

ZIMBABWE ELECTRICITY SUPPLY AUTHORITY vs MOSES MARE

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA  
HARARE JUNE 6 & OCTOBER 3, 2005

*L. Mazonde*, for the appellant

*No appearance for the respondent*

CHIDYAUSIKU CJ: The respondent in this matter, an employee of the appellant, was charged with four counts of misconduct. He was charged with contravening the following sections of the Code of Conduct: s 7(e)(viii), conducting oneself or behaving in a manner which brings or is likely to bring the name of the Authority into disrepute; s 7(e)(vi), hindering or obstructing any employee from performing his duties; s 7(j)(i), taking and converting or attempting to take and convert to his own private use property or money belonging to the Authority or in its lawful possession; and, s7(j)(iii), making any false claims or returns e.g. for travel and subsistence allowance.

The Disciplinary Committee which tried the respondent in the first instance found the respondent guilty on three of the four counts. They found him guilty of conducting himself or behaving in a manner which brings or is likely to bring the name of the Authority into disrepute; of hindering or obstructing any employee in the performing of his duties, and of making false claims or returns.

Upon being found guilty of the above charges of misconduct the respondent was dismissed from employment. The respondent appealed against the determination of the Disciplinary Committee to the Appeals Committee in terms of the Code of Conduct. The Appeals Committee dismissed the appeal.

The respondent appealed to the then Labour Tribunal, now the Labour Court. I shall refer to the Tribunal as the Labour Court hereinafter. The Labour Court allowed the appeal and reversed the determination of both the Appeals Committee and the Disciplinary Committee. The Labour Court ordered the reinstatement of the respondent without loss of salary and benefits.

The appellant was dissatisfied with this outcome and now appeals to this Court.

### **COUNT ONE**

The respondent was found guilty by both the Disciplinary Committee and the Appeals Committee of contravening s 7(e)(vi) of the Code of Conduct, that is, of hindering or obstructing any employee from performing his duties.

Factual findings of both the Disciplinary and the Appeals Committee, which findings were not challenged on appeal, are that on 2 November 1994 and at Masvingo depot the respondent intercepted and forcibly took from Mr Samangure, (“Samangure”) a ZESA employee, a report that Samangure was preparing regarding certain misconduct proceedings involving two ZESA employees, Messrs Chakauya and Makoni (“Chakauya and Makoni”). Samangure was preparing the confiscated report for submission to the Masvingo Senior Depot Foreman who required it for use as evidence at a Disciplinary Hearing into the alleged misconduct of Chakauya and Makoni.

Both the Disciplinary and the Appeals Committee concluded that the taking of the report by the respondent was unauthorized and involved harassment to fellow ZESA employees, namely, Samangure and Shoshore. The Disciplinary Committee found as a fact that the respondent had forcibly and against the will of Samangure taken the report from him. It was also common cause that an altercation ensued as a result of the respondent’s conduct. That conclusion on the evidence led before the Disciplinary Committee cannot be faulted and was never challenged.

The learned President of the Labour Court allowed the appeal on this count upon the following basis:-

“In the present case when the appellant intervened during the course of some investigations he had been requested to do so. He was not hindering the normal production processes as such. He was discharging his duties as a representative of the workers and therefore not subject to the control of his employer. He was not acting in his capacity as an employee as he was defending a worker’s rights.”

It is common cause that the respondent is a member of the Workers’ Committee and that he intervened in this matter at the request of the employee who was under investigation for misconduct. In my view members of the Workers’ Committee are not a law unto themselves. There is no legal basis for a member of the Workers’ Committee to simply, through the use of force, seize a report from a fellow employee in the above circumstances. 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. It is lawful for the employer to investigate any alleged misconduct of its employees and after such investigation to institute disciplinary proceedings. That is due process. It was not lawful for the respondent or any member of the Workers’ Committee to forcefully obstruct the lawful investigation into an employee’s misconduct. The investigation should have been allowed to proceed without obstruction. It was open to the respondent to defend the worker charged with misconduct at the Disciplinary Hearing.

The President of the Labour Court clearly misdirected herself in concluding that because the respondent was a member of the Workers’ Committee he was entitled to take the law into his hands and obstruct the investigations that were being conducted by the employer. All these events happened at the work place, in the course

of employment and accordingly there is no basis for concluding, as the learned President of the Labour Court did, that these events occurred outside the scope and course of employment.

### **COUNTS TWO AND THREE**

It is convenient to deal with these two counts as one as the factual basis relating to these counts is essentially the same. The facts of counts two and three are that the respondent submitted two claims, one to NEC and the other to the ZESA Pension Fund, for travel and subsistence in respect of the same journey and same period. It is alleged that such conduct is dishonest and contravenes s 7(j)(iii) of the Code of Conduct which proscribes the making of false claims. It is further alleged that by conducting himself in that manner the respondent brought into disrepute the name and image of the appellant contrary to the provisions of s 7(e)(viii) of the Code of Conduct which proscribes such conduct.

The respondent, by virtue of his employment with ZESA, is a member of the ZESA National Employment Council (“NEC”) and a trustee of the ZESA Pension Fund. The respondent traveled from Masvingo to Harare to attend a meeting of NEC and a Christmas party of the ZESA Pension Fund. The appellant contends that the respondent brought the name of ZESA into disrepute or tarnished ZESA’s image by making double and false claims for travel and subsistence allowance from both NEC and the Pension Fund in respect of the same period, namely 8 and 9 December 1994. The two claims for travel and subsistence allowance, one of which was submitted to NEC and

the other to the Pension Fund, clearly show that the respondent claimed from both NEC and the Pension Fund breakfast and lunch in respect of 9 December 1994. The same document also reveals that he claimed transport from both NEC and the Pension Fund in respect of a single journey to Harare. There is no doubt that in respect of these expenses the respondent claimed from both NEC and the Pension Fund.

When asked to explain why the respondent submitted the double claims to the two organisations his response was that somebody had forged or altered the dates on the travel and subsistence claims so that he could get into trouble. He claimed that somebody with a hidden agenda had endorsed or altered the date on the claim form from 8 December to 9 December to get him into trouble. When asked to explain the double claim in respect of the transport allowance his explanation was that it was not a double claim because after the meeting at NEC in the late afternoon of 8 December he traveled to Masvingo in order to get his invitation card to the Pension Fund Christmas party due to be held in Harare the following evening of 9 December. He stated that he traveled overnight getting to Masvingo in the morning and driving back to Harare immediately in order to be in time for the party. In short he was alleging that he made two trips to Harare over the period in question.

The respondent's explanations for the double claims were rejected by both the Disciplinary Committee and the Appeals Committee as false. The rejection of the respondent's explanations as false cannot be faulted. That rejection was never challenged on appeal. It is quite clear from the travel and subsistence claim forms

completed by the respondent that he claimed transport from both NEC and the Pension Fund in respect of the same journey and that he claimed breakfast and lunch from both NEC and the Pension Fund in respect of the same day, the 9 December 1994. The appellant contends that this conduct of the respondent was dishonest. The respondent no doubt appreciated that his conduct was dishonest. This is the only possible reason why he offered a false explanation for his conduct. If the respondent thought that his conduct was in order there would have been no need for the false explanation. He would have simply said that he was entitled to two transport allowances as well as the two breakfasts and lunches for the 9<sup>th</sup> December 1994.

I have no doubt in my mind that the respondent was not entitled to the two transport allowances, two breakfasts and two lunches in respect of the 9<sup>th</sup> December 1994. The respondent must have appreciated that he was not entitled to make the double claims and in making the double claims he was acting dishonestly. He compounded his transgression by offering false explanations for such conduct.

The conduct of the respondent was fraudulent and certainly amounts to a contravention of the above sections of the Code of Conduct.

The learned President of the Labour Court misdirected herself in her approach to this issue. In this regard this is what she had to say:-

“If indeed the respondent established that at no time did the appellant handle its money then charging the appellant with dishonesty of any form is in my view

improper. Had the appellant been dishonest to both ZEEWU and the Pension Fund the position would have been different. To appellant's credit not only is there proof that the claims he lodged were properly checked and honoured by the relevant authorities but at p 37 of the record ZEEWU wrote to ZESA pleading for clemency on behalf of the appellant."

Clearly the learned President of the Labour Court failed to appreciate the gravamen of the charge against the respondent. The respondent was being charged for dishonest and fraudulent conduct. The conduct of the respondent was clearly dishonest and fraudulent. The respondent never disclosed to the two parties that he was claiming from both transport allowance in respect of the same journey. He never disclosed to the two parties that he was claiming breakfast and lunch from them in respect of the same day. Had he made such disclosure there would be no basis for alleging that he was dishonest. The contention by the respondent that the appellant had no *locus standi* to complain about the double claims has no substance. The record shows that ZESA is a major contributor to the ZESA Pension Fund and has a substantial interest in NEC. On the facts of this case, who was the victim of the respondent's dishonesty is a matter of little consequence. His conduct was dishonest and fraudulent and ZESA was entitled to charge him with misconduct.

A reading of the proceedings against the respondent before the Disciplinary and Appeals Committees clearly shows that the evidence was properly assessed and the law properly applied to the facts and the right conclusion reached. There was no basis for interference by the Labour Court.

In the result the appeal is allowed, the order of the Labour Court is set aside, and the determination of the Appeals Committee is reinstated. The costs follow the result and the respondent is ordered to pay the costs.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

*Muzangaza Mandaza & Tomana*, appellant's legal practitioners