TRIANGLE LIMITED
v
VUSIMUSU SIGAUKE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA, MAVANGIRA AJA
HARARE, JANUARY 13, & AUGUST 18, 2015

I. Mureriwa, for the appellant
V. Makuku, for the respondent

ZIYAMBI JA:

[1] This is an appeal from a judgment of the Labour Court setting aside the dismissal of the respondent by the appellant.

THE BACKGROUND

[2] The respondent was employed by the appellant as a mechanic. On 28 August 2006, the Departmental manager, Mr G Boothway ("Boothway"), received certain information following which he conducted an investigation into a possible theft, by the respondent, of a Ford Tractor clutch thrust bearing. This was in terms of s 6 (1)(b) and (c) of the Triangle Group Code of Conduct which makes provision for:

> "preliminary investigations by the Departmental Manager to determine whether a misconduct was committed and if it warrants a disciplinary hearing to address it, whereafter the same manager would convene a hearing if seen fit."[1]

[3] At the conclusion of the investigations, the respondent was summoned to a disciplinary hearing on the 6 September 2006, to answer a charge of theft of the thrust bearing as well as other charges. The disciplinary committee which heard the matter was chaired by Boothway.

[4] The committee heard evidence from certain witnesses including one Kenias Labani, a student on attachment with the appellant. Labani was undergoing training in motor mechanics at the appellant's tractor shop and was working with the respondent during the relevant period. His evidence was to the effect that the respondent on the 28 July 2006, signed a requisition for a new thrust bearing and instructed him to take the requisition for authorization to a Mr Macloud despite the fact that the 'authorizer', one Mr Gwenzi, the foreman, was present. The reason given to Labani by the respondent was that he intended to steal the thrust bearing and did not want Gwenzi to know that he had drawn a new one from stock. Upon receipt of the thrust bearing Labani took it to the respondent who placed it in his satchel and charged Labani to tell no one of the incident. The respondent then fitted the old thrust bearing back onto the tractor. On 28 August 2006 the respondent informed Labani that enquiries were being made and cautioned him that if questioned he should say that a new thrust bearing was fitted onto the tractor.

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[1] Record p90

[5] The Ford tractor in question was, following the tip off (received by Boothway), stopped at the gate and returned to the workshop for assessment. Upon stripping the tractor it was discovered that the clutch thrust bearing was second hand.

[6] The disciplinary committee found the respondent guilty of theft of the thrust bearing, and imposed a penalty of dismissal. It was found by the disciplinary committee to be aggravating that the respondent held a supervisory position in the appellant as Charge Hand. Dismissal was with immediate effect, that is, on 8 September 2006.

[7] With all internal appeals exhausted, the respondent, undeterred by the lack of success, appealed to the Labour Court. Ground 3 of the grounds of appeal read:

> "An interested party (Boothway) was the chairman at the first hearing. He should have recused himself since he was part of the investigating team."

The remaining grounds of appeal were directed against findings of fact made by the Disciplinary Committee. I note, in passing, that in none of the grounds of appeal did the respondent allege his innocence.

[8] The record does not, as is customary, contain notes of the hearing. However, the Labour Court, having heard the appeal, commented in its judgment as follows:

> "It is rather disappointing that apart from the one on the penalty these grounds were basically on procedure and on fact. These are normally not grounds for appeal. The procedural issues are review matters and findings of fact are not appealable, unless a party alleges that the finding of fact is so outrageous that it amounts to a misdirection at law. Such an allegation was not made here. It is high time counsel in these courts understood these differences. This is not a point applicable in the Labour Court only. It applies to all our courts and Southern African courts too. So it is an area that is not new in our law and lawyers in our courts should adhere to the rules. See **L.D.V. Van Winseen J.D. Thomas and**

A.C. Cilliers in Herbstein and Van Winseen The Civil Practice of the Superior Courts in South Africa 2nd Edition at 668.

> "*where the reason for wanting to have the judgment set aside is that the court came to a wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where, however, the real grievance is against the method of the trial it is proper to bring the case on review* ---.*"*

The time is fast approaching when cases will be dismissed for the wrong approach."[2]

[9] The above remarks notwithstanding, the court went on to find that Boothway ought not to have sat on the 'committee that heard the case" and allowed the appeal. It made the following order:

"1. The proceedings are hereby set aside
2. The matter is referred back to the court of first hearing for a fresh trial.
3. The appellant remains on suspension pending the completion of the retrial.
4. The retrial shall be completed within 30 days of this order or such further period as may be granted on good cause shown.
5. If the respondent fails to complete the hearing within the specified time the appellant shall be deemed to have been reinstated without loss of salary and benefits from the date of suspension.
6. The respondent to pay costs of this hearing."

Aggrieved by the decision, the appellant now appeals to this Court.

THE APPEAL

[10] The grounds of appeal are as follows:

1. Having found that there were no sustainable grounds before it, the court ought to have dismissed the appeal. It could not competently convert the proceedings to review proceedings during the preparation of its judgment without affording the appellant an opportunity to make submissions on the proposed course of conduct.

[2] Record p 13

2. The court in ordering the reinstatement of the respondent, failed to apply the law which unequivocally requires an employee who has been unlawfully dismissed to seek alternative employment;
3. The court misapplied the Code of Conduct which was an integral part of the contract of employment between the parties and which directed the departmental head to conduct an investigation into an alleged misconduct and to attend to the disciplinary hearing.
4. Having correctly found that the evidence of theft against the respondent had been credible and cogent the court erred in refraining from dismissing the appeal and bringing finality to the matter.

I deal with the issues raised in each ground in turn.

1. Whether the court could competently convert the appeal proceedings to review proceedings during the preparation of its judgment without affording the appellant an opportunity to make submissions on the proposed course of conduct.

[11] It was contended by Mr *Mureriwa*, on behalf of the appellant that once the court found that there were no sustainable grounds of appeal it ought to have dismissed the appeal; that the Labour Court has no jurisdiction to *mero motu* convert an appeal to a review; that since the Labour Court rules clearly set out the procedure to be adopted on review, the Labour Court, being a creature of statute, had no jurisdiction to convert the appeal to a review; that in any event, the Labour Court erred in law by *mero motu* converting the appeal into a review without affording the parties an opportunity to make submissions on the issue.

[12] Mr *Makuku* submitted however, that the Labour Court is empowered by Rule 12 of the Labour Court Rules to proceed as it did. Rule 12 provides:

"12. Informality of proceedings

(1) Subject to these rules, the Court shall *conduct any hearing* in such manner as it considers most suitable to the clarification of the issues, the fair resolution of the matters, and generally the just handling of the proceedings before it.

(2) The Court shall, so far as appear (sic) to it appropriate, avoid formality in its proceedings and may, where circumstances warrant it, depart from any enactment or rule of *law relating to the admissibility of evidence in proceedings before courts of law generally."* (My emphasis)

[13] It seems to me that both sub rules relate to the conduct of a hearing. It is common cause that the conduct complained of took place after the hearing was concluded and in the absence of the parties. With regard to sub rule (2), the power granted is to depart, not generally from any enactment or law, but from <u>those which relate to the admissibility of evidence in proceedings before courts generally</u>.

[14] Appeals and reviews are governed by Rules 15 and 16. These Rules do not relate to the admissibility of evidence in proceedings before courts of law. They therefore fall outside the bounds of permissible departure demarcated by sub rule (2). The Rules provide:

"15. Appeals

(1) A person wishing to appeal against any decision, determination or direction referred to in section 97(1)(*a*) or (*b*) of the Act, or on a question of law in connection with any arbitral award in terms of section 98(10) of the Act, <u>shall,</u> within twenty-one days from the date when the appellant receives the decision, determination or direction or award, do the following—

(*a*) complete in three copies a notice of appeal in Form LC 3; and

(*b*) …

(3) A person making an appeal under this rule <u>who also wishes to seek a review</u> of the proceedings in respect of which he or she makes the appeal <u>shall, at the same time, complete in three copies a notice of review in Form LC 4 and serve such notice together with the notice of appeal under this rule.</u>

16. Reviews

(1) A person wishing to seek review of proceedings referred to in section 97(1) (*c*) or (*d*) of the Act shall, within twenty-one days from the date when the proceedings are concluded, do the following—

(*a*) Complete in three copies a notice of review in Form LC 4; and ….”(The emphasis is mine)

[15] It is to be noted that the procedures laid down for both appeals and reviews are clearly set out in Rules 15 and 16. Rule 15(3) sets out the procedure to be adopted by the parties if it is intended to seek a review in conjunction with appeal proceedings. This, undoubtedly, is so that the attention of the other party can be adverted to the fact that both a review and an appeal are contemplated.

[16] Neither the procedure outlined in r 16 nor that in r 15(3) was adopted by the respondent and I discern no power given to the Labour Court in the Rules to dispense with the procedure as stipulated in these two rules.

[17] My reading of the Rules reveals one other provision empowering the Labour Court to depart from the Rules of that Court. It is r 26. It states:

“26. Departures from rules

At any time before or during the hearing of a matter a President or the Court may —

(a) Direct, authorise or condone a departure from any of these rules, including an extension of any period specified therein, where the President or Court is satisfied that the departure is required in the interests of justice, fairness and equity;

(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as
appear to the President of the Court to be just, expedient and equitable.” (My emphasis).

Here again, the power to depart from the rules is to be exercised 'before' or 'during' the 'hearing' of the matter. It is not a blanket power to depart from the Rules generally, but a limited power to do so within the confines of that rule.

[18] The Labour Court's conduct in proceeding to convert the appeal into a review, and doing so after the hearing, is not supported by law and is therefore *ultra vires* its powers as set out in the Act and Rules.

[19] In any event, the failure to allow the parties, particularly the appellant in the present case, to be heard before the appeal was 'converted' to review proceedings, amounted to an infringement of the rules of natural justice which require a party to be heard before judgment prejudicial to his interests is granted.

The first issue is thus determined in favour of the appellant.

2. **Whether the court in ordering the reinstatement of the respondent, failed to apply the law which unequivocally requires an employee who has been unlawfully dismissed to seek alternative employment**.

[20] Two legal principles were violated by the order of the

court *a quo.* The first is that when a court makes an order for reinstatement it must also make an order for damages as an alternative to reinstatement. This is because of the time honoured principle of the common law that an employer is not to be compelled to retain in his employ an employee whom he no longer wishes to employ by virtue of the fact that

the relationship between the employer and the employee has soured beyond reconciliation[3].

The second is that an employee who has been unlawfully dismissed must mitigate his damages by seeking alternative employment. A court in assessing damages is required to assess, after hearing evidence, the period within which the employee could reasonably expect to obtain employment.[4] The order deeming reinstatement in the event of failure to complete fresh proceedings within 30 days has the effect of denying the respondent its right to an alternative of paying damages in a properly quantified amount.

This issue too, must be determined in favour of the appellant.

3. Whether the court misapplied the Code of Conduct.

[21] An employment code of conduct specific to a particular undertaking is, in effect, an agreement by the employer and employee that they will be bound by its terms. Where no code of conduct is in existence in a particular undertaking, the parties are bound by the applicable National Employment Code of Conduct. It is common cause that the Code of Conduct governing the parties allowed for Boothway, as the departmental manager, to investigate and convene a disciplinary hearing. The court *a quo* however concluded that the proceedings ought to be set aside because he was 'judge and jailor'. The learned Judge erred in this regard. The code of conduct was followed by the appellant. What more could the appellant reasonably be expected to do? In addition, there was no complaint of actual bias or untoward behavior on Boothway's part. In my view, there was

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[3] Hama v National Railways 1996 (1) ZLR 664 at p676; Winterton Holmes & Hill v Paterson 1995 (2) ZLR 68 (S); Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 334 (S).

[4] See Ambali v Bata Shoe Co Ltd 1999 (1)ZLR 417 (S)

no impropriety in Boothway's presiding at the hearing. This issue is decided in favour of the appellant.

4. Whether the court erred in refraining from dismissing the appeal and bringing finality to the matter.

[22] Even assuming that Boothway's presiding over the hearing was irregular, that in itself was insufficient ground for setting aside the proceedings. Labour matters are not to be decided on technicalities[5]. The court had the option of calling evidence to cure the irregularity if it considered that to be the proper course, or to decide the matter on the record.

[23] As submitted on behalf of the appellant, the court *a quo* found that there was evidence which proved on a balance of probabilities that the respondent had stolen the thrust bearing. In this regard the court said:

"On the adequacy of evidence the appellant complained about the late report and that the witness was a suspect witness. He also said that if he had stolen the bearing then it should have been recovered at the search on the way out. The main argument is on the credibility of the witness, Kenias Labani. That credibility is best judged by those who heard him give evidence of credibility. The evidence by Kenias seems to be reliable on a balance of probabilities. We are talking of an eye witness here who was working with the appellant. Nothing has been demonstrated to show his unreliability. This evidence is otherwise acceptable but shall not make a determination on it in view of the order I shall be making."(My emphasis)

[5] Dalny Mine v Banda 1999 (1) ZLR 220 (SC)

[24] In the light of the court's own judgment supporting the appellant's contention that the offence of theft had been proved on a balance of probabilities, the failure by the court to dismiss the appeal and its consequent order of a fresh trial on pain of reinstatement of the respondent in the event of a failure to conclude the hearing in 30days bordered on irrationality and amounted to a gross misdirection. There is no doubt that the appellant was prejudiced by this conduct of the court *a quo*. Quite clearly there was sufficient evidence on record to prove the commission of the offence by the respondent. The court therefore erred in failing to bring the matter to finality. The appeal ought to have been dismissed.

IN CONCLUSION

[25] I conclude with two comments on the order of the court *a quo*. Firstly, the respondent's prayer on appeal to the Labour Court was that 'the conviction be quashed'. The Labour Court gratuitously granted the order set out above. Apart from the remarks already made in this judgment, it is clear that no purpose would be served by a hearing *de novo* in these circumstances where the appellant had already established on a balance of probabilities that the respondent had stolen the bearing.

[26] Secondly, the order that the respondent was 'to remain on suspension' is a misdirection. The respondent was not suspended. He was dismissed following misconduct proceedings. The only course open to the court *a quo* in the event of a finding that he was unlawfully dismissed, was whether to order reinstatement or damages *in lieu*.

DISPOSITION

[27] It follows from the above that the appeal must succeed.

[28] It is therefore ordered as follows:

1. The appeal is allowed with costs.
2. The order of the Labour Court is set aside and substituted with the following:

   "The appeal is dismissed with costs."

HLATSHWAYO JA: I agree

MAVANGIRA JA: I agree

Scanlen & Holderness, appellant's legal practitioners

Makuku Law Firm, respondent's legal practitioners