REPORTABLE **(40)**

JOHANNES MANYENGA
v
PETROZIM (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & CHITAKUNYE JA
HARARE: 14 OCTOBER 2022 & 18 MAY 2023

L. Uriri, for the appellant

P. Dube, for the respondent

MAKONI JA:

1. This is an appeal against the entire judgment of the Labour Court ("the court *a quo*"), sitting at Harare, wherein it dismissed the appellant's appeal and upheld the decision of the respondent's disciplinary authority dismissing the appellant from employment.

FACTUAL BACKGROUND

2. The appellant was employed by the respondent as a Deputy General Manager on 1 November 2014. During the course of his employment, he was appointed as Acting General Manager during the following periods:
   - 6 to 22 January 2016 (16 days);
   - 21 to 25 August 2017(4 days);
   - 10 to 11 July 2018(1 day);

- 15 to 16 August 2018 (1 day) and;
- 11 to 21 January 2019(10 days).

3. The appellant was later charged with two counts of contravening s 4(a) of the Labour (National Employment Code of Conduct) Regulations, 2006 ("the regulations"), that is, committing any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract.

4. On the first count, the appellant was charged with failing and/or neglecting to advise the Board of Directors of the respondent (the Board) of the various problems and challenges that the company was facing in implementing its projects during the periods that he was employed as the Deputy General Manager and in particular during the above-mentioned periods when he was the Acting General Manager.

5. On the second count, it was alleged that during the appellant's employment as Deputy General Manager from 1 November 2014 to 22 March 2019 (when he was placed on mandatory leave) he attended PetroZim Board meetings and failed and/or neglected to advise the Board of the various problems and challenges that the company was facing in implementing its projects, in particular, the items numbered A to A(v) below:

> "A. The following are the incidences you failed and/or neglected to report to the Board when you were Acting General Manager and during Board meetings as Deputy General Manager:
>
> A (i) You failed and/or neglected to advise the Board that the Company had purchased two DRA skids from Kaltrade amounting to US$610 000.00. The purchase order was for new DRA skids. Kaltrade failed to deliver the skids. On their failure to deliver, Kaltrade then offered to sell to the Company the two used demo DRA skids. The Company accepted the old demo skids (which were bought

as test kits against a deposit of US$35 000), as a replacement for the new skids that Kaltrade had failed to supply. Despite the skids being previously used, the Company accepted them at the price of US$610 000.00 that had been quoted for the supply of new skids by Kaltrade.

A (ii) You further failed and/or neglected to advise the Board that the Company had irregularly accepted a purported 5-year warranty on the demo skids from Kaltrade for the period 2013 to 2019. Despite the demo skids being purported to be on a 5-year warranty the Company subsequently approved the purchase of DRA skid spares at a cost of US$ 91 082.30.

A (iii)You also did not advise the Board that despite various outstanding orders from Kaltrade, including 2 outstanding DRA skids which had been paid for in 2013, as late as September 2018, the Company went ahead and authorised the payment of US$ 267 760.00 to Kaltrade for the supply of another DRA skid. To date this has still not been delivered.

A (iv) You did not report to the Board that the ethanol project that had been purported to be commissioned as 100% functional was actually operating at 50% capacity due to the fact that only 3 out of 6 pumps had been installed and you failed and neglected to ensure delivery of the remaining 3 pumps from Kaltrade (Private) Limited despite having paid in advance, the full purchase price
.
A (v) You failed to advise the Board that the tank gauging system at Feruka was not working since its failure in 2017. Further you did not advise the Board that the Company was relying on tank readings from the customer, NOIC which compromised the Company's efficiency and systems."

6. A disciplinary hearing was subsequently held. It was the respondent's case that the material non-disclosures by the appellant, during the course of his employment, created the impression that everything was in order when in fact, there were serious operational challenges that threatened the company's capacity to deliver on its mandate. The respondent averred that the appellant had failed to perform his duties in line with the dictates of his job description which was stipulated in the contract of employment. The contract required the appellant to report on overall company performance and provide input for Board meetings.

7. The appellant denied the charges. He argued that he was never appointed as the Acting General Manager of the respondent and that the affairs of the company were regulated by a joint venture agreement between Lonrho and NOIC, which agreement reserved the right of appointment of a General Manager to Lonrho. The appellant also claimed that in terms of the company organogram, no subordinates reported to him in his capacity as the Deputy General Manager. He further stated that all employees reported to the General Manager. In addition, the appellant submitted that he had previously informed the Board that none of the other employees, including the chief engineer and the accountant, were reporting to him and further that he was being left out of project meetings and appraisals. The Board did not resolve this anomaly but instead, passed a resolution that only the General Manager was to communicate with the Board on all issues.

8. The Disciplinary Authority found that the evidence before it established that the appellant, as the Deputy General Manager, had been periodically appointed as the Acting General Manager of the respondent, in terms of the joint venture agreement. It also found that the appellant, by virtue of being the next senior person available as the Deputy General Manager, would automatically be the acting general manager in the absence of the substantive General Manager when she either travelled or was on leave. It further found that this evidence was conceded to by the appellant during cross-examination. Furthermore, the appellant’s contract of employment and job description showed that he was required to know and be responsible for the day-to-day monitoring of company operations and projects.

9. Regarding the question of whether the appellant had an obligation to report to the Board or the Board chairperson, it found that there were no Board meetings held during the time that the appellant was Acting General Manager. There was thus no way that the appellant could have reported challenges being faced by the company to the Board. Nevertheless, it found that despite there being no meetings, the appellant was still expected to update the Board chairman on operational issues. However, the Disciplinary Authority observed that the substantive General Manager, one Mrs Katsande, who the appellant would stand in for as the Acting General Manager, deliberately withheld information from the appellant such that this had an effect on his capacity to perform his duties as Acting General Manager. It was also found that despite being excluded, the appellant was still aware of the challenges concerning the prover loop and metering project.

10. In light of the above, the Disciplinary Authority concluded that the appellant was aware of his responsibilities as stipulated in his contract of employment and the joint venture agreement. It further held that the appellant had an obligation to report to the Board through the chairperson, to inform it of the prover loop metering project problems and the other problems that he admitted to being aware of because as the Acting General Manager, he was the "gateway to the Board". The Disciplinary Authority ruled that the appellant was guilty on both counts of contravening of s 4 (a) of the regulations. Consequently, the appellant was dismissed from his post as Deputy General Manager of the respondent on 14 August 2020.

11. Aggrieved by the decision of the Disciplinary Authority, the appellant filed an appeal in the court *a quo*.

SUBMISSIONS BEFORE THE COURT *A QUO*

12. At the hearing of the appeal, the court *a quo*, struck out grounds of appeal one and two because they were improper. The appeal was, therefore, heard on the basis of the remaining three grounds of appeal.

13. The appellant submitted that the Disciplinary Authority erred at law by making wrong factual considerations and failing to consider factual evidence presented at the hearing which absolved the appellant from the allegations of misconduct. It further erred at law by failing to consider, as it should have done, that the admission by the respondent that only the General Manager was permitted to report to the Board resolved the matter before it in favour of the appellant. Having noted the admission by the respondent that there were no Board meetings convened during the period in which the appellant was accused of misconduct, the Disciplinary Authority erred in proceeding to find that the appellant was guilty of the misconduct alleged in that he should have reported to the Board Chair. Finally, he argued that the Disciplinary Authority erred in failing to consider, as it should have done, that the respondent had failed to prove on a balance of probabilities that the appellant was guilty of the alleged misconduct.

14. *Per contra*, the respondent argued that the appellant had a duty to report to the Board, which duty he was well aware of and did not perform. It contended that the appellant had numerous occasions to report to the Board on the challenges faced by the company even

when it was not sitting as he communicated with the Board Chairman on various occasions. The respondent was of the view that the appellant was the Acting General Manager at the material times in issue and had a duty to protect his employer's property and interests, hence, he could not escape liability for failure to act.

FINDINGS OF THE COURT *A QUO*

15. The court *a quo* opined that the appellant was an expert who had an obligation to perform his job for the benefit of the respondent. In view of this, the court *a quo* held that the appellant had a duty to report any anomalies concerning the functioning of the company, especially during the periods he was the Acting General Manager.

16. In relation to the grounds of appeal, the court *a quo* held that they had no merit. It reasoned that in the absence of the General Manager, the appellant was the Acting General Manager who had a duty to report to the Board. It was also the court's view that even when the Board did not convene, the appellant still had access to the Board Chairman whom he should have advised of any challenges bedevilling the company.

17. The court *a quo* thus concluded that there was no need for it, as an appellate court, to interfere with the findings and the exercise of discretion by the Disciplinary Authority as there was no misdirection on its part taking into account the evidence that was before it. In the result, the court *a quo* dismissed the appeal and upheld the decision of the disciplinary authority.

18. Irked by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

"1. The court *a quo* erred in law in not finding that the principle *lex non cogit ad impossibilia* applied to the appellant's circumstances, that is to say, that objective impossibility of discharging a legal duty is always a defence when the type of the conduct charged is an omission.

2. A *fortiori* the court *a quo* erred and grossly misdirected itself on the facts and the evidence, such misdirection amounting to a misdirection in law, in not finding as it ought to have done that it was objectively impossible for the appellant to perform the obligation in respect of which the omission charged was alleged because on the common cause facts and evidence:

    (i) there was no Board meeting that took place or a properly convened and constituted Board meeting that sat at all to deal with the affairs of the respondent during the period the omission is alleged to have taken place; and

    (ii) there was an extant instruction from the board of directors directing that all communication to the Board in relation to the affairs of the respondent was to be through the General Manager only of which the appellant was not; and

    (iii) there was no way appellant could have known of the operation challenges faced by the respondent in circumstances where it was clear that as a senior managerial employee who was not always on the ground, none of the subordinates with which(sic)? such information reported to him as they all reported directly to the substantive General Manager; and

    (iv) in terms of his contract of employment the appellant had no subordinate who reported to him.

3. The court *a quo* erred and grossly misdirected itself in law in finding that reporting to or advising the Board Chair in respect of issues meant for the whole board of directors at a properly convened and constituted meeting was enough to comply with the requirement to inform the board and that appellant's failure and or neglect to report the Board Chairman, as opposed to the Board, was fatal as to go to the root of his employment contract.

4. The court *a quo* having found that appellant's interpretation of the emails he received from the general manager is correct, erred and grossly misdirected itself in any event in finding that he was appointed the Acting General Manager with duties and responsibilities of advising the Board of Directors on the operational challenges of the company.

5. The court *a quo* erred in law in considering that it was being asked to interfere with the exercise of a discretion (*sic*) in circumstances wherein the appellant impugned findings of fact.
6. The court *a quo* erred and misdirected itself, in any event, in not finding that there existed the jurisdictional facts upon which the court *a quo* could interfere with the factual findings of the disciplinary authority and in not interfering with the same."

19. The appellant prays that the appeal be allowed with costs and that the decision of the court a quo be set aside and substituted with one allowing the appeal and setting aside the decision of the Disciplinary Authority.

SUBMISSIONS BEFORE THIS COURT

20. At the hearing of the appeal, and following an exchange with the court, Mr *Uriri*, counsel for the appellant, conceded that the second ground of appeal was argumentative and not concise. He consequently abandoned it.

21. On the merits, Mr *Uriri* submitted that this case shows that the court *a quo* grossly misdirected itself on the facts and that such misdirection amounts to an error of law. He contended that it was objectively impossible for the appellant to perform the obligations in respect of which the charge was based because of the following common cause facts and evidence:

- there was no Board meeting that took place or a properly convened and constituted Board meeting that sat at all to deal with the affairs of the respondent during the period in which the omission is alleged to have taken place;

- there was an extant instruction from the Board of Directors directing that all communication to the Board in relation to the affairs of the respondent had to pass through the general manager only; and,

- there was no way the appellant could have known of the operational challenges faced by the respondent in the circumstances because he was a senior managerial employee who was not always on the ground. Furthermore, none of the subordinates who would have had such knowledge or information reported to him as they all reported directly to the substantive General Manager.

22. On the contrary, Mr *Dube*, for the respondent, submitted that the appellant failed and/or neglected to advise the Board of the various problems and challenges that the company was facing in implementing its projects during the periods that he was employed as the Deputy General Manager and when he acted as the General Manager and attended respondent's Board meetings. He further submitted that the aforementioned material non-disclosures created the impression that everything was in order when in fact there were serious operational challenges that threatened the company's ability to deliver its mandate. He concluded his submissions by arguing that the appellant failed to perform his duties during the tenure of his contract of employment as encompassed by his job description which provided that he should report on the company's overall performance and provide input for Board meetings.

ANALYSIS

23. Although the appeal raises several grounds of appeal, my considered view is that there is only one issue for determination, that is, whether or not there was sufficient evidence to justify the appellant's conviction and dismissal from employment.

24. The complaint in appellant's first ground of appeal is that the court *a quo* erred in law in not finding that the principle *lex non cogit ad impossibilia* applied to the appellant's circumstances. The nub of the charges that the appellant was facing was his omission to advise the Board on the operational challenges that the company was facing. The principle is that objective impossibility in discharging a legal duty is always a defence when the type of conduct charged is an omission.

25. The appellant's main contention is that the court *a quo* erred by finding him guilty of committing any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract, in circumstances where it was objectively impossible for him to perform the acts complained of as forming the charge against him.

26. The law regarding the defence of objective impossibility was espoused in the case of *Watergate (Pvt) Ltd* v *Commercial Bank of Zimbabwe* 2006 (1) ZLR 9 (S) at 14C-E, wherein this Court held that:

> "…the general rule is that the impossibility of performance is an excuse for the non-performance of an obligation: *impossibilium nulla obligatio est*. However, whether or not the general rule applies in a particular case would depend upon the circumstances of the case and the nature of the impossibility. In this regard, I can do no better than quote what BOSHOFF JP said in *Bischofberger* v *van Eyck* 1981 (2) SA 607 (W). At 611BD, the learned JUDGE PRESIDENT said:

> '… when the court has to decide on the effect of impossibility of performance on a contract, the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection, regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished.'" (underlining for emphasis)

27. In order for the defence of impossibility to succeed, the impossibility must be objective in the sense that it must be a real impossibility which is not based on a party's disinterest or unwillingness to perform their contractual duties. This is the position which has been accepted by this Court in the case of *Firstel Cellular (Pvt) Ltd* v *Netone Cellular (Pvt) Ltd* SC 1/15 at p 10, where PATEL JA (as he then was) held that:

> "It is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arms' length ……. In particular, it must be shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative."

28. Furthermore, the impossibility to perform must not only temporarily prevent a party from performing their contractual obligations. It must be one where performance of the contract is finally and completely impossible. See the case of *Mutangadura* v *TS Timber Building Supplies* 2009 (2) ZLR 424 (H) at 429C-F.

29. Having outlined the principles to consider in applying the defence of objective impossibility, I now turn to determine whether the circumstances in which the appellant

found himself, entitled him to be excused for his failure or omission to appraise the respondent's Board of the operational challenges that the company was facing.

30. Mr *Uriri* for the appellant contends that it was impossible for the appellant to perform his duties as the Acting General Manager in the following respects. The appellant could not inform the Board of the operational problems plaguing the company due to the fact that the Board did not convene during the material times that he was acting as the General Manager.

31. That there was no Board that was convened at the relevant times is a fact that is admitted by the respondent. Such an admission cements the appellant's case that it was impossible for him to advise the Board of the problems faced by the company for the simple reason that the Board did not convene.

32. The effect of an admission has been held to be the following in the case of *Potato Seed Production (Proprietary) Ltd* v *Princewood Enterprises (Pvt) Ltd & Ors* HH 45-17 at p 4;

> "Indeed the effect of an admission is settled law. Once made it binds its maker with the attendant consequences see *Kettex Holdingis P/L* v *S Kencor Management Services P/L* HH 236-15."

33. The consequences of making an admission which is not withdrawn is that it will not be necessary to prove the admitted fact(s): *Adler* v *Elliot* 1988 (2) ZLR 283 (S) at 288C. In addition, this Court, in the case of *Mashoko* v *Mashoko & Ors* SC 114-22, held that:

> "The law on admissions in pleadings and indeed in evidence, is also settled. A party to civil proceedings may not, without the leave of the court, withdraw an admission made, nor may it lead evidence to contradict any admission the party

> would have made. By equal measure, a party is not permitted to attempt to disprove admissions made.

34. The above position is also provided for in s 36 of the Civil Evidence Act [*Chapter 8:01*] in the following manner:

> "**36. Admissions**
>
> 1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.
>
> (2) …
>
> (3) It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings."

35. This point was conceded by Mr *Dube* upon being engaged by the court. He further conceded that no evidence was led by the respondent tying down the appellant to the acts of omission, as particularized in the charge sheet, to the specific dates mentioned in count one when the appellant was the Acting General Manager.

36. I agree with the appellant that as Mr Chiganze, the respondent's Board Chairman, admitted under cross-examination at the disciplinary hearing, that there was no properly convened Board at the material times, there was no onus on the appellant to prove that indeed the Board did not sit which resulted in him failing to advise it of the problems faced by the company. In view of the above the court *a quo* should have upheld the appellant's defense of objective impossibility in respect of count one.

37. Regarding the second count, Mr *Uriri* submitted that it was also a misdirection for the court *a quo* to find that the appellant, as the Deputy General Manager, omitted to advise the Board of the operational challenges when the common cause facts and evidence show that there was an extant instruction from the Board of Directors directing that all communication to the Board in relation to the affairs of the respondent was to be done by the General Manager only. The appellant was not the General Manager.

38. To add on to the above submissions, the appellant's predicament was further compounded by the fact that he had no subordinates reporting to him on the company's operations. The respondent's organogram was amended by removing all subordinates that were under him. The amendment was countersigned by the General Manager. The position was corroborated by the evidence led by the respondent. Two of its witnesses confirmed that they would report operational challenges to the Chief Engineer and not to the appellant. The Chief Engineer had been removed as a subordinate of the appellant.

39. It was also common cause that with this type of organizational set-up, the appellant could not have known of any operational challenges being faced by the company, which he would have had to appraise the Board of unless he personally visited the sites.

40. The next ground of appeal attacks the court *a quo's* finding that reporting to or advising the Board Chairman in respect of issues meant for the whole Board of Directors at a properly convened meeting was enough to comply with the requirement to inform the Board and that appellant's failure and or neglect to report or advise the Board Chairman, as opposed to the Board, was fatal as to go to the root of his employment contract.

41. In so finding, the court *a quo* misdirected itself. There is a clear distinction between the Board of Directors and the chairperson of the Board. According to Black's Law Dictionary 2nd ed a Board is defined to mean "*a committee of persons organised under authority of law in order to exercise certain authorities, have oversight or control of certain matters, or discharge functions…….*" Reporting to the chairperson of the Board would not have sufficed as performance of the appellant's duties as the Acting General Manager or as Deputy General Manager for the simple reason that the chairman does not constitute the Board on his own. This court has time and again pronounced that what constitutes a Board of Directors is a properly convened and constituted Board of Directors as prescribed in terms of the company's articles of association or other governing documents- *Crown and Anor v Energy Resources Africa Consortium (Private) Limited & Anor* SC 3/2017.

42. This proposition was alluded to by GARWE JA (as he then was) in the case of *Dube* v *Premier Service Medical Aid Society & Anor* SC 73/19 at pp 14-15 para 39:

> "Whilst the deponent may be the chairperson of the Board of Directors of the first respondent, that position does not, on its own, clothe him with the necessary authority to represent the first respondent's Board of Directors."

43. The fact that no Board was convened is one that was admitted by the respondent. The admission that there was no Board that was convened sufficient proof that it was impossible for appellant to advise the Board of the operational challenges that the company was facing. The court *a quo* clearly misdirected itself in its finding that the

appellant should have reported to the Board Chairman as he is the face of the Board. Such a finding has no foundation at law.

44. Mr *Uriri* further contended that a further complaint by the appellant is that the court *a quo* erred in law in considering that it was being asked to interfere with the exercise of a discretion in circumstances wherein the appellant impugned findings of fact. It is submitted that the record is clear that appellant's grief *a quo* related to the disciplinary authority's findings of fact. The appellant clearly pointed out how impossible it was, on a careful application of the law to the facts, for the Disciplinary Authority to find him guilty of the charges he faced. The fact that the court *a quo* went on to frame appellant's grounds of appeal as impugning the exercise of discretion by the Disciplinary Authority, was a question that the court *a quo* invented for itself and answered.

45. In *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S) at p 62E-F GWAUNZA JA said:

> "The appellant argues, in the light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite. I am, for the reasons outlined below, persuaded by this argument
> …
> The misdirection on the part of the court *a quo is* left in no doubt. It is my view, so serious as to leave this Court with no option but to interfere with the determination of the lower court."

46. I associate myself with the above sentiments. The court a *quo* created its own ground of appeal and answered it, which was a misdirection on its part.

47. The next ground of complaint is that the court *a quo* erred and misdirected itself, in any event, in not finding that there existed jurisdictional facts upon which the court *a quo* could interfere with the factual findings of the disciplinary authority and in not interfering with the same.

48. Mr *Uriri* submitted that the law is that the appellate court can interfere with the factual findings of a lower court if such findings are irrational. The principle is that the decision impugned must on the facts be so grossly irrational and outrageous in its defiance of logic that no reasonable person having applied his mind to the question at issue could have arrived at that decision. For the proposition he relied on the authority of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D.

49. He further submitted that failure to properly apply one's mind to the facts in issue amount s to failure to take proper and relevant consideration of the questions at issue. This Court can interfere with a decision arising out of irrelevant considerations or upon a mistaken view of the facts.

50. In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (SC) at 62F-63A the court said:

> "The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion - may only be interfered with on limited grounds. *See Farmers' Co-operative Society (Reg.) v Berry 1912 AD 343 at 350.* These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant

consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

51. Based on the above authorities, I find that it was an error and mistaken view of facts for the court to find that the appellant was guilty of the charges merely because he failed to advise the Board Chairman when the charge sheet speaks of the Board of Directors. In any event, the appellant's contract of employment and his job description mandated him to report to the General Manager and not to the Board. It is a fact that there was a resolution by the Board that all communication to the Board be made only by the General Manager. The appellant was not a General Manager of the respondent. He was just a Deputy General Manager who fell within the genus of those specifically prohibited from communicating with the Board of the respondent on all issues to do with the operations of the company. This was a common cause fact which the court *a quo* was expected to accept as proven without further ado.

52. It was also common cause that there were no subordinates who reported to him on what was happening on the ground. The court *a quo* appositely described him as a "lone ranger". There being no subordinate reporting directly to the appellant, there was no way that the appellant could have known of the operational challenges that the company was facing. There was therefore no basis for the court *a quo* to confirm the findings of the Disciplinary Authority in this regard.

DISPOSITION

53. In the light of the foregoing analysis, it is my finding that in the circumstances of this case, the court *a quo* misdirected itself in a number of respects and this Court can safely interfere with its decision. The Disciplinary Authority reached a conclusion which was not supported by the evidence before it. The court a quo erred in upholding that decision. The judgment must be vacated.

54. Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

"a. The appeal be and is hereby allowed with costs.
b. The judgment of the Disciplinary Authority, per Honourable W. Mandinde be and is hereby set aside and is substituted with the following:

"i. The finding of guilty by the Disciplinary Authority and the resultant dismissal of the appellant from employment be and is hereby set aside.

ii. The appellant be and is hereby reinstated without loss of salary and benefits from the date of suspension, being the 20th of September 2019.

iii. In the event that reinstatement is no longer tenable, the respondent shall pay the appellant damages in *lieu* of reinstatement to be agreed between the parties failing which either party may approach the court *a quo* for quantification."

MAVANGIRA JA : I agree

CHITAKUNYE JA : I agree

Mutumbwa, Mugabe & Partners, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners