

DISTRIBUTABLE (17)

Judgment No. SC 23/05  
Civil Appeal No. 80/03

TEDCO MANAGEMENT SERVICES v GEORGE CHIKWANDA

SUPREME COURT OF ZIMBABWE  
SANDURA JA, ZIYAMBI JA & GWAUNZA JA  
HARARE, FEBRUARY 10 & JUNE 23, 2005

*E Matinenga*, for the appellant

The respondent in person

ZIYAMBI JA: This is an appeal against a decision of the Labour Court.

The appeal turns on the interpretation of s 3(2) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371 of 1985 which provides as follows:

“Upon application being made in terms of subsection (1) the labour relations officer shall investigate the matter and may, according to the circumstances of the case –

(a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the labour relations officer;

or

(b) serve a determination or order on the employer concerned to remove the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer.”

The respondent who was employed by the appellant as a Credit Operations Manager, was, on 7 June 2001, suspended from his employment pending an application for the termination of his services. The allegations against him were set out in a letter to him of even date. It read in relevant part:

“Further to my discussions with you today, you are suspended from duty without pay and benefits with immediate effect pending full investigations into some very serious anomalies that I have discovered pertaining to your duties and conduct.

As already highlighted to you, these anomalies are that:-

- (a) You failed to check and verify the commission claims brought to you for authorisation and payment by Mr B Sharara and Mr P Chakanyuka resulting in the Organisation to be deprived of a substantial amount through fraudulent claims. It was your responsibility to ensure that all the claims brought to you for authorisation by the two Freelance Tracers had been thoroughly checked and verified against the amounts collected.

My initial investigations have revealed that you failed in this respect. This is a very serious omission and amounts to gross negligence on your part.

- (b) I have also learnt and subsequently established that you are a Co-director together with Mr P Chakanyuka at a private company called **ERPLEX (PRIVATE) LIMITED** which is duly registered with the Government Deeds Registry Certificate No. 5208/99 dated 6 June 1999. This is a gross violation of your employment contract as you did not declare your interests in the above-named company. You have further violated your contract of employment in that one of the main objects of your company is Debt Collection and Tracing, which directly conflicts with your responsibilities at Tedco.
- (c) In view of (b) above, I am inclined to believe that you also connived with Mr Chakanyuka to defraud the Company.

You may be called for a formal Disciplinary Enquiry once a full investigation has been carried out. However, this may not be necessary in which case, we will apply to the Ministry of Labour for your dismissal and you will be informed.”

Clause 3 of the conditions of service governing the respondents' employment with the appellant provided that:

“He shall be a full time employee of the Company and shall not, without the written consent of his Group Managing Director, be engaged or interested in, directly or indirectly, any other business or profession, nor engage in any work other than his Company duties, whether for gain or not.”

The application made to the Labour Relations Officer for the termination of his employment was unsuccessful. The Labour Relations Officer ordered the reinstatement of the respondent or, in the alternative, an agreed “exit package”. This determination was confirmed by the Senior Labour Relations Officer.

The Labour Court, before whom the matter was heard on appeal found:

“The employer alleged that contrary to this condition, the respondent was a co-director together with P Chakanyuka of Erplex (Private) Limited, a company whose main objective was Debt Collection and Tracing which objectives conflicted with his own responsibilities at his place of employment since the Credit Finance Division largely debt collected and traced defaulters on behalf of the company.

That there was no written consent has not been disputed. The respondent however says he had requested for authority and had been given the authority by the then General Manager Mrs Chalmers who had since left the organisation. This verbal consent by the General Manager however falls short of the clear requirement of a written consent by the Group Managing Director.

It is therefore clear that the respondent breached his conditions of service.

It is in my opinion just and equitable under the circumstances that reinstatement should not be ordered. It is clear that the trust that should exist in any employer employee relationship has been lost. But having

made a finding that respondent did breach clause 3 of his conditions of service I order as follows:

‘That the appellant be allowed to terminate the respondent’s contract of employment, subject to their paying the respondent an exit package as at the date of the suspension.’”

The appellant now appeals against the judgment of the Labour Court. There is also a cross appeal by the respondent against the finding of that court that he had breached the terms of his employment and the order of the Labour Court allowing termination of his contract of employment. He seeks an order setting aside the order of the Labour Court and granting him reinstatement with no loss of salary and benefits alternatively, damages in lieu of reinstatement including back pay and benefits.

The main ground of appeal raised by the appellant, was that having correctly found that the respondent had breached his contract of employment by failing to adhere to the specific requirements of the terms and conditions of his employment, the Labour Court erred in law in failing to grant the application to dismiss the respondent on the allegations which were contained in the letter of suspension.

In this regard it was submitted by Mr *Matinenga*, that once a dismissible misconduct had been established, the judicial officer had no discretion in the matter and that the court *a quo* had erred in altering the punishment of dismissal imposed by the Regulations. This submission is in my view correct. The wording of the regulation is clear. Where the grounds of suspension are proved to his satisfaction, the judicial officer must terminate the employee’s contract of employment. If, on the other hand, the

grounds of suspension are not proved, he must order reinstatement. No other option is open to him. See *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (SC) at 170G – 171A; *Wholesale Centre (Private) Limited v Mehlo & Ors* 1992 (1) ZLR 376 (H).

I am therefore of the view that the appeal should succeed on this ground and that it is not, in the circumstances, necessary to consider the other grounds raised by the appellant.

Accordingly the appeal is allowed with costs.

The cross appeal is dismissed with costs.

The order of the Labour Court is set aside and substituted by the following:

“The appellant is granted authority to terminate the respondent’s employment from 7 June 2001, being the date of his suspension.”

SANDURA JA: I agree.

GWAUNZA JA: I agree.

*Atherstone & Cook*, appellant's legal practitioners