

REPORTABLE (37)

RESERVE BANK OF ZIMBABWE
v
PHILTON MAKENA

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHITAKUNYE JA & MUSAKWA JA
HARARE: 14 & 26 JULY 2023 & 28 MARCH 2024

F. Siyawareva, for the appellant

V. Mukwachari, for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the Labour Court (“the court *a quo*”), dated 10 June 2022. The judgment was passed in respect of two consolidated appeals that were filed before it. In that judgment the court *a quo* upheld the respondent’s appeal against dismissal from employment and ordered his reinstatement or alternatively, the payment of damages in the event that reinstatement was no longer possible.

FACTUAL BACKGROUND.

The respondent was employed as a principal analyst in the Economic Research Division of the appellant. He had served with the appellant for 14 years prior to the incident that led to his discharge. On 15 April 2020, the respondent was not at work when he received, through a WhatsApp message, a document from his friend and workmate Smart Manda titled “Macroeconomic Policy Measures to support the 5-year De-dollarisation Strategy”. The

respondent opened the document and shared it with his cousin, one Bongani Zimuto, an economist in the employ of ZIMNAT Insurance. Thereafter the document went viral on social media. The respondent later on realised, through phone calls from the appellant's Governor, that he had shared a confidential document which had not been approved for circulation.

On 16 April 2020, the appellant, through the Governor, Dr Mangudya, issued a press statement to the effect that the respondent had leaked the abovementioned document. On the same day, the respondent recorded a statement detailing how he had forwarded the document to his cousin. The statement reads as follows:

"I, Philton Makena, ID Number 03-104923-Q 03, residing at 40 Shaffsbury Road, Cranborne, Harare, do hereby make the following statement:

On 14 April 2020, at 1.46 pm Smart Manda, a friend and workmate, informed me, through WhatsApp, that Dr N. Mupunga had sent him work assignments which he could not download as he had no data bundles. He reached me on my WhatsApp number 0774419687. He requested that if I had some money, I buy him data bundles. I bought 160mb for him through the Eco Cash platform.

Dr Manda acknowledged receipt of the data bundles and went on to share with me that the assignment he was working on was on possible transitional options for exchange rate unification.

On 15 April 2020, at 12.14 pm Dr Manda sent to me a document titled Macroeconomic Policy Measures to Support the 5 Year De-Dollarization Strategy, in PDF format.

I browsed the document and at 12.27 pm, I thanked him. He told me that he was getting assignments (work-related) and that he may have to be going to the office to work on the assignments.

At 9.01p.m on the same day, Dr Manda asked me through WhatsApp if I had forwarded the said document to anyone. He went on to say the document was not yet final and that someone had leaked it, and that it was being traced by government.

I only responded to his WhatsApp post today, 16 April 2020 at 8.33 a.m. I informed Dr Manda through WhatsApp that I had forwarded the document to my cousin, Bongani Zimuto (cell number 0771717770). I also informed Dr Manda that the said document had been widely circulated on social media between yesterday 15 April 2020 and 16 April 2020.

I have since realized, through phone calls from the Governor, Dr Mangudya, that I shared a confidential draft document that was not approved for circulation.

I deeply regret my actions, which were very unprofessional.

Kindly note that my cousin, Bongani Zimuto, forwarded the document to his boss, who has since told Bongani that he had received the said document from someone else, before Bongani had sent it to him.”

The respondent was charged with violating para 3.2.3 (q) as read with para 3.2.3 (u) of the appellant’s Code of Conduct for Managerial Staff (2014). Paragraph 3.2.3 (q) which prohibits disclosing confidential documents to other parties whilst para 3.3.3 deals with disregard of bank policies, procedures and rules. However, during the course of the disciplinary proceedings only the charge of breach of confidence was maintained due to duplication of charges.

PROCEEDINGS BEFORE THE DISCIPLINARY COMMITTEE

The respondent raised some preliminary points before the disciplinary committee. The first preliminary point raised related to the issue that there was a reasonable apprehension that fair administrative action would not be attained because the committee was appointed by the appellant’s governor who had already pronounced him guilty of the alleged offence.

The disciplinary committee held that it was impartial as stipulated in the RBZ Managerial Code of Conduct. The committee further held that it would make its decision based on the submissions made by both the appellant and the respondent.

The second preliminary issue raised was that there was an improper splitting of charges because s 3.2.3 (q) of the Code of Conduct prohibits disclosure of confidential information to unauthorized persons by managerial employees. On the other hand, s 3.2.3 (u) of the Code of Conduct deals with ignoring bank policies, staff circulars or departmental standing instructions relating to staff conduct and performance in instances of a gross nature. The respondent contended that the evidence which the appellant sought to rely on to sustain the charge for contravening s 3.2.3 (u) was the same evidence which it sought to rely on to sustain the charge under s 3.2.3 (q) of the said Code of Conduct.

In response the committee agreed to maintain the charge of breach of confidence and all evidence relating to the other charge was to be used on the remaining charge. The committee found the respondent guilty as charged and he was accordingly dismissed from employment.

4

Aggrieved by the decision of the disciplinary committee, the respondent appealed to the appellant's Governor in terms of s 4.5 of the Code of Conduct for managerial employees and his appeal was dismissed for lack of merit.

PROCEEDINGS BEFORE THE LABOUR COURT

Irked by the dismissal of his appeal, the respondent filed both an appeal and a review in the court *a quo* against his conviction and dismissal. The matters were consolidated. Following the hearing of the matters, the application for review was dismissed whilst the appeal was upheld.

In disposing of the matter before it, the court *a quo* identified two issues for determination. These were whether or not there was proof of the commission of the act of misconduct, and whether or not the sentence was too severe.

On the first issue, the respondent submitted that the appellant failed to adduce sufficient proof to the effect that an offence had been committed. The court *a quo* was of the view that the charge had four elements and these were: the managerial employee must have accessed the information by virtue of his work, the information accessed was confidential, the confidential information was supposed to relate to the business of the bank and or other employees and lastly, a managerial employee disclosed the confidential information to unauthorized persons.

The court *a quo* held that the onus was on the appellant to prove that the respondent had received the document by virtue of his work. It was the court *a quo*'s reasoning that the minutes of the disciplinary hearing never established that the document had been accessed by virtue of the respondent's work. It further held that it seemed to have been accepted by the parties that the respondent and Dr Manda were friends and as a result, it was important to call Dr Manda to testify on whether or not the document had been forwarded to the respondent as a friend or it was work-related. In this regard, the court *a quo* was of the view that there was insufficient evidence to prove that the respondent received the document during the scope of his work.

On the second element, the court *a quo* held that it was never alleged or established in the hearing that the document was confidential and the appellant ought to have proved that the

document in question was confidential. Furthermore, the court *a quo* held that the appellant failed to prove that the document received by the respondent was confidential information which related to the business of the appellant.

The court *a quo* made reference to the case of *Book v Davidson* 1988 (1) ZLR 365 (S) which quoted POTGIETER JA in *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (AD) at 711 E-G where he said:

“The general principle governing the determination of the incidence of the onus is one stated in the *Corpus Iuris semper necessitas probandi incumbit illi qui agit*. In other words, he who seeks a remedy must prove the grounds therefore.”

The court *a quo* further held that the appellant had the onus to prove on a balance of probabilities that the respondent had accessed confidential information by virtue of his work and that the information related to the business of the appellant or other employees and finally, that the respondent released the information to an unauthorized person. It was the view of the court *a quo* that the appellant failed to prove the allegations against the respondent and that the proceedings appeared to have been hurriedly done without giving thought to the requirement that the appellant had to discharge the onus which was upon it.

As a result, the court *a quo* ordered the setting aside of the decision by the appellant’s disciplinary committee. It ordered that the respondent be reinstated or be paid damages *in lieu* of reinstatement.

PROCEEDINGS BEFORE THIS COURT

Aggrieved by the decision of the Labour Court the appellant appealed to this Court on the following grounds of appeal:

“1. The court *a quo* erred in finding that the appellant failed to prove the commission of the act of misconduct by the respondent for breaching s 3.2.3 (q) of the RBZ Code of Conduct for managerial staff (2014), in particular that:

1.1 The court *a quo* grossly erred in failing to appreciate respondent’s own admission that the document he received and shared to a third party was work related.

1.2 The court *a quo* erred in failing to find that the document shared by the respondent was confidential.”

SUBMISSIONS BY COUNSEL

Before us, counsel for the appellant submitted that the court *a quo* erred in finding that the appellant had failed to prove that the respondent was guilty of the alleged act of misconduct. He argued that there was sufficient proof establishing that the document in issue was accessed by virtue of the respondent’s work and that it was confidential. It was further submitted that the respondent in his statement admitted that the document he received from his workmate Smart Manda was work-related. Counsel submitted that before the respondent received the document, he admitted that he had been advised by Smart Manda that he was working on work-related assignments. Thus, according to the appellant this clearly constituted admitted facts which required no further proof.

Counsel further submitted that the effect of admitted facts in judicial proceedings is that it becomes unnecessary to prove those facts that would have been admitted and the party making such admission would be precluded from contradicting such admission.

Further, it was submitted that the fact that the shared document did not have the appellant's logo did not alter its confidential nature. Counsel contended that, in the minutes of the disciplinary hearing, respondent admitted that he had worked on papers without the Reserve Bank of Zimbabwe's logo but with SADC and COMESA's logos. The respondent had further admitted that he placed a high level of importance and confidentiality on the said documents for the past fourteen years. Thus, counsel submitted that the document received by the respondent ought to have been treated with the same confidentiality.

Per contra, counsel for the respondent submitted that the document in question was forwarded to the respondent by a work friend while he was at home on a social media platform which is not an official means of communication for work-related issues of such confidentiality. Thus, counsel for the respondent maintained that the document in issue was not accessed by virtue of the respondent's work, neither was it confidential. Further, it was submitted that there is nowhere in the record of proceedings where the respondent admitted to having shared a confidential document of the appellant. He simply detailed what had transpired as he was asked to write a statement on the matter.

8

ISSUE FOR DETERMINATION

The sole issue for determination is whether or not the court *a quo* erred in finding that the appellant had failed to prove that the respondent was guilty of the act of misconduct.

ANALYSIS

Section 3.2.3 (q) of the RBZ Code of Conduct for Managerial Staff 2014 provides that:

“A managerial employee breaches confidence if, by virtue of his work he has access to confidential information on any matter concerning the business of the bank and other employees and makes disclosure to unauthorized persons.”

It was the appellant’s contention that the respondent’s admission in his statement that he received the document from his workmate, Smart Manda proved that it was work-related. The appellant further supported its argument by the fact that before the document was shared with the respondent, the respondent had been advised by Smart Manda that he was working on work-related assignments. According to the appellant such circumstances clearly constituted an admitted fact which required no further proof.

In motivating its argument, the appellant relied on the case of *Mining Industry Pension Fund v Dab Marketing (Private) Limited* 2012 (2) ZLR 132 (S). That authority however, deals with formal admissions, which the respondent’s statement is not. The respondent’s written statement constitutes an informal admission.

P.J. Schwikkard and S.E. Van Der Merwe in *Principles of Evidence*, 4th ed at 327 state the following regarding admissions:

“An admission is a statement made by a party, in a civil or criminal proceeding, which is adverse to that party’s case. Informal admissions, which are usually made out of court, must be distinguished from formal admissions made in pleadings or in court. Formal admissions are binding on the maker, and are generally made in order to reduce the number of issues before the court, whereas informal admissions merely constitute an item of evidence that can be contradicted or explained away.

Informal admissions may be admitted to prove the truth of their contents. The rationale for admitting such evidence would appear to be that a person is unlikely to make an admission adverse to his interests if the contents of that admission are not true.”

The appellant's argument was that the respondent, through his written statement, admitted that the document he received and shared was work-related and thus it was unnecessary to call the evidence of Smart Manda. From the reading of the aforementioned statement, the respondent acknowledged that Dr Manda told him that he was working on an assignment that related to possible transitional options for exchange rate unification. It is the court's view that, the respondent expressly admitted that, Smart Manda had informed him through WhatsApp that he was working on work-related assignments. Such an admission clearly constituted an admitted fact which required no further proof.

In his statement the respondent acknowledged that he sent the document to a third party. However, he contended that he only became aware that the document was confidential after it had been leaked. Such an argument is unsustainable as the respondent had prior knowledge that the person sending him the document in question was working on work-related assignments. Thus, the appellant's submission that the respondent made a formal (in our view informal) admission in his statement can be sustained. Such an admission by the respondent was enough for the appellant not to adduce the evidence of Smart Manda.

Furthermore, the appellant contended that the fact that the document in question did not have the appellant's logo but that of the Government of Zimbabwe did not alter its confidential nature. The respondent, on the other hand, argued that the appellant, in the court *a quo*, failed to prove that indeed the document shared by the respondent was the appellant's and that it was confidential.

The appellant's argument was based on s 6 of the Reserve Bank of Zimbabwe Act [Chapter 22:15] which provides that, as a part of its functions, the appellant acts as a banker and financial adviser to and as fiscal agent of the State. According to the Merriam-Webster Dictionary a fiscal agent is defined as:-

“a bank or trust company acting as the financial representative of a corporation or service organization.”

In other words, a fiscal agent is an organization such as a bank that acts on behalf of another party performing various financial duties. It is not in dispute that the document in question bore the Government of Zimbabwe's logo, and considering that the appellant as part of its functions, acts as a fiscal agent of the State, the respondent ought to have known that the document was confidential.

11

Further, the respondent was employed by the appellant for a period of 14 years. As part of his duties, he worked on documents which had the appellant's logo and some of them had SADC and COMESA logos. The respondent would accord those documents the same degree of importance and confidentiality. Thus, the respondent was grossly negligent in handling the document. In *Standard Chartered Bank of Zimbabwe Ltd v Chipininga* 2004 (2) ZLR 94 (S) at 98F-99C it was held that:

“It has been pointed out that ‘gross negligence’ is a nebulous concept, the meaning of which depends on the context in which it is used and it is a futile exercise to seek to provide a definition which would be applicable to all circumstances: see *Govt of Republic of SA (Dept of Ind.) v Fibre Spinners and Weavers (Pty) Ltd* 1977(2) SA 324(D) at 335E; *Bickle v Minister of Law and Order (Supra)* at 41A. It has been described as ‘ordinary negligence of an aggravated form which falls short of wilfulness’ (Bickle's case supra); ‘very great negligence or want of even scant care or a failure to exercise even that care which a careless person would use’. See Prosser “Law of Torts” 4ed at 183.”

The definition of the concept of gross negligence has been quoted with approval in many cases. In *City of Harare v Chikwanda* SC 70/20 BHUNU JA quoted the remarks of MURRAY J in *Rosenthal v Marks* 1944 TPD 172 at 180 where he said:

“Gross negligence (*culpa lata, crassa*) connotes recklessness an entire failure to give consideration to the consequences of his actions, a total disregard of duty: see per WESSELS J in Adlington’s case supra at p 973, and *Cordey v Cardiff ke Co.* (88LT 192).”

The respondent received the document in question from Dr Manda who had earlier on indicated to the respondent that he was working on some work-related assignments. It is an unsustainable argument that the document did not contain the appellant’s logo, therefore the respondent could not have associated it with the business of the appellant. The respondent received the document whilst he was working from home and when he received the document, he should not have forwarded it to his cousin before understanding its contents.

12

As a person who held a senior position, the respondent ought to have exercised due diligence by inquiring about the nature of the document and understanding its contents before forwarding it. On 19 July 2012, the respondent signed a declaration of secrecy with the appellant. This prohibited him from communicating to any undeserving persons, information availed to him or which he came across in his capacity as an employee of the appellant, whether such information related directly or indirectly to the affairs of the appellant. In addition, the respondent’s letter of appointment of 23 June 2011 had a clause on confidentiality. The letter even stated that where in doubt as to whether information is confidential or not, it should be treated as confidential until such time as one was informed that it was not. Thus, the respondent was reckless in forwarding the document.

Further, the respondent argued that the circumstances under which the document was sent to the respondent put the confidentiality of the document into question. The respondent received the document in issue via WhatsApp, a social media platform. During the disciplinary proceedings it was established that the WhatsApp media platform was not an official communication medium at the Reserve Bank of Zimbabwe. However, we are of the view that the means by which the respondent received the document does not take away its confidentiality. In essence the breach of confidentiality by the respondent amounts to an act of gross misconduct.

In *Tobacco Sales Floors Ltd v Chimwala* 1987(2) ZLR 210(S), McNALLY JA approved the dictum by LORD JAMES in the case of *Clouston & Co Ltd v Corry* [1906] AC 122 before going on at 218H-219A to say:

“I consider that the seriousness of the misconduct is to be measured by whether it is ‘inconsistent with the fulfilment of the express or implied conditions of his contract’. If it is, then it is serious enough prima facie to warrant summary dismissal. Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.” 13

In *Wala v Freda Rebecca Mine* SC 56/16 at p5, MALABA DCJ (as he then was) stated as follows;

“The seriousness of a misconduct is measured by looking at its effect on the employment relationship and the contract of employment. If the misconduct the appellant was found guilty of went to the root of the contract of employment in that it had the effect of eroding the trust the employer reposed in him as found by the arbitrator, could it still be said that the misconduct was trivial to warrant a penalty of dismissal? The appellant worked against company policy. It is a serious act of misconduct for an employee to deliberately act against the employer’s policies to advance personal interests”.

The fact that the respondent was a Principal Economist of the appellant is evidence that there was a deep-rooted level of trust between the parties to the extent that the respondent was entrusted with confidential information of the appellant. It was therefore the duty of the respondent to safeguard the document in question to the best interests of the appellant. Thus, the argument by counsel that the document in issue was not accessed by virtue of the respondent's work and neither was it confidential cannot prevail. The nature of the respondent's position and the fact that he was working from home 'on standby' entails that he ought to have exercised due diligence when he received the document in question. The misconduct by the respondent went to the root of the relationship between him and the appellant therefore, the appellant had the unfettered discretion to dismiss the respondent.

In the case of *S v Tsambo* 2007 (2) ZLR 33 (H), at 41 C-D UCHENA J (as he then was) held that,

14

“The correct judicial assessment of evidence must be based on establishing proved facts, the proof of which must be a result of careful analysis of the evidence led. The final result must be the product of an impartial and dispassionate assessment of all the evidence placed before the court.”

From the assessment of all the evidence adduced by both parties, it is our view that the appellant was able to prove its case. This is so because the respondent, being a managerial employee, breached confidence by sharing a confidential document to an unauthorized person. Thus, the respondent indeed breached s 3.2.3 (q) of the Code of Conduct for managerial employees.

DISPOSITION

In the circumstances the court *a quo* erred in its findings. The essential elements of the misconduct were established. Resultantly, the appeal has merit and ought to succeed.

Regarding costs, there is no reason to depart from the general principle that costs follow the cause.

It is accordingly ordered as follows:-

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

“The appellant’s appeal be and is hereby dismissed with costs”

UCHENA JA : I agree

CHITAKUNYE JA : I agree

T.H Chitapi & Associates, appellant’s legal practitioners.

Jessie Majome & Company, respondent’s legal practitioners.