REPORTABLE (21)

ALPHA MADZIMA
v
MARANGE RESOURCES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, MAVANGIRA JA & BHUNU JA
HARARE: NOVEMBER 4, 2016 & FEBRUARY 22, 2019

L Uriri, for the appellant

I Ndudzo, for the respondent

MAVANGIRA JA: This is an appeal against the whole judgement of the Labour Court, Harare, handed down on 6 March 2015.

BACKGROUND

The appellant was employed by the respondent as a Finance Manager in the year 2010. When the events that gave rise to this matter occurred in October 2012, he was the Acting Chief Finance Officer.

On 3 October 2012, the appellant received a phone call which was later followed up by an email from Tetrad Investment Bank Limited (Tetrad). In both instances a request was made of him to write a letter of undertaking. The letter was to be written on the respondent's letter head. The email reads:

"**DD Mining letter of undertaking …**

Above supplier holds an order from yourselves which we have financed. We would be grateful if you could sign the attached letter of undertaking to pay to Tetrad on your letterhead."

The email was written by one Toddy Muchongwe, General Manager Corporate Banking at Tetrad and was addressed to the appellant. The body of the draft letter of undertaking that was attached to the email reads:

"**Undertaking to direct all payments to Tetrad account number ….**

Acting under instructions received from … and pursuant to an ongoing contract/ arrangement between ourselves and … where we regularly place orders of varying quantities of … which we receive on account, we hereby irrevocably and unequivocally undertake to direct all payments as they fall due to the account held in your books for all goods received in good order and accepted by ourselves.

The details of the account to which all payments will be directed are as follows:

Account Name :

Account Number :

Branch :

We also undertake that there will not be a variation to the payment account unless we have received written instructions from Tetrad Investment Bank authorising such a variation.

Should any circumstances arise to prevent or unduly delay the transfer of any funds due for payment into the said account necessary advices shall be given to the bank and in the absence of such advices the bank shall be entitled to follow up and obtain any confirmations from ourselves as may be deemed necessary.

This letter is not transferable and will remain valid for as long as there are outstanding payments for goods received from … or unless otherwise cancelled by the bank and written confirmation has been received."

Also attached to the email, together with the draft letter of undertaking was a purchase order purporting to emanate from the respondent company to DD Mining and General Suppliers (Pvt) Ltd for an item described as "CE-125 PERIPHERAL PUMP" with a grand total value of "125 625.02"

The appellant allegedly consulted his immediate superior, one Simbisayi Wilfred Munemo, who gave him authority and the appellant proceeded to put the Tetrad draft on the respondent's letter head and he signed it. The appellant filled in the blanks in the draft letter of undertaking. Having done this the letter now reflected that the writer was "acting under instructions received from DD Mining General Suppliers and pursuant to an ongoing contract/ arrangement between ourselves and DD Mining and General Supplies." He filled in the account name as "DD Mining and General Supplies." He also filled in the account number and the branch name. He also filled in the blank in the last paragraph of the draft letter with the name "DD Mining and General Supplies" The letter was sent to Tetrad. Thereafter, Tetrad phoned the appellant's superior to confirm that the letter of undertaking was in order.

In September 2013 the appellant and his immediate superior were called by the police to give statements in relation to an alleged fraud relating to the financing arrangement of DD Mining and General Supplies by Tetrad. The immediate superior apparently stated that he had consulted with the Chief Executive Officer who saw nothing amiss about the appellant's conduct in the letter of undertaking.

In January 2014 the respondent company's auditor was called by the Police in connection with pending fraud cases relating to the respondent. At the meeting the auditor was briefed about the letter of undertaking that was written to Tetrad. The auditor briefed the then Acting Chief Executive Officer who then raised two charges of misconduct against the appellant.

The appellant was charged by the Acting Chief Executive officer with fraud and also with acting in a manner that is inconsistent with the fulfilment of express or implied conditions of his contract of employment as defined in sections 4(d) and 4(a) respectively, of the Labour (National Employment Code of Conduct) Regulations, 2006, SI 15 of 2006. The letter of suspension stated *inter alia*, that

> "The Company (Marange Resources Private Limited) (sic) became aware in January 2014 that on 3 October 2012 you wrote and issued a letter of undertaking to Tetrad Investment Bank Limited on behalf of DD Mining and General Supplies. It is a common cause fact that you were fully aware that the basis upon which the letter of undertaking was made had nothing to do with Marange Resources (PVT) LTD. It is common cause and clearly known by you that the purchase order upon which you acted upon (sic) bears no resemblance to the Marange resources (PVT) LTD order book/form. In your position you clearly know that Marange Resources (PVT) LTD does not trade as Marange Diamond Fields but you proceeded to commit the company to be tied to such an order and the associated transaction that occurred. It is further common cause fact that you were fully aware that at no time in the history of Marange Resources (PVT) LTD that DD Mining and General Supplies had conducted business with Marange Resources (PVT) LTD."

With specific reference to the charge preferred against the appellant in terms of s 4(a) (any act or conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment), the letter further stated:

> "… your position has a contractual and legal duty to act and conduct yourself honestly and solely in the interests of the Company. You wrote and issued a letter of undertaking that bound the Company to a financial transaction which had nothing to do with the Company. You breached the express and implied term of your contract of employment in relation to trust and integrity. You occupy a position of trust and your act and conduct in this matter was inconsistent with the above as you breached the trust bestowed upon you by the Company to manage and protect its interests. Your act and conduct in this matter has demonstrably lacked integrity to an extent of putting the company to serious risk, disrepute and irreparable damage."

The matter went before a Disciplinary Committee which found the appellant guilty of the latter charge, conduct inconsistent with express or implied provisions of the contract of employment. The appellant was consequently dismissed from employment.

Dissatisfied with his dismissal, the Appellant referred the matter to a Labour Officer for conciliation in terms of s 8 of the Labour (National Employment Code) Regulations, 2006, S.I. 15/2006 (the National Code of Conduct). The matter was heard by a labour officer in terms of s 93 of the Labour Act. Following unsuccessful conciliation, the matter was referred to arbitration in terms of s 98 of the Labour Act.

The arbitrator agreed that an infraction had indeed been committed by the appellant and confirmed his conviction. He however set aside the penalty of dismissal and replaced it with a final written warning valid for 6 months and he reinstated the appellant.

Disgruntled with the arbitral award, the respondent appealed to the Labour Court. Equally dissatisfied with the award, the appellant also filed a cross appeal on eight grounds. These grounds of appeal are not material to the determination of this appeal.

The Labour Court upheld the main appeal and dismissed the cross appeal. The arbitral award was set aside and substituted with the following;

> "The penalty of dismissal of the respondent be and is hereby confirmed and the reinstatement of the respondent be and is hereby set aside."

THIS APPEAL

This is the finding that is the subject of this appeal. Two issues arise from the lengthy grounds of appeal relied on by the appellant. These are:

1. Whether or not the Labour Court was correct in confirming the finding of guilty on the second charge preferred.
2. Whether or not the Labour Court had a basis on which to interfere with the decision of the arbitrator on the issue of the appropriate sentence.

I now deal with these questions *seriatim*.

1. **Whether or not the Labour Court was correct in making a finding of guilty on the second charge preferred.**

The appellant maintains that the finding by the disciplinary hearing that he is guilty of "any act or conduct inconsistent with the fulfilment of the express or implied conditions of one's contract of employment" was erroneous as there was no evidence to justify such a finding.

It is common cause that at the material time, the appellant was the Acting Chief Finance Officer of the respondent. Although the appellant's contract of employment was not produced at any stage and is not part of the record, it is trite that all contracts of employment contain both express and implied provisions. Every contract of employment is hinged on a relationship of trust between the employer and the employee. This relationship of trust is an implied provision in any employment contract even if it may not be expressly stated. In signing a contract of employment, an employee undertakes to carry out the express and implied mandate of the employer.

It is an essential principle in employer and employee relationships that an employee has a duty to safeguard the interests of the employer. In *casu,* the appellant's position as the Acting Finance Officer imposed on him the duty to exercise due care and diligence. During the disciplinary hearing the appellant reportedly conceded and confirmed that it was his duty and role to advise the respondent company's Finance Department.

This Court has on a number of occasions pronounced on an employee's conduct that is inconsistent with the express or implied conditions of the contract of employment. One such case is *Standard Chartered Bank Zimbabwe Limited v Michael Chapuka* SC 125/04 where the following is stated at page 7 of the judgement:

> "Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee … (emphasis added)

The Appellant conceded that the letter that gave rise to the litigation between the parties was written at Tetrad's bidding and initiative. The contents of the letter were authored by Tetrad. The appellant was an employee of the respondent and not of Tetrad. The appellant's conduct in writing the letter and signing it amounts to him acting in pursuance of the interests of a third party, which third party is not included in the employer-employee relationship that he had with the respondent. This is so because by appending his signature to the letter of undertaking, the appellant vouched for the truthfulness of the contents of the letter. He vouched for the correctness of the allegations in a letter that did not emanate from or benefit his employer. In addition, he did this without ascertaining the truth of the contents of the letter in circumstances where other departments of the respondent company would have been in a position to advise him accordingly.

It is undisputed that the appellant did not verify the contents of the letter in question, in particular, that there was an ongoing contract between the respondent and DD

Mining and General Supplies. Appending a signature to a letter that communicated what had not been verified by the appellant was not only negligent conduct on his part but it also exhibited a lack of the diligence that would be expected of an employee of his level and in fact, of every employee of whatever level. The best interests of an employer can only be achieved if employees diligently verify any undertaking that binds their employer. As was aptly stated in the Namibian case of *Helao Nafidi Town Council v Shivolo* [2016] NAHCMD [2016] at para 70:

> "The drift of Roman-Dutch and English authority is to the effect that the employer-employee relationship imposes a duty on the employee to act in the employer's best interest. The employee has a duty not to work against the employer's interests. **The duty arises even though there is no express term in the contract of employment to that effect.** As has been aptly stated in Lesotho Highlands Development Authority v Sole, the liability for breach of a fiduciary duty is not necessarily delictual or contractual but sui generis and will depend on the particular circumstances of each case. At the core is the principle that a person placed in a fiduciary duty will be in breach of his/her duty by failing to act bona fide in the interests of the employer." (emphasis added)

The question arises whether, despite the alleged assent by his superior, the appellant ought to be said to have not acted in the best interests of the employer when he signed the letter of undertaking without verifying its contents. The answer ought to be in the negative. By failing to verify the contents of the letter of undertaking before appending his signature, the appellant did not act in the interests of the employer. It was his signature that was to be appended on the letter and not that of his superior. There was therefore a duty on him to verify the contents that he signed for. In any event, it was not the appellant's case that his superior verified the contents of the letter of undertaking.

The fact that the appellant sought and obtained approval from his immediate superior did not take away from him the duty to verify information that had the effect of

binding his employer. The immediate superior's approval did not amount to verification of the content of the letter.

The following excerpt from the Disciplinary Authority's determination is apposite insofar as it reflects how it arrived at and justified the finding of guilty:

> "2. With respect to s 4 (a) the Respondent is a Senior Manager who acknowledges that he also has an advisory role to his Supervisors and he should have conducted himself honestly and diligently in the interest of the organisation:
> 2.1 He ought to have verified that Marange Resources had an existing order and Contract with DD Mining,
> 2.2 The letter of undertaking should have had Marange Resources References, The respondent merely printed a document without applying his mind to it
> 2.3 The fact that Mr Munemo Knew about this transaction does not make it right, and it does not absolve Mr Munemo of answering charges if the company chooses to do so,
> 2.4 The Respondent should take full responsibility for the letter of undertaking and its consequences. He cannot run away from his signature…… the act of the respondent is tantamount to gross negligence, in writing a letter of Undertaking on behalf of Marange Resources without verifying facts from other departments. In his evidence he failed to take Responsibility for what the letter was stating."

Viewed in the light of the above, the confirmations by the arbitrator and subsequently by the court *a quo* of the verdict of guilty by the Disciplinary Authority cannot be faulted.

In the result, the appellant was therefore correctly found guilty of the misconduct of an act or conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment. The court *a quo* thus correctly found that it could not interfere with the finding of guilty with which the appellant was aggrieved. It was incumbent upon the appellant to ensure the truth of what he was signing for and in this he failed.

2. **Whether or not the court a *quo* had a basis to interfere with the decision of the arbitrator on sentence**

It is settled in our law that an appellate court must be slow in interfering with the discretion exercised by a lower court. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the material for so doing. See *Barros & Anor v Chimphonda* 1999 [1] ZLR 58 [S] at 62F – 63A.

The Labour Court sat as an appellate tribunal. The only basis on which it could have interfered with the decision of the arbitrator is if the arbitrator did not show a basis for interfering with the discretion to dismiss that was exercised by the employer. As stated in *Geza v ZFC* 1998 (1) ZLR 137 (SC), appeal courts should not lightly alter penalties of dismissal without showing that there was gross unreasonableness, *mala fide* or capriciousness.

In considering the appropriate penalty to impose on the appellant the disciplinary authority stated *inter alia* that the conduct of that appellant went to the root of the contract of employment. Furthermore, that in terms of the law, once it is proved that the conduct complained of goes to the root of the contract of employment, the penalty to be imposed lies squarely at the disposal of the employer. The appellant's plea for a written warning was found not to meet the justice of the case. On the strength of authorities of the Supreme Court

cited in the Disciplinary Authority's determination,[1] the appellant was dismissed from employment.

In considering whether the dismissal of the appellant was lawful the Arbitrator opined that as the appellant was a first offender, a correctional penalty was the most appropriate. He referred to a judgement of the Labour Court *NEI Zimbabwe (Pvt) Ltd v Makuzva* LC/H/248/04 and quoted the following excerpt:

> "I am convinced that in providing for s 12B (4) in the Act, the Legislature meant to ensure that employers do not rush to dismissals merely because the acts of misconduct were dismissible … any disciplinary action taken must be largely corrective and reasonable."

The Arbitrator proceeded to state that the same principle is echoed in s 7 (1) of the National Code of Conduct which provides as follows:

> "(1) In general, disciplinary action should, in the first instance, be educational and then corrective. Punitive action should only be taken when the said earlier steps have proved ineffective."

He further stated that this principle should have been a guiding factor in the exercise of the respondent's discretion. Furthermore, that the respondent had in any event not suffered any prejudice and that there was nothing on the record to show that the appellant's mitigating factors were reasonably assessed and taken into account. He also opined that as the contract of employment was not produced during the disciplinary hearing, the respondent's stance that the misconduct went to the root of the contract was unreasonable as it was based on an inference. He proceeded to highlight that that the respondent was aware that the appellant had written the letter of undertaking after receiving a call and an email from Tetrad and that there was no finding of proof of any sinister motives linked to the letter of undertaking. He

[1] Innscor v George Chimhini SC 06/12; Mashonaland Turf Club v George Mutangadura SC 05/12; ZB Financial Holdings v Maureen Manyarara Sc03/12

therefore found that the merits of the case do not warrant a penalty of dismissal. He proceeded to set aside the dismissal penalty and instead imposed one of a final written warning valid for six months.

The Labour Court set aside the Arbitrator's penalty of a final written warning and confirmed the appellant's dismissal. It referred to the case of *Circle Cement (Pvt) Ltd v Chipo Nyawasha* SC 60/03 in which it was stated that once an employer takes a serious view of the misconduct committed by an employee to the extent that it considers it a repudiation of the contract, which repudiation it accepts by dismissing the employee, then the question of a penalty less severe than dismissal will not arise for consideration.

The court *a quo* correctly found further guidance in the case of *ZB Financial Holdings v Maureen Manyarara* SC 2/12 where it was stated that even where mitigating factors are taken into account, this would not necessarily assist an employee where the employer considers the misconduct as one that is so serious as to go to the root of the contract of employment.

The undisputed fact is that the appellant wrote a letter to Tetrad claiming that he was acting under instructions from DD Mining and General Supplies which had an ongoing contract or arrangement with the respondent in terms of which the respondent regularly placed orders. At p 5 of the judgement of the court *a quo* the learned judge aptly stated:

> "The crux of the matter is said to be that the respondent gave false information in the letter of undertaking that there was an on-going contract between the appellant and DD Mining and that he was acting under instructions from DD Mining."

By his conduct in writing the letter of undertaking that had falsehoods, the appellant abandoned his duty of safeguarding the interests of the respondent. He did not

verify the truthfulness of what he was signing for and thereby binding the respondent as its representative in his capacity as the Acting Chief Finance Officer.

The alleged or purported authorisation does not avail the appellant any relief in this regard. Furthermore, Tetrad did not write the letter on behalf of the appellant. The appellant wrote it and appended his signature thereto. The fact that the content of the letter was suggested by Tetrad does not take the appellant's case any further. By his admission that he was told what to write in the letter, the appellant in essence admitted that he had abandoned the interests and the instructions of the respondent, his employer.

The appellant signed the letter of undertaking without due diligence, thereby disregarding his duty to his employer. He committed an act and conducted himself in a manner that is inconsistent with express or implied terms of his contract of employment. This Court's statement in the case of *Toyota Zimbabwe v Posi* 2008 (1) ZLR 173 (S) is apposite:

> "It is a common law position that commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him **if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated.** *Standard Chartered Bank Zimbabwe v Chapuka* SC-125-04." (the emphasis is added)

The contention by the appellant that his conduct cannot be so viewed because the contract of employment was not produced during the hearing only goes to confirm the appellant's unsuitability for continued employment with the respondent.

It is settled that the decision on what penalty to impose on an employee is an exercise of discretion by the employer. That discretion however must be exercised judiciously. The arbitrator's finding that the employer had not exercised this discretion judiciously was not founded on any valid consideration. The arbitrator seemed to labour under the mistaken belief that mitigating factors as provided for in s 12B(4) of the National Code of Conduct have the effect of altering the common law position that allows an employer who views an employee's misconduct as one going to the root of their employment agreement, to exercise its discretion and terminate the relationship.

The following excerpt from *Standard Chartered Bank Zimbabwe Limited v Michael Chapuka* (*supra)* at page 7 of the judgement, now quoted more fully, is of assistance in the proper determination of matters of this nature:

> "Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee**, giving the former a *prima facie* right to dismiss the latter.** In *Clouston & Co Ltd v Corry* [1906] AC 122 LORD JAMES OF HEREFORD remarked by way of a *dictum* at p 129:
>
> > "Now the sufficiency of justification depends upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the termination of the contract of service by one of the parties to it against the will of the other. On the other hand, **misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal**." (the emphasis is added)

Further, at pages 8 – 9 of the judgement the following is also stated:

"In my judgment, what was said by the Tribunal about the effect of the misconduct committed by Chapuka against Standard Chartered would not have been sufficient to justify interference with the judgment of the appeals board. The relevance of the statement by the Tribunal that the intention of Chapuka in committing the misconduct was not to defraud Standard Chartered and **that no prejudice was suffered by Standard Chartered as a result of his acts is open to doubt, because the alleged intention of a fraudulent employee cannot be taken as a standard with which to determine whether an employer acted**

reasonably in taking the view that the misconduct was so serious in nature as to justify dismissal." (emphasis added)

For the reasons discussed above the decision of the court *a quo* cannot be faulted.

In the result, the appeal fails in its entirety. Costs will follow the cause. It is therefore ordered as follows:

The appeal is dismissed with costs.

HLATSHWAYO JA: I agree

BHUNU JA: I agree

Mbidzo Muchadehama & Makoni, appellant's legal practitioners

Mutamangira & Associates, respondents' legal practitioners