ALBERT JAVANGWE
v
VORTIGEN INVESTMENTS PRIVATE LIMITED T/A CPL

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & UCHENA JA
HARARE, JULY 9, 2019 and MARCH 16, 2020

M.G Bumhira, for the appellant
I. Chiwara, for the respondent

UCHENA JA: This is an appeal against the whole judgment of the Labour Court, dismissing the appellant's application for review. After hearing submissions from counsel for the parties we dismissed the appeal with costs, indicating that reasons for our decision would follow. These are they.

The detailed facts of the case can be summarized as follows;

In April 2017 the appellant who was employed by the respondent as a journeyman printer was charged with misconduct for unsatisfactory performance of his duties. He was charged in terms of the respondent's employment code of conduct hereinafter referred to as the (CPL Code). After disciplinary proceedings, the appellant was found guilty and dismissed from employment. Aggrieved by that decision, he appealed to the Appeal's Officer, who dismissed his appeal.

After the unsuccessful internal appeal the appellant applied to the court *a quo* for the review of that decision praying for the reversal of his conviction and dismissal from employment. He alleged that the proceedings *a quo* were tainted by irregularity as the CPL code which was used had not been referred to the NEC for ratification in terms of s 101 (1) (b) of the Labour Act *[Chapter 28:01]*. He further alleged that the CPL code was inconsistent with S.I. 175/12, the NEC Code.

It is not in dispute that in February 2009, the National Employment Council (NEC) for the Printing Packaging and Newspaper Industry had approved and registered the respondent's code of conduct, the 'CPL' code in terms of which the appellant was charged. The registration was in terms of s 101 (1) (b) of the Labour Act. This registration was necessitated by the coming into force of the NEC's own code for the Industry in terms of S.I. 148/09 as in terms of s 101 (1) (b) of the Labour Act, when the National Employment Council registers its own code, such code supersedes all codes under the industry made at works council levels, unless such codes are submitted to it for approval and registration.

In 2012, the NEC published a new industrial code under S.I. 175/12 which repealed and replaced S.I. 148/09. It is this new code the appellant alleged was binding and should have been used during the disciplinary proceedings against him.

In the court *a quo*, the appellant further argued that the respondent had to register its employment code again following the repeal of S.I. 148/09 and its replacement by S.I. 175/12. He also submitted that the CPL code was inconsistent with the NEC code of conduct and ought not to have been used.

The respondent opposed the application arguing that the company's code had been duly registered with the employment council in terms of S.I. 148/09 and was after the coming into effect of S.I. 175/12 approved by s 4.1 of that Statutory Instrument. The court *a quo* dismissed the application for review. It held that it was not necessary for the respondent to resubmit its code to the NEC which had through s 4.1 of S.I. 175/12 ratified all codes which came into existence before it and held that the employer had used the correct code of conduct in disciplining and dismissing the appellant from employment.

Accordingly, the court *a quo* dismissed the appellant's application for review. Aggrieved by that decision, the appellant appealed to this Court on the following grounds:

> "1. The court *a quo* erred and misdirected itself in not finding that in the absence of ratification, the workplace code of conduct could not supersede the NEC Code of conduct.
>
> 2. The court *a quo* erred and misdirected itself in failing to appreciate that Appellant had been dismissed in terms of the wrong Code of conduct and his dismissal was consequently a nullity."

The appeal raised one issue for determination:

Whether or not the court *a quo* erred in finding that the appellant was dismissed using an approved code of conduct.

Mr *Bumhira*, for the appellant, submitted that the nub of the matter was the interpretation of s 101 (1) (b) of the Labour Act. He submitted that the NEC code of conduct for the Industry surpersedes all other codes unless they are approved. He further argued that the in-built approval in s 4.1 of S.I. 175/12 is not what was contemplated by s 101 (1) (b) of

the Labour Act. He contended that the CPL code had to be resubmitted for approval. Mr *Bumhira* further argued that it followed that the code used by the respondent was not approved and everything that flowed from it was a nullity.

Mr *Chiwara* for the respondent, submitted that the CPL code was approved. He contended that S.I. 175/12 incorporated an inbuilt approval which provided that all pre-existing codes were approved and were not affected by its promulgation. Mr *Chiwara* further submitted that the inbuilt approval of all pre-existing codes was to avoid a duplicate process and could not be held to be inconsistent with the Act. He submitted that the inbuilt approval in S.I. 175/12 was sufficient in the circumstances and that the appellant's dismissal was in terms of an approved code of conduct.

The determination of this appeal depends on the interpretation of s 101(1) (b) of the Labour Act and S.I. 175/12. Section 101 (1) (b) of the Labour Act provides as follows:

> "Where an employment code is registered by a works council in respect of any industry, undertaking or workplace represented by an employment council and the employment council subsequently registers its own employment code, the employment code registered by the employment council shall supersede that of the works council unless the works council refers it to the employment council for approval."

The effect of s 101 (1) (b) of the Labour Act is that where the NEC registers a code for the industry, its Code will supersede any works council code unless the works council code would have been submitted to the NEC for approval. In this case the respondent's employment code was superseded by the Employment Council's code under S.I. 148/09. After that supersession the respondent submitted its code to the NEC for approval, which approval was granted. Section 101 (1) (b) was therefore complied with at that stage. Later S.I. 148/09 was repealed and substituted by S.I. 175/12. Cognisant of the previous approval and

registrations of the respondent's and other codes, the Employment Council through s 4.1 of S.I. 175/12 exempted the respondent and others in similar circumstances from having to resubmit their codes for approval and reregistration. Section 4.1 of S.I. 175/12 provides as follows:

> "The code shall not apply to employees with registered company codes of conduct already in use at the time of registration of the industry code of conduct."

In terms of our law, the overriding consideration in interpreting statutes is the intention of the legislature. The resultant interpretation must not lead to an absurdity. In *Grey v Pearson* 1857 10 ALL ER 1216 at 1234 it was held that in construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity.

The legislature in enacting s 4.1 of S.I. 175/12 which expressly provides that it was not to be used for employees who already had registered company codes must be presumed to have applied its mind to the possible effects of requiring re-registration of company codes which were already in existence. The grammatical construction of s 4.1 of S.I. 175/12 clearly proves that the legislature intended to establish a blanket approval of all pre-existing codes to avoid an absurd scenario of re-registration of pre-existing codes it had previously approved. Section 4.1 cannot therefore be said to be inconsistent with the Act.

Mr *Bumhira'*s submission, that there should be a re-submission of codes for approval, is an absurd and cumbersome process which was, not intended by the legislature. It is apparent that what s 101 (1) (b) of the Act requires is that the National Employment Council should consider and approve Employment Codes before they can be used. In this case the NEC had in its office the respondent's approved code before the repeal of its S.I 148/09 and the

enactment of S.I. 175/12 in its place. It was therefore entitled to review it and provide in its s 4.1 of S.I. 175/12 that it approved its continued use by the respondent. It had already been submitted to it and had been approved in terms of s 101 (1) (b) of the Labour Act. It was therefore lawful for the NEC to consider the pre-existing copy and approve it through the inbuilt provision.

There was therefore no need for the re-registration of the respondent's code. The respondent correctly used its code in disciplining the appellant. The appellant was therefore charged and dismissed in terms of the correct code of conduct.

Accordingly, the decision of the court *a quo* cannot be faulted. The appeal has no merit. It was for these reasons that the appeal was dismissed with costs.

MAKARAU JA: I agree

HLATSHWAYO JA: I agree

J. Mambara & Partners, Appellant's Legal Practitioners
Coghlan, Welsh & Guest, Respondent's Legal Practitioners