

PAUL MATUNGAMIRE v
THE POSTS AND TELECOMMUNICATIONS
CORPORATION

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 19 & OCTOBER 15, 2002

L Uriri, for the appellant

E T Matinenga, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal (“the Tribunal”) which upheld the decision by the labour relations officer authorising the respondent (“the PTC”) to dismiss the appellant.

The relevant facts are as follows. The appellant was employed by the PTC as an executive officer and was stationed at Masvingo. In March 1994 he made two official trips to Mashava. In terms of his conditions of service, he was entitled to claim travelling and subsistence allowances from the PTC for the period during which he was away from his station on official business. He could claim the reimbursement of proved or unproved expenses. However, the maximum amount he could claim in respect of proved expenses was more than the maximum amount for unproved expenses.

As he did not have any official receipts with which to prove his expenses, but wished to claim the reimbursement of an amount more than that for unproved expenses, he made out his own receipts and tendered them as proof of his expenses.

The fraud was subsequently discovered and the appellant was suspended from duty without pay in terms of the PTC’s unregistered Code of Conduct. Thereafter, the PTC wrote to the principal labour relations officer at

Masvingo seeking authority to dismiss the appellant.

In due course, the matter came before a labour relations officer, who authorised the appellant's dismissal. That decision was subsequently upheld by the senior labour relations officer and by the Tribunal. Aggrieved by the Tribunal's decision, the appellant appealed to this Court.

This appeal raises only one issue. It is whether the PTC, having suspended the appellant from duty in terms of its unregistered Code of Conduct, was obliged to exhaust the disciplinary procedure set out in that Code. I do not think so.

In my view, the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985 ("the Regulations"), in terms of which the appellant was dismissed, override the unregistered Code of Conduct.

The Regulations were made in terms of s 17(1) of the Labour Relations Act [*Chapter 28:01*] ("the Act"), and s 17(2) of the Act, in relevant part, reads as follows:

"Regulations made by the Minister in terms of subsection (1) shall, unless such regulations otherwise provide, prevail over any other statutory instrument or any agreement or arrangement whatsoever ...".

The Regulations do not have any provision to the contrary. In the circumstances, they override the provisions of the unregistered Code of Conduct, and the PTC was, therefore, obliged to proceed in terms of the Regulations before dismissing the appellant.

In fact, the argument advanced by the appellant in this case was considered and rejected by this Court in *Phineas Matoi v Zimbabwe Iron and Steel Co Ltd* S-231-93 (unreported).

The facts in that case were as follows. Phineas Matoi ("Matoi") was employed by the Zimbabwe Iron and Steel Company ("ZISCO"). He was charged with an act of misconduct, the allegation being that he had wilfully disobeyed a lawful order. He was suspended from duty without pay and benefits, and authority for his

dismissal was sought from the Ministry of Labour. That authority was granted and he was dismissed.

At the relevant time, ZISCO had an unregistered Code of Conduct which set out the disciplinary procedure to be followed when an employee was charged with misconduct. It was submitted on behalf of Matoi that ZISCO should have proceeded in terms of the unregistered Code and not in terms of the Regulations. This Court rejected that argument and held that the provisions of the Regulations prevailed over the provisions of the unregistered Code.

However, if the employee commits an act of misconduct, for which an unregistered Code of Conduct provides a punishment less than dismissal, the employer should not proceed in terms of the Regulations and seek authority for the employee's dismissal. This point was made by this Court in *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S). At 454G-455B McNALLY JA said the following:

“However, if an offender commits a minor offence, for which the unregistered Code of Conduct provides a specific punishment short of dismissal, it must surely be a defence before (a labour relations officer) to say ‘I admit the offence, but our unregistered Code of Conduct provides for a warning in such a case. How can my employer now apply for my dismissal? ...’

If the grounds upon which the employer seeks to suspend pending dismissal are not proper grounds, because his own Code of Conduct provides for a penalty less than dismissal, or for any other reason, then he has not proved grounds of suspension. He has proved grounds for a reprimand, or grounds for a written warning, or grounds for a fine, or whatever it may be.”

The same conclusion was arrived at by this Court in *Colcom Foods Ltd v Felix Chatira*, S-135-2000 (not reported). In that case, Colcom Foods Ltd (“Colcom”) had an unregistered Code of Conduct, in terms of which the penalty for the act of misconduct committed by Felix Chatira (“Chatira”), its employee, was a written warning for a first offender, which Chatira was.

However, notwithstanding that fact, Colcom proceeded in terms of the Regulations and sought the approval of the Ministry of Labour for Chatira's dismissal. This Court held that as the unregistered Code of Conduct provided for a penalty less than dismissal, Colcom could not seek Chatira's dismissal in terms of the Regulations.

The main difference between the unregistered Codes of Conduct in the *Makuwaza* and *Chatira* cases *supra* and the unregistered Code of Conduct in the present case, is that in terms of the Code in the present case the act of misconduct committed by the appellant attracted the penalty of dismissal, which was not the position in the other two cases. Had the act of misconduct committed by the appellant in this case not attracted the penalty of dismissal in terms of the Code, the PTC would not have had any basis for seeking the appellant's dismissal.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners