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Judgment No. SC 80/04

Civil Appeal No. 223/01

TENDAI MASWENYA v STANDARD CHARTERED BANK

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, JUNE 24 & SEPTEMBER 28, 2004

M C Mukome, for the appellant

C Phiri, for the respondent

GWAUNZA JA: The appellant was employed by the respondent as a bank teller at its Rusape Branch. He was dismissed from his employment on 13 November 1996, after being found guilty of "negligence causing a substantial loss to the bank", an offence committed while a prior final written warning was still operative. He unsuccessfully appealed against the dismissal to the grievances and disciplinary committee, the appeals committee and the Employment Council for the Banking Undertaking ("the Council"). In its turn, the Labour Relations Tribunal ("the Tribunal") (now the Labour Court) dismissed the appellant's appeal against the decision of the Council. Aggrieved by the decision of the Tribunal, the appellant has now appealed to this Court.

It is common cause that the appellant, who was employed as a bank teller, was on 26 January 1996 charged with certain acts of misconduct related to his work, and issued with a final written warning. According to the respondent's Code

of Conduct, the terms of a final written warning, which is valid for twelve months, are "breached" if the employee concerned is convicted of another act of misconduct before the expiry of the twelve months.

According to the evidence before the Tribunal, the appellant was transferred to the respondent's Nyanga Branch after the final written warning was issued. He was recalled to the Rusape Branch in November 1996 and committed the offence in question on the second day of his return to that Branch. The respondent, it is averred, had hoped that the appellant's work performance would have improved after his time at the Nyanga Branch.

Although the offence in question did not attract the penalty of dismissal, the fact that it had that consequence was explained as follows during the first disciplinary hearing:

> "The above offence was found to fall into category 'C' carrying a penalty of 'severe written warning'. As the officer was already on a 'Final Warning' and in line with our Code of Conduct, offences still running are progressive hence Mr Maswenya was dismissed …".

The appellant admitted being responsible for the loss to the respondent, of $1 000. His main defence was that the amount of $1 000 was not substantial, given that, in terms of the respondent's standing instructions, the threshold of difference that bank tellers were allowed, at the time, was $5 000. His other defence was that the respondent had disregarded the procedure laid down in its standing instructions, which required that a deficiency by a teller should be brought to the attention of the Branch Operations Manager, who would determine the appropriate action to take.

The appellant's counsel, Mr *Mukome*, contended in this respect that the court *a quo* erred in law by not "investigating" the evidence before it, to the effect that proper procedures had not been followed upon discovery of the shortfall. He then

sought leave to amend the appellant's grounds of appeal to include the prayer that the appeal be allowed and the matter remitted to the Tribunal for a proper consideration of the evidence on that matter. As the application was not opposed by the respondent, the Court granted the application for leave to thus amend the appellant's grounds of appeal.

The appellant's grounds of appeal were to the effect that the court *a quo* erred in disregarding, in respect of the appellant's two defences, issues of fact that had clearly been placed before it.

I am satisfied that the grounds raise points of law and that the appeal is accordingly properly before this Court. See in this respect *National Foods Ltd v Magadza* SC-105-95, in which it was stressed that a disregard of evidence placed before the Tribunal, and therefore failure to weigh up the significance of such evidence, constitutes gross irregularity, amounting to misdirection in law, on the part of the Tribunal.

I am, however, not persuaded that there is merit in the appellant's grounds of appeal.

The appellant committed the offence in question whilst still under penalty of a final written warning. This, rather than the quantum or extent of the prejudice to the respondent, was the circumstance that determined the penalty of dismissal. It is not in dispute that had the subsequent offence been committed in the absence, or beyond the currency, of the final written warning, it would have attracted

the category "C" penalty of a "severe written warning".

The appellant did not dispute that the final written warning was still operative. He, however, sought to avoid the consequence of committing the subsequent offence by arguing that the offences were different and, therefore, that the earlier offences had no bearing on the later one.

The Tribunal, in my view, correctly dismissed this argument. Among the earlier offences committed by the appellant were "concealing a difference (surplus) in your cash by making a lot of cancellations which seem fraudulent" and "incompetence resulting from numerous differences …".

A reading of the respondent's standing instructions on the management of cash by its tellers and controlling officers shows that the earlier offences, like the one under consideration, constituted a violation of such instructions. That being the case, I find there is no basis for the appellant's attempt to draw a distinction between the earlier and later offences.

Once it was established, as the Tribunal correctly found, that the offence under consideration properly attracted the penalty of dismissal by virtue of having been committed during the currency of the final written warning, it became irrelevant, in my view, whether the prejudice to the respondent was substantial or insubstantial. Nor was it relevant, after the appellant's admission of the offence, whether or not the procedure he referred to was followed. As already indicated, what was relevant was the commission of the offence in the circumstances outlined. The procedures referred to, even had they been followed, would not have negated the commission of the offence in question.

There was, in the result, no misdirection proved against the Tribunal in the judgment that it passed.

The appeal has no merit and it is accordingly dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Muvingi & Mugadza, appellant's legal practitioners

Coghlan, Welsh and Guest, respondent's legal practitioners