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MIMOSA MINING COMPANY v STANLEY SAMUKANGE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & OMERJEE AJA
HARARE, MAY 14, 2012

Advocate F Girac, for the appellant
Advocate T Mpofu, for the respondent

MALABA DCJ: This is an appeal against the decision of the Labour Court reversing the dismissal of the respondent from employment for gross negligence.

The facts of the case are as follows. The respondent was employed by the appellant as its Overseer Miner. In this position the respondent bore the overall responsibility of ensuring, amongst other things, the safety of the place where his shift was working.

On 26 April 2006 the respondent was the Overseer Miner on the shift in Mining North 2 Section of the Mining North Department. This section consists of three mining areas. The relevant one being Section 58 NGBVHW.

The area had earlier on been blasted at about 1800 hours that day. It was due for watering down and barring down to make it safe before any lashing took place. The respondent was obliged to carry out early examination of the site, assess its safety and if necessary instruct a responsible person to make safe all the blasted ends. In this regard he carried out the first examination and instructed one S. Sithole a support team leader to make the area safe.

Sithole watered down the area and discovered an overhanging rock which he could not bar down. He brought this fact to the attention of the respondent. Sithole left the area as the respondent also went to attend the breakdown of a rig and conveyor belt. This was at about 2130 hours. At about 2330 hours, Mr Shato came on duty. The respondent who knew about the dangerous rock at the site instructed Mr Shato to go and lash there. He did not tell Mr Shato about the overhanging rock. When Shato arrived at 58 Vent Holing West he did not see the rock.

Later Mr Maphosa came on duty and started lashing at the site. As he was about to remove the third bucket of ore a 63kg rock fell and hit his left hand fracturing his finger which was subsequently removed.

This led to the respondent being charged with gross negligence or wrongful act or omission that causes accident, injury or death at work. The correct citation of the section allegedly contravened should be section 4 of S.I. 165 of 1992.

Following an internal disciplinary hearing he was found guilty and dismissed from employment. His appeal to the Operation Director was unsuccessful. He successfully appealed the decision to the Labour Court. In arriving at its decision the Labour Court said:

> "Respondent's Mining Standard made appellant (as overseer) responsible for the early examination of the site. Well, he did examine the site. Then he delegated the duty to make site safe to Sithole. Sithole did not make the site safe. That is common cause and in fact admitted by Sithole whose statement reads:
> Q. 16. What do you think caused the accident?
> A. 16. I think the end was not adequately watered down and examining was also not done thoroughly.
>
> It is difficult on these facts to say what more the appellant could have done. He inspected the site. He instructed a subordinate, who occupied a responsible position

> to make the site safe whilst he attended to other duties. The subordinate did not take adequate steps to make the area safe. Regrettably an accident occurred leading to the serious injury to a miner. It appears to me that the appellant did what the standards required of him. He made the "early examination" of the site. He delegated to his subordinate the duty to make the area safe. The relevant standard, indeed, authorised such delegation. In the circumstances I have difficulty in discerning misconduct as justified the appellant's dismissal."

A point *in limine* was taken by Mr *Mpofu* as to whether the ground of appeal raised a point of law. The court is satisfied that the point *in limine* is unsustainable. The ground of appeal clearly relates to the question whether the court *a quo* correctly interpreted what constitutes negligence and applied it to the facts of the case.

The unanimous view of the Court is that the court *a quo* misdirected itself in the following respects.

The court *a quo* failed to take into account the provision of s 31 of S.I. 109 of 1990 as amended by s 3 of S.I. 81 of 1995 which places the responsibility of ensuring that a site is safe for working after a primary blasting on the miner in charge. The respondent bore the statutory responsibility in his capacity as Overseer Miner to ensure safety of the site before any work resumed. It was his duty after Sithole had advised him of the dangerous rock to ensure that no work resumed until that area had been made safe. He failed to do that.

The court *a quo* misdirected itself in interpreting the scope of the content of the respondent's statutory duty as being limited to early examination and delegation to a responsible person only. The scope of the content of the duty imposed by statute on the respondent extended beyond mere examination and delegation to include over inspection and assessment of the safety of the area after the discharge of the functions to render the site safe.

Even on the basis of the mining standards, the respondent failed to discharge his duties properly.

The court *a quo* further misdirected itself in failing to appreciate the fact that the primary obligation on the respondent was to ensure the safety of the area being worked on and not to assume duties not directly related to his role as the Overseer Miner.

A finding of gross negligence is clearly supportable on the facts. The high degree of negligence emanates from the fact that this was underground mining which is an inherently dangerous operation. His job description demands compliance with stringent mining and safety management regulations.

The appeal is therefore allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following:-

"The appeal is dismissed with costs".

Gill, Godlonton & Gerrans, applicant's legal practitioners

Messrs J Mambaras & Associates, respondent's legal practitioners