

REPORTABLE (122)

BERNARD KUJINGA
v
OLD MUTUAL LIFE ASSURANCE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 14 FEBRUARY 2023 & 16 NOVEMBER 2023

M. Gwisai, for the appellant

A. K. Maguchu, for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) handed down on 4 June 2021 wherein the court upheld the appellant's dismissal from employment by the respondent on the basis that he had engaged in misconduct which was contrary to the express and implied terms of his contract of employment.

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FACTUAL BACKGROUND

The appellant is a former employee of the respondent, which is a company duly incorporated under the laws of Zimbabwe and operates in the insurance and financial services sector. He was employed by the respondent as an accounts administrator based at Old Mutual Gardens, Emerald Hill, Harare. He was also a workers' representative in the Old Mutual Workers Committee (the Workers Committee). On 24 July 2019, the appellant was suspended from work on the basis

that his employer had good cause to believe that he had committed acts of misconduct in terms of the Old Mutual Code of Conduct and Grievance Procedure (the Code).

The events leading to the charges of misconduct are as follows. A Works Council meeting was held on 8 July 2019, and it was attended by members of the Workers Committee. At the meeting, management advised that it had resolved to increase the employees' salaries by 45%; which salary increase was communicated via email to all workers by the Group Chief Executive (the GCE) on the same day. Disgruntled by the resolution on the salary increment, four of the respondent's employees from the Workers' Committee went to see the Human Capital Consultant (the HCC) on the morning of 9 July 2019 and stated that the workers were demanding to see the Human Capital Executive (the HCE) in relation to the salary increment. The appellant was alleged to have made common cause with these four employees in that they misrepresented to and mobilized the rest of the employees to gather in the staff canteen under the guise that the HCE wanted to address them on the issue of salaries.

The issue of the sit-in reached the Group Chief Operating Officer (the GCOO), who convened an urgent meeting with the management and the members of the Workers' Committee. The appellant and his colleagues were directed to disperse the employees gathered at the canteen whilst management dealt with the issue of the salary increment. The appellant and his colleagues are said to have refused to leave the HCE's office and instead, demanded that she addresses the employees gathered in the canteen. The employees only dispersed after the designated agent from the National Employment Council read to them a memorandum drafted by management,

which instructed them to return to work or risk disciplinary action. The employees had however, spent the greater part of the day congregated in the canteen.

In light of these events, the appellant was suspended from work in terms of section 12.2 of the Code and investigations into his conduct were instituted. On 1 August 2019, the appellant was charged with contravening section 15.9.1 of the Code for “*failure to fulfil the express or implied conditions of the contract of employment or any breach of the employment contract*”. This charge was grounded on clause 8 of the appellant’s contract of employment which provides that the employee should perform his/her duties in the best interests of the respondent and refrain from any action which could in any manner, harm the good name and reputation of the respondent.

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A disciplinary hearing was conducted. Evidence was led against the appellant to the effect that he had misrepresented to the HCE that employees were demanding to be addressed by him in the staff canteen. He was also alleged to have misrepresented to the employees that the HCE wanted to address them in the canteen. In addition, the appellant was alleged to have instigated an illegal collective job action by encouraging the employees to stay in the canteen on the premise that the HCE was coming to address them. The respondent claimed that the appellant’s actions had tarnished its image.

Per contra, the appellant denied that he misrepresented facts to the HCC as the elements of misrepresentation were not established. He argued that the CCTV video evidence produced by the respondent did not confirm that he had mobilised

employees to assemble in the canteen but rather, that the employees had already started moving out and that he was not part of the delegation that went to the HCC. The appellant also argued that he had acted within his mandate as a Workers' Committee member when he approached the HCE and subsequently communicated to the employees their employer's response to the issue of salary increment. The appellant contended that the respondent was victimizing him for executing his duties as a Workers' Committee member.

In addition to the above, the appellant denied instigating an unlawful collective job action. Instead, he claimed to have acted upon the employer's request for a meeting with the respondent's executives which he duly attended. The appellant claimed that his conduct was not inconsistent with the terms of his contract of employment. In addition, the appellant argued that as he had heeded the call to return to work or face disciplinary action, the charges against him should have been withdrawn.

The Hearing Officer found that the appellant had misrepresented facts and directed the employees to gather in the canteen for an address by the HCE. He further held that the CCTV video evidence established that the employees started going to the canteen after the workers' representatives had met with the HCE. It was further held that the appellant and his colleagues had staged a sit-in in the HCE's personal assistant's office after the HCE's refusal to address the employees in the canteen and as a result, they had stayed away from their work stations and had withdrawn labour. This was held to be contrary to the appellant's express or implied terms of his employment contract.

The Hearing Officer also found that after being told that the HCE would not address the employees, the appellant failed, neglected and or refused to give such feedback to the employees, which failure abetted the continued illegal withdrawal of labour by the employees. In addition, the Hearing Officer held that the appellant had assisted in the instigation of collective job action, which was illegal as there was no compliance with s 104 (2) (a) and (b) of the Labour Act [*Chapter 28:01*]. Nevertheless, the Hearing Officer held that the appellant was being charged with ‘failure to fulfil the express or implied conditions of the employment contract or any breach of the employment contract’, which arose from his gross lack of honesty and integrity by misrepresenting facts to management and other employees, thereby putting the respondent’s name into disrepute.

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In conclusion, the Hearing Officer held that the appellant’s conduct was unacceptable to the employer as it went to the root of his employment contract, thus ruining the relationship with the employer. The Hearing Officer found him guilty as charged and terminated his employment with the respondent with effect from 26 July 2019.

The appellant lodged an internal appeal against the Hearing Officer’s decision, raising 12 grounds of appeal. In the determination handed down on 2 October 2019, the Appeals Officer made a preliminary finding that the appeal was dismissible from the onset on the basis that the appellant failed to challenge some critical findings made by the Hearing Officer. On the merits, the Appeals Officer found that some of the appellant’s grounds of appeal were repetitive. He also found

that there was no specific ground of appeal challenging what had transpired in the HCE's office. In summary, the Appeals Officer found that the Workers Committee members lied to both the employer and employees about a proposed meeting in the canteen. The Appeals Officer upheld the verdict of the Hearing Officer and also found that the issue of sentence was at the discretion of the employer. Consequently, the appeal was dismissed.

The appellant noted an appeal to the Labour Court (the court *a quo*). He submitted that the respondent had failed to address the employees who gathered in the canteen, which inevitably led to loss of production. Thus, the appellant contended that the respondent was the author of its own misfortunes. The appellant further argued that it had not been established that he had misrepresented facts to both the employer and the employees. He contended that the elements of misrepresentation had not been proven. In addition, the appellant contended that the allegation that he was acting in concert with his fellow colleagues was unfounded and not supported by any evidence on record.

The appellant also argued that the memorandum read out by the designated agent was a waiver of the respondent's right to discipline him. He thus argued that the respondent was estopped from proceeding with the disciplinary hearing against him. The appellant also argued that he had complied with the dictates of the memorandum and thus, contended that the appeals officer had grossly misdirected himself when he failed to note that the disciplinary committee was improperly constituted. He further argued that he was being victimized for exercising his rights as a Workers' Committee member. In conclusion, the appellant argued that

the penalty of dismissal was punitive as he was not guilty of the offence he was charged with.

Regarding the first ground of appeal, the court *a quo* held that it lacked clarity. As a result, that ground was struck out. In relation to the second ground which challenged the factual findings which had been upheld by the appeals officer, the court *a quo* found that the appellant played an integral part in planning and executing the scheme of gathering employees at the canteen and have management address them there. The court *a quo* thus held that there was no basis for overturning the appeals officer's decision to uphold the hearing officer's findings.

In relation to the third ground of appeal, the court *a quo* held that the appeals officer had correctly found that the appellant had been dismissed from employment not because of collective job action but on the basis of the misrepresentations he had made which led to the gathering. The court *a quo* also held that being a Workers' Committee member did not insulate the appellant from disciplinary action, hence, his claims that he had been dismissed from employment as victimisation for being a Workers' Committee member were held to be meritless.

In addition, the court *a quo* held that the appellant's conduct demonstrated a high level of dishonesty and disrespect for authority, went to the root of the employment contract and made the continuation of the working relationship untenable. As a result, the court *a quo* held that it could not interfere with the penalty of dismissal imposed by the respondent. Consequently, the appeal was dismissed. It

is this decision which the appellant now seeks to set aside on the following grounds of appeal:

GROUND OF APPEAL

The appellant's grounds of appeal are as follows:

- “1. The court *a quo* made a gross misdirection in holding, despite compelling evidence to the contrary, that appellant was excluded from the waiver granted by the employer concerning the alleged unlawful ensemble whereas appellant was covered as the waiver covered all employees.
2. The court *a quo* erred in law in upholding the dismissal of appellant for alleged dishonest conduct inconsistent with his contract of employment, whereas in the circumstances, appellant was lawfully and *bona fide* executing his role as a workers' representative.
3. The court *a quo* erred in upholding the penalty of dismissal, whereas in the circumstances the exercise of discretion in favor of dismissal by the lower tribunal was unfair and irrational regard being had to:
 - (i) That applicant was exercising a workers' **Judgment No SC 122/23** **Civil Appeal No SC 349/22** **8** circumstances of an industrial emergency.
 - (ii) Appellant's favorable mitigation submissions and record of service.”

Before this Court, the following submissions were made.

APPELLANT'S SUBMISSIONS

At the hearing of the present appeal, Mr *Gwisai*, counsel for the appellant, submitted that he would not persist with the first ground of appeal, under which it was contended that the respondent had waived its right to discipline the appellant through a notice read out to the employees by the designated agent. This was in light of this Court's decision in the similar case of *Chabvamuperu v Old Mutual Life Assurance (Pvt) Ltd* SC 12/23, that there was no waiver from disciplinary action given by the respondent.

In relation to the second ground of appeal, counsel for the appellant submitted that whilst in the *Chabvamuperu* case *supra*, the Workers Committee members had been found guilty of mobilizing the employees and making misrepresentations to both the respondent and the employees, the appellant *in casu* was not involved in the initial meeting which resulted in the employees gathering in the canteen. Counsel submitted that the appellant only got involved in the two-hour sit-in and attended the subsequent meeting with the Group Chief Operating Officer in pursuance of his duties as a Workers Committee representative. Mr *Gwisai* argued that the appellant had relative immunity from disciplinary action in terms of s 65 (2) of the Constitution of Zimbabwe, as he was *bona fide* executing his duties as a Workers Committee representative. He argued that the appellant had only acted basing on what his fellow members of the Workers Committee had told him. In addition, counsel submitted that the mitigatory circumstances of the appellant ought to have been taken into account during sentencing in line with s 12B (4) of the Labour Act

[*Chapter 28:01*]. Mr *Gwisai* contended that in the circumstances of the case, the penalty of dismissal was harsh.

RESPONDENT'S SUBMISSIONS

Per contra, Mr *Maguchu*, for the respondent argued that the appellant had not appealed against the finding that he was guilty of dishonesty arising from misrepresentations and misleading the other employees and management, and that he merely claimed that he was exercising his role as a Workers Committee member. Counsel further submitted that the appellant had ample opportunity to disengage from further lying to management and the employees when management repeatedly

informed him and his colleagues that they had not called for an address and that the gathering by the employees was unlawful. Additionally, Mr *Maguchu* contended that s 65 (2) of the Constitution of Zimbabwe did not clothe Workers Committee members with absolute immunity from disciplinary action as they are expected to execute their duties in a lawful manner.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the appellant had absolute immunity from disciplinary action in terms of section 65 (2) of the Constitution of Zimbabwe, 2013.

Mr *Gwisai* argued that since the appellant was a workers' representative, he had relative immunity from disciplinary action in terms of s 65 (2) of the Constitution of Zimbabwe, 2013 ("the Constitution"). The provision states as follows:

“Except for members of security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice and to participate in lawful activities of those unions and organisations.”

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The import of the above provision is that although every person is permitted to be a member of a trade union, as such, one is obliged to only participate in activities that are lawful. In the event that a person participates in unlawful activities, disciplinary action can be taken against such a person. The fact that a person is a workers' representative does not mean that he or she is immune from disciplinary action. If a workers' representative is involved in an unlawful activity, then he or she is subject to disciplinary action. Commenting on the import of s 65(2) of the Constitution in the case of *Zimbabwe Banks & Workers Union & Anor v Marimo & Ors* CCZ 8/21 GOWORA JCC stated the following at p 14:

“My reading of the subsection does not suggest, by any stretch of the imagination, that employees are given *carte blanche* by the Constitution to breach their contracts of employment and provisions contained in codes of conduct and thus create havoc or anarchy within the workplace under the guise of furthering the interests of workers and the union. The employer-employee relationship is sacrosanct and based on trust. The employee is therefore obliged to act in good faith and in a manner that is consistent with the interests of his or her employer. The fact that an employee is a member of a trade union or is a workers’ representative does not sever the employment relationship. It does not qualify any of the obligations and duties that each owes the other under the contract of employment. The terms of the contract of employment define the ambit of the parties’ relationship. To place the employee’s status as a union member or workers’ representative above that of the employment contract would be to subsume the contract of employment under such membership. That cannot be a correct position of the law as it pertains to employment contracts...Section 65 (2) upon which the applicants seek reliance for the alleged violation of the fundamental rights of employees in the workplace does indeed protect the right of every person to form, join and participate in the activities of trade unions or employer organisations. The rider to the right is that such participation must be clothed with legality. The applicants’ counsel was pressed on this issue and was constrained to concede that the activities protected under section 65 (2) must be lawful. It was pertinent to note that applicants’ counsel admitted that the participation of the second applicant or his colleagues in an illegal strike would not be the lawful activities contemplated by the section for protection.”

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Based on the above authority, the appellant’s actions were tainted with illegality. As such, he was not immune from disciplinary action as he acted outside the confines of the law. It is settled that workers representatives are not immune to disciplinary action in circumstances where they have engaged in acts of misconduct. As was stated by CHIDYAUSIKU CJ in the case of *Zimbabwe Electricity Supply Authority v Mare* SC 43/05 at p 4:

“In my view members of the Workers’ Committee are not a law unto themselves...I accept that a member of the Workers’ Committee has a duty to defend workers’ rights. In defending the rights of the workers, a member of the Workers’ Committee is enjoined to observe due process.”

The court is therefore inclined to agree with Mr *Maguchu*'s submission that s 65 (2) of the Constitution does not clothe the workers representative with absolute immunity.

Whether or not the court *a quo* erred by upholding the appellant's dismissal from employment.

The above issue emanates from the second and third grounds of appeal. It is the appellant's contention that the court *a quo* failed to find that the conviction and dismissal of the appellant was tantamount to victimization for exercising his role as a Workers' Committee member. In addition, the appellant is of the view that the court *a quo* did not weigh the evidence before it to determine whether it established that the appellant had made misrepresentations to the respondent and the other employees.

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In respect of the third ground of appeal, Mr *Gwisai* submitted that the court *a quo* erred in upholding the penalty of dismissal as the court had authority to interfere with the penalty in terms of s 12B (4) of the Labour Act. He further argued that the penalty was harsh and unfair in the circumstances.

The court's considered view is that the issues raised in the second and third grounds of appeal can be resolved by determining whether or not the court *a quo* correctly found that the appellant was guilty of the acts of misconduct he was charged with. It is trite that the degree of proof in labour issues is on a balance of probabilities. In the case of *British American Tobacco Zimbabwe v Chibaya* SC 30/19

the court cited the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, wherein the following was said regarding proof on a balance of probabilities:

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.”

In *casu*, the evidence on record established that the appellant was not involved in the initial Workers Committee meeting in which the members resolved to misrepresent to the respondent that the employees wanted to be addressed by management on the issue of the salary increments, and to the employees, that management wanted to address them. This was the appellant’s testimony during the disciplinary hearing, which testimony was supported by the evidence of Mr Nzombe, Basil Machocho, and Don Chabvamuperu.

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That notwithstanding, the appellant was part of the delegation that staged a sit-in in the HCE’s office and refused to leave until management had addressed the employees gathered in the canteen. Although the appellant might not have been part of the misrepresentations in the beginning of the scheme, he did participate in continuing to misrepresent to management that the employees were demanding to be addressed when that was, to his knowledge, an unfounded lie. In the case of *Anthony Makintosh v The Chairman, Environmental Management Committee of City of Harare & Anor* SC 12/14 at p 4, this Court held that:

“An appeal court will only interfere with a decision which involves the exercise of discretion by a lower court in very limited circumstances. These were set out by this Court in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62-63, where 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 relevant some 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”.

An analysis of the facts leads to the conclusion that there was no misdirection by the court *a quo* in upholding the decision of the Appeals Officer. Accordingly, the court *a quo* cannot be faulted for upholding the finding that the appellant misrepresented facts to the respondent and to the respondent’s workforce. In addition, in respect of the appellant’s allegations of victimization for executing his duties as a Workers Committee representative, it is our view that the appellant was not victimized as he was procedurally punished for committing acts of misconduct. As already sated above, whilst it is trite that members of the Workers Committee ought not to be victimized for acting in their representative capacities, it is also settled that they are not immune from disciplinary action in circumstances where they have engaged in acts of misconduct.

Thus, members of the Workers Committee must carry out their duties within the confines of the law. The appellant and his colleagues ought to have utilized the proper channels of communication put in place by the respondent in seeking to have management address the issue of the salary increment. Resorting to misrepresentations was not necessary under the circumstances and constituted acts of

misconduct. The appellant and his colleagues acted unlawfully by peddling false information to the employees and management, which resulted in the respondent losing a day's worth of production.

In addition, the imposition of a sentence is in the discretion of the disciplinary tribunal. This was aptly captured in the case of *Delta Beverages (Pvt) Ltd v Shumba* SC 167/20 at p 8, wherein it was held that:

“The question of an appropriate penalty to pass is within the discretion of the employer where an employee commits a dismissible act of misconduct. For an appellate court to interfere with the penalty imposed by the employer in the exercise of its discretion, there needs to be proof that the exercise of the discretion was impeachable”

As a result of the appellant being convicted of misconduct that involved dishonesty and which specifically goes to the root of the contract of employment, the respondent was at liberty to sever ties with the appellant and hand down a sentence of dismissal from employment. This is in accordance with what the court stated in the case of *Standard Chartered Bank Zimbabwe Limited v Musanhu* 2005 (1) ZLR 43 (S), at 47A where MALABA JA (as he then was) quoted with approval the case of *Pearce v Foster* 1886 QB 536 at 53G where it was held that:

“...if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.”

It is therefore, our view that the sentence imposed on the appellant was appropriate and the court *a quo* did not err by finding that it was limited in its interference with the imposed sentence. This is so as there was no justification for the court *a quo* to interfere with the sentence. In addition, it is important to note that the

appellant sought to criticize the Appeals Officer's judgment and yet the notice of appeal is silent on that issue.

DISPOSITION

The appellant abandoned the first ground of appeal. We are satisfied that there is no misdirection in the court *a quo*'s decision. The remaining grounds of appeal have no merit. As is the general norm, costs will follow the event.

In the result, it is ordered that the appeal be and is hereby dismissed with costs.

MAVANGIRA JA : **Judgment No SC 122/23**
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CHIWESHE JA : I agree

Matika, Gwisai & Partners, appellant's legal practitioners

Maguchu & Muchada Business Attorneys, respondent's legal practitioners