REPORTABLE (14)

TIKO CHANDIGERE
v
CARGO CARRIERS INTERNATIONAL HAULAGE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, UCHENA JA & CHITAKUNYE JA
HARARE: 14 JUNE & 19 JULY 2024 & 25 FEBRUARY 2025

J. Wood, for the appellant

T.L. Mapuranga, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the Labour Court of Zimbabwe ('the court *a quo*'), handed down on 11 February 2022, which dismissed the appellant's application for review.

FACTUAL BACKGROUND

The respondent is a company registered in terms of the laws of Zimbabwe. The appellant is a male adult who was formerly employed by the respondent as an international truck driver. On 3 August 2021, the appellant was arraigned before a Disciplinary Committee facing misconduct charges of gross negligence as defined in para 2.3.1 of the Employment Code of Conduct for the Transport Operating Industry ('the Code '). The allegations were that between 3 May 2021 and 5 July 2021, while driving on duty, the appellant lost 528 litres of diesel due to gross negligent driving. The appellant failed to give a reasonable explanation of how such a shortage came about. In addition, the appellant had been previously reprimanded for diesel shortages emanating from gross negligence.

During the disciplinary hearing, the appellant denied the allegations levelled against him. He contended that the company truck he was driving whilst on duty had not been taken for consumption tests as per the company procedures.

After conducting the disciplinary hearing, the disciplinary committee unanimously found the appellant guilty of gross negligence. In mitigation, the appellant prayed for the disciplinary committee to consider his long service of 28 years, his age and the fact that he was being charged with an offence for the first time.

In deciding on the appropriate penalty, the disciplinary committee, which comprised two employer's representatives and two workers representatives, failed to reach consensus. One half recommended dismissal whilst the other half recommended a final warning.

As the chairperson was not eligible to vote, a deadlock was declared.

The Disciplinary Committee therefore referred the matter to the Director for an appropriate penalty and this was done in terms of a clause of the Code.

The Director found that the offence committed by the appellant was grave and warranted a dismissal. The Director further found that all the mitigatory factors presented by the appellant were outweighed by the fact that his misconduct went to the root of the employment contract.

Aggrieved by these findings, the appellant lodged an application for review with the court *a quo* on two grounds. The grounds were inelegantly couched but related to the appropriateness of the charge of gross misconduct and the reference to the Director for the determination of the penalty to impose.

The first ground was to the effect that the charge of gross negligence was inappropriate, considering the allegations that were levelled against him. The appellant averred that the appropriate charge ought to have been one of incompetence. On the second ground, the appellant's complaint was that the referral of the deadlock on the penalty to the Director amounted to a serious procedural irregularity. He averred that the appropriate Code was the one in S.I. 26 of 2017 and, in terms of that Code, there was no provision for referral of a deadlock to the Director. He averred that the respondent had been wrongfully guided by repealed legislation, being the code in S.I. 67 of 2012, when it referred the matter to the Director, a procedure which had been repealed by S.I. 26 of 2017.

The application for review was contested by the respondent. The respondent raised points *in limine* that:

(a) There was no founding affidavit before the court *a quo* as the founding affidavit was signed by the commissioner of oaths before the deponent signed;

(b) The applicant had no legal basis for review; and

(c) The appellant had approached the court on a wrong procedure. He ought to have approached the court on an appeal.

On the merits, the respondent averred that the correct charge was preferred and, in any case, it is the prerogative of the employer on which charge to prefer. It further averred that the determination of the charge to prefer is not a ground for review. In this regard there is no valid ground of review relating to the charge of gross negligence.

Regarding the second ground of review, the respondent contended that the matter had been correctly referred to the Director as stated in the Code. It averred that in terms of clause D6 on p 461 of the code it is specifically stated that if there is a deadlock, then the matter can be referred to the Chief Executive Officer (CEO) for determination.

At the hearing in the court *a quo* the respondent contended that the referral to the Director was in terms of the Code that was registered on 26 November 2020 and that in terms of that Code, clause E7 thereof provides for referral to the CEO in cases of a deadlock. In terms of the Code the Director was such officer. It went on to submit that the appellant had chosen to rely on a Code that had been succeeded by a more recent Code. The respondent maintained that the Code registered with the Registrar of Labour on 26 November 2020 was the one in use since its registration.

The court *a quo* dismissed all the points *in limine* raised by the respondent. On the merits, the court *a quo,* on the first ground of review, aptly held that it is trite law that the employer has the right to choose the charge to prefer against an employee. On the second ground of review it held that the Code allowed for proceedings to be referred to the Director in the case of a deadlock. The court further found that the appellant had based his argument on a Code that was embodied in S.1. 26 of 2017. This Code had since been replaced by the code registered on 26 November 2020. The application for review was consequently dismissed.

Irked by the decision of the court *a quo*, the appellants noted the present appeal on three grounds.

GROUNDS OF APPEAL

1. The court *a quo* seriously misdirected itself at law by finding that the referral to the Director was contained in clause E7 of S.I. No. 42 of 2022 yet that statutory instrument was not in force at the material time and failed to realize that the applicable code, S.I. No 26 of 2017 does not have a referral clause.
2. The court *a quo* misdirected itself at law by failing to find that the dismissal of the appellant by the respondent's Director was *ultra vires* the provisions contained in the applicable code, S.I. No 26 of 2017.

3. The court *a quo* seriously misdirected itself at law by ignoring the affirmation or admission in the respondent's opposing affidavit of making a referral of the deadlock to the Chief Executive Officer based on a Code containing clause D6 at p 461, which was only to be found in S.I. No 67 of 2012 contrary to its later assertion that the referral was based on clause E7 of a Code alleged to have existed in 2020.

The appellant seeks the setting aside of the court *a quo*'s decision and his reinstatement to employment without loss of salary and benefits from the date of dismissal.

SUBMISSIONS BEFORE THIS COURT

At the hearing Ms *J. Wood* for the appellant, submitted that at the time of the dismissal of the appellant from employment, the Code of Conduct which was applicable was S.1. 26 of 2017. She submitted that the dismissal of the appellant was unlawful because the Director, who imposed the penalty of dismissal, was not authorised to do so by S.I. 26 of 2017. Ms *Wood* argued that the referral of the determination of the penalty to the Director was not provided for in the applicable Code of Conduct. In addition, counsel submitted that the respondent's position that the dismissal was effected in terms of S.1. 42 of 2022 was wrong. She submitted that the court *a quo* relied on a Code and not a statutory instrument in coming to its decision. Counsel further submitted that the Code which the court *a quo* relied on did not exist at the time that the disciplinary hearing and the review proceedings were held.

Counsel also submitted that at the time of the dispute, the respondent relied on S.1. 67 of 2012 which had been replaced by S.I 26 of 2017 and now the respondent was placing its reliance on a Code under S.I 42 of 2022, which had not been published in any statutory instrument. Counsel thus submitted that since the Code now being relied upon by the

respondent had not yet been published in the Government Gazette, as required by law, at the time the disciplinary hearings were conducted, therefore the referral was improper.

It was counsel's submission that the court *a quo* had two Codes before it, the one published in S.I. 26 of 2017 and the other one published in S.1. 42 of 2022. Counsel further submitted that since the disciplinary proceedings against the appellant were conducted in August 2021, the applicable Code was the one contained in S.I. 26 of 2017 as that S.I. was only repealed in 2022 by S.I. 42 of 2022.

In furthering the argument that S.I. 42 of 2022 was inapplicable, counsel submitted that in terms of s 80 (2) (b) of the Labour Act, [*Chapter 28:01*] (the Act), a Collective Bargaining Agreement (CBA) comes into effect upon publication in a government gazette or on such date as specified in the agreement. In *casu,* s 2 of S.1. 42 of 2022 provides for its date of commencement as follows:

> "**Title and period of operation**
> 1. (1) This agreement shall be cited as the Transport Operating Industry Collective Bargaining Agreement, hereinafter referred to as the CBA.
>
> (2) This agreement, in terms of section 80 of the Act, **shall operate from the first day of the month following the date it is signed and be operative until it is renegotiated**." (Own emphasis).

The effective date for S.I. 42 of 2022 would therefore be the first day of the month succeeding the date of signing. On p 492 of S.I. 42 of 2022, the CBA was signed on 14 September 2021. This entails that S.I. 42 of 2022 would start operating on 1 October 2021. Counsel maintained that in the circumstances, the date of commencement for the CBA was after that of the purported dismissal of the appellant. S. I. 42 of 2022 could not have been in force during the period of the disciplinary hearing. The timing of the disciplinary hearing and

the enactment of S.I. 42 of 2022 makes it clear that the appellant could not have relied on the latter.

Counsel also submitted that the obtaining scenario was that the Code registered on 26 November 2020 was incorporated as the sixth schedule of S.I. 42 of 2022 and it is clear from the statutory instrument that the Code 'shall come into operation on the date of registration by the Registrar of Labour.' In addition, he submitted that it is the practice of the industry that when there is a new CBA, the industry publishes the Code as part of the CBA, regardless of the fact that the Code was already in operation.

Regarding the Code relied upon, counsel submitted that the respondent did not rely on the Code in S.I. 67 of 2012 and neither did it rely on the Code in S.I. 26 of 2017. It instead relied on the Code registered on 26 November 2020 which is incorporated as the sixth schedule in S.I. 42 of 2022. By implication therefore any reference to provisions of S.I. 67 of 2012 which contained para D6 at p 461 was an error. The reference that should have guided parties was para 2.3.1 of the Code which is found in the 26 November 2020 Code that was subsequently made the sixth schedule to S.I. 42 of 2022. He alluded to the fact that the charge in fact referred to para 2.3.1 of the Code which is found in the Code registered on 26 November 2020.

Counsel for the respondent, whilst acknowledging the error in referencing to S.I. 42 of 2022 as applicable at the time of the dispute, indicated that the respondent could not have relied on S.I. 42 of 2022 as it was not yet operating at the time of the disciplinary proceedings. What was in existence and binding at the time was the Code which was subsequently attached as the sixth schedule to S.I. 42 of 2022. In this regard counsel referred

to the fact that the Code had its own registration mechanism and its own process for coming into effect.

ISSUE FOR DETERMINATION

The appellant has presented three grounds of appeal before this Court. The central issue for determination is whether the court *a quo* erred by relying on the Code annexed as the sixth schedule in S.I. 42 of 2022 instead of the Code annexed as the sixth schedule in S.I. 26 of 2017.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred by relying on the Code of Conduct in S.I. 42 of 2022 instead of the code of conduct in S.I. 26 of 2017.

It is apparent that in their respective contestations counsel seemed to conflate the CBA and the Code. The appellant's counsel's submissions were to the effect that the life of a Code of Conduct is dependent on the CBA whilst the respondent's counsel seemed to suggest that a Code has its own life which is predicated on the date of its registration with the Registrar of Labour. It is thus necessary to unbundle the status of both the CBA and the Code.

Section 74 of the Act provides for the scope of the CBA which is wide in nature. It encompasses conditions of engagement between employers and employees. Section 78 provides for the ratification of a CBA after the ratification of every portion of the agreement and the role of the Minister in that process. Section 79 then provides for the submission of the CBA to the Registrar of Labour for approval or registration.

Section 80 of the Act provides for the publication of the CBA and when it becomes binding in these terms:

"**80 Publication of Collective Bargaining Agreements**

(1) Upon registration of a collective bargaining agreement the Minister shall publish the agreement as a statutory instrument.

(2) The terms and conditions of a registered collective bargaining agreement shall become effective and binding—

(a) From the date of publication of the agreement in terms of subsection (1); or
(b) **From such other date as may be specified in the agreement.** (Own emphasis)

As per the above provision, the binding effect of a CBA commences on the date of publication or on a date explicitly mentioned in the agreement.

In casu, the other specified date is provided in the CBA, S.I. 26 of 2017, in para 1(2) as:

> "This agreement, in terms of s 80 of the Act, shall operate from the first day of the month following the date it is signed and be operative until it is renegotiated."

The above provisions are the same as in S.I. 42 of 2022.

It is clear from the above that the CBA comes into effect upon publication in the gazette by the Minister or on such date as may be provided in the agreement. In this case , the other specified date is the first day of the month following the date it is signed and will remain operative until it is renegotiated.

On the other hand, the Code incorporated in the CBA as the sixth schedule provides under A1 (ii) that:

> "The Code shall come into operation on the date of registration by the Registrar of Labour."

This provision is in both Codes in S.I. 26 of 17 and S.I. 42 of 2022. It is thus clear that the Code comes into effect and becomes binding upon its registration by the Registrar

of Labour. That is what the legislature provided in the Statutory Instruments. It is thus a matter of ascertaining when each Code was registered with the Registrar of Labour.

Though three Codes were referred to in submissions, the Codes in contestation were Codes in S.I. 26 of 2017 and S.I. 42 of 2022. For clarity, S.I. 67 of 2012 was gazetted in 2012 but was later repealed and replaced by S.I. 26 of 2017. Statutory Instrument 26 of 2017 was gazetted in 2017 but the Code therein was registered in 2015. This S.I. was repealed by S.I. 42 of 2022 which was gazetted in March 2022. The key issue before this Court is to determine which Code was applicable at the time the appellant's disciplinary hearing was conducted.

The appellant's counsel's submission that since the disciplinary proceedings against the appellant were conducted in August 2021, therefore the applicable Code was the one contained in S.I.26 of 2017 since that S.I. was only repealed in 2022 by S.I. 42 of 2022 was incorrect. Counsel seemed oblivious of the provisions relating to the registration of Codes of Conduct in terms of the Act. Whilst the effective date of the CBA was set in s 2 thereof as from the first day of the month following the date it is signed and be operational until it is renegotiated, that was not the case with the Code. (See s 80 (2) (b) of the Act).

The applicable law for the registration of employment Codes is s 101(1) of the Act. Section 101 (1) provides as follows:

> "**101 Employment Codes of Conduct**
> (1) An employment council or, subject to subsections (1a), (1b) and (1c), a works council may apply in the manner prescribed to the Registrar to register an employment code of conduct that shall be binding in respect of the industry, undertaking or workplace to which it relates.
>
> (1a) where an employment council has registered a code governing employers and employees represented by it, no works council may apply for the registration of a Code in respect of any industry, undertaking, or

workplace represented by the employment council unless it first refers the Code to the employment council for its approval.

(1b) where a Code is registered by a works council in respect of any industry, undertaking, or workplace represented by an employment council and the employment council subsequently registers its own code, the code registered by the employment council shall supersede that of the works council unless the works council refers it to the employment council for approval."

The above provision is clear that an employment Code has to be registered with the Registrar of Labour and such a registered Code is binding on members of the industry concerned. The binding nature of the Code is thus not dependant on it being gazetted by the Minister but on its registration by the Registrar of Labour.

The respondent relied on a Code registered on 26 November 2020 as the basis for charging and dismissing the appellant. This Code was incorporated as the sixth schedule in S.1. 42 of 2022. The Code as contained in S.1. 42 of 2022 provides as follows:

"**A1. INTRODUCTION/APPLICATION OF THIS CODE**

(i) This Code of Conduct (hereinafter referred to as the 'Code') may be cited as the Transport Operating Industry Code of Conduct and Grievance Management Procedures.

(ii) **The Code shall come in operation on the date of registration by the Registrar of Labour."** (Own emphasis)

The above provision establishes that the commencement of the 'Code of Conduct' as provided in S.I. 42 of 2022, is contingent upon its registration with the Registrar of Labour and not its publication in a statutory instrument as contended by the appellant. There is no question of the Code superseding the S.I. because the manner in which each becomes binding is different. The CBA is by publication or on such date as the CBA provides whilst for the Code, it is the registration by the Registrar of Labour.

The legislature in enacting the S.I. recognised this position in that it retained the effective date of the Code as the date of its registration by the Registrar of Labour.

This therefore entails that the Code applicable at the time of the disciplinary proceedings against the applicant was the Code that had been registered on 26 November 2020. There was no meaningful contestation that what is now the sixth schedule to S.I. 42 of 2022 was in fact registered with the Registrar of Labour on 26 November 2020. A certificate to that effect was tendered *a quo* and so there cannot be any dispute in that regard.

Counsel for the appellant's effort at clinging to an admitted error by the respondent in making reference to a provision in S.I 67 of 2012, that is- 'D6 at p 491' at some point, is without merit. In *Air Zimbabwe (Pvt) Ltd* v *Chiku Mnensa & Anor* SC 89/04 at p 6, this Court held 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."

In casu, the appellant should not escape the consequences of his misconduct simply because of the inadvertent reference to a code in S.I. 67 of 2012 when it was common cause that that Code had been replaced by latter Codes and the charge itself referred to a paragraph in the later Code. Another factor that cannot be ignored is that the charge of gross misconduct for which he was, by unanimous decision, convicted provides for a penalty of dismissal and no other per para 2.3.1 thereof.

The application for review clearly had no merit.

The court *a quo* did not err in relying on the Code that was subsequently annexed as the sixth schedule in S.I. 42 of 2022. The decision of the court *a quo* cannot be faulted.

On costs, though the respondent asked for costs on a higher scale, we found no merit for the award of costs on the higher scale. Costs will thus be awarded on the ordinary scale.

DISPOSITION

In view of the above, it is clear that the Code applicable to the disciplinary proceedings in question was the Code registered on 26 November 2020 which was subsequently incorporated as the sixth schedule in S.I. 42 of 2022. That Code provided for the referral of a deadlock to the CEO. In terms of the definitions under s A2 of the code, CEO was defined to include the Director to whom the referral was made. The present appeal has no merit and ought to be dismissed.

Accordingly, it is ordered as follows:

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

BHUNU JA : I agree

UCHENA JA : I agree

Chizengeya, Maeresera & Partners, appellant`s legal practitioners

Ahmed & Ziyambi Legal Practitioners, respondent`s legal practitioners