REPORTABLE ZLR (2)

Judgment No. SC 70/06
Civil Appeal No. 276/04

ZIMBABWE MINING AND SMELTING COMPANY

v

TIMOTHY ZAKEYO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA, & MALABA JA
HARARE, MAY 16 2006 & MARCH, 8 2007

E W W Morris, for the appellant

S V Hwacha, for the respondent

MALABA JA: This is an appeal from a judgment of the Labour Court dated 3 August 2004, by which an appeal by the respondent against the decision of the disciplinary hearing committee finding him guilty of two counts of misconduct under the appellant's Code of Conduct and ordering his dismissal from employment was upheld and the decision set aside with an order that he be reinstated without loss of salary and benefits, failing which damages be paid by the appellant in *lieu* of reinstatement.

The respondent was employed by the appellant (hereinafter referred to as "ZIMASCO") as a General Manager responsible for the security and proper use of its assets as from 14 March 2003. He reported to the Chief Operations Officer.

On 15 July 2003 the respondent was suspended from work and charged with two counts of misconduct under the ZIMASCO Code of Conduct Policy & Procedure No. 82 ("the Code"). He appeared before the disciplinary hearing committee on 22 July 2003 to answer the charges.

The offence with which the respondent was charged in count one arose from an alleged breach of Clause 3.1.1 of the Code, that is to say, applying property or assets belonging to ZIMASCO to wrong use for an unauthorised purpose. The allegation was that he used 30 bags of cement belonging to ZIMASCO to build his own house without having obtained authority to use the property for that purpose from senior management. Clause 3.1.4 of the Code provides that an employee found guilty of breaching Clause 3.1.1. is liable to dismissal.

The offence with which he was charged in the second count arose from an alleged breach of Clause 32 of the Code, that is to say, committing an act or conduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment. The allegation was that, without disclosure to ZIMASCO, the respondent entered into an engagement with an organisation doing business with ZIMASCO in which he had a personal interest which was likely to give rise to a conflict with the discharge of his duty as an employee.

The circumstances which gave rise to count one are these –

ZIMASCO embarked on a project involving the building of a blocking plant at its premises in Kwekwe. The building contractor was JR Goddard Contracting (Pvt) Ltd, which sub-contracted part of the work to "Hippo Pools" ("the sub-contractor"). ZIMASCO appointed its own project engineer to oversee the progress of the construction. The respondent assumed overall supervision of the project on 1 April 2003.

There was at the time an acute shortage of cement in the market. ZIMASCO gave the sub-contractor money with which to purchase the necessary building material including cement. The cement was bought from Sino-Zimbabwe Cement Company (Pvt) Ltd, delivered and stored at ZIMASCO's premises in Kwekwe. On 23 April 2003 the respondent, who knew that the cement had been delivered at the premises, instructed the project engineer, who was his subordinate, to ask the sub-contractor to release 30 bags of cement and have them delivered at a place in Kwekwe where he was building his own house. The respondent said he would replace the cement when he got delivery of his order from Sino-Zimbabwe Cement Company (Pvt) Ltd.

The sub-contractor did as asked and released to the respondent 30 bags of cement which had been bought for use in building ZIMASCO's blocking plant. The respondent used the cement to build his own house. He did not advise senior management at ZIMASCO of what he had done, nor had he obtained their authority to use the cement for the purpose of building a private residence. At the time the respondent was charged with theft as defined under Clause 3.1.1 of the Code he had not replaced the cement.

In answer to the charge of having applied property belonging to ZIMASCO to an unauthorised use the respondent told the disciplinary hearing committee that he thought that the cement belonged to "UNKI Mine" owned by Anglo-American Corporation. He said that he did not think that the 30 bags of cement could be part of cement belonging to ZIMASCO. Whilst admitting the use to which he was alleged to have put the cement and that he had not sought and obtained authority from ZIMASCO to use it for the purpose of building his house, the respondent's defence was that he did not think the cement belonged to ZIMASCO.

The disciplinary hearing committee rejected the respondent's story. He failed to give reasons why he thought cement belonging to Unki Mine was on ZIMASCO premises. It found as a fact that the respondent knew at the time he used the cement that it belonged to ZIMASCO. He was found guilty as charged and dismissed from employment.

On appeal to the Labour Court the respondent contended that the cement belonged to the sub-contractor. It was argued on his behalf that the cement was a personal loan from the sub-contractor. The learned President of the Labour Court ("the President") accepted the argument and determined that the act of misconduct charged against the respondent had not been proved. He said:

> "An offence in these circumstances could only arise if the allegation is that the appellant fraudulently induced the sub-contractor to part with the cement."

The relevant provisions of Clause 3.1.1 of the Code read:

> "THEFT OR FRAUD without in any way detracting from the ordinary meaning of the words mean inducing or attempting to induce any person to perform any corrupt act; applying or attempting to apply to a wrong use for any unauthorised purpose any funds, assets or property belonging to the company." (the underlining is mine for emphasis)

The ground of appeal was that the learned President misdirected himself in failing to appreciate that in terms of the wide definition of theft under Clause 3.1.1 the appellant sufficiently informed the respondent of the essential elements of the misconduct he was charged with by alleging that he applied the 30 bags of cement belonging to it to an unauthorised use. The question for determination is therefore whether or not it was necessary in the circumstances for ZIMASCO to allege and prove that the cement was fraudulently taken by the respondent from the sub-contractor, to prove his guilt under the charge of theft as defined in Clause 3.1.1. Before I go on to express an opinion on the question, it is convenient to set out the circumstances which gave rise to the charge of misconduct in count two.

ZIMASCO entered into a contract of transport services with Hi-Tech (Pvt) Ltd ("Hi-Tech"), in terms of which the latter agreed to supply heavy duty trucks to move ore and other materials around the premises of ZIMASCO in Kwekwe at fixed rates per hour for each vehicle used. The respondent knew that Hi-Tech was doing the transportation business with ZIMASCO. He nonetheless entered into a sub-contract with Hi-Tech, in terms of which the latter hired his Leyland Tipper truck for use in the discharge of its obligations to ZIMASCO. The respondent did not disclose to ZIMASCO that he had a personal interest in the transport services

rendered by Hi-Tech. At one time his Leyland Tipper truck was involved in a collision with a truck belonging to ZIMASCO whilst it was being used to transport ore and other materials for his employer. When a subordinate approached him for information on the whereabouts of representatives of Hi-Tech with whom he intended to discuss the accident, the respondent told him to report to him any incident arising from the operations of trucks belonging to Hi-Tech on ZIMASCO premises.

When it was discovered that the respondent had entered into the sub-contract with Hi-Tech, he was charged with conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, which was that during the period of employment and without the consent of ZIMASCO he was not to enter into an engagement with any party doing business with the company where he had a personal interest which conflicted or might conflict with the discharge of his duty. Under Clause 4.1 of the Code "Conflict of interest", which was the substance of the misconduct charged against the respondent, is defined as:

> "any personal, financial or family interest which might deter an officer or employee from acting in the best interest of the company or might give rise to an influence on him that is not in the best interest of the company."

When the respondent appeared before the disciplinary hearing committee to answer the charge he contended that he did not think that the sub-contract he entered into with Hi-Tech was a conflict of interest situation. He said any

member of the public could have entered into the sub-contract. He also argued that he had not taken part in the adjudication of the tender won by Hi-Tech.

Whilst the arguments advanced in defence of the conduct of the respondent were rejected by the disciplinary hearing committee, they were favourably received by the learned President. He said:

> "In the present case the appellant would be paid for the use of his truck by the operator who in turn is paid for transport services by the respondent. I do not consider that there is a secret profit made by the appellant at the respondent's expense. The respondent is paying what it would presumably pay the operator if the latter was using his own truck. On the other hand the appellant is being paid what any other operator would pay for the use of the appellant's truck. It is difficult to find a conflict between the appellant's duties and interests in this case. The use of his truck by the operator does not interfere with execution of the appellant's duties because the appellant has merely hired out the truck. He is not driving the truck himself. The situation would have been different if the appellant were driving the truck during his working hours or if the appellant was involved in the adjudication of bids for the transport service. In that case one might infer a conflict between his duty to fairly evaluate the operator's bid and his interest (through the lease of his truck) in the operator winning the bidding. In this case the appellant was not involved in the adjudication of the bids.

Accordingly, I find that there was no conflict of interest which would necessitate disclosure."

It is clear from the reasoning of the learned President that he was of the opinion that the appellant had to prove the existence of an actual conflict of interest to establish the grounds of misconduct charged against the respondent. As a result, the ground of appeal was that the learned President misdirected himself in failing to appreciate that failure by the respondent to disclose a potential conflict of interest constituted the misconduct he was charged with.

I now turn to determine the grounds of appeal, starting with count one. Upon a proper construction of Clause 3.1.1, the conduct of "unauthorised use" of the 30 bags of cement belonging to ZIMASCO by the respondent to build his house would, if proved, constitute the offence of theft. The appellant described the misconduct with which the respondent was charged in the language which brought it within the meaning of the offence of theft given in Clause 3.1.1 of the Code. It was not necessary for ZIMASCO in proving that the respondent applied the cement belonging to it to an "unauthorised use" to have alleged that he had fraudulently taken the property from the sub-contractor.

The respondent understood the elements of the misconduct he was charged with, in that when he appeared before the disciplinary hearing committee he did not contend that the charge was fatally defective for omitting to allege that the 30 bags of cement had been taken from the sub-contractor by means of fraudulent

inducement. The ground of his defence was that the cement which he admitted using to build his own house did not belong to ZIMASCO. He said the cement in question belonged to "UNKI Mine" owned by Anglo-American Corporation. In other words, the respondent appreciated the fact that, regardless of the manner in which he had taken the property from the sub-contractor, it was the use to which he put it without having obtained the authority of ZIMASCO which constituted the misconduct he was being charged with.

It is important to note the fact that the disciplinary hearing committee rejected the respondent's defence and found that he knew at the time he used the 30 bags of cement to build his house that the property belonged to ZIMASCO, which had not authorised him to use it for that purpose. The finding was not appealed against.

In the absence of an appeal against the finding by the disciplinary hearing committee that the cement the respondent used to build his house belonged to ZIMASCO it was a serious misdirection on the part of the learned President to entertain and accept the contention that the cement belonged to the sub-contractor, who gave it to the respondent as a personal loan. In any case, if the cement belonged to the sub-contractor it would not have been necessary for ZIMASCO to allege that the respondent fraudulently induced him to part with the property.

The finding that the cement belonged to the sub-contractor was fallacious. He clearly did not have a personal interest in the property. He held the property as a result of being a sub-contractor. The cement had been purchased with money disbursed by ZIMASCO for the purpose. It had been bought for the specific

purpose of building its block plant. The sub-contractor held the cement for that specific purpose. He would have had no right to allow the respondent to use the cement to build his own house without the authority of ZIMASCO.

If the sub-contractor held the 30 bags of cement as an agent of ZIMASCO there would have been no need to allege that the respondent fraudulently removed the property from his custody because ZIMASCO would not have granted him the authority to use the cement to build his house.

What is clear from the record of evidence is that the facts of the misconduct with which the respondent was charged were established. The facts were that he used the 30 bags of cement belonging to ZIMASCO to build his own house without having obtained the authority of senior management of the company to do so. He knew at the time that there was no authority from ZIMASCO to use the property for that purpose.

It seems to me it does not matter very much in cases of misconduct at workplaces what label one puts to the facts as long as they establish the conduct which the parties intended to regulate. The conduct in this case did not have to embody the essential elements of the common law crime of theft. The parties were at liberty to agree, as they did, upon a definition of misconduct wider than what would ordinarily be prescribed under criminal law. Under common law "unauthorised use" of property belonging to another with the intention of returning it would not constitute the offence of theft and yet under the ZIMASCO Code of Conduct, it constitutes theft. See *R v Sibiya* 1955 (4) SA 247.

The court *a quo* should have found that the disciplinary hearing committee correctly held that the respondent applied the 30 bags of cement belonging to ZIMASCO to his own wrongful and unauthorised use in contravention of Clause 3.1.1 of the Code.

On the second count, the general rule, the breach of which founded the ground of misconduct with which the respondent was charged, is that any person who is in a relationship where he has a duty to act in the best interests of the other party is not allowed to put himself in a position where personal interest conflicts, or might conflict, with the interests of one whom he is bound to protect.

The rule, which is said to be of universal application, was stated by LORD CRANWORTH LC in his celebrated speech in *Aberdeen Ry Co v Blaikie* (1854) 1 Macq. 401 at p 471. In *Regal (Hastings) Ltd v Gulliver and Ors* [1942] 1 ALL ER 378 at p 382A VISCOUNT SANKEY quoted with approval from the LORD CHANCELLOR's speech where it was said:

> "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no-one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest

conflicting or which possibly may conflict with the interests of those whom he is bound to protect."

See also *Robinson v Randfontein Est. G.M. Co. Limited* 1921 AD 168 at 177–178.

The duty to disclose does not depend upon proof of the existence of actual conflict of duty and self-interest only. It is sufficient for the purposes of enforcement of the rule that there be a potential conflict of duty and self-interest arising from the engagement entered into or about to be entered into by the employee.

In *Phipps v Boardman* [1967] AC 46 at p 111 LORD HODSON said:

"… even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied."

It follows that the application of the rule is not confined to situations where actual or potential conflict of interests is by reason of and during the actual execution or discharge of duty by the employee. The rule has its roots in the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. As such it has been strictly applied by the courts.

Once it is established that, without disclosure, an employee entered into an engagement with a party doing business with the employer where he has a personal interest which is likely to conflict with the interests of his employer no

consideration is to be had of other matters raised as part of the defence to the charge of misconduct.

In *Regal (Hastings) Limited v Gulliver supra* LORD WRIGHT quoted at p 393b the words of JAMES LJ in *Parker v McKenna* (1874) 10 Ch. 96 where he said:

> "… the rule is an inflexible rule and must be applied inexorably by this court which is not entitled in my judgment to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

In *Bray v Ford* [1896] AC 44 at p 51 LORD HERSCHELL said that an official in a senior management position, as the respondent was in this case, is held to the strict application of the positive rule on the duty to disclose actual or potential conflict of interest arising from an engagement he enters into with a party doing business with his employer out of "the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding" such a position "being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect".

I now apply these principles of law to the facts of this case. The learned President was of the opinion that ZIMASCO had to establish the existence of

an actual conflict of duty and self-interest arising from the engagement the respondent entered into with Hi-Tech. He was, with respect, clearly wrong, as it was sufficient for the purposes of the enforcement of the rule for ZIMASCO to show that there was a potential conflict of interest arising from the engagement. The comments by the learned President that the respondent had not taken part in the adjudication of tenders and was not driving the motor vehicle himself were meant to show that there was no actual conflict of interest situation. It was not necessary that potential conflict of interest should arise in the course of actual execution of duty.

The respondent's guilt lay in the mere fact that he entered into an engagement with a party doing business with ZIMASCO where he had a personal interest which was likely to conflict with the interest of the company. The only means by which he could defeat the charge of misconduct in the circumstances was the defence that he entered into such an engagement with the knowledge and informed consent of the employer.

The matters considered by the learned President, on the basis of which the charge of misconduct was defeated, were of no relevance to the determination of the respondent's guilt. In other words it was immaterial that no prejudice was suffered by ZIMASCO, or no secret profit was made by the respondent or that any member of the public could have entered into the sub-contract with Hi-Tech.

The manner in which the respondent dealt with the report of the collision between his Leyland Tipper truck and the truck belonging to ZIMASCO shows that he had put himself in a position in which personal interest might conflict

with the interest of his employer. The interests of ZIMASCO required that the accident be reported to the appropriate officer and that it be thoroughly investigated. In ordering a subordinate to report all incidents arising from the operations of the trucks supplied by Hi-Tech to him the respondent was clearly swayed by considerations of personal interest rather than by duty.

The disciplinary hearing committee was correct when it found that the conduct of the respondent was inconsistent with the fulfilment of the express or implied conditions of his contract of employment. It cannot be said on the facts that it was wrong in holding that the respondent's misconduct was of a serious nature going to the root of the employer-employee relationship. The decision of the court *a quo* was therefore clearly wrong.

I would allow the appeal with costs, set aside the decision of the Labour Court on each count of misconduct and substitute in its place the following -

> "The appeal from the decision of the disciplinary hearing committee on each count of misconduct is dismissed with costs."

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Gill, Godlonton and Gerrans, appellant's legal practitioners

Dube, Manikai and Hwacha, respondent's legal practitioners