

DISTRIBUTABLE (34)

TN HARLEQUIN LUXAIRE
v
(1) WINSTON MHONDA
(2) FUNGAI KATSVAIRO

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & UCHENA JA
HARARE, NOVEMBER 12, 2015 & AUGUST 3, 2016

J Zindi, for the appellant.

J Mudimu, for the respondent

UCHENA JA: The appellant appealed to this court against the whole judgment of the Labour Court. The appellant was the respondents' employer. It dismissed them from employment for wilfully losing two beds and mattresses, part of a consignment it had assigned them to deliver to Rusape and Mutare. The circumstances under which the respondents lost the appellant's property are fully explained in their evidence which, in spite of the evidence given by its own witnesses and the views expressed by members of the disciplinary committee, the appellant found hard to believe.

It is not disputed that on 12 August 2010 the appellant assigned the respondents the duty to deliver beds and mattresses to Rusape and Mutare. They left Harare at about 6.00pm. At about 21.00 hours the respondents phoned one Makuyo, the appellant's clerk, advising him that part of the appellant's property had been stolen by thieves as they

slowly negotiated a steep rise at a place called Mafusire along the Harare-Mutare Highway. Makuyo instructed them to proceed with their journey to Mutare.

The respondents reported the theft to Headlands Police. Police officers from Headlands Police station accompanied them to the Mafusire area to try and recover the stolen property. They were not able to recover anything. The police advised them to put up at the police station so that they could again search for the stolen property in the Mafusire area the next morning. The respondents put up at the police station and a search was conducted the following morning. The search did not yield any positive results. The respondents proceeded on their journey to Rusape and Mutare where they delivered the remaining beds and mattresses.

On their return to Harare the respondents were charged with misconduct for negligence in terms of s 2.2 (c) and wilful loss of employer's property in terms of s 2-3 (c) of The National Employment Council for the Furniture Manufacturing Industry's Employment Code of Conduct duly registered on 19 November 1992.

The respondents gave evidence before the disciplinary committee. A motorist stopped them after the Mafusire steep rise and told them that the doors of their truck were open and that he had seen people carrying beds similar to those in their truck into a mountain at the Mafusire area. Due to confusion, they did not take the details of the motorist, but immediately phoned Makuyo, the appellant's clerk and reported the theft to Headlands Police Station. The Police escorted them back to the Mafusire area that night and the following morning.

D Matsika, E Moses, M Chatsiwa and F Makuyo testified for the appellant. Matsika told the disciplinary committee that he received a phone call from Makuyo who reported to him that he had received a report of theft of the appellant's property at the Mafusire steep rise. He further told the disciplinary committee that an assistant accompanying their other lorry which was travelling behind the respondents confirmed the theft. When asked why the respondents had not taken the details of the motorist who alerted them of the theft, Matsika said, "it is strange from an academic point of view but considering the type of people involved it is possible."

Moses who apparently loaded the beds and mattresses told the disciplinary committee that, "the beds can only slip out if the ropes are untied and if the vehicle is at an uphill position." He further told the committee that, "if the beds are loaded on top they can slip out with ease." He told the committee that in view of the way the beds were packed it was not possible for one person to off load them without assistance.

Chatsiwa, a security officer, went to the scene of the alleged theft to make observations. He opined that it would have taken time for one to open the truck's doors, untie the ropes and off load the two beds and mattresses. He questioned respondents' failure to take the details of the motorist who alerted them of the theft. When it was put to him that the respondents knew that the truck doors were open but just wanted to use that possibility as a defence he said; "it was difficult as there was no one to cross examine".

Makuyo confirmed that he received a theft report from the respondents on the night of the incident. He also confirmed receiving confirmation from one Jonah who was travelling in another truck belonging to the appellant on the same route that he had seen some people carrying beds into the mountain at the Mafusire steep rise. He further told the

disciplinary committee that there is a small space at the back of the truck from which thieves could have cut locks with a bolt cutter to steal from the moving truck.

Mr Chiwaridzo, who chaired the disciplinary committee, and the majority of members of his committee initially recommended that the respondents be found guilty of negligence and be given written warnings. He, on p 62 of the record, said:

“The facts of this matter are common cause and shall not be repeated herein. I shall confine myself to the findings of other members of the panel whose findings on the negligence of the defendants I concur with in toto. The defendants were negligent and as a result lost the company’s property thus prejudicing the company to the tune of \$1 810.”

He thus agreed with the initial findings of the members of the disciplinary committee. For reasons which have not been placed on record, he subsequently changed the last part of the committee’s recommendations and recommended that the respondents be dismissed from employment. This seems to be the reason why Susan Cakana, the appellant’s Head, Group Human Resources Manager, by letters dated 15 September 2010, dismissed the respondents from employment.

Other members of the disciplinary committee held different views but converged on a finding of guilty of mere negligence for which they recommended written warnings.

Mrs L Chimbade recommended written warnings after commenting on the incident as follows:

“It is just sad that when the two were stopped by a certain motorist who advised them that the truck’s doors were open and that he had seen some beds at Mafusire they did not take his details for reference purposes. History says Mafusire area is known for

robberies and as such the two were supposed to be on guard, but in this case they were not very careful.”

She obviously believed the respondents and merely concluded that they were not very careful in view of the history of the Mafusire area.

Mr M Rukawo recommended a reprimand which in my view is another way of recommending a written warning. He, in respect of Fungai Katswairo, the first respondent, said he “failed to exercise due care and custody of the consignment”. In respect of the second respondent he said, “As the driver’s assistant he was supposed to be extra vigilant at places such as Mafusire where known acts of banditry occur”. He believed the respondents’ story and merely thought they should have been extra vigilant because of the notoriety of the Mafusire area.

Mr L Magwagwa, another disciplinary committee member, after giving a reasoned analysis of the Mafusire steep rise being three kilometres long and its history of robberies including previous theft of the appellant’s property at the same place, recommended that the respondents be found not guilty. He was however of the view that if they are found guilty a lenient sentence should be imposed. It seems to me he had in mind a minimum sentence which, in the circumstances of this case, is a written warning.

The majority of the members of the Hearing Committee convicted the respondents of negligence in terms of s 2.2 (c) of the Code for which they recommended written warnings. The Chairman’s subsequent recommendation that they be dismissed from employment resulted in Susan Cakana writing letters to the respondents dismissing them from employment.

The respondents appealed against their convictions and dismissal to the National Employment Council for The Furniture Manufacturing Industry of Zimbabwe, (the NEC Appeals Committee). The NEC Appeals Committee, after finding that the disciplinary committee had recommended that respondents be found guilty of negligence and be given written warnings, but had subsequently been inexplicably dismissed, upheld their appeal and ordered their reinstatement. It further ordered that if reinstatement was no longer possible, the respondents be paid agreed damages in lieu of reinstatement and that upon failure to agree on damages, either party may approach it for quantification.

The appellant appealed to the Labour Court which did not believe the appellant's assertion that the document which recommended that written warnings be given was a draft. It found, that there was no explanation for the existence of two sets of recommendations from the disciplinary committee. It found no fault in the decision of the NEC which it upheld.

The appellant appealed to this court against the whole judgment of the Labour Court. Its appeal is premised on the following grounds of appeal:-

- “1. The learned President erred and/or misdirected herself in law in failing to have regard to the facts of the matter and arrived at findings on the facts so outrageous which findings no reasonable tribunal applying its mind to the facts of the matter and the law could possibly have arrived at.
2. The Learned President erred and /or misdirected herself in law in arriving at findings on the facts which findings constitute misdirections at law, in that she failed to consider and pay requisite regard to the following undisputed facts;
 - a) That the beds had been loaded onto the Appellant's truck in a manner which would not have permitted their removal unless the ropes which secured them had been deliberately untied;

- b) That the doors of the truck had been locked and secured and could not be unlocked from outside while the truck was in motion.
 - c) That Appellant had never accepted Respondents' explanation that the truck had been attacked by thieves and Appellant's beds removed from the truck while the truck was in motion and without the knowledge of the Respondents;
 - d) The evidence as to the respective responsibilities of Respondents during the journey;
3. Having found that the record before her showed that there were two sets of minutes of the disciplinary hearing, the President erred in accepting the set of minutes which favoured the Respondents when it is undisputed that both sets of minutes are unsigned. The rejection of the minutes recommending dismissal of Respondents is seriously flawed having regard to the facts of the matter and the highly improbable explanation for the loss of Appellant's property advanced by Respondents.
4. The learned President erred in her interpretation of section 6 (1) (d) of the Labour Act Chapter 28:10 and in finding that that section had any application to the facts of the matter before her and in thereby finding that Respondents' lives were placed at risk by Appellant in contravention of that section. This finding having regard to the facts of the matter represents a serious and gross misdirection on the part of the learned President.
5. The learned President's finding that the Appellant acted unfairly in charging Respondents with misconduct having regard to the facts of the matter is seriously flawed, and amounts to a serious misdirection.
6. The learned President erred in dismissing Appellant's appeal which dismissal represents a serious misdirection on the facts and the law."

The issues which fall for determination are;

- (a) Whether the decision of the court *a quo* is so outrageous in its defiance of logic that no reasonable tribunal, applying its mind to the facts of the matter and the law, could have arrived at such a decision.
- (b) Whether the court *a quo* correctly interpreted section 6 (1) (d) of the Labour Act.

- (c) Whether the disciplinary committee's recommendation that the respondents be dismissed from employment was lawfully made.

THE COURT *A QUO*'S DECISION ON QUESTIONS OF FACT

The evidence led before the hearing committee which the NEC Appeals Committee and Labour Court relied on does not disclose how it could be said that the court *a quo* misdirected itself in the manner alleged in grounds of appeal Nos. 1, 2, 5 and 6.

The respondents' evidence was, as has already been indicated, substantially corroborated by evidence led from the appellant's witnesses and was accepted by the disciplinary committee.

The appellant's own evidence confirms that its grounds of appeal attacking the court *a quo*'s findings on questions of fact are an abuse of the court's process. In terms of s 92F (1) of the Labour Act an appellant can only appeal to the Supreme Court on a point of law. The appellant abused the possibility of questions of fact being brought on appeal under the guise that the Labour Court's decision is so outrageous in its defiance of logic that a reasonable tribunal could not have made such a decision. Such grounds of appeal should only be raised when they are supported by evidence. Raising them for purposes of sneaking an appeal on questions of fact to this court is an abuse which this court will frown upon. Grounds of appeal 1, 2, 5, and 6 challenge the court *a quo*'s assessment of the evidence led on how the appellant's property was lost. They should be struck out as they are not properly before the court. They raise questions of fact which this court cannot entertain. See the case of *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 at 220 D-F.

INTERPRETATION OF SECTION 6 (1) (D) OF THE LABOUR ACT

In its ground of appeal No 4 the appellant raised the issue of the interpretation of s 6 (1) (d) of the Labour Act. The court *a quo* held that the appellant took advantage of its own failure to provide security for the respondents thereby exposing them to the risk of being pounced upon by robbers at the Mafusire steep rise. It reasoned that the charges arose from the appellant's failure to provide the respondents with security because the Mafusire area is notorious for robberies.

Section 6 (1) (d) provides as follows:

“(1) No employer shall—

(d) require any employee **to work under any conditions or situations which are below those prescribed by law or by the conventional practice of the occupation** for the protection of such employee's health or safety; or” (emphasis added)

Mrs *Zindi*, for the appellant, submitted that the court *a quo* erred because s 6 (1) (d) refers to conditions prescribed by the law. She further submitted that the court *a quo* did not refer to any law which provides for the respondents' safe working conditions. I agree that the court *a quo* incorrectly applied the provisions of s 6 (1) (d) to the circumstances of this case as it did not refer to any law which prescribes the safe working conditions which should have been provided. Section 6 (1) (d) does not only rely on safety prescribed by law but also on the occupation's conventional practice. Such conventional practise must however be proved before an employer can be said to have failed to provide safe working conditions in terms of the conventional practise. Section 6 (1) (d) does not therefore apply to circumstances not prescribed by law or by proven conventional practice. This however is not the determinant issue in this appeal.

WHETHER, THE DISCIPLINARY COMMITTEE'S RECOMMENDATION THAT THE RESPONDENTS BE DISMISSED FROM EMPLOYMENT WAS LAWFULLY MADE

The court *a quo's* and NEC Appeals Committee's decisions relied on the recommendation for a written warning which the appellant sent to the respondents to enable them to prepare for the hearing of their appeal to the NEC Appeals Committee. The respondents produced those minutes before the NEC. The recommendation for dismissals which the appellant now relies on was not placed before the NEC Appeals committee. It was only raised before the Labour Court and is not consistent with the recommendations of the members of the disciplinary committee. The NEC Appeals Committee in its decision commented on the disciplinary committee's recommendation as follows:

“The committee further asked why Mrs Susan Chakana, the Group Human Resources Manager had to terminate the duo when M. T. Chiwaridzo, the designated officer who was chairing the hearing had recommended for written warnings (sic) on last paragraph of the minutes of the hearing. The Respondents could not comment on the matter.”

The appellant was the respondent before the NEC Appeals Committee. It is therefore the party which could not respond when the NEC Appeals Committee raised this issue. If the second set of minutes which recommended dismissal was available, the question arises as to why it was not presented and explained during the hearing of respondents' appeal to the NEC. The impression is thus created that the appellant in its determination to dismiss the respondents subsequently created the second set of minutes. If the appellant had the second set of minutes in its possession when it appeared before the NEC, a second question arises as to why it did not comment on the matter by simply producing the second set of minutes and proffering the explanation it later sought to give to the Court *a quo*. The question posed by the NEC Appeals Committee is simple. It wanted to know why Cakana terminated the respondents' contracts of employment when Chiwaridzo the designated officer

had recommended written warnings. It is inconceivable that, the appellant, armed with another set of minutes in which dismissals were recommended, would have failed to comment. It is also inconceivable that with the dismissal recommendation on file, the appellant would send to the respondents the minutes of proceedings which recommended written warnings and be stuck when asked to explain.

In its heads of argument the appellant argued that the court *a quo* failed to properly consider its grounds of appeal to the Labour Court. The issue of the two sets of minutes appears as ground of appeal No 3 which reads as follows:

“Under its analysis before its determination the Appeals Committee avers that the Designated Officer, who was Chairman during the hearing, had recommended for Written Warnings assuming that the element of negligence was established. This averment is inaccurate. In fact, in his ruling the Designated Officer holds that “in the circumstances, I find the defendants guilty as charged” and in the last paragraph that “I recommend that the Defendants Fungai Katsvairo and Winston Mhonda, be DISMISSED effective the 13th day of September 2010”. Had the Designated officer not made this ruling Respondents would surely not have been dismissed and there would have not been any reason for them to appeal to the NEC against the Designated Officer’s ruling.”

The appellant is referring to its grounds of appeal to the Labour Court as an explanation for the existence of the two sets of recommendations made by the disciplinary committee. Grounds of appeal are not evidence and cannot explain anything. They merely present to the court of appeal what the appellant alleges are misdirections of the court *a quo*. An explanation for the existence of two versions of the minutes of the disciplinary committee could only have been presented by way of acceptable evidence. No explanation of the existence of the two sets of minutes of the same disciplinary proceedings was placed before the court *a quo*. The appellant failed to explain when the issue was raised by the NEC

Appeals Committee. This issue therefore remains unexplained as the Labour Court correctly noted.

It was argued on behalf of the respondents before the NEC Appeals Committee that, in terms of s 4 (5) of the Code; the Chairman of the disciplinary committee was not entitled to vote. Section 4 (5) of the Code, provides as follows:

“The decision of the committee shall be by majority vote:

Provided that the Chairman shall not be entitled to vote except in the event of an equality of votes when he shall, in absolute good faith, have a casting vote.” (emphasis added)

The second disciplinary committee’s recommendation which was used to dismiss the respondents from employment was not made in terms of s 4 (5). The Chairman voted when he was not entitled to as there was no equality of votes. He unprocedurally and unilaterally sought to overturn the disciplinary committee’s earlier decision when there was no equality of votes. The circumstances warranting his casting vote did not arise in this case. The majority decision was that the respondents were guilty of ordinary negligence for which a written warning was recommended. That is the legally binding decision in terms of s 4 (5). The Chairman’s subsequent recommendation that the respondents be dismissed from employment when there was no equality of votes is a legal nullity.

The court *a quo* therefore correctly upheld the NEC Appeals Committee’s decision.

In the result the appeal is dismissed with costs:

GARWE JA: I agree

MAVANGIRA JA: I agree

Messers Mtetwa & Nyambirai, appellant's legal practitioners

Messers Mudimu Law Chambers, respondent's legal practitioners