

HAPPISON MUCHECHETERE
v
(1) ZIMBABWE BROADCASTING CORPORATION (PRIVATE)
LIMITED (2) RETIRED JUSTICE JAMES DEVITTE N.O (3)
GIBSON MUNYORO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & MAKONI JA
HARARE, 16 MARCH 2021 & 11 NOVEMBER 2021

L. Madhuku, for the appellant

E. Moyo, for the first respondent

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GWAUNZA DCJ

[1] This is an appeal against the entire judgment of the Labour Court handed down on 10 March 2017. The Labour Court dismissed the appellant's application for review challenging the disciplinary proceedings that led to his dismissal from the first respondent's employment. There were no appearances for the second and third respondents.

FACTUAL BACKGROUND

[2] The appellant was employed by the first respondent as its Chief Executive Officer (hereinafter “CEO”) between the period 2009 until the dissolution of its Board in 2013. The appellant had been employed on a contractual basis with his subsisting contract having been renewed in May 2011. On 14 November 2013, the then Acting Secretary for Information, Media and Broadcasting Services, wrote to the appellant placing him on leave with full pay, until further notice. The letter stated that the appellant was placed on leave due to the exacting challenges faced by the first respondent which required urgent intervention through a full audit of its affairs. The appellant was barred from visiting the first respondent’s premises or issuing any instructions to its staff. On 30 January 2014, the appellant was notified of the allegations of misconduct against him which were said to have been unearthed during the audit. The initial decision to place the appellant on paid leave was rescinded and substituted with leave without pay pending determination of the allegations against him.

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[3] On 18 November 2014, the appellant was duly served with a notice by the first respondent’s legal representatives, to attend a disciplinary hearing to be presided over by the second respondent. The appellant faced 32 charges of misconduct which were contained in a schedule attached to the notice of the hearing. When the disciplinary proceedings began, the first respondent abandoned 21 of the charges against the appellant, leaving only 11. At the hearing, the appellant argued that it was not competent for the first respondent to undertake disciplinary proceedings based on allegations flowing from an expired employment contract. This argument was based

on his interpretation of the Labour (National Employment Code of Conduct) Regulations, 2006 (hereinafter, “SI 15/2006”).

[4] Counsel for the appellant contended that for a person to be properly charged with misconduct, he or she must still be an employee in terms of a subsisting employment contract at both the time of the commission of the offence and institution of misconduct proceedings. He further submitted that what were now termed acts of misconduct had been properly approved by the first respondent’s Board. Counsel further submitted that the integrity of the disciplinary proceedings was further thrown into doubt by the direct role played by the Minister of Information Media and Broadcasting Services, who initiated his suspension.

[5] The first respondent disputed the appellant’s contention that it sought to improperly charge him in terms of an expired employment contract. It averred that the parties were engaged in a continuous employment relationship which was highlighted by the renewal of the appellant’s contract in May 2011. Counsel for the first respondent placed reliance on the Lesotho case of *Limkokwing University of Creative Technology Lesotho (Pty) Ltd v Mosia Nkoko and Anor* LC/REV 58/12, whose import was that an employment relationship becomes continuous, where the contract of employment is renewed immediately upon the expiry of a preceding one. Accordingly, he argued, since the acts of misconduct in question were committed during the subsistence of an employment relationship between the parties, the appellant was properly charged.

[6] The disciplinary hearing chaired by the second respondent found the appellant guilty of misconduct in respect of 7 of the 11 charges levelled against him. These were counts 1, 2, 3, 6, 7, 21 and 23 on the charge sheet. It is not in dispute that the second

respondent did not pronounce the verdict of dismissal against the appellant. This was rather, done by the first respondent.

[7] Dissatisfied with the disciplinary hearing's decision, the appellant filed an application for review in the Labour Court. The basis of the application was that there was gross irregularity, gross irrationality and illegality in the manner that the disciplinary proceedings were conducted and the decision reached. In particular, the appellant alleged gross irregularity and irrationality, or alternatively, illegality based on its review grounds 1.1 – 1.4. He went on to allege gross irrationality and alternatively, illegality and procedural irregularity on the basis of a second set of review grounds, that is, grounds 3 - 3.5. While the manner the review grounds are formulated is somewhat confusing, it is apparent that the appellant effectively submitted two sets of review grounds, each with its own alternative grounds for review.

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[8] The court *a quo* did not advert to the second set of review grounds (nor the alternative thereof), but determined the matter on the basis of the first set which alleged irregularity in the proceedings, as follows: -

1. a number of charges levelled against the appellant related to alleged acts of misconduct arising from a contract of employment which had expired,
2. the first respondent at all material times either directed or approved all acts of the appellant which were then later deemed as misconduct on his part.
3. the proceedings were initiated by the Minister of Information Media and Broadcasting Services who was not a party to the contract of employment; and
4. the first respondent improperly imposed a penalty before the disciplinary proceedings were completed, contrary to SI 15/2006 and s 12B (4) of the Labour Act (*Chapter 28:01*)

The appellant consequently sought nullification of the disciplinary proceedings and reinstatement as an employee of the first respondent.

[9] The court *a quo* dismissed the appellant's application for review. It held that the acts of misconduct in question were committed during the subsistence of the parties' employment relationship. The court found that the appellant did not adduce any evidence to disprove the claim that he enjoyed a continuous employment relationship with the first respondent during the period 2009 to 2013. It stated that the renewal of the contract in May 2011 did not vary the essential terms of his employment as he remained both the Principal Accounting Officer and CEO of the first respondent. For this finding, the court cited an *excerpt* from the case of *van Der Post v Twyfelhock Diamond Prospecting Syndicate* (1903) 20 SC 213, to the effect that where several or a series of contracts between the same parties are concluded to effect a single purpose, they should be treated as one contractual document.

[10] The court *a quo* also relied on *Air Zimbabwe v Chiku Mensa & Anor* SC 89/10, as an authority supporting its decision to uphold the outcome of the disciplinary proceedings. It was stated in that case that a person guilty of misconduct should escape the consequences of his misdeeds because he is innocent, not because of a failure to conduct proceedings properly by another employee.

In relation to the appellant's third ground of review the court held that the disciplinary proceedings conducted by the second respondent were not vitiated by virtue of the Minister of Information and Media Broadcasting, (and not the first respondent, his former employer) having authored the letter of suspension. The court took the view that the absence of a letter of suspension was, in any case, not fatal to the conduct of disciplinary proceedings. It cited in this respect the following sentiments of the court in *Shumbayaonda v Ministry of Justice Legal and Parliamentary Affairs and Anor*,

SC 11/14: -

“...Suspension is not a prerequisite to the holding of disciplinary proceedings and a disciplinary hearing does not have to take place during the period of suspension...”

[11] Finally, in so far as the final ground of review was concerned, the court *a quo* quoted the part of the second respondent’s written decision of 15 April 2015, that specifically convicted the appellant of acts of misconduct 1,2,3, 6,7, 21 and 23. The *excerpt* also indicated that the second respondent had dismissed some preliminary issues raised on behalf of the appellant. A chronological analysis of the events that then ensued satisfied the court *a quo* that the first respondent had not ‘prematurely concluded’ the disciplinary proceedings, as alleged by the appellant.

In the final result the court *a quo* reached the decision that the disciplinary proceedings against the appellant had not been irregularly conducted.

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[12] Aggrieved by the judgment of the court *a quo*, the appellant approached this Court on appeal. He prays that the decision of the court *a quo* be set aside and substituted with an order granting the application for review and setting aside both the disciplinary proceedings and his dismissal. His grounds of appeal are set out as follows: -

1. The court *a quo* erred and misdirected itself in law in holding that under the Labour National Employment Code of Conduct Regulations, 2006 SI 15/2006, the appellant could be charged with, and convicted of alleged acts of misconduct arising from an expired contract.
2. The court *a quo* erred in law in failing to find that the first respondent, through its various agents either directed or approved all the acts of the appellant which were then later construed as misconduct. The court *a quo* ought to have found that the first respondent could not regard, as misconduct, the actions it either directed or approved.
3. The court *a quo* erred and misdirected itself in law in failing to hold that it was not competent for the first respondent to impose the penalty of dismissal

before its own appointed disciplinary authority had made a determination on the appropriate penalty.

4. The court *a quo* fell into an error of law in failing to find that the appellant's conviction was contrary to the evidence that was placed before the disciplinary authority.

[13] At the hearing of the appeal, the first respondent raised a preliminary point challenging the validity of the appellant's second ground of appeal. It asserted that the ground of appeal did not raise a question of law. Rather, it attacked the factual finding of the court to the effect that the appellant had tendered no evidence to support his assertion that the first respondent's Board had approved most of the actions that formed the basis of the misconduct charges levelled against him. *Per contra* the appellant contended that the impugned ground of appeal raised a procedural issue that attributed the acts of the employee to the employer itself, that is, the first respondent. Counsel for the appellant referred to *Zvokusekwa v Bikita Rural District Council* SC 44/15, which held that it was not the formulation but the substance of a ground of appeal that matters.

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[14] After hearing argument from both counsel, the court found merit in the submissions of the first respondent and upheld its point *in limine*. The court noted that the court *a quo* clearly found as a matter of fact that the appellant had not tendered any evidence to substantiate the assertion that the first respondent's Board had indeed approved the actions that were then converted into misconduct charges against him. As a factual finding, the appellant could only have successfully impugned it upon proof that the finding was so grossly unreasonable that no other court, properly applying its mind to the issue, could have reached the same conclusion. (*See Barros and Chimphonda, 1999 (1) ZLR (S) 58 at p62*). The appellant not having proved any such misdirection

on the part of the court *a quo*, the court accordingly struck out the appellant's second ground of appeal.

[15] The appellant's fourth ground of appeal *in casu* addresses an issue that was included in his alternative set of review grounds *a quo*. It is evident from the record that the court *a quo*, having determined the review application only on the basis of the main review grounds advanced by the appellant, did not address the appellant's alternative set of review grounds, which included the issue raised in the appellant's fourth ground of appeal. To the extent that an appeal court's mandate is to test the correctness or otherwise of a lower court's decision and the reasoning behind it, the appellant's fourth ground of appeal is misplaced. This is because the ground calls upon this Court to determine, in the first instance, an issue that the court *a quo* did not consider. The ground of appeal is therefore invalid and is accordingly struck out.

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This leaves the appellant with two grounds of appeal, which the court will now consider.

Whether or not the court *a quo* erred at law by making the finding that the appellant could be charged with acts of misconduct arising from an expired contract of employment.

[16] Counsel for the appellant submitted to this Court that in terms of SI 15/2006, it is not competent for an employee to be charged with acts of misconduct purportedly committed during the currency of an expired contract of employment. He emphasised that a fixed-term contract of employment lapses automatically on the date of its expiry, and as a result, there was no such thing as the renewal of a fixed term contract. Rather, so the argument goes, the old contract lapses and an entirely new contract

comes into being. Counsel contended that SI 15/2006 employs a rigid scheme that provides an avenue for an employer to terminate an existing contract of employment owing to its serious breach by the employee. Further, that a person ought to still be an employee in terms of a subsisting contract of employment at both the time of the commission of the offence and the institution of misconduct proceedings by the employer. He averred that the misconduct contemplated by s 4 of SI 15/2006 as read with s 6 of the same statutory instrument refers to a subsisting employment contract.

[17] Save for his own interpretation of these provisions, Counsel cited no authority to support his assertions in this respect. Nevertheless, on those grounds, it was Counsel's submission that only one out of the 11 charges brought against the appellant was competent as it was allegedly committed during the currency of his existing contract. He went on to argue that it was improper to combine in the same proceedings, alleged acts of misconduct relating to an expired contract of employment and a subsisting one. That being the case, Counsel contends the first ground of appeal ought to succeed since the charge relating to the subsisting contract could not be severed from the others.

[18] In response, counsel for the first respondent disputed and challenged the appellant's strict interpretation of SI 15/2006 concerning the effect of the expiry of a contract that is immediately renewed without interrupting the employee's work nor the employment relationship between the parties. Counsel submitted that the relevant provisions of SI 15/2006, if properly interpreted, would not protect an employee who committed acts of misconduct during a previous contract of employment, from being charged with such misconduct during the currency of a subsequent contract. Counsel

further submitted that in any case, there was no cessation in the employment relationship enjoyed by the parties. The contract renewal in May 2011 was essentially on the same terms as when the appellant was engaged as the first respondent's CEO and Principal Accounting Officer. He contended that the acts of misconduct only came to light following the appellant's suspension and consequent audit proceedings. Counsel submitted that it was competent to charge the appellant in respect of acts of misconduct committed during the currency of his prior contract as he enjoyed a continuous employment relationship with the first respondent.

- [19] Counsel for the first respondent bemoaned the dearth of judicial pronouncements in our jurisdiction on the issue of whether or not it is competent to charge an employee with acts of misconduct committed during the currency of an expired employment contract which is immediately replaced with a new one on substantially the same terms. He sought to argue that an employment contract, to begin with, was a contract and thus subject to the basic tenets of the law of contract. He placed reliance on the case of *Van Der Post v Twyfelhoek Diamond Prospecting Syndicate* (1903) 20 SC 213, where the following was held: -

“Where several or a series of contracts between the same parties are concluded to effect a single purpose, they should be treated as one contractual document and where there is doubt as to the meaning, they should be read together to determine the intention of the parties and the same principles of interpretation should be applied in the case of any other contract.”

- [20] My reading of this case however suggests that it was concerned with a very different set of circumstances to those at hand. The contracts in issue in that case were neither related to an employment relationship nor were they successive in the sense of one expiring and a new one immediately replacing it. More significantly, the case was concerned about how to interpret seemingly contradictory provisions in a number of

concurrent contracts governing the sale of a property. Hence the finding that such contracts, for purposes of interpretation of their respective provisions, should be treated as one. The case is therefore distinguishable from the one at hand, where the question of interpreting any provisions of the appellant's expired and subsequent employment contracts did not arise.

[21] However, the court finds the other authority cited by the first respondent to be entirely persuasive *in casu*. This is the Lesotho case of *Limkokwing University of Creative Technology Lesotho (Pty) Ltd v Mosia Nkoko and Anor LC/REV 58/12*. The employee in that case, a lecturer on a fixed term contract, was charged with misconduct and subjected to a disciplinary hearing on 5 July 2011. Despite this, after his contract expired on 14 July 2011, it was immediately renewed for a further year with effect from 15 July 2011. That contract was due to expire on 17 July 2012. However, the employee was subsequently dismissed from employment on 19 September 2011 based on the disciplinary proceedings held on 5 July 2011. The dismissal was effected during the subsistence of the renewed fixed term contract while the disciplinary proceedings had been conducted during the employee's previous contract. Similar arguments to those made for the appellant *in casu*, were advanced before the court in Lesotho. It was argued for the employee that because the dismissal was executed after the expiry of his previous contract, his employer was in breach of the employment contract since the employee could not be accused of incidents that happened during the currency of an otherwise expired contract.

[22] On the other hand the University argued that when the employee's contract expired and was renewed on 15 July 2011, the employment contract became continuous, thus giving the employer every right to take disciplinary steps against him. Unlike in our

jurisdiction where there is no provision directly addressing the issue, counsel for the University relied on a provision in the country's Labour Code Order, 1992, which defined 'continuously employed' as follows: -

“... means employed by the same employer, including the employer's heirs, transferees and successors in interest for a period that has not been interrupted for more than four weeks in each year of such employment, (emphasis added) during which four-week period there was no contract of employment in existence and no intention of the employer to renew it once that period has elapsed ...”

The court then found, on the basis of this provision, that upon renewal of his contract, the employee's employment had become continuous, meaning he could properly be charged with acts of misconduct committed during the currency of his expired fixed term contract.

[23] The court finds merit in the first respondent's submissions **Judgment No. SC 143/21
Civil Appeal No. SC 11/18** given to sections 4 and 6 of SI 15/2006. It is also persuaded by counsel's submissions concerning the existence of a continuous employment relationship between the appellant and the first respondent, and its effect on the propriety or otherwise of the charges of misconduct brought against the former. This is notwithstanding the lack of any statutory provision similar to the one in Lesotho. The principle coming through from the Lesotho case, and the *ratio* therein, the court finds, can properly be adopted *in casu*.

[24] SI 15/2006 deals with misconduct under s 4 where its introductory part reads as follows: -

“An employee commits a serious misconduct if he or she commits any of the following offences....
(a) any act of conduct or omission inconsistent with the fulfilment of

the express or implied conditions of his or her contract; or
(b) –(h)...”

The section is read together with the operative part of s 6 of the same statutory instrument which states the following: -

“6(1) Where an employer has good cause to believe that an employee has committed a misconduct mentioned in s 4, the employer may ...”

[25] The court is not persuaded that the interpretation ascribed to these provisions by the appellant is correct. The appellant was an employee of the first respondent in terms of the old contract up until midnight of the last day of the contract. In other words, he literally went to bed as first respondent’s employee and woke up still its employee on essentially the same terms of employment, *albeit* under the terms of a new contract. He proceeded to report for work as usual, and to carry out his duties. It has not been averred that he picked up any terminal benefits attendant on the expiry of the old employment contract. Thus, notwithstanding the technicality concerning the dates of expiry and renewal of the contracts in question, the employment relationship continued. It is to be noted that this employment relationship started in 2009. The court *a quo* pertinently observed that the appellant had not adduced any evidence to prove that for the period 2009 to 2013, he was not in a continuous employment relationship with the first respondent.

[26] Against this background, to then suggest, as the appellant does, that ‘employee’ for purposes of SS 4 and 6 of SI 15/06 refers only to one who both commits and is charged with the misconduct in question, during the currency of a subsisting contract

and not a previous one, is to advocate for an absurdity. For it would mean that an unscrupulous employee who is confident of a new employment contract upon the expiry of a current one, can commit with impunity, a serious act of misconduct that he knows would only be discovered after his contract has expired and a new one has taken effect. Going by the appellant's interpretation, and irrespective of any consequent damage to the employment relationship between the parties (since he would have revealed himself as an unworthy employee), the offending employee would not only be allowed to get away with it, but the employer would also, perforce, have to retain him as an employee under the new contract.

[27] It is an accepted principle of the law that the Legislature is presumed not to intend any absurdity to arise in the interpretation of the laws that it enacts. This point is highlighted thus in *Webster Tongoona Rushesha & Ors vs Alexious Mashigande Dera & Ors*

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CCZ 24/17: -

“It is a sound principle of the law that when interpreting a statutory provision, the court must be alive to the presumption that the legislature does not intend irrational or unreasonable results. **The interpretation of a statute and indeed a constitution is based not only on what the provision says but also on what the provision does not say.** (my emphasis)”

Applied to the circumstances at hand, the court holds that the absence from sections 4 and 6 of SI 15/2006 of words expressly including an employee who might have committed acts of misconduct during the currency of a previous employment contract, does not detract from the intended meaning of the two provisions in question. Accordingly, the absurdity alluded to could not have been in the contemplation of the Legislature.

[28] A contract of employment renewed immediately after an expired one, normally is indicative of the trust and confidence that the employer has in the employee's ability and competence in the performance of his/her work. By no stretch of the imagination should the renewal of a contract be seen as a means to wipe away any acts of misconduct committed by the same employee during the currency of the previous contract or contracts where such acts only come to light after the expiry and renewal of the old and new contracts respectively. Such a position would be untenable, and clearly inimical to the wellbeing of any enterprise, business or other employer/employee concern. To the extent that it would amount to rewarding rather than punishing an errant employee, it runs counter to the letter and spirit of sections 4 and 6 of SI 15/06. These provisions are concerned with bringing to book an employee who has committed an act of misconduct. Pertinently, at the time that he was charged with the acts of misconduct in question, the appellant was in any event, an employee of the first respondent, and not an ex-employee.

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The court therefore finds that the appellant fell squarely into the category of employees referenced in sections 4 and 6 of SI 15/06. This is notwithstanding the fact that the acts of misconduct in question were committed during the currency of the appellant's previous contracts of employment.

[29] As for the continued working relationship between the parties, the court finds the following *excerpt* instructive concerning the relationship between a contract and the employment relationship that it creates between the employer and employee: -

“...the employment contract brings into being the relationship that labour legislation seeks to regulate. **However, the agreement no longer forms the exclusive basis for determining their subsequent rights and obligations;** once parties have concluded an employment contract, the content and duration

of the ensuing relationship are regulated to a considerable extent by statute. **The employment relationship is thus something distinct from and wider than the contractual relationship.** The contract of employment may therefore be regarded as little more than the founding act of a relationship the content and duration of which is regulated by statute, regulation or collective agreement. (*my emphasis*)”

(See John Grogan’s ‘Workplace Law’ 11th Ed at p52)

[30] Relating this to the circumstances of this case, the position is confirmed that the appellant cannot rely solely on his previous contracts of employment to argue that he cannot be charged with any act of misconduct committed during the currency of those contracts. On the basis of the authority cited above, the expired contracts no longer formed the exclusive basis for determining the parties’ subsequent rights and obligations. It follows that the first respondent was within its rights to charge the appellant with all acts of misconduct committed during the employment relationship that stretched from and beyond the expired contracts, into **Judgment No. SC 143 /21** **Civil Appeal No. SC 11/18**

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[31] To the extent that it may be salutary to have a provision to that effect, there seems to be a *lacuna* in our law regarding the issue of whether a party can be dismissed for acts of misconduct committed under a prior employment contract by the same employer. It is apparent that the appellant seeks to escape the consequences of his misconduct on the strength of a grey area in the existing legislation. He should not be allowed to do so, but must be made to face the consequences of his actions.

[32] When all is told, the court finds to be unassailable, the conclusion reached by the court *a quo* that the appellant was engaged in a continuous employment relationship with the first respondent at the time that he was charged with the acts of misconduct

in question. That relationship survived the expiry of his previous contract of employment and seamlessly extended into his new contract. That being the case, the court is satisfied that the appellant was properly charged with the acts of misconduct in question and that procedurally, he was properly convicted.

The appellant's ground of appeal on this issue is without merit and is accordingly dismissed.

Whether or not the court *a quo* erred at law by holding that it was competent for the first respondent to dismiss the appellant before the disciplinary committee had made its determination

[33] The appellant submitted that the first respondent pronounced the penalty of dismissal improperly, having done so before the disciplinary committee had made its determination on that issue. In the appellant's heads of argument and in oral submissions before the court, counsel for the appellant sought to expand the scope of this ground of appeal by impugning the determination and pronouncement of the penalty by the first respondent rather than the disciplinary authority. Counsel for the appellant contended that he was challenging both the timing of the penalty and the medium by which the penalty was determined and pronounced. He submitted that there was no distinction between the two. *Per contra*, the first respondent averred that this latter point was not argued before the court *a quo*. It asserted that the appellant's argument *a quo* was that he was dismissed before the disciplinary committee had pronounced a penalty.

[34] It is the observation of this Court that the appellant's papers *a quo* and, in this Court, explicitly impugned the timing of his dismissal rather than the agency by and through

which it was pronounced. As a consequence, he did not advance any argument to support his contention that the first respondent did not have the authority to pronounce the penalty of dismissal against him. It may not always follow from this that once you attack the identity and authority of the perpetrator, you automatically impugn the time at which he or she instigates the event, and *vice versa*. The one goes to the power or jurisdiction of the perpetrator to do what he or she did, while the other goes to the appropriateness of the time at which the event happened. While there might indeed be a difference between the timing of an event and the identity of the person who orchestrates it, the circumstances of this case are such that both the timing and the perpetration of the impugned action were at the instance of one entity, that is the first respondent's Board.

[35] *A quo*, and in its first ground of appeal before this Court, the appellant was pre-occupied with attacking the timing of the pronouncement of the penalty of dismissal, and was seemingly not concerned about the identity of the medium through which it was pronounced. This led, as the first respondent submits, to the court *a quo* tracing the chronology of events up to and leading to the dismissal of the appellant on 21 July 2015. The court found this happened after the appellant had filed his 'closing submissions'¹ on 8 March 2015. The court did not interrogate the question of whether the first respondent had the requisite authority to determine and pronounce the verdict of dismissal under the circumstances, for the reason that the matter was not raised or argued before it. The first respondent makes the argument that it would be unfair to reverse the decision of the court *a quo* based on a point that had not been canvassed before it.

¹ These were in fact, submissions in mitigation.

[36] The court finds that the appellant does indeed seek to raise an issue not raised or considered by the court *a quo*. The court finds, however that the issue may properly be considered by this Court alongside that of the timing of the pronouncement of the penalty. Firstly, the point in issue is one of law, which may be raised at any time before the court, even on appeal. Secondly, both circumstances arise from exactly the same set of facts, which are already before the court. The matter was thus apparent *ex facie* the pleadings on record. Thirdly, the first respondent has not shown that any inconvenience or unfairness would be suffered by it as a result of the issue being considered on appeal. In this respect, the following principles enunciated by the court in *Zimasco (Pvt) Ltd v Marikano*, 2014 (1) ZLR 1 (S) are apposite: -

“It is settled law that a question of law can be raised at any time, even for the first time on appeal, **as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed.** See *Ahmed v Manufacturing Industries (Pvt) Ltd* S294-96 at p17 and *Muchakata v Netherburn Mine* 1996 (1) ZLR153 (S) at 157A. ~~(my emphasis)~~”

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[37] It is pertinent to note, in any case, that the appellant seeks the same relief, that is the setting aside of his dismissal by the first respondent, on the basis of his submissions on either the stage at which the penalty of dismissal was pronounced or the medium through which this was done. Accordingly, a decision on the appellant’s ground of appeal as formulated, as much as one pertaining to the medium through which the penalty was determined and pronounced, would determine whether or not the appellant is entitled to the relief sought. It becomes, in the end, ‘a difference with no distinction’.

[38] *A quo*, the appellant’s ground of review concerning the timing of the pronouncement of the penalty of dismissal read as follows: -

“The first respondent arrived at a decision on the penalty before the disciplinary proceedings were completed, in contravention of SI 15/2006 as well as s 12B of the Labour Act (*Chapter 28:01*)”

The appellant in his third ground of appeal *in casu* elaborated on this argument by stressing that the first respondent had imposed the penalty of dismissal before its own appointed disciplinary authority had made a determination on the appropriate penalty. The court *a quo*, as already indicated, made the finding that the first respondent had not ‘prematurely concluded’ the disciplinary proceedings when it pronounced the penalty of dismissal. The court stated as follows: -

“The applicant filed his closing submissions (actually, submissions in mitigation) on 8 May 2015. On 19 May 2015 **the submissions were considered by the board. It was then resolved that the contract should be terminated with effect from 30 January 2014.** The decision was communicated on 21 July 2015 through a letter dated 17 July 2015. **It is therefore not correct to say the board prematurely concluded the disciplinary proceedings.** (*my emphasis*)”

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[39] This finding by the court *a quo* echoed the first respondent’s response to the allegation by the applicant in his founding affidavit that the former had arrived at a verdict before the disciplinary authority had done so. The first respondent responded as follows in its opposing affidavit: -

“This is denied. Retired Judge James Devittie handed down his determination on 22 April 2015. The applicant filed his submissions in mitigation on 8 May 2015. **Thereafter on Tuesday 19 May 2015, the ZBC Board of directors sat and considered the nature of the offences with which applicant had been found guilty, and the submissions in mitigation filed by applicant. The ZBC Board of Directors resolved that a penalty of dismissal met the justice of the case.** Applicant’s conduct particularly acts of theft go to the root of the employer-employee relationship. **The penalty of dismissal was handed down subsequent to the completion of the disciplinary hearing and after considering the judgment by Justice Devittie and whether there were any mitigatory circumstances.** (*my emphasis*)”

[40] The above *excerpts* capture a factual *conspectus* which is not disputed by the parties. The *excerpts* also make it abundantly clear that the first respondent, and the court *a quo*, subscribed to the view that the disciplinary proceedings were ‘completed’ upon the pronouncement of the guilty verdict by the disciplinary authority. That being the case, according to that view, the first respondent through its Board was at large to thereafter step in and consider the appellant’s submissions in mitigation and other factors, determine, and pronounce what it considered to be the appropriate penalty.

[41] In addition to the timing of the event, the appellant takes issue with this conflation of the roles played by the first respondent and the hearing authority in a situation where the latter ought to have, itself, completed the proceedings. It is contended that the proceedings could only have properly ended with the disciplinary authority hearing the parties’ submissions in aggravation and mitigation, and thereafter considering and pronouncing the appropriate penalty. Counsel for the appellant contended in this respect that the first respondent ‘usurped’ the responsibility of its own disciplinary authority and ‘completed’ the disciplinary proceedings itself. He asserted further as follows in the appellant’s heads of argument: -

“A proper reading of SI 15/2006 in the light of the lawmaker shows that an employer who has appointed a disciplinary authority must live with its decision. It is unlawful for the employer to split the disciplinary process into two phases, namely conviction and sentence, with the disciplinary authority handling the conviction phase while the employer takes over at the sentencing stage.”

[42] The court finds there is merit in the appellant’s submissions as outlined above. While it is inelegantly formulated, the import of the disciplinary procedure laid out in s 6 of SI 15/2006 is that disciplinary proceedings against an employee facing misconduct charges are conducted by the employer, or a disciplinary authority appointed by it.

The tone of s 6(4)(b) makes it clear that where a disciplinary authority is appointed, it is expected to conduct the hearing as set out therein, including hearing submissions in mitigation, as well as determining and imposing the ‘ultimate’ penalty. The hearing in other words is only completed after the ‘ultimate’ penalty is imposed. The impression created in the end is that the disciplinary authority, once it starts the hearings, enjoys a great measure of autonomy in the conduct of the hearing, until it has completed the process.

- [43] Considerations of fairness and the interests of justice in disciplinary proceedings support this procedural route. It is also a route that is emphasised in various authorities on the subject. In a section of the book ‘*Workplace Law*’ (11th Ed. at p285) by the learned author John Grogan, that addresses the requirements of fair disciplinary hearing, the following is stated: -

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“As in criminal proceedings, **the decision of the presiding officer should be made in two distinct stages.** First, the guilt of the accused employee should be determined on the evidence, without reference to the employee’s disciplinary record **Secondly and after the verdict is decided, a penalty must be determined** which is appropriate to the offence and the particular employee... (*my emphasis*)”

- [44] The above caption underlines three procedural issues. Firstly, the decision, must be that of the presiding officer. Secondly the decision consists of two parts, the verdict and the penalty. Thirdly, and to that extent, a ‘decision’ that ends with just the verdict would not be complete. What should and generally happens after a guilty verdict is pronounced, is aptly articulated as follows in what is termed ‘corporate disciplinary hearing templates for misconduct’, by the learned author *Michael Opperman* in his book ‘*A Practical Guide to Disciplinary Hearings*’ at p6: -

‘Stage 5 – Mitigation, aggravation and sanction

1. If the employee is found guilty, the employer may formulate arguments in aggravation and the employee may advance arguments in mitigation of the offence, for purposes of the sanction to be imposed;
2. This process will **be in the form of a mini hearing** and is removed from the facts of the main hearing;
3. **The (disciplinary) panel will then adjourn once more and consider a sanction befitting the verdict and the arguments in aggravation and mitigation.’** (*my emphasis*)

[45] It would follow from what is set out above that, after it pronounces a verdict of guilty, only the disciplinary authority is mandated to move on to the part of the proceedings that relates to mitigation, aggravation and sanction. Accordingly, the assumption of this mandate by someone who, as happened *in casu*, did not preside over the proceedings nor participate as a member of the disciplinary panel, would be highly irregular. That the person happened to have been the employer of the appellant and therefore, an interested party in the proceedings, could only have served to compound the irregularity. The first respondent, as the employer, chose to appoint the disciplinary authority that presided over the proceedings. All that it had to do, after that, was to let the disciplinary authority conclude its work by imposing the penalty that it would have adjudged appropriate under the circumstances. Only thereafter could the first respondent have properly taken the matter on and proceeded to determine the appellant’s fate.

[46] The evidence on record shows that the appellant expected the convening, by the hearing officer, of the ‘mini-hearing’ on ‘Mitigation, Aggravation and Sanction’, that is listed by the authority cited above, as the final stage in disciplinary proceedings. The chairperson of the disciplinary hearing, on or about 25 June 2015 received a letter to this effect from the appellant’s legal practitioners, *Messrs Mawire JT & Associates:*

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Re: ZBC (Pvt) Ltd vs Happison Muchechetere: Mitigation Hearing

We refer to the above matter in which you availed your determination on the verdict on 22 April 2015. We filed our written mitigatory submissions on 7 May 2015. We now enquire as to when you intend to invite the parties for a mitigation hearing. Our client is now anxious to have the matter completed. (*my emphasis*)

[47] While there is no record of any response to the letter, by the chairperson of the disciplinary authority, the letter terminating the appellant's employment removes any doubt as to what then ensued. As already indicated, the letter advised the appellant that following the verdict of guilty pronounced by the disciplinary authority, the full Board of the first respondent on 19 May 2015 sat to consider the submissions made on his behalf in mitigation and resolved that termination of his contract of employment would 'meet the justice of the case.' The first respondent, through its Board, as argued for the appellant, clearly jumped the gun, as it were, and assumed a responsibility that was properly meant to be discharged by the hearing authority.

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[48] In that way, the first respondent interfered with on-going proceedings and irregularly brought them to an end. This clearly cast into serious doubt the fairness of the proceedings post the pronouncement of the guilty verdict by the disciplinary authority. It does not escape notice that the Board, having taken over a quasi-judicial role that it should not have done after the parties had filed submissions in aggravation and mitigation, is said to have related only to the appellant's submissions in mitigation and not the respondents' own submissions in aggravation. This circumstance ran counter to the accepted procedure where an independent tribunal weighs and balances the mitigating and aggravating features of the offence in question against each other, before reaching and pronouncing an appropriate penalty. The

appellant had the right to have his submissions in mitigation considered and assessed by the same authority that had presided over the disciplinary proceedings, before pronouncement by it, of the penalty. By the same token, the first respondent should have allowed its own submissions in aggravation, to be heard and assessed by the same hearing authority.

[49] Although not argued, the point must also be made that s 69 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, guarantees the right of a litigant to a fair hearing before an independent and impartial court or tribunal. The first respondent was a party to the proceedings and had an interest in seeing the appellant dismissed from his employment. Having taken over a crucial part of the disciplinary process from the independent hearing authority, the court finds that the first respondent, through its Board, crucially undermined the fairness of the sentencing part of the disciplinary proceedings. This could only have been to the detriment of the appellant. Conduct that conjures the much-condemned circumstance where someone is seen to act as both a prosecutor and judge in the same cause, flies in the face of the time-honoured adage, ‘justice must not only be done, but must be seen to be done’.

[50] The court therefore finds that in all respects, the conduct of the Board as outlined, constituted gross irregularity whose effect was to render the part of the disciplinary proceedings that pertained to ‘mitigation, aggravation and sanction’, a nullity. The conduct was without any legal basis, and therefore surpassed the bounds of what would ordinarily be regarded as a procedural *faux pax* meriting disregard or condonation by a tribunal or court in the determination of labour matters. The court *a quo* accordingly erred in its finding that the following *excerpt* was applicable: -

“...a person guilty of misconduct should not escape the consequences of his misdeeds because of a failure to conduct proceedings properly by another employee. He should escape such consequences because he is innocent. (*Air Zimbabwe v Chiku Mensa & Anor* SC 89/10)”

The disciplinary authority *in casu* was prevented from conducting ‘the proceedings properly’ by the employer who, acting on some undefined basis, stepped in midstream of the disciplinary proceedings, and purported to complete the process itself.

Accordingly, the ‘sentencing’ stage of the proceedings cannot stand and must be vacated. It is important that the disciplinary authority be allowed to properly complete its mandate.

DISPOSITION

[51] What was before the court *a quo* were review proceedings. Of the appellant’s two valid grounds of appeal, the first lacks merit and will be dismissed. The second ground of appeal, being meritorious, will be upheld. The court *a quo*, acting on the basis of a wrong procedural principle, erred in its finding that the disciplinary proceedings properly ended with the pronouncement of the guilty verdict against the appellant.

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In the result, it is ordered as follows: -

1. The appeal succeeds in part, with each party bearing its own costs.
2. The judgment of the court *a quo* is set aside and substituted with the following: -
 - ‘(a) The applicant’s first, second and third grounds for review are dismissed;
 - (b) The appellant’s fourth ground for review is upheld.
 - (c) The matter is remitted to the disciplinary authority for it to consider the parties’ submissions in mitigation and aggravation, and thereafter, to pronounce the appropriate penalty against the applicant.
 - (d) Each party shall bear its own costs’

UCHENA JA: I agree

MAKONI JA: I agree

Lovemore Madhuku Lawyers, appellant's legal practitioners.

Scanlen & Holderness, 1st respondent's legal practitioners.