IN THE LABOUR COURT OF ZIMBABWE **JUDGMENT NO. LC/H/362/23**

HELD AT HARARE ON 9 OCTOBER 2023 **CASE NO. LC.H/219/22**

AND 11 DECEMBER 2023

IN THE MATTER BETWEEN:-

LEONARD CHISINA **APPLICANT**

AND

ZIMBABWE ELECTRICITY TRANSMISSION

AND DISTRIBUTION COMPANY **RESPONDENT**

Before Honourable Mr. Justice L.M. Murasi

For Applicant **Mr. B. Magogo**

For Respondent **Mr. C.J. Mahara**

MURASI J.,

Applicant was employed by the Respondent as Section Engineer in the Metering Section. Following the entering into an agreement between Respondent and a company which was to supply meters to Respondent, Applicant and some other employees were assigned to inspect manufacturing facilities in both the United Kingdom and Slovenia. At the conclusion of that trip, Applicant and his colleagues compiled a report to the effect that they had inspected manufacturing facilities in both the countries. This report was the cause of investigations as it was later discovered that no inspection of a manufacturing plant had taken place in the United Kingdom. The inspection of those manufacturing facilities were crucial to Respondent in that it was to rely on the report to make the decision to go ahead with the contract of procuring the said meters. The investigations revealed that only the manufacturing plant in Slovenia had been inspected. Respondent preferred the following charge against the Applicant:

> "Sometime during the period 26 November 2018 to 6 December 2018, you committed an act of serious misconduct in that contrary to the fulfilment of the implied terms of your employment contract, you improperly conducted and approved a Mandatory Factory Test

(FAT) for the procurement of smart meters from Helcraw Electrical (Pvt) Ltd. You failed to inspect the manufacturing facility for the smart meters and failed to assess the quality management systems which were crucial requirements for the fulfilment of the Factory Acceptance Test which you had been mandated to conduct."

Applicant was brought before a hearing Officer who found him guilty and recommended his dismissal. Applicant approached this Court for relief. This Court, in a judgment dated 25 February 2022, dismissed the appeal. Applicant intends to approach the Supreme Court on appeal. This is therefore an application for leave to appeal in terms of section 92 (f) (2) of the Labour Act, (Chapter 28:01). Applicant's prospective grounds of appeal are couched as follows:

1. The court a quo grossly misdirected itself in finding that the issue of what was the applicable standard for conducting Factory Acceptance Test (FAT) did not arise from the findings of the Hearing Authority when such an issue struck at the core of the charge for which Appellant was convicted.
2. The court a quo grossly erred and misdirected itself in upholding a finding that Appellant had ' improperly conducted and approved' the FAT in the face of evidence that same had been conducted in terms of RFP as read with international IEC standards in the avowed absence of a 'documented policy and procedure on conducting FATs'.
3. The court a quo erred in failing to find that once it is accepted that the FAT was carried out in terms of the applicable international Guidelines, then the same had been properly conducted and approved regardless of what the parties recorded as objectives in the FAT report compiled after the fact.
4. The court a quo grossly misdirected itself, contrary to evidence presented;
    a. In finding that the contract negotiation documents, the contract itself and in ZETDC Technical Specifications clearly provided for the inspection of the manufacturing plant.
    b. In upholding the Hearing Authority's finding that Appellant signed a report which falsely reported that there was a factory inspection in UK."

Applicant's Submissions

In submissions, *Mr. Magogo* stated that the appeal challenged the Court's factual findings and that those findings were gross misdirections. He submitted that essentially what Applicant was averring was that the Court had made a finding that the applicable Standard did arise from the decision of the Hearing Officer when this was crucial to the decision and this amounted to a misdirection. He further submitted that in the mind of the Hearing Authority, there had not been a factory inspection and that this had amounted to improper conduct on the part of the Applicant in the manner of the approval of FAT. He argued that it was thus inconceivable that something could be said to have been done improperly without any standard. He further argued that the Hearing Authority had come to a conclusion that a certain standard had to be applicable in the circumstances.

Mr. Magogo further stated if the Court had taken note of the standard referred to, it would have arrived at the conclusion that the international standard was the basis on which the FAT was done. He pointed that the fact that the contract between the contractor and the Respondent provided for an inspection was not borne out of the evidence and that the contract documents were not part of the standard envisaged by the international guidelines. He further argued that the contract itself provided that there must be an FAT but that the way the FAT was to be conducted was the real dispute in the matter. He stated that the evidence showed that the Applicant and his colleagues did not mention that there had been an inspection in the United Kingdom. The oral submissions essentially captured what was contained in the heads of argument. Precedent on what should considered in applications of this nature was cited in support of the averments made.

Respondent's Submissions

Mr. Mahara stated that he was going abide by the documents filed of record. He submitted that Applicant seemed to dwell on one aspect of the charge leaving the other crucial part. He stated that Applicant was leaving the issue that he improperly and approved an FAT. He further submitted that the contract and the minutes provided what the Applicant was supposed to do. He pointed out that these showed that the inspection was to be conducted at the manufacture's factory. He stated that the report compiled by Applicant and his colleagues had incorrectly alleged that the manufacturing line had been inspected when this had not happened. *Mr. Mahara* further submitted that Respondent had its specific technical requirements as to what the FAT team was supposed to do and this had not been done as far as the trip to the United Kingdom was concerned.

As far as the International Standard was concerned, *Mr. Mahara* submitted that these are mere recommendations and that what takes precedence are the Respondent's technical requirements and that this was buttressed by the report signed by the Applicant. He stated that Applicant should have refused to sign the erroneous report which stated that the manufacturing line in the United Kingdom had been inspected as he knew that it was wrong. *Mr. Mahara* argued that Applicant had been part of the contract negotiations which had come up with the requirement for the inspection and how it was to be conducted and therefore should have adhered to those requirements.

ANALYSIS

In **Essop v S** [2016] ZASCA 114, it was held as follows:

> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in

other words, be a sound basis for the conclusion that there are prospects of success on appeal."

In **Zimbabwe Institute of Management v Roderick Nhamo Kadungure** SC 115/20, MAKARAU JA (as she then was) had this to say at page 6 of the cyclostyled judgment:

> "It is my understanding from the above authorities that broadly speaking, an appeal from the Labour Court to this Court is competent only it it questions what the law has said in other binding cases on the issue to be determined, presumably in matters where the court has discretion, or questions what the law is on the specific issue or issues raised in the appeal or attacks the decision a quo on the facts as being irrational. The remit of this court in determining appeals from the court a quo is therefore fairly narrow.
>
> Put differently, the broad position of the law is that an appeal from the court a quo to this Court must call upon this Court to determine and pronounce on the correct and true rule of law on the matter in dispute or, if based on the facts of the matter, to set aside the decision as being irrational. <u>It cannot invite this court to revisit the entire dispute and exercise a fresh discretion in the matter."</u>

A reading of Applicant's prospective grounds of appeal show that they raise a single issue. It is that this Court misdirected itself in making a finding as to the applicability of the international standard in the matter. I believe the matter should be put in its proper perspective:

Applicant was part of the team that went to the United Kingdom assigned by the Respondent.

Applicant was one of the signatories to the report that was compiled on the team's return.

It is not denied that the manufacturing facilities were not inspected by the team in the United Kingdom.

To that extent, the report compiled by the team, with Applicant as a willing signatory, was incorrect.

Respondent was supposed to rely on that report in making a final decision on whether or not to proceed with the procurement.

Applicant was part of the negotiating team that produces minutes which referred to the inspection that was to take place.

The above issues are not denied by the Applicant. I will therefore make reference to the judgment which is the subject of the appeal. In the appeal before the Court it was argued that no written mandate was given to the FAT team and 'no clear outline of what was to be done, by whom and how'. This has now been abandoned and the assertion is that the mandate was to deal the FAT using international standards. AS shown at page 4 of that judgment, the report compiled by Applicant and his colleagues was as follows:

> "The objective of the FAT visit was to witness technical tests, inspect manufacturing and test facilities, meet the R & D Engineers and assess the quality management systems in

> place at the two production facilities. ZETDC Engineers were to confirm and verify that the meters being manufactured **fully meet the ZETDC Technical Specification** and that AMI system fully meets the **use cases specified at tender."**

This was authored by Applicant and his colleagues. A reading of this paragraph shows that there is no mention of International Standards. Was Applicant and colleagues mistaken about their mission and mandate? It is clearly mentioned that these meters were to meet ZETDC standards and NOT International Standards. What was also specified in the tender was to be another guideline. Page 5 of the Court's judgment refers to page 148 of the record where it was recorded as follows:

> "Our first port of call was in Bristol, UK where Helcraw (Supplier) and their Principal, Secure Meters took us to their factory *as per contract agreed in Harare*, *negotiations as Zimbabwe*."

Clearly what was being done was in accordance with the contract agreed upon by the parties. Page 6 of the Court's judgment, in the last paragraph thereof deals with the concerns raised by Applicant in the application for leave to appeal. The paragraph refers to the IEC guidelines and specifically relates to the contents of these guidelines. The telling portion of the guidelines is referred to in the judgment and provides thus:

> "Technical issues are included in the proforma and issues to manufacturing plants are subject to agreement between the parties."

The IEC Guidelines therefore remained what they are, guidelines. What carried the day was what was agreed upon by the parties.

Applicant had stated as follows:

> "It can then be safely concluded that in terms of the applicable RFP or IEC standards, no requirement was there during FAT to inspect the factory or to carry out type tests relevant in the assessment of a supplier's quality management systems."

The above position was dismissed by the Court. Applicant is clearly 'blowing hot and cold'. On the one hand, it is argued that no standards were specified yet on the other it is now being averred that Applicant complied with IEC Standards. Applicant, having participated in the meeting that produced minutes which formed part of the contract, knew what specifications were required by Respondent. This is clearly stated in the Court's judgment. As stated by MAKARAU JA (as she then was), Applicant wants the Supreme Court to revisit the whole factual position and, presumably, exercise a fresh discretion in the matter.

It is my considered view that the position arrived at by the Court was neither irrational nor a misdirection. There are no prospects of success on appeal. The application ought to be dismissed.

In the result, the application for leave to appeal to the Supreme Court is hereby dismissed with costs.

Messrs Makuwaza & Magogo Attorneys- Applicant's legal practitioners

Messrs Muvingi & Mugadza- Respondent's legal practitioners.