

REPORTABLE (63)

SHECKEM BARRISTER NGAZIMBI
v
MUROWA DIAMONDS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE: 14 JUNE 2024

M. Gwisai, for the appellant

R. G. Zhuwarara, for the respondent

MATHONSI JA: This is an appeal against the judgment of the Labour Court sitting at Harare (the court *a quo*) delivered on 5 October 2023, dismissing the appellant's appeal against the determination of the designated Appeals Officer of the respondent. The Appeals Officer dismissed the appellant's appeal against the determination of the Disciplinary Authority which found the appellant guilty of misconduct and dismissed him from employment.

After hearing the appeal the court issued the following order:

“IT IS ORDERED THAT:

1. The appeal be and is hereby dismissed with costs.
(Full reasons to follow in due course).”

What follows hereunder are those reasons.

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THE FACTS

The appellant was employed by the respondent as a security superintendent from 1 July 2004. On 20 April 2009 he was issued with a brand new personal issue Isuzu KB 300 TDi Double Cab motor vehicle registration number ABG 4559 in terms of the employer's company car policy. He was entreated to "read, understand and comply" with the company's rules and procedure governing the issue of the motor vehicle.

On 2 October 2009, whilst on leave, the appellant drove the company's vehicle at about 2300hours from Marondera en route to Harare. At the 61kilometer peg along that road, the appellant was involved in a pileup fatal accident involving two other vehicles, a Mazda Rustler registration number 664-269F and a GDC Whelson Transport haulage truck. He drove the motor vehicle at night despite the existence of a company policy prohibiting the driving of vehicles at night. The appellant then submitted an initial incident report alleging that the accident occurred at 1930 hours.

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On 9 October 2009, the appellant was suspended from employment with full pay and benefits and, on the same date, he was served with a notice to attend a disciplinary hearing on 14 October 2009. The charge preferred against him was couched as follows:

"Nature of Offence; Section 4 of SI 15 of 2006 part (a) 'an act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract' and part (b) wilful disobedience to a lawful order.

You drove your company allocated vehicle with registration number ABG 4559 from Marondera on your way to Harare at night around 1930hrs as per your report whilst knowing full well that you were not supposed to do so according to the company policies and procedures. Further investigations from police reports and a witness indicated that the accident occurred around 2300hrs, creating a difference between your report and the police report.

You did not operate your company allocated vehicle in accordance with traffic regulations as required by the company vehicle policy, resulting in significant damage and financial loss -

The charge sheet (which he refused to sign) and the notice to attend a disciplinary hearing, brought the worst out of the appellant. Exhibiting not the slightest contrition following the fatal accident, through his erstwhile legal practitioners Messrs Mhiribidi, Ngarava & Moyo, he addressed a strongly worded letter dated 11 October 2009 to his employer in which he acknowledged receipt of both the charge sheet and the notice of hearing.

The appellant however argued that there was nothing in the company statutes precluding him from driving the company motor vehicle between towns at night. He labelled the actions of the employer unlawful. In their own words:

“We submit that there is a hidden agenda and a deep-seated hatred and dislike for our client. What you have been waiting for is an opportunity for you to pounce on him. Unfortunately you have mistimed your actions. All what you are doing is unlawful. Our client refuses to be part of this illegality and does not condone it. If you feel that you no longer need the services of our client, retrenchment laws and various mechanisms do exist in our legal system to deal with the situation.” (The underlining is for emphasis)

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The appellant argued that the employer had unilaterally cancelled his annual leave by inviting him to a disciplinary hearing while he was on leave. He invited his employer to a round table conference instead in order to resolve the dispute.

Making it clear that he would not attend the disciplinary hearing, the appellant sought in the alternative, to fix another date of hearing. The letter written on his behalf concluded thus:

“We have instructions to receive any process/papers relating to any matter in connection with the intended disciplinary case against our client. Please deliver all the correspondence through our office and as soon as our client finishes his leave days at the end of this month we will be amenable to attend any hearing or round table conference to resolve the issue.

The writer will be attending an International Convention on Housing at Victoria Falls from 25th to 31st October 2009.

At the moment we consider that our client's leave days are not cancelled and he proceeds to enjoy his leave days until he resumes duty on 28th October 2009. Equally we consider that he is not suspended as your action is invalid."

That way, the appellant ignored the date of hearing. He did so despite being advised, through a response to his legal practitioners' caustic letter quoted above, written by the Disciplinary Authority on 13 October 2009. It reads in relevant part thus:

"Your letter dated 11th October 2009 but received by us on 13th October 2009 is acknowledged.

The issues raised thereto are in my view issues relating to your client's defence to the charges. I find it insufficient to postpone or adjourn the hearing in the manner tacitly intimated by you.

Accordingly, your client is advised to appear before the disciplinary authority as earlier advised. Any failure to appear will be deemed wilful default and the matter will be proceeded with on the merits to your client's possible detriment." (The underlining is for emphasis)

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As I have said, that did not deter the appellant from continuing with his annual leave as if there was no disciplinary hearing, except that the hearing went ahead on 14 October 2009. It was to the appellant's detriment. Without the benefit of the appellant's contestation to the charges, the disciplinary authority found him guilty on both charges and dismissed the appellant from employment with effect from 14 October 2009.

The appellant unsuccessfully appealed to the Appeals Officer. In dismissing the appeal, the Appeals Officer found no merit whatsoever in all the grounds of appeal. He reasoned that the appellant could not complain of having been given inadequate notice of hearing when no such complaint was ever raised by him upon receipt of the notice. More

importantly, the appellant had made up his mind from the onset that he would not avail himself at the hearing.

In that regard, the Appeals Officer stated:

“Under cover of the letter by his legal representative dated 11 October 2009, appellant stated in clear terms that he considered the disciplining process a nullity, in his view, his suspension was unlawful. In my view, the reason why appellant did not attend the hearing of 14 October 2009, is because he regarded the process as unlawful. The issue of inadequate time was not raised in any correspondence before this appeal, nor was it brought to the disciplinary authority’s attention. In my view, the issue of time appears to have been not an issue because no matter the amount of time appellant was to get, he had made up his mind not to attend any hearing before 28 October 2009, the day he deemed to mark the end of his ‘annual leave.’

Appellant’s resentment to the disciplinary process and his attitude not to partake the disciplinary process appears self-evident from the onset of the disciplinary proceedings when appellant flatly refused to acknowledge receipt of the letter of suspension with pay and benefits, followed by his conclusions as summarized in the letter by his representative dated 11 October 2009 that the disciplinary process was invalid.”

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The Appeals Officer found that the appellant was properly notified of the hearing but willfully absconded, thereby waiving his right to challenge the evidence adduced against him.

PROCEEDINGS BEFORE THE COURT A QUO

Disgruntled, the appellant appealed to the court *a quo*, following a remittal of the dispute to that court by this Court in terms of an order issued on 16 July 2020. This Court directed the court *a quo* to hear the matter as an appeal against the decision of the designated Appeals Officer in terms of s 92(1) of the Labour Act [*Chapter 28:01*].

The essence of the appellant’s case *a quo* was a challenge to the lawfulness of the disciplinary hearing before the Disciplinary Authority on the basis that it was held in his absence at a time when he was on annual leave and without adequate notice. On the merits,

the appellant's case was that he did not commit any misconduct as he was authorized to drive the employer's motor vehicle at night. In addition, the appellant took the view that he did not cause the accident which occurred. He also challenged the penalty of dismissal as irrational and a gross misdirection.

The court *a quo* found no merit in the appeal and, as already stated, it dismissed the appeal with costs. In doing so, it found that the appellant deliberately chose not to attend the disciplinary hearing. It reasoned that, by so doing, the appellant lost the opportunity to challenge the outcome of the proceedings. At p 11 of its judgment the court *a quo* stated:

“It is apparent from the stance of appellant's legal practitioner's letter that he had taken a position not to attend the hearing. Whether he was justified or not is really not the point. The issue is that he had a duty to attend the hearing and seek for a postponement on the basis of the reasons as advanced even the fact that his legal practitioner was not available. He did not do so. He just deliberately chose not to attend the hearing to his detriment clearly. The position of the law as captured in authority referred to *supra* on this issue is unquestionable. The appellant, by choosing not to attend the disciplinary hearing waived his rights.....”

On the issue of the appellant's vacation leave entitling the appellant not to attend, the court *a quo* saw nothing wrong with the employer recalling him from leave in order to attend the disciplinary hearing. It rejected the appellant's argument that he was not given adequate notice of the hearing as a review ground which could not be raised where the appellant elected to proceed by way of an appeal.

PROCEEDINGS BEFORE THIS COURT

The appellant was not done. Still dissatisfied, he noted the present appeal on the following two grounds.

“2. GROUNDS OF APPEAL

- 2.1. The court *a quo* erred in law in upholding respondent's unilateral cancellation of appellant's vacation leave in order to conduct a hearing whereas such cancellation was unlawful as vacation leave is a vested employee right that cannot be unilaterally varied or cancelled by an employer for the purpose of conducting a hearing.
- 2.2. The court *a quo* erred at law in ruling that appellant waived his right to appeal because of non-attendance of the hearing whereas with reference to an employee's right to fair labour practices and standards, a fundamental substantive right to appeal cannot be deemed to be waived just because of an employee's non-attendance of a hearing."

Notwithstanding the manner in which ground one is couched, the crisp issue for determination in this appeal is whether, by electing not to attend a disciplinary hearing, the appellant waived his right to be heard. It is common cause that at no point did the respondent cancel or purport to cancel the appellant's annual leave. He was only required to attend a disciplinary hearing during vacation, for an alleged misconduct committed while he was on vacation leave.

In order to motivate the two grounds of appeal which, in any event yield only one issue for determination, and to impugn a ten paged judgment, Mr *Gwisai* for the appellant committed to argument thirty-five pages. His heads of argument are nowhere near being such or complying with r 52 (2) of this Court's Rules. The rule requires a legal practitioner to file "a document setting out the heads of his or her argument." It certainly does not require a thesis to be filed.

Be that as it may, Mr *Gwisai* submitted that the proceedings before the Disciplinary Authority were invalid by reason that they were conducted during the time that the appellant was on leave. Relying mainly on case law authorities from foreign jurisdictions, he submitted that the notice to attend the hearing constituted an unlawful instruction. The appellant was at liberty, so it was argued, to refuse to attend the hearing because it was unlawful to break his leave.

On the aspect of whether there was a waiver of the right to be heard, Mr *Gwisai* acknowledged the existence of case law authorities from this jurisdiction to the effect that the employee waives his or her right by non-attendance. Counsel however submitted that those cases are distinguishable to the extent that they advert to a waiver to challenge the proceedings. In his view, non-attendance does not amount to a waiver of the right to contest outcome of the proceedings.

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Per contra, Mr *Zhuwarara*, for the respondent submitted that the appellant's leave was not cancelled, but he was summoned to attend a hearing. Counsel took the view that the conclusion by the court *a quo* that there is no law which precludes an employer from summoning an employee who is on leave for a hearing was correct and cannot be faulted.

On waiver, Mr *Zhuwarara* relied on the case of *Pacprint (Pvt) Ltd v Kumbula and Ors* SC 67/17, to make the point that, by boycotting the hearing, the appellant disintitiled himself the right of challenging the outcome of the hearing or the procedure that was adopted during the hearing.

THE LAW

This Court has expressed itself very clearly on the effect of boycotting a disciplinary hearing by an employee. In *Moyo v Rural Electrification Agency* SC 4/14, ZIYAMBI JA expressed the following sentiments:

“The main point taken by Mr *Magwaliba* before us, was that the disciplinary proceedings were irregular and unfair in that the appellant was not heard in person and the proceedings were not conducted within fourteen (14) days as required by s 6 (2) of the Regulations. In our view the appellant, by deliberately absenting himself without leave from the hearing, waived his right to challenge the conduct of the disciplinary proceedings. He had the option, which he did not exercise, of seeking a postponement since he knew that he would not be available on the date of hearing. In these circumstances we do not feel that the failure by the respondent to strictly comply with the Regulations operated to vitiate the disciplinary proceedings.” (The underlining is for emphasis)

The view expressed above was reiterated by MALABA DCJ (as he then was) in *Zesa Enterprises (Pvt) Limited v Stevawo* SC 61/16 at p 5, thus:

“Where a person wilfully defaults from attending a disciplinary hearing, he or she would have waived the right to challenge the conduct of the proceedings. The rationale was aptly and eloquently captured by ZIYAMBI JA in *Moyo v Rural Electrification Agency* SC 4/14...”

See also *St Johns Educational Trust v Gardner* SC 26/08; *Hombarume v Zimra* SC 20/14. After discussing the above authorities in *Pacprint (Pvt) Limited v Kumbula*, *supra*, at p 6 MAVANGIRA AJA (as she then was), took the point even further. She stated:

“In casu the mere boycotting of their hearings by the respondents disentitled them from challenging the outcomes of the hearings or any procedure that many have been adopted during the hearings. By their non-appearance the respondents waived the right to defend themselves. On the other hand, by bringing the application for review they sought to defend themselves. In effect this translates to approbating and reprobating at the same time. The law does not countenance this prevarication. The two positions or stances are mutually exclusive and cannot co-exist.

The respondents having decided not to attend the disciplinary hearings and defend themselves, the court *a quo* ought not to have granted their application for review. By refusing to attend the hearings the respondents waived their opportunity to assert their rights. They thereby forfeited their right to challenge the findings and procedures of the disciplinary committees.” (The underlining is for emphasis)

The law is therefore clear that, while an employee has a right to be heard, such a right may be waived, as the employee cannot be compelled to attend the hearing. However, there are consequences for non-attendance. It means that the hearing may proceed in *absentia*. See *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S); *Munyuki v City of Gweru* 1998 (1) ZLR 182(S).

EXAMINATION

The appellant's position is that even though he committed what the employer regarded as a misconduct whilst on leave, he was untouchable as long as he remained on leave. He was in effect, outside the jurisdiction of the employer until he returned from leave.

His position is that, although he was notified of the hearing, the convening of the hearing was unlawful to the extent that he was entitled to ignore the hearing. According to the appellant, no consequences flowed from his non-attendance. **Judgment No. SC 63/24** **Civil Appeal No. SC 181/24** **10** convenience, once his leave ended and his legal practitioner returned from an international convention in the serenity of the mighty Victoria Falls, deal with the employer's concerns.

The conduct of the appellant amounted to a complete waiver whose consequences are spelt out in the authorities cited above. By failing to avail himself for the hearing, the appellant lost the right to raise whatever defences he may have had against the charges. He also lost the opportunity to raise the objection that the hearing should not have been convened during his annual leave. Such argument could only be raised at the hearing as a preliminary objection. The opportunity was lost and cannot be rediscovered on appeal. So complete was the forfeiture of rights that, by the authority of *Pacprint (Pvt) Ltd, supra*, which was binding on the court *a quo* whose judgement is sought to be impugned in this appeal, the court *a quo* could not even entertain and grant the relief that he sought. In this

case, the misconduct for which the appellant was charged, was committed during his vacation leave. It was within human experience that it would be dealt with at once and without delay. It had to be dealt with within the time frame prescribed for the resolution of such matters.

DISPOSITION

An employee who, while fully aware of a disciplinary hearing, elects to absent himself or herself from the hearing for whatever reason without leave, waives the right to challenge both the proceedings and the outcome of the disciplinary hearing. By such a waiver the employee takes the calculated risk that the hearing would be concluded adversely against him or her.

When that has happened, the employee cannot come to court seeking to challenge the proceedings and the outcome. There is no merit in the appeal.

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Regarding the costs, the respondent has been made to contest the appellant's claim, a claim made notwithstanding the clear position of the law. It has been unnecessarily put out of pocket. There is no reason why the costs should not follow the result.

It is for the foregoing reasons that the court issued the order referred to above.

GWAUNZA DCJ : I agree

CHITAKUNYE JA : I agree

Messrs Munyaradzi Gwisai & Partners, appellant`s legal practitioners

Messrs Coghlan, Welsh & Guest, respondent`s legal practitioners.

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