

DISTRIBUTABLE (62)

PACPRINT (PRIVATE) LIMITED
v
PILANI KUMBULA AND 10 OTHERS

SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA & MAVANGIRA JA
HARARE, 8 JUNE 2015

T. Mpfu with N. Chamisa, for the appellant

B.T. Munjere, for the respondents

Judgment No. SC 67/17
Civil Appeal No. SC 369/14

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MAVANGIRA AJA: After hearing the parties on 8 June 2015 we granted an

order in the following terms:

- “1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
‘The application for review is dismissed with costs’
3. Reasons for this order will follow in due course.”

Pursuant to paragraph 3 of the order, the following reasons are availed.

The core issue in this appeal is the question whether employees are entitled to sabotage the conduct of a disciplinary hearing by refusing to send their representatives to a hearing committee and thereafter rely on the absence of their representatives on that committee as a ground for review.

FACTUAL BACKGROUND

The facts of this matter are largely common cause. The respondents were charged by the appellant for wilful disobedience of a lawful order. They were all suspended without pay and benefits. They were later allowed to return to work pending the finalisation of disciplinary proceedings. All were individually served with notifications to attend disciplinary hearings and all refused to sign the notifications.

Despite being notified about and invited to the hearings and despite being warned about the implications of not attending the disciplinary hearings, they all did not attend the subsequent disciplinary hearings. The workers' committee members who under the relevant Code of Conduct form part of the disciplinary committee, refused to attend the hearings. All the respondents were found guilty in absentia and all were dismissed from the appellant's employ.

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The respondents then approached the Labour Court and sought a review of the proceedings. The grounds of review raised, basically related to non-observance of the rules of natural justice, improperly constituted disciplinary committees, selective application of the disciplinary process and bias.

The Labour Court was of the opinion that the second ground of appeal was decisive and it proceeded to determine the matter on the basis of that ground alone. The second ground of appeal was couched as follows:

“The disciplinary committee which purported to conduct the disciplinary hearings against the applicants was not properly constituted as there was no representative from the workers committee.”

The court found in favour of the respondents and granted an order in the following terms:

- “1. The dismissals of Applicants by Respondent is set aside
2. The matter is remitted to an arbitrator, chosen by the parties or appointed by the Registrar of this Court, for determination of the charges laid by Respondent against Applicants; and
3. Pending the outcome of the arbitration in paragraph 2 above, Applicants are deemed to be on suspension without pay and benefits.”

THIS APPEAL

Aggrieved by the decision of the Labour Court, the employer (Pacprint) appealed to this court. Three grounds of appeal were raised, viz:

- “1. The court *a quo* erred in holding that the Disciplinary Committees that heard the Respondents’ matters were not properly constituted. In so holding the court *a quo* totally ignored the role played by the Workers Committee in trying to frustrate the hearings.
2. The court *a quo* erred in disregarding or paying lip service to the role played by the Respondents and their representatives to frustrate the hearings, which led to the court making a finding that there were irregularities in the conduct of the disciplinary hearing. (sic)
3. The court *a quo* erred in holding that the remedy for an uncooperative Workers Committee is Section 101 (6) of the Labour Act [*Chapter 28:01*]”

A letter that was written on 16 October 2012 addressed to the appellant’s Human Resources Executive and signed for on behalf of the Workers’ Committee is pertinent. It reads:

“We call upon your office to stop issuing the Disciplinary hearing letters as we feel there is no any clear explanation (sic) regarding the sit-in. No one from the management has come to explain and / or address employees concerned about what was going on.
We feel that we cannot be disciplined for asking our outstanding wages. (sic)
However, this does not stop you from reaching your final decision”

A response by the appellant, addressed to all employees, on the same date reads in part:

“A lawful order was given advising all employees to return to work within a period of thirty minutes. That lawful order was not complied with resulting in the loss of production as previously stated hence these disciplinary hearings.

It would have been procedural for the respondents to be given an opportunity to explain their individual circumstances in the matter. However, a collective position has been taken by the workers’ committee who were involved in the sit-in as well. That position not to attend the hearings is seen as an attempt to prevent the application of the industrial code of conduct.

Please be advised that failure to attend the scheduled disciplinary hearing will not stop the proceedings from proceeding. This shall mean that in some cases default judgment may be passed and it may be to the disadvantage of those concerned.

We once again warn everyone to be aware of this fact and urge you to reconsider your position, and attend scheduled hearings as lawfully requested.”

It is against this background that the respondents and the workers’ committee representatives absented themselves from the disciplinary hearings about which they were all duly notified and which proceedings were nevertheless proceeded with.

Mr *Mpofu* for the appellant submitted that by boycotting the hearings, the respondents disentitled themselves from challenging the outcomes of the hearings and any procedure adopted during the hearings themselves. He submitted that as a result, the respondents thus had no right to approach the court *a quo* on review. He also submitted that the appellant having invited the workers individually to disciplinary hearings and having also invited the workers’ committee members to participate as panellists on the disciplinary committees, which invitations they spurned, all that the appellant was required to do was to act in accordance with common sense precepts of fairness. In *casu*, he submitted, no allegation had been made that the appellant failed to so act. He urged the court to allow the appeal with costs.

Miss *Munjere* for the respondents submitted in her heads of argument that it was impossible for the workers’ committee members to participate in constituting the disciplinary

panels as they were also being charged as were the rest of the employees. However, in oral submissions before the court she conceded, correctly in our view, that it was not impossible for representatives of the workers to be on the panels of the disciplinary committees that sat separately for the hearings with regard to the charges faced by each individual employee. She conceded that such representatives could have come from within or from outside the workers' committee.

In *Moyo v Rural Electrification Agency* SC 4/14 ZIYAMBI JA had this to say:

“The main point taken by Mr Magwaliba before us, was that the disciplinary proceedings were irregular and unfair in that the appellant was not heard in person and the proceedings were not concluded within fourteen (14) days as required by s 6(2) of the Regulations. **In our view the appellant, by deliberately absenting himself without leave from the hearing, waived his right to challenge the conduct of the disciplinary proceedings. He had the option, which he did not exercise, of seeking a postponement since he knew that he would not be available on the date of the hearing. In these circumstances we do not feel that the failure by the respondent to strictly comply with the Regulations operated to vitiate the disciplinary proceedings.**”

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In *Zesa Enterprises (Pvt) Ltd v Aloyce Roy Stevawo* SC 61/16 MALABA DCJ (as he then was), citing *Moyo v Rural Electrification Agency* (*supra*), with approval, stated at page 5 of the judgment:

“Where a person wilfully defaults from attending a disciplinary hearing, he or she would have waived the right to challenge the conduct of the proceedings. The rationale was aptly and eloquently captured by ZIYAMBI JA in *David Moyo v Rural Electrification Agency* SC 4/14”

He continued at page 6:

“The above sentiments were also echoed in the cases of *St Johns Educational Trust v David Edward Gardner* SC 26/08 and *Gershun Hombarume v Zimbabwe Revenue Authority* SC 20/14. It is therefore a cardinal principle of law that where a party deliberately absents himself or herself from a disciplinary hearing without leave, he or she would have waived his or her right to challenge the conduct of the disciplinary hearing.”

In *casu* the mere boycotting of their hearings by the respondents disentitled them from challenging the outcomes of the hearings or any procedure that may have been adopted during the hearings. By their non-appearance the respondents waived the right to defend themselves. On the other hand, by bringing the application for review they sought to defend themselves. In effect this translates to approbating and reprobating at the same time. The law does not countenance this prevarication. The two positions or stances are mutually exclusive and cannot co-exist.

The respondents having decided not to attend the disciplinary hearings and defend themselves, the court *a quo* ought not to have granted their application for review. By refusing to attend the hearings the respondents waived their opportunity to assert their rights. They thereby forfeited their right to challenge the findings and procedures of the disciplinary committees. The court *a quo* ought to have dismissed the application.

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With regard to the allegation or ground that the disciplinary committees were not properly constituted, the provisions of s 24 of the Labour Act are of importance. The section provides:

“24. Functions of workers committees

(1) A workers committee shall-

- (a) subject to this Act, represent the employees concerned in any matter affecting their rights and interests.”

The appellant, as required of it, duly invited the workers’ committee to represent the respondents. The provision that members of the workers’ committee be on the disciplinary committee is a right that is afforded to employees. It was thus for the respondents to ensure that the workers committee members attended and participated in the disciplinary

hearings and represented them. The consequences of their failure to do so cannot be visited on the appellant.

The respondents ought to have requested the assistance of the workers' committee in the disciplinary proceedings. They did not do so. They did not assert their right to be represented by the workers' committee. They rather opted to also not attend and they absented themselves. They cannot now, in these circumstances, be heard to say that the proceedings are a nullity on the basis that the workers' committee did not form part of the disciplinary committees that sat.

The hearings were conducted in the absence of the workers' committee representatives due to the deliberately uncooperative conduct of the representatives as well as the respondents. The court *a quo*'s finding that the remedy for an uncooperative workers committee which refuses to send its members to a hearing is s 101 (6) of the Labour Act, is therefore a misdirection on the part of the lower court. The section entitles either party to refer a matter that is not resolved within 30 days to a Labour Officer for disposal in terms of Part XII of the Act. The facts of this matter do not support such a finding.

There were attempts to serve notices of hearing on the individual respondents on various dates ranging from 17 to 22 October 2012 for hearings on dates ranging from the 19 to 25 October 2012. Whilst the notices that were given to the respondents appear in a number of instances to be, on the face of it, too short, such would have been a valid reason for them to attend the disciplinary hearings and ask for postponements in order for them to put their houses in order and adequately prepare for their defences. However, none of the respondents did that. They refused to sign the notices of hearing and refused to attend the same.

Furthermore, the letter by the workers' committee did not raise any issue relating to the length of the notice given. The letter called upon the appellant to stop issuing the notices for the disciplinary hearings because they felt that the management had not explained or addressed the respondents about what was going on.

We were thus of the unanimous view that the appeal has merit, hence the order that we granted after hearing the parties.

GARWE JA

I agree

HLATSHWAYO JA

I agree

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Gill, Godlonton & Gerrans, appellant's legal practitioners.

Hungwe & Partners, respondent's legal practitioners.