REPORTABLE (23)

(1) GODFREY KATERERE (2) TAVONGA VANDIRAYI (3) THOMAS ZUNGA
v
TRIANGLE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHITAKUNYE JA & KUDYA JA
HARARE: 24 OCTOBER 2022

B. Magogo, for the appellants

E. T. Moyo, for the respondent

MAVANGIRA JA:

1. This is an appeal against the decision of the Labour Court ('the court *a quo'*) wherein the court dismissed the appellants' application for review after finding that the appellants had elected the wrong procedure in proceeding by way of review as opposed to an appeal. After hearing submissions by both counsel, the court dismissed the appeal and indicated that the reasons for the decision would be furnished in due course. The reasons follow hereunder.

FACTUAL BACKGROUND

2. The appellants were employed by the respondent and were members of the Zimbabwe Workers Union (ZISMIWU). The appellants were engaged in a collective job action as executives of ZISMIWU. It was alleged by the respondent that the appellants jointly

organised a strike and encouraged other staff members to not do their work as part of the collective job action. The respondent's management, through a memorandum, advised its staff members that the collective job action was illegal and that all employees were not to engage in the collective job action.

3. On 15 January 2015, the appellants willingly and knowingly disobeyed the instructions by the management that all employees resume work and they incited their fellow workers to continue with the strike. The respondent found the acts by the appellants as being unlawful and against their contract of employment and charged them for contravening s 5.7 (Collective Job Action) sub para (b) (Incitement to Strike) of the Triangle Employment Code of Conduct.

4. Disciplinary hearings were conducted for the appellants. The appellants were found guilty and their employment was terminated. The appellants jointly noted appeals to the Appeals Manager. The appeals were dismissed. The appellants thereafter noted appeals against the decision of the Appeals Manager to the Executive Director, being the second Appeals Manager. The said appeals were also dismissed. Aggrieved by the decision of the second Appeals Manager the appellants noted an appeal before the Managing Director. The Managing Director dismissed the appeals against both conviction and sentence and informed the appellants of their right to appeal to the Labour Court within fourteen days.

5. The appellants proceeded to make an application for review before the Labour Court. (the court *a quo*) The court *a quo* in dealing with the consolidated applications for review found that it was being called upon to deal with two issues being firstly, the

propriety of raising new issues and secondly, the correct procedure to be followed. The court found that the appellants could not at the different stages of hearings introduce new issues for determination when such issues ought to have, but had not been raised at the previous levels of the matter. The court *a quo* found that once a decision is made by a tribunal and no procedural flaws are committed the matter should continue by way of appeal if any party is aggrieved by the decision.

6. The court *a quo* further noted that the proper remedy which the appellants ought to have resorted to was an appeal not a review. The court also noted that the appellants admitted to the charges levelled against them by the respondent and that they sought to escape the penalty of dismissal by looking for technical loop holes. The court concluded that the appellants ought to have noted an appeal and not review. The court thus dismissed the application with costs.

7. Aggrieved by the decision of the court *a quo*, the appellants noted this appeal on the following grounds of appeal:

    1. Having found *in limine* that the three applications for review were improperly before it, the court *a quo* erred in dismissing the same on the merits instead of striking them off the roll.
    2. The court *a quo* erred in finding that the exhaustion of domestic appeal or review remedies non-suited appellants from seeking a review of the entire disciplinary proceedings.
    3. The court *a quo* erred, at any rate, in failing to find that appellant's new review grounds raised points of law which could be related to even for the first time at that stage.

ISSUE FOR DETERMINATION

8. The grounds of appeal raised by the appellants in effect raise the following issue for determination by this Court, *viz*. Whether or not the court *a quo* erred in finding that the correct procedure to be followed by the appellants was an appeal and not a review.

SUBMISSIONS BEFORE THE COURT

9. At the hearing of the appeal, counsel for the appellants argued that the court *a quo* erred in finding that the appellants had no right of review and could not approach the court as a court of first instance. Counsel argued that the court ought to have found that the right of review was provided for by the legislature. He contended that the court failed to recognise that the new grounds of review raised before it raised issues of law which could be raised for the first time before it.

10. Counsel further argued that the fact that the appellants had exhausted the internal appeals procedure did not take away their right to seek review before the court *a quo* for the first time. It was counsel's argument that after the court *a quo* found that the matter was improperly before it, it thereafter erred in failing to strike the matter off the roll and in dismissing it as it did.

11. *Per contra,* counsel for the respondent argued that the court *a quo* did not err in finding that the proper procedure to be followed by the appellants was an appeal and not a review. Counsel argued that the court correctly found that the appellants had not given any justification for the raising of the new grounds of review.

12. He maintained that the appellants could not make the argument that new grounds of review could be raised before the court without giving any justification. Counsel further argued that the arguments by the appellants before this Court ought to have been made before the court *a quo* in their justification of the raising of the new grounds and that therefore the court *a quo* did not err in finding as it did that the review application was improperly before it.

APPLICATION OF THE LAW TO THE FACTS

13. In dealing with the appellants' application for review the court *a quo* found that the correct procedure that the appellants ought to have used was the appeal procedure. The court stated:

> "If the applicant wants to challenge the decision that is before the court that has to be done by way of an appeal and not review. One does not continue to apply for review once one stage of the application has been decided. An application for review can only be done on any new issues of review that may have arisen during the hearing of the review application. A decision on the application for review is an appeal matter….It only applies where a party decides right from the onset to approach the Labour Court without first going through other appeal stages which raise review issues. The present decision is not open for further application for review unless it arises from the way the matter was also held in that hearing."

14. In dealing with the issue before this Court it is imperative for regard to be given to the respondent's code of conduct. The respondent's code of conduct provides for both review and appeal procedures. Paragraph 10 of the code of conduct reads as follows:

> "10. REVIEWS
>
> (1)…
>
> (2) If the next higher level Manager has good cause to believe that the proceedings were handled in an irregular manner or the decision made is irregular, he/she may review the case.
>
> (3)…
>
> (4) Review shall be conducted within five days of receipt of the relevant written

record of hearing."

15. Paragraph 11 of the code of conduct provides for the right of employees to appeal against any decision which involves an entry on his/her disciplinary record. Paragraph 10 (4) also provides that the Appellate Manager shall consider the appeal record after an assessment of the records and call for a clarification hearing within five working days.

16. Aggrieved by the penalty of dismissal from employment imposed on them after the disciplinary hearing, the appellants elected to proceed by way of appeal to the first Appellate Manager. The appellants noted subsequent appeals to the second Appellate Manager and finally to the Appeal Managing Director who also dismissed their appeals and informed them that they had a right to appeal to the Labour Court within 14 days.

17. In noting their appeals from the initial appellate manager's decision to the final appeal to the General Manager, the appellants raised grounds of appeal which were a mixture of grounds of appeal as well as grounds of review. Significantly, the various grounds raised issues relating to the issue of the incomplete record; the hearing being presided by managers; that the employer was judge in its own case; that the hearing officers were biased, incompetent and not independent; the expiry of time limits for the hearings as provided for in the code of conduct; Mr. Singo's refusal to recuse himself; the issue on *res judicata* of the matter; the involvement of Mr Rutanhira (the respondent's lawyer) and the failure by the respondent to produce the record of proceedings. These issues clearly related to alleged procedural irregularities on the disciplinary hearings right up to the final appeal hearing.

18. The appellants never made an application for review before the respondent. Instead, they maintained all their grievances as appeal issues which issues were all addressed by the respondent's Appellate Managers in dealing with the appeals at different levels. A reading of the code of conduct is clear and shows that where there is a procedural irregularity an aggrieved employee shall within five days apply to the higher level Manager for review.

19. It therefore follows that immediately when the disciplinary hearing was concluded and the appellants felt aggrieved by the procedure or the manner in which the hearing had been conducted, they ought to have proceeded by way of review. There was nothing prohibiting the appellants to make dual applications for reviews and appeals before the rightful authorities in terms of the code of conduct.

20. The appellants however elected to put all their eggs in one basket under the appeal procedure and indeed their appeals were dealt with by the respondent's Managers who also addressed the grounds raising procedural irregularities. The appellants could thus not successfully argue that at the end of three appeals tribunals which upheld their dismissals, they could suddenly approach the court *a quo* for reviews of the three appeal tribunals as well as the disciplinary committee.

21. It is a fact that s 89 (1) of the Labour Act [*Chapter 28:01*] ('the Act') gives the Labour Court exclusive power to hear reviews in labour matters. However, the appellants could not properly seek to approach the court *a quo* as a court of first instance over issues which had already been raised and determined by the Appellate Managers and General Managers. Section 89 (1) of the Act provides that:

"89 Functions, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions—

(a) hearing and determining applications and appeals in terms of this Act or any other enactment; and

(b)...

(c)...

(d) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;"

22. A reading of the grounds of review *a quo* clearly resolves the issue at hand as it can be seen that the issues raised by the appellants were all procedural irregularities which could be raised for the first time immediately after the disciplinary hearing or the initial appeal hearing was heard. The argument by the appellants before the court *a quo* that the application for review was being made before it as a court *a quo* of first instance was thus ill conceived and devoid of merit.

23. In *Zimasco (Pvt) Ltd v Marikano* SC 130/11 this Court confirmed that review proceedings are concerned with the manner in which a decision is taken and not the merits. The court stated as follows:

> "Review proceedings are concerned with the manner in which a decision is taken and not its merits. If for example a disciplinary authority had no jurisdiction to hear a particular matter, or was biased or its decision grossly unreasonable, the person aggrieved is empowered to approach the Labour Court and apply for the review of the proceedings."

24. Also, in *Gula-Ndebele v Bhunu N.O* 2010 (1) ZLR 78 (H) the court noted that where judicial proceedings are tainted by procedural irregularities they may be set aside before they are concluded and before recommendation is made.

25. From the above authorities, it is the court's view that the appellants had domestic remedies to apply in seeking both the reviews of the alleged procedural irregularities and appeals in challenging the merits of the decisions by which they were aggrieved. The appellants chose not to use the remedies provided in the code of conduct and opted to proceed by way of the appeals only. It was no longer open to them to decide at the eleventh hour to pursue the review route before the court *a quo* when the issues raised on review had already been dealt with by the first to second Appellate Managers and finally the General Manager.

26. It is the court's view that by their options and conduct, the appellants left themselves with the appeal procedure being the only and proper remedy at their disposal. They could only note an appeal before the court *a quo* and could not file a review. The appellants could not approach the court *a quo* as a court of first instance on review. The respondent's code of conduct clearly provides for both procedures and it is the employee who elects which procedure to take.

27. Once the appellants had elected to use the appeal procedure only, and in the absence of irregularities arising in the subsequent levels of hearings, the appropriate procedure by which they could approach the court *a quo* was an appeal. The approach to the court *a quo* by way of review reflects a total disregard of the respondent's code of conduct and a licence for the appellants to conduct proceedings in whatever way they decide or deem fit at any particular stage.

28. The decision of the court *a quo* is thus correct and cannot be faulted in this regard. The court correctly exercised its discretion in dismissing the matter. In the case of *Khauyeza v The Trial Officer & Anor* SC 23/19, this Court held that an application brought on an improper footing ought to be dismissed rather than be struck off the roll. For these reasons, it is the court's view that the court *a quo* did not err and the appeal is without merit.

29. It was for these reasons that the appeal was accordingly dismissed with costs.

CHITAKUNYE JA: I agree

KUDYA JA: I agree

Matsikidze Attorneys at law, appellants' legal practitioners
Scanlen & Holderness, respondent's legal practitioners