

**DISTRIBUTABLE** (28)

**BRITISH AMERICAN TOBACCO ZIMBABWE**  
**v**  
**JONATHAN CHIBAYA**

**SUPREME COURT OF ZIMBABWE**  
**GARWE JA, GOWORA JA & MAVANGIRA JA**  
**HARARE, JUNE 20, 2017 & MARCH 15, 2019**

*S. M. Hashiti*, for Appellant

*K. Gama*, for Respondent

**MAVANGIRA JA:** This is an appeal against the entire judgment of the Labour Court dismissing the appellant’s appeal against a decision of the Grievance and Disciplinary Committee of the National Employment Council for the Tobacco Industry (“the NEC Grievance and Disciplinary Committee”) which found that the appellant had failed to prove a *prima facie* case against the respondent.

#### **FACTUAL BACKGROUND**

The appellant, British American Tobacco Zimbabwe, is a company registered in terms of the laws of Zimbabwe. The respondent was employed by the appellant as a trade marketing representative.

The respondent was charged with an act of misconduct which was couched in the following terms:

**“Alleged Act of Misconduct: Dishonesty, theft, fraud and related matters  
Violation of Clause (d) defined as;**

Theft, or abetting theft, fraud or embezzlement or extortion or corruption and bribery:

Charges against you are emanating from that on 31<sup>st</sup> may 2012 you allegedly withdrew US\$2,605.00 from British American Tobacco Zimbabwe's (BAT Zimbabwe) account and converted this amount to your own use.”

The charge arose after it was discovered that there were two withdrawals of an amount of USD2 605-00 from the appellant's Standard Chartered Bank account on two occasions, namely, 18 May 2012 and on 31 May 2012 using one withdrawal instruction. The withdrawal of 18 May 2012 was authorised and was made by the respondent. The withdrawal of 31 May 2012 was unauthorised and was deemed fraudulent as the instruction used on 18 May 2012 was the same one which was used again to withdraw money on 31 May 2012. On the face of it the latter withdrawal was also made by the respondent.

The charges were laid almost a year later, on 29 July 2013 and the respondent was suspended from work with full pay and benefits in terms of the applicable Code of Conduct being the Collective Bargaining Agreement: Tobacco Industry (Tobacco Industry Code of Conduct, SI 322/96). A disciplinary hearing was held and the Disciplinary Committee found the respondent guilty as charged on the basis of a forensic report by a forensic scientist who, after analysing several samples of the respondent's signature, concluded that the signature on 31 May withdrawal slip was consistent with the respondent's standard signature. Consequently the respondent was dismissed from employment with effect from 30 August 2013, the date on which the disciplinary committee made the decision.

The respondent appealed to the Works Council against the dismissal. The appeal was heard on 24 September 2013 and the proceedings were adjourned to allow the panel to:

- a. obtain the original withdrawal documents;

- b. get an explanation from the bank on the processing of a withdrawal slip;
- c. get confirmation from the bank whether video evidence was still available; and
- d. seek clarification on issues raised by the Mutare branch manager during the initial hearing.

However, without obtaining and considering the documents and evidence it had hoped to get from the bank, on 25 November 2013, the Works Council made and availed its decision upholding the dismissal penalty by the Disciplinary Committee.

Aggrieved by the decision of the Works Council, the respondent further appealed to the NEC Grievance and Disciplinary Committee which upheld his appeal and set aside the order by the Works Council. The NEC Grievance and Disciplinary Committee's reasoning in arriving at this decision was that the only evidence which the appellant had relied on, namely the handwriting expert's report, was unreliable as it was based on photocopies which do not clearly show some of the features and that therefore the appellant had failed to prove its case against the respondent.

Further the NEC Grievance and Disciplinary Committee found that the bank was not co-operative as it failed to provide information which would have assisted the committee in its determination of the guilt of the respondent or otherwise. This information included the original withdrawal slip, the relevant video footage and an explanation of how withdrawal slips are processed. In light of the inconclusive handwriting report and the missing information which the bank was reluctant to supply, the NEC Committee concluded that, whilst the respondent's connivance with the bank could not be ruled out, on the proven facts and available evidence, the appellant had failed to prove respondent's guilt on a balance of probabilities.

Aggrieved by the decision of the NEC Grievance and Disciplinary Committee, the appellant noted an appeal to the Labour Court. The appellant's grounds before that court were essentially that the NEC Committee had erred at law and misdirected itself in a number of respects. It had erred and misdirected itself in holding that the appellant had failed to substantiate its claim when it found that connivance with the bank could not be ruled out; in disregarding the forensic report by the handwriting expert; in ignoring the respondent's identification details which were affixed on the withdrawal slip and in holding that the fraudulent transaction had been committed by a member of the bank.

The court *a quo* upheld the decision of the Committee. It reasoned that the withdrawal slip of 31 May 2012 was effected at 0800 hours, a time when the doors of the bank get opened to the public and that there was no evidence that was led to show that the respondent was already in the bank at that time. Further, it found that the forensic report relied upon was based on the examination of photocopies and not the original documents which were kept at the bank. Consequently, the court *a quo* concluded that the evidence on record pointed rather to the involvement of the bank's personnel and not that of the respondent. The appeal was thus dismissed.

### **BASIS OF PRESENT APPEAL**

Aggrieved by the court *a quo*'s decision, the appellant has appealed to this Court on the following grounds:

1. The court *a quo* erred and misdirected itself in failing to find that sufficient evidence, including expert forensic evidence and facts had been established linking the respondent to commission of the offences charged under clause (d) of SI 322 of 1996.

2. The court *a quo* further erred and misdirected itself in failing to find that, in any event, sufficient evidence had been led to establish respondent's connivance in the commission of the offences charged under clause (d) of SI 322 of 1996
3. The court *a quo* further erred and misdirected itself in rejecting expert evidence pointing to the respondent's guilt and connivance in the commission of the offence charged under clause (d) of S.I 322 of 1996
4. The court *a quo* consequently erred and misdirected itself in failing to find that the respondent's guilt had been established and consequently his dismissal was lawful.

## **THE ISSUE**

From these grounds of appeal and the facts above, the only issue for determination is whether or not there was sufficient evidence in the record to link the respondent to the commission of the offence.

## **APPELLANT'S SUBMISSIONS BEFORE THIS COURT**

The submission by Mr *Hashiti*, on behalf of the appellant, in both his written and oral submissions, is that the appellant managed to prove on a balance of probabilities that the fraudulent withdrawal of its funds on 31 May 2012 was made in the respondent's name and on his signature, that the withdrawal instruction bore the respondent's identity details, all of which aspects were confirmed by the handwriting expert's report which concluded that the signature on the withdrawal slips matched that of the respondent.

Consequently, the appellant argued, the respondent was guilty of the offence charged and the NEC Grievance and Disciplinary Committee had therefore wrongly found him not guilty.

## **RESPONDENT’S SUBMISSIONS BEFORE THIS COURT**

Mr *Gama*, for the respondent, argued that the appellant failed to prove on a balance of probabilities that the respondent had committed the offence. He argued that the respondent could not have signed the withdrawal slip of 31 May 2012 because he could not have been in the bank before the bank’s opening time for him to have been served at 8.00am and that therefore the withdrawal could only have been done by a staff member of the bank.

He further argued that the handwriting expert’s report was unreliable and inconclusive because the expert relied on photocopies of the withdrawal slips in assessing the signature. To show the unreliability of the photocopies the respondent pointed out the fact that the expert missed the variation between the forged signature on the photocopy of the 31 May 2012 withdrawal slip which ended with two dots and the appellant’s standard signature which had none.

## **ANALYSIS**

The charges that were laid against the respondent arose after the withdrawal of 31 May 2012 because the withdrawal slip was in his name and was purportedly signed by him. In addition, his identification particulars were also recorded thereon. A perusal of the record shows that there was no direct evidence linking the respondent to the offence. The appellant relied on circumstantial evidence. The respondent on his part argued that the circumstantial evidence relied on did not prove that he was guilty.

In *S v Tambo* 2007 (2) ZLR 33 (H), 34 C-D (a criminal matter), the court held that;

“Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable one which can be drawn from those facts. It must be supported by rational reasoning and an analysis of the proved facts. The correct judicial

assessment of evidence must be based on establishing proved facts, the proof of which must be a result of careful analysis of all the evidence led. The final result must be the product of an impartial and dispassionate assessment of all the evidence placed before the court.” (emphasis added)

However in cases where not only one inference can be drawn, the court in *Ebrahim v Pittman NO 1995 (1) ZLR 176 (H), 176*, held that;

“In a civil case, where the court seeks to draw inferences from the facts, it may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, even though that conclusion is not the only reasonable one.”(emphasis added)

In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, the concept of balancing probabilities was explained as follows;

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.” (emphasis added)

In the book, *The South African Law of Evidence*, 4<sup>th</sup> Edition, *Hoffman and Zeffertt* state as follows:

“In a civil case ... if the facts permit more than one inference, the court must select the most plausible. If this favours the plaintiff, he is entitled to judgment. If inferences in favour of both parties are equally possible, the plaintiff has not discharged the burden of proof....

Selke J held in *Govan v Skidmore* that the selected inference must ‘by the balancing of probabilities be the more natural, or plausible, conclusion from among several conceivable ones.’”

The learned authors expound further and explain that the court may however find that the contentions of the party who has produced no evidence are the more probable. They

state that what is weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case.

In the text *Principles of Evidence*, 4<sup>th</sup> edition, the authors Schwikkard and van der Merwe similarly state:

“In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference. For example, in *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* (1982 (2) SA 603 (A)) it was held that a plaintiff who relies on circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.”

In *casu*, the appellant having alleged that the respondent had committed an offence, had the burden to prove the allegation. It is trite in our law that he who alleges must prove. It was the evidence of the appellant that the fraudulent withdrawal slip was processed at 0800hours on 31 May 2012. The fraudulent withdrawal was made in the name of the respondent and an almost similar signature to his was affixed to the withdrawal slip. The withdrawal slip also bore the respondent’s personal details.

It was on the strength of this that the charge was laid against the respondent leading to a disciplinary hearing, where a handwriting expert was called to examine the withdrawal slip to determine whether it was forged or it was indeed signed by the respondent. The expert found that the signature on the withdrawal slip was the same as the appellant’s standard signature. The expert’s conclusion was based on an examination of photocopies and it was on this score that the respondent challenged the expert’s finding as well as the fact that his true signature had no dots as reflected on the signature appearing on the photocopies.



The bank was asked to assist in this matter but was not co-operative. At one point it was asked to provide the original copies of the withdrawal slip; it was also asked to assist with an explanation of the processing of a withdrawal slip and to also produce a video footage placing the respondent at the bank. The bank did not come through on all these requests. The bank's uncooperative attitude must be viewed against the backdrop of the allegation that the bank knew or already had the respondent's details; that the withdrawal slip was at all material times in the possession of the bank and was never accessed by the respondent and that the same bank teller who had served the respondent and processed the withdrawal of 18 May 2012 was the same teller who processed the same withdrawal on 31 May 2012.

The bank's uncooperative attitude is not irrelevant in the determination of this appeal. The specific requests that were made of it were in relation to critically material aspects that would need to be adverted to in determining whether, on a balance of probabilities, the respondent could be said to be guilty. In the absence of such, the guilt of the respondent cannot be said to have been proved, even on a balance of probabilities. The finding of the NEC Grievance and Disciplinary Committee, which was confirmed by the court *a quo* cannot, in the circumstances, be faulted.

The finding was that the probabilities pointed to the direct involvement of a bank official in the dishonest activities, particularly because the transaction took place at 8.00am, the exact time that the bank would have been opening its doors to the public. No evidence placed the respondent at or inside the bank at the relevant time. The bank already had the respondent's personal details. There was no evidence that the respondent had ever accessed the withdrawal slip in question as it remained in the bank's possession at all material times. This is particularly significant when note is taken of the fact that the withdrawal slip was in the

bank's possession for some thirteen days before the second withdrawal was made. The bank's failure to cooperate unfortunately meant that a number of possibilities cannot be discounted in this matter.

The court *a quo* found that, because the bank was in possession of the withdrawal slip, any of its officials could have used the documents that had previously been presented in order to capture the signature and the identity particulars of the respondent. The court *a quo* found that it was not clear whether the respondent was involved or not in the withdrawal of 31 May 2012. The appellant's involvement was thus not proved. The appellant's involvement or guilt in the withdrawal that occurred on 31 May 2012 was not the most readily apparent and acceptable inference. Rather, the balance of probabilities tended, in the view of the court *a quo*, to point to direct involvement by the bank or its employees.

Regarding the evidence of the handwriting expert, it is trite that expert opinion evidence is admitted in evidence to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. In *Menday v Protea Assurance Co. Ltd* 1976 (1) SA 565 at 569B-C it was stated that

“It is not the mere opinion of the expert witness which is decisive but his (or her) ability to satisfy the Court that, because of his (or her) special skill, training and experience, the reasons for the opinion which he (or she) expresses are acceptable.”

In *R v Chidota* 1966 (3) SA 428, (another criminal matter) the learned judge QUENET (JP), held that:

“where the sole evidence concerning an accused with the commission of an offence is that of a handwriting expert, precaution should be taken to remove the possibility of error.”

It is trite that in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion and simply adopt it without questioning or testing it against known parameters.

In *S v Zuma* 2006 (2) SACR 257, 263 the court held that the expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence.

In *casu*, the handwriting expert, having relied on photocopies, was found to have consequently missed certain distinguishing features peculiar to the respondent's signature. For that reason the adjudicating authority ought to have found that such evidence was inadequate and thus could not be relied on. It would be remiss for a court to rely on expert opinion evidence which fails to clarify that which the court needs clarification on. Where a handwriting expert relies on photocopies of the document in issue, any conclusions drawn therefrom could be inconclusive as there is a real chance that the analysis may miss certain details crucial to the determination of whether or not the document is forged may be overlooked. The purpose of seeking expert opinion evidence is thereby defeated.

## **DISPOSITION**

In light of the above findings, I am of the view that the appeal lacks merit and therefore ought to be dismissed with costs following the cause.

In the result, it is ordered that the appeal be and is hereby dismissed with costs.

**GARWE JA** : I agree

**GOWORA JA** : I agree

*Mawire J. T & Associates*, applicant's legal practitioner

*Gama & Partners*, respondent's legal practitioners