

DISTRIBUTABLE (8)

CHRISTOPHER SAMSON
v
WINDMILL (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & HLATSHWAYO JA
HARARE, JUNE 11, 2013 & FEBRUARY 26, 2015

O. Shava, for the appellant

N.M. Masunda, for the respondent

GARWE JA: The appellant was employed in the capacity of plant foreman in the handling department of the respondent company. In September 2010 he was charged with “(1) theft or fraud (2) aiding stealing, alternatively and (*sic*) (3) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of your contract”. Following a disciplinary hearing, he was acquitted on the charge of theft and fraud but was convicted of aiding stealing and any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment.

Dissatisfied, the appellant appealed to the Chief Executive Officer of the respondent. Having gone through the documents and the evidence, the respondent’s Chief Executive Officer concluded that there was no evidence suggesting that it was the appellant who had made certain alterations on the original gate pass which was to be used to take out

the empty plastic bags that formed the basis of the allegations against the appellant. Notwithstanding this finding, the Chief Executive Officer proceeded to confirm the findings of the disciplinary committee as well as the penalty of dismissal imposed in consequence thereof.

Unhappy with the decision of the Chief Executive Officer, the appellant appealed to the Labour Court. In essence, the appellant's ground of appeal was that the disciplinary committee had erred in its assessment of the evidence and that on the evidence he had not aided or abetted the theft of any property.

In its findings, the Labour Court was of the view that the appellant had been correctly found guilty by the disciplinary committee as he had facilitated the taking of the green bags which were not reflected on the gate pass. Consequently the court dismissed the appeal.

Before this Court, the appellant attacks the finding of the court *a quo* on the basis that the court grossly misdirected itself on the facts and consequently came to the wrong conclusion. It is clear from the appellants' grounds of appeal that, essentially, he is attacking the findings of fact made by the court *a quo* and, prior to that, by the disciplinary committee.

The position is now settled that an appellate court has no power to interfere with the findings of fact made by a lower court unless it is persuaded that the findings complained of are so outrageous in their defiance of logic that no sensible person properly applying his mind to the question to be decided would arrive at such a conclusion. *Barros*

and Another v Chimponda 1999(1) ZLR 58 SC; *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664, 670D.

The reason for this approach is obvious. Faced with the same facts, reasonable people might reach different conclusions without any of them properly being labelled as unreasonable. *Computicket v Marcus N O & Others* (1999) 20 ILJ 342 LC, 346.

It is necessary to mention at this stage that both parties are agreed that the conviction for any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of a contract of employment was improper. I agree that it was never proved that the appellant had been involved in endorsing the words “Broken bags” that later appeared on the original gate pass. The Chief Executive Officer of the respondent accepted this to be the position. In these circumstances, he should not have confirmed that conviction. The court *a quo*, likewise, should have set aside that conviction.

In the result, the issue that falls for determination before this Court is a simple one. It is whether the finding by the disciplinary committee, which was subsequently endorsed by the Chief Executive Officer and the Labour Court, that the appellant aided the stealing of green bags, is, on the evidence, so outrageous in its defiance of logic that no reasonable tribunal or court would have arrived at such a conclusion.

The Labour Court concluded as follows:-

“The evidence on record shows that the appellant was involved in directing the loading of the broken bags. He was also involved in originating the gate pass which he ensured that Mr Kawondera signed. He also endorsed amendment (*sic*) on the gate pass. Appellant also admitted that he authorised the loading of the green bags. However the green bags were not mentioned on the gate pass ...”

On the facts before the disciplinary committee and the Labour Court, it is clear that the purchaser of the empty bags, one Muponda, came to buy scrap ex SOA bags. “SOA” stands for Sulphate of Ammonia. It is not in dispute that the two men that Muponda sent to select the bags did in fact select SOA bags and that when they came upon the green bags in question, they paused and asked the appellant’s subordinate, one Tongoona, whether they could take these as well. The green bags must have been different for these two men to have asked whether they could take them as well. In fact Mugwagwa, in his evidence before the disciplinary committee, confirmed that the bags were almost new. It is common cause that Tongoona in turn inquired from the appellant if the two men could also take the green bags. The appellant agreed that they could do so.

I agree with the respondent’s submission that Muponda had purchased scrap ex SOA bags and what appellant allowed to be taken out were not just the SOA bags but the green bags as well. Muponda had not bought any green bags.

It is also not in dispute that the gate pass originated from one Nyamwanza, a subordinate of the appellant. Appellant admits he inserted the words “plastic scrap” on the gate pass. He said nothing about the green bags. The description of the contents *ex facie* the gate pass was therefore misleading.

I further agree that the whole purpose of describing the contents of a package on a gate pass is to enable the guards in the Loss Control section to verify the same upon exit. If the description of the contents did not matter, as the appellant seems to suggest, then it would not have been necessary to endorse “scrap ex SOA bags”.

The totality of the evidence on record seems to suggest that the green bags were almost new and were not the scrap SOA bags reflected on the gate pass. In the circumstances I agree with the submission that it was the authorisation by the appellant that paved the way for the dealers to take the green bags as well.

In these circumstances the finding by the court *a quo* that the appellant aided theft cannot be said to be irrational or outrageous in its defiance of logic. If anything, the finding was consistent with the totality of the facts which were not in dispute.

Accordingly I make the following order:-

1. The appeal succeeds to the extent that the conviction for “any conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment” is set aside.
2. The appeal is otherwise dismissed with costs.

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Mbidzo, Muchadehama & Makoni, appellant’s legal practitioners

Scanlen & Holderness, respondent’s legal practitioners