DISTRIBUTABLE (21)

Judgment No. SC 28/04

Civil Application No. 156/02

LEVER BROTHERS (PRIVATE) LIMITED v WITNESS GARAI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, FEBRUARY 24 & MAY 13, 2004

H Zhou, for the appellant

Respondent in person

ZIYAMBI JA: The respondent was found guilty by the Disciplinary Committee of the appellant of refusing to obey a lawful order in that he gave a new contract to one A & L Jobbing ('A & L') contrary to instructions that new contracts should not be awarded to any contractors without the approval of the technical director. As a result, the respondent was dismissed from his employment with the appellant. An appeal to the Personnel Director in terms of the Code of Conduct governing the parties ("the Code") was dismissed and the respondent appealed to the then Labour Relations Tribunal (the Tribunal) now the Labour Court. The Tribunal having upheld the appeal, the appellant now appeals to this Court.

The gravamen of the appeal is that the Tribunal misdirected itself on the facts and that the misdirection was so serious as to constitute a misdirection at law. See *Muzuva v United Bottlers (Private) Limited* 1994 (1) ZLR 217 (S) at 220, *Gauntlet Security Services*

(Private) Limited v S Mbijana SC 82/99 at 3 – 4 & *Mpumela v Berger Paints (Private) Limited* 1999 (2) ZLR 146 (S) at 149.

The facts leading up to this appeal are as follows:

The respondent was a junior manager in the Engineering Department of the appellant. On 23 October 1997, 14 November 1997 and 18 November 1997 respectively, three memoranda (memos) were circulated by the Technical Director, Dr T. Mahachi ("Mahachi"). Although only the last two were addressed to all managers, the respondent was aware of the contents of the first as indicated on p 10 of the record. The memo of 14 November 1997, reads as follows:

"CONTRACTOR APPROVAL

> This is to inform you that all contractor approval will be done by me. Thus from today (14 November 1997) no one else will give approval for contractor(s) to work on site.

Contractors already on site should still be approved by me to enable them to continue with their current work.

On Monday next week I expect to see no contractor on site until after my approval. I will inspect the entire factory on Monday morning and contractors not approved by me will be told to leave the site.

Thus to avoid situations that may be embarrassing, please make sure that this letter is adhered to. If anything is not clear to anyone please come to discuss with me between 7.00 a.m. – 8.00 am on Monday 17 November.

This was followed by the memo of 18 November 1997, which reads:

> "Please find listed:-
>
> 1. Approved contractors for specific jobs.
> 2. Contractor that require approval for particular task.
>
> For job listed on the attached we will only use the listed contractors. For jobs that are not listed, work will only be done after contractor approval by the

Technical Director.

Bill will co-ordinate all contractor activities and will be responsible for contractors on site. Anyone wanting to use a contractor will need to discuss with Bill and Bill will seek approval if the contractor is not approved."

A & L was listed as one of the contractors for which an alternative was required. According to the record, the respondent had been told on two occasions by Mahachi that the latter no longer wanted A & L on site. Thus when the first memo was circulated, it was as clear as can be that no new jobs were to be assigned to A & L or any other contractor without the prior approval of Mahachi.

Notwithstanding this order, the respondent on 25 November 1997, was approached by a buyer employed by the appellant, a Mrs Mugadzaweta, who handed him a purchase requisition for a canteen job. He took the purchase requisition to the office of the manager for the Buying Department, J. Marangwanda but the latter was in a meeting. According to the respondent, Mugadzaweta asked him to write a note to Marangwanda if he was sure there was no problem in giving jobs to the contractors on site. The respondent wrote the note but according to his evidence, he intended only to recommend, not to instruct as he was not authorised to give jobs directly although he sometimes gave urgent jobs. The note which he wrote reads as follows:

"Mr Marangwanda

For quick action. Give these to the old man – A & L"

Whether the note was an instruction or merely a recommendation to a fellow manager, it is clear that the note went against the instruction contained in the memos set above. Thereafter, on 3 December 1997, the respondent authorised A & L to commence the new job on the canteen by signing a "PERMIT TO WORK" No. 025.

On 5 December 1997, the respondent was asked by Mahachi who was "still giving A & L new jobs on site." The respondent denied knowledge of the new jobs being awarded to A & L. When his written instruction to Marangwanda was produced to him, the respondent said he had forgotten that he had written the memo, and secondly that he had misunderstood Mahachi's memo to mean that since A & L was still on site, they could do this new job which was urgent.

The Disciplinary Committee which conducted the hearing found the respondent's explanation to be unacceptable and found him guilty of violating the Code on two counts for both of which the punishment was dismissal. They are;

> "1. Wilful refusal to obey a lawful instruction.
> 2. Misrepresentation of facts of which the charge an act, conduct or omission inconsistent with the express and/or implied conditions of his contract of employment."

At page 53 of the record the following is recorded as having been said before the Tribunal:

"HOVE: Is it correct then to say that, when you signed this (Permit to Work) you were authorizing and giving the job to A & L?

GARAI: Because the job had to be done and the Safety Manager had already signed as well.

HOVE: Is it correct to say that you were giving the job at this stage to A & L?

GARAI: Yes you can say that because the two of us authorized the job to go ahead."

It is therefore difficult to understand the Tribunal's finding that the work was not assigned to A & L by the respondent but by the buying department. The respondent's submission that both he and the Safety Manager authorised the allocation of the new job to A & L does not excuse him from culpability for his own part in disobeying the instruction given by Mahachi. Since he had obtained an extension for two weeks to enable A & L to complete its outstanding jobs, it would have been a simple matter to seek Mahachi's approval for the new job. He chose to act in defiance of Mahachi's instructions. That in my view, amounts to wilful disobedience to a lawful order. See *Matereke v C.T. Bowring & Associates (Private) Limited* 1987 (1) ZLR 206 (S); *Chironda v Swift Transport* 1996 (1) ZLR 142 (S); *Henry Mandongwe v Art Corporation Limited* SC 15/04 Such conduct on the part of employees ought not to be tolerated.

There was no evidence to support the Tribunal's finding that the respondent acted as a result of a mistake. Indeed, if the respondent misunderstood such a clear order to mean that no new jobs were to be assigned to A & L after the extended period, then he was not worthy of his job as a manager.

Further, I agree with Mr Zhou that the respondent's conduct constituted 'misrepresentation of facts resulting in an act, conduct or omission inconsistent with the conditions of the contract of employment'. That the respondent knew this to be so, is

evidenced by the fact, that when asked to explain why he had awarded a contract to A & L, he claimed that he had forgotten that he had written the note to Marangwanda. The note was written on 25 November 1997, some five days or so before the respondent was confronted by Mahachi. With due respect to the Tribunal, bearing in mind the respondent's involvement with A & L, the application for an extension of their time on site, and the writing of the note recommending them for a further job, it is difficult to believe the respondent when he says he had "forgotten about the recommendation that he had made." The two queries by Mahachi as to who had awarded new jobs to A & L cannot have failed to prompt the respondent into remembrance. It would appear that the respondent, being unaware that the note was in Mahachi's possession, feigned ignorance in the hope that the blame might be laid at the door of the Buying Manager, Mr Marangwanda.

The Tribunal said:

> "Again on the facts before me, the 'misrepresentation' was because of misunderstandings that were caused by the fact that the appellant genuinely believed that he had not given any contracts to A & L Jobbing."

How could the respondent have genuinely believed that he had given no contracts to A & L when one week earlier he had not only recommended A & L for a new job but had subsequently given written authorisation for that company to do the work?

I find myself in agreement with Mr Zhou, that the Tribunal misdirected itself on the facts to such an extent that the said misdirection amounted to a misdirection at law. The appeal must

therefore succeed.

Accordingly the order issued by the Labour Relations Tribunal is set aside and the following is substituted:

"The appeal is dismissed."

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners