

DISTRIBUTABLE (37)

ZIMBABWE UNITED PASSENGERS COMPANY (ZUPCO)
v
ONSON MASHINGA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA, & UCHENA JA
HARARE, SEPTEMBER 30, 2016 & JUNE 29, 2017

B Ngwenya, for the appellant

The respondent in person

UCHENA JA: The appellant was the respondent's employer. The respondent was, over and above being the appellant's stores clerk, the Harare Depot chairman and national chairman of the appellant's workers' committee. Below him in the workers' committee was the chairman, of Khami Depot workers' committee as well as the Harare workers' committee which he chaired. Issues from Depot workers' committees would be forwarded to him by the two workers committees.

The appellant had, due to financial challenges, been unable to pay part of its employees' salaries for 2009 and 2010. It had also not paid their 2013 salary increases and was introducing cost cutting measures which affected employee's conditions of service. The workers through their Depot workers' committees instructed the respondent to refer their grievances to legal practitioners. The respondent obliged and engaged the services of

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Wintertons Legal Practitioners which wrote to the appellant about the workers' grievances threatening to institute legal action. The dispute between the appellant and its employees was reported in a local newspaper. There is no allegation or evidence as to who leaked it to the press.

The appellant preferred the following misconduct charges against the respondent:

- “1. It is alleged that you **did not follow established procedures in that you did not follow the laid down grievances procedures to register your grievances but instead went direct to institute legal proceedings against the company** as is evidenced by a letter from your lawyers Wintertons Legal Practitioners dated 30 July 2014.

2. Further to that, you did not follow standing instructions which state that whenever you wish to meet with the workers you write a letter to the Human Resources department seeking permission to hold the meeting. **You held a meeting with 813 employees as evidenced by the document SC 401/813 names attached to your legal representative's letter.** You did not seek clearance from the HR Department before holding the meeting and the company was not advised of the agenda of the meeting.

3. You had no authority to represent all the employees cited in the paragraph above outside the company and your conduct in so doing was disruptive of the business instead of being productive. You did not furnish management with the resolution to institute proceedings.” (emphasis added)

In his response to the charges the respondent said:

“With regard to the holding of (sic) general meeting with employees and reference of matter to our legal representative, **I kindly refer you to the minutes of the last two works council meetings** and;

With regard to caption of my name and 813 others, **I hope you sincerely appreciate that I am the National Chairman of the workers' committee and that action is provided for in terms of section H. 7 (a) of S. I. 67 of 2012.**

As of misrepresentation, I have not received any one distancing themselves from the issues and request all workers' committee members to the last two works council meetings to be availed as witnesses on the hearing day.” (Emphasis added)

A disciplinary hearing was subsequently held. The panel of four members was divided with two finding that the respondent be found guilty as charged and two finding that the respondent should be acquitted. The case was referred to the appellant's Acting CEO who found the respondent guilty and dismissed him from employment.

The respondent appealed to the Labour Court which held that his appeal had merit and ordered his reinstatement without loss of salary and benefits from the date of dismissal. The court *a quo* found that s 24 of the Labour Act does not require the respondent to obtain a petition or signatures of the employees for him to represent them. Section 24 of the Labour Act authorises members of a workers' committee to represent its members. In view of the provisions of s 24 the court *a quo* held that the respondent had authority to refer the dispute to legal practitioners on behalf of the workers and that the respondent, now appellant, did not dispute that workers were entitled to legal representation. The Labour Court also found that the penalty of dismissal should not have been imposed because the code provides for two written warnings before dismissal can be imposed.

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The appellant was aggrieved by the court *a quo*'s decision. It appealed to this court on the following grounds:

1. The Court *a quo* erred in law in tempering (sic) with the penalty imposed by the Disciplinary Committee without any legal basis to do so.
2. The Court *a quo* erred in law in ordering that dismissal was not appropriate in circumstances where the misconduct committed by the respondent went to the root of the employment contract and the penalty of dismissal was the appropriate penalty.
3. The Court *a quo* erred in finding that the respondent was dismissed for exercising his right as a Trade Union or worker's committee member when it was clear on the evidence before it that the respondent did not have the

mandate to represent the cited employees under the circumstances such finding is outrageous and in clear defiance of logic a sensible Court applying its mind to the law and the facts would not have made it.

4. Overallly the Court *a quo* erred in law in ordering reinstatement or payment of damages in lieu of reinstatement in the circumstances.

The appellant's grounds of appeal raise two issues for determination by this court:

1. Whether or not the respondent committed an act of misconduct; and
2. If he did whether dismissal was the appropriate sentence.

Whether the respondent committed an act of misconduct

It is common cause that the appellant and its employees had a protracted dispute over outstanding wages and other grievances. This was discussed at National Council meetings held on 2, 11 and 15 July 2014 which the respondent attended in his capacity as the National chairman of the workers' committee. At the meeting of 2 July members of the workers' committee indicated that if the company remained adamant they were going to force it to pay the 2013 salary increase. At the 11 July meeting members of the workers' committee complained about Management's failure to give them permission to meet workers. Management then granted the Northern division's workers' committee enough time to go and meet the workers before they met again on 15 July. At the 15 July meeting members of the workers' committee questioned the legality of sending workers on unpaid leave and threatened to approach the courts. The respondent, as the National Chairman of the worker's committee, subsequently referred the matter to Wintertons, Legal Practitioners. That is the basis of the charges preferred against him. There was in my view ample evidence that

workers had genuine grievances which the appellant was not dealing with, with the seriousness they deserved.

The determinant issue in this case is whether or not the respondent committed an act of misconduct. Mr *Ngwenya* for the appellant said he did. The respondent said he did not. The Court *a quo* agreed with the respondent. It on pp 3 to 4 of its cyclostyled judgment said:

“In *casu*, when it was apparent that there was no solution to the grievance by the Chief Executive, the matter was not referred to the NECTOI but to external lawyers Wintertons for it to engage Respondent. By a letter dated 30th July the legal practitioner engaged Respondent and indicated its intention to take legal action if the grievance is not resolved.

Filed of record are minutes dated 18th July, 2014 of a feedback meeting held on 11th July 2014 in which the employees of both Khami and Kelvin Depots made the proposal to engage a private lawyer to solve their grievances. In view of this did appellant require a petition or the signature of each and every employee to have the matter referred to lawyers? I do not think so.

In terms of section 24 of the Labour Act [Chapter 28:01] a workers’ committee, to which appellant was the chairperson, has a right to represent employees in any matter affecting their rights and interests.

In view of the above, in the exercise of his mandate as chairperson, it was not untoward for appellant to have the matter referred to some lawyers for them to handle it on behalf of the employees. I did not hear respondent argue that the Code prohibits this.”

The court *a quo* held that the respondent as the National Chairman of the workers’ committee had authority to represent workers as provided by s 24 (1) (a) of the Labour Act (Chapter 28.01), which states as follows:

- “(1) A workers’ committee shall—
(a) subject to this Act, represent the employees concerned in any matter affecting their rights and interests; and

- (b) subject to subsection (3), be entitled to negotiate with the employer concerned a collective bargaining agreement relating to the terms and conditions of employment of the employees concerned; and
- (c) subject to Part XIII, be entitled to recommend collective job action to the employees concerned; and
- (d) where a works council is or is to be constituted at any workplace, elect some of its members to represent employees on the works council.”

Section 24 (1) (a) mandates the workers’ committee to represent employees in any matter affecting their rights and interests. That authority is given by the law and cannot be disputed.

I therefore agree with the court *a quo* that the respondent did not need a petition or signatures of each employee for him to represent them or to refer their grievances to legal practitioners. What was necessary was a mere indication by the majority of workers that the dispute be referred to legal practitioners. It is not in dispute that the respondent had such indication.

The allegation that the respondent had a meeting with 813 employees without Management’s authority ignores the fact that there exists the Kelvin and Khami depots which report to him. There is no evidence that he personally met the 813 employees. What is clear on the record is that he received the views and wishes of the employees and used his mandate in terms of s 24 (1) (a) of the Labour Act. If depots held meetings without approval, that would not be misconduct by the respondent. At the meeting held on 11 July 2014, Management authorised the Northern division’s workers’ committee, to go and meet workers

before the meeting which was scheduled for 15 July 2014. This proves that that meeting was authorised. At the meeting of 15 July, the workers threatened to approach the courts. This was a collective decision of the workers on the strength of which the respondent engaged legal practitioners.

In view of the provisions of s 24 (1) (a) of the Labour Act the respondent did not need the signatures of employees to refer the case to legal practitioners. At the hearing of this appeal Mr *Ngwenya* for the appellant agreed that the referral of a dispute to legal practitioners is not an act of misconduct. He conceded that workers have a constitutional right to be represented by a legal practitioner.

The concession was properly made. It is supported by the alleged offence not being on the list and definitions of offences in Annexure 1 of the Code of Conduct S.I. 67 of 2012 and by the provisions of s 69 (4) of the Constitution.

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The acts of misconduct which can be committed under the Code (S. I. 67 of 2012) are listed and defined in Annexure 1 of the Code. The Annexure does not include the offence of not following the laid down procedure or of engaging the services of a legal practitioner. The respondent was therefore charged with an act which does not constitute an offence under the Code of Conduct.

Failure to follow the procedure under H.7 (a) and (b) was not made an offence under the Code. H.7 which falls under Miscellaneous provisions provides as follows:

“In every case where the issue concerns a collective grievance, the following procedures shall apply-

- (a) The Union or Workers Committee shall raise the issue as if they were the complainant’s, and to be discussed at Works Council;
- (b) If the decision of the Chief Executive does not resolve the issue satisfactorily, the matter shall be referred to NECTOI”.

These provisions do not, on their own create an act of misconduct but merely spells out the procedure to be followed. H. 7 (a) reaffirms the mandate of the workers’ committee to represent workers as provided by s 24 (1) (a) of the Labour Act. H.7 (b) provides for the procedure to be followed if the Chief Executive Officer fails to resolve the issue satisfactorily.

If the legal practitioners had carried out their threat to institute legal proceedings, and had not followed the procedure laid down in H.7, the failure could have been responded to by an objection based on failure to follow the laid down procedure and insistence that the correct procedure be followed. It is common cause that no litigation was instituted. It was merely threatened. The legal practitioners merely engaged the appellant.

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Section 69 (4) of the Constitution provides as follows:

“(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.”

The meaning of the word “forum” is wide enough to include representation by a legal practitioner in engaging one’s employer over non-payment of wages and other grievances. The Oxford Advanced Learners Dictionary defines “forum” as “a place where people can exchange opinions and ideas on a particular issue; a meeting organised for this

purpose”. It thus can be representation at a meeting with the employer. The legal practitioner certainly could represent the workers at tribunals and courts if the dispute was to progress that far.

The legal practitioner engaged the appellant on behalf of the workers. The discussions over the grievance therefore remained between the appellant and the workers now represented by a legal practitioner. It cannot therefore be said that the respondent failed to follow the established grievance procedure. The dispute was still within the appellant’s company though the workers were now speaking to it through a legal practitioner. The workers are entitled to engage the services of a legal practitioner. The appellant should have engaged them through their legal practitioners.

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The charge preferred against the respondent alleges that he “instituted legal proceedings against the company as evidenced by a letter from your lawyers” That is not correct. The letter from Wintertons in relevant part reads as follows:

“Pursuant to the above, we have been instructed to demand, as we hereby do, that you effect all payments due and owing to our clients within 7 days of your receipt of this letter failing which legal proceedings shall be instituted without further notice to yourselves. We hope you will comply with our clients’ demand to avoid litigation in a matter that can be resolved amicably.”

It is clear that legal proceedings were not instituted but were threatened. It is also clear that the legal practitioners were addressing the appellant about the workers’ grievances. They were therefore negotiating with the appellant on behalf of the workers in the hope of an amicable settlement as clearly stated in their letter. The discussion was to

remain in house unless the appellant refused to comply with the workers' demand through their legal practitioners. The case could have been taken to the next stage by either party.

The court *a quo* commented on referrals to NECTOI an abbreviation for the (National Employment Council for The Transport Operating Industry) as follows:

“The Code provides that the matter be referred to NECTOI for a decision. The Code does not state who should or should not refer the matter to NECTOI.”

Either party is entitled to refer the dispute to NECTOI. The employees were entitled to do so on their own or through their legal practitioner. That stage was not reached so nothing turns on the referral. The misconduct was premised on the respondent's engagement of legal practitioners and sending a list with persons the appellant says could not have authorised him to refer the case to legal practitioners as they were late or had left employment. Nothing turns on that too because the respondent got his mandate to represent the workers from his being the National Chairman of the appellant's workers' committees. Once his status is established the law gives him the mandate to represent the workers.

It is therefore of no consequence that former employees were included. It seems to me that the respondent was merely presenting the list of employees whose grievances the legal practitioners had to represent. The letter from Wintertons includes grievances of non-payment of salaries for 2009 and 2010. That issue affects employees who died or left the appellant's employment after 2009 and 2010. If he erred by presenting a list with persons who were no longer the appellant's employees it is an error of including persons who were no longer interested parties if they had been paid their dues, not one of not being given a mandate by the majority of the employees.

The court *a quo* concluded with an apt observation regarding the issue of whether or not the respondent was guilty of misconduct by saying:

“The principle of Freedom of Association stipulates that:

‘No person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities’

See paragraph 748 of Freedom of Association-Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 4th Edition.”

The court *a quo* took the view that the respondent, was wrongfully dismissed for referring the dispute to legal practitioners in his capacity as the representative of the appellant’s workers. I agree with that finding. The evidence on record does not prove that he leaked the dispute to the press which seems to have irked the appellant. The appellant did not charge him for leaking the dispute to the press. It charged him for going to legal practitioners which is not an offence under the applicable Code of Conduct. The court *a quo* correctly found that he followed the correct procedure but with the assistance of legal practitioners at the instance of the workers.

This finding resolves what could have been the second issue. Once an employee is not guilty of misconduct he cannot be punished. Therefore, the issue of the appropriate punishment does not arise.

The appeal is dismissed with costs.

ZIYAMBI JA:

I agree

HLATSHWAYO JA:

I agree

Messrs Chinawa Law Chambers, appellant's legal practitioners

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