

REPORTABLE (38)

STELLA NHARI
v
ZIMBABWE ALLIED BANKING GROUP

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 4, 2012 & OCTOBER 31, 2013**

T Mpfu, for the appellant

D Mehta, for the respondent

GARWE JA: This is an appeal against a judgment of the Labour Court dismissing with costs an application for the review of the decision of the respondent to dismiss the appellant from employment.

The facts of this case are these. The appellant was employed by the Zimbabwe Allied Banking Group (“the respondent bank”) as Head of the Compliance Section. In this capacity she reported directly to the Chief Executive Officer. In November 2007, the Chief Executive Officer of the respondent bank advised senior management of the bank of the introduction of a new reporting structure. In terms of the new structure the appellant’s position was renamed General Manager, Compliance and she was to report to the Head of the Corporate and Legal Services Division. The memorandum made it clear that the new structure would not affect the grade, salary or benefits of any incumbent.

The appellant was unhappy that she now had to report through another Head of Department and took the view that her conditions had been unilaterally changed by the respondent bank. She sought clarification from the Chief Executive Officer of the respondent bank who responded clarifying the position. She was still not satisfied with the explanation given and insisted on using the old reporting structure. She made representations to the Board of Directors of the respondent bank. The Chief Executive Officer again wrote to her directing her to follow the new structure pending any decision to be taken by the Board. The appellant continued to question the new structure and made further representations to the Board of Directors of the respondent bank. On 6 June 2008, the appellant was suspended from work without salary or benefits in terms of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15/2006 and charged with two offences namely, any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of a contract and wilful disobedience to a lawful order given by the employer. A disciplinary hearing was thereafter conducted on 20 June 2008. The matter was postponed so that the disciplinary committee could consider the verdict. The appellant did not attend further hearings of the committee.

On or about 30 June 2008, the appellant filed an urgent application in which she sought an order setting aside her suspension and reinstating her to her former position without loss of salary and benefits. The basis of the application was that since the respondent had failed to conclude the matter within the period of fourteen (14) days prescribed in the Regulations, the proceedings had become a nullity. Additionally the appellant averred that the suspension was unlawful as no act of misconduct had been committed and the circumstances merely indicated the existence of a misunderstanding. Notwithstanding the filing of the application, the disciplinary committee determined on 18 July 2008 that the

appellant be dismissed. On 14 August 2008 the Labour Court granted a default judgment in favour of the appellant in terms of which the suspension was set aside and re-instatement was ordered. In October 2008 the appellant then filed an application for the review of the decision to dismiss her. The application did not find favour with the Labour Court which proceeded to dismiss the application with costs. It is that decision which is the subject of the present appeal.

In her notice of appeal, the appellant has attacked the decision of the Labour Court on several grounds. Counsel on both sides are however agreed that there are three main issues that fall for determination before this Court. The first is whether the court *a quo* misdirected itself in failing to find that the chairman of the disciplinary committee was biased. The second is whether the court *a quo* was correct in finding that the first charge in respect of which the appellant was convicted had been proved. The third is what effect, if any, the order of the Labour Court setting aside the suspension of the appellant and ordering her reinstatement had on the disciplinary proceedings which resulted in the dismissal of the appellant from employment. I consider it prudent to deal with the last issue first.

In his submissions before this Court, Mr *Mpofu* urged us to find that the continuation of the disciplinary proceedings was invalid in the light of the application which had been filed with the Labour Court and pursuant to which an order was made setting aside the suspension and ordering re-instatement of the appellant. He further submitted that since the judgment of the Labour Court setting aside the suspension and ordering re-instatement has not been appealed against or otherwise set aside, the decision of the respondent to dismiss the appellant, predicated as it was on a suspension that has been set aside, cannot stand.

Mr *Mehta*, for the respondent, was asked to address the court on the implications of the order of the Labour Court setting aside the suspension and ordering reinstatement. Mr *Mehta* had no useful submissions to make in this regard. He advised the court that he had made attempts to get details on the order granted by the Labour Court but had failed to get any. He accepted that the Labour Court had indeed set aside the suspension of the appellant and ordered her re-instatement and that the order remains extant.

Section 6 of the Labour (National Employment Code of Conduct) Regulations, 2006 provides in relevant part:-

- “(1) Where an employer has good cause to believe that an employee has committed a misconduct mentioned in section 4, the employer may suspend such employee with or without pay and benefits and shall forthwith serve the employee with a letter of suspension with reasons and grounds of suspension.
- (2) Upon serving the employee with the suspension letter in terms of subsection (1), the employer shall, within 14 working days investigate the matter and conduct a hearing into the alleged misconduct of the employee and, may, according to the circumstances of the case –
- (a) serve a notice, in writing, on the employee concerned terminating his or her contract or employment, if the grounds for his or her suspension are proved to his or her satisfaction; or
- (b) ...”

On a proper reading of the above section, the following emerge:-

- (a) An employer must have good cause to believe that an employee has committed a misconduct as defined in s 4 of the Regulations.
- (b) If this is the case, the employer may suspend the employee with or without pay and benefits.
- (c) A copy of the letter of suspension with reasons and grounds of suspension shall forthwith be served on the employee.

- (d) Within fourteen (14) days of serving the employee with the letter of suspension, the employer shall investigate the matter and conduct a hearing into the alleged conduct.
- (e) After reaching a verdict, the employer shall serve a notice on the employee either terminating the employment if the misconduct has been proved or removing the suspension where the grounds of suspension are not proved.

It is clear that a suspension must be based on a belief that a misconduct as defined has been committed. An employer must have good cause for such belief. Only then may the employer consider suspending the employee. The procedure outlined in s 6 of the Regulations has to be followed where the employee is suspected on reasonable grounds of having committed an act of misconduct. Whilst it is clear from the language of that section that an employer need not suspend an employee in all cases, where he decides to suspend he must comply within the requirements outlined in that section.

It follows from what I have stated above that where the suspension is set aside and re-instatement ordered, any verdict or penalty imposed pursuant to any allegation made as part of the reason for the suspension must fall away. The suspension and the misconduct alleged against an employee are intertwined. There can be no suspension where there is no misconduct alleged against an employee.

Since the suspension was set aside by an order of court, which order remains extant, the proceedings that followed such suspension cannot therefore stand on their own. The law is settled that one cannot put something on nothing as it will collapse.

In the circumstances, I am satisfied that the findings of the disciplinary committee and the penalty of dismissal that was imposed cannot stand.

It is perhaps pertinent to note at this stage that the basis for the setting aside of the suspension appears to have been the failure on the part of the respondent bank to comply with the fourteen (14) day requirement provided for in s 6(2) of the Regulations. Whether the Labour Court was correct in making that order is not an issue before me. Attention should however be drawn to the decisions in *Nyoni v Secretary for Public Service Labour and Social Welfare & Anor* 1997(2) ZLR 516, 522G-523 A-B and *Posts and Telecommunications Corporation v Zvenyika Chizema* SC 108/04 which suggest that delay alone cannot justify reinstatement and that delay merely gives the aggrieved party the right to the remedy of a *mandamus* to enforce due compliance with any time limits. Whether the fourteen (14) day requirement applies to the entire proceedings or only to the investigations is not a matter which is before me and need not therefore detain me.

In the light of the finding that I have made above, namely, that the verdict and penalty cannot stand, it becomes unnecessary to decide the other issues raised during this appeal.

Before concluding, it appears to me desirable that I comment on the order of 14 August 2008 granted by the Labour Court setting aside the suspension and ordering reinstatement. That order, it is common cause, was granted in default. In terms of s 92 (c)(i) of the Labour Act, a default judgment can, on application, be rescinded. No consideration appears to have been given to the filing of such an application. Both the respondent and the

court *a quo* appear to have been oblivious to the existence of such an order and proceeded as if none existed.

The appeal must therefore succeed. It is accordingly ordered as follows:-

- (1) The appeal is allowed with costs.
- (2) The judgment of the court *a quo* is set aside and the following substituted:-

“(1) The application is allowed with costs.

- (2) The decision of the disciplinary committee of the respondent of 18 July 2008 terminating the employment of the applicant is set aside.”

CHIDYAUSIKU CJ: I agree

OMERJEE AJA: I agree

Gill, Godlonton & Gerrans, appellant’s legal practitioners

Chihambakwe, Mutizwa & Partners, respondent’s legal practitioners