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Judgment No. SC 78/04
Civil Appeal No. 79/04

CHAWASARIRA TRANSPORT (PRIVATE) LIMITED

v HOSEA NHIDZA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, SEPTEMBER 13 & 23, 2004

*J Mambara*, for the appellant

The respondent in person

SANDURA JA: This is an appeal against a judgment of the Labour Court which ordered the appellant company ("the company") to pay to the respondent ("Hosea") his salary and benefits from 3 December 1998 to 9 February 2004, together with interest at the prescribed rate.

The factual background may be tabulated conveniently as follows –

1. Hosea was employed by the company as a ticket checker. On 26 November 1998 the company management held a meeting at which it decided to suspend Hosea from his duties pending the authorisation of his dismissal by the Minister of Labour. The allegation was that he was incompetent and inefficient in the performance of his duties.

2. On 3 December 1998 the company wrote to Hosea as follows –

> "You are suspended from duty without pay or any other benefits in terms of section 3(h) of the Labour Relations (General Conditions of Employment) Regulations Statutory Instrument 371/85. You have been grossly incompetent and inefficient in (the) prosecution of your duties as a ticket checker.
>
> You are not allowed to visit our business premises at Graniteside and Ardbennie during the period of your suspension."

The Regulations referred to should be the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, ("the Regulations"), published in Statutory Instrument 371 of 1985, which have now been repealed.

3. On 3 March 1999 the company's application seeking the authority of the Minister of Labour to dismiss Hosea, which is not part of the record before this Court, was received by the Ministry of Labour. There is nothing in the record which indicates when the application was sent to the Ministry.

4. Uncertain about the procedure to be followed, Hosea filed a court application in the High Court seeking an order setting aside his suspension. That application was dismissed on 2 June 1999 because the High Court was of the view that Hosea had not exhausted the domestic remedies available to him.

5. On 17 September 1999 R.B. Mutsvangwa ("Mutsvangwa"), a labour relations officer, dealt with the company's application for the authority to dismiss Hosea. The company was in default, but Hosea appeared and gave evidence. At the end of the proceedings, Mutsvangwa

made the following determination:

> "The employee is reinstated without loss of pay and benefits from the date of suspension or alternatively be paid all his wages and benefits for the period of suspension plus ten months as damages for loss of employment."

6. On 24 April 2001 the company, having failed to challenge timeously Mutsvangwa's determination before a senior labour relations officer, appeared before the Labour Relations Tribunal ("the Tribunal") (now the Labour Court) and applied for condonation of the delay in challenging the determination. The Tribunal took the view that there had not been a proper service of the notice of hearing on the company, quashed Mutsvangwa's determination and ordered a fresh hearing before another labour relations officer.

7. On 19 March 2002 the parties appeared before P Shawatu ("Shawatu"), a labour relations officer, and the company applied for the authority to dismiss Hosea. That application was subsequently dismissed on 5 April 2002 because Shawatu was of the view that the company's application for the authority to dismiss Hosea, which had been received by the Ministry of Labour on 3 March 1999, had not been made forthwith as required by the Regulations. Accordingly, Shawatu ordered the company to reinstate Hosea without any loss of pay and benefits from the date of suspension, or pay him damages in lieu of reinstatement.

8. Thereafter the matter was referred to a senior labour relations officer at

the request of the company, and on 10 October 2002 the parties appeared before A V Mombeirere ("Mombeirere"), a senior labour relations officer. Mombeirere set aside Shawatu's determination on the ground that as the parties were governed by a registered Code of Conduct ("the Code") they should have proceeded in terms of the Code.

9. On 30 April 2003 the company's lawyers wrote to Hosea's lawyers as follows:

> "We wish to confirm that we represented Chawasarira Transport when the matter was heard by the senior labour relations officer.
>
> We wish to confirm that Mr Hosea Nhidza was discharged from the services of Chawasarira Transport in accordance with the operating Code of Conduct in the Transport Industry. The Managing Director presided over the final hearing that led to his dismissal."

10. On 4 June 2003 Hosea appealed to the Labour Court against his dismissal. The appeal was subsequently heard on 9 February 2004 and the Labour Court reserved its judgment, which was later handed down on 12 February 2004. The result of the appeal was that Hosea's dismissal was set aside with costs but, as Hosea had not sought reinstatement, the Labour Court ordered the company to pay him his salary and benefits from 3 December 1998, the date when he was suspended, to 9 February 2004, when the appeal was heard, together with interest at the prescribed rate.

The Labour Court allowed Hosea's appeal for two reasons. The first was that Hosea's dismissal had not been in compliance with the provisions of the

Code; and the second was that on the merits the company had not established Hosea's alleged incompetence and inefficiency.

Dissatisfied with the result of the appeal to the Labour Court, the company appealed to this Court.

At the hearing of this appeal, Mr *Mambara*, who appeared for the company, conceded, correctly in my view, that Hosea had not been dismissed in accordance with the procedure set out in the Code. He added that when the company's chief executive was advised to comply with the determination made by Mombeirere and proceed in terms of the Code before dismissing Hosea, he said he would not do so because he had already dismissed Hosea.

In my view, the conduct of the company's chief executive is to be deprecated and condemned in the strongest terms.

In the circumstances, the Labour Court found that no disciplinary hearing had taken place and said:

> "From the above, it is clear that no disciplinary hearing was held, but only a management meeting where the decision to suspend (Hosea) was made.
>
> Under the circumstances (the) respondent (the company) failed to prove its case against (the) appellant as it did not follow the provisions of its own Code of Conduct. The rules of natural justice were flouted with impunity by the respondent. (The) appellant's dismissal was therefore unlawful."

I entirely agree with the views expressed by the Labour Court. The company's chief executive appears to have proceeded on the basis that he could

ignore the Code and dismiss Hosea without holding a disciplinary hearing and giving Hosea an opportunity to defend himself. He was not even prepared to proceed in terms of the Code when his own lawyers advised him to do so after the determination made by Mombeirere.

The Code, which is part of the Collective Bargaining Agreement: Transport Operating Industry, published in Statutory Instrument 94 of 1995, sets out an elaborate procedure which must be followed from the time an allegation of misconduct is made against an employee up to the time the employee concerned appeals to the chief executive, from whose decision an appeal lies to the Labour Court.

The determination by Mombeirere, i.e. that the parties should proceed in terms of the Code, was obviously correct because s 101(5) of the Labour Act [*Chapter 28:01*] provides as follows:

> "Notwithstanding this Part, but subject to subsection (6), no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall he intervene in any such proceedings."

If the company's chief executive felt that the determination by Mombeirere was wrong, he should have instructed the company's lawyers to note an appeal to the Tribunal where the determination would have been challenged. In view of the fact that he did not do so, the company was bound by the determination and should have complied with it by proceeding in terms of the Code before dismissing Hosea. As the company, through its chief executive, refused to do so, that is the end of the matter. The appeal cannot succeed.

In the circumstances, the appeal is dismissed with costs.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

*Muvirimi & Associates*, appellant's legal practitioners