

REPORTABLE (41)

CASSIAN MANUHWA
v
SEEDCO ZIMBABWE (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, KUDYA JA & MWAYERA JA
HARARE: 22 FEBRUARY 2022 & 19 MAY 2023**

B. Magogo, for the appellant

G. Sithole, for the respondent

KUDYA JA

[1] The appellant appeals against the whole judgment of the Labour Court (the court *a quo*), which was handed down on 9 January 2015. The court *a quo* dismissed his appeal against the determination of the disciplinary authority, which found him guilty of misconduct and dismissed him from employment.

The facts

[2] The appellant was employed by the respondent as a Sales Distribution Services Manager. He was suspended from employment without any salary or benefits on 13 December 2010. On 4 January 2011, he was charged by the disciplinary authority with an act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment in contravention of s 4 (a) of the Labour (National Code of Conduct) SI 15/2006 (the National Employment Code).

- [3] He was alleged to have authorized the dispatch of seed maize valued at US\$931 735.06 on credit to Nelmah Holdings (Pvt) Ltd (the agro-dealer) in violation of the requisite internal procedures of the respondent. He contested the charge but was subsequently convicted thereof on 13 January 2011 and dismissed with effect from the date of suspension.
- [4] He was legally represented at the hearing. He raised two defences. The first was that he was verbally authorized by his immediate supervisor, Ivan Craig, to dispatch the seed maize to the agro-dealer. The second was that the respondent's electronic credit management system broke down and disabled him from detecting the breach of the credit limit of the agro-dealer and stop the sales transactions in real time. He, however, conceded that he was well versed with the respondent's manual pre-credit check system.
- [5] The disciplinary authority found his "evidence to be full of inconsistencies" and his "conduct reckless". It held that Ivan Craig did not authorize him to dispatch the seed maize to the agro-dealer. It was common cause that the appellant did not conduct any pre-credit checks. It was also common cause that the manual pre-credit checks preceded the credit sales and the electronic notification of the breach of a credit sale. It was further common cause that the respondent's electronic sales management system was down and could not therefore alert the Sales Office of any credit limit breach in real time. The disciplinary authority found that by virtue of his seniority, the appellant knew the manual internal pre-credit checking procedures required of him before he could authorize the sale of seed maize on credit. It, therefore, held that the failure of the electronic system to flag the breach would not absolve him from physically verifying the credit limit and status of the agro-dealer

before authorizing the sale. Lastly, it found that even though the electronic warning system was down, he ignored the verbal warning given to him by the credit controller one Thomas Mavhurumutse on 22 October 2010 and on 28 October 2010 that the agro-dealer had exceeded its credit limit. He, therefore failed to stop any further deliveries to the prejudice of the respondent. He was thus convicted of misconduct and duly dismissed from employment.

- [6] Aggrieved by the determination of the disciplinary authority, he filed an appeal and an application for review in the court *a quo*, raising 15 grounds of appeal against conviction, an additional 5 grounds against the penalty and a further 4 grounds of review.

The contentions *a quo*

- [7] In the court *a quo*, counsel for the appellant impugned the disciplinary authority's factual findings on the basis that they constituted a gross misdirection, which amounted to a misdirection of law to which no sensible court applying its mind to the facts would have made. He contended that the disciplinary authority incorrectly found that the appellant had *mero motu* authorized the dispatch of seed maize to the agro-dealer. He argued that the appellant had acted, as he was wont to do, on the verbal instruction of his immediate supervisor. He contended that the contrary finding of the disciplinary authority ignored the testimony of Thomas Mavhurumutse and the contents of the input credit application forms submitted by the agro-dealer for its respective winter wheat and summer maize programs. He argued that Mavhurumutse and the agro-dealer's representatives confirmed that Craig had verbally authorized the appellant to sell seed maize on credit. He further argued that

Craig's signature for and on behalf of the respondent on the summer maize application form signified two things. Firstly, the execution of a binding contract between the agro-dealer and the respondent. Secondly, the written authorization by Craig to sell maize seed to the agro-dealer on credit.

[8] He also contended that, Bramwell Bushu, who replaced Craig as his immediate supervisor, had prior knowledge of the agro-dealer's credit transaction. This, so he argued, was demonstrated by the letter written to the agro-dealer by Bushu on 6 October 2010. In the letter Bushu affirmed the respondent's ability to supply the agro dealer's seed maize requirements specified in its letter dated 5 October 2010. Counsel further argued that the failure by the respondent's electronic sales management system to block the excessive credit sales led the appellant to believe that it had an extant credit limit that had not yet been reached.

[9] The appellant did not motivate any of his grounds of review in his main written heads of argument *a quo*. He was prompted to do so in his supplementary heads, which he filed in response to the respondent's heads. He, therein, strenuously argued that his references to the conduct of Bramwell Bushu, which only came to his attention after the disciplinary proceedings, established his four grounds for review. The only relevant ground for review was that Bushu was an interested and biased party who for that reason could not have represented the respondent as the complainant in the disciplinary proceedings. This was because he had concealed his letter of 6 October 2010 from the disciplinary authority. The other three grounds for review related to the subsequent fraud charges levelled against

Bushu after the hearing and the recovery efforts the appellant purportedly initiated and negotiated with the agro-dealer, after the misconduct came to light.

[10] *Per contra*, the respondent made the following contentions in its written heads of argument *a quo*. The application for review was fatally defective in that it sought to introduce new evidence which was not before the disciplinary authority. This evidence, comprised the arrest of Bushu for fraud arising from the same transactions subsequent to the disciplinary proceedings and his letter of 6 October 2010. The letter did not constitute a credit guarantee letter but was a supply guarantee letter. In any event, the new evidence was not only irrelevant to the resolution of the dispute before the disciplinary authority but also negated the hallowed principle of finality to litigation. It was improper for the appellant to seek to try out new issues on fresh facts simply because the first set of facts had proved inadequate. The remaining grounds of review did not impugn the manner in which the disciplinary proceedings were conducted. They raised mitigatory factors, which rightly fall into the ambit of an appeal against sentence rather than the legality, procedural propriety and rationality of the hearing.

[11] Regarding the appeal, it argued that the determination was rationally linked to the facts and evidence and could not be interfered with on appeal. It submitted that the appellant was correctly convicted and rightly dismissed because the offence went to the substratum of and destroyed the employment relationship between the parties.

The findings of the court *a quo*

- [12] The court *a quo* reduced 15 grounds of appeal to a single issue of whether the hearing officer grossly misdirected himself by convicting the appellant on the evidence that was placed before him. Likewise, the issue raised against sentence was whether or not the sentence of dismissal was appropriate. It held that the review grounds did not constitute proper grounds of review. It however regarded them as abandoned as they had not been motivated but did not make a determination on the application.
- [13] Regarding the appeal, the court *a quo* held that the appellant authorized credit sales above the agro-dealer's US\$20 000 limit. He did so without adhering to the prevailing manual procedures, which were known to him. He was required to follow them before authorizing the sale. The electronic credit sales management system would only be activated subsequent to the mandatory manual pre-credit checks. The malfunctioning of the electronic system did not therefore absolve him from making the manual pre-credit checks.
- [14] It also upheld the factual findings of the disciplinary authority that Craig did not authorize any sales in excess of the agro-dealer's credit limit. The findings were supported by the oral and written testimonies of Craig, Mavhurumutse, Melody, Locadia Marongwe and Muzadzi who all interacted with the appellant at all material times. They were also confirmed by the documentary evidence and the probabilities. It further found that the agro-dealer could not have concluded a summer seed maize credit sale contract with the respondent, as suggested for the first time on appeal by the appellant, without submitting the required credit insurance cover. The court *a quo* further found that the probabilities

demonstrated that the appellant's conversation with Craig over the Zimbabwe Farmers Union (ZFU) seed maize voucher program could not reasonably be construed as constituting the disputed verbal authorization. The court *a quo*, therefore, held that the appellant had disingenuously authorized the credit sale for the benefit of the agro-dealer *in lieu* of the ZFU voucher program.

[15] By consent, the parties called on appeal the evidence of Craig and Bushu and produced the letter written by the agro-dealer on 5 October 2010 and Bushu's 6 October 2010 reply. It found that Bushu's reply did not constitute the requisite authority to open a credit sales trading account; its absence at the disciplinary hearing did not prejudice the appellant and its production thereat would have served no useful purpose.

[16] The court *a quo*, consequently, dismissed the appeal with no order as to costs. It, however, did not pronounce itself on the application for review.

The grounds of appeal

[17] Irked by the decision of the court *a quo*, the appellant appeals to this court on the following grounds of appeal:

1. The court *a quo* erred at law in confirming appellant's dismissal when there was no evidence that the appellant acted in a manner inconsistent with the fulfillment of the express or implied conditions of his contract of employment.

2. The court *a quo* erred at law in confirming the appellant's dismissal contrary to the evidence of Ivan Craig and Bramwell Bushu which exonerated the appellant of any wrong doing.
3. The court *a quo* erred at law in confirming the appellant's dismissal for misconduct yet the record clearly shows that appellant sought authorization before dispatching seed to Nelmah.

He seeks the success of the appeal with costs, the vacation of the court *a quo*'s judgment and its substitution with an order granting both the appeal and the application for review with costs, his reinstatement with salary and other benefits, alternatively damages, which may be computed by the Labour Court, if the parties fail to agree thereon within 30 days of the substituted order.

[18] At the commencement of the hearing, Mr *Magogo*, for the appellant moved for the addition of two other grounds of appeal. After some initial opposition, Mr *Sithole* for the respondent conceded to the addition thereof. Consequently, the following two grounds of appeal were, by consent, added to the notice of appeal as numbers:

- (4) The court *a quo* erred in finding that the appellant's 1st ground of review alleging interest in the cause did not raise a review ground and; *a fortiori*, having heard new evidence on review, in failing to record the full evidence given by the parties and to determine the effect of the new evidence on that review ground and;
- (5) The court *a quo* erred in groundlessly commenting that the review application had been abandoned and in leaving the same hanging and undetermined.

The contentions before this Court

The preliminary applications

[19] At the commencement of the hearing before this Court, Mr *Magogo*, for the appellant, took two preliminary applications. Firstly, he sought the vacation of the judgment of the court *a quo* and the remittal of the matter before a different judge. This was because of the common cause fact that the transcript of the proceedings and notes of the presiding judge *a quo* could not be located after diligent search. The transcript and the notes could also not be reconstructed due to the 5-year time lapse between the dates on which judgment was handed down and the request for reconstruction was made. Secondly, he sought the amendment of the notice of appeal by the addition of the two grounds that are set out in para (18), above.

[20] After interacting with the Court, Mr *Magogo* abandoned the first application. He conceded that it was in the interests of the due administration of justice that there be finality to this matter, which has been raging between the parties for the past decade. It was therefore dismissed. The second application was, however, granted by consent.

The substantive contentions on the merits

[21] On the merits, Mr *Magogo* contended that the conviction was not established by the evidence called at the disciplinary hearing. He argued that Craig and Bushu exonerated the appellant of any wrongdoing. He strenuously argued that the court *a quo* did not properly assess the common cause evidence of the telephonic conversation between Craig and the appellant, which took place when the appellant was in the company of Nyathi and the agro-

dealer's Mahupete. He submitted that a proper consideration of the evidence would have led to the inevitable conclusion that Craig had verbally authorized the sales transaction and resulted in the appellant's acquittal. He also argued that an acquittal would also have followed from the correct appreciation of the minutes of the meeting held at Wild Geese Lodge on 15 December 2010 between the top management of the respondent and the agro-dealer.

[22] Regarding the two additional grounds of appeal, Mr *Magogo* argued that they raise the issue of whether or not the review application was dealt with and the manner of its disposal. The review grounds concerned the alleged interest and bias of Bushu, who acted as the complainant at the hearing. Counsel argued that the non-disclosure of Bushu's letter of 6 October 2010 and of his arrest for fraud *ex post facto* the hearing, constituted a gross misdirection by the disciplinary authority. He, however, failed to articulate how the disciplinary authority's failure to consider evidence that was never placed before it could ever amount to a misdirection. He also argued that the failure to make a substantive order on the application for review was a misdirection, which would be subject to correction by this Court.

[23] Mr *Sithole* made the following contrary submissions. The evidence on record confirmed that the appellant was guilty of the misconduct for which he was charged with. The evidence of Craig, Bushu, Muzadzi and Locadia Marongwe implicated him of wrongdoing. The tele conversation between Craig and the appellant on 19 October 2010, which preceded the first dispatch of seed maize, and the minutes of the meeting at the Wild Geese Lodge

did not exonerate him of any wrongdoing. His assertion that he did not have access to the credit limit modules was controverted by Melody and Mavhurumutse. In any event, it was common cause that he never conducted the pre-creditworthiness checks required of him before authorizing the dispatch of the seed maize.

[24] He further submitted that the two additional grounds of appeal could not properly be related to by this Court in view of the finding *a quo* that the appellant had abandoned the application for review. He submitted that the court *a quo* dealt with the application for review and concluded that it had been abandoned. He argued that the court *a quo* only assessed the evidence of the two witnesses that were called before it in the context of an appeal and not of an application for review. He further contended that the appellant's failure to assail the finding on abandonment is fatal to his case. He therefore implored the Court to dismiss the appeal in its entirety.

The issues

[25] The two issues that arise from the grounds of appeal are, firstly, whether the court *a quo* correctly upheld the conviction of the appellant, which resulted in his dismissal from employment and secondly, whether the application for review was abandoned and a substantive order pronounced *a quo*.

Analysis

Whether or not the court *a quo* correctly upheld the conviction of misconduct and dismissal from employment.

[26] It is trite that an appeal court will not lightly interfere with the factual findings of a trial court unless that court is found to have proceeded on some material misappreciation or misapplication of the law and or the facts or where it has relied on some extraneous or irrelevant consideration or has failed to take into account some particularly relevant matter. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 and *Zimbabwe Homeless People's Federation et al v Minister of Local Government and National Housing & Ors* SC 94/20 at p 37.

[27] The disciplinary authority made the following findings. The tele conversation between the appellant and Craig on 19 October 2010 related to the supply of seed maize to the ZFU's Nyathi. Craig confirmed that the respondent had an extant voucher program with the ZFU and not the agro-dealer. The seed maize for the voucher programme would be drawn down on the trading account of the ZFU but there were no vouchers or orders bearing the ZFU stamp and the signatures of its signatories. The appellant *mero motu* demanded vouchers from the agro-dealer and proceeded to sell seed maize to it on credit. He was duty bound to conduct manual pre-creditworthiness checks of the agro-dealer before he could authorize his subordinates to sell seed maize to it on credit. He was warned by the credit controller Mavhurumutse when the credit limit exceeded the authorized limit of US\$20 000 by US\$83 936.90 on 22 October 2010 and by US\$489 000 on 28 October 2010. He ignored both warnings. In any event, he had no reason to *mero motu* stop further deliveries of seed maize on 30 October 2010, if his version that he had been authorized to accord unlimited credit to the agro-dealer was true.

[28] The *ratio decidendi* of the court *a quo*, in respect of the conviction, is found at page 145 of the appeal record. The court stated that:

“In the present case, if the evidence led is accepted, it does not appear that the decision arrived at was outrageous in its defiance of logic. The defence to the charge was that Ivan Craig had authorized the purchase by Nelma. He denies it and his denial is supported by other witnesses. It is also supported by the fact that Nelma did not have a good history as a credit customer. This was known to the appellant. The so-called authority as explained by the appellant himself does not strictly refer to Nelma but to Mr Nyathi and ZFU. Whichever way the matter is taken, the appellant had a duty to check on the credit limit. He had to know that in order to monitor. In the light of all this the decision to convict does not sound wrong.”

[29] The court *a quo* thus confirmed the factual findings of the disciplinary authority. The confirmation is indeed supported by the oral testimony of the witnesses, the documentary evidence and the probabilities of the case that was before the disciplinary authority. Its findings do not fall into the ambit of those that are so, outrageous in their defiance of logic or accepted moral standards that no sensible court applying its mind to the questions at issue could have arrived at. We are therefore satisfied that he was properly convicted by the disciplinary authority and that the court *a quo* correctly upheld the conviction. The first three grounds of appeal are therefore devoid of merit and ought to be dismissed.

[30] It is noteworthy that the appellant did not impugn the penalty of dismissal in his grounds of appeal. We, therefore uphold it.

Whether the application for review was abandoned and whether the court *a quo* pronounced a substantive order thereon.

[31] Mr *Magogo*'s submission that the application for review was not abandoned runs contrary to the findings of the court *a quo*. It remarked thus in its judgment, at p 143 of the appeal record:

“It will be noted that the application for review appeared to have lost its way and was not heard of in the addresses. The issues that were clearly pursued were those of the appeal. In fact, these are not review issues except for the first one if it can be proved. If it can be proved it would fall under the appeal grounds as facts which can show that the hearing officer grossly misdirected himself on the facts proved. Therefore, there was no review case at all. None was genuinely pursued. There was no need to have a separate case for review.”

[32] In our view, the correctness of this finding is affirmed by the fact that the appellant did not assail these findings in its written heads of argument or even in the additional grounds of appeal. This was in spite of the categoric assertion advanced by the respondent in para 2.5 of its written heads of argument that:

“The court *a quo* found that the same was not pursued at the hearing as the appellant only pursued the appeal. **See page 143 of the record, last paragraph.** This finding by the court *a quo* has not been challenged in the present appeal and the issue of the review is therefore, resolved”. (emphasis by the respondent).

[33] We also agree with Mr *Sithole*'s submission that, the appellant's failure to impugn the finding was fatal to the appeal. In our view, the appellant could not properly appeal against a review that it had abandoned. In the circumstances, we would dismiss the fourth ground of appeal.

[34] We, however, agree with Mr *Magogo* that the application for review was before the court *a quo*. It is trite that where a party fails to motivate a ground of appeal, it is regarded as abandoned. An abandoned ground of appeal is struck out. See *Colcom Foods Ltd v Taruwa SC 107/20* at p 5 and *Equity Properties (Pvt) Ltd v Al Sham Global BVI Limited SC 101-21*

at p 9. In our view, where, as in this case, an application for review is enrolled before a court and is regarded as abandoned, it ought to be dismissed. We, therefore agree with Mr *Magogo* that the court *a quo* ought to have pronounced itself on the application for review. In terms of s 22 (1) (a) of the Supreme Court Act [*Chapter 7:13*], this Court:

“shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require.” (my emphasis).

We believe that this a proper case to invoke the power vested in this Court by the closing phrase of s 22 (1) (a), *supra*, that is “to give such judgment as the case may require.” We will, therefore, amend the order *a quo* by inserting an additional para 2 to the effect that: “the application for review be and is hereby dismissed.” The net effect of the amendment is that the initial para 2 will therefore become para 3.

[35] In view of the finding in para [34] above, the fifth ground of appeal partially succeeds.

Costs

[36] The employer has substantially succeeded in this appeal. However, as this is a labour case, we see no reason why each party should not bear its own costs.

Disposition

[37] Accordingly, it is ordered that:

1. The appeal succeeds in part.
2. The appeal against conviction is dismissed in its entirety.
3. The judgment of the court *a quo* is amended by the insertion of para 2, so that it reads:

- “2. The application for review be and is hereby dismissed.
3. Each party shall bear its own costs.”

4. Each party shall bear its own costs.

GWAUNZA DCJ: I agree

MWAYERA JA: I agree.

Matsikidze Attorneys-At-Law, the appellant’s legal practitioners

Kantor & Immerman, the respondent’s legal practitioners