DISTRIBUTABLE (31)

STANLEY MAJURIRA
v
TREDCOR (ZIMBABWE) (PVT) LTD

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 24 & OCTOBER 1, 2013

The applicant in person
Adv. Mahere, for the respondent

Before**: PATEL JA**, in Chambers

The applicant in this matter was employed by the respondent as a Branch Manager. On 11 March 2011 he received a letter of final warning from a Senior Branch Manager (Mrs. Maisiri) arising from an allegation of dishonesty pertaining to an altered order for fuel. Subsequently, at 15.35 p.m. on 5 April 2011, he was given notice to attend a disciplinary hearing to be held on 8 April 2011 at 10.00 a.m. in relation to the same matter. The notice was written by the General Branch Manager (Mr. Goddard) who explained that the hearing was necessitated by "a conflict in the facts provided" to him. On the date of the hearing, Goddard presided over the proceedings. Thereafter, the applicant was found guilty on the allegations levelled against him and consequently dismissed.

The applicant then filed an application for review of the disciplinary proceedings before the Labour Court in Case No. LC/REV/H/36/11. (It is not clear from the papers why he did not appeal against his dismissal). The grounds for review were that: he was given inadequate notice of the hearing, that the Goddard was both the complainant and adjudicator, that the minute taker was a junior, and that he was punished twice for the same offence. The Labour Court considered and rejected all of these grounds as being without merit and dismissed the application for review with costs. A subsequent application to the same court for leave to appeal was also dismissed in October 2012.

The applicant now seeks leave to appeal to this Court on the following four grounds: he was punished twice for the same offence; he was not given three days to prepare for the disciplinary hearing; the complainant was also the hearing authority; the Labour Court ordered costs against him even though they were not sought by the respondent. With respect to the first ground, he contends that the initial letter of warning constituted a final penalty for the offence in question and was never withdrawn or set aside before the hearing was instituted.

The respondent's position is as follows. The letter of warning was not written pursuant to any hearing and was therefore of no consequence. The Labour Court properly found that two and a half days notice was in substantial compliance with the notice requirement. Goddard was not the complainant and did not carry out any

investigations. For these reasons, the Labour Court's decision was correct and, therefore, this application should be dismissed.

VALIDITY OF NOTICE OF OPPOSITION

In his answering affidavit, the applicant raises two procedural objections to the respondent's notice of opposition. The first objection is that it should have been filed within three days. It was filed two days out of time and this chamber application must therefore proceed as being unopposed.

At the hearing of this application, counsel for the respondent explained that the two day delay in filing the notice of opposition was due to the confusing fact that the application was styled as a "court application" as opposed to a "chamber application". In any event, she sought condonation for the late filing of the opposing papers. On this point, I am satisfied that no prejudice has been occasioned to the applicant. I therefore condone the late filing of the notice of opposition.

The applicant's second objection is that the deponent to the opposing affidavit (Mr. Marecha) was not authorised to depose thereto. This is because he was suspended from duty on 18 September 2012 and the disciplinary proceedings against him which were commenced on 9 October 2012 were to be continued on 19 October 2012. Consequently, the opposing affidavit must be disregarded.

Marecha's affidavit is dated 23 October 2012 and was filed on 25 October 2012. He avers that he is employed by the respondent as General Manager and that it is in that capacity that he is authorised to depose to the affidavit on the respondent's behalf. In the papers filed of record, there is nothing to show that Marecha was not the General Manager of the respondent or that he was suspended from duty at the time that he deposed to the affidavit. In my view, his averment as to his authority to depose cannot be undermined by the applicant's bare assertion to the contrary. Accordingly, the applicant's objection in this regard cannot be sustained and must be dismissed.

MERITS OF GROUNDS OF APPEAL

Before dealing with the merits of the intended appeal, it is necessary to consider the nature of the relief sought by the applicant. The order that he seeks, both before the Labour Court and on appeal to this Court, is that his dismissal be set aside and that he be reinstated without loss of salary or benefits with effect from the date of dismissal. In the event that the grounds of review or grounds of appeal are upheld, the appropriate relief would not be reinstatement but remittal to the respondent in order to correct all the alleged irregularities and institute fresh disciplinary proceedings thereafter. In this regard, I fully agree with Adv. *Mahere* that the relief sought by the applicant is irregular and incompetent.

The first ground of appeal is that the applicant was punished twice for the same offence. It is clear from the papers, in particular Goddard's letter dated 4 April 2011, that the initial letter of final warning was conceived and dispatched without any

prior disciplinary proceedings or hearing having been conducted. In my view, Maisiri's finding of misconduct and the resultant penalty purportedly imposed therefore were wholly unprocedural and constituted arrant nullities. That being so, it was not necessary for the respondent to withdraw the final warning or set it aside before proceeding with the disciplinary proceedings under review. It follows that the applicant cannot be said to have been punished twice for the same offence.

The second ground relates to the failure to give the applicant three days notice to prepare for the disciplinary hearing. In this regard, s 6(4)(a) of the Labour (National Employment Code of Conduct) Regulations, 2006 (S.I. 15 of 2006) entitles an employee to "at least three working days notice of the proceedings against him or her and the charge he or she is facing". Does this mean that any notice falling short of three working days would operate to vitiate any subsequent disciplinary hearing? While I am loath to pronounce any general rule on the point, it seems to me that strict compliance with s 6(4)(a) might justifiably be excused on the particular facts of this case. This is because the applicant was fully aware of the charge he was facing, well before he received the notice convening the disciplinary hearing, and therefore had ample time to prepare his defence. Additionally, there is no indication in the papers before me that the applicant was in any way prejudiced, and if so how, in the conduct of his defence by the failure to afford him three full days notice of the disciplinary hearing. I am therefore satisfied that the court *a quo* cannot be faulted for having found substantial compliance with the requirements of s 6(4)(a) in this specific instance.

The third ground is based on the argument that the complainant was also the hearing authority. On the facts *in casu*, this argument is entirely untenable. It is abundantly clear from the papers that Goddard did not initiate or investigate the complaint against the applicant. What he did, after having considered the allegations against the applicant and his response thereto, was to convene and thereafter preside over the disciplinary hearing to determine the charges of misconduct levelled against him. Although he might have taken an inquisitorial approach at the hearing, he certainly did not testify against the applicant. In my view, there is nothing so unprocedural in this regard as to warrant any finding of a reviewable irregularity having been committed.

The final ground, pertaining to the award of costs by the court *a quo*, is not addressed at all in the applicant's founding and answering affidavits. Nor was it pursued at the hearing of the application. It must therefore be deemed to have been abandoned. In any event, even if it were to be sustained, it could not possibly justify having to interfere with the decision appealed against.

In the result, I am satisfied that the Labour Court did not misdirect itself and that its decision was correct in all material respects. The applicant has failed to establish any prospect of success on appeal. The application for leave to appeal is accordingly dismissed with no order as to costs.

Muzangaza, Mandaza & Tomana, respondent's legal practitioners