REPORTABLE (19)

ZB BANK LIMITED
v
TIRIVANHU MARIMO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, PATEL JA & BHUNU JA
HARARE, JULY 20, 2018 & FEBRUARY 13, 2020

T. Mpofu, for the appellant

T. Magwaliba, for the respondent

GWAUNZA DCJ:

[1] This is an appeal against the whole judgment of the Labour Court, which upheld the decision of the appeals board of the National Employment Council Banking ("NEC") to the effect that the charge preferred against the respondent was inappropriate and that he had been unfairly dismissed.

FACTUAL BACKGROUND

[2] The respondent was employed by the appellant as an administrative clerk and was also the chairperson of the workers' committee. The management of the appellant and the workers' committee had been in a dispute over salary increments of the employees for some time. In August 2010 the dispute was referred to a conciliator who in September 2010 issued a Certificate of No Settlement.

[3] Thereafter, between 8 and 15 September 2010, the respondent sent out emails to his colleagues disclosing, through actual salary figures, the percentage adjustments that had been effected to the managerial employees' salaries. He also stated that the workers' committee had decided to embark on a collective job action to press their interests. The emails were sent through the appellant's IT facility to more than ten recipients at a time.

[4] On 23 September 2010 the respondent was charged with misconduct for contravening s 11 (1) of S.I 273/2000 ("the code"), it being alleged that he had acted in a manner which was inconsistent with the fulfilment of the express or implied conditions of his contract. The basis of the charge was that the respondent had generated offensive emails to a group of staff members against the bank's standing policy contained in its Information Security Management Policy Document ('IT Policy Document'), particularly ss 4.4 and 4.4.1. It was also alleged that the contents of the emails were inflammatory and contained confidential information. Further that the responses that the emails generated from staff members who received them ended up congesting the network, thus interrupting normal business communication in the bank.

[5] A disciplinary hearing was held in October 2010. The respondent was found guilty of the misconduct with which he was charged and dismissed from his employment. He appealed to the Grievance and Disciplinary Committee whose proceedings ended in a deadlock. The matter was then referred to a second Grievance and Disciplinary Committee which also ended in a stalemate.

[6] Thereafter, the matter was placed before the NEC Appeals Board, which held that the conduct complained of did not constitute an offence in terms of the charge that had been

preferred against the respondent. Accordingly, it held that the charge preferred against the respondent was inappropriate. It stated further that although the respondent exceeded the limit of the number of emails allowed by the respondent's IT Policy Document, thereby breaching the appellant's standing policy, the emails were neither inflammatory nor offensive, and that no confidentiality had been breached. It also stressed that the respondent's conduct was in pursuit of a right to represent workers and that the emails were meant to call for collective job action or at least put pressure on the appellant to accede to the workers' wage demands. Consequently, the NEC Appeals Board ordered that the respondent be reinstated to his former employment without loss of salary or benefits. Significantly, it did not order an alternative of damages in *lieu* of reinstatement in terms of s 89(2)(c) of the Labour Act [*Chapter 28:01*]

[7] Aggrieved by the decision of the NEC Appeals Board, the appellant appealed to the Labour Court. It averred that the appeals board erred in failing to find that a Category D offence had been committed, that the penalty of dismissal was appropriate in the circumstances and that alternatively, and in any event, it erred in failing to afford to the appellant any alternative to reinstatement.

[8] *Per contra*, the respondent submitted that the appellant had failed to establish the conduct that allegedly constituted the offence in question. He also contended that the NEC Appeals Board was not mandated to give an alternative for damages *in lieu* of reinstatement. Further, that it was not bound by s 89(2)(c) of the Act because that provision only relates to the Labour Court in the exercise of its functions and not internal structures such as the NEC Appeals Board.

[9] The court *a quo* took the view that as the employees were considering going on strike over the wage dispute, the respondent acted within the bounds of his official duties as the chairman of the workers' committee to communicate developments pertaining to the intended strike, to his fellow employees. The court however stated that although the respondent may have gone 'overboard' by breaching the appellant's Information Security Policy, the breach did not warrant a dismissal. Consequently, the appellant's appeal was dismissed.

[10] The appellant was aggrieved by the decision of the court *a quo* and appealed to this Court on the following grounds *viz*: -

1. Having come to the conclusion that the respondent's conduct was in breach of appellant's IT policy in that he had sent emails to more than the maximum permissible number of recipients at a time, the court *a quo* erred in concluding that such conduct did not amount to a dismissable misconduct;
2. The court *a quo* erred in failing to appreciate that the respondent's conduct in violating the standing regulation was a breach of his privileges as the representative of the workers' committee and could therefore not be excused;
3. Having come to the faulty conclusion that respondent was to be reinstated, the court *a quo* erred in not providing for an alternative of damages as is required under the statute.

I will now consider the grounds of appeal in light of the evidence before the court.

Whether the court *a quo* erred in concluding that the misconduct of sending emails to more than the maximum permissible number of recipients at a time, did not amount to dismissable misconduct.

[11] It is pertinent in order to determine this issue, to consider the charges preferred against the respondent. He was charged with contravening s 11(1) of S.I 273/2000 namely:

> "Any serious act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract where such is not provided for under Category 'A', 'B' or 'C'."

The particulars of the charge were stated as follows: -

> "Between 8 and 15 September 2010, you generated some offensive emails to a group of staff members against the bank's standing policy on Information Security Management Policy document s 4.4 and 4.4.1. Besides the contents of the email being inflammatory and confidential, the responses you asked from staff members ended up congesting the network affecting normal business communication in the process."

[12] The first ground of appeal addresses the finding of the NEC Appeals Board, expressed thus in its judgment: -

> "The appellant obviously exceeded the limit of number of recipients allowed by the bank IT policy. The limit was 10 people per email."

This finding was upheld by the Labour Court which described the respondent's conduct in this respect as amounting to him having "gone overboard by breaching (the) respondent's standing policy."

Counsel for the appellant took the view that having found that the respondent exceeded the maximum number of 10 emails at a go, the NEC Appeals Board and the court *a quo* erred in not finding him guilty. Counsel for the respondent, on the other hand submitted that the particulars of the charge did not speak to exceeding the permitted number of emails to be sent at a time. Accordingly, he contends further, the respondent could not have been found guilty of a charge that had not been preferred against him. In response, it was the appellant's submission that charges are crafted by lay persons and not lawyers. To this end, he contended that the respondent ought not to be spared a conviction on the basis of what was in effect a technicality, given that labour matters generally ought not to be determined on the basis of technicalities.

[13] I am persuaded by the respondent's submissions. He clearly was not charged with violating any standing policy forbidding the dispatch of more than 10 emails at a time

using the appellant's server. As correctly contended for him, the appellant's IT Policy Document specifically provides for this infraction in its clause 4.4.5. A closer look at the relevant portions of the clauses which the respondent was accused of breaching, that is 4.4 and 4.4.1 is instructive. Clause 4.4 proscribes the accessing or distribution of 'inappropriate or offensive material' which may harm the reputation of ZB Financial Holdings Ltd 'both internally and externally.' Clause 4.4.1 underlines the fact that its communications systems are for business purposes only, and states that any employee found abusing such facilities would be subjected to disciplinary action in accordance with the applicable code of conduct. These provisions, and the charges based on their alleged violation by the respondent, clearly do not speak to the specific issue of dispatching more than 10 emails at a time. While it may conceivably be argued that sending more than 10 emails at a time amounts to abuse of the appellant's electronic communication system, the fact that the latter saw it fit to remove this particular conduct from the ambit of abuse in general, in my view evinces the intention to keep the two offenses separate and distinct.

[14] Clearly therefore the NEC Appeals Board determined this aspect of the dispute on the basis of a matter not properly before it. The respondent could not be found guilty of sending an email to more than 10 people at a time as that was not the charge that had been preferred against him, nor did it form the particulars of the charge the respondent was called upon to answer. This finding stands notwithstanding that the respondent may, and appears to have, indeed acted contrary to the instruction as provided under 4.4.5 of the Information Security Policy. That however was not the charge that he was facing. It was therefore not open to the NEC Appeals Board to substitute the charge put to the respondent with another charge. The board therefore misdirected itself. In its turn

the Labour Court, by upholding the same finding by the appeals board, also fell into error. The law is clear that it is not open to the court or a tribunal to substitute a charge laid against an employee with another one and proceed to make a determination based thereon.

[15] There is authority that places this type of action outside the realm of what may be termed a 'technicality' on the basis of which a labour matter should not be determined. The remarks of the learned judge in *ZIMASCO (Pvt) Ltd v Chizema* 2007 (2) ZLR 314 (S) are apposite. In that case, the court had occasion to deal with the question as to whether the failure by the court to alter a charge amounted to deciding the matter on a legal technicality. It held as follows at 317A-C:

> "It should be noted that it clearly was not the responsibility of the Labour Court to amend the "charge sheet" in this matter by substituting the charge preferred against the respondent with another one. **The court is not there to formulate charges or cases for litigants.** In cases of this nature the court's brief is to determine, on the basis of evidence placed before it, whether or not a case has been proved against the respondent." (*my emphasis*).

[16] The same point was stressed in *Nyarumbu v Sandvik Mining & Construction Zimbabwe (Pvt) Ltd* 2019 (2) ZLR 10 (S) where the court stated as follows at 14F-H: -

> "It is axiomatic, in criminal as well as disciplinary proceedings that a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally charged. The reason for this is obvious, *viz.* The person accused must be made aware of the case against him in order to enable him to effectively prepare his defence. In this context, notwithstanding the provisions of s 89(2)(a)(ii) of the Labour Act, the Labour Court cannot, *mero motu,* substitute its own charge or make a finding of guilt on an entirely different offence. <u>Any such action would constitute a blatant miscarriage of justice."</u> (*emphasis added*)

The above remarks are instructive in this matter, and by parity of reasoning, apply equally to a case where one is acquitted of an offence with which they were not charged.

The decision of the court *a quo* that the appellant could not be dismissed for misconduct that in fact did not form the basis of the charge levelled against him is therefore of no force or effect.

[17] It follows from the foregoing that the appellant's first ground of appeal lacks merit on two fronts. Firstly, it seeks to sanitise the improper substitution by the court *a quo* of the charges that the appellant brought against the respondent with a new charge. Secondly the ground of appeal purports to impugn a decision of the court *a quo* that, as I have determined, was improper and of no force or effect. The first ground of appeal is accordingly dismissed.

Whether the court a quo erred in failing to appreciate that the respondent's conduct in violating the standing regulations was a breach of his privileges as the representative of the workers' committee and could therefore not be excused.

[18] Counsel for the appellant correctly does not dispute that the respondent, as chairman of the Workers' Committee, had a right to champion the cause of the workers by, among other means, communicating with them through use of requisite media. Nothing therefore, turns on the respondent's citation of various statutory and constitutional provisions that protect and emphasise the importance of workers' rights being championed by and through their chosen representatives. Counsel for the appellant contends however, that in exercising this entitlement, the respondent did not have the right to breach the law, in this case the standing policy in question. There is merit in this contention. 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

representatives, 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. In upholding the NEC appeal's board ruling on this point, the court *a quo* took the view that the respondent 'did not abuse the appellant's facilities for personal gain' but did so because he had a right, indeed a duty, to communicate to fellow employees the developments on the wage dispute. Accordingly, his actions, *albeit* violating standing instructions, did not merit the harsh penalty of dismissal. The court found no fault with the respondent's use of the appellant's email facility, stating that he had in the past used the same medium of communication. Accordingly, in the court *a quo's* view, the respondent's conduct as alleged, was proper.

[19] The view taken by the court *a quo* does not find support in the law, however.

In *Chidembo v Bindura Nickel Corporation* 2015 (2) ZLR 25 (S), an employee who had disclosed confidential information sought to argue that although the information had been unlawfully obtained, the disclosure was lawful as he was the chairperson of the Workers' Committee. The court in rejecting this submission reasoned as follows at 29G-30A: -

> "The disclosure of confidential information without the requisite authority of the employer, remained an unlawful act in terms of the respondent's code. **The fact that the appellant committed the misconduct while performing his role as the worker's committee chairperson is of no moment. This is because his status as a workers' committee chairperson did not turn what was unlawful, into a lawful act.** It became unlawful the moment he disclosed the information without the authority of the respondent. An employer is perfectly within its right to put in place measures that will protect confidential and sensitive information relating to its employees and operations, against unlawful disclosure. Employee salary scales fall into this category of information. Given that the code of conduct *in casu* expressly provides that it is only the employer who can authorise any disclosure by any employee, of such information, the

words of *CHIDYAUSIKU CJ* in the case of Zimbabwe *Electricity Supply Authority v Moses Mare* SC 43/05, are apposite:

> 'In my view, members of the Workers' Committee are not a law unto themselves …. In defending the rights of the workers, a member of the workers' committee is enjoined to observe due process.'" (*emphasis added)*

These remarks are in my view entirely apposite *in casu.* The view taken by the court *a quo that* a workers' committee member is at liberty to violate the employer's code of conduct as long as he does so in his exercise of the right to champion the worker's rights, is clearly wrong and not sustainable at law.

[20] What is to be determined next therefore is whether or not the respondent did violate the specified standing policies. Further, whether if he did so, such conduct constituted the dismissible misconduct that he was charged with. Earlier on in this judgment I paraphrased the import of relevant portions of the clauses which the respondent was accused of breaching. Clause 4.4 of the IT Policy Document proscribes the accessing or distribution of 'inappropriate or offensive material' which may harm the reputation of ZB Financial Holdings Ltd 'both internally and externally.' Clause 4.4.1 stresses that the appellant's communications systems are for business purposes only, and that abusing them was a punishable offense in accordance with the applicable code of conduct. Examples of such abuse are indicated in the clause as including but not limited to: -

i) the transmission by email of information considered 'highly confidential' such as confidential personal data of any member of staff;
ii) private business activities; and
iii) transmission of any such material that may be deemed offensive or abusive.

[21] My reading of the letter setting out the acts or conduct that formed the basis of the misconduct charge levelled against the respondent, (set out above), is that these were, firstly, the generation and dispatch by him to 'a group of employees', of emails that contained confidential material, in addition to being offensive and inflammatory. While the considerable number of addressees of the emails is evident from the record, the appellant asserts and is not challenged on it, that the recipients totalled 378. Secondly, the appellant took issue with part of the content of such emails, which successfully solicited responses that 'ended up congesting the network' and affected normal business communication within the Bank.

[22] It is not disputed that the respondent sent the emails in question. Nor does the respondent deny that he did not seek the authority of the appellant before doing so. He in fact conceded as much during the disciplinary hearing. The appellant charges that the emails among other content disclosed confidential information relating to the salaries earned by fellow employees. The respondent however disputes that he sent information that could be classified as confidential since the table that he sent, filed on p 170 of the record, did not specify the names of the senior staff managers who benefitted from defined levels of salary increments indicated in the table. In any case, the respondent argues further in his heads of argument, the recipients of the information had a 'legitimate interest' in knowing the salary scales pertaining at the appellant's business. The court *a quo* was persuaded by the respondent's submissions and took the view that no evidence was placed before the court to substantiate this allegation. The appellant on the other hand contends that a glance at the table on p 170 of the record would easily enable the recipients of the email concerned, to identify the affected senior employees.

[23] I am persuaded by the appellant's submissions in this respect. It would not be unreasonable to assume, as the appellant contends, that the recipients of the information contained in the table in question would know who of the junior and senior managers fell into which grade and would therefore be earning the respective salaries specified therein. The appellant submits in this respect, correctly in my view, that the respondent could have made the point that certain increases had been effected and even relied on the percentages quoted, without divulging the actual salaries of fellow employees.

Against this background, I find, contrary to the view taken by the court *a quo that* the appellant did place before the court evidence substantiating the charge that the respondent abused its IT systems and disclosed confidential information relating to the salaries of certain employees, in violation of clause 4.4.1 of its IT Policy Document.

[24] The appellant alleged that the emails generated by the respondent were considered by it to be, in addition, inflammatory and offensive. The court *a quo* opined that the particular emails or the exact phrases that were alleged to be offensive or inflammatory were not specified in the letter containing the charges. Further, that no evidence was placed before the court to substantiate these allegations. The court's observations in my view cannot be faulted, particularly if regard is had to the respondent's accurate assertion that this particular matter has not been pursued by the appellant in this appeal. I will accordingly give no further consideration to this charge.

[25] The appellant in its heads of argument has not expanded on aspects of the charges relating to the alleged abuse by the respondent of the appellant's IT policy for private business nor has anything further been said about the alleged clogging of the appellant's

[29] Paragraph 4.4.1 of the policy document creates the special misconduct of abuse by an employee, of its company-facilitated communication media and services. It further provides that any employee found abusing the services in question 'shall be subject to disciplinary action in accordance with the code of conduct.' The misconduct is clearly characterised as one of commission. I take the view that in the circumstances at hand, there is a conceptual difference between doing an act that contravenes a laid down policy of the employer, and failing to obey a standing instruction or order, of the same employer. I find therefore that the act with which the respondent was charged was not provided for under Categories 'A' 'B' or 'C' of the appellant's code of conduct.

[30] What falls to be determined next is whether the conduct complained of was properly characterised as "serious" and inconsistent with the terms of the respondent's contract of employment. In *Wala v Freda Rebecca Gold Mine* SC 56/16, the court had occasion to define the terms "serious act of misconduct". It stated as follows at p 5 of the cyclostyled judgment: -

> "In *Tobacco Sales Floors Ltd. v Chimwala* 1987(2) ZLR 210 (S), McNALLY JA approved of the dictum by LORD JAMES OF HEREFORD in the case of *Clouston & Co Ltd v Corry* [1906] AC 122 before going on at 218H-219A to say:
>
> > 'I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough *prima facie* to warrant summary dismissal. Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was **so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.'**
> >
> > The seriousness of a misconduct is measured by looking at its effect on the employment relationship and the contract of employment. If the misconduct the appellant was found guilty of went to the root of the contract of employment in that it had the effect of eroding the trust the employer reposed in him as found by the arbitrator could it still be said that the misconduct was trivial to warrant a penalty of dismissal? **The**

> **appellant worked against company policy. It is a serious act of misconduct for an employee to deliberately act against the employer's policies to advance personal interests."** (*my emphasis*)

[31] It is argued for the appellant firstly, that the conduct in question went to the root of the respondent's contract of employment, and not least because the respondent had breached a 'confidentiality arrangement' that he had entered into with the appellant. Secondly, it is argued that compliance with the IT policy of the appellant that the respondent breached was cast in peremptory terms. Accordingly, the policy had to be obeyed without reservation. (*See Messenger of the Magistrates' Court, Durban v Pillay* 1952(3) SA 678(A) at 683*)*

[32] I find that there is merit in the appellant's submissions. The appellant proved that the respondent worked against company policy by abusing its company-facilitated communication media and services. As properly highlighted in the *Chidembo v Bindura Nickel Corporation* case (*supra*) an employer is perfectly within its right to put in place measures that will protect confidential and sensitive information relating to its employees and operations, against unlawful disclosure. Employee salary scales are confidential information and should not easily be disclosed.

The respondent therefore disclosed other employees' salaries through abuse of the appellant's communications media and services. I find accordingly that this particular misconduct was both serious and inconsistent with the fulfilment of his contract of employment. The same misconduct also properly fell within Category 'D' of the appellant's code of conduct.

[33] I will now consider the propriety of the penalty of dismissal that was imposed on the respondent. The appellant argues in this respect that the decision to dismiss the respondent was properly reached on the basis that the appellant as his employer took a serious view of the misconduct in question. Further, that the appellant in taking such a serious view of the misconduct was not shown to have acted unreasonably. Accordingly, there was no cause to interfere with the decision that flowed from the view taken by the appellant. The appellant relies for this argument on the case of *Circle Cement (Pvt) Ltd v Nyawasha* SC 60/03 where the following is stated: -

> "Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of the contract which it accepted by dismissing her from employment, the question of a penalty less severe than dismissal being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee." (*my emphasis*)

The appellant argues, lastly, that the penalty of dismissal was competent since it was provided under and in terms of the code of conduct.

[34] I find merit in these submissions. The respondent, as submitted for the appellant, abused its communications media and services in order to disclose not just the salary scales of the junior and senior employees falling into the categories listed, but also the actual salaries awarded for each grade. This was in addition to an indication of the percentages by which the salaries of employees in the grades listed were raised. As the appellant correctly contends, the respondent could have simply shown these percentages and not the actual salaries of the affected employees. There is therefore merit in the submission by the appellant that the respondent breached his privileges as a workers' committee representative through conduct that violated the IT policy of the appellant. Clearly, his

being a workers' committee representative did not convert an unlawful act into a lawful one.

[35] The respondent in any case has not shown that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted. (See *Tobacco Sales Floors Ltd case (supra).* No basis has, accordingly been established for interfering with the penalty of dismissal.

The appellant's second ground of appeal therefore has merit and is hereby upheld.

This finding renders the appellant's last ground of appeal irrelevant to the determination of this appeal.

DISPOSITION

[36] In light of the foregoing, 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 set aside and substituted with the following: -

   "a) The appeal is allowed with costs;

   b) The respondent shall stand dismissed from his employment with the appellant with effect from 26 October 2010, the date of his initial dismissal."

PATEL JA: I agree

BHUNU JA: I agree

Messrs Gill, Godlonton & Gerrans, appellant's legal practitioners.

Mabundu Law Chambers, respondent's legal practitioners.