AUGUSTINE M. TIRIVANGANA
v
THE UNIVERSITY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, MAY 29, 2012 & JUNE 17, 2013

Ms *F Mahere*, for the appellant
L Uriri, for the respondent

GOWORA JA: This is an appeal against the judgment of the Labour Court upholding an appeal against an arbitral award.

The background to the appeal is as follows. The appellant was employed by the University of Zimbabwe ("the University") as a full time lecturer in the department of Rural and Urban Planning. It is common cause that sometime in October 2008 the appellant stopped reporting for duty. In November 2008 he was removed from the pay sheet and his salary was stopped. In December of the same year a firm of legal practitioners purporting to act on his behalf addressed a letter to the respondent in which they challenged the latter's intention to evict the appellant's family from the accommodation afforded to the appellant by the respondent. Ultimately the appellant's family was evicted. An invitation was sent to the appellant to physically avail himself to the respondent's offices by 6 February 2009. The appellant did not attend as requested.

In August 2009 the appellant addressed a letter to the respondent which was in the following terms:

> "This memo serves to inform you that following the official reopening of the University by the Vice-Chancellor, after the long temporary closure, I am here to resume my normal teaching duties. I, however, apologise for missing the opening sessions due to some logistical problems. Nonetheless, I promise to make up for the lost hours as soon as you give me my teaching load for the semester."

The appellant was however barred from performing any duties and was denied access to his office. On 23 September 2009 the appellant wrote to the respondent alleging unfair labour practice and demanding an end to the alleged practices. On 14 October 2009 the appellant advised the Ministry of Labour of the alleged unfair labour practices and requested conciliation. On 15 October 2009 the respondent laid charges of misconduct against the appellant resulting in his dismissal.

When conciliation proved fruitless the matter was referred to an arbitrator for compulsory arbitration. The arbitrator found that the respondent had committed unfair labour practices in ejecting the appellant from its flat and by stopping his salary and benefits without having formally charged him with misconduct. It had also failed to honour its duty to the employee to provide him with work when it denied him access to his office. The arbitrator also found that there was no evidence produced by the respondent to show that the appellant had obtained employment elsewhere. Deciding that the appellant had been dismissed constructively, the arbitrator issued an award in favour of the appellant. In the award the arbitrator ordered that the appellant be reinstated to his employment without loss of salary and benefits, or in the alternative that he be paid damages *in lieu* of reinstatement.

Dissatisfied with the award the respondent lodged an appeal with the Labour Court. The learned President of the Labour Court upheld the appeal and set aside the award by the arbitrator. The appellant has appealed to this Court against that decision.

The grounds of appeal are as follows:

1. That the court *a quo* erred in making a determination on the substantive correctness of the Disciplinary proceedings when that was never an issue before it.
2. That the court *a quo* also erred in essentially coming to the conclusion that it was proper for respondent to dismiss the appellant without affording him an opportunity to be heard and so erred in giving effect to the cessation of benefits in the absence of a hearing and in breach of the basic tenets of natural justice.
3. The court *a quo* further erred in not declaring void disciplinary proceedings that had been put in motion notwithstanding a complaint had been properly lodged with a labour officer and had so been put in motion in order to negate that complaint.
4. The court *a quo* also erred in dealing with and interfering with issues of fact when such issues are not cognizable before it.

Ms *Mahere* who appeared for the appellant submitted that the appellant had been unfairly dismissed and argued further that the dismissal had been effected contrary to s 12B of the Labour Act [*Cap. 20:28*],("the Act").

It is common cause that the appellant did not report for duty for the period October 2008 to the middle of August 2009. The appellant contends that the University had been shut down and was not conducting business. The respondent on the other hand contends that the normal business of the university was not suspended, and that although students were not in attendance all staff members were required to report for duty as normal.

Section 12B of the Act provides that an employee has a right not to be unfairly dismissed from employment. It further provides that a dismissal shall be unfair unless it has

been effected in terms of a registered employment code, or if such is not available, the Labour National Employment Code of Conduct S.I.15/2006.

The onus is on the employer to show that the dismissal of an employee was effected in terms of a registered employment code. The respondent has not denied that it removed the appellant from the payroll and also caused the eviction of his family from the residential premises that had been availed to the appellant as part of his employment benefits. He was also barred from performing any of the duties of a lecturer when he made himself available in August 2009. He was denied access to the office that he had been using prior to November 2008. He was not suspended or subjected to disciplinary procedures before these measures were taken against him. He also wrote letters to the respondent complaining about the alleged unfair labour practices and demanding that he be accorded his employment rights and benefits to no avail. The appellant then complained to a labour officer who referred the matter to an arbitrator for conciliation.

The arbitrator made a finding of fact that the University was closed during the period in question, i.e. from October 2008 to August 2009. It is contended on behalf of the appellant that the learned President in the court *a quo* suggests no justifiable basis for impugning the arbitrator's finding on fact. It is evident that the court *a quo* took a different view to that of the arbitrator on the alleged absence of the respondent from duty during the relevant period. The court *a quo* substituted its own discretion in place of the arbitrator and proceeded to make findings of fact contrary to those found established by the arbitrator on the papers before the court. The court *a quo* could only have upset the findings of fact by the arbitrator if the exercise of his discretion by the arbitrator was irrational on the evidence

placed before him. As was stated by KORSAH JA in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 at p 670:

> "The general rule of law as regards irrationality is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon v Rosenberg* 1936 AD 380 at 395-7; Secretary of State for *Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671E-H; *CCSU v Min for the Civil Service* supra at 915A-B; *PF-ZAPU v Min of Justice* (2) 1985 (1) ZLR 305 (S) at 326E-G".

The learned President found that the department in which the appellant had been employed had been operational and that the respondent had absented himself from his employment from October 2008 to August 2009 and that the respondent had been justified in stopping his benefits. The court also made a finding that on the evidence presented before the arbitrator the appellant could not claim constructive dismissal because he had not rendered services to the respondent which entitled the latter to cease payment of the salary and benefits.

An appeal to the Labour Court is on a point of law. The court *a quo* did not find that there was any misdirection on the part of the arbitrator and consequently the court fell into error in reversing the award on the basis of findings of fact.

The Labour Court was also criticised before us for determining an issue that was not before it as an appeal. The arbitrator did not delve into the disciplinary proceedings instituted by the respondent against the appellant. The record reflects that the arbitrator commented on those proceedings in passing but made no finding one way or other. It was

therefore not an issue before the Labour Court for determination on appeal. Despite this, the court had this to say:

> "As regards the second ground of appeal, i.e. whether the employer could discipline the respondent when the respondent had referred that dispute to a labour officer for conciliation and possible arbitration.
>
> The court is of the view that the arbitrator erred in holding that the employer could not. An employer is entitled in law to discipline any of its employees in terms of the governing laws whenever it is alleged that the employee has committed an act of misconduct. The reporting of the dispute to a labour officer does not take away the employer's right to discipline its employees. That is a settled principle of our law."

Although the court was correct in its statement on the law, in my view it misdirected itself by determining an issue which was never before the arbitrator.

The appellant argues that the court further misdirected itself by finding that the respondent had a right to stop paying the appellant his salary and benefits in circumstances amounting to a constructive dismissal. Section 12B of the Labour Act [*Cap. 28:01*], the "Act" provides:

> **"12B Dismissal**
> (1) Every employee has the right not to be unfairly dismissed.
> (2) An employee is unfairly dismissed—
> (*a*) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of anemployment 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)."

The arbitrator had found that the dismissal of the appellant had been effected in contravention of s 12B of the Act. The respondent does not have a registered employment code and perforce any disciplinary proceedings in relation to its employees would have to be conducted in terms of the Labour National Employment Code of Conduct, S.I. 15/2006. Section 5 of the National Code of Conduct prohibits any dismissal that is effected in defiance

of the provisions of s 12B. By dismissing the appellant without first conducting a disciplinary hearing as required in terms of ss 5 and 6 of the National Code the respondent deprived the appellant of his right to be heard in breach of the *audi alteram partem* principle. This is an elementary notion of fairness and justice which is universally accepted as being the norm by which parties should govern their relationship with each other. A failure to adhere to the tenets of the principle results in prejudice to the party against whom the breach has been perpetrated.

In *Taylor v Minister of Education & Anor* 1996 (2) ZLR 772 GUBBAY CJ stated at p 780A-C:

> "The *maxim audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken. See Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at 333B-F; compare on the facts, Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 at 551F-G, per SCHREINER JA."

The Labour National Code of Conduct sets out in detail procedural steps that have to be taken before a person is dismissed from his or her employment. It is common cause that before the appellant had his benefits and salary unilaterally withdrawn by the respondent he was not afforded an opportunity to be heard. In effect he was dismissed without any disciplinary proceedings having been conducted. This is borne out by the fact that the respondent then proceeded to hold disciplinary proceedings in November 2009.

Before us Ms *Mahere* sought to impugn the subsequent proceedings as to their fairness and legality. This court, like the Labour Court in the previous proceedings, is not

seized with the disciplinary proceedings instituted by the respondent and cannot comment on the propriety of the same.

It was contended by Mr *Uriri* that the failure by the appellant to attend at his place of employment during the period in question amounted to a repudiation of his contract of employment. It was contended further that the appellant was amongst a group of employees of the respondent which had found employment in Ethiopia during the period in question. These averments were placed before the arbitrator who found that although the respondent raised these issues it had failed to substantiate them. Mr *Uriri* did not invite us to find that the findings by the arbitrator that the department had been closed during the requisite period amounted to a misdirection inviting intervention by this court or the Labour Court. Likewise there was no suggestion that the evidence of such employment in Ethiopia had been established before the arbitrator.

In the circumstances it is evident that the court *a quo* misdirected itself in setting aside the award by the arbitrator. The appeal must therefore succeed.

In the result, I make the following order:

The judgment of the court *a quo* is set aside and is substituted with the following:

"The appeal is dismissed with costs."

GARWE JA: I agree

OMERJEE AJA: I agree

Chadyiwa & Associates, appellant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners