Judgment No. S.C. 16/99
Civil Appeal No. 73/98

CLAN TRANSPORT COMPANY (PRIVATE) LIMITED

vs TIMOTHY MUKWENGWE

SUPREME COURT OF ZIMBABWE
MUCHECHETERE JA & SANDURA JA
HARARE, JANUARY 28 & MARCH 4, 1999

F Girach, for the appellant

F G Gijima, for the respondent

MUCHECHETERE JA: This is an appeal against the decision of the Labour Relations Tribunal on 15 February 1998 in which the respondent's dismissal was set aside.

The facts in the matter are that the respondent and one Tachiona Chivhange ("Chivhange") fought at work. A meeting said to have been called by an Internal Disciplinary Committee was held on 1 August 1994. The meeting was attended by both the respondent and Chivhange as well as other workers. The Minutes of the meeting read as follows:-

> "A meeting was called to resolve an issue which had been reported to the Management by Mr T Chivhange that he had been assaulted by Mr T Mufunga (Mukwengwe).
>
> WITNESSES

> The Chairperson asked the members who witnessed the incident to elaborate on what had happened.
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> The acting workers' committee secretary, Mr Zimai, narrated to the meeting saying: After a workers' committee meeting which passed a vote of no confidence in Mr Mufunga, and on the way to the offices, Mr Mufunga assaulted the Chairman of the workers' committee. This was witnessed by Mr (Messrs) Saurombe, Zamai, Chipunza and even (a) Union official, Mr Kujeke.
>
> VERDICT
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> For the sake of peace and good working relationship(s) within the workers' committee, reference was made to the Code of Conduct 3-9 which warrants dismissal. As leaders it was over-emphasised that they have to lead by example.
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> The meeting agreed to comply by (with) the Code of Conduct of the Transport Industry. Both members (the respondent and Chivhange) were to be suspended from duties without pay pending dismissal. …"

Both the respondent and Chivhange "appealed" against the decision. From the Minutes of the "appeal" on 19 August 1994 it appears that the respondent and Chivhange were not present at the hearing. The persons said to have been present were the Managing Director, the Operations Executive – Department Head, the Industrial Relations Officer and the Administrative Executive. All that appears to have occurred is that the Managing Director (Mr B Saunders) asked for all the relevant documentation regarding the case to be produced and read. After this was done the following occurred:-

> "… Mr Saunders asked if there had been any prior similar offences involving either of the parties. Mr Roberts (Administrative Executive) advised (that) Mr Mukwengwe had been involved in a fight several years earlier but that the written warning given then could not be used as it had time expired. No previous offence was on record against Mr Chivhange. Mr Saunders then said that in the light of the evidence and the report from Mr Thomas (Operations Executive – Department Head) and taking into account the Code of Conduct procedure he agreed with the decision for dismissal under section 3.9 of the Action Code."

Both the respondent and Chivhange were in the result dismissed.

The Code of Conduct applicable in this case - Collective Bargaining Agreement: Transport Industry, SI 94 of 1995 ("the Code of Conduct") - provides the following procedure on alleged misconduct in the Sixth Schedule:-

> "1. When an offence is alleged to have been committed, the responsible official shall investigate the act of alleged misconduct and shall -
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> (a) notify the person alleged to have committed the act, of the nature of the alleged misconduct, ensuring that he fully understands it;
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> (b) afford the person the opportunity of presenting his case before the responsible official;
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> (c) gather such evidence, whether oral, written or otherwise, as may be appropriate;
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> (d) having collected the facts, invite the workers' committee member (if one is present) to comment.
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> 2. When the responsible official has completed his investigations in terms of section 1, he shall -
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> (a) dismiss the case and advise the employee and any other person concerned accordingly; or
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> (b) if the misconduct is a first breach of a minor offence and he is satisfied that justice will be done by such decision, verbally reprimand the employee without reference to his superior, in which case no entry will be made on the employee's disciplinary record; or
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> (c) take action in terms of section 3."

Section 3 provides for the forwarding of the case to the Personnel Manager who, after investigations, will make recommendations to the official administering discipline to make a decision he deems appropriate having regard to the seriousness of the offence, the disciplinary and service record of the offender, the

position of the offender and the example he is expected to show, the nature of the offence in the context of the offender's duties, the possible consequences of the offence, and the comments of the workers' committee representative. The decision shall be given within fourteen days from the day the responsible official started his investigations. The time can be extended for exceptional reasons. A written record or summary of all proceedings and decisions taken shall be made at the time of such proceedings and/or decisions and shall be kept for a period of not less than twelve months.

It is, in my view, clear that the meeting of 1 August 1994 did not comply with the provisions of section 1 of the Sixth Schedule of the Code of Conduct. Firstly, although the responsible official can be said to have investigated the alleged misconduct in this case, there is no indication that he ensured that the persons alleged to have committed the misconduct fully understood it. All that is indicated is the fact that the persons attended the meeting. Secondly, it is clear that the persons were not given an opportunity to present their cases before the responsible official. All that is indicated is that witnesses and the acting workers' committee secretary were the only persons who gave evidence and spoke at the meeting.

The responsible official did not also, in my view, fully comply with the provisions of section 2 of the Sixth Schedule. He did not give a clear verdict as to whether the two persons involved or one of them were guilty of the offence. All that was said was that "for the sake of peace and good working relationship(s)" the two persons involved ought to be dismissed. What is required is a clear verdict.

I also consider that the meeting of 19 August 1994 did not properly comply with the provisions of section 3 of the Sixth Schedule. The meeting was held as an appeal by the two persons alleged to have been involved in the misconduct, whilst it should really have been a consideration by the Personnel Officer of the findings by the responsible official who investigated the case. The Personnel Officer would then have made his investigations and made his recommendations to the official administering discipline. That official would be the person to decide. Further, the decision should have been made within fourteen days of the day the responsible official started his investigations. In this case the investigations were started on 1 August 1994. The final decision was supposed to have been made by 15 August 1994. It was made on 19 August 1994, some four days after it should have been.

It is clear therefore that the appellant did not comply with the procedure in the Code of Conduct. Indeed it admitted as much in the case of *Chivhange v Clan Transport* (the appellant) S-268-96. What I said in that case was admitted as being common cause. I stated the following:-

> "The facts in the matter are that the appellant (Chivhange) was, on 1 August 1994, dismissed from the respondent's employment on the allegation that he had assaulted a fellow employee. Although the respondent (the appellant in this case) had a Code of Conduct, the appellant was dismissed without a hearing (proper), contrary to the terms of the said Code of Conduct. In view of that the dismissal was held to have been wrongful." (The underlining is mine).

As can be gathered from the above, the respondent and Chivhange were charged with the same offence. The procedure adopted to dismiss them was the same - in fact they were charged jointly on the same papers. In the circumstances, it

is surprising and, in my view, improper for the appellant to now argue that the dismissal of the respondent was proper whilst having conceded that that of Chivhange was improper.

In the result, the appeal is dismissed with costs.

SANDURA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

F G Gijima & Associates, respondent's legal practitioners