

**IN THE LABOUR COURT OF ZIMBABWE
HARARE ON 21ST JANUARY, 2014
AND 14TH FEBRUARY, 2014**

**JUDGMENT NO. LC/H/68/14
CASE NO. LC/H/549/12**

In the matter between

AMOS CHIRIMUMBWE – APPLICANT

And

T.M. SUPERMARKET - RESPONDENT

Before The Honourable P. Muzofa J.

For Applicant : A. Zeure (Legal Practitioner)

For Respondent : B. Peresuh (Legal Practitioner)

MUZOFA J,

This is an application for review of the Respondent's Appeals Committee's decision to confirm applicant's dismissal.

The Applicant was employed by the Respondent as a Creditor's Clerk. He was suspended in July 2011 on allegations that he had received an amount of US\$450.00 as a bribe from one of the Respondent's service providers. The disciplinary authority heard the matter and dismissed the Applicant. Applicant appealed to the National Employment Council of the Commercial Sector, which dismissed the appeal. Still dissatisfied Applicant noted an appeal to the Negotiating Committee which also dismissed the appeal. Consequently he applied for the review of the decision to this Court. The grounds of review being: -

1. That the Internal Appeals structure and the Respondent overlooked the point that Applicant did not cross examine its witness but simply relied on an affidavit written by the witness.
2. The decision to dismiss the Applicant was grossly unreasonably and defies logic

The Respondent raised a point *in limine* that the grounds of review amount to questions of law which should be raised on appeal. This application was opposed. The Court made a ruling on this issue by dismissing the application in relation to the first ground of review and struck off the second ground of review. The reasons were read out to parties. They relied on Section 27 of the High Court Act that sets out the grounds of review. It is trite that an application for review must be concerned not with the decision as such, but with the decision making process. *Dandazi v Wankie Colliery Co. Ltd 2001 (2) ZLR 298(H)*. The first ground of review related to the process. The second ground of review being too broad amounted to questioning the appropriateness of the decision which would qualify it to be a ground of appeal.

Having addressed the point *in limine* the Court proceeded to hear submissions on the first ground of review only.

It was submitted for the Applicant that the Respondent relied on an affidavit authored by one Mr Tavarwisa. The witness was not called to give *viva voce* evidence so that the Applicant could cross examine the witness. The affidavit by Mr Tavarwisa outlined how he paid money to certain employees of the Respondent including the Applicant and that the money was to “facilitate quick payment.” For this submission the counsel relied on the case of *Chataira v ZESA 2001 (1) ZLR 30(H)*. According to the Applicant this witness was supposed to be called by the Respondent or even the hearing authority to verify the truthfulness of the affidavit. For the Respondent it was submitted that Mr Tavarwisa the author of the affidavit was not a witness for Respondent. From the record of proceedings on page 19 the fifth paragraph it is clear that Mr Tavarwisa was Applicant’s witness. It was Applicant who indicated that Mr Tavarwisa could not attend the proceedings. In addition when the Applicant noted the application for review, it indicated that it will call Mr Tavarwisa and still failed to bring the witness before this Court. So it was submitted Respondent should not be blamed for not calling the witness who was Applicant’s witness. What is decisive in this case is the evidence that Respondent relied on in my opinion. Respondent claims it did not solely depend on the affidavit, but in addition there was evidence of the deposit slips that showed deposits into Applicant’s Kingdom Account by this Mr Tavarwisa. This evidence was not disputed at all.

From the documents filed of record it is clear that from the onset, when the disciplinary proceedings commenced the witness Mr Tavarwisa was Applicant’s witness. The Applicant cannot be heard to say he failed to cross-examine a witness he intended to call. If he had called Mr Tavarwisa it was Respondent to cross-examine the witness. This ground of review

cannot succeed to vitiate the proceedings. In any event it was shown by Respondent that Applicant on two separate occasions had his account deposited with US\$250.00 and US\$ 200.00 respectively. It was not in dispute that the deposits were made by Mr Tavarwisa of Twin Maid based in Bulawayo. It was also not in dispute that Twin Main had a contract with Respondent to repair oven bakeries. Clearly the relationship between the Applicant and Mr Tavarwisa resulted from the business transactions for Respondent. Mr Tavarwisa was based in Bulawayo and Applicant was based in the accounts department of the Respondent. It remains to anyone to conclude why a service provider would deposit money into Applicant's account if there is no prior arrangement. Clearly Applicant provided details of his account so that he might be given the said amounts. In my mind the evidence from Mr Nhamoinesu, Mr Mutandagayi was on a balance of probabilities sufficient to tip the scales against the Applicant. It was submitted that the criminal matter did not see the light of day because Mr Tavarwisa disowned the affidavit. It must be borne in mind that the burden of proof in civil matters is different from criminal matters see *Dera v ZESA SC 79/88*. From my perspective the very conduct to receive money from a service provider whether it was a 'thank you' as explained by Applicant or what as long as it was undeclared to the employer remain tainted. In any case why would a service provider thank an employee when the employee is paid to render such services.

This application has no merit and accordingly the following order is made.

The application for review be and is hereby dismissed.

There is no order as costs.

Warara & Associates – Applicant's legal practitioners

Honey & Blanckenberg – Respondent's legal practitioners