THE LABOUR COURT OF ZIMBABWE JUDGMENT NO. LC/H/363/23
HARARE 11 SEPTEMBER,2023 CASE NO. LC/H/292/21
AND 11 DECEMBER, 2023

In the matter between: -

Zimbabwe Revenue Authority Appellant

Versus

PHILLIP MUJURU Respondent

Before the Honourable L. Hove, Judge:

For appellant Mr. T. Maringire
For respondent Mr. N. Mashizha

This is an appeal against the decision of a Labour officer who found that the respondent was not guilty a of misconduct charge of refusal to obey a lawful order which had been preferred against him by the appellant.

Facts

the background facts are that the respondent was an employee of the appellant. The appellant alleged that the respondent as its employee was bound by Human Recourses policies and procedures that would be in force from time to time. On 30 August 2018 a loss control lifestyle audit policy which was a human resources policy was circulated to all of the appellants employees.

The policy allowed loss control officers to interview and question employees who would have been identified for a lifestyle audit.

The loss control officer acquired the respondent's bank details and requested the respondent to explain the source of income in his NMB bank account. This was said to be in terms of clause 6.2 (b) of the lifestyle audit policy.

The respondent believing that the employer had violated his rights by accessing, without his authority, his bank details initially enquired as to how the appellant had accessed his banking details. He explained through his lawyers how accessing his banking details had been an infringement of his right to privacy. He further explained that it was illegal to access his private banking details and the subsequent instruction to explain was illegal as it was flowing out of an illegal act.

The appellant then preferred the charges of refusal to obey lawful instructions.

The grounds of appeal

The appellant was not happy with the decision of the tribunal aquo and noted an appeal to this court.

It raised two grounds of appeal as follows;

1. The Labour Officer erred and misdirected himself in finding that the instruction given by the appellant was an unlawful instruction and,
2. The Labour Officer erred and misdirected himself in finding that the bank account schedules had been obtained illegally.

The grounds of appeal will be considered ad seriatim.

<u>Whether or not the Labour officer erred and misdirected himself in finding that the instruction given by the appellant was an unlawful instruction.</u>

That the respondent had a duty to obey lawful instructions given by his employer is common cause see **Innscor v Gwatidzo SC 5/15.** The respondent does not argue that he had no duty to obey lawful instructions. He instead argues that the instructions given by the appellant was not a lawful instruction. The case of **Matereke v CT Bowring and associates (pvt) Ltd 1987(1) ZLR 206 (5)** outlines what constitutes a lawful instruction but it does not address the issue that presents itself for determination in casu. The issue that arises is whether or not the instruction was lawful and this issue is raised by the respondent on the basis that the appellant had unlawfully acquired his personal banking details. The instruction to explain unlawfully acquired bank schedules of the respondent's personal bank details was unlawful.

The appellant avoids addressing the issue of whether or not it acquired the bank details lawfully. The tribunal aquo made a factual finding that the schedules had been unlawfully acquired. The appellant in my opinion aught to have focused on that issue and show that the instruction was lawful because the bank statements were lawfully acquired. This issue did not arise and was not discussed in the cases that the appellant referred the court to. The case of **Matereke v CT Bowing and associates (pvt) Ltd 1978 (1) ZLR 206 (5)** discussed what constitutes a lawful instruction and gives examples of what may not constitute a lawful order. In my considered view, the examples given by the supreme court are not and were not meant to be exhaustive.

The court a quo's findings being challenged in casu is that an order that is based in an illegal act cannot be legal. The tribunal aquo made a factual finding that the instruction was not a lawful one, this court sitting as an appellate court cannot interfere with factual findings unless it is demonstrated that in coming to that factual conclusion, the appellant grossly erred and came up with a decision that was irrational. See in this regard the case of **Hama v National Railways of Zimbabwe 1996 (1) ZLR 664**. An appellate court will not interfere with a decision of a trial court based on a finding of fact unless, having regard to the evidence before it, the finding complained of is irrational.

The respondent submitted that the lifestyle audit policy was circulated in 2018 and the respondent was being asked to explain bank schedules which dated back to a time the lifestyle audit policy had not been signed and circulated to the employees. The lifestyle audit policy could not be applied with retrospective effect. There is in law a strong presumption that an enactment does no operate retrospectively to remove or in anyway impair existing rights or obligations unless such construction appears clearly from the language used. See **Zimphos v Matora SC 44/05**. The lifestyle policy does not have any retrospectivity effect and it has not been argued that it has. The representative for the appellant argued that the lifestyle audit had been in place before its circulation among the employees. If this was the correct position there would not have been a need to refer to a latter date in 2018. the court does not accept that the lifestyle policy was in place prior to 2018. I

therefore accept the employee's argument that even if one were to accept that the respondent was bound by the lifestyle audit policy, the request was still unlawful because it sought to be applied retrospectively.

The respondent further argued that for the policy to be binding, it must have been agreed between the parties. The appellant could not have unilaterally imposed it on its employees. This argument is currently pending before the high court and also before the relevant Ministry. I will not therefore pronounce myself on the legality or otherwise of the policy seeing that the current dispute can be resolved on the basis that the policy could not have a retrospective effect and for that reason, it could not have been a lawful order to require an employee to explain under those circumstances. Further, the applicant has not shown that it accessed the respondents bank details lawfully therefore the instruction was not a lawful one.

I find that there is no basis in law for this court to interfere with the findings of the tribunal aquo. The ground has no merit and cannot succeed.

<u>The ground of appeal number 2:</u>

<u>The Labour officer erred and misdirected himself in finding that the bank account schedules had been obtained illegally.</u>

The tribunal a quo clearly stated that section 44 (1) of the Income tax Act [chapter 23:06] (the Act) was not applicable. The evidence on record that is the respondent's affidavit clearly stated that the employer had obtained the bank details after mispresenting to the bank that these could be required in terms of section 44(1) of the Act. This was not disputed or challenged before the tribunal a quo. Further the respondent's own lifestyle audit policy referred to the Act. The tribunal aquo did not dream of section 44(1) of the act, it did not go on a floric of its own.

The decision of the tribunal a quo can not be challenged on the basis of what was not placed before it.

The appellant has not shown that in coming to the conclusion that the schedules had been obtained illegally, the tribunal a quo was grossly unreasonable. There is therefore no basis for me to interfere with the decision of the tribunal a quo.

<u>Whether or not the tribunal aquo cold order reinstatement without making provision or ordering the payment of damages in lieu of reinstatement</u>

The position is trite that this is a misdirection. An employer cannot be forced to retain in its employ an employee that it does not wish to retain.

In the result, the appeal succeeds partially. The following order is made;

<u>ORDER:</u>

1. The appeal partially succeeds.
2. The decision of the tribunal aquo is amended to read as follows;
   a) The appeal is dismissed in respect of grounds of appeal numbers 1 and 2. The appellant is to be reinstated into his former position without loss of salary or benefits with effect from the date of suspension.
   b) Should reinstatement no longer be tenable, the appellant shall pay the respondent damages in lieu of reinstatement which damages shall be agreed between the parties or quantified by the Labour Officer.
3. The appellant bears the respondent's costs.

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JUDGE