

REPORTABLE (59)

SIMON GAZI
v
NATIONAL RAILWAYS OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & MAVANGIRA AJA
HARARE, MARCH 16 & OCTOBER 19, 2015

T. Magwaliba, for the appellant

A. Muchadehama, for the second respondent

GWAUNZA JA: This is an appeal against the entire judgment of the Labour Court, handed down on 6 August 2013.

The background to the dispute is aptly summarised as follows in the judgment of the court *a quo*;

1. “Appellant was employed by respondent as a painter. He was dismissed from respondent’s employ on 10 November 2009 following a charge of absence from work for more than 7 consecutive days without a reasonable excuse. Appellant did not attend the disciplinary hearing despite being advised of the date, time and place for the hearing.
2. Aggrieved, appellant appealed to the respondent’s general manager who dismissed the appeal. On 6 January 2010, appellant referred the matter to a Labour Officer for conciliation. Respondent objected to the Labour Officer’s involvement in the dispute arguing that the latter had no jurisdiction to entertain the matter.

3. On 24 May 2010, the arbitrator awarded in favour of the appellant. Respondent filed an application for review to reverse the referral as well as the arbitral award on the basis that they were governed by a code of conduct and therefore the conciliator had no jurisdiction. This Court set aside the arbitral award by consent. Appellant then applied for condonation and the application was granted. Appellant then filed this appeal.”

The grounds on which the appellant based his appeal to the respondent’s General Manager were as follows:

- “11.1 The Area Manager went ahead to give a decision before your office had responded to its call by the union for a Disciplinary Inquiry as provided for under clause 15 of the N.R.Z. Code of Conduct.
- 11.2 The narration by the Area Manager that we were afforded a chance to be heard does not sit well. The union had asked for an inquiry not a hearing given the seriousness of the confusion by those handling the matter.
- 11.3 The allegations are pregnant with inconsistencies given that the Personnel Officer Midlands cleared Mr Gazi of any wrong doing and the union is at a loss why a sudden turn around Ref 350417 dated 24 April 2009.”

In spite of the fact that the decision of the disciplinary committee chaired by the Area Manager was effectively a default one, the appellant as is evident from the above, took the course of appealing against that decision. The disciplinary committee correctly observed before imposing the penalty of dismissal, that the appellant had deliberately spurned the proceedings and had accordingly denied himself the chance to present a defence and proffer any arguments in mitigation. The General Manager, however, disregarded this procedural *faux pas* on the part of the appellant, and proceeded to hear his appeal on the grounds outlined above. He subsequently upheld the dismissal and stated that he “*found no justification to alter the punishment meted out for the following reasons ...*”

The appellant based his appeal to the Labour Court on the following grounds:

1. that the General Manager erred in holding that the appellant was absent without leave because he had not submitted periodic medical booking off certificates as per the dictates of a weekly notice when that is not a requirement in terms of the Labour Act or the Code thereby making the requirement *ultra vires* the Labour Act.
2. that the General Manager erred in upholding the conviction of the appellant when there was evidence to show that appellant was on sick leave as certified by a registered medical practitioner's sick leave booking which amounts to a reasonable excuse at law.
3. that in the event that the verdict is upheld, the penalty of dismissal was inappropriate and unwarranted in the circumstances.

The court *a quo* correctly observed from the outset (an observation not disputed by the appellant) that the appellant's grounds of appeal constituted a complete departure from the grounds that formed the basis of his appeal to the respondent's General Manager. If the appellant's appeal to the General Manager against what was effectively a default judgment against him is to be regarded as a form of procedural transgression, it is evident that he compounded this conduct by advancing completely new grounds of appeal before the Labour Court. He therefore effectively enjoined that court to determine matters which:

- a) had not been placed before the General Manager; and
- b) the respondent had not had the opportunity to consider or make any pronouncement on.

The appellant defended this conduct on the premise that the new grounds constituted points of law, which can be raised at any stage in the proceedings before the courts.

The court *a quo* commented on the respondent's response to this submission as follows:

"It was argued strongly by Mr *Chikwaya* for the respondent that the court should disregard these "new" grounds as not to do so would seriously prejudice the respondent in particular and employers in general in that employees would bring flimsy grounds before internal hearings and then bring 'real' grounds and evidence before an appellate court."

The court *a quo* and this Court, have been directed to the case of *Dandazi v Wankie Colliery Co. Ltd* 2001 (2) ZLR 298 H which set out the following principle, which I find to be on all fours with the circumstances of this case:

“If therefore, the applicant was content to appeal against the decision of the lower body on three grounds only, he **cannot, in my view, bring on review other grounds which he did not appeal against to the internal appellate body.** Even if he was entitled to do so, he would not in any case succeed, because he did not make an issue of them at the hearing ...

The applicant’s failure to raise the other grounds must therefore be construed as waiver of those grounds ... and it is inappropriate for such person to place before the reviewing court grounds which he did not challenge on appeal to the internal appeal panel. The result is that I will examine only the three grounds on which the applicant appealed to the disciplinary appeal panel of the respondent and not those grounds which are raised for the first time in his founding affidavit. It is appropriate, in my judgment, to take this approach because, where a person has exhausted the domestic remedies available to him, which is what he generally must do then on bringing the entire proceedings on review he must stick to the case which he placed before the domestic appellate body.”

The appellant in his heads of argument agrees with the principle set out in *Dandazi*’s case and cites other authorities that support such a principle. He aptly cites the following *dictum* from the case of *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 W at 380;

“Secondly it is clearly a wholly new line of defence now being taken. It was not mentioned in the summary judgment proceedings not in the plea, it was never referred to in evidence or argument at trial. Its mere novelty, of course is no ground *per se* for rejecting it. However, generally speaking, a court of appeal will not entertain a point not raised in the court below and especially not one raised on the pleadings in the court below.” (*my emphasis*)

Mr *Magwaliba* for the appellant seems to have latched onto the apparent life line thrown to the appellant by this and other similar *dicta*¹ to advance the following arguments in the appellant’s heads of argument;

- (i) that while this principle is correct in relation to ordinary civil proceedings in the High Court and Supreme Court, it is not compatible with the statutory

¹ See also *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR (1)(S). *Goto v Goto* 2001 (2) ZLR 519 (S) and *Austerlands (Pvt) Ltd v Traded and Investment Bank Ltd & Others* 2006 (1) ZLR 371(S).

provisions regulating the exercise of power by the Labour Court, to the effect that the latter court should not take as strict a view of its jurisdiction.

- (ii) that the *Dandazi* judgment (*supra*) was based on specific facts of that matter and therefore did not set a general rule that no new matters could be raised which were not raised before the internal tribunal and that; and
- (iii) that in *casu* the point of law in question, that is the issue of weekly notice of an employee on sick leave – was ‘fully’ covered in the pleadings.

The issues numbered (ii) and (iii) were raised in the court *a quo* and, relying on the principle set down in *Donnelly* case (*supra*), the court stated as follows ;

“In principle a court of appeal is disinclined to allow a point to be raised for the first time before it. Generally it will decline to do so unless;

- (i) the point is covered by the pleadings;
- (ii) there would be no unfairness to the other party;
- (iii) the facts are common cause or well nigh inconvertible; and
- (iv) there is no ground for thinking that other or further evidence would have been produced that could have affected the point.”

The learned judge *a quo* then considered each of these principles in the light of the evidence before him and respectively determined thus in relation to the four principles;

- (i) that the point of law at issue was not covered by the pleadings, since all that the appellant did was write a letter to the District Civil Engineer (not the general manager) protesting his innocence.
- (ii) that it was unfair to the respondent to raise the point of law in question for the first time on appeal in that the respondent “argued its case on the basis that the appellant was absent from duty without reasonable excuse”. Accordingly, the General Manager, who confirmed the dismissal, was not confronted with the argument that the “bedrock of its case was being challenged.”
- (iii) that the facts of the matter were not common cause, as evidenced by the fact that there was a dispute as to whether or not the weekly notice and other related instruments therein, formed part of the appellant’s contract of employment and lastly,
- (iv) that had the appellant appeared to argue his case before the disciplinary committee, he could have led evidence regarding the Area Manager’s mandate to issue a weekly notice, the nature, validity and effect of such a notice *vis a vis* employees’ rights enshrined in s 14 of the Labour Act, and the parties’ conduct regarding this notice prior to the commission of the offence.

The court *a quo* then concluded as follows;

“In respect of point (ii) above the appellant sought to argue that the respondent’s allusion to ‘real’ grounds being raised for the first time on appeal, amounted to a concession that the new point had merit. I am not persuaded by this contention. Far from making any concession, it is evident from the context in which the remark was made, that all the respondent meant was that the issue of the validity of the weekly notice was a ‘real’ issue that should appropriately have been brought before the internal tribunals. This would have afforded such tribunals the opportunity to properly address the merits of the issue, rather than being “ambushed with it” on appeal”.

I find the court’s reasoning and conclusions as outlined above to be eminently sound and therefore unassailable.

The appellant makes the point that the court *a quo* should not have relied so strongly on authorities that pertain to “ordinary” civil matters, in its determination of labour disputes. This is because, he contends, the Labour Court should not take as strict a view of its jurisdiction. I find no merit in this contention and, in the context of the particular circumstances of this case, have no hesitation in dismissing it.

Firstly, labour matters are civil in nature and while the same standards of procedural stringency as are required in ordinary civil matters may not always apply, I do not believe those standards are necessarily ousted merely on the basis that the matter at hand is a labour dispute. This is particularly so where serious legal principles are at issue and where, as *in casu*, a party who belatedly clamours for such procedural relaxation is himself the author of the very predicament that he later finds himself in. It goes without saying that, but for his own default, the appellant could have properly raised the new legal point he now seeks to raise, and adduced evidence on it, during the disciplinary proceedings before the Area Manager.

It is in my view necessary in this respect to remind parties in labour disputes that it is important to show respect for laid down formalities in the adjudication of disputes that concern them. Showing disdain for such formalities and later expecting the court to turn a blind eye to such conduct, in my view smacks of double standards and a lack of seriousness on the part of the litigant concerned.

Secondly, the authorities cited and relied on by the court *a quo* (e.g. *the Dandazi* case) arose from labour disputes, and lastly, the appellant himself relied on one such “ordinary” civil judgment for its contention that there are exceptions to the general principle that the courts should not accept new points raised for the first time on appeal². It is therefore rather contrary of the appellant to impugn the court *a quo*’s reliance on similar authorities. The appellant has, in any case, not alleged any gross misdirection on the part of the Labour Court in drawing guidance from authorities other than those dealing exclusively with labour matters.

In the final analysis, it is the finding of this Court that the appeal lacks merit and ought to be dismissed.

It is in the result ordered as follows;

The appeal be and is hereby dismissed with costs.

ZIYAMBI JA:

I agree

² Goto’s case (*supra*) Austerlands (Pvt) Ltd v Trade & Investment Bank Ltd & Others – 2006 (1) ZLR 373 at 378

MAVANGIRA AJA:

I agree

Danziger & Partners, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners