

Judgment No. SC 81/05
Civil Appeal No. 11/05

CHIKOMBA RURAL DISTRICT COUNCIL v SHADRECK MARECHA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, DECEMBER 1, 2005

O C Gutu, for the appellant

L Uriri, for the respondent

ZIYAMBI JA: This is an appeal against a decision of the Labour Court. At the end of the hearing we dismissed the appeal with costs and indicated that our reasons would follow. I now set them out.

The respondent was employed by the appellant as its Chief Executive Officer. On 10 September 2001, the appellant wrote to the Labour Relations Officer seeking authority in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985 (now repealed), (“the Regulations”), to dismiss the respondent. The letter read as follows:

“Re : APPLICATION FOR AUTHORITY TO DISMISS MR SHADRECK MARECHA (CEO CHIKOMBA RURAL DISTRICT COUNCIL)”

We hereby apply for authority to dismiss Mr Shadreck Marecha the CEO Chikomba Rural District Council in terms of Statutory Instrument 371 of 1985, Labour Regulation (General Conditions of Employment) Termination of Employment Section 3(a) with effect from the 6th September 2001.

Mr Marecha has been on suspension pending investigations into allegations of mismanagement of Council affairs. Investigations have revealed the following irregularities which are in contravention of Statutory Instrument 371 of 1985, Labour Regulations (General Conditions of Employment) Termination of Employment Regulations Section 3(a):

- (1) Non remittance of employees’ Pay As You Earn (PAYE) to the department of taxes as well as Pension contributions to Old Mutual since February 2000 and never as Chief Executive Officer and Advisor to Council advised Council of the non remittance of the deductions which are in effect statutory obligations.
- (2) Illegal advances of loans to self and employees as well as abuse of the above facility against a background of Council bankruptcy.
- (3) Illegal allocation of stands without following or adhering to the waiting list.
- (4) Violating the provisions of section 120(3) of the Rural District Councils Act by failing to manage Council assets as evidenced by the following:
 - (a) All Council vehicles and other equipment of value including buildings are not insured against damage, theft or fire.
 - (b) There is no proper asset register in place showing or reflecting values of all council assets.
- (5) Violating the provisions of the Road Motor Traffic Act by allowing uninsured council vehicle to be used in public roads.
- (6) Violating section 51 of the RDC Act by failing to put in place and maintain council records including guard books for council minutes and resolutions.
- (7) Failure to put in place and maintain council Records relating to:

- (a) Tender Records or Documents
 - (b) Stands Registers and
 - (c) Rates Registers.
- (8) Misuse of Council vehicles for private and personal business when conditions of service do not provide for such benefits.

Can authority therefore be granted to dismiss and terminate Mr Shadreck Marecha's contract of employment with Council."

The same allegations were repeated in a letter of suspension written on the same date to the respondent advising him of the appellant's application to the Labour Relations Officer for authority to dismiss him.

The hearing before the Labour Relations Officer took place on 18 January 2002 and proceeded on the basis of the allegations set out above. At the end of the hearing the Labour Relations Officer gave his decision in the following terms:

“OBSERVATIONS AND CONCLUSIONS:

1. Mr Marecha could not say how and why council lost over \$300 000,00 at Sadza Council offices.
2. Mr Marecha should be held responsible for the missing Northwood stands Register though he implicates Mrs Muranda – he should take responsibility as head of the Council – Collective responsibility.
3. Permission to dismiss granted in terms of S.I. 371 of 1985 section 3(a).”

It will be readily observed that paragraphs 1 and 2 of his conclusions relate to matters which were not included in the list of allegations upon which authority to dismiss the respondent was sought. The respondent was aggrieved by this determination and appealed to the Senior Labour Relations Officer who dismissed the appeal on the following grounds:

“The most important duty of any Chief Executive Officer of any organisation is to ENSURE that every task/operation is carried out. It was proved that appellant did not ensure that PAYE and Pension contributions were remitted, that uninsured vehicles were not used on public roads, that illegal advances of loans were given and that Council finances were kept safely – All these were acts inconsistent with conditions of service.”

Once again, it will be apparent that the issues referred to in the Senior Labour Relations Officer’s determination have no relation to the conclusions of the Labour Relations Officer. The respondent again appealed - this time, to the Labour Court which made the following determination:

“My view is that upon finding the Appellant innocent on the eight allegations, the Labour Relations Officer should have ruled in his favour. I also find that the Senior Labour Relations Officer was wrong in referring to issues which were not before him and more so issues on which the Appellant had been found innocent by the Labour Relations Officer. That being the case, the appeal succeeds with costs and it is therefore ordered as follows:

1. That the appeal succeeds with costs.
2. The Respondent be and is hereby ordered to reinstate the Appellant to his original position without loss of salary and benefits with effect from the date of dismissal.
3. That in the event that reinstatement is no longer an option, the Respondent be and is hereby ordered to pay the Appellant agreed damages in lieu of reinstatement. If the parties fail to agree on the quantum of damages then either party can approach this Court for the quantification thereof.”

In this Court, it was submitted by Mr *Gutu*, on behalf of the appellant, that the Labour Court misdirected itself on the facts to such an extent that the misdirection

amounts to one at law. However, as Mr *Uriri* submitted on behalf of the respondent, the finding made by the Labour Court was that the Labour Relations Officer determined the matter on facts which were not before him. This finding, he submitted, could not be said to be grossly unreasonable.

Indeed, Mr *Gutu*, while conceding that the allegations upon which the matter was decided were not put in the letter seeking authority to dismiss the respondent, submitted that the issues of the missing \$300 000. 00 and the missing Northwood stands register constituted “any act, conduct or omission inconsistent with the fulfillment of the express or implied conditions of (the respondent’s) contract” of employment in terms of s 3(1)(a) of the Regulations.

However, even if that submission was to be accepted, it is clear that the specific act or acts relied upon would have to be alleged by the appellant in the letter setting out its grounds for seeking authority to dismiss the respondent. That much is clear from the case authorities. See for example, *Standard Chartered Bank Zimbabwe v Matsika* 1996 (1) ZLR 123 (S) at p 130 C-F.

The appellant sought to place reliance on *Karembera v Mvurwi Rural Council* 1999 (1) ZLR 327 (S). However, the ratio *decidendi* of that case is that where a suspension has lapsed by reason of the failure of an employer to apply forthwith for authority to terminate the employment of an employee in terms of Statutory Instrument 371/85, the employer, in a subsequent application seeking authority to dismiss the

employee, is not precluded from raising new grounds in the letter seeking dismissal notwithstanding that those grounds were not contained in the previous letter.

In the present matter, the appellant sought refuge in the fact that the suspension had lapsed by reason of the failure of the appellant to apply forthwith for authority to dismiss the respondent. Because of this, so it was argued, the appellant was entitled to rely on new grounds not set out in the letter of September 2001.

The difficulty that the appellant faces is, as Mr *Gutu* correctly conceded, that it did not withdraw the first letter of application and submit a fresh letter setting out the new grounds on which it sought to rely. That course was open to the appellant but not adopted.

Accordingly, the appellant having in his letter to the Labour Relations Officer, placed reliance on specific grounds for the dismissal of the respondent, was obliged to rely on those grounds at the hearing and the Labour Court correctly found that the Labour Relations Officer had wrongly determined the matter on issues that were not before him. The appeal was, therefore, devoid of merit.

SANDURA JA : I agree.

GWAUNZA JA : I agree.

Gutu & Chikowero, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners