MASHONALAND TURF CLUB
v
GEORGE MUTANGADURA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & GOWORA AJA
HARARE, FEBRUARY 6, 2012

N Madya, for the appellant

P Makuwaza, for the respondent

ZIYAMBI JA: This is an appeal against the judgment of the Labour Court in which it upheld an award by an arbitrator dismissing the appellant's appeal. The arbitrator substituted a penalty of a final warning in place of an order of dismissal made by the appellant.

It is common cause that the respondent, a managerial employee employed by the appellant for 20 years, participated as spokesperson in, and facilitated, an unlawful industrial action by the employees of the appellant. Following a hearing, the respondent was found guilty of two acts of misconduct namely, conduct inconsistent with the express or implied terms of his contract and disobedience to a lawful order as a result of which he was dismissed from employment.

The arbitrator to whom the matter was referred for compulsory arbitration found, that in the process of the unlawful industrial action, the respondent "openly taunted members of management and challenged their authority. He openly called for the dismissal

of six managers and brought about chaos and mayhem at the appellant's business premises on 3 and 4 December 2008. He held a very senior position as branch manager and he openly led and associated himself with his subordinates in an act of disobedience to his superiors". He found that the appellant could not be faulted in finding that the respondent's conduct warranted his dismissal from employment and that the two 'offences' of which the respondent was found guilty and in respect of which he was dismissed by the appellant went to the "very basis of his contract of employment with the respondent. He found the appellant's decision to dismiss the respondent to be 'unassailable'.

Notwithstanding the above findings, the arbitrator went on to find that the dismissal was unfair in the circumstances principally because only the respondent of all the employees who participated in the industrial action had been singled out for disciplinary action. He found to be mitigatory the fact that the unlawful industrial action consisted of a peaceful sit-in which lasted only 2½ hours; that the workers had genuine grievances; and that the record of service of the respondent had been accorded little weight. He therefore set aside the penalty of the dismissal and imposed in its place a final warning.

The court *a quo* agreed with the arbitrator and upheld his award. It found that in terms of s 12B (4) of the Labour Act, the arbitrator was correct in setting aside the penalty of dismissal imposed by the appellant. In addition, the court *a quo* found as mitigating the submission that the respondent had acted both in a personal and representative capacity and that he was leading workers who 'needed little persuasion'.

The gravamen of the appeal is that the Labour Court erred in upholding the manner in which the arbitrator exercised his discretion in terms of s 12B (4) of the Labour Act and that the decision of the court *a quo* ignored the employer's right to dismiss an employee found guilty of an act of misconduct which goes to the root of the employment contract. Alternatively, it was contended that the order made by the arbitrator was defective in that it made no award of damages as an alternative to reinstatement as required by s 89(2)(c)(iii) of the Labour Act and that the court *a quo* misdirected itself in upholding the order.

Having considered submissions of both counsel, we are of the view that J*iah's*[1] *case* to which we were referred by the respondent is not applicable to the circumstances of this case. The record clearly shows, and the arbitrator found, that the respondent committed serious acts of misconduct which went to the root of his contract of employment. The law is clear that in a situation such as this the employer is entitled to dismiss the employee. The fact that the respondent was singled out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract.

In the exercise of their powers in terms of s 12B (4) of the Labour Act, the Labour Court and arbitrators must be reminded that that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.

[1] Jiah & Ors v Public Service Commission & Ors 1999 (1) ZLR 17

We are therefore of the unanimous view that both the Labour Court and the arbitrator erred in substituting their discretion for that of the employer in setting aside the dismissal.

In view of the decision we have reached it is not necessary to consider the alternative relief sought by the appellant.

It is accordingly ordered as follows:

(1) The appeal be and is hereby allowed with costs.

(2) The order of the court *a quo* is set aside and substituted as follows:

(i) The appeal is allowed with no order as to costs.

(ii) The award of the arbitrator is set aside and the dismissal of the respondent is hereby confirmed.

GARWE JA: I agree

GOWORA AJA: I agree

Wintertons, appellant's legal practitioners
Sinyoro & Partners, respondent's legal practitioners