

REPORTABLE (35)

ELIAS CHIDEMBO
vs
BINDURA NICKEL CORPORATION LIMITED

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA, MAVANGIRA AJA
HARARE, MAY 20, 2014 & JULY 2, 2015**

T.K. Hove, for the appellant

T.A. Toto, for the respondent

GWAUNZA JA: This is an appeal against the decision of the Labour Court which upheld the dismissal of the appellant from his employment with the respondent.

The factual circumstances of this matter are common cause. The appellant was in the employ of *Bindura Nickel Corporation Limited* and served as a workers' committee chairman. He was dismissed from employment for disclosing confidential information during conciliation proceedings. He challenged his dismissal on the basis that it was an unfair dismissal and noted an appeal to the Labour Court. The Labour Court dismissed the appeal on the main ground that the appellant did violate the respondent's code of conduct in that he did not follow the laid down procedures on the obtaining and disclosure of confidential information. The appellant was aggrieved by the decision of the Labour Court and has approached this Court on the grounds summarised below;

1. The court *a quo* misdirected itself and erred at law entirely in not finding that the disciplinary procedures set down in the code of conduct of the respondent were not followed thereby rendering the dismissal both substantively and procedurally, wrong.
2. The court *a quo* further erred in rejecting the appellant's defence that the disclosure of the company information was not in breach of s 3(4) of Schedule 1 of the Employment Code of Conduct for respondent as read with Part C 10.2.
3. The court *a quo* erred and misdirected itself at law in finding that the appellant was not unfairly dismissed.

Procedural Irregularities

The Labour Court did not address the issue of procedural irregularities in its judgment even though it had been raised as a ground of appeal. Be that as it may, the appellant avers that the hearing authority that summarily dismissed him was not properly constituted, a circumstance that he argues rendered the disciplinary proceedings a nullity. The appellant, however, does not elaborate on this averment either in his grounds of appeal or in his heads of argument. As correctly contended for the respondent, it is not enough to merely allege, as the appellant does in his heads of argument that:

“In terms of the Code of Conduct for the respondent's entity, the hearing authority must be either, a Line Supervisor, Section Head or Head of Department. This was not the composition of the Hearing Authority that dismissed the appellant.”

The appellant should have explained in what way he perceived the Code of Conduct to have been violated, at what stage of the proceedings this might have happened and who in his opinion should have properly constituted the disciplinary authority. The respondent, in any case, disputes that the disciplinary authority was not properly constituted.

In making the averment cited below, the respondent helpfully gives some insight into what the appellant's specific grievance might have been.

“Appellant was employed as a Human Resources Administration Officer. The Head of Department for Human Resources Department was *Mr Moyo*, who appointed *Mr P. Muremba* to hear the matter as hearing officer duly authorised thereby The delegation of the function to conduct the hearing to *P. Muremba* as the Hearing Officer was permissible in terms of the code.”

Assuming this was the appellant's concern, it is evident from the record that he has tendered no evidence that may in any way be interpreted as disproving the respondent's averment on this issue. Nor has he alluded to any prejudice having been suffered by him as a result of the alleged improper constitution of the disciplinary authority.

The respondent, I find, correctly contends that it is not every procedural irregularity that may render the proceedings in question a nullity, especially in labour matters¹. The respondent further cited the case of *Air Zimbabwe (Pvt) Ltd v Chiku Mnensa & Mavis Maweyi* SC 89/04, where this Court stated that a person guilty of misconduct should not escape the consequences of his misdeeds simply because of improperly conducted disciplinary proceedings. He should escape because he is innocent.

I find in the result that the appellant has failed to place before the court sufficient evidence for a proper determination of whether or not there was a fatal irregularity in the conduct of the disciplinary proceedings. The onus to prove his case on this point lay on the appellant, and it is abundantly clear that he has failed to discharge it.

Accordingly the appellant's ground of appeal relating to the composition of the Disciplinary Authority is dismissed.

¹ See *Dalny Mine v Banda* 1999(1)ZLR 220 at 221

Whether the appellant's conduct violated the respondent's Code of Conduct

The appellant was charged with unauthorised disclosure of company secrets as outlined in s 3.4 Schedule 1(12) as read with Part C 10.2 of the respondent's code of conduct.

The relevant part of the Code reads as follows:

“Information with respect to any confidential product, plan or business transaction of the group, or personal information regarding employees, including their salaries, or any business information must not be disclosed by any employee unless and until proper authorisation for such disclosure has been obtained.” (*my emphasis*)

It is not in dispute that in the course of conciliation proceeding attended by both employer(respondent *in casu*) and employee representatives, a request was made to the appellant who was present as the workers' committee chairman, for a list, if he had it, of employees affected by alleged salary anomalies. The appellant duly submitted the list, except that it showed employees' salaries, in addition to their names. The respondent alleged as follows in respect of how the appellant secured this confidential information.²

“It is common cause that salaries information was downloaded by one *S. Mamina* and sent by e-mail to one *W. Muyenza* who in turn e-mailed it to the appellant. Equipped with this information, the appellant did not simply e-mail it to the next colleague. Instead he changed the label of the file and instructed it to be printed” (*sic*). The resultant print-out is what the appellant disclosed before the conciliation proceedings, leading to the charges in question.

The appellant does not deny disclosing the information in question. Nor does he deny that he did so without any authority. His defence was that the information in question-

“was disclosed during a lawful conciliation hearing and in the appellant's capacity as a worker representative, not as an employee ... this was done as a *bona fide* step to prove the worker's case. It was not an act done in the normal course and scope of the contract of employment of the appellant.”³

² See respondent's heads of argument in the Labour Court.

³ Paragraphs 2 and 7 of the appellant's heads of argument

The appellant further contends that since the disclosure of the list in question was “clearly” done in the pursuit of employees’ interest, it was lawful. He relies for this contention on the following excerpt taken from *Munyaradzi Gwisai’s “Labour and Employment Law in Zimbabwe* at page 115:

“In circumstances involving trade unions or workers committee, the duty of confidentiality on employees not to divulge confidential information has to be read with the workers’ fundamental right to democracy at the workplace under s 7 and to conduct workers’ committee or trade union business in terms of ss4 and 8 of the Labour Act. Divulsiion of information in one capacity as a worker representative and within the pursuit of lawful objects of such organisations or giving information to such organisation in the pursuit of lawfully pursuing an employee’s interest, is not in breach of such duty.”

The distinction between confidential information required by an individual worker and that required by a worker’s representative is in my view a useful and indeed critical one. However, I entertain some doubt concerning the above excerpt’s correctness when it suggests that such divulsiion of information would nevertheless be lawful, even if it is done in blatant violation of an express provision of the code of conduct. In fact, it would appear that a worker representative has a greater opportunity of lawfully accessing confidential information than an ordinary employee by, for example, formally discovering such information at negotiating *fora* or requesting adjudicating bodies to order the production of such information. This to be compared, for instance, with section 5 of the *Income Tax Act* Cap 23:06 which allows tax department employees who have sworn an oath of secrecy regarding tax matters, to break such oath where they are ordered by a competent court to disclose the required information. Where confidential information is unreasonably withheld, a worker representative may invoke unfair labour practice provisions in the *Labour Act*. Ultimately, employees are better advised to negotiate for easier access to information

provisions in employment codes of conduct than to blatantly violate the law as is implicit in the excerpt cited above.

The respondent in its heads of argument in my view correctly counters this excerpt by stating thus:

“The disclosure of the information in violation of s 3.4 of Schedule 1 of the Code as read with Section 10.2 of Part C of the Code is permissible subject to the appellant seeking authority from the employer to do so..... If such authority was sought but nonetheless unreasonably withheld, appellant might have been justified to access the information as he did and proceed to disclose it anyway within the spirit of the labour law jurisprudence emoted by the learned author”

The appellant’s position seems to be that even though the information was obtained by him unlawfully from the workplace - through use of the employer’s resources and in his capacity as a worker - the disclosure that followed was lawful. He justifies this on the basis that by then he had shed his “worker” mantle and figuratively replaced it with that of “chairman of the workers committee”. In other words, it was perfectly in order for him to use his status as a worker in order to access confidential information that he fully knew he would disclose as a worker’s committee chairman.

I find this reasoning to be flawed in two main respects. First and foremost, the appellant was an employee of the respondent, to whom at all times he bore the duty of trust and loyalty. His conduct in relation to the respondent was regulated and governed by the requisite Code of Conduct, in this case *S.I. 379/1990*. As correctly averred by the respondent, the appellant remained accountable to his employer irrespective of the position he assumed as the worker’s committee chairman. Secondly, I am satisfied that an act of misconduct committed by a worker outside the workplace, and in his – also work related – capacity as a

workers' committee member, is unlawful as long as it impacts directly on the employer's private interests and in addition, constitutes a violation of the employer's Code of Conduct. This Court has effectively ruled as much in cases where workers' committee members, purporting to advance or protect workers' rights, have engaged in unlawful job actions.⁴ The workers found that their status as workers' committee members did not clothe them with a cloak of immunity against misconduct charges. The central issue being the fact that if the conduct in question is outlawed under the Code of Conduct, it remains unlawful irrespective of the "hat" that the offending worker may be wearing at the time the misconduct is committed.

Likewise *in casu*. The disclosure of confidential information without the requisite authority of the employer, remained an unlawful act in terms of the respondent's code. The fact that the appellant committed the misconduct while performing this role as the worker's committee chairperson is of no moment. This is because his status as a workers' committee chairperson did not turn what was unlawful, into a lawful act. It became unlawful the moment he disclosed the information without the authority of the respondent. An employer is perfectly within its right to put in place measures that will protect confidential and sensitive information relating to its employees and operations, against unlawful disclosure. Employee salary scales fall into this category of information. Given that the code of conduct *in casu* expressly provides that it is only the employer who can authorise any disclosure by any employee, of such information, the words of *Chidyausiku CJ* in the case of *Zimbabwe electricity Supply Authority v Moses Mare* SC 43/05, are apposite;

"In my view, members of the Workers' Committee are not a law unto themselves ... In defending the rights of the workers, a member of the workers' committee is enjoined to observe due process."

⁴ See in this respect, *Shadreck Moyo & 13 Others v Central African Batteries (Pvt) Ltd v Boniface Mwonozora*, 23 Ors SC 09/09.

The appellant not only failed to follow the “due process” that would have allowed him to lawfully disclose the information in question, he openly expressed disdain for such process by stating as follows;⁵

‘I did not do wrong ... I did not need to get any authorisation from anywhere.’

His case might have been different had he sought, and been denied, the requisite authorisation. The respondent, I find, is correct in its contention that these assertions were a direct infringement of the provisions of s 10.2 of Part C of the Code, and also misplaced in view of the sentiments in the *ZESA* case, cited above.

In view of all that has been said above, I find that the respondent (and the Labour Court in upholding the decision) properly charged, convicted and dismissed the appellant.

One issue, in my view, calls for comment. The provision of the code under which the appellant was charged, expressly penalises the act of disclosing prohibited information, without the respondent’s authority. The provision is silent on the question of access, or the manner of it, to the information concerned. The respondent contends that the requirement for authorisation from the employer, applies equally to accessing and disclosure of the prohibited information. In *casu* the tone of the respondent’s arguments demonstrates that the respondent took issue both with the unauthorised manner of accessing the information, and its subsequent disclosure. In view of the express provisions of s 10.3 of Part C of the Code, the propriety of this conflation of issues may be open to question. One could conceive of a situation where a worker lawfully acquires confidential work- related

⁵ Honography notes in the Labour Court at page ...

information meant for his consumption and then discloses it to outsiders without the authority of the employer. Such a person would, it seems, fall foul of s 10.3, in the same way that he would have done had he disclosed information unlawfully acquired. Be that as it may, it appears to me that even had the appellant properly acquired the information in question, he would still be in the very same position that he is in now. The exception being that he might have, possibly, been able to argue in mitigation that he had lawfully acquired the information.

In all respects, therefore, I find that the appeal lacks merit and ought to be dismissed. Costs shall follow the outcome.

It is in the result ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of suit.

HLATSHWAYO JA: I agree

MAVANGIRA AJA: I agree

Venturas and Samukange, appellant's legal practitioners

Mwonzora and Associates, respondent's legal practitioners