawful; that the court consequently erred in finding that the respondent's refusal to write the report did not constitute wilful disobedience of a lawful order given by his superior.

A further aspect, arising from submissions made by counsel at the hearing of the matter, relates to the penalty that was imposed upon the respondent. It was contended on behalf of the respondent that the penalty of dismissal was unduly harsh on the facts of the case and, additionally, that it did not conform with the penalty prescribed under the appellant's code of conduct. For the appellant, it was argued that the respondent's

misconduct went to the root of his contract of employment and therefore warranted his dismissal. Whatever the merits or demerits of these submissions, the propriety of the penalty on the above grounds was not raised before the Labour Court. Consequently, this is an aspect that cannot be addressed and determined on appeal to this Court.

LAWFULNESS AND REASONABLENESS OF ORDER

In principle, every employee has a duty to obey any lawful order given by his or her employer. See *Matereke* v *CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at 212E-213F, where the meaning of what constitutes a lawful order is explained by Gubbay JA as follows:

> "The second requirement, that the disobedience be directed at 'a lawful order', means simply that the employee is not bound to obey an order to do something not properly appertaining to the character or capacity of his contract of employment. An order which involves a reasonable apprehension of immediate danger to the employee's life or injury to his person, not reasonably contemplated at the time he entered the employment, is unlawful and he is justified in refusing to obey it. For instance, an order to remain in a place in which his personal safety is endangered by violence or disease. See *Bouzourou* v *The Ottoman Bank* [1930] AC 271 (PC) at 276. The position would be otherwise were the employee a fireman, a policeman or a member of the armed forces. See Scoble *op cit* at p 147; Chitty on Contracts 25 ed vol 2 para 3510.
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> The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful. This proposition is well illustrated by the old English case of *Turner* v *Mason* (1845) 14 M & W 112; 153 ER 411, in which a domestic servant - quite deliberately because she had made a request which was rejected - absented herself during a night when she should have been on duty. Her plea of justification was that her mother was desperately ill, though it is not clear that she so informed her employer. She was summarily dismissed and the Court of Exchequer upheld the dismissal. PARKE B remarked that even if the employer had been made aware of the cause of her request to absent herself, it would not have been sufficient to justify her disobedience to his order. …. .
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> …. The order to vacate the office did not involve a contravention of any law or any improper conduct on the part of Bowring. It did not expose the

> appellant to any risk or danger. In fact it only required him to return to his own office. That order was not so unreasonable as to be unlawful."

As for the element of reasonableness, Korsah JA made the following remarks in *PTC* v *Chihoro* 1997 (1) ZLR 148 (S) at 153F-154C:

> "What is a reasonable order must necessarily rest on the circumstances of each case. There is no requirement that a lawful order must in addition be reasonable. If an order be so unreasonable as to defy common sense then it cannot be a lawful order. For instance, if the respondent herein had been ordered to go and deliver the telegrams immediately after suffering an epileptic seizure the order would have been so unreasonable that it could not be categorised as lawful, and disobedience to it would not justify summary dismissal. Similarly, if the respondent had been requested to deliver the telegrams at a place where a riot was in progress it may well be that his refusal to comply with the order would not justify his summary dismissal.
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> It is not an offence to refuse to obey an unreasonable order, for such an order is not a lawful order: *R* v *Qumba* 1930 CPD 396. And in the Indian case of *Punjabhai* v *Bhagwandas* (1928) ILR 53 Bom 309 (C) (cited in Words and Phrases Judicially Defined) Mirza J expressed the view that -
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> > 'Lawful is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or judicial.'
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> An order so unreasonable as to oppose the principle or spirit of the law cannot be lawful. What I said in the *National Foods* case *supra* should be read in this light. Implicit in lawful is what is not unreasonable."

What I glean from these remarks is that although there is no positive requirement for an order to be reasonable, an order that is shown to be unreasonable is unlawful and need not be obeyed. I would add that it would be necessary to show that the order is unreasonable in the given circumstances of the case. To put it differently, an order or instruction is unlawful where it is so unreasonable that no reasonable person in the position of the employer would possibly issue it with the expectation that any employee would comply with it.

In summation, the test for evaluating the lawfulness of an order, as derived from the cases, is whether the order: is capable of being carried out by the employee; is for the advancement of the employer's business; is closely related to the duties of the employee; constitutes an instruction to the employee to perform a lawful act; and is not unreasonable in the circumstances of the case.

WILFUL DISOBEDIENCE AND INSUBORDINATION

In essence, wilful disobedience and insubordination, although treated separately in case authority, are two sides of the same coin. In other words, an employee will be guilty of insubordination where he or she wilfully disobeys a lawful order.

In *Matereke's* case (*supra*) at 211G-212A, it was held *per* Gubbay JA that wilful disobedience connotes:

> "a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial - not simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and employee, going to the very root of the contract of employment."

Similarly, as was observed by Korsah JA in *Chironda* v *Swift Transport* 1996 (1) ZLR 142 (S) at 146F:

> "Surely, the omission to comply with a lawful order is not necessarily born out of a defiance of authority. Unless the proved facts lead irresistibly to an intention to hold authority at defiance, it is a serious misdirection to hold that the appellant's omission to comply with an order was wilful."

According to Grogan: *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed.) at p. 307, insubordination arises when an employee refuses to accept the authority of his employer or superior. The employee must by his act of insubordination challenge the authority of his employer and thereby undermine their contractual relationship. There must be a calculated breach by the employee of his duty to obey his employer. In short, he must intend to defy the employer's order or instruction.

DISPOSITION

In the present case, there can be no doubt that the order given to the respondent to write the report was capable of being carried out by him. Additionally, although there is no reporting requirement spelt out in the appellant's code of conduct, I see no reason to disagree with the appellant's position that it was procedurally necessary for each one of its employees to account for his or her absence in writing so as to maintain discipline at the workplace. In that sense, the order was not only in the interests of and for the advancement of the appellant's business but also closely related to the duties of the respondent. Lastly, it cannot be gainsaid that the instruction given to the respondent was one to perform a lawful act.

The order given to the respondent was to put in writing the reason for his non-attendance for overtime duty. He was not asked to explain where he was or what he was doing during his time off. He was simply asked to formalise his non-attendance at work. In the circumstances, I do not think that the order can be regarded as being an invasion of his privacy or so unreasonable as to be unlawful.

The respondent refused to write the report as instructed because he was of the firm view that the appellant had no right to ask him to write the report, particularly as the appellant was aware that he was on authorised time off. He felt that the instruction given by his superior was an invasion of his privacy. Therefore, he deliberately and consciously disobeyed the instruction.

As was made clear in *Matereke's* case (*supra*) at 212G-213C, the existence of a moral excuse for disobedience does not make the employee's disobedience any less wilful or the employer's order any less lawful. Thus, the fact that the respondent vehemently believed that he was justified in refusing to obey the order does not diminish the wilfulness of his disobedience or affect the lawfulness of the order. Nor does it matter that the appellant was aware of the cause of the respondent's absence from work. That awareness did not relieve the respondent from his duty to obey the lawful instruction given to him.

The instruction was issued by the respondent's immediate supervisor who held a position of authority over the respondent. Consequently, the respondent had a duty to obey the instruction irrespective of the belief, which he openly proclaimed, that there was no need for him to submit the report. His refusal and failure to obey the order constituted an attack on the authority of his employer and undermined their contractual relationship. Moreover, he compounded his defiance of authority at the disciplinary hearing, by refusing to answer the questions put to him or to explain his earlier defiance. It is abundantly clear on the facts that he intended to defy his superior and ultimately his

employer. In the event, there can be no doubt that he was guilty of wilful disobedience and insubordination.

The Labour Court found that the order given to the respondent to write the report was unreasonable and therefore unlawful. It accordingly found that he was not obligated to comply with the order and that his refusal to do so did not amount to insubordination. Having regard to the position that I have taken, the court *a quo* clearly misdirected itself and erred in its findings. In the result, the appeal against its decision must be upheld, with costs inevitably following the cause.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The decision of the court *a quo* is set aside and substituted as follows:

   "The appeal be and is hereby dismissed with costs."

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners
Mwonzora & Associates, respondent's legal practitioners