

DISTRIBUTABLE (13)

UNIFREIGHT LIMITED
v
LIGHTON MADEMBO

SUPREME COURT OF ZIMBABWE
GOWORA JA; GUVAVA JA & MAVANGIRA JA
HARARE: 31 JULY, 2015

A. Rukawo, for the appellant

N.S. Chidzanga, for the respondent

GUVAVA JA: This is an appeal against a decision of the Labour Court judgment number LC/H/122/2012 dated 17 August 2012. After hearing arguments from both counsel the appeal was dismissed with costs. It was indicated that the reasons for this decision would follow in due course. These are they.

The brief facts which gave rise to this matter may be summarized as follows:

The respondent was employed by the appellant as a truck driver. His duties included delivering bulk fuel to various service stations. On 8 September 2010 the respondent made a delivery to Cargill Chegutu. Upon arrival at the premises he had a physical altercation with a local tout. The manager of Cargill reported the incident to the police and the tout was arrested. Upon being interviewed by the police, the tout made a statement claiming that on a previous occasion,

the respondent stopped at an off-route location and offered to sell two “containers” of diesel to the tout for \$60.00. The tout offered to pay \$30.00 which the respondent rejected. The respondent denied the allegation and stated that he had in fact been robbed of a container of diesel by the tout.

When the appellant was informed by the police on the allegations made by the tout it suspended the respondent from 15 September 2010 with pay until Monday 20 September 2010 whilst conducting investigations into the matter. On 18 September 2010, the Contracts Supervisor wrote a report of the incident to the Personnel Manager of the appellant indicating that a report against the conduct of the respondent had been filed by Total Zimbabwe who is a customer of the appellant and to whom Cargill Chegutu is a client. The Contracts Supervisor, on the basis of this report, requested that the personnel department arrange for the respondent to be charged with misconduct arising from the incident.

Following the above report the respondent was charged with the following acts of misconduct:

1. Contravening Part III Section 3.3.5 as read with Part VII 7.3 Subsection 7.33 (d) of the Unifreight Group Code, that is, violent and disorderly behaviour.
2. Contravening Part III Section 3.3.5 (ix) as read with Part VII, Section 7.4 subsection 7.4.4 (d) of the same Code of Conduct, that is any act or attempted act of dishonesty against the company or any of its customers whether a criminal conviction is pursued or not.

The respondent was summoned to attend a disciplinary hearing scheduled to be held on 24 September 2010. The letter advised the respondent that he had the right to be represented by a workers committee member or fellow worker at the proceedings.

At the hearing the respondent denied the charges and explained that on 25 August 2010 the tout had approached him and asked to buy fuel from him. He advised the tout that he did not sell fuel and he should buy it from a service station. He went on to ask this individual where he could buy affordable potatoes and he was directed to a place a few kilometres outside Chegutu. He admits that he went off route in search of these potatoes. When he pulled off the road, he crossed the road to buy the potatoes. As he was buying the potatoes he noticed a small truck with four men in it parked behind his truck. He stated that some of them disappeared behind his truck. He crossed over to investigate and realized that they were syphoning diesel from his truck. He stated that a scuffle ensued but the men got away with some fuel. The respondent admitted that he did not report this incident as he reasoned that the fuel syphoned was negligible. The respondent explained that when he made the delivery on 8 September 2010 he recognized the tout as one of the four men involved in the incident of 25 August, 2010 and he decided to confront him.

The disciplinary committee disbelieved the respondent and found him guilty as charged. It reasoned as follows:

1. He failed to report the incident of 25 August 2010 which was found to be tantamount to contributing to fuel loss and or theft;
2. The company suffered substantial prejudice by loss of business as a result of his violent and disorderly behavior as it lost the contract with Cargill.
3. The respondent did not appear to show any remorse.

The disciplinary committee decided that the appropriate penalty was to dismiss the respondent as a deterrent to any other would be perpetrators in their employ. He was dismissed

with immediate effect on 24 September 2010. The respondent appealed this decision to the Executive Director of Personnel and Training on 28 September 2010. In his appeal he submitted that he was under the assumption that the hearing was merely a discussion and not a formal hearing. He stated that he queried why there were no representatives from the workers committee present during the hearing in accordance with their code. He informed the appeals committee that when he queried the anomaly he was advised that it was simply a discussion not a hearing. He stated that he was therefore surprised to receive a letter of termination of employment.

The Executive Director of Personnel and Training analyzed the appeal and concluded that the determination of the committee could not be faulted. As to composition of the committee it was brought to his attention that the Works Council minutes of 23 September 2010 discussed the threat by the Logistics Workers Committee to boycott all disciplinary hearings on allegations that the employer was perpetually inclined to dismiss employees. This difficulty remained ongoing at the time the respondent's hearing was held and the employer made the decision to proceed with hearings and not be held to ransom by the Workers Committee. The Executive Director also took into account that the respondent was informed of this predicament at the hearing and that he gave his consent to proceed. It was also noted that the letter calling the respondent to the hearing advised him that he would be well within his rights to attend with any other worker if he was so inclined. He was also advised that he could seek legal representation. Having taken note of all these factors the appeal was dismissed on 7 October 2010.

Dissatisfied with the result, the respondent appealed to the Labour Court alleging gross procedural irregularities which he believed should result in the setting aside of the decision of the disciplinary hearings. He argued that:

1. The employer failed to produce the record of proceedings
2. That there was no evidence to support claims of the boycott members of the Workers Committee as alleged by the Executive Director, neither was there evidence to show that members of the Workers Committee were notified and invited to attend which invitation they declined
3. In the absence of a representative of the Workers Committee the hearing was not properly constituted
4. The hearing was not properly constituted as the Chairman was also the complainant and also served as the minute taker.

The court *a quo* in its judgment was dissatisfied with the failure by the disciplinary committee to transcribe proper minutes and the double role performed by the Chairman which it held compromised his impartiality as he had to be both complainant and adjudicator. On this basis the court *a quo* ordered the remittal of the matter to be heard *de novo* by the disciplinary committee in a procedurally correct manner within thirty days of the order and, pending such hearing the respondent was to revert to “suspension with pay” basis.

The appellant was aggrieved by the judgment of the court *a quo* and appealed against its decision on the following grounds:

1. The Labour Court grossly misdirected itself on the facts in finding that there were gross procedural irregularities in the disciplinary proceedings
2. The Labour Court erred in finding that by doubling up as complainant and Chairman, the impartiality of the Chairman became compromised when in fact the Chairman was never the complainant
3. The Labour Court erred in finding that members of the disciplinary committee were also the investigating officials
4. The Labour Court erred in finding that the Chairman's assumption of the role of secretary was an irregularity in procedure nullifying the disciplinary hearing
5. The Labour Court grossly misdirected itself in ruling that there was an irregularity in procedure because the workers representatives had not been asked to provide a secretary at the hearing when in fact the workers representatives had boycotted the disciplinary hearing

In my view it is apparent from the above grounds of appeal that this appeal turns on one issue; that is, whether the procedural irregularities in the disciplinary hearing are so serious as to warrant the setting aside of the determination of the hearing committee.

It cannot be denied that there were some irregularities during the disciplinary hearing. This is indeed accepted by the appellant. Although it is trite that not all irregularities result in the vitiating of disciplinary proceedings it must be shown that the irregularities resulted in prejudice. This point was well articulated in the case of *Nyahuma v Barclays Bank of Zimbabwe* SC 67/05 wherein the court held as follows:

“...it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity it must be shown that the party concerned was prejudiced by the irregularity.”

In *casu*, it appears most of the procedural dictates of the Code governing the employment relationship between the parties were disregarded. There was a blatant disregard of the most basic of procedural requirements. No accurate minutes of the disciplinary hearing were kept by the appellant. The committee comprised of only two disciplinary officers, one of whom was the chairman and also posed questions raising the employers concerns. In essence, the Chairman’s role went beyond that of an inquisitorial authority and became a party to the proceedings.

It is important to note that the Code that regulates the conduct between employer and employee operates as a contractual obligation which they both willingly entered into and is therefore binding. One of the parties cannot therefore arbitrarily, and to the prejudice of the other, decide not to comply with certain dictates of that contract.

The double role undertaken by the Chairman as both chairman and complainant was in my view wholly inappropriate and not in line with the principles of natural justice. His impartiality could in these circumstances not be guaranteed. This is clearly apparent when one has regard to the accepted test for bias. The case of *City and Suburban Transport (Pvt) Ltd v Local Board Road Transportation Johannesburg* 1932 WLD 100 sets out clearly the test for bias. It was held that:

“the test [for bias] appears to be whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased.” [My emphasis]

This case makes it clear that the conduct of the appellant, in convening a hearing, must be transparent. Any reasonable person faced with the above facts would suspect that the chairman was biased. *In casu* the duplication of roles creates doubt with regard to impartiality in anyone’s mind and therefore a reasonable man could not find such an arrangement free from bias. The case of *Musarira v Anglo American Corporation* SC 53/05 states that once a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. The Chairman cannot therefore operate in an employer appointed role and remain impartial as the adjudicator in the hearing.

The Code mandates that a representative of the Workers Committee be present at all hearings, for substantive and procedural fairness, a disciplinary hearing ought to be properly constituted. In the case of *Madzitauswa v ZFC Ltd & Anor* SC 73/15, GOWORA JA stated that:

“The definition of disciplinary committee clearly envisages a body in which both the employer and the employees are represented ...

In any event, this court has time after time emphasised the need for flexibility in the conduct of disciplinary proceedings in which the overriding principle is that disciplinary tribunals must conduct an enquiry. The rules of natural justice require no more than that the domestic tribunal acts according to common sense precepts of fairness. See *Dulys Holdings v Chanaiwa* 2007 (2) ZLR 1 at 6A-B.” [My emphasis]

A disciplinary committee must be comprised of representatives of the employer and the employees. This was not the case during the respondent’s hearing. This case also recognizes that certain liberties can be taken in conducting hearings. However, such flexibility must not operate against the rights of the employee to a fair and procedurally just hearing. (See also

Chataira v ZESA HH9/2000). In my view, the facts of this case show that the respondent was clearly prejudiced by the irregularities.

The appellant also invited this Court to set aside the decision of the court *a quo*, which was based on findings of fact. It is trite that for an appellate court to interfere with the judgment of a court *a quo* based on factual findings gross misdirection must be alleged and established. The case of *Hama v National Railways of Zimbabwe* 1996(1) ZLR 664 (S) states in this regard as follows:

“In other words, the decision must have been irrational, in the sense of being outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion.” [My emphasis]

This cannot be said of the decision of the court *a quo*. It cannot be said that the court *a quo* erred. In fact, the court *a quo* correctly applied the principles in *Dalny Mine v Banda* 1999(1) ZLR 220 which states that:

“As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:

- (a) by remitting the matter for hearing *de novo* and in a procedurally correct manner;
- (b) by the Tribunal hearing the evidence *de novo*.”

It is the finding of this Court that the court *a quo* therefore correctly remitted the appeal back to the disciplinary committee.

Accordingly it was for the above reasons that the court found against the appellant.

GOWORA JA: I agree

MAVANGIRA JA: I agree

Gwaunza & Mapota, appellant's legal practitioners

Mangwana & Partners, respondent's legal practitioners