

**REPORTABLE** (17)

**MICHEAL HENRY BROWNE**  
**vs**  
**TANGANDA TEA COMPANY**

**SUPREME COURT OF ZIMBABWE**  
**ZIYAMBI JA, GWAUNZA JA, PATEL JA**  
**HARARE NOVEMBER 16, 2015 AND MAY 24, 2016**

*E. Matinenga*, for the Appellant

*A. Rutanhira*, for the Respondent

**GWAUNZA JA.** This is an appeal against the whole judgment of the Labour Court handed down at Harare on 30 August 2013.

The facts of the matter are as follows:

The respondent is a company engaged in farming operations on a number of its plantations and estates in the Manicaland Province. The appellant joined the employ of the respondent in 1997 as an Estates Coffee Manager based at New Year's Gift. Early in 2000, he was offered and took up the position of Agricultural Manager. All estate managers were now reporting to the appellant. In 2007 the appellant became General Manager Agriculture and subsequently in 2010, he was appointed Director.

Sometime in 2011 the appellant was charged with contravening sections of the respondent's Employment Code of Conduct (hereinafter called "the Code"). In particular, he was charged with gross incompetence and negligence in the performance of his work, and violating the respondent's Anti-Sexual Harassment policy. In the latter respect the appellant was accused of having improper relations with two junior members of staff. It seems however, that the sexual misconduct charges were pursued only in relation to one of the two junior members of staff.

In October 2011, the appellant was notified of disciplinary proceedings set to be conducted against him. The disciplinary hearing subsequently took place at New Year's Gift estate. After the hearing on 22 November 2011, the respondent wrote to the appellant notifying him of his dismissal from duty following his being found guilty of breaching the relevant sections of the Code. The appellant appealed internally but unsuccessfully against the decision of the Disciplinary Committee. Aggrieved by that decision, he filed an appeal with the Labour Court. The appeal before the Labour Court was essentially on two grounds:

- i) that the charges in respect of sexual misconduct and failure to graft the macadamia seedlings had prescribed; and,
- ii) that the charges in any case lacked sufficient evidence and were therefore not proved.

The Labour Court having dismissed the appeal, the appellant has now appealed to this Court against its judgment.

The grounds of appeal raise the following issues:

1. Whether or not the hearing and appeal tribunals were properly or improperly constituted thus technically rendering their decision to dismiss the appellant nugatory;
2. Whether or not the allegations against the appellant at the commencement of the disciplinary proceedings had prescribed;
3. Whether or not the appellant's failure to graft the macadamia seedlings amounted to gross negligence in the performance of his duties, as alleged; and
4. Whether or not the alleged sexual relationship between the appellant and one junior staff member was proved;
5. Whether or not in light of the above issues, the penalty of dismissal against the appellant was justified.

I will consider each of these issues in the order indicated.

#### 1. **Constitution of the Disciplinary Committee**

The appellant alleges that the Disciplinary Committee that found him guilty and imposed the penalty of dismissal was not properly constituted as set out in respondent's employment code of conduct. This was because it did not include a "fellow employee" of the appellant.

Paragraph 4.5 of the respondent's Code provides for the composition of its Disciplinary Committee, in part as follows:

- "4.6 Employee Representation
- 4.6.1 ...
- 4.6.2 Managerial employees shall be represented by one fellow employee, or one Managerial Employees' Committee member of their choice." (*my emphasis*)

It is common cause that the appellant was a managerial employee. He submits firstly that the issue was not raised in the court *a quo* and secondly that it was being and could, properly be raised for the first time on appeal.

Before addressing the appellant's contention in this respect, I find it necessary to consider some salient facts germane to this issue.

Firstly, there is no evidence to suggest that the appellant "chose" a fellow employee to represent him at the disciplinary hearing, nor that he presented such person to the committee and was turned down. Secondly and more to the point, there is no evidence to suggest that he challenged the absence of such a fellow employee at the commencement of the very lengthy disciplinary proceedings. The appellant's counsel effectively confirmed this fact as is evidenced by this exchange during the proceedings in the court *a quo*:<sup>1</sup>

MR KUHUNI: The disciplinary committee was not properly constituted

COURT: That should have been raised at the hearing, you were involved at the hearing, why did you not challenge the composition at that stage? Why wait to do it on appeal?

MR KUHUNI: No answer

The record shows that Mr Kuhuni then proceeded to address the court on a completely different aspect of the case. This in my view suggests, and the court *a quo* must have taken it to be the case, that Mr Kuhuni for the appellant decided to abandon the argument relating to the constitution of the disciplinary committee. It is pertinent to note that

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<sup>1</sup> Honography Notes at pages 50-51 of the record

there is also no indication in the appellant's heads of argument in the court *a quo*, that this matter was raised.

Given this background I do not find it to be a correct representation of the facts by the appellant, that the point concerning the proper constitution of the Disciplinary Committee was not raised in the court *a quo*. The matter was clearly not only raised, it was also, in my view, effectively abandoned after the court *a quo* queried the appellant's failure to challenge the constitution of the disciplinary committee at the commencement of the proceedings. In its judgment the court *a quo* made no determination on this issue, in my view correctly so, since no argument was advanced to enable it to do so. The appellant does not argue before this Court that the court *a quo* was mistaken in taking this stance. He bases this ground of appeal on the false premise that the point is being raised for the first time on appeal. This I find to be a submission that is both misplaced and unsustainable. A party cannot abandon an argument, or like in this case, a ground of appeal, in a lower court and hope to validly resuscitate the same ground on appeal to a superior court.

For these reasons I find that there is no merit in the first issue raised by the appellant, and the ground of appeal related to it is accordingly dismissed.

## **2. Prescription**

### **2.1 Re: Grafting of the macadamia seedlings**

It is common cause that the respondent bought macadamia seedlings from one Mr Scott ("Scott") and that the seedlings, which fell under the authority of the appellant, were planted in 2007. Scott's evidence that he expressly told the appellant that the macadamia seedlings were supposed to be grafted before being planted, is also not disputed.

The appellant did not graft the seedlings. Subsequent inspections of the macadamia plantation revealed that over 35ha thereof exhibited a poor crop. The respondent consequently around August/September 2010, engaged two consultants to do a comprehensive assessment of the crop and submit a report to the Chief Executive officer. The evidence on record suggests that it takes some 5 years for a macadamia crop to reach maturity. The assessment revealed that the seedlings had not been grafted before planting, a circumstance that was said to be largely responsible for the poor state of the macadamia crop. This fact was then communicated to the respondents, who as a result laid the charges of misconduct referred to, against the appellant. This was in October 2011. The consequent disciplinary proceedings were held from 26 to 28 October, 2011.

Based on the period between the planting of the macadamia seedlings in 2007, and the bringing of misconduct charges related to it (in October 2011), the appellant contends that the charges were prescribed. The court *a quo* was not persuaded and found against the appellant on this point. The learned judge opined as follows on page 5 of her judgment:

“...the evidence on record clearly shows that Tanganda Tea Company became aware of the Appellant’s gross negligence in relation to agricultural activities at the estates in 2010, after it had engaged consultants, and not earlier.”

The appellant charges that this factual conclusion by the court *a quo* was so “irrational” as to amount to a misdirection at law.

I am not persuaded there is merit in this argument.

The respondent averred that the first consultant, James Wessels (‘Wessels’), detected signs of bad management of the macadamia crop and its resultant poor condition.

However, it was only after reports were submitted by the second consultant, Timothy Fennel ('Fennel') following his closer analysis of the crop situation, that the "true cause" of this poor state of affairs was disclosed to the respondent. This was towards the end of 2010. Prior to this, the various other persons that the appellant alleged must have been, or were aware of, the poor state of the crop, and the main causes thereof, could not have appreciated that part of the problem arose from the fact that the seedlings had not been grafted before planting.

It is not disputed that the charges of gross negligence in the performance of his work were not restricted to the issue of the grafting of the macadamia seedlings but went beyond this, to encompass the appellant's management of the whole estate. The record, however makes it clear that the issue of the Macadamia seedlings stood out among the various other factors alleged to have resulted in the crop exhibiting signs of failure to thrive.

There seems to be nothing on the record to suggest that while some of the respondent's senior officials may have been made aware of the challenges faced by the appellant generally in managing the macadamia plantation, their attention was also drawn specifically to both the failure by the appellant to graft the seedlings before planting, and the causes thereof<sup>2</sup>. Nor does the appellant state that the officials whom he named, had the capacity or obligation to submit reports to the respondent's Chief Executive Officer in Harare. It is in light of this latter point, that the court *a quo* stated as follows on page 3 of its judgment:

"The appellant sought to rely on the challenges of finance and labour during the relevant period. This did not assist him much because there is no evidence on record to suggest that he brought the challenges on macadamias (*sic*) to the attention of his superiors in Harare .... It took outside consultants for Tanganda Tea Company to know the situation concerning the macadamias (*sic*) ...."

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<sup>2</sup> According to the appellant, these included unavailability of the grafting materials, and the requisite labour for it.

Against this background I do not find any fault with the Labour Court's factual finding that the respondent only became aware of the appellant's failure to graft the seedlings in question before planting them, in the latter part of 2010. The finding is in my view fully supported by the evidence on record. It therefore cannot be said to be irrational, nor "so outrageous in its defiance of logic"<sup>3</sup> that no sensible person could have arrived at the same decision. The question of prescription in relation to this issue must therefore, be determined on this basis.

In terms of ss 16 (1) and (3) of the Prescription Act [*Chapter 8:11*] prescription shall commence to run as soon as a debt is due. Moreover, a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.

The relevant charges against the appellant were preferred against him in October 2011. I have determined that the respondent became aware of the appellant's failure to graft the macadamia seedlings earlier, in the latter part of 2010 when the consultant's report was released to the appellant's superiors in Harare. However, it is important to determine whether the respondents could have, through the exercise of reasonable care, acquired this knowledge before that time.

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<sup>3</sup> See in this connection, *Hama v National Railways of Zimbabwe*, 1996 (1) ZLR 664 at 670



In this connection, I find the following excerpt from the book “Extinctive Prescription” by the South African author MM Loubster<sup>4</sup>, to be a useful guide given the circumstances of this case:

“It is suggested that the following factors will be relevant to determine whether the creditor has reasonably endeavoured to acquire the requisite knowledge: the physical and mental capacity of the creditor to acquire knowledge; the opportunity to acquire knowledge from sources open to investigation; whether the creditor already knew facts which would have caused an ordinary, prudent person to investigate further; and the nature of the relationship between creditor and debtor .... It appears that reasonable care for purposes of (the equivalent section to our Prescription Act) is not measured by the objective standard of the hypothetical reasonable or prudent person, but rather by the more subjective standard of a reasonable person with the creditor’s characteristics.”<sup>5</sup>

It is contended for the appellant, in his heads of argument, that the finding of the court *a quo* that his superiors in “far away” Harare had not been shown to have known about the appellant’s conduct, gave the ‘unfortunate’ impression that he presided over ‘an isolated Kingdom’ at the estate in Chipinge. The appellant avers that a certain Mr Lightfoot (‘Lightfoot’), to whom he reported from about 2000 to 2007 was resident in Chipinge. Further, that the Managing Director, a Mr Andrew Mills (‘Mills’), though staying in Harare had in September 2008, expressed himself ‘very strongly’ against his subordinate, Mr Craig’s (‘Craig’) negative attitude to his responsibilities. On this basis, and without indicating what relevance Craig’s attitude to his work, had on the charges he (appellant) was facing, he argues that it is not true that his superiors in Harare would not have known about the facts upon which the misconduct charges in question were based.

It is evident from these averments that the appellant does not indicate whether Lightfoot and Mills had specific knowledge relating to his failure to graft the macadamia

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<sup>4</sup> First Ed at page 105

<sup>5</sup> See also *Brand v Williams* 1988 (3) SA 908 (C) at 913

seedlings. Nor does he give any cogent basis for the belief that the two conveyed such knowledge to the relevant superior authorities in Harare. When the excerpt cited above is applied to the circumstances of this case, it cannot, in my view, be said that the appellant has established that the ‘creditor’ *in casu*, that is, his relevant superiors in Harare;

- i) had the capacity and opportunity to acquire the requisite knowledge from sources ‘open to investigation’; or
- ii) already knew facts which would have caused an ordinary, prudent person to investigate further:

In the result I find that the appellant failed to show that the respondents knew, or should have known, of the alleged gross incompetence in the performance of his duties, before 2010. I find that accordingly the court *a quo* correctly determined that prescription in relation to the charge of gross incompetence only started to run from around October 2010.

## **2.2 Sexual Misconduct**

The parties’ submissions on prescription in relation to the charge of sexual misconduct are essentially the same as those tendered in respect of the gross incompetence charges.

There are however a few considerations that are peculiar to the sexual misconduct charges.

The improper relationship between the appellant and a certain Eulater Makuyana (‘Eulater’) allegedly took place from 2003 to 2006. It is the respondent’s

submission, based on evidence that is on record<sup>6</sup>, that its attention was drawn to this relationship in August 2011. The appellant disputes this and submits that the respondent ‘must have known’ about the allegation as way back as 2009. He relies on two circumstances to buttress this assertion:

- i) the evidence of the said Eulater that most of the people in Ratelshoek (the area where the estate was located) were aware of their love affair, and
- ii) that Lightfoot, who was his superior at the time was based in the Chipinge area and knew about the love affair between Eulater and Craig, who was the respondent’s subordinate, and allegedly his rival in Eulater’s affections.

The court *a quo* assessed this evidence and stated as follows at page 5 of its judgment:

“The appellant sought to rely on the evidence of Eulater’s lost diary and rumours around the estates. As previously stated, even if there were rumours around the estates, there is still no evidence in the record which shows that the appellant’s superiors in *Harare* got to know what the appellant, who was the Chief boss (*sic*) at the estates, was up to in faraway Chipinge. The courts work on evidence, not rumours or conjecture and indeed the applicant did not point the court to any evidence that his misdemeanours with staff on the estates had reached his boss’ ears in Harare” (my emphasis)

I find the reasoning of the court *a quo* on this point to be eminently sound. It is one thing to be expected to know of something and quite another to actually know of it. In any case I doubt one would expect the appellant’s superiors in Harare to have had both the reason and opportunity to make it their business to follow up on stories that may have been doing the rounds concerning improper relationships between senior and junior staff on its estates. This is particularly so in view of Eulater’s evidence in cross examination during the

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<sup>6</sup> Specifically, a letter dated 23 August, 2011, written by the Chairman of the Board of Directors to the appellant, in which he was informed that their attention had been drawn to his alleged improper relationships with ‘junior staff’

disciplinary hearing, that she and the Appellant took every effort to keep their relationship secret.

As for Lightfoot, the appellant does not state how his knowledge in 2009 of an alleged love affair between Craig and the said Eulater, could have had a bearing on the specific charge that he himself faced with regard to Eulater. More significantly, he does not state why Lightfoot would have been expected to report such a matter to the superiors in Harare, nor whether he, in reality did so.

In view of the foregoing, I am satisfied, as I was with respect to the charge of gross incompetence and negligence and on the same basis, that the appellant has failed to show that the respondent had knowledge of the alleged sexual relationship between him and Eulater earlier than 2011, nor that they could have acquired such knowledge through the exercise of due diligence.

Flowing from this, I find that the charges brought against the appellant had not prescribed at the time disciplinary proceedings against him commenced.

**3. Did the appellant's failure to graft the macadamia seedlings amount to gross negligence in the performance of his duties?**

I consider it pertinent to prefix this part of the judgment, and the next, with the observation that the disciplinary proceedings conducted against the appellant had all the hallmarks of a fully-fledged trial. Looking at the detailed record of proceedings, one gets the impression that all issues were fully ventilated and argued. Each party was legally represented and was able to call its own witnesses. These were put through comprehensive

examination-in-chief, cross-examination and re-examination. Written submissions before and after the hearing, were also filed.

Against this background, it is the respondent's argument that it proved a case of gross negligence and incompetence in fulfilling his duties, on the part of the appellant. This, according to the respondent, was in large part attributable to his failure to graft the macadamia seedlings before planting them. The respondent further charges that this circumstance resulted in it suffering huge financial loss. Lastly, that this misconduct merited the penalty of dismissal.

The appellant does not deny that he failed to graft the seedlings as alleged nor that the seller of such seedlings, Scott, had advised him to do so before planting them. He blamed his failure to graft the macadamia seedlings on the fact that at the time that they were supposed to be grafted, the estates were beset with economic and other hardships leading to inadequate operational funds, unavailability of the necessary grafting tools and shortages of labour. The respondent also sought to elicit evidence from his witness Mr PFW Lee ('Lee'), to the effect that the failure of ungrafted seedlings to thrive was attributable not only to that circumstance, but to other factors as well. He also sought, in my view unsuccessfully, to contrast the expert opinion of Lee with that of the two consultants engaged by the respondent. The consultants, Fennel and Wessels, gave evidence for the respondent on the effect of not grafting macadamia seedlings before they are planted.

As correctly argued for the respondent, while the experts' opinions varied from the categorical to the almost ambivalent depending on the side for which they were

proffered, all experts seemed to agree that decidedly, there were disadvantages to not grafting the seedlings in the manner advised.

To illustrate this point, Fennel stated that it was ‘common knowledge’ that one cannot plant ungrafted macadamia seedlings. He estimated that between 35 and 40ha of the plantation in question had ‘no future’. Wessels, the other consultant, estimated that about US\$300 000.00 of revenue was lost and that this was largely due to the non-grafting of the macadamia seedlings. He added that only 20 per cent of the entire macadamia field was expected to bear fruit. Contrasted with this was Lee’s evidence to the effect that given all the problems observed, the crop that he saw was ‘surprisingly good’ despite its ungrafted state. However, as the court *a quo* noted, Lee’s other comments on the value of grafting seedlings appeared to take the appellant’s case a step or two back. The court noted in relation to his evidence:

“Even his own witness, Mr PFW Lee on page 1994 of the disciplinary record (*sic*), confirms the appellant’s gross negligence when he says the ‘orchard that we visited wasn’t receiving full irrigation. The trees had been stressed because they lacked water.’ On page 194 he also confirms the importance of grafting seedlings, when he says as a consultant, he would not recommend that commercial growers use the ungrafted method. So even from the evidence of (the) appellant’s own witness, the gross negligence on the issue of macadamias comes out.”

Added to this, and as correctly noted in the respondent’s heads of argument, Lee went further to state that the effect of not grafting seedlings would be that:

“You will have a situation where some trees will produce good fruit while others produce low fruit. Overallly you will have an average yield...”

The upshot of the foregoing is, in my view, to put it beyond doubt that the failure by the appellant to graft the seedlings in question substantially eroded the quality of the product from the crop. I find that in this respect, the appellant compounded his default by:

- i) dis-regarding the advice from the seller of the seedlings, that he should first graft them before planting; and
- ii) having faced challenges in carrying out the task, failing to draw his superiors' attention to the problem before proceeding to plant.

There is, in addition, nothing on the record to suggest that the appellant disputed that the harvest from the crop in question was seriously compromised. He does not seem to dispute the loss said to have been suffered as a result of the failure to graft the seed, estimated at some 35ha and worth over USD300 000.

I find, in the result, that the alleged gross negligence and incompetence in his work, was sufficiently proved against the appellant. In short the appellant was properly found guilty of the misconduct of gross negligence, defined as follows in the respondent's code of contact:

**12.17 Gross Negligence**

An employee is grossly negligent if he/she fails to exercise proper care in the discharge of his/her duties resulting in loss of life, or serious damage or loss of company property

**4. Whether the alleged sexual relationship between the appellant and Eulater, was proved.**

The appellant alleges that the court *a quo* made an irrational finding that the respondent had proved the violation by him of the anti-harassment and discrimination policy.

The appellant was charged in terms of the respondent's code of conduct, under the banner of "**An inconsistent Act, Conduct or Omission.**" The specific offence of which he was accused was conducting an improper sexual relationship with a junior member of

staff, one Eulater Makuyana sometime between 2003 and 2006. This was contrary to the respondent's anti-harassment and discrimination policy (sexual misconduct), which in relevant part reads as follows:

**“9. Sexual Misconduct**

Sexual misconduct applies where both parties are consenting, but the relationship is likely to jeopardise the smooth operation of the work place ....

Sexual misconduct towards subordinates in the workplace raises serious questions regarding the ability to provide a healthy, safe and harassment-free work atmosphere, especially on the estates, where access to residences is easy ...”.

The relevant provision of the respondent's code reads:

**12.20 Inconsistent Act, Conduct or Omission**

An employee commits a gross offence if he/she does any act, conduct or omission, which is inconsistent with the fulfilment of the express or implied conditions of his/her contract of employment.

At the disciplinary hearing, and regarding this charge, the respondent called as its witnesses the said Eulater, the appellant's former cook, Irene Sithole, and the appellant's alleged love rival, *Craig*. Eulater went into great detail in both her evidence in chief and under cross examination, regarding when the relationship started, where it was conducted, how long it lasted, the care taken by both parties to keep it secret and how it all ended.

The appellant's defence was to deny that such a relationship ever existed between him and Eulater. It was in light of this that the court *a quo* in its judgment after analysing the evidence of the three witnesses had this to say:

“Eulater's evidence was corroborated by her next boyfriend, Brian Craig, who got to know about the relationship when he started his own relationship with Eulater ... and asked her to choose between him and the appellant .... Eulater's evidence was also corroborated by the appellant's cook, Irene Sithole. The court agrees with the hearing officer's finding that Eulater was a credible witness. The sum total of the evidence of Eulater, Craig and Irene shows that the relationship between Eulater and the appellant must have existed for them to talk about it because they gave their evidence long after the relationship had terminated. Why then would all three corroborate (*sic*) on the existence of this relationship between 2003 and 2006? If their evidence was a



fabrication, why would they confirm the expiration of the relationship and not allege that it was in existence up to the time of Eulater's resignation? ... Because of the above reasons, this court is convinced that both the Disciplinary Committee and the appeal hearing officer were correct in accepting the corroborated evidence of Eulater on the relationship with the appellant as truthful"

I can find no fault with the reasoning and conclusion of the court *a quo* on this point.

The appellant challenges the finding of the court *a quo* that the evidence of Eulater was corroborated by that of Irene Sithole. It is contended as follows in his heads of argument:

"With respect, Irene Sithole did not corroborate Ms Makuyana's evidence as the Labour Court found. At best, Irene Sithole's evidence merely lent consistence to Ms Makuyana. No more."

My understanding of this averment suggests that while according to the appellant, Eulater lied about the existence of the relationship in question, she was consistent in such a lie, and Irene Sithole's evidence did no more than 'lent consistence' to the lie. I find it difficult to follow this reasoning. Even if it were to be accepted that Irene Sithole sought to corroborate false evidence by Eulater, the appellant has not offered any explanation as to what the motivation would have been for Irene Sithole to act in that manner.

A reading of the record shows that Irene Sithole gave what could be termed eye witness evidence, to the effect that over a period of several years while she worked as the appellant's cook, she saw Eulater come often to his house, and always after dark. She would talk to Eulater among other things, about the reason for her visits, which always took place in the absence of the appellant's wife. Irene Sithole would then go to her cottage to retire for the

night, leaving the two of them in the house. She told the disciplinary hearing that she never witnessed Eulater leave the appellant's house, nor could she say what time she did so, since she would be out of sight.

I am not persuaded by the appellant's contention that even though Eulater said she and the appellant conducted their relationship at his house, at night and in the absence of his wife, this evidence was not corroborated by that of Irene Sithole. It is a contention that I find has no merit.

The appellant also disputes that the evidence of Eulater on her relationship with him was corroborated by Craig. In his heads of argument the appellant disputes the respondent's averment that Craig was forced to resign by the appellant "in furtherance of his fight over Ms Makuyana's attention ...." He attributes such resignation to other factors extraneous to the alleged sexual relationship between him and Eulater. However, the appellant does not, as one might have expected, challenge Craig's evidence as to the events that he observed which proved to him that Eulater and the appellant continued with their relationship even after she told him (Craig) that she was choosing him over the appellant. That evidence remains unchallenged and serves to discredit the appellant's contention that it did not corroborate Eulater's evidence regarding their sexual relationship.

Thus when all is told, I find that Eulater's evidence on the existence of the relationship in question was sufficiently corroborated by that of Irene Sithole and Brian Craig.

The appellant further challenges the Labour Court's endorsement of the disciplinary hearing's positive findings on the credibility of Eulater as a witness. It is stated as follows in paragraph 5.1 of appellant's grounds of appeal,

"The hearing officer did not address the credibility of Eulater Makuyana at all, contrary to the comments of the appeals officer in this regard."

A perusal of the appeal hearing officer's decision suggests that the appellant either misread, or did not read, that decision, whose paragraph 4 reads:

"4. The designated hearing official who had the opportunity to observe witnesses giving evidence and to assess their demeanour found Eulater Makuyana to have given evidence in a credible manner and believed her evidence. I cannot interfere with his findings. He also found Irene Sithole *and* Brian Craig who corroborated the evidence of Eulater Makuyana to have been credible witnesses."

The correctness of this statement is beyond doubt. It is trite that an appeal tribunal should be and generally is, reluctant to interfere with a trial tribunal's findings on the credibility of witnesses who give *viva voce* evidence before it. The reasons for this are aptly articulated by the appeal hearing officer in the words cited above and merit no further comment.

It is in my view necessary to highlight the fact that the disciplinary proceedings *in casu*, while having been conducted in a manner akin to a fully defended trial before a court of law, did not constitute a criminal trial. The appellant was not an accused person facing trial for a criminal offence before a magistrate or judge. Labour matters being civil in nature, all that had to be proved *in casu* was whether or not, on a balance of probabilities, the respondent had proved the charges in question, against the appellant. I have found that the respondent did so.

I find when all is told, that it is difficult to fault the judgment of the court *a quo* to the effect that the appellant was properly found guilty in relation to the offence of sexual misconduct.

## 5. Penalty

It is the appellant's contention that the decision to dismiss him was irrational and contrary to the provisions of the respondent's Code of Conduct. I do not find that this assertion is supported by the Code in question. The offences of 'Gross Negligence' and of "An inconsistent Act, Conduct or Omission are listed in Schedule IV of the respondent's Code of Conduct. The section is entitled "**GROSS OFFENCES: (DISMISSAL)**". As is evident, the offences attract the penalty of dismissal. Given this circumstance there can be no doubt that the respondent imposed a penalty consistent with what its code stipulates.

The position is settled, that where an employer takes a serious view of misconduct committed by an employee and in its discretion, imposes a penalty of dismissal, the appeal court will generally not interfere with the exercise of such discretion in the absence of demonstrated unreasonableness or gross irrationality. This position was articulated in the case of *Mashonaland Turf Club v Mutangadura* SC 5/12 where **ZIYAMBI JA** held as follows:

"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."

I have already determined that the appellant, who held the most senior position on the estates in question, was in the circumstances of this case, properly found guilty of the misconduct charges that he faced. That being the case I am not persuaded there was any

misdirection or unreasonableness in the exercise of the respondent's discretion in imposing the penalty of dismissal.

## **6. DISPOSITION**

I find, in the final analysis, that this appeal lacks merit and ought to be dismissed. Costs will follow the cause.

Accordingly, it is ordered as follows:

The appeal be and is hereby dismissed with costs.

**ZIYAMBI JA,**        I agree

**PATEL JA,**        I agree

*C. Kuhuni Attorneys*, appellant's legal practitioners

*Scanlen and Holderness*, respondent's legal practitioners