Judgment No. SC 95/02

Civil Appeal No. 199/01

STEPHEN NHIRE v CHITUNGWIZA TOWN COUNCIL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, JUNE 3 & NOVEMBER 11, 2002

T Murombo, for the appellant

E T Matinenga, for the respondent

MALABA JA: This appeal is from a judgment of the High Court, delivered on 30 May 2001, dismissing with costs an application by the appellant ("Mr Nhire") for the review of a decision of the respondent ("the Council") to dismiss him from employment.

Mr Nhire was employed by the Council as a senior accounts clerk in charge of the financial records from beerhalls. His duties included the checking of stock sheets and invoices submitted to his office from beerhall outlets to satisfy himself that the information recorded therein was correct before signing them for payment. The quantities of beer recorded in invoices as having been delivered to beerhalls were supposed to be reflected in stock sheets.

On a number of occasions during the period extending from July 1997 to May 1998 Mr Nhire, in the performance of his duties, received stock sheets and invoices from beerhall outlets indicating that certain quantities of beer had been delivered to these outlets. Quantities of beer recorded in some of the invoices as

having been delivered were not reflected in the stock sheets. Mr Nhire signed the invoices as correct and entitling the suppliers to payment by the Council.

The invoices were discovered by internal auditors to have been false, in that the quantities of the beer recorded therein had not been delivered and received on behalf of the Council. Some of the stock sheets in which the quantities of beer ordered from suppliers were not recorded were kept in a drawer in Mr Nhire's office. The Council was prejudiced of an amount of $52 556.00, which it paid to suppliers for beer it never received.

On 5 January 1999 Mr Nhire was suspended from office without pay in terms of s 141(4)(a) of the Urban Councils Act [*Chapter 29:15*] ("the Act"). On 16 April 1999 he appeared before a board set up to inquire into allegations of misconduct made against him. The allegations were that Mr Nhire had performed his duties in a grossly negligent manner.

Mr Nhire admitted to the preliminary board of inquiry that he had signed invoices without having checked and satisfied himself that the quantities of beer recorded therein had been delivered to and received at the beer outlets. He confessed to the board that he was aware of a standing instruction to check the truthfulness of the contents of stock sheets and invoices before signing them. When asked why he did not obey the instruction, Mr Nhire is recorded as having pointed out that:

> "… there was a deliberate intention to ignore such instructions and that he had to follow what was being practised in the office since he was new to the system."

He also revealed that some of the fake invoices were created in the office.

At the end of the hearing, the preliminary board of inquiry recommended that Mr Nhire should appear before the main board of inquiry and be charged with the following acts of misconduct contained in the General Conditions of Service:

> "(1) Section 51(b) - Negligent performance of his work or failure, without adequate reason -
>
> (i) to perform any work properly assigned to him; or
>
> (ii) to obey instructions properly given to him by his supervisor.

(2) Section 51(d) - incompetent or inefficient performance of his work due to causes within his control."

On 11 June 1999 Mr Nhire appeared before the main board of inquiry. He was charged with gross negligence in the performance of his duty, in that he authorised invoices for payment by the Council for beer which had not been delivered to beer outlets. Whilst admitting that he signed the fake invoices, Mr Nhire sought to excuse his conduct on the ground that he had been doing that job for ten months. He said he was still new in the system. The main board of inquiry found that the explanation proffered by Mr Nhire for his conduct did not amount to a defence to the act of misconduct charged against him. It recommended to the Council that Mr Nhire be dismissed from employment.

On 10 March 2000 the acting town clerk wrote to Mr Nhire, advising him that the Council, after considering the results of the inquiry into the circumstances of his suspension, had passed a resolution discharging him from employment in terms of s 141(6)(ii)(e) of the Act. The date when the decision to dismiss Mr Nhire was made was not given in the letter of 10 March 2000. He said he received the letter on 7 April 2000.

Mr Nhire took the decision to dismiss him from employment to the High Court on review on two grounds –

(1) That the decision had been taken after the expiry of six months from the date of his suspension in contravention of s 141(7)(a) of the Act, which provides that:

> "Where an employee has been suspended in terms of subsection (4) –
>
> (a) his suspension, unless earlier lifted, shall terminate when the Council has decided not to discharge him or after six months has elapsed, whichever occurs the sooner."; and

(2) That the decision was grossly unreasonable, in that it was not supported by the evidence placed before the main board of inquiry.

In his founding affidavit Mr Nhire averred that the period of six months from the date of his suspension expired on 5 July 1999. He did not give the date when the Council took the decision to dismiss him from employment. He did not refute the averment by the Council in para 18 of the opposing affidavit that the decision dismissing him from employment was made within six months of the date of his suspension. It was averred in the said paragraph that Mr Nhire was aware of the date when the Council dismissed him from employment, as he requested and was given the minutes relating to his case.

The learned judge held on the first ground of review that he was unable on the papers to decide whether the decision dismissing Mr Nhire from employment was made by the Council before or after the expiry of the period of six months from the date of his suspension.

In dismissing the second ground of review, the learned judge said:

> "The applicant, in his capacity as senior accounts clerk, signed a number of documents that acknowledged delivery to the respondent of materials that were not delivered.
>
> The respondent was prejudiced to the extent of $52 556.00. The applicant acknowledged his signature on the documents. He admitted that he had failed in his duties. His explanation and excuse was that he did not understand the system. That excuse, *prima facie*, is somewhat lame considering the applicant had worked for the respondent for nearly twenty years and had held his position as senior accounts clerk for ten months prior to his dismissal. On these facts one cannot say that the respondent was grossly unreasonable in dismissing the applicant."

On appeal the grounds on which the appellant's case was argued were simply that the learned judge erred in failing to find that the decision dismissing him from employment was not made within six months from the date of suspension and that the decision was grossly unreasonable.

Although Mr *Murombo* argued in support of the submission that the decision in terms of which Mr Nhire was dismissed was made after the expiry of the period of six months from the date of his suspension, there was no evidence to support the submission. The *onus* was on Mr Nhire to produce evidence to prove the averment that the decision was taken outside the prescribed period. He did not dispute the averment by the Council that it made the decision on his dismissal from employment within the statutorily prescribed period.

The letter of 10 March 2000 shows that the decision dismissing Mr Nhire from employment was made before that date. The delay in communicating the decision to him was said to have resulted from the fact that Council officials were not clear whether the dismissal required the approval of the Minister of Local Government, Public Works and National Housing ("the Minister") in terms of Statutory Instrument 371/85. The letter was written following a decision of the Supreme Court to the effect that dismissal of a junior official by the Council did not require the approval of the Minister. Without the specific date when the decision dismissing Mr Nhire from employment was made, it cannot be said the learned judge was not entitled to arrive at the conclusions he reached in the circumstances.

Mr *Murombo* properly conceded in respect to the second ground of appeal that it was not enough for Mr Nhire to allege in review proceedings that the evidence did not support the decision reached by the learned judge, that the decision of the Council to dismiss him was not grossly unreasonable. He had to go further and show that the decision was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" – *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670D.

The learned judge placed himself in the position of the Council and

examined the facts that were placed before it to decide whether the decision to dismiss Mr Nhire from employment was grossly unreasonable. It was common cause that Mr Nhire signed the fake invoices, thereby authorising payment on them to the suppliers of the beer recorded therein as having been delivered when he knew that the stock sheets did not reflect the quantities in question. It was clear from his own admission that Mr Nhire deliberately breached a standing instruction to verify the contents of invoices before signing them.

The conclusion reached by the learned judge, that a reasonable employer would, on the evidence placed before the Council, have found that Mr Nhire had committed the act of misconduct charged against him and dismissed him from employment, cannot be faulted.

The appeal is accordingly dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Muvingi & Mugadza, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners