REPORTABLE: (14)

ERASMUS GUDZA
v
CITY OF HARARE

SUPREME COURT OF ZIMBABAWE
HLATSHWAYO JA, GUVAVA JA & CHIWESHE AJA
HARARE, JUNE 23, 2014 & FEBRUARY 10, 2020

R Chingwena, for the appellant

C Kwaramba, for the respondent

HLATSHWAYO JA: This is an appeal against the entire judgment of the Labour Court handed down on 14 December 2012 under case number LC/REV/H/86/2011 wherein the appellant's application for review was dismissed for lack of merit. The facts that have a bearing on this matter are as follows:

The appellant was employed by the respondent as a Divisional Officer in the Public Safety Department. On 11 May 2011, the respondent preferred charges of misconduct against the appellant, citing extortion, corruption and conduct that raised a clear conflict of interest. The appellant was charged in terms of Part IV, Clause 4 (iv) of S.I. 17/2007 (S.I. 17/2007) being the Collective Bargaining Agreement, Harare Municipal Undertaking (Code of Conduct and Grievance Handling Procedure).

It was alleged that the appellant had abused his office to improperly secure work from a trucking company for the benefit of a consultancy company in which he was the owner and Director. The trucking company was subject to inspections by the appellant of its fuel depot complex for compliance with city fire and safety regulations. It was averred that the appellant threatened the trucking company with the non-approval of its construction plans and closure of its depot for non-compliance with safety regulations if it did not acquiesce to his demands. It was under this threat that the appellant was able to acquire work for his consultancy firm which was paid US$7 500, employment for a relative and fuel for himself from the trucking company.

Matters finally came to a head when the appellant demanded that he be contracted and paid US$107 000.00 to construct fuel tanks for the trucking company or he would cause the closure of its depot. The trucking company then alerted the respondent to the activities of the appellant, resulting in the charge of misconduct against him. The disciplinary committee heard the matter on 23 May 2011. Whilst the appellant denied the allegations, he was eventually found guilty of the offence and dismissed from employment.

Aggrieved, the appellant approached the Labour Court with an application for review citing procedural irregularities. The application raised five grounds for review which challenged the proceedings of the disciplinary committee on the basis that an invalid code of conduct had been adopted by the respondent. The composition of the disciplinary committee was queried by the appellant on the basis that it was not chaired by a person who had the same grade as the applicant. The appellant also averred that the disciplinary proceedings were not in compliance with the relevant code of conduct in that proceedings ought to have commenced and been finalized within thirty days from the date of discovery of the alleged offence. It was the appellant's submission that whilst the alleged offence was committed during the

subsistence of S.I. 17/2007, the hearing should have subsequently been conducted in terms of S.I. 171/2010 (S.I. 171/2010) which repealed and substituted the former.

The respondent disputed the submission arguing that the repeal of a law did not affect the previous operation of any enactment repealed or anything done under the repealed law. It was submitted that the use of S.I. 171/2010 would be tantamount to applying a statute with retrospective effect. The respondent contended that the applicable statute was S.I. 17/2007 as it was the code of conduct in force at the time of the commission of the offence.

The Labour Court found favour with the arguments presented by the respondent and dismissed the point. The court *a quo* further found that the objection to the composition of the disciplinary committee was premised on a code of conduct already deemed as inapplicable by the court.

On the matter of days within which the disciplinary proceedings were to be instituted and finalized, the court *a quo* found that proceedings commenced on 11 May 2011, being the date upon which the appellant was served with a formal charge letter concerning the alleged misconduct. The disciplinary hearing was duly convened on 23 May 2011 and a determination communicated to the appellant on 13 October 2011. Due regard being had to the foregoing, it was established that proceedings were concluded outside the stipulated time frame of thirty days. However, the court *a quo* stated that the applicant ought to have raised the irregularity at the hearing, which it failed to do on account of the fact that the applicant had walked out of proceedings together with his legal representative. The court *a quo* was of the view that the applicant was partly to blame as he failed to exercise the remedies available to him upon a realisation of the irregularity. It was held that the application by the applicant was

based on academic considerations and technicalities in the pursuit of abuse of court process. Accordingly, the issue was dismissed.

Dissatisfied with the decision of the court *a quo*, the appellant appealed to this Court on the following grounds of appeal:

1. The court *a quo* erred and misdirected itself on a point of law in its interpretation of S.I. 17/2007 and S.I. 171/2010 and failed to appreciate that the respondent could not conduct disciplinary proceedings against the appellant in May 2011 in respect of allegations of misconduct which came to the attention of the respondent in November 2009.
2. The court *a quo* misdirected itself as far as the law of interpretation of statutes is concerned and consequently failed to appreciate that whilst the charges of misconduct against the respondent were as defined by the repealed S.I. 17/2007, the procedure to be followed by the disciplinary committee, ought to have been provided for in S.I. 171/2010 which was the respondent's code of conduct as of May 2011.
3. The court *a quo* erred in failing to appreciate that the improper composition of the respondent's disciplinary committee, which was admitted by the respondent, had prejudiced the appellant and accordingly warranted the setting aside of the disciplinary proceedings.
4. Having found as a matter of fact, that the respondent's disciplinary committee failed to finalise the disciplinary proceedings within the period prescribed by the code of conduct, the court *a quo* erred in failing to set aside the disciplinary proceedings since the respondent's code of conduct makes it mandatory for the referral of such proceedings to a Designated Agent of the National Employment Council for the Harare Municipal undertaking. The code does not give the respondent discretion on whether

or not to continue with the proceedings beyond the period stipulated by the code of conduct.

The key issues for determination by this Court are three-fold. Firstly, there is need to establish the applicable code of conduct to the disciplinary proceedings between the appellant and the respondent. Secondly, the court must determine whether or not the disciplinary committee was properly constituted and if that was not the case the implications thereof. Finally, the appellant has enjoined this Court to consider whether or not the disciplinary committee proceedings were conducted in accordance with the time limits imposed by the relevant code of conduct.

It is the appellant's contention that S.I. 171/2010 was the applicable code of conduct to the disciplinary proceedings brought against him. However, the correct position of law in instances where an earlier statutory instrument has been subsequently repealed by another is clearly and plainly established in s 17 of the Interpretation Act [*Chapter 1:01*] which provides as follows:

"17. Effect of repeal of enactment

(1) Where an enactment repeals another enactment, the repeal shall not…
(a) …or
(b) Affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or …
(c) … or
(d) … or
(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty … and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced… as if the enactment had not been so repealed." (Emphasis added)

A South African authority, which is of persuasive value to this Court, similarly sets out the following in *Curtis v Johannesburg Municipality* 1906 TS 308 at p 311:

> "In the absence of express provisions to the contrary, statutes should be considered as affecting future matters only and more especially…they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation." (Emphasis added)

The respondent has correctly submitted that no impropriety arises from adopting legislation that was in force at the time that the offence was committed. Accordingly, since the alleged offence was committed sometime in November 2009, during which time the applicable code of conduct was S.I. 17/2007, I find that the court *a quo* applied the correct principle to the facts and correctly held that S.I. 17/2007 was the applicable code of conduct to the disciplinary proceedings against the appellant.

The second issue raised by the appellant is that the composition of the disciplinary committee was irregular and that the irregularity was prejudicial. In the circumstances, the court notes that the submission was made on the presupposition that the applicable code of conduct was S.I. 171/2010. In view of the finding that the applicable code of conduct was S.I. 17/2007, no basis exists upon which to consider the submission. I find no fault in the determination of the court *a quo* in this regard.

On the final issue regarding non-compliance with the time limits provided for by the relevant code, it has been established that there was clear non-compliance in that disciplinary proceedings ought to have been initiated and concluded within thirty days. The established position in our law was considered in the case of V*utete v Chairperson of the Appeals Committee (ZOU) & Anor* HH 257/18 wherein it was stated:

> "… that the appeals committee failed to determine the appeal timeously does not render their decision wrong. This position finds support in the sentiments by Gillespie J in *Nyoni v Secretary to Public Service Labour & Social Welfare & Another* 1997 (2) ZLR 516 (H) at 523 A-B which I find compelling

> "an employee validly suspended does not, because of delay alone, became entitled to reinstatement nor to reversal on review of a subsequent dismissal. Instead, they (the parties) each have available to them the remedy of mandamus to enforce due compliance with that which is timeous." (Emphasis added)

It appears to me that where delay exists, it merely gives the aggrieved party the right to the remedy of a *mandamu*s to enforce due compliance with any time limits that are requisite. It is common cause that the appellant walked out during the proceedings of the disciplinary committee and subsequently failed to raise the irregularity and seek the appropriate remedy. The right to redress is clearly vested in the appellant. In the present instance, the appellant chose not to exercise this right and as such cannot seek to rely upon it after the fact. Accordingly, I find favour with the position of the court *a quo* in dismissing the objection by the appellant.

Ultimately, the court *a quo* aligned itself with correct principles of law in relation to the circumstances. It is of concern that the appellant has not sought to deny allegations levelled against him and defend himself but rather has sought to deploy allegations of procedural irregularities to escape liability. Nonetheless, the appeal itself is devoid of merit and stands to be dismissed with costs following the outcome.

Accordingly, the appeal is dismissed with costs.

GUVAVA, JA **:** I agree

CHIWESHE, AJA : I agree

Danziger & Partners, appellant's legal practitioners

Mbidzo Muchadehama & Makoni, respondent's legal practitioners.