

**IN THE LABOUR COURT OF ZIMBABWE
HELD AT HARARE 21ST NOVEMBER 2013
& 14TH FEBRUARY 2014**

**JUDGMENT NO LC/H/09/14
CASE NO LC/H/372/13**

In the matter between:-

CONSTANCE MUPOMBWA

Appellant

And

**THE MINISTER, MINISTRY OF EDUCATION,
SPORTS, ARTS & CULTURE**

Respondent

Before The Honourable Hove, J

Appellant

In person

For Respondent

Ms Kuipa (Civil Division)

HOVE, J:

The Appellant in this matter was employed by the Ministry of Education, Sports Arts & Culture as an acting Head.

She was charged with several acts of misconduct which included that:

She had misappropriated \$485.05 during the period 2009 to 2010.

She was not found guilty on some of the charges raised against her. She was however found guilty of some of the charges. She was reprimanded for all the other offences which she had been found guilty of. But she was dismissed for the offence of misappropriating \$485.05.

She noted an appeal against the decision to dismiss her.

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Her grounds of appeal are;

1. That the Disciplinary Authority erred by ignoring the Appellant's submissions that she was not given a chance to go through the books to try and trace the alleged shortfall if any.
2. The Disciplinary Authority misdirected itself by turning down the request for the Respondent's cash book and minute book thereby clearly stifling the Appellant's defence.
3. The Disciplinary Authority's determination was grossly unreasonable on the substantive merits and relied on the outcome of a criminal matter without considering that the Appellant lacked the skill of an Accountant, a job that she was never inducted/trained to do.
4. The Respondent erred by failing to allow the Appellant to address the Disciplinary Authority in mitigation.
5. The Respondent's decision to dismiss the Appellant was improperly exercised considering that the Respondent did not suffer any prejudice.
6. The Disciplinary Authority erred by relying on incredible and prevaricating witnesses who clearly were interested parties actuated by malice.

In finding the Appellant guilty of misappropriating US\$485.05 the Disciplinary Authority noted that an amount of US\$300 had been withdrawn without School Development Committee authority and that the Appellant had failed to prove to the Disciplinary Committee how she used the money. Two witnesses Mr Zimidzi and the School Clerk denied that the money had been used to purchase stationary and that there were receipts to this effect. They also took into account that Appellant had admitted that she had failed to

account for a further sum of US\$185.05. Finally the Committee took into account that Appellant had been convicted in the criminal court.

The Appellant submits in support of her grounds of appeal that she had requested that she be granted access to the office and the cash book to trace how the shortfall was arising but she was denied access to both the School and the records. It is therefore in this light that she had admitted that she could not account for the \$185.05.

The record does show that she requested to have access to the cash book and minute book but the Acting Head of the school refused to give the books to her to enable her to properly prepare her defence. The Appellant needed these books as they were important to prove her case during the hearing. The response was as follows;

“Your request for the cash book to take for your hearing has been turned down because I cannot guarantee its security. The minute book covering the period 2009 is not available and is expected not to have been returned by the Audit team.”

The Disciplinary Committee ought to have taken this into account and to have helped the Appellant to have access to these documents which she needed to defend herself in connection with the missing \$185.05. Clearly her admission that she had failed to account for the \$185.05 ought to have been looked at in the light of her failure to access documents that she wanted to use in her defence. The admission to failing to account for \$185.05 was therefore an admission which ought to have been interrogated by a Disciplinary Authority that was fair, impartial and genuinely seeking to establish the truth.

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As regards the \$300, the Appellant explained that the 200 was used for the purchase of stationary. The vouchers and receipts were kept at the school but Appellant was denied access to the school to retrieve the receipts. The \$100 was for bricks i.e. \$20 for transport and \$80 for the bricks. The bricks were received at the school and the receipts were taken by the audit team and not returned to the school. There is admission by the school authorities that some documents had indeed been taken by the auditors and not returned. The probabilities that Appellant was telling the truth were high.

The Appellant even explained that the stationary was bought from a stationary shop in Marondera and she was issued with a school slip. But the slip had no purchaser's name.

The shop owners even confirmed that the Appellant had indeed purchased school stationary in August 2010 but they could unfortunately not provide duplicate receipts as their system could not do this.

Appellant alleged that the two witnesses who testified against her were brother and sister, related to each other. They admitted that some purchase, had been made though they said it was during the 1st term and not the 2nd term. The purchases are still in the school. The witnesses could not have been telling the truth in view of the shop owner's confirmation that the purchases had been in August.

That these witnesses were not reliable witnesses can be noted from the fact that they refused that it was not them who had withdrawn money from the

bank when the signatures were remarkably similar. It was up to the Disciplinary Authority to disprove that it was one of the witnesses who had withdrawn in view of the signature. The witness most probably withdrew the money and had something to hide and was protecting himself by blaming the Appellant. He had a motive to lie against the Appellant. His evidence ought to have been approached cautiously.

Most importantly, Appellant stated that the circumstances leading to her promotion to the position of head of school were that the substantive headmaster left the school in the height of political disturbances in the area for political reasons. The deputy head refused to assume the position of headmaster and the Appellant was elevated to that position. This came with a lot of accounting responsibilities, but Appellant was not trained in managing the financial issues of the school and neither was she familiarized with the governing circulars and regulations. Her attention was never drawn to these. Hitherto she had been employed as a mathematics teacher and had no experience whatsoever in running a school.

The employer ought to have trained and equipped her with the necessary skills. She was just thrust into a position with responsibilities and unfortunately not trained to meet those responsibilities.

The employer is partly to blame for the Appellant's failure to run the financial affairs of the school in a professional manner. It is a principle of our law that no man should benefit from their own wrong. An employer cannot rely on misconduct it had induced as a basis for dismissing an employee. No one maintains an action arising out of his own wrong.

See in this regard the case of **Mushaya v Glens Corporation** 1991 (1) ZLR 162.

Surely it was wrong for the Respondent to elevate the Appellant to the position of head of school and do nothing to train or equip her in her new role.

The Respondent does not deny the fact that access to certain documents was denied. This was a serious misdirection on the part of the Respondent's officials. The Courts have on numerous occasions emphasised the importance of allowing an employee, facing allegations of misconduct, a fair hearing by among other things allowing her access to documents that she would need to prepare her defence see **Chataira v Zesa** SC 83/01.

The Respondent states that the circumstances of her appointment and the fact that she was not trained is irrelevant. It argues that it was her responsibility to familiarize herself with all relevant circulars once she had accepted the position of head of school. She could have approached provincial offices requesting for training in financial accounting. Respondent says that she ought to have sought advice and appropriate circulars from experienced persons.

This is neither reasonable nor feasible, how could she identify were she lacked if she had no knowledge. It was the responsibility of the Respondent to equip her. Substantive fairness means the reason for termination must be valid by reference to incapacity and must be justified by consideration of factors surrounding each case. These include the nature and cause of the

incapacity. The degree and cause of incapacity. The employer should also provide adequate instruction, training and guidance.

See in this regard the case of **Quest Motor Corporation (Pvt) Ltd v Nyamukura** 2000 (2) ZLR 84 (H).

Appellant also alleges that the audit was conducted while she was on leave and was not called to come and explain. She also said that she could not have gone to the provincial offices to seek for training as there was no one at the offices. This was not disputed. Audit findings contradicted the testimony of the key witness against Appellant in that while the witness said that Appellant had forged his signature to withdraw money and such money was not used to make any purchases at the school, the audit team which had access to the receipts confirmed that Appellant had made the purchases.

The facts generally support the Appellant. It was the Disciplinary Committee that did not fairly consider the issues nor give the Appellant an opportunity TO have access to all the documents she would have wanted to help her to prepare to argue her case.

In the result the conviction on the allegation that she failed to account for \$485.05 cannot be sustained. 300 USD had been used to purchase stationery and this was confirmed by the auditors. 80 USD had been used to purchase bricks and they were there at the school. 20 USD had been used for transport and the receipts had been removed from the school by the auditors.

I accordingly order as follows,

The decision to dismiss the Appellant be and is hereby set aside.

The Appellant is to be reinstated into her position as a Mathematics teacher with effect from the date of this decision.

That there be no order as to costs.

Civil Division, Respondent's Representatives