REPORTABLE (16)

LAWSIGN NYARUMBU
v
SANDVIK MINING AND CONSTRUCTION ZIMBABWE (PVT) LTD

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL AJA
HARARE, MAY 7, & JULY 9, 2013

B. Makururu, for the appellant

D. Ochieng, for the respondent

PATEL AJA: After hearing argument from counsel, we allowed the appeal in this matter and made the following order:

1. The appeal is allowed with costs.

2. The judgment of the Labour Court is hereby set aside and substituted as follows:

   (i) The appeal is dismissed with costs.

   (ii) The Appellant shall reinstate the Respondent to his former position without loss of salary and benefits or pay damages to the Respondent in lieu of reinstatement.

We further indicated that the reasons for our decision would follow in due course. These are the reasons.

BACKGROUND

The appellant was employed by the respondent as a stores clerk. On 12 February 2009, he issued a hydraulic pump to another employee without recording the issuance in the stores book. After the disappearance of the pump, the co-employee was convicted of theft. The appellant himself was also charged but later acquitted.

Following internal disciplinary proceedings, the appellant was dismissed. The matter was referred to the relevant National Employment Council and then to an arbitrator. The latter referred the case back to the respondent's disciplinary committee to rehear the matter. The disciplinary committee found the appellant guilty of theft and that decision was confirmed by the respondent's appeals committee. On appeal to the National Employment Council, it was ordered that the appellant be reinstated. The respondent then appealed to the Labour Court on the ground that the appellant should have been found guilty of theft.

Labour Court found the appellant not guilty of theft on the basis of what it regarded as purely circumstantial evidence. Instead, it found him guilty of negligence because of his apparent admission to that effect in the proceedings before the disciplinary committee. The court took the view that negligence was a competent verdict on a charge of theft. It also found that the appellant's negligence had resulted in prejudice to the respondent and therefore constituted a grave offence warranting dismissal for a first offence. The court set aside the conviction of theft and substituted a conviction of

negligent performance of duty resulting in loss to the employer. It then confirmed the penalty of dismissal.

The appellant now seeks an order for his reinstatement or damages in lieu thereof. His grounds of appeal are threefold: that the applicable code of conduct only permits dismissal for negligence following two prior warnings; that the court's finding of negligence was not the subject of appeal; and that negligence is not a competent verdict on a charge of theft. I shall deal firstly with the last ground of appeal.

NEGLIGENCE AS COMPETENT VERDICT ON CHARGE OF THEFT

As a general rule, the standard of proof required in disciplinary matters is that on a balance of probabilities. This is obviously not as stringent as the standard required in criminal cases. By the same token, a disciplinary tribunal is endowed with a greater measure of flexibility than that expected before a court of criminal law. Nevertheless, there are certain basic principles that neither a court nor tribunal can depart from. One of those principles is that the offence that the accused is found guilty of must be commensurable with the offence that he has been charged with. In other words, both offences must bear some legally cognisable affinity with one another.

In our criminal law, as is probably the case in any other legal system, the essential elements of theft and offences based on negligence do not share any meaningful convergence. They are *sui generis* and fundamentally distinct offences. In my view, the same must apply to the treatment of these offences *qua* acts of misconduct in disciplinary matters. This is clearly recognised in the Employment Code of Conduct applicable in the

present matter – as prescribed in the Collective Bargaining Agreement: Engineering and Iron and Steel Industry (S.I. 301 1996), amending the principal agreement contained in Statutory Instrument 282 of 1990. The Schedule to the Code sets out four broad categories of misconduct and defines the diverse offences constituting misconduct. Negligence is identified as an act of misconduct under item B(4)(b), while the specific offence of theft is captured under item D(c). They are clearly separate and distinct acts of misconduct.

The appellant *in casu* was charged with theft as defined in item D(c). The Labour Court found him guilty of negligence. That finding of negligence was clearly not a competent verdict on the particular charge of theft preferred against the appellant. In this regard, the court patently ignored the specific provisions of the Code that should have guided its decision in the matter. In short, as was conceded by Adv. *Ochieng* in his curious but not inappropriate reference to a malapropism having been committed, the court's finding was grossly erroneous.

DISMISSAL WITHOUT PRIOR WARNINGS

Insofar as concerns the penalties that may be imposed for proven acts of misconduct, the Code of Conduct is very clear and specific as to what may or may not be done. By virtue of s 5(6) (b):

> "An employee may only be dismissed by the commission of an act of misconduct for which the appropriate penalty in terms of this Code is dismissal."

In relation to the offence of negligence specified in item B (4) (b) of the Schedule, a first offence calls for a written warning and a second offence invites a last written warning. It is only the commission of a third offence of negligence that attracts the drastic and ultimate penalty of dismissal.

The record *in casu* shows that the appellant was given a "valid warning" in 2007. However, it is not clear whether this was a first or second warning or whether it was one given in writing. Moreover, there is no indication as to whether this warning was for negligence or some other offence.

Thus, even if it were to be accepted that negligence is a competent verdict on a charge of theft and that there was clear evidence of negligence on the part of the appellant, the penalty of dismissal imposed by the Labour Court was clearly *ultra vires* the Code and therefore invalid. Again, the court appears to have disregarded the requirements of the Code and thereby committed a further fatal error.

POWER TO SUBSTITUTE DECISION OR ORDER

Section 89 of the Labour Act [*Cap 28:01*] regulates the functions, powers and jurisdiction of the Labour Court. S 89(2), in its relevant portion, provides that:

> "In the exercise of its functions, the Labour Court may –
> *(a)* in the case of an appeal –
>
> (i) Conduct a hearing into the matter or decide it on the record; or
>
> (ii) Confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order."

It is axiomatic, in criminal as well as disciplinary proceedings that a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally charged. The reason for this is obvious, *viz.* The person accused must be made aware of the case against him in order to enable him to effectively prepare his defence. In this context, notwithstanding the provisions of s 89(2)(a)(ii) of the Labour Act, the Labour Court cannot, *mero motu*, substitute its own charge or make a finding of guilt on an entirely different offence. Any such action would constitute a blatant miscarriage of justice. See *Zimasco (Pvt) Ltd* v *Chizema* 2007 (2) ZLR (S) 314 at 316E-317G. Furthermore, sitting as a court of appeal, it can only deal with the matter on the basis of the grounds of appeal that have been raised by the appellant. See *Chikanda* v *United Touring Company Limited* SC 7/99 at p 3.

In the instant matter, it is not in dispute that the appellant was never at any stage charged with negligence. Moreover, the grounds of appeal before the Labour Court were confined to theft, without any reference to negligence, and negligence was not canvassed by the parties in the proceedings before it. What the court did, by finding the appellant guilty of negligence, was to usurp the functions of the respondent's disciplinary and appeals committees. It follows that the court fundamentally erred in its finding of negligence, as that was an issue which was clearly not the subject of the appeal before it.

DISPOSITION

It seems necessary before concluding this judgment to make one observation regarding the conduct of the appellant himself. Having regard to the record

as a whole, it seems that the Labour Court failed to take into account the totality of the evidence before it. Quite contrary to its finding on the charge of theft, the facts of the case suggest that there was ample evidence, albeit circumstantial, to indicate that the appellant was indeed guilty of theft. Regrettably for the respondent, it neglected to file any cross-appeal on this point. Had it done so, the outcome of this matter might have been entirely different.

In any event, the appeal must be allowed on all of the grounds of appeal framed by the appellant.

It was for the above reasons that we allowed the appeal and set aside the decision of the Labour Court.

ZIYAMBI JA: I agree.

GARWE JA: I agree.

Guni & Guni, appellant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners