

REPORTABLE (51)

CELSYS LIMITED
v
NOBERT NDELEZIWA

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & PATEL JA
HARARE, SEPTEMBER 16, 2014 & JULY 29, 2015

D. Ndawana for the Appellant

S. Banda for the Respondent

GWAUNZA JA: This is an appeal against the entire judgment of the Labour Court, dated 4 May 2012.

The facts of the matter are largely common cause and may be summarised as follows:

The respondent was employed by the appellant as a Stores Foreman. In this capacity he ordered for the appellant, white sheet board size 610 x 860mm from Paroan Vista. Paroan Vista however supplied the wrong size of sheet board, ie 610 x 810mm, which was received by the respondent. The respondent subsequently used a pen to alter the copy of the Goods Received Voucher (GRV) to reflect the size received. He did not let the Machine Minder know that the board that he was using was of a different size to the one required. The result was that the latter was left to discover the error for

himself, a circumstance that led to the matter being drawn to the attention of the respondent's superiors. The appellant in light of this conduct, took the view that the purpose of the respondent's alteration of the GVR was to conceal his defective work or his inefficiency. He was thereafter charged with contravening clause 18 of *SI 148/2009: Collective Bargaining Agreement for the Printing, Packaging and Newspaper*, that is:

“any act or omission inconsistent with the fulfilment of the express or implied conditions of employment.”

The respondent was found guilty by a Disciplinary Officer and dismissed from employment. He appealed to the Chief Executive Officer who upheld the findings of the Disciplinary Officer. He further appealed to the National Employment Council for the industry (NEC) which ruled that the penalty of dismissal was too harsh in the circumstances.

It ordered:

- i) reinstatement of the respondent without loss of salary and benefits,
- ii) that the respondent forfeits one month's salary, and
- iii) that he be served with a final written warning valid for 12 months.

The appellant was aggrieved by this decision and appealed to the Labour Court which dismissed the appeal and made the additional order that if re-instatement was no longer an option, the respondent be paid damages *in lieu* of reinstatement. This did not go down well with the appellant who has filed the present appeal.

It is common cause that the respondent does not deny the charge. He only takes issue with what he perceives to be a harsh penalty under the circumstances. Both the NEC and the court *a quo* agreed with him.

The respondent's defence essentially is premised on the following assertions:

1. The order form that he filled in and issued to the supplier reflected the correct dimensions of the required white sheet board (i.e. 610 x 860mm);
2. The supplier however delivered the wrong size, i.e. 610 x 810mm, which was smaller than what was ordered;
3. Upon noticing the anomaly the respondent made a report to that effect to his superiors;
4. His actions in thereafter altering the dimensions of the sheet board on the GRV so that they accorded with what was actually delivered, were motivated by the need to clarify the real position for accounting purposes. This was because, without such alteration, the employer would have paid more when it was entitled to pay less for the smaller sized paper which was actually delivered;
5. In other words his motive was to protect the appellant's financial interests;
6. He had no desire to conceal any wrongdoing or incompetence, and in any case the appellant suffered no financial prejudice as a result of the impugned conduct; and
7. Finally, given these circumstances, the conduct in question did not strike at the root of the employment conduct. Even if it did, the appellant was unreasonable and misdirected itself in the exercise of its discretion on punishment.

The appellant challenges these assertions and insists that the respondent altered the document in question without lawful authority and only did so in order to conceal poor work performance. This constituted a breach of trust and confidence and more importantly, the appellant further contends, in so altering the document in question, the respondent flagrantly violated the relevant provisions of its Standing Operating Procedures which read as follows:

- “5.2 Receive supplied goods and check against P.O.R.
 - 5.2.1 Check if Order number and supplier correspond with P.O.R.
 - 5.2.2 Check if quantity is correct and to specific requirements with P.O.R.
 - 5.2.3 Check quality and measurements before signing delivery documents from supplied.
- 5.3 If goods are not to standard of satisfaction, raise G.R.N. and return to supplier immediately, indicate areas of concern clearly for supplier to understand reason for rejection.” (my emphasis)

Instead of following the laid down procedure, the appellant charges that the respondent received a substandard product compared to what was ordered, without any “checks or measurements”. Further that as a result of this action, additional paper had to be requested to fulfil the order, a circumstance that put the appellant “at risk” of conduct not in conformity with the requisite I.S.O. requirements. The appellant did not elaborate on this assertion.

The appellant further charges that alternatively the respondent should have obtained non-conformity authority from his superiors before accepting the wrong order.

The grounds of appeal raise two issues:

- (1) Whether or not the appellant exercised its discretion reasonably in deciding that the misconduct of the respondent justified his dismissal; and
- (2) Whether the court *a quo* was correct in interfering with an employer’s discretion to dismiss.

In contending that NEC and the court *a quo* were correct in their finding that the penalty of dismissal was not warranted by the circumstances of this case, the respondent contends as follows:

“The principle is well established in our law that the court will not interfere with the discretion of an employer to dismiss an employee found guilty of misconduct provided that the alleged misconduct goes to the root of the employment contract unless there has been misdirection or unreasonableness on the part of the employer.”

The respondent went on to cite the following *dictum* to support this contention:¹

“In the exercise of their powers in terms of s 12 B (4) of the Labour Act, the Labour Court and arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer’s discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.” (my emphasis)

The respondent does not dispute that the Standard Operating Procedures required him to act in a certain way in the case where a wrong order is delivered. To that extent and notwithstanding what the respondent considered, on his own, to be the best way to rectify the error, he clearly acted contrary to the express or implied conditions of his contract of employment. That such conduct is generally regarded as going to the root of the employment contract is highlighted in the case of *Standard Chartered Bank v Chapuka* SC 125/04 as follows:

“Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and employee giving the former a *prima facie* right to dismiss the latter.”

¹ *Mashonaland Turf Club v George Mutangadura* SC 15/12

The law is settled that in circumstances where an employer takes a serious view of an employee's misconduct, it has a clear discretion as to what penalty to impose after finding such employee guilty of the misconduct in question. The question that then arises, on the basis of the law and authorities on this matter, is whether the appellant judiciously exercised its discretion in deciding on, and imposing, the penalty of dismissal. It is only upon a negative answer to this question, that an appeal court would be justified in interfering with such decision.

Mr *Mpofu* for the appellant contends that *in casu*, since neither the NEC nor the court *a quo* made a finding on the existence or otherwise of a misdirection or unreasonableness on the part of the appellant in dismissing the respondent, both were "wrong" in interfering with it. While there may be merit in this contention, I am not persuaded that the decision reached by the NEC, and confirmed by Labour Court, was on this basis, wrong. I am further not satisfied that the failure by these two tribunals to articulate a finding that the appellant misdirected itself in imposing the penalty of dismissal, necessarily erodes the validity of their interference with the penalty. The Labour Court found no reason to interfere with NEC's finding to the effect, *inter alia*, that in the circumstances of the case dismissal was too harsh, that the appellant's failure to write a non-conformity report was 'correctable without much prejudice', and that in any operation there should be a meaningful/reasonable margin of error. In my view, a conclusion based on these facts - even if not articulated - that the appellant unreasonably exercised its discretion on penalty, would be justified. To further justify such a finding would be the fact that the appellant does not allege that it suffered any financial prejudice as a result of the misconduct in question. To the contrary and as indicated, there is a suggestion by the respondent that through such conduct, he had in fact spared the appellant possible financial prejudice.

The appellant made reference to what seemed to be potential prejudice, when it stated that requesting, as it did, additional paper to fulfil the order had put it ‘at risk’ of acting contrary to the requisite ISO requirements. This statement was, however, not elaborated upon. The court is thus not able to assess the measure of such potential prejudice.

Finally, I find that the misconduct in question, having been committed for the reasons given by the respondent, and not having caused the appellant any real prejudice, financial or otherwise, appropriately fits into what was described in the case of *Clouston & Co Ltd v Carry*, cited with approval in *Tobacco Sales Floors Ltd V Chimwala* 1987 (2) ZLR S at page, as:

“misconduct (which), though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted”.² (my emphasis)

In short, while the respondent admits to having acted contrary to the express or implied conditions of his employment, I find myself in agreement with the conclusion of NEC and the court *a quo* that the misconduct was not one that, on any reasonable basis, merited the harsh penalty of dismissal. In view of this I find that the appellant acted unreasonably in dismissing the respondent from employment, and therefore misdirected itself.

I find in the final analysis that the appeal has no merit and ought to be dismissed. However, in the interests of completeness, the judgment of the court *a quo* will be amended to include the option of recourse to that court, in the event that the parties fail to reach agreement on the *quantum* of damages, if any, to be paid to the respondent.

² *Vide Clouston & Co Ltd v Carry_cited with approval in Tobacco Sales Floors Ltd V Chimwala 1987 (2) ZLR S at page*

Accordingly, it is ordered as follows:

1. The appeal be and is hereby dismissed with costs.
2. The judgment of the court *a quo* is amended to include the following:

“Should the parties fail to reach agreement on the damages, if any, to be paid to the respondent, they are granted leave to approach this court for quantification of such damages.”

HLATSHWAYO JA: I agree

PATEL JA: I agree

Gill, Godlonton & Gerrans, appellant’s legal practitioners

J. Mambara & Partners, respondent’s legal practitioners