

DISTRIBUTABLE (24)

ZESA ENTERPRISES (PRIVATE) LIMITED
v
ALOYCE ROY STEVAWO

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & BHUNU JA.
HARARE, MARCH 3, 2016 & MARCH 30, 2017

M Baera, for the appellant

C Mucheche, for the respondent

BHUNU JA: The respondent was employed by the appellant as a Sales Marketing Manager. During the currency of his employment he fell ill and proceeded on 90-day statutory sick leave. At the expiry of his statutory leave his doctor recommended retirement on medical grounds. Upon expiry of his sick leave he did not report for duty on account of his continued illness. He was then required to appear before the ZESA Medical Board for a final assessment of his medical condition and recommendation.

For purposes of performing its function, the Medical Board requested the respondent to provide a specialist surgeon's report. He was unable to provide the specialist surgeon's report as requested. His failure to provide the specialist report and continued absence from work prompted the appellant to institute disciplinary proceedings against him alleging absenteeism from work.

The matter was initially set down for hearing before the disciplinary committee on 23 December 2011. The notice to appear before the disciplinary committee dated 14 December 2011 advised the respondent of his rights and cautioned him that in the event of him defaulting, the hearing would proceed in his absence. To this end the notice reads in part:

“Please note that you must appear before the Disciplinary Committee (in) person and you are allowed to bring a Legal Practitioner or fellow employee to represent you.

Please also note that should you not avail yourself to the hearing, the hearing will proceed and judgment passed in your absence.” (My emphasis)

The respondent duly received the notification. He however requested in writing that the matter be postponed to 30 December 2011. His written request reads:

“SUBJECT: NOTICE TO APPEAR BEFORE A DISCIPLINARY COMMITTEE.

Please note that I received your communication in connection with the above on Friday the 16th in the afternoon. Considering that I am now staying with my family in Bulawayo and I have to travel to Harare to organise my legal representation I propose that the hearing date be moved to a later date, 30th of December 2011. Please note that this date is my proposal before communicating with my legal practitioner. I will be travelling to Harare tomorrow Tuesday the 20th, funds permitting considering I am not earning anything, and will meet my lawyer on Wednesday the 21st who will then contact you on my behalf.”

The appellant acquiesced and agreed to postpone the disciplinary hearing to 30 December 2011 to accommodate the appellant’s request for a postponement. The matter was then set down for hearing on 30 December at the respondent’s special instance and request.

Despite having indicated that his legal practitioners would contact the appellant, no lawyer contacted it. Instead the respondent sent an email to the human resources manager on the eve of the date of hearing seeking a further postponement to any time after 3 January 2012. The letter reads:

“SUBJECT: NOTICE TO APPEAR BEFORE A DISCIPLINARY COMMITTEE.

My memo dated 19 December 2012 refers.

I write to inform you that I have just been informed that my legal counsel will not be available to represent me tomorrow. I had confirmed the date on the strength that the law firm was open only to be advised this morning that my lawyer will not be available. I humbly request that you set a hearing date for after the 3rd of January 2012 when everyone will be back from the holidays, I will wait to be advised of the new hearing date from yourselves.”

The respondent’s letter was not responded to considering that it was written at short notice on the eve of the date of hearing. Despite notification, he however absented himself from the hearing with full knowledge that the hearing would proceed and judgment delivered in his absence. Considering that the notice of hearing called upon him to appear in person the unavailability of his lawyer on that date was no valid excuse for him not to attend. His default was therefore wilful and deliberate.

The Disciplinary Committee convened and deliberated over the matter in his absence. He was found guilty of absenteeism and dismissed from employment in absentia.

Aggrieved by the disciplinary committee’s determination, the respondent took the matter on review to the Labour Court citing procedural irregularities. The Labour Court found in his favour. It reasoned that the appellant’s failure to postpone the matter after being requested by email amounted to denying the respondent the right to be heard.

On the basis of such finding the Labour Court set aside the disciplinary committee’s determination and ordered reinstatement without loss of salary or benefits. The appellant was ordered to pay costs of suit. Dissatisfied with the judgment of the court *a quo* the respondent appealed to this court.

The crisp issue for determination is whether the respondent was denied the right to be heard in the circumstances of this case. The right to be heard is a fundamental cornerstone of our law. It is a fundamental principle of the rules of natural justice forming the backbone of a fair hearing enshrined in our constitution as read with the Administrative Justice Act [*Chapter 10:28*]. The maxim that no one shall be condemned without being heard holds sway in our law.

The right to be heard is however not an absolute immutable rule of law. It can be waived or forfeited where the beneficiary is at fault. It is now necessary to ventilate the law and apply it to the undisputed established facts as narrated above.

Professor G Feltoe in his booklet, *A Basic Introduction to The Administrative Law of Zimbabwe*, states at p 18 that the principle of natural justice can be waived when he says:

“Clearly when a person is offered the chance to exercise one of the rights recognized as being part of the principles of natural justice and he declines to avail himself of this right, then he has waived his right.”

The same learned author proceeds to elaborate in his other book, *A guide to Administration and Local Government Law*, 2009, at p 57 that:

“Where a party due to his own fault fails to attend a hearing after being properly notified to attend, the enquiry can proceed in his absence.”

The courts have consistently held that to be the unquestionable position at law. See *Chitizanga v Chairman of the Public Service Commission & Anor* 2000 (1) ZLR (H) 201 and *Rwodzi v Chegutu Municipality* HH – 86 – 03 relied upon by the appellant.

The facts before the court *a quo* established beyond question that the respondent was given notification of the hearing date. He successfully negotiated for a date convenient to

himself but defaulted on the date of hearing. His request for a further compromise by email could not absolve him from attending the hearing unless it was granted by the employer. By deliberately absenting himself from the hearing the respondent irrevocably waived his right to be heard.

In light of his deliberate default from the hearing, the Disciplinary Committee was within its rights in proceeding with the hearing in his absence as previously advised. The respondent cannot be heard to complain when he deliberately absented himself from the hearing with the full knowledge that the disciplinary hearing was going to proceed in his absence. He voluntarily elected not to attend the hearing. He has no one to blame except himself, *volenti non fit injuria*.

The learned judge in the court *a quo* therefore misdirected herself and fell into gross error by wrongly apportioning blame on the respondent when in the eyes of the law the respondent was not to blame at all.

It is accordingly ordered:

1. That the appeal be and is hereby allowed with costs.
2. That the judgment of the Labour Court be and is hereby set aside and substituted with the following
“The application is dismissed with costs”

MALABA DCJ: I agree

GOWORA JA: I agree

Baera & Company, the appellant's legal practitioners

Mastsikidze & Mucheche, the respondent's legal practitioners