

**DISTRIBUTABLE (9)**

INNSCOR AFRICA (PVT) LTD  
v LETRON CHIMOTO

SUPREME COURT OF ZIMBABWE  
MALABA DCJ, GARWE JA & OMERJEE AJA  
HARARE, JANUARY 30, 2012

*T Bhatasara*, for the appellant

*W Muchengeti*, for the respondent

MALABA DCJ: This is an appeal against the judgment of the Labour Court setting aside the decision of the arbitrator by which she confirmed the dismissal of the respondent from employment following a conviction for misconduct. The respondent was convicted of conduct inconsistent with the fulfilment of the express or implied terms or conditions of his contract of employment contrary to the provisions of s 4(a) of S.I. 15 of 2009.

It was alleged that the respondent, in the course of his employment as a pizza maker, had produced a pizza without having received the necessary docket authorising the production of the pizza.

In terms of the code of conduct what the respondent did constituted a dismissible offence. The disciplinary hearing committee and the arbitrator

found that the misconduct by the respondent was of a serious nature going to the root of the relationship of employment and that it involved an element of dishonesty on the part of the respondent.

The Labour Court overturned the penalty of dismissal and substituted it with reinstatement. In doing so it held that the arbitrator had not taken into consideration that the respondent was acting under pressure. It went on to say that the appellant had not suffered any prejudice through the production of the pizza and that the pizza was worth only \$4.00. It also said that the penalty should have been corrective rather than punitive.

The unanimous view of the Court is that the Labour Court seriously misdirected itself in coming to the conclusion it did. There is no question that the appellant had contested the allegation by the respondent that he was acting under work pressure. Indeed, the Labour Court acknowledged this in the third paragraph of its reasons for judgment. The issue of prejudice was irrelevant to the assessment of an appropriate penalty because the purpose of the introduction of the docket system was to obviate dishonest conduct on the part of pizza makers. The finding that the pizza was only \$4.00 was of no consequence. The offence committed involved a betrayal of trust and confidence reposed in the respondent by the appellant thereby going to the root of the relationship between the employer and employee. In the circumstance

the holding by the Labour Court that the respondent ought to have been corrected is a misapplication of the provisions of s 7(1) of S.I. 15 of 2006. The provision was not intended to apply in a situation where the misconduct of an employee goes to the root of the contract of employment.

A principle has now been firmly established to the effect an appellate court should not interfere with an exercise of discretion by a lower court or tribunal unless there has been a clear misdirection on the part of the lower court. In this case the Labour Court did not even appreciate that it was dealing with a case of an exercise of discretion by the arbitrator. The Labour Court merely substituted its own discretion for that of the arbitrator, without finding any recognisable misdirection on the part of the arbitrator.

In the circumstances, the Court is satisfied that the appeal ought to succeed.

Accordingly, it is ordered as follows:

1. The appeal succeeds with costs.
2. The order of the Labour Court is set aside and substituted with the following:

“The appeal is dismissed with costs”.

GARWE JA: I agree

OMERJEE AJA: I agree

*Wintertons*, appellant's legal practitioners

*Matimba & Muchengeti*, respondent's legal practitioners