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Judgment No. SC 58/05
Civil Appeal No. 274/04

INTERFRESH LIMITED v RYAN DZAPATA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA
HARARE, JUNE 7 & NOVEMBER 21, 2005

G Mehta, for the appellant

The respondent in person

ZIYAMBI JA: This is an appeal from a judgment of the Labour Court. The respondent was, on 19 August 2002, dismissed from his employment with the appellant. He was found guilty, by the Disciplinary Committee of the appellant, of negligence in failing to report an accident to the police. It was alleged that as a result of his failure to report the accident, the appellant was unable to claim for the repairs of the vehicle from its insurers.

The respondent, having unsuccessfully appealed to the various domestic tribunals provided in the appellant's code of conduct, appealed to the Labour Court which ordered his reinstatement without loss of salary or benefits with effect from the date of his dismissal. Against this decision, the appellant now appeals to this Court.

It appears to me that the appeal turns on whether or not the learned President of the Labour Court "erred in law in finding that the conviction of the respondent was irregular." If the conviction was indeed irregular, then the respondent was unlawfully dismissed.

The letter notifying the respondent to attend a disciplinary hearing was dated 17 August 2002. It contained the following allegation:

> "It is alleged by D. Nyoni that you abused a company vehicle and did not follow company procedures."

The Disciplinary Committee determination was:

> "Second written warning for negligence – accused failed to report to police."

It will be seen that the charge of negligence or failure to report to the police was not contained in the letter of 17 August 2002. The charges put to the respondent at the hearing were as contained in the letter of 17 August 2002. He was exonerated on both charges enumerated therein. In his letter to the respondent dated 22 August 2002, the appellant's Managing Director stated:

> "1. In your appeal you deny abusing a company vehicle, whereas the disciplinary committee did not penalize you for such.
>
> 2. Although you state in your appeal that you were not informed of any written company procedures, the disciplinary committee did not penalize you for not following such procedures.
>
> 3. You were given adequate notice of the hearing on 17 August 2002 for a hearing that took place on Monday 19 August 2002.
>
> 4. You were negligent in that you did not report an accident involving a company vehicle allocated to yourself that took place at the place where you reside to the police."

A reading of the record shows that, at all times, the respondent was defending himself against the charges as put to him in the misconduct letter. Indeed the record of the disciplinary proceedings is headed:

"ALLEGATIONS OF NOT FOLLOWING COMPANY PROCEDURES."

The minutes of the hearing are contained in pages 16-18 of the record. Only at the bottom of page 18 was mention made of the police report to the respondent ("RD"):-

"AC Where is the police report?
Accident must be reported to H.O.D.

EM What is your knowledge of company procedures?

RD When you get vehicle, vehicle is checked for dents, therefore we report dents to Makope.

AC You should report issues to the relevant H.O.D

GM You should approach Distribution with necessary details of accidents, with report to police and necessary details of attending officer."

I am therefore in agreement with the learned President of the Labour Court that the conviction was irregular in that the respondent was found guilty of an offence which was not charged in the misconduct letter or at the hearing. He was convicted of an offence for which he was not tried. The respondent was therefore unlawfully dismissed by the appellant.

The allegation by the appellant that the respondent has taken up alternative employment was unsubstantiated and, in any event, denied by the respondent. If the respondent has taken up such employment, that is a factor to be considered when determining the quantum of damages to be awarded to him.

The conclusion I have reached, namely, that the respondent was unlawfully dismissed, is decisive of the appeal. However, some mention must be made of the first ground of appeal which is stated as follows:

> "The learned President erred in law in failing to allow the Appellant to raise the point that the Respondent had filed his appeal to the Labour Court out of time."

In dealing with this issue the learned President remarked as follows:

> "The parties appeared in this Court on 21st July 2004. The appellant alleged the disciplinary hearing was held at an unreasonably short notice and that the alleged offence was not proved. The respondent alleged that the employment code (hereafter called the code) does not specify a minimum notice period prior to a hearing and that the evidence at the hearing proved the alleged offence. I then directed the parties to file written submissions. In its submissions, the respondent for the first time raised the point that appeal to this Court was filed out of time. This point was not made at the hearing on 21st July 2004 and neither is it canvassed in appellant's submissions. Although the appeal appears to be out of time, we do not know when appellant received the letter from the CEO, which dismissed his penultimate appeal. So we do not know when the appeal period started running. I consider that the respondent has sought to unfairly ambush the appellant by raising this point at such a late stage where appellant is unable to deal with the issue. This tactic is unfair and grossly prejudicial to appellant. No explanation has been given for raising the point late. In the circumstances I will not allow the point to be raised at this stage."

The appellant contended that the court *a quo* had wrongly refused to allow the point to be raised since a point of law going to the root of the matter may be raised at

any stage of the proceedings. It is indeed trite that a point of which goes to the root of the matter may properly be raised at any time and even for the first time on appeal. This was settled in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S). However, where the consideration of the point of law will result in unfairness to the party against whom it was raised, the Court will not allow the point to be raised. See *Muchakata v Netherburn Mine* (*supra*) at p 157 A where KORSAH JA stated:-

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it was directed: *Morobane v Bateman* 1918AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G."

The learned President of the Labour Court was of the view that the raising of the point of law during the filing of written submissions was unfair to the respondent. His appreciation and application of the legal principle involved was correct. Had this point of law been raised at the hearing, the respondent would have been given an opportunity to answer the allegations.

In any event, it was not established on the papers that the appeal to the Labour Court was out of time since it could not be ascertained on what date the appeal was determined by the Chief Executive Officer. Even the heads of argument filed by the appellant before the Labour Court and in which the point was first raised, do not state the date on which the appeal was determined. One would have expected the appellant to allege the date of determination of the appeal in order to establish that the respondent

had appealed to the Labour Court outside the prescribed period. The absence of the date in any of the papers on record provides strong support for the decision of the learned President of the Labour Court.

Further, it is not apparent on the record whether or not the Code of Conduct provides that the party disciplined must be advised of his right of appeal to the appropriate forum. If the Code does so provide, there is nothing on the record to show that this procedure was followed. I therefore subscribe to the view expressed by the learned President of the Labour Court that the introduction of this point after the conclusion of the hearing was unfair to the respondent.

Accordingly, the judgment of the Labour Court is upheld and the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Hussein Ranchod & Company, appellant's legal practitioners