

DISTRIBUTABLE (2)

**ZIMBABWE MINING DEVELOPMENT CORPORATION
V
EDWARD HAMBAKACHERE**

**SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, PATEL JA & GUVAVA JA
HARARE, MARCH 23, 2017**

T. Zhuwarara, for the appellant

N.Y. Motsi, for the respondent

GUVAVA JA: This is an appeal against the judgment of the Labour Court handed down on 14 February 2014 in which the respondent was reinstated to his former position without loss of salary or benefits.

At the hearing of this matter the appeal was allowed and the following order was issued:

- (1) The appeal is allowed with no order as to costs
- (2) The judgment of the court *a quo* is hereby set aside and substituted with:-
“The appeal be and is hereby dismissed with no order as to costs.”

It was indicated that detailed reasons for granting that order would follow. These are they.

BACKGROUND FACTS

The respondent was employed by the appellant as a buyer. At a date and time which is not mentioned in the record, the respondent was taken by the police from his workplace on allegations that he had acquired his diploma fraudulently. This happened following a raid that the police undertook at the respondent's house, from which they seized a certificate, which belonged to the respondent and was considered to have been forged. This prompted the applicant to conduct its own internal investigations, to ensure that it had employed an employee with the requisite qualifications.

Following the internal investigations carried out by the appellant, a copy of the alleged National Certificate in Purchasing and Supply Management (hereinafter referred to as 'certificate') was discovered at the human resources department.

In order to confirm the authenticity of the certificate the appellant made an enquiry to Harare Polytechnic to find out if the respondent had enrolled and attained the certificate from their institution. The principal of that institution through a letter responded indicating that they had searched through their data base and the finding was that the respondent had not taken any course at Harare Polytechnic College and his purported candidate number belonged to a female secretarial student. The principal's conclusion was that the respondent never attended a course at their institution.

The respondent was suspended from work on 24 May 2011. He was subsequently charged in terms of the appellant's code of conduct. The allegations levelled against the respondent

were that on 3 February 2010 during the course of his employment he had submitted a forged certificate with his employer for filing and consideration. The respondent was charged for contravening s 4 (G) (111) of Statutory Instrument 105/1992 (the appellant's Code of Conduct):-

- (a) Falsifying or changing any document with fraudulent intent or attempting to do so.
- (b) Uttering, attempting to utter fraudulent or false documents.

The respondent denied the allegations. It was the respondent's submission that the police had acted upon a malicious report from his ex-wife and raided his house whereupon they seized the said certificate which they then presented to his employer with a view to get him arrested. The respondent submitted that he attained a diploma in Purchasing and Supply from Top Grade College which is an agent of Harare Polytechnic. He was thus issued with a correspondence certificate.

Following a disciplinary hearing that was conducted on 8 June 2012, the respondent was found guilty by the Presiding Officer who recommended that he be dismissed from his employment. The respondent was accordingly dismissed by the appellant. Aggrieved by the decision of the disciplinary committee, the respondent appealed to the Appeals Officer of the appellant who also upheld the decision to dismiss him.

PROCEEDINGS BEFORE THE LABOUR COURT

Determined to have his dismissal set aside, the respondent appealed to the Labour Court arguing that the disciplinary authority erred in finding him guilty as insufficient evidence was placed before it proving that he committed the offence for which he was charged. He submitted that the Principal of Harare Polytechnic College was not called to confirm that the respondent had not attended the College nor the human resources officer who received the fake certificate.

The appellant submitted that the letter from the principal of Harare Polytechnical College was sufficient proof that respondent did not attend the college. The appellant also stated that it was not necessary to call the person who had received the certificate as it was not in dispute that the certificate had been found in the respondent's file in the human resources office.

The Labour Court allowed the appeal. It held that there was no evidence that the respondent falsified the certificate. The court also found that there was no evidence concerning who had filed such document at the appellant's human resources office. As a result the court a quo ordered that the respondent be reinstated to his original position without loss of salary or benefits. It also ordered that if reinstatement was no longer possible, that the appellant pay the respondent damages in lieu of reinstatement.

Aggrieved by that decision, the appellant applied for leave to appeal to this court from the Labour Court and leave to appeal was denied. On 24 July 2014 this Court granted an order by consent allowing the appellant leave to appeal.

PROCEEDINGS ON APPEAL

The appeal was based on the following grounds:

1. “The Honourable Court erred on a point of law by holding that the Appellant failed to justify its dismissal of the Respondent on a balance of probabilities for falsifying or changing any document with fraudulent intent or attempting to do so.
2. The Honourable Court erred in law in failing to place reliance on submissions made in appellant’s heads of argument, which conferred (sic) that a letter from the Principal from Harare Polytechnic College dishonoured the Notarial Certificate in Purchasing and Supply Management’ which certificate was submitted by the respondent to Applicant’s Human Resources Manager
3. The Honourable Court erred grossly and seriously misdirected itself in interpreting the evidence placed before it by finding that there was no evidence to prove false documents when it was common cause that the Respondent had not taken any course at Harare Polytechnic College.
4. The Honourable Court erred in law in holding that Respondent’s dismissal by the Applicant was unlawful.”

Although there are four grounds of appeal, it is my view that the crux of the matter is whether or not the court *a quo* erred in finding that there was no evidence to prove that the respondent committed the offence for which he was charged.

ANNALYSIS

It is not in dispute that the respondent was charged with:-

- “a) Falsifying or changing any document with fraudulent intent, or attempting to do so.
- b) Uttering, attempting to utter fraudulent or false documents.”

The appellant submitted that the respondent uttered a false and fraudulent copy of a statement of results of a National Certificate in Purchasing and Supply to the Human Resources

Department. The appellant further argued that such conduct warranted dismissal in terms of its Code of Conduct (S.I 105/1992).

The respondent argued that he never tendered the certificate to any of the appellant's officials. He contended that the letter from the Principal of Harare Polytechnic was not authentic. According to the respondent, the fact that appellant did not call the Principal of Harare Polytechnic College to confirm the content of the letter made the letter unreliable.

It is important to note that the court *a quo* in analyzing the evidence before the disciplinary committee found the following facts to be common cause;

- 1) A National Certificate in Purchasing and Supply Management was produced as evidence during the hearing.
- 2) The Respondent did not take any course at Harare Polytechnic College and the candidate number used belonged to a female Secretarial Studies student.
- 3) The Principal of Harare Polytechnic was not called to comment on the authenticity of his letter.

It seems to me that having found the above facts as common cause it is necessary to determine whether or not the letter by the Principal which was produced as evidence was authentic in view of the fact that the Principal was not called to give evidence.

The author P.J. Schwikkard in his book *Principles of Evidence*, 3rd ed, (Juta and Co, Cape Town) p 405 states that in order for a document to be admissible as evidence in a court of law it must be original, authenticated. Thus the first requirement pertains to whether or not the document was an original.

The letter from the principal came in the original typed format. It bore the Harare Polytechnic letter head, the address and the institution logo. The letter was addressed to the Purchasing Manager of the appellant. The contents of the letter were that the respondent was never a student at their institution therefore the purported certificate was fake. It is through the letter that the candidate number used by the respondent was established as belonging to a female student doing Secretarial Studies. The respondent did not dispute any of these elements in the court *a quo*.

The next requirement is whether the document was authentic. According to *Webster's Dictionary*, to “authenticate” means to “render authentic; to give authority to, by the proof, attestation, or formalities required by law, or sufficient to entitle to credit so as to render a document admissible as evidence in a court of law.” The letter in question was stamped. It displayed the date upon which it was written as well as the authority of the person who had stamped it. The principal’s signature and contact details were affixed by hand at the very bottom of the letter. The disciplinary committee having satisfied itself that the above requirements had been met by the principal’s letter, admitted it into evidence.

The case of *Zimbabwe Banking Corporative Limited v Thando Ndlovu SC-61-04* is apposite in this regard. MALABA JA (as he then was) said the following:

“The first misdirection by the appeals board and the Tribunal is in the view that the form in which evidence is presented, (whether affidavit or viva voce) and its character (circumstantial or direct) determines whether it is of any probative value. The thinking was that because the evidence against the respondent was presented in affidavit form and circumstantial in character, it could not be relied upon as proof of the respondent’s guilt.

Needless to say, that thinking was wrong. It is the cogency of the evidence that matters and not the form in which it is presented. Evidence in affidavit form is evidence on oath. It can be relied upon- *Smith Chatara v ZESA SC-83-01*.

The question was not whether or not the evidence should have been presented viva voce, but whether or not in the form it was presented the evidence was adductive of facts probative of the fact in issue, that is to say, the involvement of the respondent in the commission of the fraud against Zimbank.”

The *Zimbank case (supra)* buttresses the point that it is the cogency of the evidence that matters and not the form in which it is presented. Thus taken in conjunction with the evidence, which the court *a quo* accepted, that respondent did not enroll for a course at Harare Polytechnic College and that the candidate number used belonged to someone else, a female Secretarial Studies student the court *a quo* should have taken into account the evidence of the letter by the principal. Therefore the court *a quo* erred in finding that the letter was not authentic and there was need for the principal to be called to give *viva voce* evidence.

It is also my view that the finding by the court *a quo* that the evidence did not prove the charges that were laid against the respondent was wrong. In *Vhukani Maadza v Air Zimbabwe (Pvt) Ltd* SC-41-02, MALABA JA (as he then was) said the following;

“It is clear, however, that what the appellant did on 30 September 1999 constituted the offence of falsification of information. **He deliberately wrote in the register false information about his identity as the respondent’s employee.** He was falsifying information on the name and staff number by which he was known to his employer. He was, in my view, properly charged with the offence under paragraph 4(a) of Part 5 of the Code.” (*emphasis added*)

In *casu* it was established as common cause that the Respondent did not take a course at Harare Polytechnic College and the candidate number used belonged to a female secretarial student. The respondent has led no evidence to substantiate his defence. He gave bare and unsubstantiated averments before the disciplinary committee. In his closing submissions during the disciplinary hearing the respondent’s legal practitioner, Mr. *Mugiya*, highlighted to the court that:

“The police acted on a malicious report from the respondent’s ex-wife and raided the respondent’s house whereupon they seized the said certificate which they presented to ZMDC....”

The respondent’s submission unwittingly confirmed that there was original forged certificate was in his house. The fact that the original copy of the forged certificate was in his house and a forged copy was found in his qualifications file at work could only mean that it was the respondent who submitted a forged copy at his work place.

The findings of the court given the circumstances of this case are that,

1. The original copy of the falsified certificate was found in the respondent's house.
2. The respondent has raised no arguments that the falsified original copy of the certificate in question found in his house was planted there, meaning he was aware of its existence.
3. A copy of the falsified certificate was found at the respondent's work place.
4. The certificate in question was relevant to respondent's work.
5. The respondent did not dispute the findings of the court *a quo* that he was never a student at Harare Polytechnic and the candidate number on his falsified certificate belonged to a female student doing Secretarial Studies.

Having established the above facts the only logical conclusion that this Court could reach was that the respondent is the one who falsified the certificate and submitted it at his place of work.

This case is based on circumstantial evidence given that the respondent denied having submitted the certificate and the court had to solely rely on the facts that were presented before it in drawing its inferences. According to P. J Schwikkard, *Principles of Evidence*, 3rd ed, (Juta and Co, Cape Town) pp 537- 538:

“The court should always consider the cumulative effect of all the items of circumstantial evidence. In *R v De Villiers* 1944 AD 493 at 508-9 it was pointed out that the court should not consider each circumstance in isolation and then give the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance.”

At p.538 P. J. Schwikkard further notes that in civil proceedings the inference sought to be drawn must be consistent with all the proved facts, but it need not only be a reasonable inference, it is sufficient if it is the most probable inference.

In justifying its reliance on circumstantial evidence reference is made to the case *Moyo v The State* SC 65/13 where the court cited the case of *R v Bloom* 1939 AD 188 at pp 202-203 where WATERMEYER J set out the cardinal rules which must be taken into account when dealing with circumstantial evidence. They are as follows:

1. “The circumstances from which an inference of guilt is sought to be drawn must be cogently and formally established.
2. Those circumstances should be of a definitive tendency unerringly pointing towards the guilt of the accused.
3. Those circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

In general circumstantial evidence, in order to sustain a conviction, must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. The above is the legal position and it is trite.”

The circumstances before this Court, taken cumulatively, lead to one conclusion, which is that, the respondent uttered a falsified certificate at his place of work.

It is imperative to note that when it comes to the issue of burden of proof in disciplinary hearings, it is not necessary to prove that one has committed the offence beyond reasonable doubt. The test is that the employer must prove his case on a balance of probabilities. (see *ZESA v Dera* 1998 (1) ZLR 500 (S) at p504A)

On the question whether the offence goes to the root of the contract warranting dismissal, the appellant relied on the case of *Standard Chartered Bank Zimbabwe Limited v Musannhu* 2005 (1) ZLR 43 (S). At pg 47A MALABA JA (as he then was) quoted with approval the case of *Pearce v Foster* 1886 QB 536 at 53G where LORD ESHER MR held that:

“.....if the servant’s conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.”

The conduct of the respondent was grossly immoral. It goes to the root of the employment contract. It is a breach of trust that had been built between the parties over the years and breach of that trust renders the employment relationship untenable. In *Patanguli v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 291, the Federal Court of Appeal upheld a decision of the Public Service Labour Relations Board, which found that an employee’s conduct breached the trust of his employer and thus irretrievably damaged the employment relationship. The existence of trust is fundamental to the viability of the employment relationship. The court went on to say:

“The outcome in this case demonstrates that a serious breach of trust on the part of an employee can warrant dismissal, even if the employee has not been involved in any prior transgressions. This is particularly true if the nature of an employee’s position requires a

high degree of trust and where an employee's credibility and integrity is called into question as a result of his or her conduct."

Thus, the fact that the respondent had not committed any offences prior to this case does not stop the employer from dismissing him. Admittedly the respondent if had served the appellant for twenty two years. This does not however change the intensity of his offence as the breach of trust between appellant and respondent was not irreparable.

I am of the view that the penalty of dismissal of the respondent cannot be faulted.

DISPOSITION

The evidence filed of record, showed on a balance of probabilities that the respondent falsified a certificate about his qualifications and submitted it to the appellant. The appellant proved its case by producing the Principal's letter which confirmed the position that the respondent was never a student at their institution and that the candidate number belonged to someone other than the respondent.

The court *a quo* misdirected itself on the evidence that was presented before the court. Its common cause findings show that it was in agreement with the fact that the respondent was never a student at Harare Polytechnic and that the purported candidate number belonged to someone else but went on to make a determination that the evidence before the court was not sufficient to convict the respondent. This amounted to a misdirection.

The appellant did not seek costs from the respondent therefore costs were not awarded.

It is for these reasons that the appeal was allowed with no order as to costs.

HLATSHWAYO JA:

I agree

PATEL JA:

I agree

Hogwe, Dzimirai & Partners, appellant's legal practitioners

Mugiya & Macharaga, respondent's legal practitioners