REPORTABLE ZLR (6)

Judgment No. SC 9/04
Civil Appeal No. 9/02

THE TOBACCO RESEARCH BOARD v NELSON MAGAYA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 9 & 23, 2004

H Zhou, for the appellant

A Muchadehama, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal (now the Labour Court) ("the Tribunal") which ordered the appellant ("the Board") to reinstate the respondent ("Magaya") as its carpenter.

The relevant facts are these. Mr Magaya was employed by the Board as a carpenter with effect from 7 February 1980. On 25 April 1995 the disciplinary committee set up in terms of the Board's Code of Conduct ("the Code") found him guilty of theft of the Board's property. In terms of the Code, the penalty for that offence was dismissal. However, he was not dismissed because the Board took into account the length of his service and issued a final written warning to him.

Subsequently, on 5 March 1996, the disciplinary committee found him guilty of refusing to carry out a lawful instruction from a senior member of staff. In terms of the Code the penalty for that offence was a final written warning in respect of

the first offence, and dismissal in respect of the second offence. As Magaya had not committed such an offence before, the Board issued a final written warning. In confirming that penalty, the Board's assistant director and research coordinator said, *inter alia*:

> "I have no option, therefore, but to confirm my FINAL WARNING of 5 March 1996 and to stress that the slightest breach of the Board's Employment Code of Conduct by you will result in your immediate suspension, and that we would get permission from the Labour Relations Department for your dismissal. Your behaviour and work will be closely watched."

Thereafter, on 10 February 1997 Mr Madgwick ("Madgwick"), the head of the department in which Magaya worked, alleged that Magaya had assaulted him. The circumstances in which the alleged assault had taken place were set out in a statement made by Madgwick, which reads as follows:

> "Some time late on Monday morning at approximately 11.15 am I went into the Carpenter's Shop and could not find Mr Magaya who(m) I had asked to cut some land pegs/markers which had been requested.
>
> I proceeded to the Admin. Area to attend to other work and on my return, some fifteen or so minutes later, he was still not in the Carpenter's Shop.

I found him at the Stores Counter talking to three ladies. I was annoyed and asked him what he was doing. He said he was buying fertiliser for himself. I told him he was wasting a lot of time and that I was not at all happy with his output, and that he should get on with the job. This took place in the passage close to and around the corner from Stores. I then pushed past him and went to my office.

A little later (some ten minutes) I went into the Motor Mechanic's Office to find him on the 'phone. I started to reprimand him as we walked outside, telling him that if he did not want to work like everyone else he would have to go.

As I turned to go he appears to have lost his temper and tore into me, tearing my shirt and breaking my glasses which were in my shirt pocket, and took a couple of swings at me.

I did not retaliate as Mr Washington, and I think one other, took hold of him very quickly. He was still ranting and raving and I went into my office.

He later came into my office and accused me of riding him, but did apologise for the

attack.

Mr Magaya only does just enough to stay out of trouble and sometimes not even that."

In his statement Magaya admitted the assault, but alleged that Madgwick had called him a "kaffir". That allegation was denied by Madgwick.

Subsequently Magaya was charged with an act of misconduct and on 12 February 1997 was suspended from duty without pay. He later appeared before the disciplinary committee and was found guilty of assault. As the penalty for that offence was dismissal, the committee recommended his dismissal.

Mr Magaya later appealed to the staff committee of the Board against that decision, but the appeal was dismissed. He then appealed to the Tribunal and was successful. The Tribunal ordered the Board to reinstate him without loss of salary and benefits, or pay him damages in lieu of reinstatement. Aggrieved by that decision, the Board appealed to this Court.

The main ground of appeal was that in view of the fact that the assault was committed, the Tribunal's decision was grossly unreasonable and irrational.

However, before determining that issue, I would like to deal with the submission by Magaya's counsel that the Board did not follow the disciplinary procedure set out in the Code. He submitted that the irregularities in the procedure adopted vitiated the proceedings.

In this regard, I wish to make two points. The first is that there was no cross-appeal by Magaya and the issue now raised cannot, therefore, be entertained by this Court; and the second point is that even if the alleged irregularities had been committed, they did not in any way affect the Tribunal in its determination of the matter because the facts were virtually common cause.

This Court has previously stated that labour relations matters should not be determined on the basis of procedural irregularities. Thus, in *Dalny Mine v Banda* 1999 (1) ZLR 220 (S) at 221 B-D McNALLY JA said:

> "As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:
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> (a) by remitting the matter for hearing *de novo* in a procedurally correct manner;
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> (b) by the Tribunal hearing the evidence *de novo*.
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> In regard to the first of these alternatives, this Court has previously said that:
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> 'The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.'
>
> See *Air Zimbabwe Corp v Mlambo* 1997 (1) ZLR 220 (S) at 223F and s 101(8) of the Act.

In regard to the second alternative, I draw attention to the words in the above extract: 'and that it cannot come to a conclusion on the merits'."

In the present matter, as the facts were virtually common cause, the Tribunal was in a position to come to a conclusion on the merits, and did in fact do so, without hearing the evidence *de novo*.

I now wish to deal with the main issue in this appeal, which is whether the Tribunal's decision was grossly unreasonable and irrational.

The words "unreasonable" and "irrational" have been considered in a number of cases. For example, in *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA) at 682H-683A LORD GREENE, M.R. considered the word "unreasonable" and said:

> "In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

Subsequently in *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) LORD DIPLOCK considered the meaning of "irrationality" and at 951 a-b said:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

This pronouncement received the approval of this Court in *Patriotic Front – Zimbabwe African People's Union v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) at 325H-326F.

Those are the principles I shall apply in order to determine whether the Tribunal's decision was grossly unreasonable and irrational.

According to the evidence given to the disciplinary committee, no-one witnessed the discussion between Madgwick and Magaya which preceded the assault.

The only eye-witness who gave evidence to the committee was a Mr Golombe ("Golombe") who said that he saw Magaya and Madgwick fighting each other but that he had not seen how it had all started. He added, however, that he had managed to get another man to assist him in separating the two men from each other.

In view of Golombe's evidence, it seems to me that what happened was that when Madgwick was attacked by Magaya he retaliated, and a fist fight or scuffle ensued.

Relying upon Golombe's evidence that he had seen the two men fighting, the Tribunal concluded that what had happened was not that Magaya assaulted Madgwick but that the two men fought each other. The relevant part of the Tribunal's judgment reads as follows:

> "The Board also ignored that there was a fight. That the two men were engaged in a scuffle. They found that the appellant assaulted Mr Madgwick when the evidence of an independent witness was that the two men fought. …

The decision to fire one of two persons involved in a fight is wrong."

In my view, the Tribunal's conclusion was grossly unreasonable and irrational in the *Wednesbury* sense.

In the first place, in determining whether the assault had been perpetrated the subsequent fist fight or scuffle was irrelevant. It should have been ignored.

Secondly, Magaya himself admitted assaulting Madgwick, although he alleged that he had been provoked. In his statement he said:

> "I could not contain this and, of course, gave him a couple of blows."

Quite clearly, that was a physical assault upon Madgwick. The fact that Madgwick retaliated and a fist fight or scuffle ensued did not alter the nature of the act committed by Magaya.

And thirdly, even if Magaya had been pushed and insulted by Madgwick as he alleged, that did not justify the assault. The Code sets out the correct procedure to be followed by an employee who has a grievance or complaint against another. That procedure was designed to maintain discipline amongst the Board's employees. Mr Magaya was aware of it but completely ignored it.

It would appear that Magaya objected to the close supervision exercised over him by Madgwick. I say so because he complained about that at the disciplinary committee hearing. The record of that hearing summarises his evidence in this regard as follows:

> "Mr Magaya then said that Mr Madgwick never leaves him to do a job but keeps following him around and checking upon him every two minutes. Mr Magaya stated that he is the only person on the station Mr Madgwick does this to."

In my view, Magaya's complaint about the close supervision was

completely unjustified because when the final written warning was issued to him in March 1996 he was informed that his behaviour and work would be closely watched. Mr Madgwick, as the man in charge of the department in which Magaya worked, was therefore simply carrying out his duties.

As the Tribunal's decision to uphold Magaya's appeal was grossly unreasonable and irrational, it cannot be allowed to stand.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order of the Labour Relations Tribunal is set aside and the following is substituted –

"The appeal is dismissed with costs".

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Mbidzo Muchadehama & Makoni, respondent's legal practitioners