

AJASI WALA
v
FREDA REBECCA MINE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA & MAVANGIRA JA
HARARE, MAY 23, 2016

T Zhuwarara, for the appellant

T Magwaliba, for the respondent

MALABA DCJ: This is an appeal against the whole judgment of the Labour Court given on 3 September 2012. At the end of hearing argument from both parties, the Court dismissed the appeal with costs for lack of merit and indicated that reasons for the decision would follow in due course. These are they.

The appellant was employed by the respondent as an acting Human Resources Manager. As such he had under his custody exclusive control of all confidential personal files of employees of the respondent including his own. That contractual duty imposed on him the need to act in accordance with trust placed on him to keep documents safe. When a new General Manager came into office, he asked for the personal files of all employees. Documents relating to the disciplinary record of the appellant for the entire period, of seventeen years he was employed by the respondent were missing from his personal file. Initially the appellant alleged that his “lawyers” had the documents. The appellant had removed from his personal file all documents on his disciplinary record to create an impression that he had a blameless employment record. He was charged with contravening ss 4(a) and (g) of the National

Employment Code of Conduct Regulations S.I 15/2006. The first charge preferred against the appellant was to the effect that:

- i. Being the custodian of personal files of all employees, the appellant had failed to give a reasonable and satisfactory explanation for the missing and confidential company documentation from his personal file.

The second charge was that:

- ii. The appellant had intimidated a newly appointed Human Resources Manager so that he did not take up the job with the company.

The facts giving rise to the second charge were that the appellant got to know that a new Human Resources Manager had been appointed. He had visited the company on a familiarisation tour. The appellant went to the office of security guards at the entrance of the company premises where he opened the visitors book. He extracted from the book the personal details of the new Human Resources Manager including his residential address. In a desperate bid to intimidate the new Human Resources Manager so that he did not take up the job with the respondent, the appellant wrote an anonymous letter threatening him with bodily harm if he took up the job. In the anonymous letter, the appellant alleged that the Human Resources Manager would not be welcome at the company because he belonged to a different tribe and region. These sentiments were contrary to the company policy which discouraged discrimination on tribal and regional grounds in the recruitment of staff.

The third charge preferred against the appellant was that:

- iii. He had failed to obey a lawful instruction to discipline an employee as requested by the General Manager.

The Disciplinary Committee found the appellant guilty of the first two charges. It acquitted him of the third charge. The appellant was dismissed from employment. Aggrieved by the Disciplinary Committee's decision the appellant appealed to the Appeals Officer who upheld the dismissal.

The question whether the dismissal of the appellant was unfair was heard by an arbitrator who determined that the appellant had been properly found guilty of the acts of misconduct charged against him. He, however, took the view that the penalty of dismissal was unwarranted. In a rather contradictory process of reasoning, the arbitrator said:

“.....However it is my considered view that both acts of misconduct are not serious enough to warrant the verdict of dismissal as there was no direct benefit on the part of the Claimant (appellant *in casu*).....I take note that the trust the Respondent had on the Claimant has been eroded and he cannot be trusted to occupy any office of authority such as the one he was appointed to temporarily occupy. It is therefore my considered opinion that the penalty befitting this offence would be to demote the Claimant to a lower grade than the one he was acting for the period prior to the confirmation of the current incumbent to commence from the date of suspension. I accordingly order the re-instatement of the Claimant to a grade lower than the one currently occupied....”

The respondent appealed to the Labour Court on the following ground:

“The Honourable arbitrator fundamentally misdirected himself in finding that the penalty of dismissal was unduly harsh and excessive in the circumstances and therefore awarding the penalty of reinstatement to a lower position.”

The Labour Court held that the appellant's action went to the root of the contract of employment. The court *a quo* held that the penalty of dismissal imposed on the appellant

was appropriate. It allowed the appeal and set aside the arbitrator's determination on the penalty.

The appellant appealed against the court *a quo*'s judgment on the following grounds:

1. The court *a quo* erred at law in entertaining the respondent's appeal, which appeal, raised no questions of law. The respondent's appeal was defective in that it did not satisfy the attendant requirement of s 98(10) of the Labour Act [Cap. 28:01].
2. In the absence of a gross misdirection, the court *a quo* erred at law in substituting its discretion for that of the arbitrator. At law, the court *a quo* could only interfere with the discretion of the arbitrator where it was alleged and proved that the arbitrator made a decision that defied logic and which no person who had applied his mind to the facts would have arrived at.
3. Without assessing mitigation, the court *a quo* grossly misdirected itself in holding that the appropriate penalty to be levied against the Appellant was dismissal. In exercising discretion, the court *a quo* was enjoined, by operation of s 12 (B) (4) of the Labour Act, to consider mitigating circumstances and assesses the same against the gravity of the offence.
4. The court *a quo* erred in summarily allowing the respondent's appeal without addressing the Arbitrator's reasoning or the facts upon which such reasoning was predicated. At law, the court *a quo* was enjoined to apply its mind to the record of the proceedings and thereafter judicially evaluate if there existed any error of the law. The court *a quo* could not arbitrarily ignore the proceedings

before the arbitrator and precipitously apply its own determination without applying its mind to the record.

The question for determination is whether or not the court *a quo* misdirected itself in interfering with the decision of the arbitrator. Mr *Zhuwarara* correctly stated the principle that an appellate court can only substitute its discretion for that of the tribunal whose decision is appealed against where there has been a serious misdirection or error of law committed by the tribunal.

In *Tobacco Sales Floors Ltd. v Chimwala* 1987(2) ZLR 210(s), McNALLY JA approved of the dictum by LORD JAMES OF HEREFORD in the case of *Clouston & Co Ltd v Corry* [1906] AC 122 before going on at 218H-219A to say:

“I consider that the seriousness of the misconduct is to be measured by whether it is ‘inconsistent with the fulfilment of the express or implied conditions of his contract’. If it is, then it is serious enough *prima facie* to warrant summary dismissal. Then it is up to the employee to show that his misconduct, 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.”

The seriousness of a misconduct is measured by looking at its effect on the employment relationship and the contract of employment. If the misconduct the appellant was found guilty of went to the root of the contract of employment in that it had the effect of eroding the trust the employer reposed in him as found by the arbitrator could it still be said that the misconduct was trivial to warrant a penalty of dismissal? The appellant worked against company policy. It is a serious act of misconduct for an employee to deliberately act against the employer’s policies to advance personal interests.

When an employee causes confidential records of an employer relating to his disciplinary record which are under his exclusive custody by reason of his position as an acting Human Resources Manager, to disappear to create a false impression of having a blamelessness record, he or she undermines the trust the employer would have reposed in him or her. By his or her own misconduct the employee repudiates the contract of employment thereby giving the employer the right to dismiss him or her from employment.

The appellant undermined the very status of being an employee thereby disabling himself from fulfilling any of the express or implied terms or conditions of his contract of employment with the respondent. The circumstances of the commission of the offences the appellant was convicted of show that the continuance of a normal employer and employee relationship had in effect been terminated.

In *Standard Chartered Bank Zimbabwe Limited v Michael Chapuka* 2005 (1) ZLR 52 (S) at 57 C it is stated:

“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 an employee, giving the former a *prima facie* right to dismiss the latter.”

In *Toyota Zimbabwe v Posi* 2008 (1) ZLR 173 (S) at 179F the Court held that the Labour Act [*Cap. 28:08*] contains no provision which either expressly or by necessary implication alter purports to the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. Once it was accepted that the misconduct the

appellant was found guilty of went to the root of the contract of employment, dismissal was the appropriate penalty.

Mr *Zhuwarara* sought to argue that there are different levels of trust in an employment relationship. The argument was that a person employed in a substantive position is under a higher degree of trust than one employed in an acting position. The contention was that since the appellant was in an acting position of a Human Resources Manager he was not subject to the same degree of trust by his employer as he would have been if he was a substantive Human Resources Manager. Mr *Zhuwarara* overlooked the fact that the trust the employer reposes in an employee relates to the expectation that the employee will diligently and honestly perform the duties of the office he or she occupies whether in a substantive or acting capacity. The duties of an office are no less important in the business of an employer because they are performed by an employee in an acting capacity.

Mr *Zhuwarara* also attacked the correctness of the decision of the court *a quo* in imposing the penalty of dismissal on the appellant on the ground that it did not place much weight on mitigatory factors. He said that was contrary to the requirements of s 12B(4) of the Act which provides:

“In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee’s service, the employee’s previous disciplinary record, the nature of the employment and any special personal circumstances of the employee.”

The above section contemplates consideration of relevant mitigating factors. Relevant mitigating factors ought to be considered together with relevant aggravating

circumstances. In the present case, the arbitrator in setting aside, the decision of the employer considered irrelevant mitigating factors. The arbitrator noted and considered the fact that the appellant had not derived any benefit from his wrong doing. Such a factor was irrelevant as no benefit could be derived from a misconduct that eroded trust between the employer and the employee. All the employee could achieve by his misconduct was the erosion of the trust the employer had reposed in him. The arbitrator further considered that the employer did not suffer any financial loss arising from the appellant's misconduct. Again such factor was irrelevant. Prejudice suffered by the employer as a result of the appellant intimidating a prospective substantive Human Resources Manager did not have to be measured in financial terms.

In *Mashonaland Turf Club v George Mutangadura* SC-5-2012 the Court said:

“In the exercise of their powers in terms of s 12B (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.”

The appeal had no merit. It was accordingly dismissed with costs

GWAUNZA JA: I agree

MAVANGIRA JA: I agree

Chambati Mataka & Makonese, appellant's legal practitioners

Magwaliba & Kwirira, respondent's legal practitioners