MUROWA DIAMONDS v UNION MAKUMBE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, CHEDA JA & GARWE JA
HARARE, SEPTEMBER 8, 2008 & MAY 21, 2009

E T Matinenga, for the appellant

The respondent in person

CHEDA JA: On 20 June 2004 the appellant wrote to the respondent offering him a job as a security shift supervisor and proposed that he should start work on 1 July 2004. The respondent accepted the offer of employment and was furnished with the detailed conditions of service. His employment was subject to a three month probation period.

On 7 September 2004 the respondent was issued with a permit to drive company vehicles. On 20 October 2004 the respondent in the course of his employment was involved in an accident while driving one of the company vehicles.

On 23 October 2004 he was invited to a hearing and charged with misconduct based on the following grounds:

1. Negligent damage to the Mazda vehicle registration 723-513 B.

2. Misuse of company property in that he travelled an extra 132 km over and above the 300 km he was supposed to travel to and from Masvingo.

3. Giving false evidence, deliberately giving untrue, erroneous and misleading information and testimony in relation to the accident.

Following this first hearing the respondent was found guilty of misconduct and a letter of dismissal from employment was served on him the same day.

The respondent appealed to the security manager and complained about a number of irregularities. The security manager set aside the proceedings and ordered that the disciplinary hearing be conducted *de novo* before Mrs Ellan Muchemwa, who was appointed to hear the case.

Following the second hearing the respondent was again found guilty of misconduct and it was decided that he be dismissed from employment with effect from 15 November 2004.

It was after this hearing that the respondent made a procedural error.

Although the dismissal letter advised him that he could appeal to Mr Phil Plaisted if he so wished, he did not do so. There was no good reason for not appealing to

Mr Plaisted who was the designated authority under the Code of Conduct to appeal to had previously shown some appreciation of respondent's concerns. Instead he appealed direct to the Labour Court. This was not permissible because the company's code of conduct in S.I No. 165 of 1992 provides as follows:

"PART A

1. – 5 … .

6. All disciplinary actions should at first seek resolution within the laid down Company Code or National Code of Conduct before going external for decision … .

PART D

Code of conduct procedure

7. Appeals procedure

   a. …

   b. When an employee wishes to appeal against disciplinary action which has been taken against him he shall appeal to the designated authority within a period of five working days following the imposition of the penalty and must state the grounds for the appeal, in writing. Out of time appeals may only be considered when there is reasonable excuse for the delay;

   c. …

   d. The designated authority shall make a determination in respect of the appeal within five working days and the form enclosed accordingly. The decision of the designated authority shall be final."

Even in relation to the grievance procedure the Code shows the need to exhaust domestic remedies first. It reads as follows:

Guidelines for a grievence procedure

5. Appeals

(a) – (d) …

(e) Should the aggrieved employee still be dissatisfied with the head of department's decision, he may appeal to the manager in writing, within seventy-two hours stating the grounds of the appeal.

(f) The manager will review the case and make a decision within seventy-two hours and endorse the case records accordingly. The manager's decision shall be final."

These provisions are mandatory because they are worded as follows:

"All disciplinary actions should at first …
The appeal shall be heard by …
The designated authority shall …
The employee … shall appeal to the designated authority … ."

The respondent in this case did not follow these procedural steps laid down in the Code of Conduct.

In conclusion I find that the Labour Court did not have the jurisdiction to hear the matter. It should have simply referred the matter back so that the proper procedure be followed. The respondents also challenged the charge against him saying it had been changed from the one preferred against him earlier. In the previous hearing the respondent had been charged with:

1. Negligent damage to the Mazda vehicle registration No 723-513B
2. Misuse of company property in that you traveled an extra 132 km over and above the 132km you were supposed to travel to and from Masvingo.

3. Giving false evidence, deliberately given untrue erroneous and misleading information and testimony in relation to the accident.

Following the complaint he made to Mr Plaisted the proceedings on these charges were set aside.

In the second hearing before Mrs Muchemwa he was charged with:

1. Wilful disobedience to a lawful order;
2. Misuse and damage to company property.

The finding that the respondent was guilty of misconduct cannot be faulted.

He drove at night against instructions. He misused the employer's property. The mileage he traveled exceeded that of the authorized journey by 132 km.

His argument that there was no log book does not assist him as the mileage was recorded at the time the vehicle was fueled. He has not challenged the recorded mileage or shown that it was incorrectly recorded.

There is a summary in the labour court record which is not very clear and is not dated. It also refers to proceedings and pages which are not in the record.

Assuming the labour court decided to re-hear the matter, as it was entitled to in terms of s 90(2) of the Act, the conclusion it arrived at is not supported by the evidence. There was sufficient evidence on the record to show that the respondent had driven the appellant's vehicle at night and had misused the vehicle by traveling a distance that exceeded the authorized one by 132 kilometes.

The finding that he was guilty of misconduct should have been allowed to stand.

In view of the above, the appeal is allowed with costs.

The decision of the labour court is set aside and is substituted by the following order -

"The appeal is dismissed with costs."

MALABA DCJ: I agree

GARWE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners