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STELLA NHARI
V
ZIMBABWE ALLIED BANKING GROUP LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & UCHENA JA
HARARE, FEBRUARY 2, 2017

T. Zhuwarara, for the appellant

T. Malunga, for the respondent

GUVAVA JA: This is an appeal against the entire judgment of the Labour Court of Zimbabwe sitting at Harare delivered on 2 November 2010 in which the court *a quo* dismissed an application for review by the appellant. After hearing counsel's submissions, the appeal was dismissed with costs.

These are the reasons for the decision.

BACKGROUND FACTS

The appellant was employed by the respondent as Head of Compliance. In terms of her contract of employment she reported

directly to the Chief Executive Officer. On 14 November 2007 the respondent wrote a memorandum to its senior management and indicated that a new reporting structure was going to be introduced. In terms of the new structure the appellant's position as Head Compliance was altered to "General Manager (Compliance)". The appellant was not happy with the restructuring and new reporting structure because she was now required to report to the Head of Corporate and Legal Services division as opposed to the Chief Executive Officer directly as she used to.

The appellant took the view that her contract of employment had been unilaterally varied by the respondent. She sought clarification from the Chief Executive Officer. He explained that she remained responsible for Compliance and that in terms of the new structure she should report to the Compliance Committee Board and then to the Head of Legal and Corporate Services. It was emphasized that her functions remained the same and that her grade, salary and benefits were not affected in any way. The appellant was not satisfied with the explanation given and insisted on using the old reporting structure directly to the Chief Executive Officer.

The appellant thereafter made representations to the Board of Directors of the respondent about her dissatisfaction. The Chief

Executive Officer again wrote to her directing her to follow the new structure pending any decision to be taken by the Board. The appellant continued to query the new structure with the Board of Directors of the respondent. In spite of all the correspondence exchanged between the parties, the appellant refused to follow the new reporting structure.

On 6 June 2008, the appellant was suspended from work without salary or benefits in terms of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15/2006 and was formerly charged with two offences, that is, "Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of a contract of employment and wilful disobedience to a lawful order given by the employer in that you have refused to recognise, obey, respect and follow the new structure introduced by the Board in September 2007.

A disciplinary hearing was conducted on 20 June 2008. The matter was postponed to enable the disciplinary committee to deliberate on it and to come up with a verdict. On 18 July 2008, the appellant was invited to come and note the verdict but declined to do so. She was found guilty on the first charge and not guilty on the second. As she was not present at the hearing she was not

heard in mitigation. The disciplinary committee dismissed her from employment.

Following her dismissal, the appellant filed an application for review of the decision in the Labour Court in October 2008.

PROCEEDINGS BEFORE THE LABOUR COURT

Before the court *a quo*, the appellant based her application for review on four grounds. Firstly, she submitted that the chairperson of the disciplinary authority was biased against her because he was a beneficiary of the new restructuring exercise. She alleged that since he was elevated from "Head Advances" to "Operations Director" this resulted in him being biased against her. Secondly, she alleged that the charge of conduct inconsistent with the fulfilment of the express or implied conditions of her contract of employment did not go to the root of her employment relationship. She thus argued that the penalty of dismissal was not warranted. Thirdly, the appellant submitted that the respondent failed to conclude the proceedings within 14 days in accordance with s 6(2) of SI 15/2006. Finally, the appellant alleged that the respondent had failed to write a letter dismissing her following the handing down of the verdict by the disciplinary

committee. She thus sought an order that she be reinstated without loss of salary or benefits.

The court *a quo* dismissed the appellant's application for review. With regards the allegation of bias, the court held that the appellant had failed to prove bias on the part of the chairman of the disciplinary committee. On the ground of conduct inconsistent with appellant's contract of employment, the court held that the appellant's refusal to comply with the new structure made the employment relationship untenable. Concerning the respondent's failure to write the appellant a letter of dismissal, the court held that the appellant had been invited to attend the handing down of the verdict but had chosen not to do so. On the failure to comply with the fourteen day period to finalise the hearing, the court stated that the delay was occasioned by the appellant who had been invited to come and make submissions in mitigation because she was not present when the committee determined her matter.

The court *a quo* found no merit with the application for review and consequently dismissed it. Aggrieved by that order, appellant applied for leave to appeal to this Court. The application was granted on 23 May 2011.

PROCEEDINGS ON APPEAL

The appellant lodged this appeal on the following grounds:

1. "The Court a *quo* erred in holding that the Appellant was enjoined to prove bias for her to successfully impugn the disciplinary hearing she had been subjected to.
2. Gross misdirection (sic) by the Court *a quo* in holding that in the circumstances, the tenets of natural justice had been observed and that there was no bias.
3. The Court a *quo* grossly misdirected itself on the facts in holding that the Appellant was guilty of misconduct inconsistent with her employment contract.
4. The Court a *quo* erred in holding that the Appellant had a duty to comply first and complain later."

Although the appellant raised four grounds of appeal, I am satisfied that only three issues arise for determination.

1. Whether or not the chairman of the disciplinary committee was biased.
2. Whether or not the appellant was guilty of conduct inconsistent with her employment contract?
3. Whether the appellant was obliged to comply with the employer's directive and take corrective action later?

1. *Whether or not the chairman of the disciplinary committee was biased.*

The appellant argued that the hearing process was vitiated by the chairman's bias. She averred that the Chairman was a beneficiary of the restructuring scheme as he was elevated from

Head Advances to Operations Director and therefore he was biased against her. She further alleged that since the chairman was also a subordinate of the Chief Executive Officer, her guilt was pre-determined. The appellant's counsel relied on the case of *Mcmillan and Ors v Provincial Magistrate Harare* 2004 (1) ZLR 17 (H) at p 20G-21B where the court quoted with approval the following passage from *S v Roberts* 1999 (4) SA 915 (SCA);

> "Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even handed justice which the law requires from those who occupy judicial office'…what the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused See S v Raul 1982 (1) SA 828 (A) at 831H-832A"

It seems to me that the above case does not apply to this case as the proceedings in question were not judicial proceedings. In the case of *Dunmore Mupandasekwa v Green Motor Services (Pvt) Ltd* SC 30/15 GWAUNZA JA (as she then was) said the following;

> "In any case numerous authorities in this jurisdiction and beyond effectively caution against treating disciplinary proceedings at the work place, as if they were court proceedings. The authorities point to a number of important considerations that come into play in considering the question of whether or not to set aside proceedings of this nature on the basis of any alleged bias. The first general consideration is aptly expressed thus in Geo Quinot's "Administrative law: Cases and Materials" Second Edition at page 539;

> "While it is true that the duty to act fairly and listen to both sides lies upon everyone who decides anything, one should be careful not to treat administrative tribunals as though they were courts of law……. The test in matters of this nature is whether the hearings were fair when proceedings are judged in their broad perspective. We should not lose sight of the fact that one is here dealing with disciplinary hearings presided over by largely laymen. Therefore they cannot be expected to observe all the finer niceties that would have been observed by a court of law. It appears that every effort was made to give the first applicant a fair opportunity to be heard before an impartial tribunal…"

In determining bias, what is important is considering the circumstances of each case and the impression or perception that is created in the mind of right thinking persons and not the applicant's subjective impression of bias. The test is an objective one.

The respondent cited the case of *Leopard Rock Hotel Co (Pvt) Ltd v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at p275E-G where this court said,

> *"In R (Donoghue) v County Cork JJ [1910] 2 IR 271 at 275 Lord O' Brien CJ said:* "By bias ' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be a reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds- was reasonably generated-but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision".

The court *a quo* cannot be faulted for having found that the appellant did not prove the alleged bias. Where bias is alleged, the question to be asked is, 'in the mind of an average reasonable person, did the Chairperson appear biased?' I agree with the respondent that the legal test cannot on the facts of this case, lead to a conclusion that the chairperson of the disciplinary committee was biased. The fact that a person has been elevated to a senior rank does not necessarily suggest that he is biased.

In *casu*, the appellant's allegation that the Chairman of the disciplinary committee was a beneficiary of the restructuring exercise was bound to be biased because he was elevated from Head Advances to Operations Director is not enough. She had to show that he acted unfairly in the hearing. It is trite that he who alleges must prove. Therefore it was incumbent for the appellant to provide facts that showed such bias. This she did not do.

The appellant also alleged that the chairperson took the place of the chief executive officer during the disciplinary hearing. It was her submission that since he was a subordinate of the Chief Executive Officer then he was biased. It was not in dispute that the reason why the Chairman took the place of the Chief Executive Officer was because he could not have presided over the matter since he was personally involved in the exchange

of correspondence which gave rise to this dispute. Thus the idea of appointing a subordinate of the Chief Executive Officer was in line with the precepts of justice and common sense. A reading of the minutes of the disciplinary hearing shows that the chairperson remained impartial throughout the proceedings. He allowed appellant to give her defence and to cross-examine witnesses. He postponed the hearing on no less than two occasions to allow the appellant to make submissions in mitigation. It was the appellant who declined to take advantage of the postponements.

In dismissing the point of bias the court a *quo* correctly held that,

> "The respondent submits that the tenets of natural justice were followed and that there was no bias. The record shows that the hearing officer gave the applicant the opportunity to present her case. The tenets of natural justice require that a party be given sufficient notice to prepare her defence and that she be heard. [See Smith Chataira v ZESA SC 83/2001]. The tenets of natural justice were therefore observed. It is correct that the hearing officer was a subordinate of the C.E.O. The fact that he was a subordinate to the C.E.O does not necessarily mean that the manner in which the proceedings were conducted was biased. Further, bias must not be imagined or far-fetched. It must be proved. What is clear though is the applicant's uncooperativeness. On the question of bias therefore, I find that such bias has not been proved."

The court *a 'quo* cannot be faulted for reaching the conclusion that it did. In these circumstances I am satisfied that the appellant failed to show that the chairperson of the

disciplinary committee was biased. I find no basis for faulting the finding of the court *a quo* that the appellant failed to demonstrate bias on the part of the chairperson of the disciplinary hearing.

2. *Whether or not the appellant was guilty of conduct inconsistent with her employment contract.*

The appellant was charged with and dismissed in terms of the Labour (National Employment Code of Conduct) Regulations, S.I 15/2006 for committing,

> "Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of her contract of employment"

On different occasions following the restructuring of the Group, appellant refused to accept the fact of the restructuring. Appellant also refused to respect the new reporting structures as evidenced by various correspondence to the Group Chief Executive Officer, the Chairman of the Board Human Resources Committee, and the Chairman of the Board, which ignored new reporting structure.

This charge was in terms of s 4(a) of the Labour (National Employment Code of Conduct) Regulations, SI 15/2006. The disciplinary committee found the appellant guilty of the above charge when she refused to comply with the new restructuring

system. The court a *quo* upheld this finding and said the following at p 7 of the judgment:

> "The failure by the applicant to comply with instructions cannot be held to be consistent with her contract of employment. If an employee, no matter how senior they may be, refuses to follow what has been put in place by their employer, managing them and consequently managing the workplace can prove to be difficult. Under the circumstances her refusal to comply amounted to a misconduct. The respondent submits that the misconduct was proved. I agree"

In the case of *Standard Chartered Bank* v *Chapuka* 2005 (1) ZLR 52 (S) at p57B-D, MALABA JA (as he then was) said the following concerning the issue of conduct inconsistent with fulfilment of the express or implied conditions of a contract of employment;

> "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 Clouston & Co Ltd v Corry [1906] AC 122 LORD JAMES OF HEREFORD remarked by way of a dictum at p 129:
>
> > "Now the sufficiency of justification depends upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the termination of the contract of service by one of the parties to it against the will of the other. On the other hand, **misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.**"(my emphasis)

From the *Standard Chartered Bank* case (*supra*) it can be noted that there is no fixed rule of law defining the degree of

misconduct which will justify dismissal. Also in the case of *Tobacco Sales Floor v Chimwala* 1987 (2) ZLR 210 (S) at p 218D-E, the court said the following; "*In Halsbury's Laws of England 4 ed Vol 16 para 642* it is said:

> "Misconduct inconsistent with an employee's proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal."

In *casu*, it is common cause that the appellant refused to comply with the new reporting structure of the respondent which all the other affected employees complied with. The employee's conduct went to the root of the employment contract, it made the employer-employee relationship untenable.

3. *Whether the appellant was obliged to comply with the employer's directive and take corrective actions later.*

In my view the appellant's conduct cannot be regarded as consistent with the fulfilment of her employment. Her conduct undermined the trust and confidence between the parties as envisaged by her correspondence with the Chief Executive Officer. It is an implied term of the appellant's contract that she must comply with orders of the respondent bank. The failure by the appellant to comply with the order, despite numerous invitations to do so made the relationship between the parties untenable. She

should have complied with the directive and then taken corrective action later. In my view this amounted to a serious misconduct which warranted dismissal.

As a result the court *a quo* cannot be faulted for finding that the Disciplinary Committee was correct in finding that she was guilty of the charge and that the proper penalty was one of dismissal.

DISPOSITION

The court *a quo* clearly did not misdirect itself in any way so as to warrant the setting aside of its decision. The appellant has not been successful and must bear the costs of the appeal.

It was for the above reasons that the appeal was dismissed with costs.

GARWE JA: I agree

UCHENA JA: I agree

Gil, Godlonton and Gerrans, appellant's legal practitioners.

Chihambakwe, Mutizwa and Partners, respondent's legal practitioners.