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Judgment No. SC 38/07
Civil Appeal No. SC 114/05

ZIMASCO (PRIVATE) LIMITED v JAMESON CHIZEMA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, JUNE 11 & NOVEMBER 12, 2007

R Moyo, for the appellant

N Goneso, for the respondent

GWAUNZA JA: The appellant was ordered by the Labour Court to reinstate the respondent to his employment without loss of salary or benefits, or, in lieu thereof, pay him damages. The appellant was aggrieved at this decision and has now appealed to this Court.

The facts of the matter are not in dispute. The respondent asked to borrow the appellant's brick-moulding machine for private use. The machine was at the time not functional and needed repairs. A foreman of the appellant, one Mr Dzombe, assigned another company employee to repair the machine, a task that was undertaken on a Saturday in the presence and at the instigation, of the respondent. To facilitate these repairs, the respondent had the machine removed from the timber yard to the brick-moulding yard. It is the appellant's submission that the former premises were more secure than the latter. After the machine was repaired, it remained within the brick-

moulding yard while the respondent waited for authority from the mine manager to use it. It was then later discovered that the electric motor to the machine had been stolen.

The appellant preferred charges of theft/fraud against the respondent and, after finding him guilty of the offence, subsequently dismissed him from his employment. The respondent successfully appealed to the Labour Court, as indicated.

The court *a quo* reasoned and concluded as follows in its judgment:

> "For the respondent to prove the appellant was indeed guilty of theft, there was need to prove, on a balance of probabilities, the appellant's intention to permanently deprive the respondent of the machine or some misrepresentation in the case of fraud. The facts showed that the appellant wanted to have the machine repaired and then use it …. However, no intention to steal on his part was shown. In view of the above, a case of theft or fraud has not, on a balance of probabilities, been made against the appellant."

In my view, this reasoning and conclusion, given the facts of the matter as outlined, cannot be faulted. Indeed the appellant concedes in its Heads of Argument, that the facts of the matter did not establish the commission of theft or fraud by the respondent. Having so conceded, one would have expected the appellant to have accepted defeat and let the matter rest.

It did not do so, however, but chose to take the matter on appeal to this Court, effectively on points that were not raised with or considered by, the court *a quo*. But for the fact that a point of law can be raised at any stage of the legal proceedings in any dispute, this Court might, on that ground, have dismissed the appeal.

Be that as it may, the appellant charges that the court *a quo* erred in ordering the reinstatement of the respondent, and therefore deciding the matter on legal technicalities, when it was "apparent" from the facts of the matter that he had committed a dismissible offence. According to the appellant, this was ***"an act inconsistent with the fulfillment of the express or implied conditions of his contract".***

Two points of law arise from the appellant's contentions. The first is whether the Labour Court, faced with an appeal in the case where an employee was dismissed on the basis of a wrong charge, can *mero motu* substitute the wrong charge with another. The second is whether the failure by the court *a quo* to alter the wrong charge preferred against the respondent by the appellant, amounted to deciding the matter on a legal technicality.

Dealing with the first point, it is evident from the record that the respondent was charged with theft or fraud. He was subjected to disciplinary hearings on this basis, and was subsequently dismissed after being found guilty as charged. At no stage during these disciplinary proceedings, or during the appeal hearing in the Labour Court, was it indicated that the respondent was being charged, in the alternative, with committing '***an act or conduct inconsistent with the fulfillment of his contract of employment.'***

The Labour Court considered the appeal on the basis of the evidence placed before it. It found that such evidence did not establish, even on a balance of

probabilities, the commission of that offence. The court therefore properly discharged its mandate. It should be noted that it clearly was not the responsibility of the Labour Court to amend the "charge sheet" in this matter by substituting the charge preferred against the respondent with another one. The court is not there to formulate charges or cases for litigants. In cases of this nature the court's brief is to determine, on the basis of evidence placed before it, whether or not a case has been proved against the respondent. It needs no emphasis that he who alleges anything against another person, must prove such allegation. The appellant *in casu* failed to prove, on the facts presented, that the respondent committed fraud or theft.

The second issue arising from the appellant's submissions is whether, by not substituting the original charge with another, the Labour Court had decided the matter on the basis of legal technicalities, and not on the merits. The appellant in this respect sought to argue, on the authority of *Dalny Mine v Banda* 1999 (1) ZLR at 220, that procedural matters in labour disputes should not determine the ultimate direction of the matter but rather that a consideration of the merits thereof should be the basis for disposing of the matter.

I do not find any merit in this contention, nor am I persuaded that the *Dalny* case is applicable to the circumstances of this case. The Labour Court did consider the merits of the matter, as they were argued by both parties. The facts of the matter were not in dispute. What the Labour Court was called upon to do, quite properly, was to determine whether, on the basis of such facts, the offence with which the respondent was

charged had been established on a balance of probabilities. The appellant's contention, in fact, is that the Labour Court should have gone beyond this mandate to rewrite the "charge sheet" for the appellant, and then try the respondent on a charge not preferred against him on the papers. A charge, moreover, to which the respondent would not have had an opportunity to respond.

That such an action would have resulted in a miscarriage of justice, as contended for the respondent, can in my view not be disputed. It would also have been unprocedural and improper for the Labour Court to so act.

The appellant in its heads of argument raised a number of other arguments in its endeavor to have the respondent penalized, at any cost, for the conduct that it had mislabeled 'fraud or theft'.

It is for instance contended that while the respondent may not have committed fraud or theft in the ordinary sense, the definition of 'theft' in the appellant's Code of Conduct, which extended to ***'unauthorized application of the appellant's assets,***' came "quite close to the facts of this matter".

I do not find this argument to be persuasive. Apart from the appellant now wishing to improperly argue its case differently, the contention is clearly not sustainable on the facts of the matter. The respondent did not intend to use the brick-moulding machine without authority. To the contrary, he asked for, and was still awaiting, such

authority when the theft in question occurred. His actions in taking the machine from one place to the other for repairs can hardly be described as attempting to "***apply to a wrong use for any unauthorized purpose"*** the brick- moulding machine in question.

The respondent submits that the appellant, at the initial hearing before the disciplinary committee and later before the General Manager, "totally refused" to accept the proposal from the respondent's representatives to prefer alternative charges if it felt the respondent had moved the machine without authority. Instead, the appellant is said to have insisted that the allegations of fraud and theft were appropriate to the facts of the mater. It seems to me the appellant would have done well to heed that suggestion from the respondent. As a result of not doing so, the appellant now finds itself in a position where it must literally clutch at any straw in an attempt to have the respondent penalized for the conduct in question.

I find when all is said, that the appeal has no merit.

It is accordingly ordered as follows:

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

SANDURA JA: I agree

CHEDA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Goneso & Associates, respondent's legal practitioners