REPORTABLE (43)

EMMA KUNDISHORA
v
ZIMBABWE RED CROSS SOCIETY

SUPREME COURT OF ZIMBABWE
HLATSHAWO JA, MAKONI JA & BERE JA
HARARE: OCTOBER 2, 2018 & MARCH 13, 2020

T. Zhuwarara, for the appellant
C. Damiso, for the respondent

MAKONI JA: This is an appeal against part of the judgment of the Labour Court setting aside an arbitral award in terms of which the respondent was ordered to pay the appellant the sum of US$ 17 500.00.

THE BACKGROUND

The appellant was employed by the respondent as a Secretary General. On 2 June 2012, the National Governing Council (the Council) of the respondent held a meeting in which council members expressed concerns regarding the performance, by the appellant, of her work. As a result, it was recommended that the appellant be suspended from work pending investigations into her conduct or alternatively that she be given the option to resign. The appellant elected to resign and did so by letter dated 3 June 2012. On the same date the

resignation was acknowledged, in writing, by the respondent's Acting President. The following was set out in the letter;

> "The board resolved that in the event of you resigning instead of a suspension with pay that you will be entitled to all your benefits.
> Outlined hereunder are all your benefits
> Leave days accrued
> Gratuity
> One month's notice salary
> Toyota Prado registration number ABH3278 that you have been using
> Phone handset
> Laptop you are currently using"

On 6 June 2012, the Honorary Treasurer of the respondent, one Mr Gotora, who was tasked with overseeing the handover takeover process between the appellant and the new office bearer, wrote a letter to the appellant stating that the respondent was to meet the costs related to the change of ownership of the vehicle. As a result, the appellant made a claim of US$ 17 500.00 being the residual duty payable to ZIMRA upon the disposal of the vehicle by the respondent that is the cost of the change of ownership.

On 2 March 2013, the council convened a meeting to deliberate on the appellant's claim. Mr Gotora was reprimanded for generating the communication as he had no authority to do so. It was stated that considering the level of the employee in issue, communication was to be done by either the President or the Secretary General.

On 5 March 2013, Mr Gotora wrote a letter to the Acting President and copied same to the appellant, retracting the statement that he had made regarding the respondent meeting the change of ownership costs for the motor vehicle. He also conceded that he had acted without the mandate of the Board.

Following the retraction, the appellant referred the matter to a Labour Officer claiming the sum of US$ 17 500.00 from the respondent. Conciliation failed and the matter was referred to an arbitrator who ordered the respondent to honour the undertaking made on its behalf by the Honorary Treasurer. The arbitrator held that the Honorary Treasurer's undertaking remained valid and binding on the respondent. He referred to the case of *Royal British Bank v Turquand* (1856) 6 E & B 327, ER 886 and reasoned that the appellant was not supposed to know the legitimacy of the undertaking made by the Honorary Treasurer on behalf of the respondent. As such, the Honorary Treasurer bound the respondent.

Aggrieved by the arbitral award, the respondent appealed to the Labour Court. It challenged the decision of the arbitrator on the basis that the communication, in issue, had been made without the approval of the board, and that in any event, the communication had been retracted and could not be given effect to. The respondent further argued that there was no basis for the arbitrator to rely on the letter by Mr Gotora as it could not give benefits not outlined in the initial letter by the Acting President wherein all the benefits due to the appellant had been expressly stipulated. Further to that, the practice was that employees who received such a benefit would meet their own costs of transfer.

The respondent also expressed the view that the *Turquand* rule was inapplicable because the appellant knew or ought to have reasonably known that the Honorary Treasurer was not an executive member and could not make binding decisions on behalf of the respondent. The respondent also averred that, should the amount be due, it was payable to the Commissioner or ZIMRA and not to the appellant. The respondent also contended that the arbitrator had cast upon it an obligation cast by law on a transferee of property.

The appellant opposed the appeal. She contended that the respondent sought to interfere with the findings of fact made by the arbitrator. She argued that the arbitrator correctly found that the undertaking was never retracted and remained valid. The appellant further contended that the undertaking to pay the transfer costs was an employment benefit and as such, arguments on the law of transfer or taxation were irrelevant.

DETERMINATION OF THE COURT *A QUO*

The court *a quo* found that the appellant was not entitled to the transfer costs of the motor vehicle. It held that the communication by the Honorary Treasurer could not bind the respondent. It found that the *turquand rule* was inapplicable and neither could it be said that Mr Gotora had ostensible authority to bind the respondent. The court reasoned that the appellant was not some innocent third party but occupied the highest post in the respondent and was aware or ought to have been aware of the authoritative communications in the organisation. The court further explained that even if it was to be assumed that Mr Gotora was acting under delegated authority, there was no evidence of such delegation. In any event Mr Gotora had also confirmed that he had made the communication without the required authority.

The court also noted that the letter of 3 June 2012 by the Acting President, which set out all the benefits the appellant was to get, made no mention of transfer costs. As such, Mr Gotora's letter could not be read to vary or supplement the package already offered to the respondent by the Board and properly transmitted to the respondent by the Acting President. The court further held that the transfer costs were payable to the Zimbabwe Revenue Authority and not the respondent. It also found that there was no law that precluded parties to deviate from the provisions of the Customs and Excise Act [*Chapter* 23:02] by paying another's transfer costs since what the law requires is that the transfer costs be paid.

The appellant, dissatisfied with the outcome, launched the present appeal based on the following grounds:

GROUNDS OF APPEAL

1. That the court *a quo* erred in granting the respondent's appeal as regards the award of US$ 17 500.00 and thus upsetting, without legal basis, the arbitrator's factual finding that the evidence furnished by the respondent to prove the Treasurer's lack of authority was stage-managed.
2. That the court *a quo* grossly erred in interfering with the arbitrators discretion to award the appellant US$ 17 500.00 as evidence placed before him showed that there was never any valid retraction on the respondent's commitment to pay the US$ 17 500.00.
3. That the court *a quo* grossly erred in granting the respondent's appeal with respect to award of US$ 17 500.00 as the finding by the arbitrator that the undertaking to meet the costs of transfer was validly made cannot be faulted given that the respondent accepted provisions in the letter of undertaking by the Honorary Treasurer.
4. That the court *a quo* grossly erred in granting the respondent's appeal with respect to the award of US$ 17 500.00 as it erroneously made a finding that the mention of ZINARA cost instead of transfer costs in the letter of retraction by the Honorary Treasurer was an error by the respondent when no such evidence of a mistake or error was alleged or argued before it by the respondent of any of the parties.
5. That the court *a quo* erred by making a finding that the US$ 17 500.00 should have been paid to the Zimbabwe Revenue Authority and not to the appellant when such issue was not properly before the court *a quo* in terms of the grounds of

appeal that were before it and when such issue did not affect the appellant's eventual entitlement to the benefit.

SUBMISSIONS IN THIS COURT

At the hearing of the appeal, counsel for the respondent, Ms *Damiso*, raised a point *in limine* to the effect that the appeal was invalid for the reason that the appellant's notice of appeal reflected that the appeal was against part of the judgment of the court *a quo* when essentially the appeal is against the entire judgment. She moved that the appeal be struck off the roll with costs.

On the other hand, Mr *Zhuwarara* for the respondent submitted that there was a concession made in the court *a quo* regarding the pension issue. Therefore, the appeal before the court *a quo* succeeded in part. The appellant was therefore appealing against the one part regarding the claim of US$ 17 500-00.

The point was conceded by Ms *Damiso*. As a result, by consent, the point *in limine* was dismissed.

I now turn to the arguments of the parties on the merits.

Mr *Zhuwarara* made the following submissions. The court *a quo* dealt with the matter afresh and re-assessed the evidence and made its own determination. The court *a quo*, in setting aside the arbitral award, upset the arbitrator's factual findings. In particular, the arbitrator's finding that the treasurer had the authority to make the communication as the treasurer's lack of authority was stage-managed. The arbitrator's finding could only be upset on the basis of gross unreasonableness. Once the arbitrator held that the *turquand* rule applied

in the circumstances of the matter, the court *a quo* was not at liberty to re-hear the matter but to assess whether the factual findings of the arbitrator were grossly unreasonable. This does not feature anywhere in the judgment of the court *a quo*.

In considering the *turquand rule* the court *a quo* ignored one fundamental aspect that the employer communicated through its honorary treasurer. Thereafter the organisation was silent for a year. It then retracted the offer after a meeting where the appellant did not attend. The respondent allowed the appellant to have no doubt that the transfer costs would be met by the respondent. The *turquand* rule was designed to protect the appellant in the circumstances. The appellant was now an outsider on the basis of her resignation. Her ability to relate to the internal mechanism had been cut.

Ms *Damiso* on the other hand contended that there were no factual issues which arose in the appeal before the court *a quo*. She argued that the full list of benefits due to the appellant were approved by the board and communicated by the Acting President. These benefits did not include transfer costs of the motor vehicle. She also contended that the court *a quo* properly identified the issue for consideration as to whether the *turquand* rule was applicable in the circumstances of the case. Ms *Damiso* further submitted that a person in the position of the appellant could not claim the benefits of the *turquand* rule since the appellant knew how the respondent was run. Had the benefits been revised, the Acting President, being the person who had communicated the benefits, was the one to communicate the change in those benefits.

ISSUES FOR DETERMINATION

From the grounds of appeal and the submissions above two issues fall for determination and these are;

1. Whether or not the court *a quo*'s finding that the Honorary Treasurer lacked authority to make the undertaking unduly interfered with the arbitrator's factual findings.
2. Whether the undertaking made by the treasurer is binding on the respondent by virtue of the provisions of the *turquand* rule.

THE LAW

It is settled law that an appellate court can only interfere with the findings of fact made by a lower court in exceptional circumstances. In *Hama vs National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670, KORSAH JA remarked:

> "The general rule of the law as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. …"

In *Susan Rich v Jack Rich* SC 16/01, EBRAHIM JA cited with approval the remarks in Hoffman and Zeffert: The South African Law of Evidence, 4th ed, at p 489, that:

> "There are no rules of law which define circumstances in which a finding of fact may be reversed, but as a matter of common sense the appellate court must recognize that the trial court was in some respects better situated to make such findings. In particular, the trial court was able to observe the demeanor of the witnesses, and courts of appeal are therefore very reluctant to disturb findings which depend upon credibility. The appeal court has rather more latitude in criticizing the reasons which the court *a quo* has given for its decision. The reasons given for accepting certain evidence may be unsatisfactory, e.g. they may involve a clear *non sequitur*. Alternatively, it may be plain from the record that the reasons are based upon a false premise, e.g. a mistake of fact, or that the trial judge has ignored some fact which is clearly relevant. Errors of this kind are generally referred to as misdirections of fact. Where there has been no misdirection of fact by the trial court, the appeal court will only reverse it when it is convinced that it is wrong." (Own emphasis)

In *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01, at pp 5 to 6 of the cyclostyled judgment, the court held that if an appeal is to be related to the facts,

"there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. 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."

In *Zvokusekwa v Bikita Rural District Council SC 44/15* this Court clarified this obvious but often misunderstood position. It said;

"[20] It is correct, as submitted by the appellant, that an appeal to this Court must be based on a point of law. What constitutes a point of law has been stated and restated in a number of decisions of this Court. See for example *Muzuva v Limited Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S)*; Hama v NRZ* 1996 (1) ZLR 664*; RBZ v Granger & Anor* SC 34/01.

[21] It is also correct that in *RBZ v Granger & Anor (supra),* this Court stated that if an appeal is to be related to the facts, "there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who has applied his mind to the facts would have arrived at such a decision. 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."

[22] In my view, the remarks made in Granger's case (*supra)* need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. If it is clear that an appellant is criticising a finding by an inferior court on the basis that such finding was contrary to the evidence led or was not supported by such evidence, such a ground cannot be said to be improper merely because the words "there has been a misdirection on the facts which is so unreasonable that no sensible person … would have arrived at such a decision" have not been added thereto. If it is evident that the gravamen is that an inferior court mistook the facts and consequently reached a wrong conclusion, such an attack would clearly raise an issue of law and the failure to include the words referred to above would not render such an appeal defective. After all, there is no magic in the above stated phrase and very often the words are simply regurgitated without any issue of law being raised. See, for example the case of *Sable Chemical Industries v David Peter Easterbrook* SC 18/10 where it was noted that the words "erred on a question of law" are sometimes included in grounds of appeal but without any question of law actually being raised."

See also *Kukwenge v Clan Transport Co* 2001 (1) ZLR 199 (S) and *Mutsuta and Another v Cagar (Pvt) Ltd* 2009 (2) ZLR p 327 (S).

APPLICATION OF THE LAW TO THE FACTS

The court *a quo* properly identified the issue to be determined as follows:

> "The issue that falls for determination in this appeal is whether the honorary treasurer of the appellant had ostensible authority to bind the appellant. In other words, the issue is whether the *Turquand* Rule applies in the circumstances of this matter."

This was an issue of law which the court *a quo* dealt with based, as it is, on facts that are essentially common cause.

In light of the authorities cited above, one can conclude that failure to appreciate a fact at all or a finding of fact contrary to evidence actually presented constitutes a misdirection which warrants interference by an appellate body.

The arbitrator found that the treasurer had authority by virtue of occupation of that post, his attendance in meetings involving important decision making by the respondent, that the authority had been delegated to him by the Acting President and that the letter of retraction was 'stage managed', as it came nine months after the initial letter, in anticipation of a civil suit. These findings were not based on evidence presented before him but were based on suppositions. The fact that someone occupies what he termed an important position in the organisation does not clothe that person with authority to make decisions on behalf on the organisation. No evidence was led to confirm that the Acting president had delegated his functions to the honorary treasurer. His finding regarding the letter of retraction is a clear indication that he did not appreciate that the respondent was run by a board which met when the need arose.

It is my view that the arbitrator's findings, that the treasurer had authority, in light of the evidence presented before him was a misdirection. In making that finding, he

completely ignored the fact that it was not in dispute that "all the benefits" due to the appellant upon her resignation were outlined by the Acting President in a letter dated 3 June 2012 as follows:

- Leave days accrued
- Gratuity
- One-month notice salary
- Toyota Prado, that you have been using
- Phone handset
- Laptop you are currently using.

It is apparent that the benefits did not include the costs of transfer. It is also not in dispute that, the letter by which the Honorary Treasurer stated that the respondent was going to meet the cost relating to change of ownership of the motor vehicle awarded to her was not authorised. This emerged from the meeting of 2 March 2013. The Honorary Treasurer acknowledged that he had no authority to do so and took "full responsibility" of the mistake. Once the statement was duly retracted, its validity and enforceability necessarily fell away. The communication made by the Honorary Treasurer could not bind the respondent neither could it be enforced against it.

Further to that, no board meeting was convened neither is there a resolution on record authorizing Mr Gotora to make the undertaking he made. The subject matter of the communication being a significant financial undertaking by the respondent, it was obligatory for Mr Gotora to obtain the approval of the Board. Further to that, Mr Gotora's letter highlighted that the communication was a "follow up" on the Acting President's letter of 3 June 2013. There was no approval by the Board or the Acting President who had initially

communicated to the appellant nor was there ratification after it had been made. He also rejected the established precedent, that the respondent did not pay for such costs, without any justification Accordingly, it is my view that the decision of the court *a quo* was well founded. The arbitrator's decision was a misdirection in that he made findings, contrary to evidence actually presented.

WHETHER THE UNDERTAKING MADE BY THE TREASURER IS BINDING ON THE RESPONDENT BY VIRTUE OF THE PROVISIONS OF THE *TURQUAND* RULE.

Having found that the undertaking by the honorary treasurer was not binding on the respondent, it is necessary to determine whether the *turquand* rule can aid the appellant's case. I am of the view that it cannot. The arbitrator invoked the principles of the *turquand rule* to show that the respondent was liable to pay the costs of transfer. It is also the appellant's argument that where a person is dealing with another in fair dealing, the *turquand* rule should apply.

In *Mills vs Tanganda Tea Company Ltd* HH12/13, which is almost on all fours with this case, in the following instructive *dictum*, it was stated, at p 53 of cyclostyled judgment.

> "…I do not think that there is any basis for invoking ostensible authority in relation to Beaumont's actions. Firstly, the fact that he was the Group Chief Executive of Meikles Limited does not mean that he had the requisite ostensible authority by virtue of that position to negotiate and conclude severance packages on behalf of respondent. There is nothing in the papers to suggest that he normally exercised that function in that particular capacity…the applicant was not some third party dealing with an agent or employee of the respondent. He was its Managing Director and, given that position, I can see no justification for extending the doctrine of ostensible or apparent authority to the facts of this case."

The *turquand* rule is a company law principle emanating from the old case of *Royal British Bank v Turquand* (1856) 6E & B 327. Simply put the rule states that where a person conducts the affairs of the company in a manner which appears to be perfectly consonant

with the articles of association, those so dealing with him externally are not to be affected by irregularities which may exist in the internal management of the company. The *turquand* rule was aptly captured in the case of *Victoria Falls Steam Train Co (Pvt) Ltd v Wankie Colliery Co Ltd*, HH-03-04, where the court stated the following:

> "The rule in *Royal British Bank v Turquand* (1856) 6 E & B 327, 119 ER 886, which prevents a corporation from relying on non-compliance with its internal procedures to avoid contractual liabilities towards a third party, applies only where the third party was a genuine outsider acting in good faith, and where the transaction was carried out in good faith and was a legitimate one within the powers of the corporation though lacking completeness in terms of the corporation's internal arrangements. The rule does not apply in cases where there has been a forgery, nor should it apply in the analogous case where the transaction has been carried out in deliberate violation of the internal procedures of the corporation." (Emphasis added).

H.S Cilliers and M.L Benade in their book *Company Law, Practitioner's edition* at pp 66-67 state the rationale behind the rule as put across in the *Turquand* case *supra* as follows:

> "For third parties it is an impossible task to investigate all the internal proceedings of a company in order to ascertain whether someone, who could potentially be a representative in terms of the articles, in fact had the necessary authority. He would not find any prohibition of the relevant act-an authority to act subject to compliance with certain formalities but nevertheless a clear authority."

The *turquand rule* has since been codified in our company law as s 12 of the Companies Act [*Chapter 24:03*] which provides that:

> "12. **Presumption of regularity**
>
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving authority title from it shall be estopped from denying their truth-
>
> a) that the company's internal regulations have been complied with;
> b) ……
> c) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned
> d) ……

e) …….
Provided that -
i)
ii) a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if he reasonably ought to know the contrary.
iii) ……..”

From the above cited authorities, it is clear that the *turquand* rule is meant to protect genuine outsiders who deal with a company in good faith, and where the transaction was carried out in good faith and was a legitimate one within the powers of the corporation. *In casu*, the appellant was clearly not some third party dealing with an agent or employee of the respondent but occupied the highest post in the respondent as its Secretary General. As at 6 June 2012, the appellant was still an employee given that her contract terminated on 8 June 2012. She knew how the respondent was run. She had the letter from the Acting President outlining all the benefits approved by the board. She could not have assumed and had no basis for assuming that the board had met again inside the two days to revise the benefits as already offered. Even if it did, the revision would have been communicated by the person who communicated the benefits to her in the first place. In any event, in her position as Secretary General, she must have known that any decision in that regard would require a board resolution from the respondent authorising the Honorary Treasurer to generate the communication to her.

Further to that, the rule does not operate where the transaction has been carried out in deliberate violation of the internal procedures of the corporation. What can be derived from the papers filed of record is that the communication was carried out in breach of the internal procedures of the corporation in that, the Honorary Treasurer had no mandate to generate such communication, which role was the preserve of the Acting President or the Secretary General pursuant to a board meeting. By virtue of this, the binding nature of the communication fell away.

What further militates against the application of the rule is the fact that the Secretary General had actual knowledge or was reasonably expected to know that the internal procedures of the company had not been met. This is so because having worked for the respondent for a period of eleven years, the appellant was well aware of how the internal procedures of the respondent were carried out. It therefore follows that, due to the fact that the Honorary Treasurer had not been given the mandate to make the communication, there is no justification for the application of the *turquand* rule.

I also associate myself with the court *a quo*'s decision that there is no basis for invoking ostensible authority in relation to the Honorary Treasurer actions. Firstly, the fact that he was the Honorary Treasurer did not confer him with the requisite ostensible authority by virtue of that position to make an offer for the payment of the transfer costs on behalf of the respondent without the mandate from the Board to do so. Secondly, there is also nothing on the papers to suggest that he normally exercised that function in that particular capacity. See *Mills supra*.

In light of the above, the court *a quo* cannot be faulted for holding that the appellant was not entitled to the transfer costs as the Honorary Treasurer's undertaking did not bind the respondent. It had no legal effect. Neither the *turquand* rule nor the principle of ostensible authority aid the appellant's case. The appellant has failed to establish a basis for interfering with the decision reached by the court *a quo*. The appeal must fail.

Both parties prayed for costs but the respondent put a rider that "to the extent that the appeal is indubitably vexatious, the court is at large to consider an award of costs on the higher scale." The appeal cannot be described as indubitably vexatious. There is therefore no basis for awarding costs on a higher scale.

In the result, l make the following order:

The appeal be and is hereby dismissed with costs

HLATSHWAYO, JA I agree

BERE, JA I agree

Chambati Mataka & Makonese, appellant's legal practitioners

Coughlan Welsh & Guest, respondent's legal practitioners