

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/22/14

HELD AT HARARE 21ST NOVEMBER 2013

CASE NO LC/H/755/11

& 14TH FEBRUARY 2014

In the matter between:-

NORTON TOWN COUNCIL

Appellant

And

EDSON MUPAMHADZI

Respondent

Before The Honourable R Manyangadze, Judge

The Honourable B.S. Chidziva, Judge

For Appellant

Mr O Shava (Legal Practitioner)

For Respondent

Ms G Nyamai (Legal Practitioner)

MANYANGADZE, J:

This is an appeal against an arbitral award that set aside Appellant's Disciplinary Committee's decision which found Respondent guilty of misconduct and imposed a penalty of demotion.

The brief facts of the matter are as follows;

The Respondent was employed by the Appellant as a Security Officer. Sometime in October 2010, the Appellant conducted an auction. The Respondent purchased a push cart at the auction. When the Respondent realised that the cart he had bought was broken, he swapped it for one that was in working order. He did not seek authority for the swap.

JUDGMENT NO LC/H/22/14

When the Appellant became aware of the swap, it repossessed the push cart, and subsequently charged Respondent with misconduct. The Respondent was charged with theft in terms of section 4 (d) of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15 of 2006. The particulars of the charge were that he had taken without authority or stolen a push cart from council.

A Disciplinary Committee hearing held on 8 December 2010, found him guilty of misconduct. The penalty imposed was demotion from the rank of Security Officer (Grade 11) to that of Corporal (Grade 8).

The Appellant appealed against the Disciplinary Committee 's decision to its Appeals Committee. The Appeals Committee dismissed the appeal on 30 March 2011, on the basis that it had been filed out of time and the decision of the Disciplinary Committee had not been communicated to the Respondent. It therefore upheld the decision of the Disciplinary Committee.

Respondent complained of being subjected to unfair labour practice, basing his complaint on the delays in the hearing process and the resultant penalty of demotion. The matter was referred to compulsory arbitration. In the arbitral award of 28 November 2011, it was held that Respondent's demotion constituted an unfair labour practice. The Arbitrator set aside the decision of the Disciplinary Committee and ordered Respondent's reinstatement without loss of pay and benefits.

The Appellant lodged its appeal against the arbitral award with this Court on 8 December 2011. The Appellant defaulted in filing its Heads of Argument. Its application for condonation of the late filing of Heads of Argument was dismissed on 6 August 2013. Appellant's Heads of Argument,

which had been filed on 17 September 2012, 5 months out of time, were struck off the record. Thus Appellant was barred in terms of Rule 19 (3) (b) of the Labour Court Rules.

When the parties again appeared on 8 October 2013, Appellant was allowed to file an application for condonation of late filing of Heads of Argument. This was obviously an error, in the light of Justice Muzofa's order of 6 August 2013, dismissing the application for condonation and striking off the Heads of Argument. None of the parties had brought this to the attention of the Court, resulting in the erroneous order.

The parties appeared on 21 November 2013, after the order of 8 October 2013 had been brought to the attention of the Court. The Court made an order rescinding its order of 8 October as one that was made in error in terms of section 92 C (1) of the Act, thus expunging the erroneous order from the record. The effect of this was to bring the parties to the position as at 6 August 2013, when Appellant's application for condonation was dismissed. This meant that Appellant remained barred, and the Court, acting in terms of Rule 19 (3) (b) proceeded to deal with the matter on the merits.

With the Appellant barred, the Court has to look at the grounds of appeal, and whatever submissions were made by the Respondent. The Respondent submitted that he would abide by his Heads of Argument.

The Appellant's grounds of appeal are as follows;

- “1. The learned Arbitrator erred at law in holding that the Labour Officer had jurisdiction to entertain the matter.
2. The learned Arbitrator misdirected himself and erred at law in

holding that he had jurisdiction to entertain the matter.

3. The learned Arbitrator grossly misdirected himself and erred at law in finding that the nature of claimant's complaint constituted an unfair labour practice in terms of the Labour Act.
4. The learned Arbitrator grossly misdirected himself and erred at law in finding the claimant was punished twice when in fact that was not the case."

The Respondent, in his Heads of Argument, raises a point *in limine*, that the appeal does not raise a point of law.

A look at the grounds of appeal shows that they raise issues of jurisdiction. One would have to look at what the law says in order to determine whether or not the Labour Officer and the Arbitrator had jurisdiction. In this respect, it is difficult to appreciate on what basis the point *in limine* was raised. The case cited by the Respondent is very clear on what constitutes a question of law. It is the case of **Muzuva v United Bottlers (Pvt) Ltd** (1) ZLR 217 (S), where, at p 220 Gubbay CJ defined a question of law as, *inter alia*

"... a question as to what the law is. Thus, an appeal or a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter."

In my view, an appellate Court considering whether or not a lower court or tribunal had jurisdiction over a matter, is seized with a question of law. It

has to consider what the law is on the matter of jurisdiction. I therefore find that Respondent's point *in limine* is without merit.

Turning to the merits of the appeal, the first issue that falls for determination is whether or not the Labour Officer, and consequently the Arbitrator, had jurisdiction to entertain the matter.

The Appellant made detailed submissions to the Arbitrator on the question of jurisdiction. The Arbitrator ruled that he had jurisdiction. After summarising the parties' arguments, he determined that both the Labour Officer and the Arbitrator had jurisdiction to hear the matter and stated his reasons as follows:

"... first, Section 93 of the Labour Act a Labour Officer is authorised to redress any dispute or unfair labour practice and secondly that he was not given reasons for the decision made by the Disciplinary Committee."

With due respect to the learned Arbitrator, he did not give due consideration to the submissions made by the Appellant (then Respondent) on this aspect, apart from merely summarising them.

It is significant to note, as per Arbitrator's summary of Respondent's (then Claimant's) submissions, the referral to the Labour Officer was not made in terms of Statutory Instrument 15 of 2006 but in terms of Section 101 (6) of the Labour Act. The dispute had been handled in terms of S.I. 15 of 2006. Instead of completing it in terms of that Statutory Instrument, as the applicable Code of Conduct, the Respondent referred the matter to another forum, that of the Labour Officer and subsequently the Arbitrator.

The Appellant referred the Arbitrator to the case of **Monday Watyoka v Zupco (Northern Division)** SC 87/05.

It is instructive to look at what the case says on the applicability of S 101(6) of the Labour Act. Cheda JA stated, at page 3 of the cyclostyled judgment:

“There are, therefore, three important conditions under which such a matter can be referred to a Labour Relations Officer or Senior Labour Relations Officer -

- a) the matter must not be one that is or is liable to be the subject of proceedings under a Code of Conduct;*
- b) the matter has not been determined within thirty days of the date of notification; and*
- c) where the parties to the dispute request it and are agreed on the issues in dispute.*

The learned judge of appeal went on the state, at page 4;

“subsection (6) of S.I. 101 provides for a referral of the matter to a Labour Relations Officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a Labour Relations Officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made.”

In casu, the Respondent referred the matter to a Labour Relations Officer after he had become aware of the determination by the Disciplinary

Committee. Notwithstanding the delay, a determination had been made, and was known by Respondent, when he took the matter to the Labour Relations Officer. S.I. 15 of 2006, in terms of which the disciplinary proceedings were held, provides for an appeal mechanism. The Respondent abandoned this and went straight to a Labour Relations Officer. The obligatory processes under S.I. 15 of 2006 had not been exhausted.

Appellant, in my view, correctly submitted to the Arbitrator that Respondent's allegations that he had not received reasons for the determination are no justification for using wrong procedures and forums. He could compel Appellant to furnish him with the reasons through legal processes. In fact, he could cite the lack of such reasons as a ground for appeal.

The Respondent chose not to refer the matter to a Labour Relations Officer at the time he felt that the Disciplinary Committee was taking too long to determine the matter. He waited until he became aware of the determination.

In **Watyoka's** case, *supra* Cheda JA, further stated, at page 5;

"The party concerned does not have to refer the matter to the Labour Relations Officer. That party may still wait for the determination to be made even after the thirty days period.

Accordingly, the period of thirty days does not refer to the time within which a valid determination should be made. The section does not say the determination should be made within the thirty days period. All it does is to restrict any concerned party from

rushing to refer the matter to a Labour Relations Officer before the expiry of the thirty days.

It follows that were the thirty days have lapsed the concerned party can choose to refer the matter to a Labour Relations Officer or wait for a determination to be made.

The thirty days therefore refers to the period after which the party concerned may complain, and does not make any determination made after its expiry a nullity.

In this case, the Appellant continued to attend the proceedings even after the period of thirty days had expired. He clearly intended to wait for the determination to be made. The section cannot be read as providing for a second determination over and above one already made by a Disciplinary Committee. Once there was a determination, the correct procedure was to appeal to the company's management, as provided in the Code of Conduct."

(Emphasis added)

Clearly, the present case is one where the Respondent should have scaled up his case to the next level of appeal as provided for in the Code of Conduct. Nothing prevented him from doing so. In the circumstances, the Labour Relations Officer, and consequently the Arbitrator, had no jurisdiction to hear the matter. The effect of this is to nullify the arbitral award, which had overturned the decision of the Appeals Committee. The Respondent's status reverts to that determined by the Appeals Committee. The Appeals Committee, as already indicated, upheld the decision of the Disciplinary

Committee, which found the Respondent guilty of misconduct and imposed a penalty of demotion.

In the result, it is ordered that;

1. the appeal be and is hereby allowed
2. The arbitral award granted by Honourable M Dangarembizi dated 28 November 2011 be and is hereby set aside
3. The decision of the Appeals Committee dated 4 November 2011 be and is hereby confirmed
4. Each party shall bear its own costs.

.....

R.F. MANYANGADZE
JUDGE

..... I agree

B.S. CHIDZIVA
JUDGE