

**ZIMBABWE UNITED PASSENGER COMPANY
V
BEAULAR MASHINGE**

**SUPREME COURT OF ZIMBABWE
MAKARAU JA, GOWORA JA & BERE JA
HARARE: SEPTEMBER 25, 2018 & MARCH 26 2021**

P. Ngwenya, for appellant

Respondent in person

MAKARAU JA

**Judgment No. SC 21/2021
Civil Appeal No. SC 625/17**

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1. On 24 February 2017, the Labour Court granted, with no order as to costs, an application for review brought by the respondent against the appellant. It thereby set aside the decision of the appellant to dismiss the respondent whom it reinstated with no loss of salary and benefits with effect from the date of the dismissal. In the alternative and if reinstatement was untenable, it ordered that the appellant pays damages to the respondent.
2. This is an appeal, with leave, against that order.

BACKGROUND

3. The respondent was employed by the appellant as a bus conductor. Suspecting that she had committed an act of theft or fraud, the appellant brought the respondent before a

disciplinary committee. The disciplinary committee failed to reach a decision in the matter. Instead of referring the matter to the Chief Executive as is provided for in the governing code of conduct, the deadlocked disciplinary committee referred the matter to the Division Operations Manager who, clearly oblivious of his incompetence in the matter, found the respondent guilty and dismissed her from employment.

4. On the sole basis that the referral of the matter to the Division Operations Manager was a nullity, the respondent approached the court *a quo* on review seeking to have the decision dismissing her set aside. At the hearing of the matter *a quo*, the court held the appellant barred for want of filing heads of argument on time. It however proceeded to determine the matter on the merits. It granted the application. After setting aside the appellant's decision to dismiss the respondent, it made the additional order of reinstatement detailed above. Aggrieved by the order of reinstatement, the appellant noted this appeal.

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THE APPEAL

5. In the appeal, the appellant raised one ground of appeal as follows:

“The learned judge in the court *a quo* erred at law in ordering reinstatement of the respondent or alternatively payment of damages *in lieu* of reinstatement, in an application for review where only a procedural irregularity was determined.”

6. Quite clearly and correctly so, the appellant did not challenge the correctness of the court *a quo*'s order to set aside the decision of the Division Operations Manager to dismiss the appellant as a nullity and therefore as unlawful. This therefore considerably narrows down the issues that fell to be resolved in this appeal.

THE ISSUE

7. The sole issue that arose in this appeal is whether, after setting aside the dismissal of the respondent as unlawful, it was competent for the court *a quo* to order the reinstatement of the respondent with no loss of salary and benefits with effect from the date of the dismissal, or in lieu thereof, the payment of damages.
8. Whilst the appellant argued both in its heads of argument and orally before the court that the only relief the court *a quo* could grant in the matter was a remittal of the matter to the appellant, the issue of the appropriate remedy *a quo* does not arise in this appeal. This is so because the issue was not raised in the sole ground of appeal that I have reproduced above. Whilst it may be regarded as a point of law that can be raised at any time, no procedural foundation was laid for the raising of the point.
9. In any event and more importantly in my view, the power to remit a matter to a lower court or tribunal is a common law power inherent in the High Court and in the court *a quo* by virtue of s 89 of the Labour Act [*Chapter 28.01*], used in its discretion and in circumstances where it is not possible or desirable for the court to substitute its own discretion in the matter. There has been no proper attack on the exercise of the court's discretion in this regard. I will therefore disregard this issue as it has not been properly raised.

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THE LAW

10. It is common cause that the matter was placed before the court *a quo* by way of an application for review. It is further common cause that reviews before the Labour Court are governed by s 89 of the Labour Court [*Chapter 28.01*], which provides that the

Labour Court shall exercise the same powers of review in relation to labour matters as would be exercisable by the High Court.

11. The powers of the High Court on review are based on the common law and on the provisions of the High Court Act [*Chapter 7.06*].

12. Section 28 of the High Court Act provides that on a review of any proceeding or decision in civil matters, the High Court shall have the power, subject to any other law, to set aside or correct the decision or proceedings reviewed. By virtue of s 89 of the Labour Court, the Labour Court similarly has power to set aside or correct the decision or proceedings reviewed.

13. As discussed above, the only issue that arose in this appeal is whether the court *a quo* could competently order the reinstatement of the respondent when it did not consider the merits of the charges preferred against the respondent in the disciplinary proceedings under review. The appellant argued that the court had no such competence. It correctly based its argument on the position of law that upon the setting aside of a fatally irregular decision in disciplinary proceedings without a consideration of the merits of the matter, the *status quo ante* of the parties is restored. It mainly relied on the cases of *Standard Chartered Bank of Zimbabwe Ltd v Chikomwe and 211 Others* SC 77/2000, and *Air Zimbabwe (Private) Limited v Chiku Mnensa and Another* SC 89/04, both decisions of this Court.

14. It appears to me that the appellant understood the legal position enunciated in the above authorities to only mean that the setting aside of fatally irregular proceedings on review automatically restores the proceedings to the last valid proceeding. In other words, it

understood the legal position to be purely procedural, affecting only the procedural rights of the parties and not their substantive rights.

15. The appellant was partially correct. Its understanding however represents the narrow procedural position. It is not uncommon for procedural irregularities to also affect the substantive rights of the parties to the dispute. It is not uncommon for procedural irregularities to produce nullities that then restore in full the rights of the parties *ante*.

16. The broader and more readily acceptable position in my view is that the *status quo ante* of the parties that is restored upon the setting aside of the irregular employment disciplinary proceedings also relates substantively to the contractual status of the parties. Put simply, it must be understood to mean broadly that upon the setting aside of fatally defective disciplinary proceedings, the employment contract is restored, without necessarily or by implication negating the remedies and procedures available to each of the parties to terminate the contract in terms of the agreed terms.

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17. It thus presents itself clearly to me that the restoration of the contract in such a situation has no effect on the merits of the charge or charges against the employee and the right of the employer to proceed against the employee in terms of the governing code of conduct.

18. The position that I come up with above was obliquely endorsed by McNally JA in *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR 220 (S) where, at page 223 H he accepted as correct the submission by counsel for the respondent to the effect that:

“...as soon as there is a finding that the disciplinary findings were a nullity, **it must follow that the employee is reinstated.** After all, the basis for his dismissal has been set aside. So he has not been properly dismissed.” (The emphasis is mine).

19. The conclusion that I reach above is similar to the conclusion reached by this Court in the case of *Minerals Marketing Corporation v Mazimavi* 1995 (2) ZLR 353 (S) where the court upheld the decision of the tribunal *a quo* to reinstate the employee after finding that a gross irregularity had occurred during the disciplinary proceedings.

20. The clear position of the law appears to me to be that upon the setting aside of employment disciplinary proceedings as a nullity, both the procedural and the substantive rights of the parties are restored to the position immediately before the nullified process. In other words, where a dismissal is set aside as being a nullity, the employee is reinstated as such notwithstanding the further disciplinary proceedings that the court may order by way of remittal or otherwise.

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21. I thus reject as stating the correct position at law the argument by the appellant that the court *a quo* could only confine itself to confirming or nullifying the disciplinary proceedings of the appellant without granting substantive relief in the matter.

ANALYSIS

22. Applying the law to the facts of this matter, it cannot be disputed that by setting aside the dismissal of the respondent by the Division Operations Manager, the court *a quo* effectively restored the status of the respondent as an employee of the appellant, *albeit* one who had charges pending against her and had appeared before a disciplinary committee.

23. The record is not clear whether, prior to her being brought before the disciplinary committee, the respondent was on suspension with or without salary. This is a material consideration. In the absence of evidence that the respondent was on suspension pending the determination of the charges against her, the appeal has no merit.

24. I note in passing that the issue that the employees in the *Air Zimbabwe v Mensa* case were on suspension was the turning point in that case. The court reasoned that before the suspension was lawfully lifted, the employees could not be reinstated. In that case the employees concerned were on suspension without salary. This is the status they reverted to after the setting aside of the disciplinary proceedings. This reasoning does not and cannot apply in *casu*. It was not argued *a quo* that the respondent was on suspension without salary before she was unlawfully dismissed. It was similarly not so argued before us.

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25. In the circumstances of this matter, the setting aside of the unlawful dismissal of the respondent restored her status as an employee of the appellant. To this extent and in the absence of evidence that she had been lawfully suspended without salary before she was dismissed, the order *a quo* cannot be faulted.

26. In the result, I find no merit in the appeal which I must dismiss.

27. In view of the fact that there is no justification for departing from the general position that costs follow the cause, I must dismiss the appeal with an accompanying order of costs.

28. Accordingly, I make the following order:

The appeal is dismissed with costs.

GOWORA JA : I agree

BERE JA : (NO LONGER IN OFFICE)

Chinawa Law Chambers, appellant's legal practitioners

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