

REPORTABLE (18)

ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED
v
RONALD GODIDE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & HLATSHWAYO JA
HARARE 2 OCTOBER, 2014 & 30 MAY, 2016

T. Mpofo, for the appellant

T. Magwaliba, for the respondent

GOWORA JA: The respondent was employed by the appellant as a mechanical foreman. On or about 12 March 2010 a screen problem developed at a production site. An examination revealed that there was discharge of pulp to a plate screen and that pulp was being discharged onto the floor. The mill was stopped to allow rubbers to be changed. After this process an inside rubber was found to be off position and, on 14 March 2010, the respondent was tasked to attend to it. The respondent attended to the rubber but did not secure it properly as he used worn out bolts instead of new ones. The job had to be re-done by other artisans and in the process the appellant lost an hour and a half worth of production time. As a result of this mal-performance the respondent was on 16 March 2010 charged with gross incompetence or inefficiency in the performance of his duties.

Prior to the disciplinary hearing that took place on 15 April 2010, [relating to the above mentioned alleged misconduct], the respondent had, on 1 April 2010 been

convicted of a misconduct involving negligence and had been given a final written warning as a penalty.

On 15 April 2010, he was convicted by the disciplinary committee ‘only’ of negligence. He was dismissed on the basis that he was already sitting on a final written warning which was given on 1 April 2010. Part of the determination by the disciplinary committee read as follows:

“Although the offence amounts to negligence but as the accused is already on a final warning, dismissal verdict awarded.”

The respondent appealed internally. He alleged in the appeal that the final written warning which persuaded the disciplinary committee to issue a penalty of dismissal related to an act of misconduct which occurred after the act of misconduct which gave rise to the disciplinary proceedings he was seeking to have set aside. He contended therefore that the final written warning had been taken into account un-procedurally. The question that arose was whether the consideration of the final written warning was appropriate when regard was had to the fact that it was issued out only after the first offence had already been committed but not yet determined. The Appeals Officer dismissed the appeal and upheld the determination of the Disciplinary Committee. The respondent appealed to the Labour Court.

In his grounds of appeal before the Labour Court, the respondent alleged that the Disciplinary Committee erred in taking into account the final written warning when considering an appropriate penalty. The essence of the complaint was that the final written warning was in respect of an offence committed after the commission of the offence in the matter before the court.

The Labour Court found that the final written warning was issued in relation to a different offence and as such, was not applicable to the disciplinary proceedings which culminated in the dismissal of the respondent. The court *a quo* stated:

“The Committee dismissed him on the basis that he was sitting on a valid final written warning in respect of similarly placed conduct. The record shows that the previous warning related to the loss by a colleague of a tool that had been allocated to the appellant. This is not in any way “similar” to alleged acts of negligent performance of one’s duties. It was therefore a misdirection on the part of the hearing committee to take this final written warning into account. The two offences were not similar.”¹

On that basis the Labour Court allowed the appeal and set aside the dismissal of the respondent. In its stead, the Labour Court imposed a final written warning. It is against that decision that the appellant has appealed.

In this Court the appellant submitted that the respondent was already sitting on a final written warning when he was convicted of the act of misconduct and was dismissed on that basis. It was argued further that the court *a quo* erred in interfering with the penalty imposed by the disciplinary committee without any legal basis for doing so.

The respondent *per contra*, has argued that the final written warning did not apply to the disciplinary proceedings simply because the final written warning was not in place when the act of misconduct in issue was committed. To that end it should not have played any part in the determination of the appropriate penalty. In addition the respondent contends that the final written warning relates to an unrelated offence and for that reason should never have been a consideration in the penalty.

¹ Page 3 of the cyclostyled judgment.

Whether the Labour Court was correct in interfering with the penalty imposed by the employer.

The respondent did not challenge the decision to find him guilty of misconduct. What was before the court therefore was the issue of the penalty imposed upon the respondent and its appropriateness. The court *a quo* could only have dealt with the question whether or not the employer had improperly exercised its discretion.

The respondent has not suggested either in the internal appeals process or before the Labour Court that the misconduct of which he was found guilty did not go to the root of the employment contract and that on that basis a penalty of dismissal was not justified. In *Toyota v Posi (supra)* the position was stated as follows:

“That position accords with the common law principle that an employer is entitled upon conviction of an employee of misconduct which goes to the root of their relationship entitled to dismiss him.

.....

In any case, the fact that the two penalties, that is to say the final written warning valid for 12 months and /or demotion end/or suspension without pay for up to 30 days and dismissal are penalties provided for the serious breaches, means that any of them can be lawfully imposed as a punishment for the offences in that class of cases.”

At common law an employer has the discretion on what penalty can be imposed upon an employee who has been found guilty of an act of misconduct which is inconsistent with the fulfilment of the expressed or implied terms of his or her contract of employment and where such misconduct goes to the root of his or her employment contract.² It is also settled that an appeal court cannot interfere with the exercise of this discretion by the employer unless there has been a misdirection in the exercise of such discretion.³

²See *Toyota v Posi* 2008 (1) ZLR 173 (S). at 179.

³ *Malimanjani v Central African Building Society* 2007(2) ZLR 77 (S), at 80B-C

The respondent did not attack the penalty imposed on the premise that the exercise of its discretion by the employer was irrational or that there had been a serious or gross misdirection on the part of the employer. Indeed before us, Mr *Magwaliba* submitted that the employer had erred, and made the concession that there was no irrationality or misdirection on the part of the employer.

The court *a quo* appeared however, to have justified its interference with the penalty on the basis that the respondent had not been found guilty of gross incompetence or inefficiency but negligence. Clearly, the view it took was technical. The law is settled that labour disputes should not be delayed through the consideration of issues of a technical nature but should be resolved on substantive issues. In my view, it was immaterial whether the respondent had been found guilty of negligence as opposed to gross incompetence or inefficiency. The record shows that the evidence adduced established the charges of misconduct preferred against him.

I agree with the submissions by Mr *Mpofu* that the right to dismiss is available at common law and that such right is entrenched. The employer at its election may decide to impose a lesser penalty than dismissal. Such is the exercise of discretion. In *Malimanjani v Central African Building Society (supra)* this Court stated:

“The issue of what punishment to impose after an employee is found guilty of an act of misconduct is clearly one of discretion.....
It is trite that an appeal court does not interfere with the exercise of a discretion by a lower tribunal unless it is shown that the discretion was improperly exercised. As contended for the respondent, the penalty imposed must show a serious misdirection to justify interference by the appeal court.”

Clearly the court *a quo* erred in interfering with the employer’s exercise of discretion. The court ought to have asked itself whether the employer had properly taken a

serious view of the matter and whether there was sufficient evidence to support the conviction on the preferred charges. Unfortunately the court *a quo* did not ask itself these pertinent questions and proceeded to determine the matter on an issue which was not even premised on the grounds of appeal before it. The law is clear that once an employer takes a serious view of the matter and the aggravated nature of the misconduct, it is irrelevant that the code does not provide for dismissal as a penalty. In *Circle Cement v Nyawasha* S 60/03, this Court held:

“Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment the question of a penalty less severe being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee. The principle enunciated in *Zikiti’s* case *supra* was inapplicable to the decision of the disciplinary and grievance committee to dismiss *Nyawasha* because it was not shown to the Labour Court that its finding that her act of misconduct was of so serious a nature as to constitute a repudiation of her contractual obligation entitling Circle Cement to dismiss her from employment was one a reasonable employer would not have made.”

In my view, these remarks are not only pertinent they are entirely apposite in the case in point. A mere examination of the charges of gross incompetence or gross negligence preferred against the respondent reveals the gravity with which the appellant viewed the respondent’s conduct.

In any event, the court *a quo* did not sit to consider the penalty against the backdrop of the exercise of discretion by an employer. It proceeded to consider the propriety of the conviction. It therefore proceeded on a wrong premise and misdirected itself in the process. Thus, there was no principle of law upon which the court could have acted in overturning the proper exercise of discretion by the employer. Clearly the court erred.

Whether the appellant could have taken into account the final written warning in imposing a penalty upon a conviction for misconduct.

It was contended by the appellant that the court *a quo* misdirected itself in concluding that it, the appellant, ought not to have had regard to the final written warning in imposing a penalty upon the respondent. The court *a quo* concluded that the final written was not relevant for purposes of arriving at a penalty for the sole reason that in its view the offences in issue were unrelated. In this regard, the court *a quo* erred. The final written warning was issued in relation to a finding of guilty of negligence. In relation to the events of 16 March 2010, although charged with gross incompetence or negligence, the respondent was found guilty of negligence. In this respect therefore the final written warning was a relevant consideration in relation to offences.

The respondent never argued that the two offences were unrelated. Rather his contention was that as the final written warning was issued for an offence committed after the commission of the misconduct for which he was dismissed, the disciplinary committee ought not to have taken it into account in assessing the penalty for the subsequent offence.

Had the court *a quo* dealt with the issues as presented by the parties, it would have come to the realisation that the respondent was dismissed because he was sitting on a final written warning. It would have then had to consider whether the appellant, in dismissing the respondent had exercised its discretion improperly. Its failure to deal with the matter before it amounts to a misdirection which invites this Court to interfere with its conclusion.

The appellant contends that the respondent was dismissed because he was a habitual offender and that his offences caused losses to the appellant. I could not agree more. The code of conduct does not provide that the effectiveness of a final written warning depends on the relatedness of the offences. It is irrelevant for purposes of deciding what penalty is imposed whether or not the offences are related. What is critical is the employee's conduct in the work environment. This is what the employer has to consider in the exercise of its discretion in imposing an appropriate penalty. Any employer is bound to view previous convictions for misconduct in a negative light and come to the conclusion that the acts of misconduct go to the root of the employment contract. For this Court to interfere with the penalty imposed by the employer in the exercise of its discretion there needs to be proof that the exercise of the discretion was impeachable based on the principle laid out in *Barros v Chiphonda*.⁴ Thus:

“It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution...”

The respondent did not, either in the internal appeal or in the court *a quo*, show that the disciplinary committee had made any error in the exercise of its discretion. It was not enough to suggest that the final written warning should not have been taken into account merely on the grounds that it related to a subsequent breach on the part of the respondent. The disciplinary committee would have been within its right and entitlement to take the same into account. To do otherwise would have been a negation of its mandate. The final written warning was an indicator of the type of employee that the respondent was. It was a manifestation of his attitude towards his contract of employment - an absence of diligence. There is no principle that supports the contention by the respondent that to be relevant a final

⁴ 1999 (1) ZLR 58 at 62

written warning should be in respect of an earlier infraction for purposes of arriving at an appropriate penalty.

In my view the appeal has merit and must succeed. In the result the following order is issued:-

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

“The appeal is dismissed with costs.”

ZIYAMBI JA: I agree

HLATSHWAYO: I agree

Messrs Kantor and Immerman, appellant’s legal practitioners

Kamusasa and Musendo, respondent’s legal practitioners