

REPORTABLE (ZLR) 15

CHIKOMBA RURAL DISTRICT COUNCIL
v
HERBERT PASIPANODYA

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, MAY 29 & JUNE 26, 2012

D C Kufaruwenga, for the appellant

P Mabundu, for the respondent

GARWE JA: This is an appeal against the decision of the Labour Court setting aside the suspension and dismissal from employment of the respondent by the appellant and re-instating the respondent to his former position without loss of salary and benefits.

The background to this matter is as follows. The respondent was employed by the appellant as its Chief Executive Officer. In terms of the contract of employment signed by the two parties, the respondent's conduct at the workplace was to be "regulated through the Staff Code of Conduct and the Labour Relations Act [*Cap. 28:01*] as well as other related Statutory Instruments". It was further agreed that all disciplinary and appeals procedures were to "be handled in conformity with S.I. 371 of 1985 and/or according to the code of conduct of the organisation".

In December 2006, the respondent was suspended from employment without benefits in terms of s 4 of the Labour (National Employment Code of Conduct) Regulations Statutory Instrument 15 of 2006 ("the National Employment Code of Conduct") and also in

terms of the Labour Relations (Employment Codes of Conduct) Regulations S.I. 379 of 1990 and further in terms of the Chikomba Rural District Council Code of Conduct. In due course the respondent appeared before a disciplinary committee facing eight (8) charges of misconduct as defined in s 4 of the National Employment Code of Conduct. He was found guilty of six of the eight charges and was dismissed from employment. Dissatisfied, the respondent lodged an application for review in the Labour Court. Essentially he sought an order setting aside the decision of the disciplinary committee on the basis that the appellant should have conducted the disciplinary proceedings in terms of its code of conduct and not the National Employment Code of Conduct. The Labour Court accepted this submission and consequently made the order that is the subject of this appeal.

The appellant, in its grounds of appeal, has attacked the decision of the Labour Court on several bases. These are:

1. That the court erred at law in concluding that the appellant's use of the procedure provided for in the National Employment Code of Conduct was fatal to the disciplinary proceedings conducted against the respondent.
2. That the court misdirected itself in failing to appreciate that the contract of employment signed by the appellant and the respondent allowed the appellant to use either its code of conduct or the National Employment Code of Conduct in conducting disciplinary proceedings against the respondent.
3. That the court erred in disregarding the provisions of the contract of employment signed by the parties in terms of which both parties expressly agreed that the appellant's code of conduct, the Labour Relations Act [*Cap. 28.10*] and other related statutory instruments were to govern labour disputes between the parties.

4. That the court adopted an over fastidious approach in interpreting the National Employment Code of Conduct and in the process resolved a labour dispute on the basis of a legal technicality despite the overwhelming evidence which pointed to the respondent's guilt.

The above grounds raise one issue only and that is whether at law, the appellant, which had a registered code of conduct, was entitled to discipline the respondent using the National Employment Code of Conduct.

The starting point is s 12B of the Labour Act [*Cap. 28:01*] ("the Act"). That section provides in relevant part as follows:

- "12. An employee is unfairly dismissed –
- (a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
 - (b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)." (underlining is for emphasis)

The Labour (National Employment Code of Conduct) Regulations, 2006 ("the Regulations") were made in terms of s 101(9) of the Act. Those regulations also provide in s 5 as follows:

- "5. ***Termination of contract of employment***
No employer shall terminate a contract of employment with an employee unless -
- (a) the termination is done in terms of an employment code which is registered in terms of section 101(1) of the Act; or
 - (b) in the absence of the registered code of conduct mentioned in (a), the termination in terms of the National Employment Code of Conduct provided for under these regulations; or
 - (c) ...
 - (d) ..." (underlining is for emphasis)

Section 101 of the Act provides that a registered employment code shall be binding in respect of the industry, undertaking or workplace to which it relates.

It is the appellant's contention before this Court, as it was in the court *a quo*, that the appellant was entitled to use either the Regulations made under the Act or its code of conduct or both as this was specifically agreed upon in the contract of employment signed by both parties.

There can be no doubt, regard being had to the provisions in the Act and the Regulations to which reference has been made, that the submission by the appellant that it was entitled to use either the Act or the Regulations or both is not tenable. Both the Act and the Regulations are clear that the National Employment Code of conduct contained in those regulations can only be invoked where there is no registered code of conduct. Since it is common cause that the appellant does have a registered code of conduct, the termination of a contract of employment of any of its employees had to be in terms of its code of conduct and not the National Employment Code of Conduct. The appellant therefore erred in terminating the respondent's employment in terms of the National Employment Code of Conduct.

The submission that the appellant was entitled to use the National Employment Code of Conduct because the parties had agreed that the code could be used is equally without merit. Clearly any agreement entered into between the parties had to comply with the specific provisions of both the Act and Regulations. Any agreement to the contrary would be against the law and a termination of employment based on such agreement would be null and void. That statutory provisions override the common law goes without saying.

I am satisfied that the court *a quo* was correct in coming to the conclusion that the suspension and dismissal of the respondent by the appellant was null and void. The appeal must therefore fail.

The appeal is accordingly dismissed with costs.

GOWORA JA: I agree

OMERJEE AJA: I agree

Dzimba, Jaravaza & Associates, appellant's legal practitioners

Maganga & Company, respondent's legal practitioners