

**IN THE LABOUR COURT OF ZIMBABWE
HELD AT HARARE ON 26TH MARCH, 2013
And 17th January, 2014**

**JUDGMENT NO. LC/H/30/2014
CASE NO.LC/H/469/2011**

In the matter between

ZIMRA

APPELLANT

and

FIADO MAGO

RESPONDENT

Before The Honourable B.T. Chivizhe: Judge

For The Appellant : Ms N. Mpumelo (Legal Officer)

For The Respondent : Ms R.R. Mutindindi (Legal Practitioner)

CHIVIZHE, J.

The Appellant noted the present appeal against the award handed down by the Honourable Arbitrator on the 28th of July, 2011.

On the date of hearing of the appeal the Respondent took a *point in limine* that the appeal as presented did not raise questions of law as envisaged under **Section 98 (10)** of the **Labour Act [Chapter 28:01]**. The Appellant having conceded to the point leave was then granted to Appellant to file its amended Notice of Appeal. The Appellant through documents filed on 23 October 2012 amended its Notice of Appeal to read as follows;

GROUND OFS OF APPEAL

1. The Arbitrator erred and misdirected herself on a point of law in holding that the Labour Officer and hence the Arbitrator had jurisdiction to hear the matter in terms of **Section 101(6)** of the **Labour Act [Chapter 28:01]** (hereinafter referred to as the Act).
2. The Arbitrator erred and misdirected herself on a point of law in holding that the thirty day period in **Section 101(6)** of the Act begins to count as soon as the Employee is served a letter of suspension.
3. The Arbitrator erred and misdirected herself on a point of law in holding that the notification referred to in **Section 101 (3) (e)** of the Act can be construed as referring to the delivery of the letter of suspension to the Employee.

4. The Arbitrator erred and misdirected herself on a point of law in holding that the suspension was unlawful because the Appellant should have started instituting disciplinary proceedings well before 8th January, 2011, when the Employee was suspended.
5. The Arbitrator grossly erred and misdirected herself on facts which misdirection amounts to a misdirection of law in failing to take into consideration the Appellant's submission that in the event that it was held that the thirty day period was supposed to start to run from the date of suspension, ZIMRA had not committed an unfair labour practice because they were no Workers' Committee representatives during the period in question to constitute the required panel of the Disciplinary and Grievances Committee.
6. The Arbitrator erred and misdirected herself on a point of law in determining the matter on technicalities, instead of dealing with the matter on the merits as it is trite law that labour matters should not be dealt with on technicalities.

The Appellant in relief is seeking the following:

1. The decision of the Arbitrator be and is hereby set aside.
2. The matter be remitted back to the Appellant to be dealt with in terms of its employment Code of Conduct within twenty one days of receipt of this Court's judgment
3. **Alternatively**, that the matter is remitted back to the Arbitrator to deal with the merits of the case.

Before I proceed to determine the appeal a brief background to the matter is necessary.

The Respondent was employed by the Appellant as a Revenue Specialist. He was stationed at the Harare Port. On the 8th January, 2010, he was suspended from duty without pay or benefits in terms of the ZIMRA Code of Conduct on allegations that he had received a bribe of \$200 at the Central Bar so that he would not seize undeclared goods belonging to a client, one Mrs Epiphania Taruwinga. The Respondent was consequently charged on 23rd February, 2010, with the following acts of misconduct;

- a. D.16 Falsification of records and documents and for writing false information onto Authority documents.
- b. D.24 Colluding with clients to undervalue or wrongly classify goods or to cause \ loss.

- c. D.25 Carrying out any act which is inconsistent with the express or implied conditions of employment.

The Respondent however on the same date i.e. 23rd February, 2010, before receiving the Notice to Attend Disciplinary Hearing, had referred the dispute to the Labour Officer claiming that although he had been suspended on 8th January, 2010, the Appellant had become aware of the offence on the 26th November, 2009. It was Respondent's contention that the Appellant had therefore violated **Section 101 (6)** of the **Labour Act [Cap 28:01]** requiring that a hearing should be conducted within 30 days from the date of suspension. The matter was set down for conciliation on the 2nd of March, 2010. At the hearing the Appellant challenged that the period of thirty days had lapsed as to grant the Labour Officer jurisdiction to hear the matter. The Labour Officer failed to settle the matter and the matter was referred for compulsory arbitration. The terms of reference were outlined to be the following;

- a. Whether or not the Labour Officer hence the Arbitrator had jurisdiction to hear the matter in terms of **Section 101 (6)** of the Act.
- b. Whether or not the Respondent's proceedings against the claimant are unlawful.
- c. To determine if any, the appropriate remedy.

The Arbitrator in his award concluded that the Appellant had violated the provisions in **Section 101 (6)** of the **Labour Act [Cap 28:01]** by failing to institute disciplinary proceedings within the stipulated time frame. The Arbitrator then concluded that the proceedings against the Respondent were unlawful and directed Appellant to reinstate Respondent with full salary and benefits from the date of suspension. The Arbitrator further gave the Appellant option to thereafter follow correct disciplinary procedures under its Code of Conduct.

The Appellant was aggrieved by the arbitral award and noted the present appeal on the grounds as amended and referred to supra.

The main issue that is before the court is the correct legal interpretation of **Section 101 (6)** of the **Labour Act [Cap 28:01]** more particularly when does the thirty day period begin to run in order for the referral to be considered as lawful. The Appellant's position is

that the Arbitrator erred in concluding that the period begins to run from the date when the employee is served with a letter of suspension. The Appellant position is that the thirty days referred to in **Section 101 (6)** of the **Labour Act [Cap 28:01]** are counted from the date when the ‘Notice to attend Disciplinary Hearing’ is brought to the employee’s attention. As the Notice to Attend had not yet been written on the 23rd February, 2010 when the matter was referred to Labour Officer the thirty days had therefore not begun to run. The period only began to run on the same date i.e. the 23rd February, 2010, when Respondent was later served with the notification to attend a hearing. It is Appellant’s further contention that as the matter was still liable to be dealt with in terms of the Code of Conduct the Labour Officer and by extension the Arbitrator were barred from dealing with the matter in terms of **Section 101 (5)** of the **Labour Act [Cap 28:01]**.

The Respondent’s position accords with the Arbitrator’s findings. The Respondent submitted that as the Respondent had been suspended on 8th January, 2010, the investigation report having been completed on the 11th January, 2010, the Appellant had delayed in instituting the disciplinary proceedings and the matter had properly been referred to a Labour Officer upon the expiry of thirty days.

I find myself in agreement with Appellant’s position. The term “notification” as submitted by Appellant originates from **Section 101 (3)** of the Act. That section provides as follows:-

- “(3) An employer’s Code shall provide for:-
- (a)
 - (b)
 - (c)
 - (d)
 - (e) The notification to any person who is alleged to have breached the employment Code for proceedings to be commenced against him in respect of alleged breach,
 - (f)
 - (g)

It is clear from a perusal of the same Section that where an employee is charged under a Code of Conduct the employee should be notified that proceedings are to be commenced

against him. The 'notification' refers to the notice to attend a hearing in respect of an alleged misconduct. The notification referred to in **Section 101 (3) (e)** of the Act clearly cannot be construed to be the same with a letter of suspension. It follows therefore that the Arbitrator misdirected himself on a point of law in holding that the thirty day period began to run as soon as the Respondent was served with a suspension letter.

Having come to the conclusion that the Arbitrator misdirected himself on a crucial point of law it shall not be necessary for the court to determine the rest of the grounds of appeal. The arbitral award clearly stands to be set aside. The Appellant had asked in relief that the matter be remitted either to the Appellant to be dealt with in term of the Code of Conduct within twenty-one days of receipt of this judgment or to the Arbitrator for him to deal with the merits of the case. The second option is clearly not an option available. Having found that the period of thirty days should have begun to run from the date of notification of hearing (in this case 23rd February), it follows that the referral to the Labour Officer on that same date i.e. 25th February 2010 was premature. The Labour Officer was consequently not empowered to deal with the matter under **Section 93** and by extension the Arbitrator was also precluded from hearing the matter.

In the circumstances it is ordered as follows:-

- (i) the appeal be and is hereby allowed with costs
- (ii) the arbitral award handed down on 25th July, 2011 be and is hereby set aside
- (iii) the matter is hereby remitted to the Appellant for the Appellant to deal with it in terms of its employment Code of Conduct
- (iv) the Appellant shall constitute a disciplinary hearing within twenty-one days of receipt of this court's judgment

Matsikidze and Muccheche, Respondent's Legal Practitioners