

DISTRIBUTABLE (35)

FRASER MUYAKA
v
BAK LOGISTICS (PVT) LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, MAVANGIRA JA & UCHENA JA
HARARE, JANUARY 20 & JUNE 22, 2017

L Madhuku, for the appellant

T Magwaliba, for the respondent

UCHENA JA: The appellant appealed against the decision of the Labour Court which upheld his dismissal from employment.

In 2001 the appellant was employed by the respondent as a warehouse clerk in the Distribution Department. He rose through the ranks to the position of Distribution and Transport Manager, a position he held until 1 July 2013, when he was transferred to the post of Port Division Manager. While he was in charge of the Port Division it came to the attention of his superior that there were 40 containers which had been received in May 2013 which had not been invoiced. According to the record the appellant had by September 2013 become aware of the containers but they were not invoiced till January 2014. The appellant was asked to submit a report on why the containers had not been invoiced. In his statement in respect of the inquiry about the containers, appellant acknowledged having received information that there were 40 containers that needed unpacking and he prepared a

spreadsheet to make it easy for officials under him to calculate storage charges upon dispatch and/or unpacking the containers. However, nothing was done to invoice these containers till January 2014.

The appellant was charged with contravening s 4(f) of the Labour (National Employment Code of Conduct) Regulations, 2006 (SI 15 of 2006), “gross incompetence or inefficiency in the performance of his duties.” He was charged for failing to account for daily activities under his department which resulted in non-tracking of 40 containers and failure to put in place a system that controlled his subordinates’ daily activities, concealing information on the non-invoicing of the containers from September 2013 to January 2014 and failing to consult his superiors on issues requiring clarity.

A disciplinary hearing was conducted. The appellant was found guilty of gross inefficiency in the performance of his duties in that he was unable to perform his duties to the best advantage resulting in targets being missed. He was dismissed from employment. Prior to his transfer to the post of Port Division Manager he had been given a final written warning for inefficiency. He appealed to the Managing Director against his subsequent conviction and dismissal for the subsequent charge of gross inefficiency. His appeal was dismissed and his dismissal from employment was upheld. The case was referred for conciliation where a certificate of no settlement was issued.

From conciliation the case was referred to arbitration. The two terms of reference before the arbitrator were; whether or not the appellant was unfairly dismissed and the appropriate remedy if any. The arbitrator found the dismissal to be unfair and ordered that the appellant be reinstated into his position without loss of salary and benefits or in the event that reinstatement was not tenable, to be paid damages.

The respondent was aggrieved by the arbitrator's determination. It appealed to the Labour Court. The Labour Court set aside the decision of the arbitrator and upheld the decision of the Appeals Officer. The appellant then noted this appeal against the decision of the Labour Court to this Court.

The appeal is premised on the following grounds:

1. The learned Judge in the Court *a quo* erred in interfering with a finding of fact by the Honourable arbitrator regarding whether or not the appellant had been guilty of gross incompetence in circumstances where that finding of fact was not so outrageous as to create a question of law for the Labour Court.
2. The distinction drawn by the Labour Court *a quo* between principles of law applicable to gross incompetency and those applicable to gross inefficiency does not exist at law, thereby committing an error of law.
3. Alternatively, the Honourable Court *a quo*, after setting aside the arbitrator's finding /on the guilty verdict, erred in law in not applying section 12B (4) of the Labour Act (Chap 28:01) to set aside the penalty of dismissal.

The issues which fall for determination are:

1. Whether the court *a quo* erred by interfering with "a finding of fact by the arbitrator" on whether or not the appellant was guilty of gross inefficiency.
2. Whether there is a distinction at law between gross inefficiency and gross incompetence.
3. Whether the court *a quo* erred in not applying section 12B (4) of the Labour Act [*Chapter 28:01*] to set aside the penalty of dismissal.

Whether the court *a quo* erred by interfering with 'a finding of fact by the Arbitrator' on whether or not the appellant was guilty of gross inefficiency.

Mr *Madhuku* for the appellant submitted that the Labour Court erred in interfering with the factual finding of the arbitrator that the charge of gross incompetency/inefficiency was not proved. He submitted that the arbitrator made factual findings that the respondent failed to prove gross incompetency/inefficiency and by

interfering with such finding of fact where it was not so outrageous, the Labour Court grossly erred. Mr *Magwaliba* for the respondent submitted that the Labour Court correctly interfered with the finding of the arbitrator because it was irrational and contrary to the evidence presented before him.

The starting point on this issue is whether the arbitrator made findings of fact as to whether or not the appellant was found guilty of incompetence. When the dispute was referred to arbitration, the issues for determination were whether or not the respondent unfairly dismissed the appellant and whether or not the penalty imposed was justified. In that regard, the arbitrator was to determine whether the respondent (employer) was correct in finding the appellant guilty and imposing the penalty of dismissal in view of the evidence filed of record. In so doing the arbitrator was dealing with a record of proceedings. It was not the duty of the arbitrator to determine whether the appellant committed the offence, rather the arbitrator's duty was to find on the evidence filed of record, whether the employer was correct in its findings.

Findings of fact in any proceedings except where an appeal is heard in the wide sense (a rehearing) are made by the initial disciplinary authority, tribunal or court of first instance. They can, except in the case of an appeal in the wide sense, only be made once by such disciplinary authority, tribunal or court. In this case, they were made by the initial disciplinary authority. Thereafter from the respondent's internal appeals officer to the Labour Court, the task was not to make findings of fact, but to assess the findings of fact made by the disciplinary authority against the standard of gross unreasonableness in the circumstances they were made. The arbitrator could therefore not make factual findings. The appellant therefore laboured under a misconception in thinking that the arbitrator makes

factual findings. As a result, I dismiss the first ground of appeal on the ground that it proceeds on the mistaken view that the arbitrator made findings of fact.

Be that as it may, I find that the question the arbitrator had to ask himself was whether in light of the evidence and all the circumstances, of this case the findings of fact made by the disciplinary authority were so unreasonable as to be outrageous in their defiance of logic. The principle to apply is that when one appeals, they appeal against an order and not the reasoning. In the spirit of that principle, it is important to look at whether the decision of the disciplinary hearing was so unreasonable in its defiance of logic that the arbitrator could interfere with it.

The appellant was charged for gross inefficiency or gross incompetence in the performance of his duties. The allegations were that the appellant failed to account for daily activities in his division. It is also important to note that appellant was found guilty of gross inefficiency in that he failed to perform his duties to the best advantage resulting in targets being missed. It is necessary to assess the evidence led to determine whether the finding that appellant was grossly inefficient in the performance of his duties was reasonable.

It is not in dispute that before the appellant was transferred to be a Port Manager, there were 40 containers which had come around May 2013. The appellant became a Port manager on 1 July 2013 and as the head of the department he was responsible for supervising the daily activities of his department. As of January 2014, these containers which came in May 2013 were not recorded in the system. During the hearing before the disciplinary hearing, appellant admitted having received information that there were 40 containers which had to be unpacked and he prepared a spreadsheet to make it easy for his staff at the invoicing desk to calculate storage charges upon dispatch and/or unpacking the

containers. The spreadsheet demonstrated that the appellant knew that there were some invoices to be prepared. There also exists a manual which shows the invoicing and charging procedures to be followed at Port Bak and the appellant had attended an ISO training. In the manual with the procedure for Port Bak processes, the following was stipulated as a procedure to be followed before release of consignments:

“Once Customs has completed the examination and goods have been moved into the warehouse, the Importers have to submit to Port Bak the customs clearance documents. Port Bak issue each Importer a computer Dispatch Note and raise an Invoice for the handling and storage charges. All payments are made before the consignments are released.”

The appellant had this manual at his disposal which should have guided him in the performance of his duties. The preparation of the spreadsheet with two tentative ways of invoicing shows an awareness of the duty to prepare invoices. At the very least such knowledge should have guided the appellant to ensure the invoicing of the containers. In his statement when asked why there was non-invoicing, appellant accused Ruth Leman of having deliberately concealed the figures relating to storage costs. At p 190 of the record the appellant said:

“Myself (sic) and my supervisor would assume that all figures being represented concerning the unpacking of the containers cover all the charges involved since she already had or knew all the figures that were supposed to be invoiced also including the spreadsheet that I had given her for the purpose of our tracking”.

What is apparent from his response is that the appellant acted on the assumption that everything was working perfectly well. However, it is that act of assuming, which grounds the misconduct because a divisional head cannot rely on assumptions without checking on actual performance of his Division for a period of almost six months.

Further with the procedures in place and because such invoicing and charging was central to his duties, the appellant ought to have found out even from his predecessor or the manual what his Department should have done. It must be noted that Ruth was retained to help with the appellant's orientation. He could have, sought his predecessor's assistance, or inquired at ZSS (another invoicing office), if the containers, had been invoiced at that office, instead of relying on assumptions. One further important point to note is that the appellant set his performance target which he took before his superior for approval. He in that performance target scored four out of five. This shows that the appellant had a full understanding of his role but failed to perform it efficiently.

It is apparent that the evidence led established that appellant was guilty of the charge of gross inefficiency in the performance of his duties. It was therefore not the duty of the arbitrator to interfere with such findings where there was no misdirection. The arbitrator was therefore wrong in finding that appellant was unfairly dismissed where the evidence prove that appellant was grossly inefficient in performing his duties.

Whether there is a distinction at law between gross inefficiency and gross incompetence.

The appellant was charged for gross incompetence or gross inefficiency in the performance of his duties but was found guilty of gross inefficiency. The arbitrator set aside the conviction and dismissal on the basis that the facts did not prove that appellant was grossly incompetent or inefficient. In terms of the arbitrator's finding, for one to be found guilty and be dismissed from employment for gross inefficiency, the principles to be applied are those which are applicable to gross incompetence as stated in the case of Kwangwari v CBZ 2003 (1) ZLR 551 (H) at 559 E-G. That is whether the appellant was made aware of the standard that he was required to meet, whether he was given sufficient training and whether he was given an opportunity to reform.

In support of that finding, counsel for the appellant, Mr *Madhuku*, submitted that the findings of the arbitrator are correct because there is no substantial difference between gross incompetency and gross inefficiency. He submitted that since the offence is characterised as gross incompetence or inefficiency, the test is the same. Mr *Madhuku* further submitted that incompetence is broader and inefficiency is its component. I do not agree.

On the other hand, counsel for the respondent, Mr *Magwaliba* submitted that gross incompetency and inefficiency are two different offences that is why the framers used the disjunctive 'or'. He further submitted that the requisites of these two offences are different. I agree.

The misconduct was couched as “**gross incompetence or inefficiency** in the performance of his duties.” The use of the word “or” means either of the two but the requirement is that it be gross of either incompetence or inefficiency. This means for one to be guilty of misconduct, he has to be found to be either incompetent or inefficient. A distinction at law between the two is found in the fact that it can be either of the two.

The literal meanings of the two words can be useful in establishing a distinction between them. Incompetence is defined as “the lack of skill or ability to do a job or a task as it should be done.” Inefficient is defined as “not doing a job well and not making the best use of time, money, energy etc” (see the Oxford Advanced Learner’s Dictionary, International Student’s ed pp 760 and 766).

An incompetent employee lacks the knowledge of what to do and how to do it, while an inefficient employee knows what to do and how to do it, but simply fails to exact

himself in doing what he knows. There is therefore a difference between the two. Thus an inefficient employee may be competent in so far as having the necessary skill or ability to do his work but does not do it efficiently due to dereliction of duty, laziness, carelessness, negligence, lack of zeal, lack of personal drive, not being thorough, procrastination of performance of duties or some other personal traits which hinders him from doing his job efficiently and make use of resources optimally.

An incompetent employee could be able to use time and energy well but his lack of skill will not be remedied by such good use of time and other resources. In this case the appellant by setting targets which earned him a respectable four out of five demonstrates competency. He on the other hand demonstrated inefficiency by arranging to meet the owners of the containers Grindsberg on three occasions but failed to avail himself for such meetings on all three occasions when the owners come for the meetings at his invitation

This demonstrates that the appellant's conviction was not based on a single incident. It was based on failure to supervise his Department over a period of six months and failure to perform his duties efficiently. He set targets which earned him a good rating but did not exact himself to implement them.

That said, it is important to know the relevance of this ground of appeal which seeks to impugn the decision of the court *quo* based on making this distinction. It would appear that the appellant seeks to put across the point that it matters not what principles the arbitrator applied, incompetence or inefficiency, there is no real distinction at law between the two. That is not correct because the misconduct itself is couched disjunctively. As has been highlighted above, appellant was grossly inefficient when he failed to supervise his

department and relied on assumptions for almost 6 months and failed to attend three meetings he had scheduled.

Whether the court a *quo* erred in not applying section 12B (4) of the Labour Act to set aside the penalty of dismissal.

The last issue relates to the issue of the penalty imposed by the disciplinary hearing. It is trite that penalty is in the discretion of the employer. See *Malimanjani v CABS* 2007 (2) ZLR 77 (S), *Toyota Zimbabwe v Posi* 2008 (1) ZLR 173 (S). The employers' discretion can only be challenged where its exercise was grossly unreasonable, capricious or mala fide. See the case of *ZFC v Geza* 1998 (1) ZLR 137 (S). In the case of *Barros v Chimpondah* 1999 (1) ZLR 58 (S) the court held as follows:

“It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. 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.”

In the absence of a finding of gross unreasonableness, the appellate court or tribunal cannot substitute its own discretion simply because it would have taken a different course. In *casu*, the appellant had a final warning for inefficiency albeit from a different department but within the same organisation as an employee of the respondent. Inefficiency need not be related to the same duties but is a reflection of the employee's inability to produce the best possible output. It is not like incompetency which is centred on lack of skill or ability to do a certain task but instead it is the manner of performing his duties. In the negative, inefficiency relates to a person's failure to perform optimally. In light of the final warning, the respondent's exercise of discretion resulting in the dismissal of the appellant was not outrageous and did not defy logic and thus did not warrant interference.

Section 12B (4) of the Labour Act provides as follows:

“(4) In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee’s service, the employee’s previous disciplinary record, the nature of the employment and any special personal circumstances of the employee.”

In interpreting s 12B (4), this court in *Mashonaland Turf Club v Mutangadura* SC 5/12 held that;

“In the exercise of their powers in terms of s 12B (4) of the Labour Act, **the Labour Court and arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it.** In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer’s discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.”

The court *a quo* considered the propriety of the dismissal penalty and decided that the final warning justified the penalty. The employee’s previous disciplinary record is a relevant consideration in terms of s 12B (4) of the Labour Act. In the case of *Zimbabwe Alloys Ltd v Muchohonyi* 2006 (1) ZLR 389 (S), failure to take into account the disciplinary record of an employee was held to be a misdirection on the part of the Labour Court in exercising its powers under s 12B (4) of the Labour Act. As stated above, the task of the Labour Court sitting as an appellate body was to take into consideration the provisions of s 12B (4) of the Labour Act in determining whether the employer was grossly unreasonable in the exercise of its discretion. It found none. It did not therefore err in finding that the

misconduct went to the root of the contract of employment and warranted the penalty of dismissal.

I therefore find that the court *a quo* correctly found that the appellant was guilty of gross inefficiency and that the penalty of dismissal was accordingly reasonable in the circumstances. Accordingly, it is ordered as follows:

“The appeal is dismissed with costs.”

MALABA DCJ: I agree

MAVANGIRA JA: I agree

Mundia & Mudhara, appellant’s legal practitioners

Wintertons, respondent’s legal practitioners