

Civil Appeal No 232\2000

UNIBANK v LILY JIJITA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE MAY 30 & AUGUST 8, 2002

J.B. Colegrave, for the appellant

P. Nherere, for the respondent

GWAUNZA AJA: This is an appeal against a decision of the Labour Relations Tribunal, which ruled that the appellant either reinstates the respondent to her job or pays her damages which the parties could agree upon, or refer to the Tribunal for quantification.

The pertinent facts of the matter are as follows: The respondent was employed by the appellant as Secretary to its Managing Director. Some time in 1997 she was physically assaulted by the wife of the Managing Director, (Mrs "M"), and threatened with further assaults. Mrs "M" suspected that the respondent was having an illicit affair with her husband. Following this incident, the respondent felt that the appellant was not giving her grievance the sensitive attention that it deserved. She then first met with, and then wrote a letter to, the Chairman of the appellant

emphasizing her unhappiness at continuing to work in an environment that was causing her great stress (Annexure “B”). She followed this letter with another one (Annexure “A”) in which she advised the Chairman that she had found it necessary not to report for work as from Monday, the 2nd of February 1998 “until my case is concluded”. On the same day she wrote this letter she received a response from the Chairman of the appellant, Mr S C Tawengwa. In the letter Mr Tawengwa offered the respondent a new post within the bank, of Public Relations Officer. The position came with an increased salary and meant that the respondent would be transferred to another department within the appellant. The respondent, in writing, accepted the offer and ended her letter by seeking clarification on certain issues, in these words:-

“I will report back for work with the signed copy of your letter as soon as I get the clarification on the above.”

The respondent received no response to this letter and did not report for work. The appellant then sought to dismiss the respondent for absenting herself from work from the 2nd to the 13th of February 1998. A disciplinary hearing that was subsequently held, passed a determination authorising the dismissal of the respondent. The appellant appealed to the Grievance and Disciplinary committee, which failed to reach a consensus on the matter. The matter was then referred to the Appeals Board of the Employment Council for the Banking Undertaking, which unanimously agreed that the respondent had a reasonable excuse for staying away from work for the period in question. The Board then overturned the respondent’s decision to dismiss the respondent prompting the appellant to appeal to the Labour

Relations Tribunal.

The Chairman of the Tribunal dismissed the appeal and noted:-

“I take the view that being subjected to assaults and threats of continued violence at work by the wife of one’s Managing Director constitutes a reasonable excuse for an employee to absent herself from duty. I do not see how simply changing the respondent’s designation at job was going to protect the respondent from the Managing Director’s wife. Her designation or job title was not the cause of the violence. In the circumstances she was perfectly entitled to seek clarification regarding her safety before reporting for duty.”

The Chairman of the Tribunal then made the order referred to at the beginning of this judgment.

In appealing against this ruling the appellant contends that no reasonable excuse had been proffered by the appellant for failing to present herself at work, particularly since:

- (i) she had indicated she was happy to accept the offer of a promotion and transfer to a new department and
- (ii) the issue on which she sought clarification, i.e. the provision of a company car, was “manifestly” a subsidiary matter to her promotion and should in no way have affected a decision to report back for work as soon as possible.

It is evident that the appellant’s interpretation of the respondent’s letter

of the 2nd of February 1998 is that the clarification sought by the respondent related only to the issue of the company car.

The respondent, on the other hand, argues that the clarification sought related to both the issue of the company car, and that of her security, given the assaults perpetrated on and threatened against, her by Mrs “M”. Mr *Nherere*, for the respondent, contends that since the respondent’s reason for absenting herself from work in the first place had not been directly addressed, it was perfectly reasonable for her to seek clarification on the matter. Further, that it was quite reasonable for the respondent to seek clarification on the issue of the company car before taking up the new post of Public Relations Officer.

It is trite and both parties *in casu* accept, that the question of whether or not a “reasonable excuse” exists on the facts of a given case is one of law.¹ In the present case the court thus has to determine, firstly, what excuse the respondent gave for not coming to work and, secondly, whether that excuse was reasonable.

There is a dispute between the parties on what the respondent’s excuse was. The appellant’s understanding of the respondent’s excuse is that she had sought and not received clarification on whether or not she would be given a company car. The respondent, on the other hand, situates the excuse within the wider context of the whole dispute.

I am inclined to agree with the respondent. It is evident from the letters exchanged

¹R v Allan NO 1956 (4) SA 208 SR at 211F and *Mhowa v Beverley Building Society* 1998 (1) ZLR S at 549, both cited in respondent's Heads of Argument at p 2

between her and the Chairman of the appellant, Mr Tawengwa, and between her and the authorities within the appellant, that the respondent's primary concern was her security and safety. She expresses frustration and disappointment over the fact that the authorities, seven months after the event, had not given her grievance the sensitive and effective attention that it deserved.

Indeed that concern is reiterated in her letter of the 2nd of February 1998. The letter is clearly in two parts, the first dealing with the issue of her security, and the second dealing with the "Public Relations Officer post". In the first part of the letter, which is addressed to the Chairman Mr Tawengwa, she wrote:-

"Thank you for your letter dated 30th January 1998.

The point I have been trying to make so far is that of my safety. Since in your letter Unibank is divorcing itself from the incident between Mrs Mushambadzi and myself, I do not have anywhere else to turn to. I do not know Mrs Mushambadzi personally, except through Unibank. I was not expecting Mrs Mushambadzi to be governed by the Unibank Code of Conduct, but surely Unibank lawyers can represent me because I am a Unibank employee.

If the above can be done, i.e. having access to Unibank's lawyers) I would like to have a statement recorded with them that my life has been threatened and the person I suspect is Mrs Mushambadzi. This would then mean that if I continue to be harassed, my lawyers would know where to begin."

The letter then goes on to deal with the offer of the Public Relations

Officer post and her acceptance thereof. She then enquires whether the new job would come with a company car.

She ended the letter with the words already cited, in which she sought clarification “on the above”.

This letter, as already indicated, was not responded to. The respondent was thus left in the dark as to whether or not her request for certain safeguards concerning her safety had been considered, much less whether it was to be granted. The appellant’s attitude was clearly that the respondent’s concerns regarding her safety had been effectively addressed through her transfer to another department. That, in my view, has the effect of trivialising the respondent’s grievance and the danger to her person. Her transfer to another department did not mean Mrs “M”, if she was so inclined, would have been deterred from carrying on with the threats against the respondent’s life, or even further assaults on her. In other words, the transfer did not address the real problem, that is, the respondent’s fear for her safety. That this was her primary concern is left in no doubt.

To suggest, given this background, that in her letter of the 2nd of February 1998, the respondent was concerned only with clarification concerning the company car, is, in my view, to miss the point of the whole dispute. The suggestion amounts to a continued manifestation of the insensitivity with which the appellant dealt with a matter that appropriately should have been of serious concern to it. It surely could not have been good for staff morale and the image of the appellant as a concerned employer, for a member of staff to be assaulted at work and then offered

neither support nor sympathy from the employer.

The same suggestion also implies that the respondent was no longer concerned with the issue of her safety particularly the safeguards she had requested. I am not persuaded that is correct. The respondent had not only relentlessly pursued the issue of her safety for several months, she had also again raised it in the same letter in which the issue of the company car was raised.

I am, in the final analysis, satisfied that the clarification sought by the respondent related to both the matter of her safety and that of the company car.

Having determined the nature and scope of the appellant's excuse the next issue to consider is whether this was a reasonable excuse for absenting herself from work. The Employment Council for the Banking Undertaking was satisfied it was. The minutes of the Council's meetings (page 29 of the record) record that:-

“Every member of the Appeals Board felt that Ms Jijita did indeed have a reasonable excuse to be absent from work during the stated period. They felt that she had been under considerable stress from an incident that was not of her making.”

It cannot be disputed that the appellant had taken a casual approach to the respondent's grievance. They had done nothing to ensure that their employee was protected. While it was true that Mrs “M” did not fall under their authority, it could not be said that her husband was in the same position. There is nothing in the evidence before the court to show any decisive action was taken to ensure, through

Mr Mushambadzi, that the unfortunate incident would not be repeated, nor that he would prevail on his wife not to continue with the threats against the respondent. The incident happened to their employee and within their premises. Yet they chose to distance themselves from both the incident and its consequences upon the respondent and her work. She reported in one of her letters that while waiting for the matter to be dealt with she could no longer give her work the attention it deserved since she could not concentrate.

Faced with this lack of sympathy from the appellant, and with the knowledge that no protection would be forthcoming from it in relation to the threatened violence from Mrs “M”, I do not see how it can be said no reasonable excuse existed for the respondent’s failure to report for work.

The Chairman of the Labour Tribunal was, in these circumstances, satisfied that the respondent had a reasonable excuse for absenting herself from work. Since I find his determination to be eminently sound there is no reason to upset it.

Accordingly, the appeal is dismissed with costs.

SANDURA JA: I agree

CHEDA JA: I agree

Stumbles & Rowe, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners