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DELTA BEVERAGES (PRIVATE) LIMITED
V
JOHN SHUMBA

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHITAKUNYE AJA
HARARE: JULY 10, 2020 & NOVEMBER 26, 2020

T.L. Mapuranga, for the appellant
J. Bamu, for the respondent

CHITAKUNYE AJA: This is an appeal against the whole judgment of the Labour Court, dated 3 April 2019, setting aside the dismissal of the respondent by the appellant. The facts giving rise to the appeal are largely common cause. They may be summarised as follows:

The respondent was employed as a Forklift Driver by the appellant, whilst concurrently enjoying the position of President of the Brewing and Distilling Workers' Union. In 2018, allegations of misconduct were levelled against him and subsequently, he was charged with three counts of misconduct in terms of the Delta Beverages Employment Code of Conduct (the Code). Pursuant to the disciplinary hearings, he was found guilty and dismissed from employment.

The first count of misconduct was uttering a false document wherein the respondent allegedly drafted a petition to the appellant under the guise of all employees with false contents in contravention of ss 30 and 31 as read with s 1.1 of Annexure II to the Code. The second count of misconduct related to an alleged failure to follow due process in that the respondent called for and addressed meetings of fellow employees of the appellant during working hours without senior management's approval in contravention of s 14(13) under annexure I of the Code as read with s 2.4 of Annexure II to the code. The third count of misconduct was failure to comply with established procedures/standing instructions on communications policy whereby the respondent allegedly took company issues to a newspaper in contravention of the Code.

The misconduct charges against the respondent were initially heard before the appellant's Superior Level Committee, which found the appellant guilty. An appeal against that determination was subsequently made to the appellant's Head of Department Committee and thereafter to the Works Council. Both appeals failed. Having pursued all of the internal processes of appeal available to him within the company structures, the respondent subsequently noted an appeal to the court *a quo*.

On the first charge of uttering a false document, it was the appellant's contention in the court *a quo* that a document was purportedly prepared by the respondent petitioning the Board responsible for the administration of Delta Employee Share Participation Trust ("the Trust") to dissolve the said fund and pay every beneficiary thereon by 31 March 2018. The petition was said to be premised on an allegation that the Trust was not delivering on its objectives in that there were no beneficial rights accruing to the employees and a general fear of mismanagement of the Trust by non-beneficiaries thereon. According to the petition, the fear was spurred on by a perceived high casualization of labour by the appellant.

The petition document was not produced in the court *a quo* but it was established as common cause that a disciplinary hearing conducted by the Works Council ("the Council") ultimately determined that the contents of the offending document were false. The court *a quo* found that the Council failed to highlight evidence proving that the respondent had authored the petition document or that the contents therein were false. Furthermore, it was found that the Council neglected to canvass the "uttering" aspect of the offence which was aggravated by a lack of evidence to establish the respondent's guilt. In light of the perceived paucity of evidence against the respondent, it was the court *a quo*'s considered view that the Council ought to have acquitted him on that particular charge.

With regards to the second charge, it was contended by the appellant that the respondent had addressed employees' meetings on 16, 17 and 18 January 2018 during working hours without the requisite approval from senior management. The respondent denied liability on the premise that he had acted in his capacity as a trade union official. It was the respondent's position that any liability arising from his address to the employees or consequent remedy sought by the appellant be directed towards the trade union as provided for in the Labour Act [*Chapter 28:01*].

The respondent's view did not find favour with the court *a quo*, which upheld council's finding that as both an employee of the appellant and a trade union official, the respondent had an obligation to comply with due process as established by his employer. The court *a quo* in effect confirmed the conviction on this count.

On the third charge of misconduct, it was alleged that the respondent gave an interview to the press/media on matters pertaining to the Trust, in contravention of company communication policy. The Council had sight of the article concerned and after analysing it,

concluded that the respondent was guilty of the offence as had been determined by the appellant's other disciplinary committees which also had sight of the article in which the respondent made utterances in contravention of company policy. The Council further found that the respondent's evidence was unreliable in that whilst he denied liability and alleged that there were certain persons within the company that had engaged the press, he had failed to adduce any evidence to substantiate his allegations.

The court *a quo's* finding on this issue was that the Council had proceeded on the basis that the respondent was guilty and bore the *onus* to exonerate himself. It was ascertained that the respondent did not admit to the offence. The court *a quo* was of the view that the evidence of guilt against the respondent was tenuous and in the circumstances, it would be improper to impute liability on him for the misconduct of other employees.

In the result, the court *a quo* found that the respondent was not guilty of the first and third charges. However, he was found guilty of the second charge of misconduct of addressing employees' meetings in contravention of due process. The applicable penalty for the offence in terms of the appellant's Code was determined to be a final warning on a first breach and dismissal on a second breach. The court *a quo* surmised that submissions not having been made by the appellant as to whether or not the misconduct constituted a first or second breach by the respondent, or whether or not there was a valid warning operating against the respondent, the appellant had failed to discharge its *onus* to prove the appropriate penalty in terms of the relevant Code. Ultimately, it was held that the appellant failed to sustain the penalty of dismissal imposed on the respondent. Resultantly, the court *a quo* upheld the respondent's appeal and ordered his reinstatement or alternatively, payment of damages *in lieu* of reinstatement.

Dissatisfied by the decision of the court *a quo* the appellant noted an appeal to this Court on the following grounds:

1. Having found that the respondent was properly convicted on one of the charges he faced and having concluded that he could properly be punished in terms of the law, the court *a quo* erred in nonetheless allowing the whole appeal without qualification and thus upsetting even a confirmed conviction.

2. The court *a quo* erred in not considering that the findings of fact which had been made by the Disciplinary Committee had been confirmed on appeal and so erred in failing to appreciate the limited role that it was required to play in considering the matter.

3. It having been common cause that the respondent had attended and addressed the meetings at which the contents of the false petition were read out and the encouragement was given for the employees to sign it, the court *a quo* erred in concluding that the evidence of "uttering" of that petition had not been produced.

4. A *fortiori*, the court *a quo* erred in not investing with any validity the fact that the conviction for addressing a meeting which it had upheld was so intrinsically linked to the uttering of the document, that the two could not be taken apart.

5. The court *a quo* erred in concluding that there had been no evidence that respondent had spoken to the press notwithstanding that his words were quoted verbatim in the press report, and no warrant existed for the conclusion it arrived at that it was only "some" of the employees who had been interviewed.

6. The court *a quo* erred in all circumstances in not considering that the misconduct with which respondent had been charged and for which he had been convicted was sufficiently serious and invested in appellant the right to dismiss him from employment.

At the hearing of the appeal, counsel for the appellant, Mr *Mapuranga*, submitted that the court *a quo* erred by convicting the respondent of the second charge of misconduct of calling a meeting without following due process whilst proceeding to contrarily grant his entire appeal. It was further submitted that the court *a quo* misdirected itself by failing to find that direct evidence had been led establishing the liability of the respondent for breach of the appellant's code of conduct. Mr *Mapuranga* argued that the respondent had, in violation of the relevant code of conduct, engaged the press through the medium of an interview and made comments pertaining to the appellant, thus he was guilty of the third count of misconduct. He further averred that it was highly improbable that the respondent called a meeting for the purpose of discussing a petition, without actually producing the said document at the meeting. Counsel for the appellant further took the point that the respondent had an evidentiary burden to rebut the allegations established against him.

Counsel for the respondent, Mr *J. Bamu*, conceded the point that the operative part of the judgment *a quo* failed to uphold the partial conviction of the respondent, which omission constituted an irregularity. However, he went on to submit that the appellant had failed to lead evidence to support its case on the penalty. It was further submitted that the entire case turned on considerations of evidence, which evidence was not led by the appellant.

From the grounds of appeal and submissions made by the parties, the issues for determination are as follows:

1. Whether or not the court *a quo* misdirected itself in failing to impose a sanction against the respondent, pursuant to a determination that he committed an act of misconduct.

2. Whether or not the court *a quo* misdirected itself by failing to find that direct evidence had been led establishing the respondent's liability for "uttering" a false document and his involvement with the press.

The issues shall be considered *seriatim*.

1. Whether or not the court *a quo* misdirected itself in failing to impose a sanction against the respondent, pursuant to a determination that he committed an act of misconduct.

The court *a quo* in its judgment upheld the conviction on the second charge, that of calling for meetings of employees during working hours without following due process. The court *a quo* observed that in terms of the appellant's code the penalty for a first breach for this offence was a final warning. Dismissal was for second breach. The court *a quo* opined that the appellant had not led evidence as to whether this was the first or second breach; if it was the second breach, whether the final warning in respect thereof was still operational. This conclusion was not consistent with the record of proceedings from the lower tribunals. The record of proceedings of the Immediate Superior Level shows that in its determination it passed sentences in respect of each count as follows; for count one dismissal which is the penalty provided in s 1.1 of annexure II to the code; count 2 final warning which is the penalty provided in s 2.4 of annexure II to the code.; and count 3 final warning. It is clear that for count 2 the

penalty imposed was a final warning which was consistent with a first breach. This was consistent with submissions made that the respondent was a first offender. It was therefore incorrect to hold that there was no evidence on this aspect. What that committee did was to consider the overriding penalty and hence imposed the overall determination of dismissal.

It is my view that had the court *a quo* considered this fact it could, at the very least, have upheld the penalty as imposed by the lower tribunal on this one count. The failure to impose a penalty was clearly a misdirection.

The overriding penalty of dismissal arose from the aggravating circumstances which included the number of charges and the fact that the penalty for the first charge was dismissal. The question of an appropriate penalty to pass is within the discretion of the employer where an employee commits a dismissible act of misconduct. For an appellate court to interfere with the penalty imposed by the employer in the exercise of its discretion there needs to be proof that the exercise of the discretion was impeachable. This principle was laid out in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at pp 62-63 G-H, wherein the court held that:

> "It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution..."

In *casu*, the court *a quo* did not allude to any misdirection in the exercise of the discretion in deciding penalties for each count and the overall penalty. There was therefore no justification for not imposing a penalty in respect of the count whose conviction the court *a quo* upheld.

2. **Whether or not the court *a quo* misdirected itself by failing to find that direct evidence had been led establishing the respondent's liability for "uttering" a false document and his involvement with the press.**

A perusal of the record of proceedings shows a failure to appreciate the offence of uttering a false document. The offence of uttering was well defined in *The Virginia Law Register* Vol. 8, No. 5 (Sep., 1902) at page 322 in the following terms;

> "Uttering is the passing, offering, or exhibiting, with guilty knowledge and fraudulent intent, a false instrument, which, if genuine, would be valid in law, and apparently the basis of some liability."

A thread that runs through the respondent's defence on this aspect was that the appellant failed to prove that he had written the document, however, the charge against him was that of uttering a false document and not writing it. Uttering occurs when a false document is made available to a third party for consumption. It does not require that one must be the writer of the document. In *casu*, the document was present and the respondent and his colleagues were speaking to that document in their address to fellow workers in a bid to get them to sign it. As such, his argument is misplaced.

It may also be noted that the offence in question was intricately connected with the addressing of the meetings without following due process. The document in question was the subject of such meetings. The Council made findings to the effect that the respondent had addressed the meetings together with fellow Trade Union leaders. The agenda of the meetings was to present the petition and urge employees to sign it. That petition was brought by the respondent and his colleagues. Council also made a finding that the contents of the petition

were false and the respondent as a Member of Trustees knew that the consequences of the dissolution of the trust were not as they were portraying to the employees.

A careful perusal of the record of proceedings shows that such findings are not contrary to the evidence adduced. For instance, it is evident that the respondent was evasive about the capacity and role in which he attended and addressed the employees. His responses were vacillating between him acting as a trade union official and as a Delta employee. In the process he contradicted himself on the role he played in presenting the petition to fellow employees. He, however, did not deny that the agenda or purpose of calling for and addressing the meetings was to urge employees to sign the offending petition. He equally did not deny associating himself with fellow trade union officials who were in his company during these meetings. It is also clear from the record and findings by Council that the respondent did not categorically deny that as a member of the Board of Trustees he was aware that the information they were peddling in the petition was misleading.

It may also be noted that the findings of fact by the Council were not seriously challenged by the respondent at the hearing of the appeal. It is settled that an appellate court will not readily interfere with findings of fact made by a lower tribunal.

The law is settled that such findings can only be interfered with where the conclusions reached by the lower tribunal are contrary to the evidence presented before it. This was reiterated in *TM Supermarkets v Mangwiro* 2004 (1) ZLR 186 (S), at p 189D-E as follows:

> "I am also persuaded by the contention that the court *a quo* in this particular respect misinterpreted the evidence placed before it. This Court has held, in *Reserve Bank of Zimbabwe v Corrine Granger supra* that such a circumstance amounts to a misdirection in law. At p 6 of that judgment, MUCHECHETERE JA stated as follows;
>
> > 'And a misdirection of fact is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.'"

The above authority is apposite to the facts of this matter. A careful perusal of the record of proceedings tends to support the Council's conclusion on the charges. It is clear that the respondent presented to fellow employees a petition whose contents were not true. He together with those in his company urged the employees to sign the petition. Thus the offence of uttering was proved.

The finding on the third charge of misconduct was also amply supported by the evidence adduced. The article in question specified the respondent in clear terms. Whilst the respondent made frantic efforts to distance himself from the report by stating that it was historical and not current, the report contains aspects showing actions that were current. After giving a historical progression of the issue, the report proceeded to state, *inter alia*, that, "The President of the Brewing and Distilling Workers' Union and former Delta Corporation Workers' Committee leader, John Shumba, said he was summoned by the Zimbabwe Anti-Corruption Commission (ZACC), which sought to understand concerns of the aggrieved pensioners and how the contentious pension fund was being administered, a decade after it was established."

The respondent was quoted saying that he was summoned by ZACC Commissioners who wanted to understand if the fund was properly administered and what happened to its proceeds, he was yet to meet them again to complain about the management of the fund and implored ZACC to act accordingly and unearth corruption. The article also quoted the respondent saying that the government's current fight against corruption should also be extended to private companies whilst safeguarding the interests of workers. This article is clearly specific as to who it ascribes the information to, thus it cannot be referring to interviews of some other people but that of the respondent.

Further, after being asked whether or not he denied talking to the reporter, the respondent's response was that he had only made a query with the newspaper and had told the executives about it three days before the article came out. Thereafter, he alleged that he went to the newspaper where he met the reporter who was a son of a retiree. That reporter indicated to him that his father complained about the Trust all the time to him. The response given by the respondent was self-trapping in that if he had not given any interview, how could he have known about the article which was published three days after he had been to the newspaper? It appears to have been an attempt to put a lid to the story on reflection. Equally, the story that the reporter was a son to a retiree who always complained was proved to be untrue when the father of the reporter, in his evidence, denied any knowledge about this issue or even complaining about the Trust to his son. This left the respondent's defence without any leg to stand on. The finding of the Council that the respondent was clearly guilty of failure to comply with the appellant's communication policy which conduct was inconsistent with the terms of his contract of employment, cannot be faulted in the circumstances. It was not shown before the court *a quo*, and the court *a quo* had no basis for finding so, that the finding of the trial tribunal was grossly unreasonable as to warrant interference on appeal.

It is the appellant's contention that the actions of the respondent amounted to a repudiation of his employment contract and were sufficiently serious to entitle the appellant to exercise its right of dismissal as an employer.

The essence of the appellant's submission was canvassed in the case of *Celsys Limited v Ndeleziwa* 2015 (2) ZLR 62 (S) at p 65F, wherein it was stated that:

> "The law is settled that in circumstances where an employer takes a serious view of an employee's misconduct, it has <u>a clear discretion as to what penalty to impose after finding such employee guilty of the misconduct in question.</u> The question

> that then arises, on the basis of the law and authorities on this matter, is whether the appellant judiciously exercised its discretion in deciding on, and imposing, the penalty of dismissal. It is only upon a negative answer to this question, that an appeal court would be justified in interfering with such decision." (Emphasis added)

In *Chidembo v Bindura Nickel Corporation Ltd* 2015 (2) ZLR 25 (S) at p 29E, it was aptly stated that:

> "…an act of misconduct committed by a worker outside the workplace, and in his – also work related – capacity as a workers' committee member, is unlawful as long as it impacts directly on the employer's private interests and in addition, constitutes a violation of the employer's Code of Conduct." (Emphasis added)

In *ZB Bank Limited v Tirivanhu Marimo* SC 21/20 at p 8 GWAUNZA DCJ reiterated the point in stating that:

> "The right to champion workers' rights is, in my view, not exercised in a vacuum, as it were, but should be exercised within the confines of the law as dictated, in this case, by the relevant code of conduct. This would ensure that the delicate balance between the competing interests of the employer and those of the workers, through their representation, is maintained. It falls to reason therefore that the respondent would not be able to hide behind his position as the chairperson of the workers' committee should the conduct alleged against him be proved."

The court *a quo* misdirected itself when it held that the evidence on the three charges leveled against the respondent was tenuous. The respondent was not being held accountable for all the employees, rather he had to be accountable for his own actions whereby he failed to follow standard procedures at his workplace and in the process committed the acts of misconduct in question

From the foregoing, it is evident that the respondent disregarded appellant's code of conduct thus he was guilty of the allegations levelled against him in respect of all the charges

against him. He violated the appellant's code of conduct through his unscrupulous actions, therefore, the employer properly exercised its discretion in dismissing him from employment.

Disposition.

Accordingly I find that the appeal has merit and ought to succeed.

In the result, it is ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is hereby set aside and substituted with the following:-

"(a)The appeal is dismissed with costs

(b)The respondent shall stand dismissed from his employment with effect from 19 April 2018 the date of his initial dismissal."

BHUNU JA: I agree

MATHONSI JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners