DISTRIBUTABLE (32)

TONGAI MACHONA
vs
OLD MUTUAL LIMITED

SUPREME COURT OF ZIMBABWE
GOWORA JA; HLATSHWAYO JA & GUVAVA JA
HARARE: OCTOBER 11, 2016

No appearance for the appellant
G. Madzoka, for the respondent

GUVAVA JA: This is an appeal against the whole judgment of the Labour Court which upheld the dismissal of the appellant from employment.

The appellant was in default on the day of the hearing but had filed heads of argument. In accordance with r 36 (4) of the Supreme Court Rules, 1964 the court, in its discretion, decided to deal with the matter on the merits. After the respondent had made submissions to the court, the appeal was dismissed with costs. The Court advised that in view of the default by the appellant written reasons for this decision would follow in due course. The delay in handing down these reasons is regretted. It was due to an administrative glitch wherein the file remained at the Constitutional Court after its separation with the Supreme Court in circumstances where the judgment had already been written and was ready for handing down.

BACKGROUND FACTS

The appellant was employed by the respondent as an Accounts Clerk. On 16 December 2010, he was suspended from employment with pay and benefits with effect from the date of suspension. The basis for the suspension was that respondent had good reason to believe that the appellant had committed acts of misconduct in terms of the respondent's code of conduct. He was formally charged in terms of s 4.8.3 of the Old Mutual Code of Conduct on 17 December 2010 for allegedly overstating and unjustifiably claiming overtime during the period extending from 7 January to 4 November 2010. The charge read as follows:

> "Deliberately giving untrue, erroneous or misleading information or testimony whether verbally or in writing".

It was alleged that from 7 January 2010 to 4 November 2010, a period of about eleven months, the appellant gave untrue and erroneous information regarding his overtime by overstating the hours. As a result of this erroneous information the appellant unjustifiably claimed overtime wages to the prejudice of his employer. A disciplinary hearing was held on 23 December 2010. The charges laid against the appellant highlighted sixteen separate counts as set out below:

a) On 7 January 2010 he claimed that he worked 4 hours and 30 minutes overtime when he never stayed behind for overtime at all on that day.
b) He claimed to have worked 4 hours of overtime on 8 January 2010 when the records showed that he only worked for 1 hour.
c) He claimed 3 hours on 11 January 2010 when he only stayed for 1½ hours.
d) He claimed 4 hours and 30 minutes overtime on 12 January 2010 where he only worked 3 hours and 30 minutes.
e) He claimed 6 hours 30 minutes on 13 January 2010 yet he worked for 5 hours 15 minutes.
f) He claimed 5 hours overtime on 12 April 2010 when he did not work overtime at all that day.

g) He claimed 4 hours of overtime on Tuesday 20 April 2010 yet he only stayed for 30 minutes.

h) He claimed 5 hours 15 minutes on 27 April 2010 yet he only worked for 3 hours 45 minutes overtime.

i) He claimed 5 hours overtime on 20 May 2010 yet he never stayed behind after hours on this day.

j) He claimed 5 hours on 24 May 2010 when he only worked 3 hours and 30 minutes of overtime.

k) He claimed 5 hours on 7 July 2010 yet he worked 3 hours of overtime.

l) He claimed 5 hours on 8 July 2010 when he only worked 3 hours 15 minutes.

m) He claimed 5 hours overtime on 12 July 2010 when he only worked 2hours and 30 minutes.

n) He claimed 5 hours and 30 minutes of overtime on 13 July 2010 but the employer's records indicate he worked only 3 hours.

o) He claimed 5 hours of overtime on 4 August 2010 when he did not stay after hours at all that day.

p) He claimed 5 hours and 30 minutes on 4 November 2010 yet he did not stay behind at work that day at all.

Before the Disciplinary Committee which conducted the hearing on 23 December 2010 the respondent presented evidence from Mr Ruwende who outlined the management policy procedure and produced reports from the access control systems which indicated the time that the appellant left work each day. The respondent also called the Administration Manager, Ms. Agnes Murape, who testified that when she asked for supporting information for the claims filed by the appellant relating to the November 2010 overtime claim the appellant attempted to withdraw his claim. The claim was subsequently withdrawn through the appellant's immediate superior, a Mr Ruwende, who gave instructions to the payroll department not to pay the claim.

The minutes of the Disciplinary Committee indicated that the appellant had admitted making claims for items (a), (b), (f), (p) and (o). He however stated that the claim in respect to (p) had been withdrawn. He therefore argued that as the claim for overtime had been withdrawn the charge should also fall away. With respect to the eight remaining charges, being items (c), (e), (g), (h), (i), (j), (k) and (l) the appellant sought to justify the excess claims for overtime by saying that he was required to drop off other staff members at their houses when they worked after normal working hours. He further argued that the overtime he claimed reflected the time he dropped off the last person. Following the hearing the appellant was found guilty of misconduct on the basis that he had admitted the charges. The Disciplinary Committee did not accept his explanation that he was dropping off workers as a basis to claim overtime.

An application for dismissal of the appellant by the hearing officer to the Works Council was confirmed on 31 December 2010 and the dismissal was upheld by the Appeal Hearing Officer on 3 January 2011.

The appellant was dissatisfied with his dismissal and appealed to the Labour Court.

PROCEEDINGS BEFORE THE LABOUR COURT

Before the court *a quo* the appellant submitted that he had been suspended without the respondent having followed the procedures outlined in the code of conduct. He also submitted that he had been dismissed from employment when there was no proof that he was guilty of the acts of misconduct with which he had been charged. It was also his submission that the respondent had not established that he deliberately gave untrue, erroneous or misleading information or testimony.

The court *a quo,* in a full and comprehensive judgment, analyzed the evidence before the Disciplinary Committee and found no misdirection. The Learned Judge *a quo* thereafter dismissed the appeal.

Aggrieved by this judgment, the appellant again appealed to this Court on the following grounds:

a) "With respect, the Court *a quo* erred by finding that there were no fatal irregularities that prejudiced Appellant in the disciplinary proceedings.
b) The Court *a quo* erred, further, by finding that the suspension which was outside the ambit of the code of conduct was valid and lawful.
c) The Court *a quo* grossly misdirected itself by finding, as a matter of fact, that Appellant only challenged the alleged admissions in supplementary Heads of Argument and that he did admit the charges.
d) The Court *a quo*, with respect, erred by finding that there was proof, on a balance of probabilities, of commission of a misconduct by Appellant.
e) The Court *a quo* erred by finding that the argument that the respondent did not prove an element of the offence in question was an admission that a misconduct was committed by Appellant."

From the grounds of appeal stated above the appeal is centered on two issues:

1. That the suspension was not done in accordance with the procedure set out in the code and that therefore the entire proceedings should be regarded as a nullity.

2. That the respondent had not proved the appellant's guilt in view of the withdrawal of the admission of guilt before the court *a quo*.

I will address each of these issues in turn.

SUBMISSIONS ON APPEAL

Mr *Madzoka,* for the respondent, addressed the court on the merits. He submitted that the first issue covered the first 2 grounds of appeal on whether the irregularities vitiated the

proceedings leading to the suspension of the appellant. It was his submission that appellant's averment that he was suspended without being heard had no basis because he had been suspended with pay. He further submitted that even if there were irregularities, they did not prejudice appellant and warranting the vitiation of the proceedings. He relied on the case of *Shumbayaonda v Minister of Justice and Anor* SC 11/14 which stated that even if a suspension was unlawful, it would not absolve the appellant from acts of misconduct. He further averred that in this case the appellant had admitted the acts of misconduct. On the issue that the respondent had not proved the acts of misconduct, it was the respondent's submission that once there is an admission it is not necessary for the opposing party to adduce evidence to prove those facts. The respondent relied on the case of *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S C).

Following these submissions Mr *Madzoka* prayed that the appeal be dismissed with costs.

Whether or not the appellant's suspension was carried out in compliance with the Code and if not, the effect thereof?

Section 5.4.5 of the respondent's code prescribes that before an employee is given a suspension notice the Divisional Manager must convene a meeting with the workers committee representatives, employees senior, personal development advisor and witnesses. It is only after this hearing and a finding that there is prima facie misconduct that an employee may be suspended. The respondent accepted that this procedure was not followed but submitted that since the appellant was suspended with full pay and benefits this provision did not apply.

Clause 5.4.7 of the Code provides as follows:

> "When the Divisional Manager is convinced that the employee committed an offence which warrants suspension pending dismissal, he consults with his Assistant General Manager before telling the employee in writing that he is suspended. He specifies the effective date of suspension. He has to state that the suspension is without pay …"

The appellant was formally suspended on 16 December 2010 with pay. It seems to me that the onerous provision outlined above was meant to ensure that an employee would not be suspended without pay without some consideration of the issue by more than one person. In this case, the appellant's suspension was with pay. This meant that he would not suffer any prejudice. Essentially, in my view, the provision was meant to protect the employee's interest so that he would not be suspended without pay and without proper consideration of the matter.

The events as outlined above thus constituted a breach of procedure as prescribed by the code as no hearing was held before the appellant was suspended. The question becomes whether or not the procedural irregularity denied the accused a fair hearing and whether or not the accused was prejudiced. The appellant does not show that he suffered as a result of the failure to hold a hearing before his suspension any prejudice. It is not in dispute that the appellant was suspended with pay and benefits during this period. It would be difficult for any person to show that he was prejudiced by such a suspension as he was receiving all his benefits without going to work.

I am not persuaded by the respondent's submission that there was no irregularity. Section 5.4.7 operated in this case as the suspending provision, and it was section 5.4.5 that guided the employer on the necessary steps to be taken when an employee is to be suspended. This means

that the pre- suspension meeting called for by the code of conduct under s 5.4.5 would under normal circumstances be peremptory. Thus it is my view that not holding a preliminary meeting in the circumstances did constitute a procedural irregularity.

It should also be noted that the issue of procedural irregularity was raised for the first time on appeal to the Labour Court. The appellant had not raised the issue when he challenged his dismissal through the internal appeal process. This suggests that he had waived his right to raise the issue. Even if the appellant had not acquiesced to the irregularity, the finding by the Labour Court that "…there were no fatal irregularities that prejudiced the appellant in the conduct of the disciplinary proceedings" cannot be faulted. (See *Air Zimbabwe v Chiku Mnensa* SC 89/01)

The point has already been made that it is not all procedural technicalities that can viciate disciplinary proceedings. The courts are not inclined to deciding matters on technicalities. See *Shumbayaonda v Minister of Justice and Anor* SC 11/14.

It is also trite that it is undesirable for labour matters to be resolved on technicalities See *Dalny Mine v Banda* 1999 (1) ZLR 220(S). In *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 445 (S), SANDURA JA quoted with approval *Jockey Club of South Africa and others v Feldman* 1942 AD 340 at 359 wherein TINDALL JA stated;

> "I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled."

This view was also echoed by in *Larson and Ors v Northern Zululand Rural Licensing Board* 1943 NPD 40 and by HOLMES JA in *Rajah and Rajah (Pty) Ltd and Ors v Ventersdorp Municipality and Ors* 1961 (4) SA 402 (AD) at 407H-408B.

The appellant raised in his supplementary heads of argument in the court *a quo* other incidents where the code was not observed. Some of the procedural irregularities to which the appellant complained of have found their way into this appeal.

Firstly, the appellant argued that the applicable code of conduct does not penalize the mere giving of untrue, erroneous or misleading information because the making of innocent error is something humans cannot avoid. Ordinarily this is not something for which an employee should lose their job.

Secondly, that other employees also registered inconsistencies between their log times and what the log in system recorded. He argued that if the information given by the machine about one Sharon's movements on the day is correct, then why was Sharon not similarly charged or even asked to write a report as per clauses 2.2 and 2.3 of the Code of Conduct

With respect to the first argument, the court *a quo* correctly observed that it was impossible to ignore the magnitude and persistence of the "innocent" errors. In addition, where a charge had been put to an employee and the employee was found guilty, the penalty imposed upon that employee was within the discretion of the employer within the confines of the law.

The argument presented by the appellant to the effect that the employer ought to have specifically penalized what he calls the "mere giving of untrue, erroneous or misleading information" is indicative of lack of remorse on the appellant's part, and brings into question the "innocence" of the repeated "errors." This conduct is in fact addressed and prohibited in the employer's Code in the charge preferred against the appellant of deliberately giving untrue, erroneous or misleading information or testimony whether verbally or in writing. It is observed that the code specifically outlaws the deliberateness in that offence. The frequency and consistency of the errors makes it inconceivable that his actions were not deliberate. His attempt to withdraw his November claim when specifics were requested for it shows that he was aware of the error in his conduct. This contention is therefore devoid of merit.

Similarly, with regards to the second allegation, where appellant argues that the possible blameworthiness of other staff members for the same charge is without merit. It is trite that the blameworthiness of other people does not absolve the one currently charged. The appellant could not be absolved from the penalty of a dismissal on the basis that fellow staff members had not been found guilty of misconduct of a similar offence. (See *Zimbabwe Banking Corporation Limited v Saidi Mbalaka* SC 55/15 citing the case of *Lancashire Steel (Private) Limited v Mandevana and Ors* SC 29/95).

Clearly, there existed no just cause, on the procedural irregularities cited by the appellant to nullify the disciplinary proceedings.

Whether the respondent proved the appellant's guilt and the effect of the attempted withdrawal of the admission *a quo*.

It should be noted that the appellant himself admitted to the charge which was the basis on which the entire dismissal was founded. In the determination of the disciplinary hearing, sixteen separate incidents where set out as items (a) to (p) on which the appellant was charged with overstating his overtime hours.

The learned judge *a quo* correctly denied the appellant the right to suddenly repudiate his admission as he did not take issue with the disciplinary hearing which recorded that he had made such admissions. There can be no doubt that the respondent made out a case of the charges levelled against the appellant on a balance of probabilities. The evidence of Mr Rwende explaining how the computer captured the times of clocking in and out was not challenged at all. In the light of this evidence which was found to be both credible and reliable it was therefore incumbent on the appellant to lead evidence to disprove the charges.

In any event the minutes of the disciplinary hearing, and the final determination by the hearing officer both highlighted admissions made by the appellant to parts of the claims made against him. It was largely from these admissions that the disciplinary hearing reached its determination and the Workers Council upheld the dismissal. This Court has already expressed its disapproval of sudden abandonment of an admission. (See *DD Transport (Pvt) Ltd v Abbott* 1988 (2) ZLR 92 (S). Where an admission is made the onus to prove an accused's guilt falls away. The respondent need not have persisted in proving what had already been admitted by the appellant.

DISPOSITON

I find that the failure to hold a pre-suspension meeting did constitute a violation of the code. However, the procedural irregularities alleged by the appellant were not such irregularities that would warrant the setting aside of the entire proceedings. The attempted withdrawal of the admission by the appellant was properly refused by the court *a quo*.

It was for these reasons that this Court dismissed the appeal as it was devoid of merit.

GOWORA JA **:** I agree

HLATSHWAYO JA **:** I agree

Wintertons, respondent's legal practitioners