DISTRIBUTABLE (40)

HWANGE COLLIERY COMPANY LIMITED
v
(1) BENSON NDLOVU (2) ANDREW NDLOVU

SUPREME COURT OF ZIMBABWE
GARWE JA, BHUNU JA & BERE JA
BULAWAYO, AUGUST 1, 2018 & AUGUST 2, 2018

L. Nkomo, for the appellant

W. Ncube, for the first respondents

BERE, JA: During the period extending from 14 to 18 October 2013, the two respondents who were employed by the appellant joined other employees in a collective job action. The strike was over unpaid salaries. An attempt by the appellant's management to stop the strike failed leading to the issuance of a disposal order by the Labour Court on 30 October 2013 declaring the job action illegal and directing the workers, who included the respondents, to return to work.

The two appellants were subsequently charged under the appellant's code of conduct for engaging in an illegal strike action, failing to obey a lawful order and inciting other employees to embark on strike.

Upon being charged, the two employees pleaded guilty to the charges. As a result, they were both found guilty and discharged from employment. The third charge of inciting other workers was not pursued.

Aggrieved by the penalty of dismissal from employment, both respondents noted separate appeals to the Appeals Hearing Committee against the penalty. They did not appeal against conviction as they had pleaded guilty to the two acts of misconduct as already outlined.

The appellant's Appeals Hearing Committee dismissed the respondents' appeals and upheld the penalty of dismissal against both respondents.

Dissatisfied with the outcome of their internal appeals, both respondents separately appealed to the Labour Court against the penalty of dismissal. The appeals to the Labour Court were noted on 3 February 2014. It is significant that the respondents' respective appeals to the Labour Court were specifically against the penalty of dismissal only.

The two separate appeals were consolidated and heard on 27 February 2014. The Labour Court upheld the appeals and set aside the penalty of dismissal. It ordered that the respondents be reinstated without loss of salary and benefits, or alternatively, that the respondents be paid damages *in lieu* of reinstatement.

In upholding the respondents' appeals, the Labour Court was mainly swayed by two basic considerations, namely, that there was selective prosecution of the respondents since their fellow striking employees were not charged and, secondly, that the appellant had not provided sufficient evidence to support its case against the respondents.

Dissatisfied by the decision of the Labour Court, the appellant lodged the instant appeal basically on three grounds. The three grounds of appeal were framed as follows:

> "1. The court *a quo* erred at law by finding that the appellant had not properly exercised its discretion in singling out some of the employees for disciplinary action who had taken part in an illegal strike action.
> 2. The court *a quo* erred at law in finding that the appellant had to give evidence in a matter in which the respondents had pleaded guilty to the offence that led to their dismissal.
> 3. The court *a quo* erred at law by finding that the appellant was supposed to give evidence by way of affidavit in a matter that was brought on appeal and the presiding officer had not so directed."

Consequently, on the basis of these grounds of appeal, the appellant sought to have the Labour Court decision set aside and substituted with an order that "the decision of the employer to dismiss the employee be and is hereby upheld."

Counsel for the respondents, Professor Ncube, felt very strongly that the appellant's case was not well founded and that it ought to be dismissed with costs. I will now proceed to consider the grounds of appeal in *seriatum*.

1. <u>Did the appellant properly exercise its discretion in singling out the respondents for disciplinary action?</u>

Professor Ncube felt very strongly that the appellant had exhibited a flawed and unacceptable approach by choosing to pursue disciplinary action against the two respondents out of a host of other employees who had participated in the same illegal job action. The Labour Court also grounded its determination on the same reasoning as evidenced by the following excepts of the Court's judgment:

> "The number of workers that were on strike was 3200 men and women ----. While engaging in an unlawful job action always attracts a penalty of dismissal almost in all cases, and is the discretion of the employer who to charge and dismiss. In my view this discretion was not properly exercised when the rest of their colleagues were pardoned."[1]

With respect, if regard is had to the rich line of precedent from this court, the court *a quo* fell into serious error. The position of the law is clear on this point. GOWORA JA could not have put it any better when she remarked in the case of *Zimbabwe Banking Corporation* v *Saidi Mbalaka*[2], relying on the *dicta* in *Lancashire Steel (Private) Limited* v *Mandevana and Others* SC 29/95 as follows:

> "Arguments may be addressed *ad misericordam* 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."

[1] . Taken from pp 81-82 of record of proceedings.
[2] . SC55/15 at p.4 of the cyclostyled judgment.

The same position of the law is again captured in the case of *Mashonaland Turf* v *Club Mutangadura*[3] as follows:

> "The law is clear that in a situation such as this the employer is entitled to dismiss the employee. The fact that the respondent was singled out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract."

In light of the authorities cited above, both the court *a quo* and the respondents' counsel's position on the law on selective prosecution is unsustainable. Mr Nkomo for the appellant was clearly on firm ground in arguing to the contrary. We accept his position of the law in this regard.

This takes me to the second point raised in this appeal.

2. <u>Did the appellant properly use its discretion when it dismissed the respondents</u>?

Again, the position of our law on this point has been sufficiently traversed. An appellate court must be very slow to interfere with the employer's discretion on dismissal. It must be in very rare circumstances that an appellate court interferes with that discretion. The decision to interfere with the employer's discretion in this regard is not one that can be intuitively made but must be well justified by the peculiar circumstances of each case. The court succinctly puts it as follows in the case of *Barros* v *Chimphonda*;[4]

> "it is not enough that the Appellate Court thinks that it would have taken a different course from that of the trial court. 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

[3]. 2012 (1) ZLR 183 (S) at p. 184 B-D
[4] . 1999 (1) ZLR 58 at p. 62

some relevant considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution."

A further apposite view of the law in this regard is highlighted by this court in *Zimbabwe Platinum Mines (Pvt) Ltd* v *Godide*[5] where the court remarked as follows:

"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."

In *Browne* v *Tanganda Tea Company*[6] the same position of our law is again re-stated as follows:

"The position is settled that where an employer takes a serious view of misconduct committed by an employee and in its discretion imposes a penalty of dismissal, the appeal court will generally not interfere with the exercise of such discretion in the absence of demonstrated unreasonableness or gross irrationally."

What all the authorities point to is that the discretion of the employer must be respected. It is not just a question of the appellate court, in the comfort of its chambers or courtroom, deciding to substitute its own discretion merely because it holds a different view from that of the lower court.

Throughout his passionate submissions in this court, I did not hear the respondents' counsel, Professor Ncube, convincingly highlighting any unreasonableness or gross irrationality

[5] . SC – 2 – 2016 at p. 5
[6] . SC22/16 at p.20

demonstrated by the appellant in its decision to dismiss the respondents. This same aspect is conspicuously missing in the labour court judgment.

We take the view that the nature of the acts of misconduct to which the respondents pleaded guilty and were convicted of are serious in nature and that they must not be lightly viewed. There is a more civilized way in which the respondents could have had their situation addressed.

Professor Ncube was at pains to convince us that if the totality of what happened in the initial hearing of the respondents' case is properly considered, then it is clear that the respondents did not commit the misconducts that they were convicted of. We do not share this view, neither do we wish to be detained by such sentiments. We take a different view basically for two reasons.

Firstly, and as correctly argued by *Mr Nkomo*, for the appellant, the record of proceedings in the two hearings conducted by the appellant clearly shows that the respondents pleaded guilty to the acts of misconducts preferred against them. Secondly, when the respondents decided to take their appeals to the Labour Court, they did not impugn their convictions. Rather their appeals were against the sentence of dismissal only. This explains why the Labour Court's attention was confined to the propriety or otherwise of the penalty of dismissal.

3. <u>Did the appellant have an obligation to lead fresh evidence or file an affidavit to prove the charges that had been admitted?</u>

This issue arises from the reasoning of the Labour Court that, in its view, the appellant was supposed to lead evidence or avail an affidavit to explain exactly what it is the respondents had done to warrant their conviction and the ultimate penalty of dismissal imposed on them by the appellant.

In our view it was not necessary at all for the court to consider this issue. We say so for two reasons. Firstly, the Labour Court was not seized with an appeal against conviction but sentence only. It was therefore improper for it to start enquiring into the issue of conviction which had not been placed before it. The Labour Court's enquiry should have been limited to the propriety or otherwise of the penalty imposed.

Secondly, and more importantly, as argued by Mr Nkomo, it was common cause that the respondents never denied the acts of misconduct that they were convicted of. From the inception they both admitted the charges. In the case of *DD Transport (Pvt) Ltd* v *Abbot*[7] the court dealt with an almost similar situation in the following terms:-

> "But this admission in the plea is of the greatest importance, for it is what Wigmore (paragraphs 2588-2590) calls a 'judicial admission' (of the confession *judicialis of Voet* (42.2.6) which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it ---".

Further, in *Moven Kufa and another* v *The President of The of Zimbabwe N.O and others*[8] the court held the following regarding an admission of fact:

---

[7] . 1988 (2) ZLR 92 (S) at 97.
[8] . CCZ22/17 at p.18 of the cyclostyled judgment.

> "The law is clear that once a fact is conceded, no evidence needs to be called to prove such fact. The law is also settled that once a concession on an issue of fact is made, such concession cannot be withdrawn, except on application and good cause shown. This position is so well established in our law that no authority need be cited in its support."

The court *a quo* was clearly in error when it expressed the view that the appellant should have adduced evidence "to support the charge" when that issue had already been admitted and was not the one it was called upon to determine. In any event, there was no need for the appellant to prove that which had been admitted by the respondents.

It is abundantly clear to us that the appeal in the court *a quo* was upheld on wrong principles of law and therefore cannot be sustained.

4. Disposition

Consequently, the court makes the following order:

1. The appeal is upheld with costs.

2. The judgment of the court *a quo* dated 18 June 2014 is set aside in its entirety and in its place is substituted with the following order:

   "The appeal against the decision of the Appeals Hearing Committee be and is hereby dismissed with costs."

GARWE, JA I agree

BHUNU, JA I agree

Messrs Coghlan and Welsh, appellant's legal practitioners

Mathonsi Ncube Law Chambers, respondents' legal practitioners