Judgment No. SC 54/04

Civil Appeal No. 260/03

HAMMER AND TONGUES (PRIVATE) LIMITED

v OBADIAH GIYA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 3 & SEPTEMBER 9, 2004

E Mushore, for the appellant

The respondent in person

CHEDA JA: The respondent obtained employment as a security guard with the appellant on 21 January 1999. He was placed on probation for three months. His duties included guarding both the customers' and the employer's property that was within the yard. When customers brought in property for sale, it was his duty to assist and direct them to the persons responsible for receiving the goods, after which he was to check on the documents that the goods were actually received and recorded.

One Andrew Masunungure ("Masunungure") came to the appellant's premises on 24 March 1999 with items that he wanted sold by the appellant. He found the respondent on duty. The respondent then told him that the items for sale should be recorded in the respondent's name because of the time it would take to auction them. Further, if the owner of the goods was around the goods would be sold quickly at higher prices. In his note filed on record Masunungure put it this

way:

> "Please don't pay O Giya.
>
> The items are mine, three shelves metal cabinet, wooden counter (2 door).
>
> I was told by Obadiah to assign the following items to his name because of time taken here for auction. So he said the owner will be near around (meaning him (*sic*) they will be sold quickly at higher price(s).
>
> I brought the things by myself to Hammer and Tongues – that is were (where) I met him."

Subsequent to this, Masunungure swore an affidavit exonerating Giya, which affidavit we are now told was false and was made under the influence of Giya with the intention that he (Giya) would not lose his job.

The respondent was subsequently discharged by the appellant from employment. The respondent complained about the dismissal, saying, among other things, that he did not commit any wrong, that there was no hearing, and that the Code of Conduct was not followed.

Several hearings were held before different authorities as it had been ordered that the respondent be reinstated. The hearings were appeals by the appellant. I do not intend to deal with the details, save to highlight that the appellant did not attend most of these hearings.

This is a case which should never have gone as far as it did. The respondent was employed on 21 January 1999. According to the papers, he was dismissed on 16 April 1999. The respondent himself confirms this in his letter of complaint which he wrote on 20 April 1999. Accordingly, calculating three months from the date of employment, this placed him within the probationary period. If he was still on probation, surely the employer was entitled to say – "I wanted a security guard. I took you on for trial on probation in order to decide whether I can offer you permanent employment. I am not happy with your performance and you have to go."

With this in mind, the various hearings that took place were absolutely unnecessary. To argue otherwise is to try and defeat the whole purpose of placing employees on probation.

My view is that the appellant is partly to blame in that if it had attended the hearings when it was called, and the merits were properly canvassed, there is a possibility that the matter would have been resolved earlier. I do not

believe the appellant when it suggested that all process calling upon it to attend court hearings did not reach the appellant, yet it received other process in the form of court orders.

The respondent had no good basis for arguing that he committed no offence. He was a security guard. He knew what his duties involved. He was dishonest. He did not perform his duties properly regarding Masunungure's property. He further persuaded Masunungure to swear to a false affidavit. The dates for his employment and dismissal show clearly that he was dismissed within the probationary period.

Putting aside all the issues raised, I cannot see why an employer can be compelled to keep or compensate a clearly dishonest security guard, especially when his dishonesty is related to property which he should be guarding.

It is also clear that the decision of the Labour Relations Tribunal (now the labour court) was based on the failure by the appellant to give satisfactory reasons for its persistent default.

However, once the dishonesty of the respondent and the fact that he was still on probation was highlighted, we looked at all the issues raised on appeal as they clearly supported the appellant's chances of success and found that the appeal should succeed.

In conclusion the appeal is allowed and it is ordered as follows –

1. The order of the Labour Relations Tribunal dated 3 July 2002 is set aside.

2. The decision of the chief designated agent of the negotiating committee of the National Employment Council for the Commercial Sectors of Zimbabwe is set aside.

3. There will be no order as to costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Mawere & Sibanda, appellant's legal practitioners