

REPORTABLE (73)

ADMIRE DAMANJERA
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & MATHONSI JA
HARARE: 6 MARCH 2020 & 18 JUNE 2020

T. L. Mapuranga, for the appellant

S. Bhebhe, for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the Labour Court delivered on 14 July 2017 which dismissed with costs an appeal launched in that Court by the appellant against the decision of the respondent’s Appeals Committee dated 20 July 2016.

The Appeals Committee upheld the decision of the respondent’s Disciplinary and Grievance Committee which found the appellant guilty of ‘deliberate misrepresentation of facts’ in the declaration of assets. It dismissed the appellant from employment with effect from 31 March 2016.

BACKGROUND

The appellant was employed by the respondent as a Revenue Officer based at Beitbridge Border Post. In terms of Clause 16 of his contract of employment he was required to declare any newly acquired assets, which declaration would be verified by the respondent. A failure to declare assets or making a false declaration amounted to an act of misconduct.

Indeed, deliberate misrepresentation of facts in the declaration of assets is listed as Serious Offence number 26 under acts of misconduct carrying a maximum penalty of dismissal for a first offence in the respondent's registered Code of Conduct. The Code was registered by the Registrar of Labour Relations on 3 February 2003.

Sometime in 2015 the respondent commenced an exercise to conduct a lifestyle audit for members of staff. This was designed to fight the scourge of corruption bedevilling the organisation, creating a bad image and undermining public confidence in the revenue collecting institution. The lifestyle audit was being undertaken by the respondent's Loss Control Division. The appellant is one of the staff members affected by the exercise.

A bank search resulted in the unearthing of a Stanbic Bank account in the name of the appellant in which regular deposits in varying amounts were made by different people. Between August and October 2015, 12 separate deposits with a total amount of US\$57 598.30 had been deposited in that account attracting the attention of Loss Control Officers. Upon being questioned about the money, the appellant gave an explanation in affidavit form.

He stated that the money constituted repayments of loans he had advanced to other people, payments for goods sold to some people and bribes received for undervaluing certain declared goods as well as avoidance of seizure of goods as required by the respondent's procedures. The appellant later recanted that affidavit statement insisting it had been made under duress as he was intimidated by Loss Control Officers.

Previously, on 25 October 2011 the appellant had, in accordance with his contractual obligations, completed an asset declaration form in which he declared only household effects as assets

that he owned. On 11 June 2013, the appellant completed another Asset Declaration Form in which he declared a Honda CRV motor vehicle he had acquired in June 2012 and an FBC Bank account opened in 2011.

On 22 January 2014 the appellant again completed an asset declaration form in which he declared a Toyota Mark X motor vehicle acquired on 5 January 2014. Finally, on 23 October 2015 he completed an asset declaration form which formed the basis of the misconduct charge preferred against him. In that form the appellant repeated the declaration of the Toyota Marks X declared on 22 January 2014 and the FBC Savings account opened in August 2011 with a bank balance of \$100.00. The bank account had also been declared previously on 11 June 2013.

As I have said, investigations by the respondent revealed that at the time the appellant made the asset declaration of 23 October 2015, he had a pre-existing Stanbic savings bank account which had an inflow of deposits. It had a balance of US\$57 598.30. He had converted that account to a savings account by letter to the bank manager dated 8 July 2015. The appellant failed to declare that asset in the declaration form.

On 31 March 2016 the appellant was suspended from duty without pay and benefits in terms of Clause 10.1(ii) of the respondent's Code of Conduct. He was charged under the Code of Conduct, Group D, Serious Offences, Category 26, that is, deliberate misrepresentation of facts in the declaration of assets.

The Disciplinary Committee found that the appellant had indeed completed the asset declaration form in question which did not have the Stanbic account and the money declared. It found that there is no form signed by the appellant in which that asset was declared even though the account

had been converted to a savings account on 8 July 2015. Accordingly the appellant was found guilty and dismissed from employment.

The appellant appealed to the Appeals Committee which upheld the decision of the Disciplinary Committee. The Appeals Committee reiterated that the asset declaration form required employees to give a correct record of all the assets, investments and businesses owned fully or jointly by them. The appellant had failed to do so and was therefore correctly found guilty and dismissed from employment.

Again the appellant was aggrieved. He lodged an appeal to the Court *a quo* on several grounds. The essence of his appeal was that he had submitted a separate asset declaration form to the respondent's Human Resources Department in which he had declared the asset held in the Stanbic savings account. That declaration form had gone missing in that department. Both the Disciplinary and Appeals Committees had made "an unreasonable and outrageous finding of fact" that no declaration had been made because the respondent's filing system was in a state of a shambles.

The Court *a quo* found that nothing had been advanced by the appellant justifying interference with the factual findings of the tribunal below and that the Stanbic account had not been declared by the appellant. It found that there was no basis for interference because there was nothing on record pointing to the fact that the appellant ever made a separate declaration of the bank balance and no date of such a declaration was suggested.

In arriving at that conclusion the Court *a quo* reasoned at p2 of the cyclostyled judgment:

"The appellant did not declare everything. The affidavit in question was made voluntarily and without any undue influence being brought to bear on the appellant. There is therefore no reason why the bank account in question was not declared. In the result the respondent's appeals committee was correct to have found that the offence against the appellant had been proved on

a balance of probabilities. It upheld the dismissal. In *Barros v Chimpondah* 1991(1)ZLR 58(S) the Supreme Court stated that a decision from a lower tribunal should only be interfered with if it is plainly wrong.

I am not able to say the decision of the Appeals Committee is ‘plainly wrong’. I also find that the Appeals Committee considered all the evidence before it, before coming to its conclusion.”

Still the appellant was not satisfied. He appealed to this Court on the grounds that follow.

GROUNDS OF APPEAL

Three grounds of appeal are relied upon by the appellant. They are:

1. The court *a quo* grossly erred and misdirected itself by dismissing the appellant’s appeal on the basis that the appellant failed to prove he had submitted the declaration form and that he had declared all assets when evidence on record showed that the respondent’s system of submitting the declaration forms had no records and/or registers of submission and had no clarity on how the forms ought to be filled which defect was conceded by the respondent.
2. The court *a quo* grossly erred and misdirected itself by dismissing the appellant’s appeal and thus allowing the respondent to benefit from its own wrong emanating from its shambolic declaration of assets system, which it charged the appellant for failure to comply with and which system it had to adjust and amend after the appellant’s disciplinary hearing.
3. The court *a quo* grossly erred and misdirected itself in making a finding that the respondent had proved the guilt of the appellant on a balance of probabilities as the system of submitting asset declaration forms was in shambles and had no certainty such as to prove someone submitted or did not submit a form.

I have to point out that the first ground of appeal does not raise a point of law at all. In terms of s 92F of the Labour Act [*Chapter 28.01*], in terms of which this appeal is made, an appeal to this Court from any decision of the Labour Court lies on a question of law only. The point was

made in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 220 E-F that the phrase ‘question of law’:

“First it means ‘a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what it considers to be the truth and justice of the matter’. Second, it means ‘a question as to what the law is.’ Thus an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.

I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this.”

The first ground of appeal clearly addresses factual issues and not any question of law. It falls far too short of the requirements. There is no basis for this Court to exercise jurisdiction over the issue raised in that ground which fails to raise any question of law. See *Hlahla v Ok Zimbabwe* SC 64/04. The first ground of appeal will not be entertained because it has not been suggested nor shown that the factual findings of the lower court being contested were grossly unreasonable. Neither has it been suggested nor shown that there was such serious misdirection as to amount to a misdirection of law. It is only in such circumstances that this Court would have a foothold for interference.

As eminently articulated by this Court, with considerable eloquence, in *Mazunze v Lobels Brothers* SC 96/02 at p 2 of the cyclostyled judgment:

“This was quite clearly a finding of fact. I agree with Mr Ncube, for the respondent, that it cannot be appealed against in terms of s 92(2) of the Act unless it was accompanied by a serious misdirection amounting to a misdirection in law or the decision was so outrageous in its defiance of logic that no reasonable court properly applying its mind could have come to it. The notice of appeal contains no allegation of such a misdirection in law or irrationality by the tribunal. It raises no question of law and is, therefore fatally defective and void.”

See also *Zinwa v Mwoyounotsva* 2015 (1)ZLR 935 (S); *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S) at 670C-D.

The same applies to the first ground of appeal in the present appeal. In fact, even the second ground could have been crafted in a more elegant manner because it also does not contain a proper allegation of a misdirection at law or the irrationality of the decision of the court *a quo*. As I said, this Court will not exercise jurisdiction over the first ground of appeal as it is fatally defective. That ground therefore stands to be struck out. It is accordingly struck out.

ISSUE FOR DETERMINATION

Emanating from the remaining grounds of appeal is only one issue for determination on appeal: whether the court *a quo* erred in finding that the guilt of the appellant had been proved on a balance of probabilities.

SUBMISSIONS ON APPEAL

Mr *Mapuranga*, for the appellant, submitted that the appellant completed a separate asset declaration form in which he declared the asset contained in the Stanbic savings account. The form in question was given to the respondent's Human Resources Department on an unknown date, two weeks prior to the submission of the declaration form of 23 October 2015. The form in question was misplaced by that department.

As to why it became necessary, if indeed the appellant had made a declaration two weeks earlier, for him to make another one on 23 October 2015, Mr *Mapuranga* could not say. On why the appellant did not include the Stanbic account in the declaration form of 23 October 2015 if he had included it in the missing declaration form, Mr *Mapuranga* submitted that the appellant understood the procedure for declaring assets to mean that each declaration form was an update of new assets

acquired. According to him, it was not necessary to include the bank asset in the new form of 23 October 2015 as it had already been declared.

As to what it is that is in the declaration form of 23 October 2015 which was an update, Mr *Mapuranga* could not say. This is so because the declaration form in question contains only a Toyota Marks X motor vehicle which had already been declared in the form dated 22 January 2014. It also contained the FBC savings account which had already been declared in the form of 11 June 2013.

Mr *Mapuranga* maintained that the failure to declare the Stanbic bank account was as a result of a misunderstanding which does not constitute an act of misconduct. It cannot be said that the account was not declared because the respondent did not keep a register of the declaration forms. In fact it's record keeping was shambolic.

Mr *Bhebhe*, who appeared for the respondent, submitted that the charge of deliberately misrepresenting facts in the declaration form of 23 October 2015 was proved. In proving the charge, all the employer had to do was to show that the declaration form made by the employee did not have the correct information pertaining to his assets. That was done.

According to Mr *Bhebhe*, the simple question to be asked is: Was all the appellant's property listed in the declaration form in question? If it was not, then the charge would be proved. He maintained that the declaration form is very clear and there is nowhere in it where it calls for an update. All the assets of the employee must be listed. Accordingly, all the evidence presented points to a deliberate non-disclosure of the Stanbic bank account which, admittedly, was opened in July 2014.

ANALYSIS

It is crucial to note from the onset that the declaration of assets by the appellant employee was a contractual obligation. This is made clear by Clause 16 of the employment letter dated 27 August 2013 signed by the parties. It states in part:

“You will be required to declare any newly acquired assets which will be verified by the authority. Failure to declare assets or making false declaration amounts to an act of misconduct.”

I have said that the employment code of conduct of the respondent also lists “deliberate misrepresentation of facts in the declaration of assets” as a dismissible serious misconduct. It is therefore apparent that in the employment relationship between the parties the declaration of assets is viewed in serious light. It has to be, given the commitment by the respondent to stamp out corruption among its employees. Lifestyle audits play a crucial part in that process.

The asset declaration form itself is couched in such a way that, not only does it contain specific instructions on what has to be declared by the employee, it also admits of no doubt whatsoever that all the employee’s assets must be listed on the declaration form. The one that the appellant completed on 23 October 2015 has a preamble which reads:

“I Dambanjera Admire of Block 79/2413 Mpopoma Bulawayo hereby declare that today 23 day of October 2015 have the following movable and immovable properties whose detailed description is also supplied.”

The appellant was required to submit a list of all his assets. There is absolutely nothing to suggest that each declaration form completed required the employee to list only new assets not declared previously. It does not end there. The concluding part of the declaration reads:

“I solemnly declare that the information I have given above is a correct record of all the assets, investments and businesses owned fully or jointly by me.”

I also declare and promise to disclose for purposes of updating this record, any immovable and/or movable assets, investments and businesses that may accrue to me during my employment with ZIMRA.

I have signed this form out of my own will without any undue influence.” (The underlining is for emphasis).

The appellant never suggested that he did not read and understand the instructions on the declaration form. He is taken to have appreciated what he was required to put in the form. The suggestion that he was declaring his assets in instalments, in separate forms, also does not hold water. This is so because in the form giving rise to the misconduct charge, he declared both the Toyota Marks X motor vehicle and the FBC Bank accounts he had previously declared. This shows that he was aware that all his assets had to be listed on each and every form submitted.

I agree with Mr *Bhebhe* for the respondent that all the evidence presented suggests only one thing, that the appellant deliberately omitted the Stanbic Bank Savings account. The omission is significant because a substantial amount was involved which should not have escaped the appellant's mind when making the declaration. This is an employee who had the presence of mind to declare an FBC account containing \$100.00. Surely, had he been acting in good faith he would have declared US\$57 598.30.

It may have been the paucity of the defence that declaration forms were understood by the appellant to require only updates, that constrained Mr *Mapuranga* to advance another argument. This relates to the claim that a separate form containing a declaration of the Stanbic Bank account was submitted but misplaced by the Human Resources Department.

I am of the view that the argument is also devoid of merit. Firstly, I have found that each declaration form, in particular the one dated 23 October 2015, was a complete instruction to be

complied with, for the declaration of all the assets. A failure to declare the Stanbic bank account in the declaration form of 23 October 2015 was a misconduct, irrespective of the existence or otherwise of another declaration form.

Secondly, there is no possibility that such a separate declaration form existed at all. There are a number of reasons why this is so. The record shows that there were only four employees manning the Human Resources Department at the time. If indeed the appellant had submitted an extra declaration form, almost contemporaneously with the one giving rise to the misconduct charge, he would have remembered both the date of submission and the person he submitted it to.

Considering that a declaration form was submitted on 23 October 2015, there was no reason for submitting another one around the same time. Quite frankly, the appellant tried to take advantage of the fact that records are kept by the Human Resources Department to build a non-existent case. The whole issue about a missing declaration form is a red herring.

DISPOSITION

The court *a quo* cannot be faulted for upholding the employer's decision to find the appellant guilty of misconduct and dismissing him from employment. Its finding that the appellant's guilt was proved on a balance of probabilities was based on sound reason. The appeal is without merit and ought to fail.

Regarding the issue of costs, in his heads of argument, Mr *Bhebhe*, for the respondent, asked for costs on the scale of legal practitioner and client because the appeal is frivolous and was noted "*mala fide*." He did not advance any further reasons for holding that view. More importantly, at the hearing of the appeal, Mr *Bhebhe* did not motivate the prayer for costs on the adverse scale. I

am not persuaded that punitive costs are warranted in this matter. The appellant was entitled to test the correctness of the judgment of the court *a quo*. However, there is no reason why the costs should not follow the result given that the appeal is without merit.

In the result, it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall bear the costs.

GARWE JA I agree.

GUVAVA JA I agree.

Atukwa Attorneys, appellant's legal practitioners.

Kantor & Immerman, respondent's legal practitioners.