

REPORTABLE (26)

EMMANUEL MASVIKENI
v
NATIONAL BLOOD SERVICE ZIMBABWE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & MAVANGIRA JA
HARARE, NOVEMBER 10, 2017 AND MARCH 4, 2019

M. Nkomo, for the Appellant

T. Zhuwarara with *R.G. Zhuwarara*, for the Respondent

MAVANGIRA JA: This is an appeal against the whole decision of the Labour Court confirming the dismissal of the appellant from the respondent's employ.

Factual Background

The appellant was employed by the respondent as a Blood Procurement Manager from October 2001 to April 2012 when he was dismissed. Sometime in 2011, anonymous emails containing divisive and damning allegations against certain staff members as well as his superior, the Chief Executive Officer of the respondent, were circulated and sent to various employees of the respondent. The respondent conducted some investigations and concluded that the appellant was the author of the anonymous emails.

Consequently, in October 2011, the appellant was charged in terms of the “National Blood Service Zimbabwe Code of Conduct” (sic), (“the Code”), with the following acts of misconduct:

1. Section 3(c)(vi): Writing and publishing anonymous letters which damaged the reputation of his superior or colleague
2. Section 4(a)(ii): Deliberately giving untrue and misleading information about his superior concerning his professional behavior by alleging that he distributed diseased blood.
3. Section 4(a)(vii): Accusing his superior of nepotism in the anonymous letters he published.

A written invitation to the appellant to respond to the allegations met no response. On 16 November 2011 he was suspended from duty with no salary.

A disciplinary hearing was then conducted on 13 April 2012. Despite having been properly served with the notice of hearing, the appellant did not attend the hearing. After making its deliberations on the evidence and papers that were before it, the disciplinary committee found the appellant guilty of all 3 charges. The appellant was invited to make submissions in mitigation before the imposition of a penalty. The invitation met no response. Eventually, on 26 April 2012, the appellant was advised of the penalty imposed on him. On the first charge a final written warning was found to be the appropriate penalty. On the second charge the penalty was dismissal. On the third charge the penalty was also dismissal.

On the 30th of April 2012, the appellant lodged an internal appeal to the Finance and Administration Manager in terms of the Code. The Manager dismissed the appeal in a reasoned ruling for lack of merit.

Aggrieved thereby and in terms of the same Code, the appellant appealed to the Board Chairman. The appellant then also requested the Board Chairman to recuse himself from the matter. The basis of the application for recusal was that the Board Chairman had previously been involved in the matter leading up to the appellant being charged and subsequently dismissed. The Board Chairman recused himself from the matter and indicated that “(T)he appeal would be referred to the Labour Court in accordance with the provisions of the Code of Conduct.” However, this did not happen.

In February 2013, the appellant eventually referred the matter to a Labour Officer in terms of the Labour Act. The parties did not settle at conciliation and subsequently the matter was referred to arbitration.

On 30 July 2013, the Arbitrator ordered the respondent to constitute an Appeals Committee to hear and determine the appellant’s appeal against the decision of the Finance and Administration Manager which had confirmed the appellant’s dismissal from employment as decided by the disciplinary committee.

The Appeals Committee was set up and, on 5 August 2013, it heard the appellant’s appeal and came to the conclusion that the appellant’s appeal lacked merit and it therefore dismissed it. It was against that decision of the Appeals Committee that the appellant noted an appeal to the court *a quo*.

The appellant raised seven grounds of appeal in the court *a quo*. Four of the grounds related to the composition and appointment of the disciplinary committee. Although there was no appeals officer involved at any stage in the matter, curiously, one of the appellant's grounds of appeal was couched in the following terms: "The Appeals Committee erred at law and misdirected itself in upholding the decision of the Appeals officer and Disciplinary Committee despite clear evidence of bias in both the Appeals Officer and the Disciplinary Committee" (sic). From a reading of the papers, it can safely be assumed that the reference to an "Appeals Officer" ought in fact to be a reference to the Appeals Committee. This is so because it is the Appeals Committee which heard the appellant's appeal against the decision of the Finance and Administration Manager to whom he had appealed against the decision of the disciplinary committee.

The appellant also challenged the determination made by the Appeals Committee which upheld the decision of the disciplinary committee to the effect that he was not entitled to legal representation in terms of the Code of Conduct.

In the rest of his grounds of appeal, the appellant challenged the finding that the information which was contained in the emails was untrue, erroneous or misleading and that it had the effect of damaging his superior's or anyone's reputation. He also sought to challenge the interpretation given by the disciplinary committee to s 4 (a) (vii) of the Code of Conduct which interpretation was confirmed by the Appeals Committee thereby leading to the upholding of his conviction. In terms of the Code the following is a dismissible misconduct: "Any other act of prejudice towards the organisation, fellow members of staff, or members of the public, such as racism, tribalism, nepotism, sexism and regionalism." The appellant's contention in this regard is that on a proper interpretation of the provision he ought not to have

been charged. Rather, it is the person that he accused of practicing nepotism that ought to have been charged with the misconduct. The conflicting contentions are dealt with in more detail at pp 13 – 15 of this judgment under the heading: “**2. Whether or not the court *a quo* wrongly interpreted section 4 (a) (vii) of the respondent’s code of conduct**”.

The court *a quo* found that the appellant had admitted to publishing the anonymous emails and in so doing meant to damage the name of a superior or colleague. The court further held that the interpretation that had been attributed to s 4 (a) (vii) was correct as it was clear that the listed items in the provision were not exhaustive. The court thus concluded that the appellant’s appeal lacked merit and dismissed it.

PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved by these findings and conclusion of the court *a quo*, hence the present appeal.

The appellant’s grounds of appeal are crafted as follows:

1. The court *a quo* seriously misdirected itself on the facts when it concluded that “**the challenged grounds for review relate to the composition of the appeals committee**”. This amounts to a misdirection in law in that it led the court to follow a wrong path and reach a decision which is bad at law. (sic)
2. The court *a quo* misdirected itself at law when it focused on the improper appointment of the disciplinary committee, per se, rather than determining the substantive correctness of the decision of the Appeals Committee whose decision was being appealed against.

3. The court *a quo* misdirected itself in dismissing grounds of appeal one, two and three as grounds for review despite the clear and unambiguous language to the effect that it was the decision of the appeals committee which was being challenged.
4. The court *a quo* grossly misdirected itself when it ruled that **“it is not in issue that the appellant was the author of the emails. This was admitted ...”** Nothing in the submissions placed before her supported this conclusion. This error of fact is so fundamental that it amounts to a misdirection at law. (sic)
5. The court *a quo* grossly erred and misdirected itself when it concluded that the appellant ought to have established the truthfulness of what he allegedly published. This would be tantamount to turning the established principle that **“he who alleges must prove”** on its head. It is a misdirection at law. (sic)
6. The court *a quo* grossly erred and misdirected itself in its interpretation of s 4 (a) (vii) of the Code of Conduct and failing to appreciate that the charge would only stick if the alleged offender is the one committing the act of prejudice.

The appellant’s prayer is for his appeal to be allowed and for his reinstatement without loss of salary and benefits with an alternative of payment of damages.

In dealing with the appeal before it, the court *a quo* struck out some of the appellant’s grounds of appeal on the basis that they were grounds for review and not grounds of appeal. The grounds challenged the composition and appointment of the committee and they also alleged bias. It is the striking out of those grounds which the appellant is now challenging in his grounds of appeal numbers 1, 2 and 3.

It is common cause that the appellant did not attend the disciplinary hearing. For that reason, his decision to challenge the composition and appointment of the committee at the appeal stage was no longer available to him. Such objections could only have been raised at the disciplinary hearing which he opted not to attend. The principle was explained in clear terms in the case of *Moyo v Rural Electrification Agency* SC-4-14:

“In our view the appellant, by deliberately absenting himself without leave from the hearing, waived his right to challenge the conduct of the disciplinary proceedings. He had the option, which he did not exercise, of seeking a postponement since he knew that he would not be available on the date of the hearing. In these circumstances we do not feel that the failure by the respondent to strictly comply with the Regulations operated to vitiate the disciplinary proceedings.”

The effect therefore is that the issues raised by grounds 1, 2 and 3 fell away the moment the appellant absented himself from the disciplinary proceedings. At the hearing of this appeal, the appellant conceded this point and abandoned the said grounds 1, 2 and 3. The concession was properly made.

ISSUES RAISED FOR DETERMINATION

The remaining grounds of appeal raise two issues, that is, whether or not the court *a quo* made findings supported by the evidence on record and whether or not the court *a quo* wrongly interpreted s 4 (a) (vii) of the respondent’s code of conduct. I deal with each of these in turn.

1. Whether or not the court *a quo* made findings supported by evidence on record.

The court *a quo* found that it was not in issue that the appellant authored the emails because he had admitted doing so.

The appellant contends that nowhere in the record did he admit to having published the anonymous emails. He contends that all that is on record are allegations by the respondent that the anonymous emails were authored by him. Furthermore, that he had denied the allegations throughout. It was also argued that nothing proving the allegations was placed before the court *a quo* except for a bare averment by the respondent in its papers that on 22 November 2011, the appellant deposed to an affidavit, which affidavit was never placed before the court, admitting to authoring the emails.

However, a perusal of the record will show why the finding of the court *a quo* is supported by the evidence.

At page 150 of the record is a document marked as “Appendix 22” and headed “Charges proffered against Mr. Emmanuel Masvikeni as per the Code of Conduct of the National Blood Service Zimbabwe”. It lists as evidence of the misconduct in terms of s 3 (c) (vi) emails dated 3 and 7 December 2010 which were sent at 11.52 and 15.27 respectively to undisclosed recipients. It also lists emails dated 31 July 2011 sent at 22.46 to undisclosed recipients and it also states that “(I)n his affidavit dated 22 November 2011, Mr Masvikeni admits to sending the anonymous emails.” The affidavit is not part of the record before this Court thereby limiting the extent to which the reference to it could assist in the determination of this matter.

More importantly though, on 5 August 2013, the following questions were asked by the Board Chairman (TC) and answers thereto were given by the appellant’s legal practitioner (MN) at the Appeals Committee hearing:

“TC: Can I continue to ask? We were talking about the anonymous emails and letters. You said you were to agree with you on the issues. (sic) He is agreeing that he circulated the emails?

MN: Yes

TC: Ok, and with all its contents. It was not tampered.

MN: We don’t know the information that was contained. Those emails were never availed to us.” (the underlining is mine)

Further, the following exchanges also took place between the appellant’s legal practitioner, MN and board members, JN and NM:

“TC: I want to work with the numbers there. Can I have the email he sent talking about the release of blood. The circulation of the anonymous mail which talks of the release of blood. (sic)

NM: NBSZ Bulawayo branch sold an estimated 200 units of blood ...

NM: Well I can tell you that from the other matter that I have for him he has clearly distanced himself from that particular email.

JN: Mr Chairman I am really confused. At one time you saying he did say that there was ... now you are saying he is distancing himself from this email.

MN: He never mentioned quantities in his correspondence so whoever put the quantities is something different. (sic)

JN: You are querying the quantity and not the contents?”

Subsequently, the following exchange ensued:

“TC: Any other questions? I was putting down my questions. I just want to find out so that when we make a decision we have enough complete information. Does he agree he is the author of emails? (sic)

MN: There are some contents that we are disputing honestly.

NM: Did he circulate some emails?

MN: He did circulate some emails but there are others that he did not circulate he is alleged. You know what Mr Chairman the difficulty we have is if we give the blanket an unqualified response (sic) you may interpret it otherwise we need to qualify our response. Specifically he never mentioned the quantities ...

NM: Does he have the emails he circulated? So that we can at least have the basis of saying these are the ones I circulated and these I did not.

MN: Unfortunately we do not have the emails. The other computer crashed. Some of the emails were wanted by these guys when they instituted some mysterious criminal prosecution so his two laptops are actually captured as exhibits as we speak right now. There is a possibility that maybe or maybe not they may be on the hard drive of those captured computers.

....

MN: ... What we are saying is that there are some infractions into his emails some people were employed to hack into his emails so he had to clean up his email accounts and discontinue some of them.

TC: Who were employed?

MN: By people whose names we are going to reserve.”

Without quoting the whole text of the ensuing exchanges, suffice to quote the following answer given by the appellant’s legal representative to a question from a board member:

“... all these acts of misconduct he was being victimised because he raised a red flag and the audit report confirmed the issues.” (sic)

In light of this exchange, on a balance of probabilities, the appellant admitted, through his legal practitioner, that he is the one who published the emails in issue. He seems to prevaricate and avoid giving simple or straight forward answers. He also purports to take issue with some of the content of the emails and seeks to create an impression that his email accounts were hacked and the hackers added some content relating to quantities, into emails that he authored, which content was not authored by him thereby producing the objectionable overall content. At the same time the appellant also seems to justify his authoring of the emails on the basis that the content thereof or the issues raised therein are after all true.

In these circumstances, the finding of the court *a quo* that the appellant admitted to authoring the emails is a reasonable finding in the circumstances. This is particularly so when consideration is given to the fact that the applicable standard of proof is “a balance of probabilities.”

The court *a quo* thus made findings that are supported by the evidence on record.

- 2. Whether or not the court *a quo* wrongly interpreted section 4 (a) (vii) of the respondent’s code of conduct.**

Section 4 (a) (vii) of the National Blood Service Zimbabwe Code of Conduct reads as follows;

“4 DISHONESTY, THEFT, FRAUD AND RELATED OFFENCES

a. Dishonesty

- (vii) Any other act of prejudice towards the organisation, fellow members of staff, or members of the public, such as racism, tribalism, nepotism, sexism, regionalism.”

It also states that the penalty for a first offence is dismissal.

The court *a quo* held at page 3 of its judgment:

“It is not in issue whether or not the appellant was the author of the emails. This was admitted. What is in issue is whether or not the appellant, in publishing the emails, meant or intended to damage the reputation of his superior or colleague, whether or not the information was untrue, erroneous or misleading and finally what the correct meaning of section 4 (a) (vii) was and whether or not the appeals committee misdirected itself by failing to appreciate the true meaning of the section.”

The court *a quo* continued at page 5 of its judgement as follows:

“The section refers to any other act or conduct such as nepotism, sexism, etc. The examples given such as nepotism and sexism cannot be taken to have been exhaustive. A literal reading of the section only shows that the items listed were only examples and not meant to be exhaustive. The appeals committee did not err.”

And further:

“On the merits of this case ... the appeals committee did not err in finding that the appellant had published information that he failed to show was correct and truthful. He must have meant to damage the name of either a superior or a colleague. He was therefore guilty on the merits of the case.”

The appellant’s contention is that this interpretation of the provision by the court *a quo* was wrong in that the court failed to appreciate that if the literal rule of interpretation was applied, the charge would only be valid if the appellant was the one accused of prejudicial conduct. In *casu*, the appellant contends that he was rather being charged with the misconduct

of accusing his superior of practising nepotism. He contends that that was a result of an improper interpretation of the section. His conduct, in his view, is above board and did not justify the laying of the charge against him as he was not the one practising nepotism.

The respondent however argues that the manner in which s 4 (a) (vii) is crafted cannot be deemed to be exhaustive because prejudicial acts are not limited to those that are specifically mentioned. Any other acts which can be shown to be prejudicial also fall under the provision.

A close reading of the provision shows that it incorporates the misconduct that the appellant was charged with. The use of the words ‘any other act of prejudice’ and the words ‘such as’, is an indication that the prejudicial acts which any person may be charged with under the provision are not limited to the ones that are specifically mentioned. Once this is accepted, the conduct of the appellant in publishing untrue and misleading material meant to damage the name of the Chief Executive Officer qualifies as “any other act” which is prejudicial to a fellow member of staff. The section proscribes any other act of prejudice. The appellant’s conduct does fall into this category.

It is for the above reasons that I find that the interpretation given to the provision by the court *a quo* was correct.

Accordingly, I hold that this appeal lacks merit and must be dismissed. There being no reason advanced why this Court must hold otherwise, costs will follow the cause.

Accordingly, it is ordered that:

The appeal be and is hereby dismissed with costs.

GWAUNZA JA: I agree

GARWE JA: I agree

Donsa-Nkomo & Mutangi Legal Practice, appellant's legal practitioners

D.M.H. Commercial Law Chambers, respondents' legal practitioners