REPORTABLE (75)

BATSIRAI MAMBAYO
v
OLD MUTUAL SHARED SERVICES PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & MUSAKWA JA
HARARE: 5 JULY 2022 & 26 JULY 2023

M. Gwisai, for the appellant

A. K. Maguchu, for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) wherein it upheld the appellant's dismissal from employment for misconduct.

FACTUAL BACKGROUND

The appellant was employed by the respondent as an accounts administrator. She was also a member of the workers committee. She was charged with misconduct in terms of the Old Mutual Code of Conduct and Grievance Procedure, (in particular s 15.9), for failure to fulfill the expressed or implied conditions of her contract of employment or any breach of the employment contract. The allegations against her were that during the morning of 9 July 2019 she misrepresented to and mobilized Old Mutual employees to gather in the Mutual Gardens canteen. This was on the pretext that the Human Capital Executive wanted to address them. As a result, employees gathered in the canteen for the entire day.

Having been suspended, a disciplinary hearing was conducted before a Hearing Officer. Evidence was led to the effect that during the morning of the day in question, four other members of the workers committee visited the senior Human Capital Consultant and advised him that employees were not happy with the 45% salary increase. The workers committee members intimated that the employees were demanding to be addressed by the Human Capital Executive on the matter. The Human Capital Consultant declined to address the workers. The appellant had separately approached the finance section and informed the employees to go to the canteen saying the Human Capital Executive wanted to address them. The appellant also went to the Human Capital Executive's office in the company of two workers committee colleagues, Bernard Kujinga and Don Chabvamuperu. The three demanded that the Human Capital Executive should address the employees at the canteen. The Human Capital Executive declined and instead invited the three for a meeting which they turned down. The appellant and her colleagues then staged a sit-in in the Human Capital Executive's office and refused to return to work unless the employees gathered in the canteen had been addressed by management. Having been advised of the sit-in, the Group Chief Operating Officer (GCOO) convened an urgent meeting. During the meeting the GCOO pleaded with the workers representatives to engage employees and advise them to return to their work stations to no avail. The employees eventually dispersed after a memorandum from management was read to them by the Designated Agent from the National Employment Council.

The appellant's defence was to the effect that it was the employees who demanded to be addressed by the Human Capital Executive. She claimed not to have been part of the team that initially went to the office of the Human Capital Executive.

She also denied staging a sit-in and stated that they were waiting for a meeting which eventually took place. According to her, the confusion that arose was attributable to management who delayed engaging the employees. She also claimed victimization for being a member of the Workers Committee. A fellow committee member, Bernard Kujinga gave evidence in support of the appellant.

In finding the appellant guilty, the Hearing Officer held that she did not dispute the veracity of the respondent's witnesses' evidence. It was found that the appellant misrepresented to employees about a meeting in the canteen when there had been no such undertaking by the Human Capital Executive. She was found to have mobilized workers in the finance department after other workers committee members had met the senior Human Capital Consultant. It was also found that the appellant declined to attend a meeting to which she and her two colleagues had been invited by the Human Capital Executive. The appellant was also found to have staged a sit-in after the Human Capital Executive had declined to address the workers in the canteen. The hearing officer further found that the credibility of the evidence given by the appellant's witness during the hearing was questionable given that witness's involvement in the impugned conduct as he was an accomplice in the matter.

In mitigation, the appellant submitted that her conduct was pardonable and that there was no justification to punish her. She denied going to the senior Human Capital Consultant's office or to the canteen. She claimed to have been equally a victim of misrepresentation. She also claimed to have been new in the Workers Committee and hence had little experience in workers committee functions. Finally, she submitted that she had no adverse disciplinary record. On the other hand, in aggravation the respondent

submitted that there had been misrepresentation which went to the root of the contract of employment. The demand made to have the Human Capital Executive address the employees smacked of disrespect of the office on the part of the appellant. There was loss of production time because of the disruption of service. There was harm to the respondent's reputation through publication of the incident. It was also submitted that the Hearing Officer had been abused during the hearing and the appellant had not shown remorse for her conduct. Pursuant to a finding that the appellant had committed a serious dismissible act of misconduct, her contract of employment was terminated on 26 July 2019.

The appellant appealed to the Appeals Officer on 18 grounds. She challenged factual findings of the hearing officer. She contended that the Human Capital Executive had agreed to address the employees. She further submitted that it was the employees who had requested to be addressed and not the workers representatives. The appellant further contended that she was pardoned for her conduct through a memorandum that was read by the Designated Agent from the National Employment Council. It may be noted that in terms of the memorandum all workers gathered in the canteen were told to go back to work failure of which the respondent would charge them for participating in an illegal collective job action.

The Appeals Officer held that the appropriate charge had been proffered against the appellant. He further held that he could not readily interfere with the findings of fact made by the Hearing Officer. The Appeals Officer held that there was enough evidence to show that the employees never demanded to be addressed by the Human Resources office. He held that it was clear that the appellant sat in the office of the

Human Capital Executive for the purpose of putting pressure on her to address the employees even after she had made it clear that she was not going to do so. This amounted to misconduct on the part of the appellant. In relation to the penalty, the Appeals Officer held that the Code classified the misconduct in issue as a dismissible one therefore the penalty was proper. The appeal was resultantly dismissed.

Dissatisfied by the decision of the Appeals Officer, the appellant appealed to the Labour Court (the court *a quo*). The appellant averred that the Appeals Officer erred in finding that she and members of the workers committee had lied to the employees and management. It was the appellant's contention that without an order from a competent authority stating that there was an unlawful collective job action, the respondent could not discipline her. Further, the appellant argued that the Appeals Officer failed to take into account the memorandum that had been read requesting the employees to go back to work. The appellant was of the view that by virtue of the memorandum, the respondent had waived its right to discipline her. The appellant further contended that there was not enough evidence before the hearing officer and that he failed to properly exercise his discretion in order to come up with a fair and just penalty.

In response the respondent submitted that the appellant was raising new issues that were never placed before the hearing officer. The respondent further contended that there was uncontested evidence on record to show that the appellant had lied to the employees which resulted in the gathering and work stoppage.

The court *a quo* found no basis upon which the Appeals Officer could have interfered with the factual findings made by the Hearing Officer. It further held that the Appeals Officer correctly found that the issue was not on the lawfulness or otherwise of the alleged collective job action but it was about the misrepresentation made by the appellant which led to the gathering. The court *a quo* dismissed the appeal with costs.

Aggrieved by this decision the appellant has lodged the present appeal on the following grounds:

GROUNDS OF APPEAL

2.1 The court *a quo* grossly misdirected itself in confirming the Appeals Officer's determination that the respondent did not waive its right to discipline appellant through its memorandum addressed to all employees because the matter in issue was not one of the lawfulness or otherwise of the alleged collective job action, whereas the charges against appellant clearly related to mobilization and participation in an unlawful collective job action and the memorandum covered the same.

2.2 The court *a quo* grossly misdirected itself in confirming the determination by the Appeals Officer upholding the finding that the appellant acted in concert with her Workers Committee colleagues and lied to management and employees despite overwhelming evidence on the record to the contrary that;

(i) Appellant was not present in the preparatory Workers Committee meeting and the meeting with the Human Capital Consultant that led to the gathering.

(ii) Appellant was in bona fide execution of her role as a workers' representative in the context of an industrial relations emergency and lack of adequate experience and training.

2.3 The court *a quo* erred at law in holding that an appeal court "has very little, if any, room to manoeuvre when dealing with the exercise of discretion by a lower tribunal on the assessment of an appropriate penalty" and thereby upholding the Appeals Officer's refusal to interfere with the Hearing Officer's discretion, whereas;

(i) an appeals forum has substantial discretion to interfere with an unfair discretion of penalty of dismissal by a lower tribunal by consideration of the factors specified in s 12B (4) of the Labour Act [*Chapter 28:01*] and s 65 (1) of the Constitution;

(ii) In the circumstances of the case, the exercise of discretion was unfair and irrational considering the minimum role played by appellant in convening the gathering, that there was an industrial relations emergency, appellant's inexperience and that she was exercising her role as a workers' representative and that appellant was a breadwinner and had a clean and long record of service.

3. RELIEF SOUGHT

WHEREFORE, the appellant prays for the following relief:

3.1 The appeal succeeds with costs.

3.2 The determination of the court *a quo* be and is hereby set aside and substituted with the following;

3.2.1 The appeal succeeds with costs.

3.2.2 The decision of the Appeals Officer be and is hereby set aside and substituted with the following;

(1) The appeal succeeds.

(2) The decision of the Hearing Officer be and is hereby set aside and substituted with a finding of not guilty.

(3) Appellant be and is herby reinstated in her position without loss of salary and benefits from the date of dismissal.

3.2.3 Should reinstatement in terms of paragraph 3.2.2 above no longer be tenable or desired by the appellant, parties to negotiate the appropriate damages in lieu of reinstatement, failure of agreement either or both parties to refer the matter to the court for final quantification."

APPELLANT'S SUBMISSIONS

At the hearing of the appeal, Mr *Gwisai* for the appellant submitted that he was abandoning the first ground of appeal. In relation to the second ground of appeal, Mr *Gwisai* submitted that whilst in the other disciplinary matters members of the Workers Committee had been found guilty of mobilizing the employees and making misrepresentations to both the respondent and the employees, the appellant *in casu* was not involved in the initial meeting which resulted in the employees gathering in the canteen. Counsel submitted that the appellant only got involved in the two-hour sit-in and attended the subsequent meeting with the Group Chief Operating Officer in pursuance of her duties as a Workers Committee representative. *Mr. Gwisai* argued that

the appellant had relative immunity from disciplinary action in terms of s 65 (2) of the Constitution of Zimbabwe, as she was *bona fide* in executing her duties as a Workers Committee representative. He argued that the appellant had only acted based on what her fellow members of the Workers Committee had told her. In addition, counsel submitted that the mitigatory circumstances of the appellant ought to have been taken into account during sentencing in line with s 12B (4) of the Labour Act [*Chapter 28:01*]. Mr. *Gwisai* contended that in the circumstances of the case, the penalty of dismissal was harsh.

RESPONDENT'S SUBMISSIONS

Per contra, Mr *Maguchu* for the respondent submitted that the appellant had not appealed against the finding that she was guilty of dishonesty due to making misrepresentations and misleading the other employees and management. Counsel further submitted that the appellant had ample opportunity to disengage from further lying to management and the other employees when management repeatedly informed her and her colleagues that they had not called for an address and that the gathering by the employees was unlawful. Additionally, Mr. *Maguchu* contended that s 65 (2) of the Constitution of Zimbabwe did not clothe Workers Committee members with absolute immunity from disciplinary action as they are supposed to execute their duties in a lawful manner.

THE ISSUES

Although the appellant raised several grounds of appeal attacking every finding by the court *a quo*, the main issues for determination is as follows:

a) Whether or Not the Appellant Had Absolute Immunity from Disciplinary Action In terms of s 65 (2) Of the Constitution of Zimbabwe, 2013.

b) Whether or Not the Court *A Quo* Erred by Upholding the Appellant's Dismissal from Employment.

APPLICATION OF THE LAW TO THE FACTS

WHETHER OR NOT THE APPELLANT HAD ABSOLUTE IMMUNITY FROM DISCIPLINARY ACTION IN TERMS OF SECTION 65 (2) OF THE CONSTITUTION OF ZIMBABWE, 2013.

Mr *Gwisai* argued that since the appellant was a workers' representative, she had relative immunity from disciplinary action in terms of s 65(2) of the Constitution of Zimbabwe, 2013 ("the Constitution"). The provision reads as follows:

> "Except for members of security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice and to participate in lawful activities of those unions and organisations."

The import of the above provision is that every person is allowed to be a member of a trade union and as such one is obliged to only participate in activities that are lawful. In the event that a person participates in unlawful activities, disciplinary action can be taken against that person. The fact that an employee is a workers' representative does not mean that he or she is immune from disciplinary action. If a workers' representative is involved in an unlawful activity then he or she is subject to disciplinary action. Gowora JCC commenting on the import of s 65(2) of in the case of *Zimbabwe Banks & Workers Union & Anor v Marimo & Ors CCZ* 8/21 said the following:

> "(30) My reading of the subsection does not suggest, by any stretch of the imagination, that employees are given *carte blanche* by the Constitution to breach their contracts of employment and provisions contained in codes of conduct and thus create havoc or anarchy within the workplace under the guise of furthering the interests of workers and the union…
> (31) The employer-employee relationship is sacrosanct and based on trust. The employee is therefore obliged to act in good faith and in a manner that is consistent with the interests of his or her employer. The fact that an employee is a member of a trade union or is a workers' representative does not server the employment relationship. It does not qualify any of the obligations and duties that each owes the other under the contract of employment. The terms of the contract of employment define the ambit of the parties' relationship. To place the employee's status as a union member or workers' representative above that of the employment contract would be to subsume the contract of employment under such membership. That cannot be a correct position of the law as it pertains to employment contracts…
> (32) Section 65 (2) upon which the applicants seek reliance for the alleged violation of the fundamental rights of employees in the workplace does indeed protect the right of every person to form, join and participate in the activities of a trade unions or employer organisations. The rider to the right is that such participation must be clothed with legality. The applicants' counsel was pressed on this issue and was constrained to concede that the activities protected under s 65 (2) must be lawful. It was pertinent to note that applicants' counsel admitted that the participation of the second applicant or his colleagues in an illegal strike would not be the lawful activities contemplated by the section for protection…"

Based on the above authority, the appellant's actions were tainted with illegality. As such, she was not immune from disciplinary action as she acted outside the confines of the law. It is settled that workers representatives are not immune from disciplinary action in circumstances where they engage in acts of misconduct. These sentiments were shared by Chidyausiku CJ (as he then was) in the case of *Zimbabwe Electricity Supply Authority* v *Mare* SC 43/05 at p 4 in the following manner:

> "In my view members of the Workers' Committee are not a law unto themselves…I accept that a member of the Workers' Committee has a duty to defend workers' rights. In defending the rights of the workers, a member of the Workers' Committee is enjoined to observe due process."

We are therefore, inclined to agree with Mr *Maguchu's* submission that s 65(2) of the Constitution does not clothe the workers' representative with absolute immunity.

WHETHER OR NOT THE COURT *A QUO* ERRED BY UPHOLDING THE APPELLANT'S DISMISSAL FROM EMPLOYMENT.

Counsel for the appellant is of the view that the court *a quo* erred in upholding the penalty of dismissal as the court had authority to interfere with it in terms of s 12B (4) of the Labour Act. He further argued that the penalty was harsh and unfair in the circumstances.

It is our considered view that the issues raised in ground 2.3 of the appeal may be resolved by determining whether or not the court *a quo* correctly found that the appellant was guilty of the acts of misconduct she was charged with. It is trite that the degree of proof in labour issues is proof on a balance of probabilities. In this respect see *British American Tobacco Zimbabwe v Chibaya* SC 30/19.

In casu, the evidence on record established that the appellant was not involved in the initial Workers' Committee meeting in which the members resolved to misrepresent to the respondent that the employees wanted to be addressed by management on the issue of the salary increments, and vice versa. This was the appellant's testimony during the disciplinary hearing, which testimony was supported by the evidence of Mr. Nzombe, Basil Machocho, and Don Chabvamuperu.

Be that as it may, the appellant was part of the delegation that staged a sit-in in the Human Capital Executive's office and refused to leave until management had addressed the employees gathered in the canteen. Although it appears that the appellant might not have been part of the misrepresentations at the beginning of the scheme, she did participate in continuing to misrepresent to management that the employees were demanding to be addressed when that was an unfounded lie. In the case of *Makintosh v The Chairman, Environmental Management Committee of City of Harare & Anor* SC 12/14 at p 4, this Court held that:

An appeal court will only interfere with a decision which involves the exercise of discretion by a lower court in very limited circumstances. These were set out by this Court in *Barros & Anor v Chimphondah* 1999 (1) ZLR 58 (S) at p 62-63, where the court said:

> "The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See Farmers' *Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court".

An analysis of the facts leads us to the conclusion that there was no misdirection by the court *a quo* in upholding the decision of the Appeals Officer. Accordingly, the court *a quo* cannot be faulted for finding that the appellant misrepresented to management and the employees as alleged. Furthermore, in respect of the appellant's allegations of victimization for executing her duties as a Workers'

Committee representative, it is our view that the appellant was not victimized as she was procedurally punished for committing acts of misconduct. As previously stated above, whilst it is trite that members of the Workers' Committee ought not to be victimized for acting in their representative capacities, they are not immune from disciplinary action when they engage in acts of misconduct.

Thus, members of the Workers' Committee must carry out their duties within the confines of the law. The appellant and her colleagues ought to have utilized the proper channels of communication put in place by the respondent in seeking to have management address the issue of the salary increment. Lying and being deceitful was not necessary under the circumstances and therefore, constituted acts of misconduct. The appellant and her colleagues acted unlawfully by peddling false information amongst the employees and management, which resulted in the respondent losing a day's worth of production. The court *a quo* therefore, cannot be blamed for finding that the appellant's conviction was proper.

In addition, the imposition of a penalty is in the discretion of the disciplinary tribunal. This was aptly captured in the case of *Delta Beverages (Pvt) Ltd v Shumba* SC 167/20 at p 8, wherein it was held that:

> "The question of an appropriate penalty to pass is within the discretion of the employer where an employee commits a dismissible act of misconduct. For an appellate court to interfere with the penalty imposed by the employer in the exercise of its discretion, there needs to be proof that the exercise of the discretion was impeachable"

As a result of the appellant being convicted of an act that involved dishonesty and which specifically goes to the root of the contract of employment, the

respondent was at liberty to sever ties with her by dismissing her from employment. This is in accordance with what the court stated in the case of *Standard Chartered Bank Zimbabwe Limited v Musanhu* 2005 (1) ZLR 43 (S), at 47A where Malaba JA (as he then was) quoted with approval the case of *Pearce v Foster* 1886 QB 536 at 53G where it was held that:

> "...if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him."

It is therefore, our view that the sentence imposed on the appellant was not unfair or irrational, and the court *a quo* did not err by holding that it was limited in its interference with the imposed sentence.

DISPOSITION

In the result, it is ordered that the appeal be and is hereby dismissed with costs.

BHUNU JA: I agree

MATHONSI JA: I agree

Matika, Gwisai & Partners, appellant's legal practitioners

Maguchu & Muchada Business Attorneys, respondent's legal practitioners