

**DISTRIBUTABLE (60)**

**ZIMBABWE BANKING CORPORATION LIMITED**  
**v**  
**SAIDI MBALAKA**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, GOWORA JA & MAVANGIRA AJA**  
**BULAWAYO, AUGUST 3 & 5 2015**

*D Tivadar*, for the appellant

*L Nkomo*, for the respondent

**GOWORA JA:** The appellant, (hereinafter referred to as “the Bank”), is a registered commercial bank. It has branches throughout the country. Until 7 September 2004, the respondent was employed by it as a branch manager at its Jason Moyo Branch in Bulawayo. On 22 June 2004, the Bank preferred the following charges of misconduct against the respondent:

- i) Failure to comply with standing instructions;
- ii) Gross incompetence or inefficiency;
- iii) Habitual and substantial neglect of his duties; and
- iv) Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract as per the Labour Relations Act [Chapter 28:01] as amended by Act No. 17/02 as read with S.I. 130 of 2003.

On 20 August 2004 a disciplinary hearing was conducted by the Bank in respect of these charges and this resulted in the respondent being found guilty on all charges. A penalty of dismissal was imposed.

The facts upon which the charges were premised are the following. The respondent, as the branch manager for the Jason Moyo Branch, had a lending limit of Z\$10 Million. On 2 June 2004, the respondent authorised the encashment of a cheque in the sum of Z\$73 million against an account which was already overdrawn in the sum of Z\$10 690 875. In respect of the second charge, the facts on which the respondent was convicted were that his branch was amongst the highest in terms of anomalies relating to the failure to adhere to data capture. The branch had the highest number of overdrawn accounts, greatest exposure to risk in relation to client indebtedness, as well as the highest number of unclassified savings accounts. In relation to the third charge the respondent was alleged to have disobeyed instructions to ‘un-pay’ cheques against certain accounts, which was evidence of habitual and substantial neglect of his duties. Overall, he was charged with an act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract.

The respondent was aggrieved by the outcome and appealed to a labour officer, who in turn, on 9 December 2004 referred the matter to compulsory arbitration on an alleged unfair dismissal. On 14 February 2005, the arbitrator issued an award. She confirmed the finding of guilt on the charges of misconduct but set aside the penalty of dismissal imposed by the Bank. The arbitrator also ordered the Bank to reinstate the respondent, serve him with a final written warning and transfer him to a different branch. The Bank appealed to the Labour Court which dismissed the appeal with costs and upheld the arbitral award. This appeal is against the dismissal of that appeal by the Labour Court.

The appeal is premised on essentially two grounds, firstly that the court, in upholding the arbitrator's award against a finding of misdirection on the part of the arbitrator, had also misdirected itself, and secondly, that the court *a quo* had misdirected itself in its finding that the severe written warning operating against the respondent should not be taken into account in the assessment of a penalty to be imposed upon him.

The basis for the arbitrator's decision to set aside the dismissal of the respondent by the Bank is implicit in the following excerpt from the arbitral award:

“Be that as it may, I find it very difficult to isolate Mbalaka and dismiss him after the Bank officially presented a table of managers from branches nation-wide who flouted the same rules as Mbalaka did. Mbalaka's percentages of flaws could have been higher but the fact remains the same, more than one manager committed the same offence. Singling out Mbalaka for dismissal irrespective of his personal record in the file would be tantamount to victimisation unless there was a Code of Conduct which tabulated degrees of blameworthiness on each offence. The Labour Amendment Act 17 of 2002 read together with S.I. 130 of 2003 do not express different categories of punishment based on the offences.

As long as an offence is committed it deserves the same concern but the Act gives room to avoid dismissal by looking at mitigating factors section 12B (4).”(sic)

It is also evident from the arbitral award that the arbitrator neither considered nor made a determination on the exercise by the bank of its common law right to dismiss an employee where an act of misconduct is regarded by an employer as going to the root of the employment contract. There was no finding on the part of the arbitrator that the employer in imposing the penalty of dismissal had exercised its discretion capriciously nor that it had acted upon a wrong or incorrect principle of the law.

The Labour Court dismissed the appeal despite a finding which it expressed in these terms:

“I find that the arbitrator misdirected herself in only two aspects. Firstly, in finding that because Mr Mbalaka was not the only one who committed acts of misconduct, to charge him alone was tantamount to victimisation. **This was a misdirection that goes to the root of the case because it influenced the arbitrator in coming up with the**

**award she made and in that manner, that decision was partly based on a wrong premise.**” (my underlining)

The Labour Court also relied on the *dicta* in *Lancashire Steel (Private) Limited v Mandevana & Ors* SC 29/95, wherein the court stated:

“Arguments may be addressed *ad misericordiam* as to how unfair it is that the four respondents out of a number of forty workers who participated in the collective unlawful job action should have been selected for punishment, but such arguments cannot absolve them of their breach of their statutory duty not to participate in such action. It is not uncommon for the alleged ringleaders in any unlawful gathering or action to be singled out for punishment. **If they are guilty it is not in law relevant that others may be guilty.**” (my underlining).

It is beyond doubt that the Labour Court was alive to the discretion that is reposed in the employer in the application of this principle in disciplining an employee for an alleged misconduct as appears in the following statement by the court *a quo*:

“This does put to rest the argument about perceived selective punishment and victimisation. The respondent should face the consequences of his actions and cannot be allowed to hedge behind others.”

In our view this finding by the Labour Court was eminently sound both on the facts and on the law and yet, the Labour Court then went on to contradict itself in an apparent abandonment of this finding by stating as follows:

“The arbitrator did support the argument in a way. She stated that Mbalaka’s co-workers who were probably on the same black list with him, exited with hefty packages. By parity of reasoning, it defies logic to dismiss him. I agree with her. He has faced the music as it were, gone through a gruelling hearing, borne the embarrassment that goes with it, and a dismissal where others are let go with hefty packages defies all logic and common sense, since disparity in sentences is discouraged. **The misdirection is thus not so gross as to warrant interference by this court.**” (my emphasis)

Given the finding by the court *a quo* that the arbitrator had misdirected herself in ruling that the charges of misconduct preferred against the respondent amounted to selective punishment and victimisation, and that the misdirection went to the root of the case,

it is the finding of this Court that the Labour Court, in turn, grossly misdirected itself in then holding that the misdirection by the arbitrator was not so gross as to warrant interference.

In relation to the second ground of appeal, we find that the Labour Court further misdirected itself in its consideration of the circumstances surrounding the severe written warning and its relevance to the disciplinary proceedings in question. The finding by the court *a quo* that the severe written warning did not relate to two of the charges on which the respondent was convicted was misplaced. It is evident that the severe warning also related to the charge concerning conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment. To that extent the severe written warning was a relevant consideration in the determination of the penalty to be imposed on him.

In the light of the misdirection by the Labour Court alluded to above, we find that there is merit in the appeal and it ought to succeed.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the Labour Court is hereby set aside and is substituted with the following:
  - (a) The appeal is allowed with costs.
  - (b) The arbitral award by Mrs F Muzofa of 14 February 2005 be and is hereby set aside.
  - (c) The finding of guilt by the Hearing Officer and the resultant dismissal of the respondent from employment be and is hereby upheld.

**GWAUNZA JA:** I agree

**MAVANGIRA AJA:** I agree

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

*Dube-Tachiona & Tsvangirai*, respondent's legal practitioners