REPORTABLE (21)

OLIVINE INDUSTRIES (PRIVATE) LIMITED
v
(1) B. SHONHIWA (2) F. GARATSA (3) P. ZARANYIKA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & PATEL JA
HARARE, SEPTEMBER 25, 2014 & MARCH 31, 2015

GWAUNZA JA: This is an appeal against the judgment of the Labour Court declaring null and void a disciplinary hearing conducted by the appellant and in terms of which the respondents were dismissed from their employment. Having found that the hearing was conducted in a manner that violated the appellant's code of conduct in that there were no workers' committee representatives present, the Labour Court remitted the matter to the appellant for a fresh hearing to be conducted.

The facts of the matter are as follows. The respondents were employed by the appellant in various capacities, with the first respondent being a supervisor. On the night of 17 March 2009, 45 cases of buttercup margarine were stolen from the holding area within the appellant's premises. Its security personnel caught sight of a truck which was suspiciously parked near the holding area. The truck sped away when the security personnel attempted to block it and in the process three cases of margarine fell off it. The security personnel also observed four people running into the holding area, and one of them was wearing khakhi overalls.

A follow up was made and the only people found in the holding area were the respondents and one Sergeant Musiiwa. The latter was not an employee of appellant, but of a security company engaged by it. The appellant alleged that the third respondent was wearing khakhi overalls. Investigations conducted by the security personnel revealed that the respondents and Sergeant Musiiwa were the only people who were observed running into the holding area.

The respondents were charged in terms of ss 2.4.4 and 3.2.3 (F) of the appellant's code of conduct, with-

a) theft of 45 cases of margarine, and

b) gross dereliction of duty.

A hearing was conducted by the Head of Department, who found the respondents guilty as charged and dismissed them. Aggrieved by the decision, the respondents sought to appeal to the appellant's disciplinary committee as stipulated in s 5.2.2 of the code of conduct. However, due to the fact that there was at that time no workers committee in place, it was not possible to constitute a disciplinary committee that met the requirements of the code of conduct. The matter was referred to the labour officer in terms of s 101(5) and (6) of the Labour Act [*Chapter 28:01*]. The labour officer in turn referred the dispute to an arbitrator for the determination of the appeal.

In their submissions before the arbitrator, the respondents indicated that they were aggrieved at the appellant's violation of the code of conduct and what they perceived to be an unfair dismissal as there was no evidence to the effect that they had indeed committed the offence in question.

The arbitrator dismissed the appeal on both grounds and upheld the dismissal of the respondents. They appealed to the Labour Court on the following grounds:-

(i) The arbitrator erred on a point of law by determining that the employer had a right to violate a registered code of conduct, and

(ii) The arbitrator erred on a point of law by basing her analysis on hearsay evidence which could not be substantiated.

The Labour Court having upheld the appeal as already indicated, the appellant has now filed this appeal on grounds that essentially raise the following issues, namely:-

1. whether the appellant violated its own code of conduct by holding a hearing with a panel that, in the view of the respondents, did not meet the composition requirements of the code of conduct

2. whether the court a quo erred at law in failing to determine all the issues which were before it on appeal.

The first issue calls into question the correct interpretation of the provisions of the appellants' code of conduct, in terms of which the disciplinary hearing was conducted. In this respect, it is pertinent to note and emphasise that only one disciplinary hearing was conducted by the appellant. This was the hearing before the Head of Department, as provided at Step 2 of the organogram on page 20 of the appellant's code of conduct, titled "Disciplinary Structure and Levels of Authority". There seems to be some merit in the assertion by the appellant that the court *a quo* fell into the error of confusing this hearing and the one that could have been held following the respondent's endeavour to appeal to the disciplinary committee as stipulated in s 5.2.2 of the code. As indicated above, this latter hearing was aborted, since it could not be properly constituted.

The respondents argue that at the hearing before the Head of Department the participation of a workers' committee representative was mandatory. This is the argument that found favour with the court *a quo,* hence its ruling, now impugned by the appellant. In disputing this contention, the appellant argues, quite correctly in my view, that while step 2 of the structure indicates that the composition of the hearing authority at that stage is the Head of Department and workers' committee representatives, this is not to be read independently from subsections 5.1.2 and 5.1.3 of the code. Subsection 5.1.2 relates to the initial investigation and collection of written statements related to a charge by the Head of Department. Subsection 5.1.3 relates to the subsequent hearing before the Head of Department and reads in the relevant part as follows;

> "The composition of the hearing committee shall be as per diagram on page 20. The employee facing disciplinary charges may be accompanied by the worker's committee representative" (my emphasis)

In the organogram at page 20 of the code the composition of this hearing committee is indicated as follows;

> "Head of Department.
> Workers committee
> Representatives"

It appears to me that while the organogram gives a graphic presentation of the levels and composition of disciplinary hearings, para 5 elaborates, in a narrative form, on the same issue. Thus it is explained in both subsections 2 and 3 of paragraph 5 that the employee may be accompanied or represented by a workers' committee representative at the hearing before the Head of Department. This is not a mandatory provision. While it is not in dispute that the absence of a workers' committee at the relevant time frustrated the desire of the respondents to be represented at such hearing by workers' committee members of their choice, the appellant, in my view, was within its rights to reject the request by the workers to

bring representatives from the disbanded workers' committee. The latter no longer had the mandate to represent the respondents. The respondents would have had a genuine grievance had the employer denied them the right to be accompanied by members of a substantive workers' committee. This, however, was not the case.

The appellant, which did not have to accede to what must have been another request by the respondents, nevertheless did so and allowed them to be accompanied to the hearing by their fellow workers. Given that neither the presence nor the absence of the respondent's co-workers could have undermined the propriety of the proceedings, in terms of the composition of the hearing authority, I find that the court *a quo* misconstrued the provisions in question and, consequently, misdirected itself in finding, as it did, that the hearing before the Head of Department was improperly constituted. Nor do I find, as contended by the respondents, that the proceedings could also be impugned on the basis of the presence of other managers of the respondent. The Head of Department *in casu,* one Mr D Kadzirange, sat as the hearing authority in terms of the code. The other two managers who were present were not part of the hearing committee, since one was a minute taker and the other represented the complainant.

Although the respondents might have suffered a setback in their quest for justice, occasioned by the appellant's inability to properly constitute a disciplinary committee to hear their appeal, they were able to initiate a process that later saw them arguing their case before an arbitrator. The latter dealt with the matter as if it was an appeal to her in the first instance. In the light of all this I do not find merit in the contention, upheld by the court *a quo,* that the respondents were denied the right to be heard.

I am satisfied, in the result, that the procedures were correctly followed and that no basis has been laid for the assertion that the appellant's code of conduct was violated. The arbitrator was correct in her finding in this respect, and the court *a quo* should have upheld it.

It is evident from its judgment that the court *a quo* determined and dismissed the matter on the basis of one technical point, that is, whether or not the hearing committee of the appellant in this case, was properly constituted. As indicated above, the court's finding on this point was based on a misconstruction of the relevant provisions of the appellant's code of conduct. There was thus no need to remit the matter to the arbitrator for a fresh hearing. Be that as it may, and since it is generally accepted that labour matters should not be determined on the basis of technicalities, the court *a quo* could still have properly considered the other issues placed before it by the appellants (respondents *in casu*)[1]. In particular, the court should have addressed the ground of appeal that impugned the arbitrator's reliance on 'hearsay' evidence. This brings in the second issue arising from the appellant's grounds of appeal.

It is evident from the arbitrator's award that she relied on circumstantial, rather than hearsay evidence, in reaching the decision that she did. On page 3 of the award, the arbitrator stated as follows;

> "as much as evidence given to me by the employer was circumstantial.(*sic*) It is glaringly clear that the 3 had something to do with the theft"

I have no doubt, given this circumstance, that the respondents mistakenly labelled as 'hearsay' the evidence that was placed before the arbitrator..

[1] See Dalny Mine v Banda 1999 (1) ZLR 220 S

I have already expressed the view that the arbitrator correctly interpreted the relevant provisions of the appellant's code. As is apparent from the papers before the court, the arbitrator adequately considered the merits of the case and reached a decision that I am persuaded is unassailable, despite being premised on circumstantial evidence. That being the case and in the interests of bringing finality to this litigation, I am of the opinion that no real purpose would be served by remitting the matter to the Labour Court for it to consider the same merits. This Court has before it all the evidence relevant for a final determination of the matter.

I am persuaded that the evidence before the arbitrator, *albeit* circumstantial, was difficult to challenge. The theft of the 45 cases of margarine, the truck (from which a few cases of margarine fell off) that sped off after detection by security agents and the sight of people running away from the truck and disappearing into the appellant's holding area, were all facts that were not challenged by the respondents. They and Sergeant Musiiwa were the only people who were subsequently found inside the holding area. They failed to tender any evidence to disprove the allegation that they were the people seen running to the holding area by the appellant's security personnel. Nor could they answer the question as to whether there was another entrance to the area, apart from the one they were seen disappearing into. Thus the inference to be drawn, and which in my view the arbitrator correctly drew from this evidence, was that the respondents stage-managed and were active perpetrators in the whole operation. This being a civil case, it is important to note that the inference sought to be drawn from circumstantial evidence, while it must be consistent with all proved facts, need not be the only reasonable inference. This point is stressed in the South African case of *AA Onderlinge Assurance Bpk v De Beer*[2] where it was held that a plaintiff who relies on

[2] 1982 (2) SA 603

circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

Applied to the circumstances of this case, there can, in my view, be little doubt that the appellant properly discharged the burden of proving the respondents' culpability as charged.

When all is told, I find that the appeal has merit and ought to succeed.

For reasons not apparent from the record, the court *a quo* ordered that each party should bear its own costs. Since the appellant has not specifically implored this Court to substitute the Labour Court's order in this respect with a different order as to costs, that order will be maintained.

It is in the result ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The decision of the Labour Court be and is hereby set aside and substituted with the following:

"1. The appeal be and is hereby dismissed.

2. Each party shall bear its own costs."

ZIYAMBI JA: I agree

PATEL JA: I agree

Coghlan Welsh & Guest, appellant's legal practitioners

G.H. Muzondo & Partners, respondents' legal practitioners