

**DISTRIBUTABLE** (49)

**WARDLOVE MUPARAGANDA**  
**v**  
**COMMERCIAL WORKERS UNION OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**  
**GARWE JA, GUVAVA JA & BHUNU JA**  
**HARARE: JULY 3, 2018 & SEPTEMBER 27, 2018**

*T. Zhuwarara*, for the appellant

*R.R. Mutindindi*, for the respondent

**BHUNU JA:** The appellant was employed by the respondent as a Senior Organising Secretary with effect from 19 January to November 2009. On 12 October 2009 the respondent suspended him without pay following allegations of misconduct.

Disciplinary proceedings were instituted against the appellant commencing 30 October 2009. The proceedings were in terms of the (National Employment Code of Conduct) Regulations S.I. 15 of 2006. The hearing officer was however unable to determine the matter one way or the other. Consequently, on 3 November 2009 he referred the matter to the employer for final determination saying that:

“... as the Hearing Officer, I am unable to make a ruling as such I forward both submissions and my summary to the employer for his Final decision. The accused employee Mr Muparaganda is therefore advised to appear before the general secretary personally or with a representative of his choice at 1200hrs at GWUZ head Office Park town Harare”

Following the hearing officer's failure to reach a verdict, the General Secretary wrote to the appellant lifting the suspension without pay. His letter to the appellant reads in part:

"Your suspension without pay has been lifted and you can get your pay if you go to the bank now".

The appellant subsequently appeared before the General Secretary for a disciplinary hearing in terms of the hearing officer's reference. The General Secretary delivered his verdict on 30 October 2009 dismissing the appellant from employment.

Aggrieved by the dismissal, the appellant appealed to the Ministry which in turn referred the matter for arbitration. The arbitrator made an award nullifying the prior proceedings as unprocedural and fatally defective. In particular he held that the referral by the hearing officer to the General Secretary for a final determination a nullity for want of compliance with the rules saying:

"There was no reason whatever for the Hearing Officer to have proceeded to refer the matter to the General Secretary. The hearing officer was obliged to make a decision."

Having set aside the proceedings before the hearing officer and the General Secretary, the arbitrator proceeded to hear the matter *de novo*. In his verdict the arbitrator found the appellant guilty of a dismissible act of misconduct for late banking of Union dues in contravention of s 17.17.1 of the respondent's Constitution. He accordingly made the following award:

1. Claimant's dismissal was substantially unfair.
2. Claimant's dismissal was procedurally unfair.
3. I therefore order the claimant be paid his salary and benefits from the date of suspension to the date of the award,

- 26 April 2013. Such payment should be made within 14 days of receipt of this award.
4. It is further ordered that claimant's contract of employment is terminated with effect from 26 April 2013.
  5. If parties fail to agree on the calculations, they can approach the arbitrator for quantification".

Dissatisfied by the arbitral award, the appellant appealed to the Labour Court. The appeal raised only 2 issues for determination:

1. Whether the defendant was entitled to a salary from the date of suspension when in fact his contract was terminated?
2. Was respondent's contract lawfully terminated?

The appellant was partially successful. In respect of issue number one, the court *a quo* held that the respondent was not entitled to his salary and benefits because he had been placed on suspension without salary and benefits. She reasoned that when the prior proceedings were nullified by the arbitrator the respondent reverted to his status as an employee on suspension without pay.

As regards the second issue, the court *a quo* upheld and sustained the arbitrator's award to the effect that the lawful date of dismissal was the 26 of April 2013.

Despite the fact that the appellant had been partially successful, the learned judge in the court *a quo* in error proceeded to make an order as if the appellant had been wholly unsuccessful. The order reads:

"The appeal therefore partially succeeds and accordingly the following order is made.

1. The appeal be and is hereby upheld
2. The arbitral award dated 26 April 2013 is hereby upheld
3. No order as to costs.”

In her ruling on the application for leave to appeal to this Court the learned judge properly acknowledged that she erred in making an order upholding the entire appeal when the appellant had only been partially successful.

On the appeal before this Court the only issue was whether the respondent was entitled to his salary and benefits from the date of suspension to the date of lawful dismissal that is to say from 12 October to 26 April 2013. In holding that the respondent was not entitled to his salary the learned judge reasoned that the nullification of the entire proceedings by the arbitrator had also nullified the upliftment of the respondent’s suspension by the General Secretary. This is what the learned judge had to say at page 4 of her judgment:

“However the proceedings uplifting the suspension, having culminated into an unprocedurally unfair dismissal were set aside. To my mind everything that transpired was set aside including the upliftment of the suspension. When the arbitrator set aside the dismissal, the respondent reverted to his position on suspension without salary and benefits see *Bank of Zimbabwe v Chikomwe and 211 Others SC 77/00*. I do not agree with the respondent that he was entitled to his salary and benefits as he was clearly on suspension without salary and benefits. This ground of appeal has merit and therefore succeeds.”

With respect, it appears that the learned judge confused administrative action with disciplinary proceedings done by the employer or management. When the General Secretary lifted the suspension he was exercising his administrative function and not disciplinary action against the respondent. Disciplinary action was only instituted when both the hearing officer and the General Secretary took *quasi-judicial* action against the respondent.

It is the *quasi-judicial* proceedings that were tainted with irregularity and not the administrative action of lifting the suspension. The arbitrator could not have nullified the upliftment of the suspension because this was never an issue placed before him and in any case it was not tainted with irregularity. It is not in dispute that in terms of s 10.2.2 of the appellant's Constitution, the General Secretary has the discretionary power to suspend any employee of the Union with or without pay.

Secretary took *quasi-judicial* action against the respondent.

There having been no irregularity in the manner in which he uplifted the suspension, the upliftment of the suspension was perfectly lawful and binding. An employer who elects to pay an employee during the course of disciplinary proceedings voluntarily assumes an obligation from which he cannot unilaterally wriggle out without first re-suspending the employee without pay. Although it was within the appellant's discretion to re-suspend the respondent without pay, it did not exercise that option until the contract was lawfully terminated on 26 April 2013. For that reason the judgment of the court *a quo* upholding the arbitral award of 26 April 2013 cannot be faulted.

While it is correct, as stated in the case of *Bank of Zimbabwe (supra)*, that when disciplinary proceedings are set aside for irregularity, parties revert to the *status quo ante*. In this case the principle was misapplied because, at the time of the arbitral award, the respondent's status had changed from that of an employee on suspension without pay to that of an employee

on suspension with pay. Thus the respondent could not have reverted to being an employee on suspension without pay because that status no longer existed. That being the case the appeal can only fail. There being no reason for departing from the general rule that costs follow the result.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

**GARWE JA:** I agree

**GUVAVA JA:** I agree

*Matsikidze & Mucheche*, appellants' legal practitioners

*Chambati Mataka & Makonese*, respondent's legal practitioners