BUHLE NOLWANDLE MANGENA

AND

GROUP FIVE ZIM LTD

AND

THE DISCIPLINARY AUTHORITY (MR NGORIMA) N.O

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 6 FEBRUARY 2013 AND 14 FEBRUARY 2013

Applicant in person
Mr N Mangena for the respondent

Urgent Chamber Application

CHEDA J: This is an application for an interdict provisional order which is couched as follows:

> **"Terms of the Final Order**
> that you should show cause to this Honourable Court why (sic) Final Order should not be granted in the following terms;
> (1) that 1st and 2nd Respondents be and are hereby interdicted from holding a disciplinary hearing.
> (2) that the Labour Dispute be and is hereby annulled as the applicant is still to be charged;
> (3) that the provisions of Statutory Instrument 15/2006 Section 6(4)(b) be and is hereby waived on this case's Disciplinary Hearings;
> (4) that the respondents pay the costs.
>
> **Interim Relief Granted**
> (1) Pending confirmation or discharge of this Provisional Order, the respondents be and are hereby interdicted from hearing the alleged charges and that the 1st respondent lifts the suspension within 12 hours of receipt of this Provisional Order".

The background of this matter is that applicant who was a self actor is employed by first respondent as a Junior Civil Engineer. On the 17th August 2012, first respondent suspended her from work on the allegations that she had misconducted herself towards her immediate

supervisor one Aaron P. Chikodzi [hereinafter referred to as "Aaron"]. A letter was written to her on the 17th August 2012 informing her of the suspension.

Applicant was not happy with the suspension as she is of the view that it did not comply with the provisions of Statutory Instrument 15/2006 in particular section 6(1) as read with section 4 of the said Statutory Instrument which provide thus:

> "**Disciplinary procedure**
> 6.(1) Where an employer has good cause to believe that an employee has committed a misconduct mentioned in section 4, the employer may suspend such employee with or without pay and benefits and shall forthwith serve the employee with a letter of suspension with reason and grounds of suspension.
>
> **Misconduct**
> 4. An employee commits a serious misconduct if he or she commits any of the following offences-
> (a) any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract; or
> (b) wilful disobedience to a lawful order; or
> (c) wilful and unlawful destruction of the employer's property; or
> (d) theft or fraud; or
> (e) absence from work for a period of five or more working days without leave or reasonable cause in year; or
> (f) gross incompetency or inefficiency in the performance of his or her work; or
> (g) habitual and substantial neglect of his or her duties; or
> (h) lack of a skill which the employee expressly or impliedly held himself or herself to possess."

Applicant does not deny that there was some misunderstanding at her work place involving her immediate supervisor. Her argument is that whatever she said, if at all, was as a result of her immediate supervisor's untoward and unworthy conduct towards her, which was or borders on sexual harassment which in itself, if proved is a serious infringement of her right as a woman and employee of first respondent.

In addition she also seeks an order forcing first and second respondents to allow her to be represented by a Labour Relations Practitioner.

On the other hand Respondents through their legal practitioner argued that a report was made about applicant's behaviour and conduct.. It is their company policy that when a report or complainant is made about an employee an investigation process is instituted to

establish its truth or otherwise. It is, therefore, this investigation they are seeking to carry out. It is further their argument that, by mounting this application, applicant is attempting to prevent the said investigations from taking place.

The issue at hand as I see it is whether or not the intended disciplinary enquiry by first respondent is procedurally correct. It is almost common practice and in some organisations a must that every employer should have disciplinary rules and procedures in order to promote fairness and order. These rules are usually contained in the code of conduct. Therefore, in the interest of transparency it is essential for an employee to be clearly and properly informed of what is expected or not expected of him/her in the event of their alleged wrongdoing. Therefore, both the employer and employee should as of rule, work within the ambit of the rules of natural justice. This principle which is usually expressed in two Latin maxims *audi alteram partem* (hear the other side) and *memo iudet in propria causa* (no one may judge in his own cause) should be observed. These principles which themselves are requirements can be stated as thus:

(1) an employee being accused of wrongdoing should know the nature of the accusation against him/her;

(2) he/she should be given an opportunity to state his/her case; and

(3) the domestic tribunal which has been set to adjudicate upon his/her fate should act in good faith.

The above principles of natural justice are flexible as a lot depends on the circumstances of each case, see *Russell v Duke of Norfolk* [1949] 1 ALLER 109, 118 where Tucker LJ had this to say:

> *"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth*."

An employee should be accorded an opportunity to state his/her case in detail. He/she can only do so if he/she is sufficiently informed of the allegations against him/her. In that regard an employer who fails to adhere to these principles, would no doubt have acted unprocedurally, which action or inaction will invite the wrath of the courts in a possible

disapproval. Where an employer suspects some wrongdoing, he should carry out some degree of investigations before levelling any allegations against the employee.

In *casu*, first respondent received a complaint from applicants' supervisor one Aaron regarding her conduct. This relates mainly to verbal abuse. I specifically refer to this piece of complaint as I would like to deal with it hereinunder *vis-a-vis* applicant's response to the said allegation. Irrespective of a plethora of allegations contained in the written report of the 13th August 2012, by Aaron I would like to deal with paragraphs 4 and 7 of her response in relation to Aaron's report which reads:

Paragraph 4 "*That I must go to hell and talk to Lucifer, and*
Paragraph 7 " *I don't appreciate the work she does*."

In her response to the said allegations about the incident of the 8th August 2012 she responded as follows:

> "**Response on the report written against me on the 8th of August 2012**
> *Aaron Chikodzi and I are still struggling to get along despite our attempts to involve management in order to resolve these problems and find a way to work together. I have requested to be moved as I felt that it would allow Aaron and I to work without problems, as I feel our current working relations are bad for the (sic) both of us.*
>
> *I have disagreed with Aaron thrice including this last incident.*
>
> *On the 8th of August I did get angry at Aaron and this is because of the pressure that was piling up on me. I wish I could have ignored or reacted differently but at that point I lost my temper. I admit that two points on the report first page are true, which is number 4 and 7.*
>
> *The recording however is not a true reflection of the incident as it only captured the end. I would not get angry over someone who (sic) just offering to help.*
>
> *I sincerely hope you can help us resolve this issue. Thank you.*
>
> *Yours faithfully*
> *(Signed)*
> *Buhle N. Mangena"*
> (The underlining is mine)

To me this response is proof that she at least uttered words which to Aaron are of an offensive nature and attract investigations which if proved may lead to disciplinary measures

being taken against her. The admission, of the contents in paragraphs 4 and 7 is *prima facie* proof of misconduct which no doubt requires a further explanation from applicant.

Having admitted uttering the said words which she goes on to apologise for and seeks to justify them on her emotional short comings and her complete failure of anger management, she can not, thereafter, refuse to attend a disciplinary hearing. A disciplinary hearing is a necessary labour dispute forum which any affected or offended party can not avoid to convene and/or attend without lawful excuse. A disciplinary hearing is essential in order to allow both the offended and the alleged offender an opportunity to be heard and a fair determination to be made.

Applicant also argued that she has not been properly informed of the allegations against her. Even, if this were possibly true, her complaint could have been cured by a mere request for further information, referred to as further particulars in common legal parlance. In light of her partial admission of the offensive words contained in Aaron's report, it is clear that she was sufficiently aware of the allegations against her at that stage. Further even if she desired more information she would have easily obtained it without litigation. Applicant should allow the due process of law to continue. The wheels of justice since set on motion should be allowed to move freely without unnecessary interference designed to derail them. Both parties must as of right have their days in count.

It is also her prayer that first respondent should be ordered to allow her to be represented by a Labour representative. While representation of that nature, maybe in order, respondents have a duty to comply with the provisions of Statutory 15/2006 and of the Labour Act [Chapter 28:01]. As long as they are acting in accordance with the provisions of Act and Regulations they can not be forced to act contrary to the rules in operation. Applicant must place evidence before the court of her potential prejudice in default of the absence of such representation. It is proper and in order that she appears before a disciplinary hearing. This is the first step or hurdle she should pass at this stage.

This application which she mounted against respondent was purely to post-pone the inevitable, which, with all due respect borders on abuse of the court process. While the courts are open to all citizens who seek redress, they should not be abused in such a brazen manner.

Any litigant who does so can not avoid being saddled with punitive costs. Applicant is lucky that first respondent did not ask for costs at a higher scale, and I am not inclined to do so, but, would like to warn her against such abuse in future.

The following order is accordingly made:

Order

(1) The application is dismissed with costs.

(2) First and second Respondents be and are hereby ordered to convene a disciplinary hearing within 30 days of this order.

Coghlan and Welsh, respondents' legal practitioners