REPORTABLE (71)

GRAIN MARKERTING BOARD
v
INNOCENT BEREMAURO

SUPREME COURT OF ZIMBABWE
BHUNU JA, UCHENA JA & CHATUKUTA JA
HARARE: 20 MAY 2022 & 24 JULY 2023

B. Magogo, for the appellant

O. Kondongwe, for the respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the Labour Court of Zimbabwe (the court *a quo*) handed down on 13 March 2020 in which the court reversed the decisions of the appellant's disciplinary committee and the appeals committee dismissing the respondent from employment and ordered his reinstatement.

FACTUAL BACKGROUND

The respondent was employed by the appellant as the resident fitter and turner at its depot in Lions Den, Mashonaland West. His duty was to carry out repair and maintenance works on the plant. The works included welding and general plant safety. On 28 August 2018, one Isaac Pini (Pini), a contract general hand, was welding a grain duct in a silo tower which was used to convey soya beans. Whilst he was carrying out the assignment an explosion occurred which

resulted in the death of six employees, serious injuries to two others and extensive damage to the silo tower.

Investigations into the cause of the explosion were conducted resulting in the respondent being charged with two acts of misconduct. The charges were couched as follows:

First charge:

> "Category 1 section 10 of the Grain Marketing Board Code of Conduct: Negligent, disregard or violation of safety rules endangering own life or lives of others and causing damages to GMB property."

Second Charge:

> "Category 1 Section 11: Any act of misconduct or omission inconsistent with the fulfilment of the express or implied condition of one's contract of employment."

Both charges were based on allegations that the respondent had assigned Pini, an unskilled general hand, to weld a duct in a "hot works area" which term was curiously not defined by any of the parties during all the proceedings. It was alleged that the appellant was negligent, in violation of or disregard of safety rules by assigning an unskilled worker to carry out the maintenance works. It was further alleged that the respondent abandoned his duties as the resident fitter and turner when he assigned Pini to work in the "hot works area". A hearing was conducted by the disciplinary committee. At the close of the hearing, the respondent was found guilty and was dismissed from employment.

The respondent's appeal to the appellant's Chief Executive Officer was dismissed by a letter dated 28 June 2019. Disgruntled by the dismissal, the respondent appealed to the court *a quo*.

SUBMISSIONS IN THE COURT *A QUO*

It was the respondent's argument, *inter alia*, that the evidence from the witnesses showed that the cause of the explosion was inconclusive. It was further submitted that the explosion could not be attributed to the welding in the 'hot works area' and therefore, to the respondent. It was argued that the respondent had assigned Pini to carry out repairs to ducts outside the "hot works area". It was submitted that Pini had carried out repairs in the "hot works area" on instructions from one Chikonore and one Moyo. It was contended that the respondent was therefore not responsible for the explosion.

The appellant submitted *a quo* that the evidence it produced proved on a balance of probabilities that the respondent was guilty as charged. It was argued that assigning Pini, who was an unskilled general hand, to perform repairs in a confined area amounted to negligent disregard and violation of safety rules. It was further argued that such conduct amounted to an abandonment of the respondent's duties, contrary to the express or implied conditions of his contract of employment.

It was further argued that although the actual cause of the explosion was not conclusive, it was highly probable that the welding that was done by Pini in the silo was the cause of the explosion and that the respondent's actions indirectly caused the explosion.

COURT *A QUO*'S DETERMINATION

The court *a quo* held that the finding by the Disciplinary Committee that the respondent assigned Pini to repair the duct that was spilling soya beans was not supported by any evidence. It further held that the reports produced in evidence were not conclusive of the cause of the explosion and that the respondent could not therefore be held responsible for the explosion. It also held that Pini had undertaken work in the duct on instructions from persons other than the respondent. It held that that the respondent was therefore not responsible for Pini's conduct. The court found that the appellant failed to prove its case on a balance of probabilities. Consequently, the court *a quo* allowed the appeal.

Disgruntled by the decision of the court *a quo*, the appellant has filed the present appeal on the following grounds:

GROUNDS OF THE APPEAL

1. The court *a quo* erred at law in failing to decide on the point before it; that the issue relating to what was the proximate cause of the explosion was not germane to the charge faced by the respondent as defined in Category 1 s 10 of the GMB Code of Conduct.

2. In finding that Pini's hot works did not cause the explosion the court *a quo* wrongly applied the criminal law circumstantial evidence test of discounting all other possible inferences yet in civil matters the inference sought must be the most readily apparent and acceptable from a number of possible inferences.

3. The court *a quo* grossly erred and misdirected itself on facts which error amounts to an error in law in finding that the instruction to repair ducts was given to Isaac Pini by persons other than the respondent

3.1 *A fortiori*, the court *a quo* grossly erred in failing to find that Isaac Pini's mandate to repair ducts did not emanate from the implementational guidance provided by Messrs Chikonore and Moyo but on the overall instruction to repair ducts given to him by the respondent.

4. The court *a quo* erred in failing to make a decision on whether or not the act of delegating the welding and duct repairing task to a general hand was consistent with the fulfilment of the express or implied condition of the respondent's contract of employment.

5. The court *a quo* erred in granting an order for specific performance without an option for damages.

SUBMISSIONS BEFORE THIS COURT

APPELLANT'S SUBMISSIONS

Counsel for the appellant submitted as follows: The respondent was the resident fitter and turner and was trained to carry out the maintenance work. The responsibility to carry out maintenance work at the depot lay solely in the hands of the respondent. He delegated the responsibility to Pini who was a general hand with absolutely no training in maintenance work. Pini carried out maintenance work which resulted in an explosion killing 6 people and seriously injuring two others including Pini himself. The respondent did not deny the fact that by delegating to an untrained person the responsibility to carry out maintenance work he was negligent and endangered the lives of Pini and other employees. Further, he did not deny that his conduct was

inconsistent with his contract of employment. The court *a quo* therefore misdirected itself when it placed emphasis on the cause of the explosion and not so much on whether the proven, and to some extent, accepted facts were enough to find the respondent guilty of the charges preferred against him.

Whilst conceding that the first charge was inelegantly drafted, the appellant's counsel further argued that: The charge, with the exclusion of reference to the question of the explosion causing damage to the appellant's property, was specifically provided for in the code of conduct. The court *a quo* therefore misdirected itself when it upset the decision of the appellant on the basis that the additional aspect of the charge was not proven.

Counsel also argued that the court *a quo* erred by only ordering the reinstatement of the respondent without a corollary provision for payment of damages in the event that reinstatement is no longer tenable.

RESPONDENT'S SUBMISSIONS

Per contra, counsel for the respondent argued as follows: The first charge was drafted by the appellant and not the court *a quo*. The court *a quo* therefore did not err in holding that the respondent could not be found guilty where the appellant had failed to prove an element of the charge that he caused the explosion.

Counsel conceded that Pini was a general hand and worked as a subordinate to the respondent. He further conceded that the respondent assigned Pini duties to repair ducts outside

the plant and in the workshop. He however denied that the respondent gave Pini instructions on the fateful day to conduct welding in the silo. The explosion could therefore not be attributed to the respondent. The court *a quo* therefore correctly allowed the respondent's appeal.

Counsel lastly argued that a court cannot give an order of damages in the absence of evidence on the unsustainability of the employment relationship between the parties. The court *a quo* therefore did not misdirect itself when it only ordered the reinstatement of the respondent without the corollary relief.

ISSUES FOR DETERMINATION

One main issue commends itself for determination, that is:

Whether or not the court *a quo* misdirected itself in allowing the respondent's appeal.

THE LAW AND ANALYSIS

The appellant argued that the court *a quo*, with respect to the first charge, concentrated on the issue whether the appellant proved the cause of the explosion when it ought to have considered the evidence that the respondent had been negligent and disregarded safety rules which endangered lives.

The first charge preferred against the respondent is couched in the "Grain Marketing Board Code of Conduct Amended 2009" (the code of conduct) as follows:

> "Category 1 section 10: Negligent, disregard or violation of safety rules endangering own life or lives of others."

The charge preferred against the respondent by the applicant read as follows:

> "Category 1 section 10 of the Grain Marketing Board Code of Conduct: Negligent, disregard or violation of safety rules endangering own life or lives of others **and causing damages to GMB property**." (own emphasis)

The appellant therefore added to the charge in the code the phrase "and caused damage to GMB property." The phrase is outside the provisions of the code of conduct and is therefore clearly superfluous. The respondent could not be charged with and found guilty of causing damage to GMB property as this was an irrelevant consideration which went beyond what is provided for in the code. Applying the blue pencil rule, the patently invalid phrase can be severed or struck out and the charge as per the code remains valid. The fact that the charge had alleged more than what is provided for in the code does not prevent the respondent from answering the charge whether his conduct evinced negligence, disregard or violation of safety rules endangering his own life and that of others. Once it is accepted that his acts were negligent, a disregard or violation of safety rules which resulted in endangering others, the offence would have been proven.

This Court remarked in *Air Zimbabwe (Pvt) Ltd* v *Mensa* SC 89/04 that:

> "A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent."

Whilst the above principle was laid down at the backdrop of flawed disciplinary proceedings which were set aside, it applies with even greater force in the present matter where the matter was decided on the merits and there was adequate evidence including admissions by the respondent upon which the court *a quo* ought to have dismissed the respondent's appeal. The

respondent could not escape the consequences of his misdeeds solely because the charge included superfluous elements.

The manner in which the charge was couched could not vitiate the findings of the disciplinary committee that the appellant was guilty of negligence, and disregarded or violated safety rules endangering his own life or the lives of others.

Counsel for the respondent conceded that the phrase in issue was extraneous and that the respondent could not have been charged outside the law. He further conceded that it would have been competent to convict the respondent of the charge as it appears in the Code of Conduct. He, however, persisted with the submissions that the respondent was not negligent and did not disregard safety rules as he was not the one who instructed Pini to weld the duct inside the silo.

The court *a quo* had been called upon to answer to the question whether the respondent was negligent or disregarded or violated safety rules. The import of the findings of the court *a quo* is that the respondent was not negligent or did not disregard or violate safety rules because he did not firstly, give instructions to Pini to carry out work in the silo and secondly, that the evidence adduced by the appellant was not conclusive as to the cause of the explosion.

The findings of the court *a quo* are not borne out by the evidence adduced before the Disciplinary Committee. The respondent was represented at the hearing by Mr D. Mlambo. Mr Mlambo admitted responsibility for Pini's conduct not only on the date of the explosion but on

other occasions. The following is the relevant extract of the record of proceedings of the disciplinary hearing at pp 41-2:

> "Complainant: Were you aware that I. Pini would carry out welding job?
> Personal Rep: On this particular day?
> Complainant: Even before
> Personal Rep: Like we said, we took full responsibility but from like he said, he was like a super hero. The plant was left in the hands of an unqualified people (*sic*). He did not follow proper procedure."

And at p 44:

> "Complainant: You accept responsibility?
> Personal Rep: Yes."

In the Closing Submissions at p 48 of the record of proceedings *a quo*, the respondent's personal representative submitted as follows:

> "Respondent was responsible for 4 silos and GMB has a total of 12 depots with silos. I think HR can confirm that Silos are class 1 depots which have to be manned by a qualified person."

It is apparent from the above quotations that the respondent's representative accepted the fact that the work in the silo had to be done by a qualified person. He further accepted that the plant had been left in the hands of an unskilled person, Pini. He lastly accepted that the respondent was taking full responsibility for Pini's conduct. The admission that the respondent was taking responsibility for Pini's conduct ought to have put the matter to rest as regards the respondent's guilt. The questions as to who exactly instructed Pini to go into the silo and what caused the explosion were therefore inconsequential. It is common cause that Pini was unskilled and therefore ought not to have been allowed to be a "super hero". He became "a super hero" because the

respondent allowed him to do work which he was not qualified to do and which work the respondent had been employed to do.

The extent to which the respondent had allowed Pini to run the show, as it were, comes out of Pini's evidence. The following was the exchange between Pini and the appellant's representative (Mgt):

"Mgt Rep: So people had been used to telling you and when there is need you did sealing/repairs?
Pini: Yes.
Mgt Rep: Why did they come to you?
Pini: Because I would have been allocated to do that, however, I would advise him (Respondent) before or after the work had been done. At times I would tell him and he would ask on what I would have done about the issue.
Mgt Rep: Are you a qualified Journeyman Assistant?
Pini: No.
Mgt Rep: So you had no knowledge?
Pini: Yes ……
Mgt Rep: Where did you get the welding machine?
Pini: I took it from the workshop.
Mgt Rep: Who gave you?
Pini: I took it from the workshop and sometimes he would give me.
Mgt Rep: How about on this day?
Pini: It was known that I was going to seal/ repair the ducting.
Mgt: What do you mean it was known?
Pini: Mr Beremauro knew we were going to use the welding machine."

Pini's testimony is therefore consistent with the admissions by the respondent's representative. Pini testified that he had been given *carte blanche* to carry out repair and maintenance works at the depot. He had been assigned by the respondent the duty to repair ducts, be it in the workshop only or inside the silo. It is also apparent from his evidence that at times he undertook work without the supervision of the respondent and reported to the respondent only after carrying out the work. In fact, according to the respondent's evidence, the explosion occurred

when the respondent was in the canteen during a tea break having tea away from where Pini was carrying out maintenance work. He had to be called to the silo after the explosion. The respondent was negligent in the performance of his duties. He allowed an unskilled person to work in a dangerous area regardless of the fact that he was aware of the dangers of assigning work to an unskilled person and not supervising the unskilled person. The mere assignment of an unskilled person to undertake work specifically assigned to a skilled person was an abrogation of duty. It amounted to negligence and a disregard or violation of safety rules. It is common cause that prior to the explosion, and on 1 September 2017, the respondent and other managers had in fact been trained on Hazard Identification and Risk Assessment in Chinhoyi where issues on the dangers of hot works in confined areas and the dangers of explosions were taught. In spite of the training, the respondent still allowed an unskilled worker to undertake welding inside a silo and without any supervision.

In *TM Supermarket* v *Mangwiro* SC 57/03 this Court dealt with the issue of delegation of work by a superior to a subordinate and failure to supervise. In this case the court held that,

> "I am satisfied the respondent delegated to a subordinate a function that, given its sensitive nature, he should have carried out himself. He compounded the error by not checking to see that the work had been done properly. This, in my view, suggests an inability to appreciate the seriousness of one's responsibilities. This is particularly so given the fact according to Mashingaidze, that the appellant had taken the trouble to stress to each and every one of its managers, the importance of personally keeping the reset control book. The respondent thus defied both the appellant's Management Control Manual, and the appellant's explicit instructions. His conduct resulted in substantial financial loss to the appellant."

The respondent was therefore negligent in delegating duties to Pini to perform tasks which he was not qualified to do and failing to supervise him. Ample evidence proving the respondent to be negligent and violating or disregarding safety rules was abounded. The appellant

endangered the lives of the other employees. The court ought to have found the respondent guilty in the circumstances.

Even assuming that there was no evidence that the respondent was guilty of the first charge, the appellant had succeeded in establishing conduct inconsistent with one's employment and therefore proved the second charge. Clause 12 of the respondent's contract of employment stated that:

> "An employee shall at all times comply with instructions in regard to duties assigned and shall perform such duties diligently and faithfully …."

The respondent had undergone safety awareness training in Chinhoyi consistent with the above condition of employment. The respondent's conduct of assigning work to an unskilled person amounted to abrogation of responsibility and was indisputably inconsistent with the respondent's contract of employment.

The court *a quo* therefore misdirected itself in upsetting the dismissal of the respondent in circumstances where he was guilty as charged. This finding renders it moot to consider and determine the question whether the court *a quo* erred in not making an award of damages *in lieu* of reinstatement. This is for the simple but good reason that the respondent is not entitled to reinstatement or damages following his dismissal from employment. It is trite that courts are not inclined to determine moot issues.

In the final analysis, we find that this appeal has merit and ought to succeed.

It is trite that costs follow the cause. There is no basis for departing from this rule.

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

   "The appeal be and is hereby dismissed with costs."

BHUNU JA: I agree

UCHENA JA: I agree

Makuwaza & Magogo Attorneys, appellant's legal practitioners

Dube, Manikai and Hwacha, respondent's legal practitioners