

**IN THE LABOUR COURT OF ZIMBABWE
HARARE, 30 SEPTEMBER, 2010
LC/H/265/2010**

**JUDGMENT NO. LC/H/40/2011
CASE NO.**

AND 11 OCTOBER, 2013

In the matter between:-

TOGARA CHIKONZO

-

Appellant

And

DELTA BEVERAGES

-

Respondent

Before The Honourable B.T. Chivizhe: President

For Appellant : Mr. W. Nyika (Legal Practitioners)

For Respondent: Mr. G. Chingoma (Legal Practitioner)

CHIVIZHE, B.T.:

This is an appeal against the determination by the Works Council handed down on 21st May 2010 which determination confirmed an earlier decision by the Disciplinary Committee to dismiss the Appellant from employment.

The background facts are as follows:-

The Appellant was employed by the Respondent as a driver in the Sales and Distribution Department. He was arraigned before the Disciplinary Committee on 23 April 2010 following allegations that he along with his accomplices had on the 2nd of April failed to deliver an assortment of drinks at Bon Marche Avondale. There was a shortfall of 50kg size cases and 30 1 litre crates. The invoice raised however reflected the confirmed delivery from Delta Beverages. It was Respondent case that following on a stock take by

Bon Marche employees the shortfall was discovered. A Bon Marche employee had then advised the Appellant of the discovery. The Appellant on 7th of April 2010 whilst making delivery of another order then corrected the anomaly by delivering the balance of the drinks. During the second delivery of the 7th of April 2011 the Appellant used a gate-pass belonging to a co-worker by the name Guzha. He had also inscribed that name when making the delivery at Bon Marche. Guzha was however not present on the day. The Appellant was found guilty on the charges of breach of Section 1.1 (*that is, theft, fraud or forgery, misappropriation*) and Section 1.3 (*falsifying certificates, personal or company documents of the Delta Beverages*) of the Employment Code of Conduct. The Appellant appealed initially to the Head of Department and when that failed he appealed to the next level that is, the Works Council. The Works Council dismissed the appeal. Still aggrieved by the Works Council decision the Appellant then lodged his appeal with Labour Court.

The Appellant grounds of appeal as reflected in his notice of appeal are as follows:-

1. *The Works Council erred in failing to hold that appellant was authorized to use the gate pass which is the issue at hand.*
2. *The Works Council erred in failing to realize that all what appellant did on the gate pass in issue was a normal practice which had no sinister motive except to advance respondents cause.*
3. *The Works Council erred in upholding a conviction on a charge of fraud, forgery or falsifying Company documents in the absence of clear evidence to sustain such charge as defined in the Delta Beverages code of conduct (2003) .*
4. *The Works Council erred in failing to realize that appellant's actions were designed with the intention of furthering the Respondent's interest and not with the intension to cause harm or prejudice to the respondent.*

I will initially address the last two grounds. The first issue is whether sufficient evidence was laid to find a conviction on the charges of fraud, forgery and falsifying company documents. In my view insufficient evidence

was led to find that the Appellant was personally responsible for the shortfall. The Respondent has placed before the court the evidence of several witnesses. There is a copy of the invoice which the Appellant is supposed to have raised misrepresenting the quantity of products sold to Bon Marche on the 2nd of April 2010. This on its own does not show the Appellant was responsible. If anything from the record it is clear Guzha was responsible for raising the invoice on the day. There is a statement by Kampira, Securico Security Guard who confirms that short quantities delivered. Again the evidence does not point directly to Appellant. There is a statement by Zaraunye a security officer who also confirmed that there was a shortfall on the delivery made on 2nd April, 2010 and that Appellant with his crew delivered the balance on the 7th of April 2010. Again there is no evidence directly linking the shortfall to Appellant personally. The Appellant during disciplinary proceedings raised the issue of some of the witness statements having being made under duress. The Appellant requested that these witnesses be called to give evidence in his case but the request was not addressed by all three tribunals that sat to hear the matter.

There are also statements by Brighton Mhuri and Munaku who were the truck assistants on the 2nd of April 2010 who confirmed they were instructed to offload part of the delivery. The two witnesses however did not point to Appellant as the person directly responsible for the delivery of the short quantities.

The issue of Appellant's use of the gate pass belonging to Guzha on the 7th of April 2010 also took a lot of focus by the Works Council. This was the basis for the charge under Section 1.3 of the Code of Conduct i.e. falsifying certificates, personal or company documents of the Delta Beverages. The Appellant was asked in the Works Council hearing why he had used Guzha's gate pass and inscribed the name Guzha when making the second delivery. He tendered an explanation that he did not have his own

gate pass. Guzha's gate pass had been given to him by the Supervisor. He had written Guzha's name in order not to create confusion with accounts. The Works Council failed to call the referred Supervisor to confirm or deny the submissions by the Appellant. The Appellant suggested before the Works Council that it may actually have been a practice in the industry which point the Respondent again failed to disprove.

It was also clear during both hearings a quo that two witnesses that is, Munaku and Mhuri had identified Mr Guzha and not Appellant as the person who instructed them to offload the drinks. It is not clear from the record whether Mr. Guzha was also arraigned to face similar charges. The suggestion was made by Appellant in his heads that Mr. Guzha had been tried and found not guilty. This point was not disputed by the Respondent's Legal Representative. This raises the issue on what basis the Works Council found the Appellant guilty on the charges and allowed Mr. Guzha to go scot-free in view of the damning evidence against him. The **Labour Act [Chapter 28:01]** has in sections 2(a) and section 4(a)(1) paragraph (b) provided for equity and equal treatment of employees. The Supreme Court in the decision of **Jiah & Ors vs. Public Service Commission and Another, 1999** (1) ZLR 17 (SC) underscored that "equity" requires that Court should have regard to the '*parity principle*' which requires that like cases should be treated alike. In other words employees who behave in a similar position should have meted out to them much the same punishment.

I am not satisfied that *in casu*, the Respondent did establish on a balance of probabilities that the Appellant was guilty of the preferred charges. This is so particularly in view of the lack of evidence directly pointing to Appellant. In the circumstances the appeal must succeed.

It is accordingly ordered as follows:-

(1)The appeal be and is hereby allowed.

(2)The decision by the Works Council dated 21st May 2010 be and is hereby set aside.

(3)The Appellant is to be reinstated to his previous position without loss of salary and benefits and in the event that reinstatement is no longer possible be paid damages in lieu of reinstatement to be agreed upon by the parties, failing which either party may approach the Court for quantification of such damages.

Nyika - Appellant's Legal Practitioners

Dube, Manikai and Hwacha - Respondent's Legal Practitioners