REPORTABLE (31)

Judgment No. SC 47/09
Civil Appeal No. 183/08

(1) NORMAN MUTSUTA (2) TONDERAI KATSANDE v

CAGAR (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, SANDURA JA & CHEDA JA
HARARE, MAY 18 & NOVEMBER 9, 2009

A Mugandiwa, for the appellants

S M Bhebhe, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Court which upheld the appellants' dismissal by the respondent.

The background facts are as follows. The appellants were employed by the respondent ("the company") as managers in a shop at High Glen Shopping Centre, in Harare. There was a police post at the shopping centre, and the shop was guarded by security guards employed by another company.

The keys for the shop and for the safe, which was housed in one of the rooms in the shop, were kept by the appellants. The external doors of the shop could only be unlocked when both appellants were present because for each door each appellant

had a key different from the key in the custody of the other appellant. For instance, there were two locks at the main entrance to the shop, and each appellant could unlock only one of them. The same applied to the safe. In order to unlock the safe both appellants had to be present.

However, spare keys for the shop and for the safe were kept at the company's head office, and senior employees had access to them.

At the end of the working day on 27 May 2001, the appellants locked up the shop, and a security guard checked the external doors and satisfied himself that everything was in order before the appellants left the premises.

When the appellants arrived at the premises on the following morning they were informed that the back door of the shop had been found open. They entered the shop and found the door of the safe open and the sum of Z$247 000, which had been in the safe on the previous day, missing. They reported the matter to their superiors. Subsequently, the matter was reported to the police, but the police declined to prosecute the appellants.

Thereafter, the company charged the appellants with theft of $247 000, and suspended them from their posts without pay and other benefits on 12 June 2001. In addition, the company forthwith applied to a labour relations officer for an order authorising the appellants' dismissal. The application was made in terms of s 3(1)(d) of

the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985.

Subsequently, the application was heard by a labour relations officer on 24 September 2002, and on 13 November 2002 the labour relations officer found the appellants guilty of theft and authorised the company to dismiss them.

In due course, the appellants appealed to the Labour Court which, on 4 February 2008, dismissed the appeal with no order as to costs. Aggrieved by that result, the appellants appealed to this Court.

Two of the grounds of appeal set out in the notice of appeal read as follows:

> "1. That the court *a quo* misdirected itself, on a question of law, by making the following findings of fact which are so outrageous in their defiance of logic that no reasonable person properly applying his mind to the issues could have arrived at the conclusions reached:
>
> 1.1 That the appellants were the sole custodians of the keys to the premises;
>
> 1.2 That the premises had not been forcibly broken into; and
>
> 1.3 That records from security guards who were guarding the premises were placed before the Labour Officer and were part of the record of proceedings.
>
> 2. – 3. …
>
> 4. That the court *a quo* misdirected itself, on a question of law, by reaching the conclusion that theft by the appellants was the more natural implausible (*sic)* conclusion among several conclusions that could be

arrived at from the circumstantial evidence that was available. That conclusion did not take into account the fact that the respondent had not placed the following evidence before the Labour Officer:

4.1 Evidence of the security guards;

4.2 The evidence of the senior management at head office who kept another set of keys for the shop (they could have been called to state whether or not any of them had visited the shop at the relevant time, or whether or not their set of keys disappeared at any stage during the relevant period);

4.3 The evidence of an expert locksmith; and

4.4 Fingerprint evidence (which they could have requested from (*sic*) the police who investigated the theft to lift from the scene of the offence)."

The first issue which I shall consider is whether the appeal is on a question of law. The issue is important because in terms of s 92F(1) of the Labour Act [*Cap 28:01*] ("the Act") the only appeal which lies to this Court from a decision of the Labour Court is an appeal on a question of law. The section reads as follows:

"**92F Appeals against decisions of Labour Court**

(1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court."

What is a question of law has been discussed in a number of cases, the leading one in this jurisdiction being *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S). At 220 D-F GUBBAY CJ said the following:

"The twin concepts, questions of law and questions of fact, were considered in depth by E.M. GROSSKOPF JA in *Media Workers' Association of South Africa and Ors v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A). Approving the discussion of the topic in *Salmond on Jurisprudence* 12 ed at 65-75, the learned JUDGE OF APPEAL pointed out at 795 D-G that the

term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.

I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this."

Another relevant case is *National Foods Ltd v Stewart Magadza* SC 105/95, a case in which EBRAHIM JA said the following at p 4 of the cyclostyled judgment:

"It seems to me that it was open to the legal representative of the appellant in its appeal to this Court to challenge the findings of the Tribunal on the basis that it misdirected itself in its findings on the facts.

It is true that this Court only has jurisdiction to hear an appeal from the Tribunal on a point of law. … But clearly if there is a serious misdirection on the facts that amounts to a misdirection in law. The giving of reasons that are bad in law constitutes a failure to hear and determine according to law."

Finally, in *Reserve Bank of Zimbabwe v (1) Corrine Granger (2) Martha Mataruka* SC 34/2001, MUCHECHETERE JA, with whom McNALLY JA and I concurred, said the following at pp 5-6 of the cyclostyled judgment:

"An appeal to this Court is based on the record. If it 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 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. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670; and *S v Pillay* 1977 (4) SA 531 (AD) at 535 C-E."

Applying the principles set out in the three cases cited above, I have no doubt in my mind that the appeal raises questions of law. There are allegations in the grounds of appeal that the Labour Court committed misdirections on the facts which are so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. The appeal is, therefore, properly before this Court.

The main issue in this appeal is whether the appellants were properly found guilty of theft of the sum of $247 000. I do not think they were. I say so because, in arriving at the conclusion that the appellants were guilty, the President of the Labour Court misdirected herself in a number of respects.

Firstly, at p 1 of the judgment the President of the Labour Court said:

> "The employees (i.e. the appellants) were the sole custodians of the keys to the premises."

In making that finding, she completely ignored the uncontested facts that another set of keys for the shop and for the safe was kept at the company's head office, and that the company's senior employees had access to the keys. This was a failure to appreciate the facts of the case. And it was also a finding of fact which was contrary to the evidence actually presented.

In the circumstances, the President of the Labour Court committed a misdirection on the facts which is so unreasonable that no sensible person who had applied his/her mind to the facts would have made the finding that she made.

Secondly, at p 2 of the judgment the President of the Labour Court said:

> "If outsiders or other persons from the head office had visited the premises during the night in question, security officers who guard the premises could have alleged as such, (much?) but in this case the security guard's records did not show that there had been any intruders. The back door had simply been left open. There was no evidence of any forced entry."

The finding that the records of the security guards did not show that there had been any intruders suggests that such records were placed before the labour relations officer or the Labour Court. However, nothing could be further from the truth. No evidence whatsoever was obtained from the security guards, and there is no such evidence in the record before this Court.

When the appellants appeared before the labour relations officer, Mr *Mugandiwa*, who represented them, submitted that the company should have obtained a report from the security company, whose officers were guarding the premises at the relevant time, dealing with the following matters –

> "(i) The identity of all the persons that were seen entering or leaving the complainant's premises after the shop's closing time.
>
> (ii) The exact time the back door was found open, and whether or not any instruments were found at the scene."

That submission would not have been made if the records of the security guards had been placed before the labour relations officer.

It is pertinent to note that although the appellants could have called the security guards to testify before the labour relations officer on what happened during the night in question, they did not do so because they had been released on bail on condition that they did not interfere with potential State witnesses, who included the security guards.

In the circumstances, the finding that the records of the security guards did not show that there had been any intruders was unfounded, and was contrary to the evidence before the labour relations officer and the Labour Court, which did not indicate that such records had been produced. The finding was, therefore, 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 conclusion.

Finally, at p 3 of the judgment the President of the Labour Court said:

> "… the most probable persons to have committed the theft were the two joint custodians of the keys to the back door and to the safe."

This conclusion was based on a misdirection on the facts referred to earlier in this judgment, i.e. that the appellants were the sole custodians of the keys to the shop and to the safe.

In my view, bearing in mind that another set of keys for the shop and for the safe was kept at the company's head office, and that the company's senior employees had access to the keys, the finding that the appellants were the most probable persons to have committed the theft is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have made such a finding. On the evidence before this Court, one cannot say who committed the theft, or who most probably committed the theft.

I now wish to deal with the question of the costs reserved in the Chamber application filed by the appellants for leave to appeal and for an extension of time within which to appeal. I cannot see any reason why these costs should be borne by the company.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order granted by the Labour Court is set aside and the following substituted –

   "(a) The appeal is allowed with costs.

   (b) The order or determination made by the labour relations officer is set aside.

(c) The respondent shall reinstate the appellants without loss of salary and benefits, with effect from the date of suspension, provided that if the employment relationship is no longer tenable, the parties may agree on the quantum of damages payable in lieu of reinstatement, failing which either party may approach the Labour Court for the quantification of such damages."

3. No order as to costs is made in respect of the appellants' application for leave to appeal and for an extension of the time within which to appeal.

MALABA DCJ: I agree

CHEDA JA: I agree

Wintertons, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners