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Judgment No. SC 113/02
Civil Appeal No. 234/01

ECON SPAR v DAVID S BANDA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA AJA
HARARE, SEPTEMBER 23, 2002 & JANUARY 20, 2003

C Selemani, for the appellant

C Ngwenya, for the respondent

CHEDA JA: The issue to be decided in this appeal is whether the respondent's conduct falls under Group III offences or Group IV offences of the Code of Conduct of the National Employment Council for the Commercial Sector.

The offences under Group III provide for a final warning in writing for a first offence, and dismissal for a second offence, provided the warning is still valid as it should be valid for twelve months.

The respondent's conduct was explained in detail by witnesses who gave evidence before the Deputy Chairman of the Labour Relations Tribunal ("the Tribunal"). In short, the respondent insulted the manager and behaved towards him in a manner that was very threatening. There was no physical contact in the form of assault. He, however, threatened the manager to the extent that the manager wanted to close the shop.

Elliot says the respondent shouted at Mr Maluwa, the manager, and verbally abused him. It is clear that the respondent's conduct was unacceptable. It gives the picture of a rude and difficult person who has no respect for his seniors.

Despite all this, his conduct still falls under Group III offences, where it is provided as follows:

> "4. **Violence and other related offences**
>
> Threatening to harm, or threatening to do physical injury to any other person in the workplace.
>
> Using abusive, offensive, threatening or insulting language."

The penalty for this conduct for the first offence is not dismissal but a final warning in writing. The penalty of dismissal for the second offence is only when the written warning is still valid.

It was stated that the respondent had breached these conduct provisions and received warnings before, but no details were given as to what he did, when he was warned and whether the warnings were in writing as stipulated in the Code of Conduct. It cannot just be assumed that because he had committed offences before, the warnings were in writing and still valid. There is a need to prove this correctly before a penalty can be imposed on that basis.

It was not correct to charge the respondent with the more serious offence under Group IV offences, as his conduct does not fit into those offences. Had he behaved as stated in Group IV offences, it would have been appropriate to dismiss him.

In my view, the respondent's conduct falls under Group III offences and he should not be dismissed.

The appellant submitted that assault was not defined and the Court should be guided by the criminal law regarding the definition of assault. I do not consider this necessary because the provisions of Group III offences are set out in such a way that they clearly distinguish between threats of assault or threatening to do physical bodily harm from those referred to in Group IV offences. It is clear that the authors of the Code of Conduct did not mean that threatening physical injury amounted to assault as provided for in Group IV offences. The word "assault" is not used in Group III offences but is used in Group IV offences.

If the respondent threatened to do physical injury, it cannot be said he assaulted the manager. Such an interpretation would result in the respondent being unfairly brought within the ambit of Group IV offences and this would result in a miscarriage of justice.

I agree with the conclusion reached by the Tribunal.

The appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA AJA: I agree.

Byron Venturas & Travlos, appellant's legal practitioners

Karuwa & Associates, respondent's legal practitioners