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Judgment No. SC 48/04

Civil Appeal No. 77/02

UZUMBA MARAMBA PFUNGWE ZVATAIDA RURAL DISTRICT COUNCIL v (1) EDWIN MAPURISA CHIGODO & (2) H SIBANDA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, JUNE 7 2004 & SEPTEMBER 7, 2004

J R Tsivama, for the appellant

H Zhou, for the respondent

GWAUNZA JA: The appellant brought an application before a Labour Relations Officer, for authority to dismiss the first respondent from its employ. The Labour Relations officer's ruling was to the effect that:

(a) the application by the appellant to dismiss the first respondent was prescribed and

b) that the appellant reinstate the first respondent to his former employment with the appellant, failing which he (first respondent) was to be paid damages.

The appellant was dissatisfied with the decision of the Labour Relations Officer, as well as the way the proceedings leading to it were conducted. It therefore filed an application with the High Court, for a review of such proceedings and decision. The

High Court dismissed the application for review, prompting the appellant to appeal to this Court.

The following facts are not disputed:

The appellant suspended the first respondent, who was its Chief Executive Officer, from its employ with effect from 22 July 1996. On 20 November 1996, the appellant's legal practitioners addressed a letter to the Labour Relations Officer which read in part as follows:-

> "During the period of employment he (first respondent) unlawfully converted monies amounting to at least $3 000 to his own use. As a result of this misconduct our client suspended him without pay pending the outcome of an application to you to dismiss him.
>
> By this letter we hereby apply on behalf of our client, for a determination seeking to dismiss him …" (my emphasis)

The Labour Relations Officer who presided over the hearing of the matter on 12 May 1997, proceeded on the basis that the first respondent's dismissal was based on the single allegation of theft as outlined in this letter. He dismissed the application and ordered that the first Respondent be reinstated without loss of benefits. This was on 26 June 1997.

On 22 July 1997 the appellant filed an appeal against this decision, to a Senior Labour Relations Officer. Before the appeal was heard, and on 19 September, 1997, the appellant's legal practitioner wrote a letter to the Labour Relations Officer which read in part as follows:

> "… our client has reasons to believe that Mr Chigodo has committed acts of misconduct which are inconsistent with his contract of employment and which client regard as sufficiently serious to warrant his dismissal. The following are client's allegations of misconduct against Mr Chigodo which form the basis of this application … ."
> (my emphasis)

The letter then went on to list ten acts of misconduct being alleged against the first respondent. In the last paragraph of the letter, the appellant sought permission to dismiss the first respondent.

The appeal was heard by a senior labour relations officer on 11 August, 1998. On this occasion, the letter dated 19 September 1997, from the appellant's legal practitioners, was on file. All parties were agreed that the senior labour relations officer had no authority, according to the Labour Relations Act [*Chapter 28:01*], to re-hear the matter taking into account the new charges outlined in the letter of 19 September 1997. The senior labour relations officer then remitted the matter to a different labour relations officer, for further investigations and a determination based on the allegations in that letter. This was on 8 December 1998.

The matter was then heard before a different labour relations officer on 17 May 1999.

In her report entitled "Hearing Script Report" the labour relations officer recorded that Mr *Mawere*, the legal practitioner for the appellant, submitted that the hearing was based on the application of 19 September 1997. She also

recorded that Mr *Muvingi*, who appeared for the first respondent, then raised the point (in effect, a special plea) that the matter was prescribed since it was referred to the Labour Relations Officer fourteen (14) months after the first respondent was suspended. That period far exceeded the 180 days within which the Labour Relations Act in s 94(1)(b) required such disputes to be referred to the Labour Relations Officer[1]. The labour relations officer upheld the special plea and made the order already referred to, which the appellant unsuccessfully took to the High Court on review.

The appellant averred that both a copy of the letter suspending the first respondent, and a document listing the various charges against him, were submitted to the Labour Relations Office before the end of July, 1996. The first respondent vehemently disputed the assertion that a document listing the charges had been so submitted. While conceding there was nothing on record but the word of its Chief Executive Officer that he himself had so submitted the two documents, the appellant argued that this action sufficed for the purpose of an application for authority to dismiss the first respondent.

Whatever the merits of this argument might have been, the learned judge in the court *a quo* was, in any case, not satisfied that the appellant had proved that a document listing the various acts of misconduct that were being levelled against the first respondent, had been submitted to a labour relations officer together with a copy of his letter of suspension in July 1996. Consequently, the learned judge found,

[1] S 94(1) of the Labour Relations Act. See also *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S), in which it was held that "a dispute" as defined in s 2 of the Labour Relations Act was sufficiently wide to embrace a dispute between an employer and employee resulting in an application to dismiss such employee.

no application to dismiss the first respondent on the ground of multiple charges had been filed before the end of July, 1996.

I agree with this finding.

The evidence on record tends to disprove rather than prove, that the document in question had been submitted to the labour relations officer in the manner indicated.

Firstly, as the learned judge correctly pointed out, the letter of suspension stated emphatically that charges against the first respondent, emanating from the audit report, would only be preferred against the respondent after the conclusion of investigations yet to be carried out. This conveyed the impression that at the time of suspension, the appellant was yet to come up with a full list of charges against the first respondent. In other words, the document listing the charges was not yet in existence and therefore could not have been submitted together with the letter of suspension.

Secondly, the letter itself made no mention of the purported Annexure to it, said to have been sent together with the letter.

Thirdly, the labour relations officer who first heard the matter on 12 May 1997 indicated that according to the papers on record, authority to dismiss the first respondent was being sought on the basis of a single allegation of theft. This

was in reference to the letter of 20 November 1996, from the appellant's legal practitioners. Hence her determination of the matter on the basis of that one charge of theft.

Fourthly, the letter from the appellant's legal practitioner, dated 20 November 1996, without making reference to earlier communication on the matter or its referral to the Labour Relations Office, sought permission to dismiss the first respondent on the basis of the specific allegation of having converted $3000 to his own use. The appellant's Chief Executive Officer asserts, without substantiation or a supporting affidavit from the legal practitioner concerned, that this letter was written in error. He does not explain how the error could have arisen if, as submitted by him, the appellant's legal practitioners had been furnished with the full list of the allegations against the first appellant, in July 1996.

In the light of this evidence, it is clear the probabilities favour the finding, correctly reached by the learned judge in the court *a quo,* that before the end of July, 1996, no document listing multiple charges against, and therefore no application to dismiss, the first respondent, had been submitted to the Labour Relations Officer.

The first respondent asserted in his opposing affidavit that he never received the full list of allegations said to have been attached to his letter of suspension. However, a letter written by his lawyers on 23 September 1996, which made reference to the document containing the detailed acts of misconduct alleged

against him, casts doubt on the veracity of this assertion. The first respondent's legal practitioners could only have received such document from him. It should be noted that the letter was written before the appellant's legal practitioners wrote their letter of 20 November 1996. It can therefore safely be assumed that the first respondent fully appreciated the fact that he was due to face more allegations or charges of misconduct than the single one of theft mentioned in the letter of 20 November 1996. This, however, does not alter the crucial fact that it has not been established by the appellant that the document detailing the numerous charges the first respondent was to face, was submitted to the Labour Relations Office together with the letter of suspension, in July 1996.

The Labour Relations Officer therefore had no reason to determine the matter on the basis of allegations that had not been given as grounds for seeking authority to dismiss the first respondent.

An appreciation of the consequences of this oversight, if such it was, must have influenced the appellant's legal practitioners to write the letter of 19 September 1997 which contained a detailed list of the allegations against the first respondent. The legal practitioner did not say in that letter that it was a follow up, an addition or in any way connected to, the letter of 20 November 1996. The letter of 19 September, 1997 was formally before the court on the date of the hearing of the appeal before the senior labour relations officer, on 11 August, 1998.

It is recorded that both parties acknowledged the fact that the senior

labour relations officer whose jurisdiction in the matter was not original, but appellate, could not take into account the new evidence and conduct what would have amounted to a re-hearing of the matter. He correctly sent the matter back to a labour relations officer for a hearing based on the detailed allegations that had not been put before the labour relations officer who had first heard the matter.

Given these circumstances, the labour relations officer to whom the matter was remitted took the view that the proceedings were to be conducted on the basis that the matter was referred to her by the appellant through the letter of 19 September 1997. She determined that prescription was to be reckoned up to this date, from the date the first respondent was suspended that is, 8 July, 1996, (which was also the date by which it could be said the appellant first became aware of the misconduct alleged). A period of 14 months separated the two dates and was therefore well beyond the 180 days limit.

The learned judge in the court a quo found there was no irregularity in the conduct of the proceedings before the labour relations officer, and the decision based on those proceedings. She rejected the appellant's argument that the consideration by the labour relations officer, of the issue of prescription, amounted to an improper review of the decision of the senior labour relations officer who had remitted the matter for a re-hearing. The learned judge noted as follows on page 8 of the judgment:

> "The matter was resolved by the labour relations officer on a point of law raised, *albeit* at a late stage, which

> point of law the labour relations officer could not have disregarded as it affected the validity of the proceedings as a whole … . His (her) conduct in so doing cannot, in my view, be found to have amounted to an exercise of review, or appellate powers."

On the question of prescription, the learned judge had this to say, again on p 8 of the judgment:

> "From my reading of the record of proceedings … the first record of the notification of additional allegations (i.e. 19 September 1997) was after the expiry of 180 days from the date on which the acts or omissions upon which applicant sought to rely occurred and also the 180 days from the date on which applicant became aware of such acts and omissions."

I find the learned judge's reasoning and conclusions to be sound. Consequently her finding that there was no irregularity in the manner in which the proceedings before the labour relations officer were conducted, is not to be faulted.

The appeal must, in the result, fail.

It is accordingly ordered as follows:

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

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Muvingi & Mugadza, respondent's legal practitioners