

REPORTABLE (49)

DOREEN SAGANDIRA
v
MAKONI RURAL DISTRICT COUNCIL

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & OMERJEE AJA
HARARE, MARCH 19, 2013 & SEPTEMBER 16, 2014

B Magogo, for the appellant

A Zeure, for the respondent

GARWE JA: This is an appeal against the decision of the Labour Court dismissing, with no order as to costs, an appeal against an arbitral award upholding the dismissal of the appellant from her employment with the respondent.

In order to appreciate the issues that fall for determination in this appeal, it is necessary to set out in some detail the background giving rise to the present proceedings.

The appellant was employed by the Makoni Rural District Council, (“the respondent”). She was stationed at the council offices in Rusape. She was married and had children. Her family was running a business in Rusape.

Her problems with the respondent appear to have started on or about 9 October 2003, when she absented herself from work and allegedly used a council computer to

transact personal business. By letter dated 10 October 2003, the appellant wrote a letter to the council treasurer in the following terms:

“... I am sorry for using council computer for private business documents and absence from work. I had valid reasons which I had shared and had been given permission by the Deputy Treasurer, Mrs S Mtisi, that my child, Fadzai was not feeling well ...”

On 11 October 2003, the council treasurer wrote to the appellant accepting the apology but warning her not to do the same thing and to ensure that leave days are authorised by the Chief Executive Officer of council before such leave was taken.

On 14 October 2003, Mrs Mtisi, the deputy council treasurer, wrote to the appellant denying that she had ever authorised her to go away.

It is not clear what happened thereafter but on 31 March 2004, the appellant wrote a letter to the Chief Executive Officer. The letter was in the following terms:-

“I apologise for all what I did wrong. I promise to be trustworthy, not to be lazy, not to tell lies and to notify my immediate supervisor whenever I will be going out. I will be very grateful if you consider my apology.”

In the meantime the appellant had been transferred from the finance department to the health department. Both of these departments are located within the Rusape town council area.

On 3 February 2005, one C.Z Doto, a community sister, wrote to the appellant asking her to write a report on her absence from duty without approval. By letter dated 4 February 2005, the appellant responded in the following terms:-

“I apologise that I was absent from duty on 3 February 2005. What happened is, I received an emergency at about 4 to 12 in the evening that my uncle was seriously ill at Honde Valley and I had to collect him to Harare.

I left a note at home that maybe my line 091 807 018 will not have network that Mr Sagandira will report of the emergency at my workplace ...”

On 8 February 2005, the appellant held a meeting with the respondent’s Chief Executive Officer, E. M Pise. Following that meeting, Mr Pise wrote to the appellant as follows:-

“Reference is made to my meeting with you over your failure to report for work and absconding from duty. You have the habit of leaving office without authority and we believe you need to be relocated out of Rusape.

You are therefore advised that you have been transferred to Inyati Mine with effect from 14 February 2005 ...”

On 11 February 2005, the appellant responded to the above letter expressing her disappointment at the turn of events. In the letter the appellant stated:-

“I have noted with great displeasure that my excuse for attending the funeral was unaccepted and that your decision to transfer me to Inyathi Mine was based on false allegations. You were informed that I went out for business instead of the said illness that later turned into a funeral ...

Chief, as you have already concluded, I have no objection to your instruction that I be transferred to the above mentioned station. You have all the rights to give whatever punishment you think is worthy. May I point to you that I am going to Inyati Mine with groaning because I don’t see where I wronged you. You have on several times tried to be on a fault finding mission on my performance of duty but your efforts have been in vain because the truth shall set me free.

The truth about my transfer if I may put it across to you is that your advisors are not happy with my husband’s business and in all instances they think whenever I go out they think I would have gone to manage my private business yet I will be attending to crucial social problems

You did not bother to seek audience with me to verify the validity of the allegations against me and because of this I strongly feel that you want to get rid of me from this organisation. Because by transferring me to Inyati Mine you know that I will lose contact with my family and this may lead to the disintegration of my family and to make my children suffer and look miserable during my absence.

Once again I want to reiterate that I am not pleased to go to Inyati Mine although I am going to comply with your instructions.”

It is common cause the appellant did not report at Inyati on 14 February 2005. Instead she wrote what she called an appeal against the transfer. In the “appeal” she stated that the Chief Executive Officer had “no basis to punish” her as the allegations were baseless and malicious. She also stated that it was government policy that couples should not be separated to reduce the incidence of HIV, minimise costs and obviate separation.

On the same day Mr Pise wrote back to the appellant in the following terms:-

“... You are hereby advised that your appeal has been dismissed as evidence from your file clearly indicates that you have failed to work at our headquarters. ...

We want to hear that you have taken up your position at Inyati today 14/02/2005 ...”

Following a further appeal for him to reconsider his decision to transfer her, the Chief Executive Officer on the same day wrote to the appellant advising of council’s decision to suspend her, without pay, pending a hearing to take place on 21 February 2005. The suspension was said to be in terms of s 12B 2(b)(i) and(ii) as read with s 35 of the Council Conditions of Service.

On 21 February 2005, the appellant appeared before what was termed a works council hearing. The hearing committee consisted of Mr Pise, who was chairman, Mr J Mugari, a member of the workers’ committee, Miss N Bofu, a council employee charged with minuting the proceedings and the appellant. In its determination, the committee remarked:

“It has been proved beyond any shadow of doubt that Mrs D Sagandira has the habit of defying authority and the cases of absence from work without permission point to this and in addition her failure to transfer to Inyati Mine when instructed to do so, so

(sic)is another case in point. It is not in dispute that Mrs D Sagandira failed to follow instruction to transfer. She at first agreed to transfer and later changed her mind. It should be pointed out that they operate a family business within Rusape where she frequently goes leaving the office unattended. She has been transferred before from the Finance Department and this did not help. She has remained stubborn and does not want to obey orders. Given the above, the said employee is dismissed with effect from 14 February 2005 ...”

Dissatisfied, the appellant took the matter up with a labour officer who referred the matter to an arbitrator. The arbitrator upheld the dismissal. The appellant then appealed to the Labour Court. The Labour Court found that her failure to transfer to Inyati Mine amounted to disobedience. The court also found nothing wrong with the composition of the disciplinary authority. In the result, the court dismissed the appeal with no order as to costs. It is against that order the appellant now appeals to this Court.

In her grounds of appeal, the appellant attacks the decision of the court *a quo* on the basis that the court misdirected itself and erred in three respects. Firstly, that the court *a quo* failed to appreciate that the order to transfer was punitive and therefore not lawful. Secondly, that the appellant was not consulted before the decision to transfer her was made. Thirdly, that the Chief Executive Officer was an interested party; he was the complainant, charged the appellant, set the matter down, prosecuted and chaired the meeting before finding the appellant guilty of misconduct in violation of the *nemo judex* principle.

In her heads of argument, the appellant submitted that the decision to transfer her was not an ordinary transfer decided by an employer in order to maximise operational efficiency. The transfer was to punish her on account of perceived misconduct on her part and in particular absenteeism. As no hearing to determine the misconduct was conducted, the transfer in these circumstances was unlawful. Further her personal circumstances were not

taken into account. Inyati Mine is fifty kilometres from Rusape. The mine itself is no longer operational and the greater portion of the road to the mine is on gravel. Further it was the Chief Executive Officer of the respondent who decided to transfer her on account of perceived misconduct. He dismissed her appeal against the transfer. When she did not report for duty at Inyati Mine on 14 February 2005, it was him who suspended her and arranged for the hearing to take place on 21 February 2005. On the date of hearing it was him who chaired the disciplinary hearing. It was also him who announced the verdict and the penalty of dismissal. In these circumstances, he became judge, jury and executioner. The *nemo judex* principle having been violated, the proceedings were accordingly vitiated.

In its submissions, the respondent rejected the suggestion that the transfer was unlawful. That the appellant had absented herself from duty without authority was common cause. In the circumstances the respondent was within its rights to transfer the appellant as there is no law which makes it mandatory for an employer to hold a disciplinary hearing first before taking such a course. Considering the appellant's conduct which was well documented, the decision to transfer her cannot in these circumstances be said to be unlawful. In the respondent's opinion, the Chief Executive Officer exercised restraint. Whilst he had the power to suspend the appellant and institute disciplinary proceedings, he decided, instead, to transfer her to Inyati Mine some fifty kilometres away. Whilst it was known that the appellant was married, she could commute. The appellant was better off being relocated than being dismissed. In the circumstances, the respondent submitted that the transfer cannot be described as unlawful.

Taking into account the submissions made by both parties, it seems to me that there are three issues that arise for determination, although the second and third issues depend

on the resolution of the first. The first issue is whether the transfer was in the circumstances, unlawful. If it was, then that is the end of the matter and this appeal must be decided in favour of the appellant. In the event that a finding is made that the transfer was lawful, the issues that would follow are whether, firstly, the decision to transfer her is unlawful on account of the failure by the respondent to consult her and take into account her personal circumstances. Secondly, whether the involvement of the respondents' chief executive officer in the proceedings violated the *nemo iudex* principle. I proceed to consider the first issue.

Before doing so, it seems to me pertinent to note that, on the papers, it is not clear in what capacity exactly the appellant was to be employed at Inyati Mine. It is also not clear what operations the respondent had at the mine. However, before the penalty of dismissal was pronounced during the disciplinary hearing, the works committee chairperson present exhorted the respondent to reconsider its decision to transfer the appellant to Inyati Mine and instead transfer her to other council departments within Rusape or, alternatively, to other council offices at Nyazura or Headlands which were nearer and situated along the main tarred road where transport was not a problem.

I revert to the question whether the transfer of the appellant was, in the circumstances, unlawful.

In terms of the common law, an employer has the right to unilaterally vary the terms of employment, such as the duties being done by the employee, the location of work or department. This may be necessary, *inter alia*, to re-organise the operations of the employer, to facilitate disciplinary investigations, provided always that such variation is not substantially different from the contract job description or does not result in the substantial

downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee – *Labour Employment Law in Zimbabwe, Relations of work under Neo-Colonial Capitalism, M Gwisai* at p 78.

A temporary transfer to facilitate investigations into possible criminal activities is lawful – *Chimenya v Associated Textiles Limited* SC 201/94.

In *Director of Works & Anor v Nyasulu & Ors*, 2002 (1) ZLR 658 (S) the respondents, who were employed as farm managers by the City of Harare, received warning letters from the appellant based on allegations of unsatisfactory performance of their duties. They refused to sign the letters as they were not sure what the consequences of signing would be. Their immediate supervisor regarded their failure to sign as disrespectful.

Subsequently the respondents received letters transferring them elsewhere in the service of the council. The respondents applied to the High Court for an order setting aside the transfers on the basis that the transfers were punitive. The High Court agreed and set the transfers aside. The City of Harare unsuccessfully appealed against that determination.

In dismissing the appeal this Court, per ZIYAMBI JA, remarked at p 662 H – 663:-

“I am in respectful agreement with both conclusions reached by the learned judge. It is, therefore, my view that the learned judge was correct in holding that the rules of natural justice had not been complied with in that the respondents were not afforded a hearing before the punitive measures of warnings and transfers were taken against them ...”

And at p 665 A, the learned judge continued:-

“As the learned judge remarked even if the penalty of transfer had not been imposed the appellants would have had an entitlement to be heard before the issue of the letters of warning.”

The authorities to which attention has just been drawn emphasise two important principles in our labour law. These are, firstly, that an employer does have the authority to transfer an employee in order, *inter alia*, to enhance operational efficiency or to facilitate investigations. Secondly an employer, whatever the circumstances, has no right to invoke a transfer as a punitive measure outside of the disciplinary framework. It must always be remembered that a transfer can be ordered as part of the penalty imposed on an employee found guilty of misconduct.

In this case, there can be no doubt that the respondent, and, in particular its Chief Executive Officer, believed that the appellant was guilty of absenteeism. The appellant had indeed been moved from the Finance Department to the Health Department for that reason. That transfer was within council premises in the same town. No-one complained. The transfer to Inyati Mine was different. This was a transfer of a married woman with school-going children. The transfer obviously necessitated her being away from her husband and, in particular, minor children. Inyati Mine is fifty kilometres from Rusape. It is not easily accessible. Whilst it was once a bustling mining centre, its operations as a mine ceased years ago. Transport to and from Inyati Mine, mostly on a gravel road, is not easy. It is not even clear on the papers what position the appellant was to assume on reporting for duty there or where she was to stay. Whilst the decision to transfer her was made, no detail is apparent on the papers as to what was to happen once she got there.

In my view, once the respondent had formed the opinion that the appellant was misconducting herself, a disciplinary hearing should have been held to determine whether she was in fact guilty. After all, whilst the appellant admitted being absent on the occasions cited in the correspondence, she never admitted at any stage that she did not have a lawful excuse. At one stage she made it clear she had gone to Honde Valley to collect a sick uncle whom she took to Harare. The uncle subsequently died. When she absented herself in order to attend the funeral, she was regarded as being absent without lawful excuse and was made to write a report on such absenteeism.

In a situation such as that in which the respondent found itself, proper disciplinary proceedings should have been conducted. In the event that it was found that the appellant had no lawful excuse to be absent, she could have, as part of the penalty, been transferred to any other department of the appellant. In proceeding to transfer the appellant in the manner it did, the respondent fell foul of the *audi alteram* principle. It found the appellant culpable without holding any disciplinary proceedings and in the result imposed, as a penalty, an order that the appellant transfers to a place some fifty kilometres away where transport was difficult. The inference that this transfer was punitive, or intended to be a punishment, is inescapable.

It seems to me an opportune time to emphasize that whilst transfers effected in the ordinary course of operations are appropriate, transfers that are punitive, based purely on perceived misconduct on the part of the employee, are not acceptable as they are unlawful. A punitive measure can only be predicated on a proper finding of culpability following proper disciplinary proceedings.

I am satisfied that the order that the appellant transfers to Inyati Mine was, in the circumstances of this case, punitive, and therefore unlawful.

Further, I am satisfied that, given the appellant's circumstances, her personal wishes, and views should have been taken into account before the ultimate decision to relocate her some fifty kilometres away at some disused mine premises was made. See *Director of Works & Anor v Nyasulu & Ors* (supra)

In view of the above conclusion, it becomes unnecessary to consider whether the disciplinary committee was properly constituted.

In the result, the appeal must succeed. It is accordingly ordered as follows:-

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and in its place the following substituted:-

“(a) The decision of the arbitrator of 3 November 2006 confirming the dismissal of the appellant is set aside.

(b) It is ordered that the appellant be reinstated to her position with the respondent without loss of salary or benefits. Should re-instatement no longer be possible, the respondent is to pay to the appellant such damages as may be agreed upon or, that failing, as are, upon application, quantified by this Court.

(c) The respondent is to pay the costs of the appeal.”

MALABA DCJ: I agree

OMERJEE: (Retired)

Sinyoro & Partners, appellant's legal practitioners

Messrs Warara & Associates, respondent's legal practitioners