

SC 22.12

Tregers Plastics (PVT) LTD v Woodreck Sibanda (2) Paul Magondo

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & GOWORA AJA
HARARE, MAY 8, 2012
T Mpfu, for the appellant
O Hute, for the respondents

ZIYAMBI JA: This is an appeal against a judgment of the Labour Court confirming an award by the arbitrator setting aside the conviction of the respondents by the appellant for misconduct as well as their subsequent dismissal.

The facts of this case are largely common cause. The respondents were employed by the appellants as internal sales persons for 14 and 16 years respectively. The appellant company's policy was that cash purchases should be paid for on the date on which the invoices were generated. It was conceded by the respondents that cash purchases made by themselves late on Friday afternoon and invoiced on the same day, were only paid on the following Monday.

The respondents were charged with misconduct it being alleged that they had committed an act, conduct or omission inconsistent with the express or implied conditions of their employment contract. They were convicted of the act of misconduct charged and dismissed from employment.

In due course, the matter was referred by a Labour Officer to an arbitrator who ordered reinstatement of the respondents on the ground that the penalty imposed by the appellant was excessive in the circumstances.

Aggrieved by this determination the appellant appealed to Labour Court which upheld the arbitrator's award and dismissed the appeal on the basis that, while the respondents had violated the company policy, that violation did not go to the root of the contract of employment.

It is against that decision by the Labour Court that the appellant now appeals.

Mr *Mpfu*, for the appellant, attacked the decision on two grounds. Firstly, that the conduct by the respondents clearly went to the root of their employment contract and that the finding of the court *a quo* to the contrary was a misdirection. Secondly, that the court *a quo* took into account irrelevant considerations when considering the propriety of the award made by the arbitrator.

There can be no doubt in our view that the conduct of the respondents went to the root of the employment contract. The company policy was prescribed in order to obviate internal theft/fraud. The respondents had been in the appellant's employ for 16 and 14 years respectively. They were employed in the internal sales section and were responsible for the implementation of that policy. Clearly therefore, by conducting themselves as they did, they violated the trust and confidence reposed in them by the appellant.

It is now settled law that where the misconduct goes to the root of the employment relationship an employer is entitled to dismiss the employee. Further, the principle has now been firmly established that an appellate court will not interfere with an exercise of discretion by the employer unless there has been a misdirection in the exercise of such discretion. *Innsco Africa (Pvt) Ltd v Chimoto* SC 6/2012; *Malimanji v Central Africa Building Society* 2007 (2) ZLR 77 (S) at 79G-C. *Toyota Zimbabwe v Posi* SC-55-07.

The Labour Court took no account of the fact that it was dealing with a matter of discretion exercised by the employer. It took into account wrong considerations for example the value of the purchases concerned, the fact that the respondents paid for the goods invoiced on the following Monday and that there was no prejudice to the appellant and the fact that the respondents were long serving employees. These were irrelevant considerations once it was found that the respondents' misconduct conduct went to the root of their employment contract.

We are satisfied that the decision of the appellant company to dismiss the respondents cannot be impugned in any way.

In the circumstances it is the unanimous of this Court that this appeal should succeed.

There has been no prayer for costs and Mr *Mpofu* for the appellant indicated that he would not press for them.

Accordingly it is ordered as follows:-

1. The appeal is allowed.
2. The decision of the Labour Court confirming the Arbitrator's award as well as the Arbitrator's award are hereby set aside.

GARWE JA: I agree

GOWORA AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioner
Hute & Partners, respondent's legal practitioners