

REPORTABLE (45)

**JAINOS ZVOKUSEKWA
v
BIKITA RURAL DISTRICT COUNCIL**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, MARCH 6, 2014 & JULY 22, 2015**

F. Mahere, for the appellant

L. Mazonde, for the respondent

GARWE JA

[1] In a judgment delivered on 16 April 2013, the Labour Court set aside an award made by an arbitrator reinstating the appellant to his former position without loss of salary or benefits. In its place, the Labour Court substituted a finding that the appellant was guilty of gross negligence and withholding information. In consequence of that finding, the Labour Court imposed the penalty of dismissal and ordered that each party pays its own costs.

[2] This appeal is against that order.

FACTUAL BACKGROUND

[3] The respondent is a Rural District Council set up in terms of the Rural District Councils Act, [*Chapter 29:13*]. Like all other local authorities, it is constituted by elected councillors and salaried employees, the latter falling under the aegis of a Chief Executive Officer.

- [4] The appellant was employed by the respondent as its Executive Officer, Finance. In this position, he was the financial advisor to the respondent on all financial issues. He was also responsible for the purchase of all council assets and controlled all council income and expenditure.
- [5] In a routine audit of council books, auditors found that statements were not being produced timeously. They recommended that the respondent purchase more computers. Following a meeting of the respondent's finance committee, it was resolved to buy four (4) computers for the finance department and one for the audit department. The four computers for the finance department were to enhance council operations in the income, debtors and creditors sections whilst the main server was to consolidate and record daily transactions of all sections. As finance officer, the appellant was tasked with the responsibility to ascertain the computer specifications necessary for this task and to make recommendations on the suppliers.
- [6] The appellant prepared a document for consideration by the finance committee. The document, which was presented to the finance committee on 4 February 2005, made two recommendations on the hardware specifications. On the server minimum specifications, the appellant recommended a "Compaq Pentium 4-IBM, Dell". On the workstation minimum specification, he recommended "Compaq Dell/Clone/IBM Microsoft Windows 2000 Professional TM/Windows XP." (underlining is for emphasis)
- [7] In his presentation to the finance committee, the appellant reported that he had received nine quotations, that he had investigated the companies concerned and that, after due diligence, he recommended that the tender be awarded to a company called Powertec Distribution (Pvt) Ltd ("Powertec").

- [8] In its tender, Powertec had quoted the price for five IBM *Clone* Pentium IV computers. That Powertec had tendered to supply clone computers was not disclosed by the appellant during the presentation before the finance committee.
- [9] Although a member of the finance committee – a councillor - expressed some disquiet on whether the recommendation by the appellant had been prepared after due diligence, the finance committee, following assurances by the appellant that he had carried out due diligence and that the company was reputable, resolved to award the tender to Powertec.
- [10] The computers were delivered by Powertec, the delivery note reflecting that what had been delivered were clone computers. The appellant authorised their payments without reference to the Chief Executive Officer. Payment was made on the same day that the computers were received.
- [11] It further appears from the papers that the respondent was not entirely happy with the performance of the computers. Consequently, the respondent engaged the services of an information technology expert who advised council that the computers procured were clones and that clones were not original computers but were assembled using parts from different computers. Attempts to locate Powertec were in vain. The box number reflected on the quotation was found to belong to the Anglican Church. The respondent concluded that Powertec was a briefcase company and that its physical location could not be traced.
- [12] Following this development, on 12 May 2005, the respondent charged the appellant with the following:-

- (a) negligence, in that the appellant had failed to take reasonable care to inspect the computers received to ensure they complied with technical specifications, that he had proceeded to pay Z\$25 million on a voucher which described the computers as clone, that he had failed to submit the payment voucher to the Chief Executive Officer for his endorsement and lastly, notwithstanding that he had not signed the payment voucher, released payment.
- (b) Withholding information in that he had inserted a password in the computer system which he refused to disclose on request, that he had collected the tender documents and minutes of the tender board meeting from council offices and had refused to return them, that he had refused, when requested, to disclose the password for the networked computers, by the Chief Executive Officer.
- (c) Fraud, in that he misrepresented that he had thoroughly investigated the background of the company Powertec and had recommended that it be awarded the tender when in fact the company was not operational but was a shelf company.

[13] The disciplinary hearing took place before the council disciplinary committee on 6 July 2005. The committee found the appellant guilty of all three charges and consequently determined that he be relieved of his duties in terms of the Code of Conduct for the Council.

PROCEEDINGS BEFORE THE ARBITRATOR

[14] The appellant appealed to an arbitrator against the dismissal. Whether or not this was the correct procedure is not an issue before me. In essence, the arbitrator found

that the computers received were in accordance with the quotation. He further found that, since the appellant had not previously received a warning, he was not guilty of negligence. On the charge of withholding information, he found that the computers in question were still functional and, if not, could have been returned to the supplier. On the allegation of fraud, he found that no evidence of such fraud had been proffered and that, to the contrary, council operations had been enhanced following the procurement of these computers.

[15] In consequence he found that the verdict of guilty of misconduct was unlawful and accordingly set the verdict aside and ordered his reinstatement without loss of salary and benefits from the date of his dismissal.

RESPONDENT'S GROUNDS OF APPEAL BEFORE THE LABOUR COURT

[16] Dissatisfied, the respondent appealed to the Labour Court. In view of the grounds of appeal raised in this appeal, it is necessary to restate those grounds. The respondent's grounds of appeal may be summarised as follows:-

- (a) That the arbitrator erred in concluding that, since the appellant was supervised by the Finance Committee and the Chief Executive Officer, he was not responsible for the events that subsequently unfolded following the award of the tender.
- (b) That the arbitrator erred in finding that, in terms of the quotation, council wanted clone computers and not new IBM computers.
- (c) That the arbitrator erred in concluding that the computers purchased had been approved by the Finance Committee in circumstances where such committee had acted on the appellant's advice.

- (d) That the arbitrator erred in concluding that, since the appellant had not previously been given a warning, the charge of negligence was not sustainable and the appellant was therefore not guilty.
- (e) That the arbitrator erred in concluding that the clone computers were still functional in the absence of evidence. The computers were utilised for less than six months and it became necessary for council to buy new IBM computers.
- (f) That the arbitrator erred in concluding that if the clone computers had been defective, they should have been returned to the supplier, when it was the respondent's case that the supplier was a briefcase company that had given a non-existent address.

FINDINGS BY THE LABOUR COURT

[16] In a judgment delivered on 16 April 2013, the Labour Court set aside the arbitrator's award and in its place substituted a finding of guilty of gross negligence and withholding information. The Labour Court found the appellant not guilty of fraud. It however imposed a penalty of dismissal.

[17] In arriving at the above conclusions, the Labour Court made a number of conclusions:

- 17.1. First, that although the grounds of appeal by the respondent largely raised issues of fact, the "bottom line" was that the respondent was alleging that the arbitrator had misdirected himself on the facts and had, consequently, come to the wrong conclusion.

- 17.2. That the appellant passed the documents for payment without the authority of the Chief Executive Officer and paid for them immediately without such authority.
- 17.3. That the computers failed to meet council standards. As the suppliers could not be traced, Council was forced to purchase more computers.
- 17.4. That the arbitrator had misdirected himself in concluding that, because the appellant had never previously been warned, he was therefore not guilty of negligence.
- 17.5. That the appellant had admitted that he had released payment without signing the payment voucher.
- 17.6. That the arbitrator made a finding on the functioning of the computers without evidence on that aspect.
- 17.7. That on the evidence, negligence had been proved. So was the charge of withholding information. The charge of fraud was not supported by the evidence.
- 17.8. That the negligence was gross and accordingly that finding was substituted.
- 17.9. That a penalty of dismissal was, in the circumstances, justified.

APPELLANT'S GROUNDS OF APPEAL IN THIS COURT

[18] Dissatisfied, the appellant noted an appeal to this Court against the decision of the Labour Court. He has attacked the decision on various grounds:

- 18.1. That the appeal before the court *a quo* was based on issues of fact and not law and therefore incompetent. Relying on the judgment of this Court in *Reserve Bank of Zimbabwe v*

Granger & Anor SC34/01, he submitted that no allegation had been made that there was a misdirection on the facts which was so unreasonable that no sensible person applying his mind to the facts would have arrived at such a conclusion.

- 18.2. That there was no basis upon which the Labour Court could interfere with the finding by the arbitrator that the appellant was not guilty of withholding information as no competent ground had been raised in respect of it. In any event, the conclusion was drawn in the absence of a finding that there was an error in the exercise of discretion by the arbitrator.
- 18.3. That the finding by the court *a quo* on the issue of negligence, premised as it was on a ground which was meaningless, was incompetent.
- 18.4. That the penalty of dismissal was ill-founded as the requirements of gross negligence were not met.

RESPONDENT'S SUBMISSIONS ON APPEAL

[19] The respondent does not agree that the court *a quo* misdirected itself. It has submitted as follows:-

- 19.1. On the charge of negligence the finding by the court *a quo* that the arbitrator had misdirected himself could not be faulted as there was no need for previous warnings to be taken into consideration in determining whether or not the appellant was guilty of misconduct.
- 19.2. On the charge of withholding information the court *a quo* was correct in finding that the insertion of a password in the

networked computers, the refusal to disclose such password, the collection of tender documents and refusal to surrender them, constituted withholding information.

APPEAL TO THIS COURT MUST BE ON A POINT OF LAW

[20] It is correct, as submitted by the appellant, that an appeal to this Court must be based on a point of law. What constitutes a point of law has been stated and restated in a number of decisions of this Court. See for example *Muzuva v Limited Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S); *Hama v NRZ* 1996 (1) ZLR 664; *RBZ v Granger & Anor* SC 34/01.

[21] It is also correct that in *RBZ v Granger & Anor* (supra), this court stated that if an appeal is to be related to the facts, “there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented.”

[22] In my view, the remarks made in *Granger’s* case (supra) need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. If it is

clear that an appellant is criticising a finding by an inferior court on the basis that such finding was contrary to the evidence led or was not supported by such evidence, such a ground cannot be said to be improper merely because the words “there has been a misdirection on the facts which is so unreasonable that no sensible person would have arrived at such a decision” have not been added thereto. If it is evident that the gravamen is that an inferior court mistook the facts and consequently reached a wrong conclusion, such an attack would clearly raise an issue of law and the failure to include the words referred to above would not render such an appeal defective. After all, there is no magic in the above stated phrase and very often the words are simply regurgitated without any issue of law being raised. See, for example, the case of *Sable Chemical Industries v David Peter Easterbrook* SC 18/10 where it was noted that the words “erred on a question of law” are sometimes included in grounds of appeal but without any question of law actually being raised.

WHETHER APPEAL BEFORE THE COURT A QUO WAS PROPER

[23] The issue that arises is whether the court *a quo* was correct in concluding that, although inelegantly cast, the grounds of appeal raised an issue of law.

[24] I am inclined to agree with the court *a quo* that indeed the complaint raised in the appeal was that the arbitrator had misdirected himself on the facts and had consequently arrived at a wrong conclusion. Amongst other things, the reference by the arbitrator to the absence of past warnings resulted in him finding the respondent not guilty of negligence on that basis alone – a finding based on a clear misunderstanding of the facts. The finding that the computers were functioning normally and that council operations were enhanced was made on no evidence at all.

[25] Clearly therefore, whilst greater care should have been taken in drafting the grounds of appeal, some of the grounds certainly raised issues of law based on the allegation that the decision was either irrational or not supported by the evidence. I am therefore satisfied that the matter was properly before the court *a quo*. However I also agree that not all of the grounds raised issues of law.

DISPOSITION

[26] The charge of negligence which was upheld by the court *a quo* was based on the conduct of the appellant in processing and receiving clone computers without advising Council and in effecting payment for the clone computers without the authority of the Chief Executive Officer.

[27] Those facts were largely not disputed by the appellant. The decision by the court *a quo* to substitute a verdict of guilty of negligence cannot, in these circumstances, be said to be irrational or wrong.

[28] The court found the negligence to be gross on the facts. Considering the appellant's crucial role in the administration of council funds, that finding cannot be said to be irrational.

[29] As regards the finding that the appellant was guilty of withholding evidence, I agree with the appellant that this was not an issue that had been raised by the respondent in its grounds of appeal against the award made by the arbitrator. Accordingly, it was not competent for the court to deal with that issue *mero motu*.

[30] Given the finding that the appellant was guilty of negligence and that the negligence was gross, I find no basis for interfering with the order by the court *a quo* upholding the employer's decision to dismiss the appellant.

[31] The appellant occupied a position of responsibility within Council. In financial matters, he was the expert and under obligation to properly advise council so that correct decisions could be made. As observed during the disciplinary proceedings, councillors who constitute the finance committee are politicians and not experts at financial issues and tender procedures. They have to rely on advice given by the appellant as to who should be awarded a tender. That the quotation by Powertec included clone computers was never brought to their attention and it is clear, from a consideration of all the facts, that they may have thought that they were buying new, original, brand computers. The clone computers were delivered and irregularly paid for the same day. It is also pertinent to note that the specifications for the server required an original brand name computer, viz "Compaq Pentium 4 –IBM, Dell" and not a clone.

[32] In my view, the appellant cannot complain that the penalty of dismissal was inappropriate. The Council was certainly entitled to take a serious view of the manner in which he had misconducted himself.

[33] The appeal must therefore succeed only to the extent that the verdict of guilty of withholding information should be set aside.

[34] In the result, it is ordered as follows:

1. The appeal is allowed to the extent that the verdict of guilty of withholding information is set aside.

2. The appeal is otherwise dismissed with costs.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Matutu Kwirira & Associates, appellant's legal practitioners

Chuma Gorejena & Partners, respondent's legal practitioners