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Judgment No. SC 21/05

Civil Appeal No. 270/03

FUNGAI GWANGWARA KHUMALO v ZIBAGWE RURAL DISTRICT COUNCIL

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, MARCH 24, 2005

W J Mutezo, for the appellant

E T Matinenga, for the respondent

GWAUNZA JA: After hearing argument in this matter, we dismissed the appeal with costs and indicated that the reasons would follow. These are the reasons:

The respondent applied to the Labour Relations Officer for authority to dismiss the appellant from its employ, in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985. The application was turned down. On appeal to the Senior Labour Relations Officer, the decision to reinstate the appellant was upheld, even though the Labour Relations Officer found that the appellant was guilty of the act of misconduct in question. His reason for dismissing the respondent's application to dismiss the appellant was that there were

"mitigating" circumstances like the appellant's long service with the respondent, the fact that no financial prejudice had been suffered by the respondent and the appellant's belief that she was being victimised because she was a war veteran.

The learned President of the Labour Court, who heard the respondent's appeal, set aside the Senior Labour Relations Officer's order for the reinstatement of the appellant and granted the respondent authority to dismiss her. The reasons for the decision of the court *a quo* are set out in the following passage from its judgment:

> "I agree with appellant's submission that upon finding the respondent guilty of the acts of misconduct, the Senior Labour Relations Officer ought to have given permission for the dismissal of the respondent. The regulations under which the application was made do not give room for mitigation. Once the offence is proved to the satisfaction of the Labour Officer, the Labour Officer is duty bound to grant the authority to dismiss. He has no discretion to act otherwise. This position was clearly established in the case of *Masiyiwa v T.M. Supermarkets* 1990 (1) ZLR 166 (SC) where at p 170 paragraph H it was stated:
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> 'Thus, in the case of s 3(2), the Labour Relations Officer has to determine whether the grounds of suspension are proved or not proved. If they are proved, he must proceed in terms of sub paragraph (a); if they are not proved, he must proceed in terms of sub paragraph (b). To put it another way, he has a choice, <u>but that choice is governed not by his</u> <u>discretion</u>, but by his finding. If he finds the grounds proved, he must choose (a) if not proved, (b)'. (underlining for emphasis).
>
> Section 3(2) reads 'Upon application being made in terms of subsection (1) the Labour Relations Officer shall investigate the matter and may according to the circumstance(s) of the case –
>
> (a) Serve a determination or order … terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the Labour Relations Officer; or
>
> (b) Serve a determination or order on the employer concerned to remove

the suspension of the employee and to reinstate such employee if the grounds … are not proved'.

In the circumstances the Senior Labour Relations Officer misdirected himself by ordering reinstatement where the grounds for suspension had been proved to his satisfaction".

This reasoning in my view is sound and unassailable. The decision of the court *a quo* can therefore not be interfered with.

The appellant sought before this Court, to argue that the court *a quo* should have found as a "condition precedent" that the evidence before it did not support a finding that the grounds for suspending the appellant had been substantiated. This argument is clearly misplaced. The Labour Court sat to hear the appeal filed by the respondent in *casu*. The appellant, who was the respondent then, had not filed a cross appeal to protest against the finding of the Senior Labour Relations Officer that she was guilty of the act of misconduct with which she was charged. There was therefore no cause for the Labour Court to consider, much less determine, a matter that had not been placed before it. The appellant, by raising this matter at this late stage, is clearly clutching at straws.

In all the circumstances therefore, and for the reasons outlined above, we found no merit in the appeal, and dismissed it.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Mutezo & Company, appellant's legal practitioners

Wilmot & Bennet, respondent's legal practitioners