

DISTRIBUTABLE: (12)

DON CHABVAMUPERU
v
OLD MUTUAL INSURANCE COMPANY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHATUKUTA JA & MWAYERA JA
HARARE, 4 MARCH 2022 & 10 FEBRUARY 2023

M. Gwisai, for the appellant

G Peneti with *A. K. Maguchu*, for the respondent

BHUNU JA:

[1] The appellant brings an appeal against the whole judgment of the Labour Court (the court *a quo*), which upheld the Appeal Officer's decision confirming the Hearing Officer's determination dismissing the appellant from employment.

FACTUAL BACKGROUND

[2] The appellant was employed as a cashier by the respondent company sometime in 2014. He doubled up as a workers' committee member with effect from 20 February 2019. On 8 July 2019 he attended a meeting, as a worker's committee representative with management to discuss contentious issues of cushioning employees against the vagaries of spiralling hyperinflation.

[3] After the meeting which does not appear to have gone down well with the workers' representatives, the appellant and other members of the committee are alleged to have instigated and fomented unlawful work stoppage by the employees. They are alleged to have instigated the work stoppage through misrepresentation of the outcome of their meeting with management. They are also alleged to have misrepresented to the employees to stop work and gather in the canteen where management wanted to address them. They were also alleged to have misrepresented to the Human Capital Executive that the workers were demanding to be addressed by him at the canteen.

[4] As a result of the interactions of members of the workers' committee with the workers after the meeting with management, the workers left their respective work stations and gathered at the canteen for the better part of the day without permission from management. This prompted management to issue a written notice to the employees ordering them to return to their work stations on pain of being charged with participating in an illegal collective job action.

[5] The notice reads:

“NOTICE TO EMPLOYEES

Dear colleagues

We note that you have been gathered in the canteen from 8:30hrs to 1600hrs demanding to be addressed by management concerning the July salary increase.

Please report back to duty immediately, failure of which the employer will have no choice but to charge you for participation in an illegal collective job action.

Management”

[6] The workers, the appellant included, heeded the call by management to resume work to avert being charged with participating in an illegal collective job action. Despite

heeding the call to return to their work stations, the appellant and his colleagues in the workers committee were subsequently charged with acts of misconduct arising from the manner in which they had mobilised the workers to gather at the canteen under the false pretext that management wanted to address them. They were also alleged to have lied to management that the workers were demanding to be addressed by the Human Capital management. It was further alleged that they staged an illegal sit-in at the HR executive's office for two hours demanding that he should address the workers gathered at the canteen.

[7] The allegations against the appellant and his workers' committee colleagues were summarised as follows:

- Misrepresentation to the Human Capital Consultant that workers were demanding to be addressed by Human Capital and that they were heading to the canteen.
- Misrepresentation to staff that the Human Capital Executive wanted to address them in the canteen.
- Unprocedural mobilisation of staff from their workplace for the purpose of congregating them in the canteen.
- Abating on illegal collective job action by misrepresenting to, encouraging staff to remain in the canteen and away from their work stations under the pretext that the Human Capital Executive would come to address them.

[8] Arising from the above allegations, the appellant appeared before the hearing officer charged with contravening section 15.9.1 of the respondent's registered code of conduct. That is to say, "failure to fulfil expressed or implied conditions of the contract of employment or breach of the contract of employment".

Clause 8 of the registered code of conduct provided for the appellant's specific express obligations under the contract of employment as follows:

“8. **OBLIGATIONS AND UNDERTAKINGS OF THE EMPLOYEE**

- (i) The employee will perform his/her duties in the best interest of Old Mutual and will refrain from any action which may in any manner harm the good name and reputation of Old Mutual or which may place Old Mutual in an invidious or compromising situation. As such the employee is expected to display total honesty and integrity in the performance of his/her duties and to exercise appropriate care and skill.
- (ii) All material (physical and intellectual) acquired by the employee in the course of employment will remain the property of Old Mutual.
- (iii) The employee undertakes not to divulge or to use for his/her or any other person's benefits any of Old Mutual's information, either during the course of his/her service or after termination thereof. The employee also undertakes to avoid conflicts of interest and breach of his/her fiduciary duties and trust towards Old Mutual and its clients.
- (iii) Without prior written approval of his/her senior, the employee is not permitted to work either for him/herself or for any other employer, nor offer his/her services in a consulting capacity, in circumstances where this may, in the opinion of Old Mutual, interfere with his duties and responsibility to Old Mutual in terms of this Contract.
- (iv) The employee will observe the various principles regarding the protection and non-disclosure of information whether held in electronic or any other form as laid down from time to time by Old Mutual.
- (v) The employee hereby gives his/her irrevocable consent to a duly authorised representative of Old Mutual to search him/her or any vehicle in his/her possession or control or any article worn by him/her or in his/her possession at the premises of Old Mutual.”

[9] The appellant subsequently appeared before the Hearing officer charged with **failure to fulfil expressed or implied conditions of the contract of employment or any breach of the contract of employment** in breach of s 15.9.1 of the Old Mutual Code of Conduct and Grievance Procedure. He pleaded not guilty but was found guilty and dismissed from employment after full contest. In convicting the appellant the hearing officer made the following material findings of fact:

1. That Don misrepresented facts to and caused fellow workers in the OMICO to move to the canteen.

2. Don made a demand for the workers to be addressed by the HR executive or any member of the HR team and hence staged a sit-in at the HR executive's office for approximately 2 hours when this demand was not met.
3. For the 2 hours indicated in 2 above, Don was not at his work station. I conclude that labour was withheld.

[10] Aggrieved, the appellant appealed to the Appeals Officer. He filed 22 grounds of appeal basically challenging the factual findings of the hearing officer. The long and short of it all is that he was denying that he committed the alleged acts of misconduct.

THE RELIEF SOUGHT

[11] Upon success in his appeal he sought the following relief:

“**Wherefore** Appellant prays as follows:

- (a) The appeal is hereby allowed
- (b) The decision of the hearing officer is hereby set aside and substituted with the following:
 1. The Respondent be and is hereby ordered to reinstate the Appellant to his position without loss of salary and benefits.”

PROCEEDINGS BEFORE THE APPEALS OFFICER

[12] The Appeals Officer duly set down the appeal for hearing on 24 September 2019 at 13:00 in the Old Mutual Life Company Zimbabwe Limited EBCS Committee Room giving notice to all interested parties. The notice of hearing gave warning that in the event of default the matter would proceed to be heard and determined in the appellant's absence. On the date of hearing the appellant did not appear. His representative however appeared on his behalf. His representative argued before the Appeals Officer against the hearing proceeding in the absence of the appellant without success. The appellant's

representative then walked out of the hearing in a huff without any further participation in the proceedings.

[13] The Appeals Officer's opening remarks in his judgment at p 13 of the record gives a graphic description of the circumstances surrounding the walkout. This is what he had to say:

“I take it that you (Appellant) did not turn up for the appeal hearing despite my notification being send to you in time for the appeal. Your representative who turned up for the appeal hearing failed to give just cause for your absence but rather threatened to walk out of the appeal hearing on the basis that you were not present. I did not find their threat to walk away as a reason sufficient to warrant me to postpone the appeal. They eventually walked out of the appeal proceedings despite taking part in the initial deliberations of the appeal. The appeal therefore went ahead in your absence as indicated in my letter to you for the appeal hearing.”

[14] Consequently, the Appeals Officer found no merit in the appeal and accordingly dismissed it without any meaningful motivation of the appellant's appeal.

[15] Dissatisfied by the Appeals Officer's determination, the appellant appealed to the court *a quo* without success hence the appeal to this Court. The court *a quo*'s judgment is founded on the *dictum* in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 which chides appeal courts not to disturb factual findings made by lower courts and tribunals in the absence of gross misdirection or irrationality.

[16] The appellant's appeal to this court is founded on 3 grounds of appeal. Couched as follows:

GROUND OF APPEAL

- 1 The Court *a quo* erred in fact, which error in the circumstances amounted to a gross misdirection which no reasonable court would make, in holding that appellant was excluded from the general amnesty waiver granted by the employer concerning the alleged workers' unlawful assemble at the canteen, whether the waiver did not provide for such exclusion., expressly or impliedly and in any case there was no evidence established that Appellant dishonestly or improperly caused the assembly outside his mandate as a workers representative.
- 2 The court *a quo* misdirected itself in fact and law in upholding the determination of the Appeals Officer and Hearing Officer dismissing the Appellant for the misconduct of an act inconsistent with contract of employment for allegedly dishonestly instigating an unlawful assemble of employees, whereas, in the circumstances, Appellant was lawfully and *bona fide* executing his role as a workers' representative. The conviction was an unlawful conflation of Appellant's role as a workers' representative and that as a cashier under the contract of employment and accordingly a victimisation of a workers' representative in contravention of section 4, 6 (1) (e), 7 (1) and 24 (1) of the Labour Act and 65 (2) of the Constitution.
- 3 The court *a quo* erred in upholding the penalty of dismissal whereas in the circumstances the Hearing Officer's exercise of discretion in ordering dismissal was unfair and irrational regard being had to the circumstances of the case including that appellant was exercising his role as a workers' representative, the parity principle that other employees in the same circumstances were not charged, the grave emergency circumstances in which the misconduct occurred and appellant's role in diffusing the situation and the personal mitigation and record of service of the Appellant, giving rise to the conclusion that Appellant was punished for his role as a workers' representative

in contravention of sections 4, 6(1) (e), 7 (1) and 24 (1) of the Labour Act and 65 (2) of the Constitution.

OBJECTIONS IN LIMINE

[17] The respondent took issue with the grounds of appeal arguing that they are prolix, argumentative and imprecise. The appellant countered that the grounds of appeal were proper and in accordance with the rules. Having due regard to the need to resolve labour matters on the merits rather than technicalities, we took the robust view that the defects complained of were not so serious as to vitiate the appeal proceedings. If one was to turn a blind eye to the argumentative repetitive and verbose language the grounds of appeal would somewhat comply with the rules.

[18] The respondent also complained that the appeal was fatally defective in that the appellant could not appeal against a default judgment. We again took a robust view and came to the conclusion that the appellant was not in default as he appeared through a recognised proxy who to some extent made some submissions on the appellant's behalf.

[19] We accordingly dismiss the points in limine and proceed to determine the appeal on the merits.

ANALYSIS AND DETERMINATION OF THE APPEAL

[20] The appeal is essentially an attack on the factual findings made by the hearing officer as will more fully appear in para 7 of this judgment. As a result of such findings, he concluded that the appellant was guilty of an act inconsistent with an express or implied

term of his contract of employment. He accordingly ordered dismissal of the appellant from employment.

[21] The appellant chose to appear before the Appeal Hearing Officer by a proxy who abandoned the appeal hearing without motivating or advancing the appellant's grounds of appeal in any way. Once the proxy had appeared before the hearing officer he was duty bound to remain in attendance until excused by the hearing officer. His act of walking out in protest against a ruling made by the hearing officer was contemptuous of the disciplinary tribunal lawfully established in terms of the respondent's registered code of conduct. That type of conduct has adverse legal consequences.

[22] In *Gudza v City of Harare* SC 17 – 20 at p 7, this Court had occasion to stipulate and clarify the attendant consequences when it remarked that:

“It is common cause that the appellant walked out during the proceedings of the disciplinary committee and subsequently failed to raise the irregularity and seek the appropriate remedy. The right to redress is clearly vested in the appellant. In the present instance, the appellant chose not to exercise this right and as such cannot seek to rely upon it after the fact. Accordingly I find favour with the court *a quo* in dismissing the objection by the appellant.”

[23] Further clarification is to be found in *TM Supermarket v Chimhini* case SC 41 – 19 at p 15 where the Court said:

“The principle that comes out of cases such as *Moyo v Rural Electrification Agency (supra)* and *Emmanuel Masvikeni v National Blood service Zimbabwe (supra)* is that a person cannot walk out of a hearing and thereafter allege that things done in his absence are subject to review by the court. In a review one is concerned with the procedural propriety of proceedings and not the merits of the matter. If, for example, a disciplinary committee is not properly constituted, an employee who walks out of the proceedings taking place before that committee can properly seek the setting aside of those proceedings on account of that irregularity.”

[24] The fact of the matter is that the appellant did not advance or motivate the grounds of appeal upon which he now wants to criticize the Appeals Officer's judgment. He shot himself in the foot by failing to attend the hearing and the conduct of his proxy who walked out of the hearing without motivating the appeal. It therefore follows as a matter of established fact that the appellant did not challenge the factual and legal findings made by the Hearing Officer before the Appeals Officer. It is trite that failure to motivate grounds of appeal is tantamount to an abandonment of the same. Once the grounds of appeal have been abandoned they cannot be resuscitated because the lower court will not have determined them, save for points of law which can be raised at any point of the proceedings.

[25] It appears to me that the only other ground upon which the Appeals Officer's judgment could be upset is if he was guilty of a misdirection on a point of fact which was so gross in its defiance of logic such that no reasonable court or tribunal could have come to that conclusion.

[26] The appellant did not seek to raise new points of law. In fact he kept on raising and repeating the same arguments of fact and law at every stage of the case. Both the court *a quo* and the Appeals Officer dissected and scrutinised the Hearing Officer's findings of both fact and law but found no misdirection let alone gross misdirection. We have also scrutinized the record of proceedings and have come to the same conclusion.

DISPOSAL

- [27] In summary the Hearing Officer relied on concrete credible eye witness evidence to come to the conclusion that the appellant had caused the unlawful collective job action by lying to both the workers and management. He staged an unlawful sit-in at the Human Capital Executive's office for about two hours when he was supposed to be at his work station. The letter which provided waiver expressly stated that it related to employees gathered at the canteen. It did not mention those employees who had instigated the unlawful strike. It also did not cover the unlawful sit-in staged by the appellant at the Human Capital Executive's office. The conclusion that the appellant was guilty of contravening section 15.9.1 of the respondent's registered code of conduct, that is to say, "failure to fulfil expressed or implied conditions of the contract of employment or breach of the contract of employment" was eminently reasonable.
- [28] The appellant did not help matters by waiving his right to challenge the Hearing Officer's judgment before the Appeals Hearing Officer. That being the case, no blame can be laid at the court *a quo's* door. In the result the appeal can only fail. Costs follow the result.
- [29] It is accordingly ordered that the appeal be and is hereby dismissed with costs.

CHATUKUTA JA : I agree

MWAYERA JA : I agree

Matika, Gwisai & Partners, appellant's legal practitioners

Maguchu & Muchada Business Attorneys, respondent's legal practitioners.