DISTRIBUTABLE (24)

ASTRA INDUSTRIES LIMITED
v
PETER CHAMBURUKA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, JUNE 11 & JULY 19, 2012

R M Fitches, for the appellant
The respondent in person

OMERJEE AJA: This is an appeal against part of the judgment of the Labour Court in which the court allowed an appeal against the dismissal verdict returned by the Disciplinary Hearing Committee of the appellant.

The background relevant to this matter is as follows. The respondent was employed by the appellant as a dispatch clerk whose duties included dispatching various company products to customers. In May 2005 the respondent was tasked to load various products onto a delivery truck. He was given invoices that reflected the quantities of the products to be loaded.

In executing his duties the respondent loaded 4x20 litres of lacquer thinners without an invoice authorising such loading. This act was detected by the security guard who was at the main gate conducting spot checks. It was established that there was an over-supply of 4x20 litres of lacquer thinners. The respondent's immediate supervisor was informed.

The respondent was charged with four counts of misconduct emanating from the same act. He was charged with neglect of duty, negligence, theft and / or aiding theft. The respondent admitted that he was negligent in the performance of his duties. Although there was a clear splitting of charges, he was found guilty of all the charges and dismissed from employment. No proper record of proceedings was kept by the Disciplinary Hearing Committee.

The respondent appealed to the general manager who dismissed the appeal. He then appealed to the Labour Court and his application was successful on the charge of theft. The President of the Labour Court held that the sketchy facts set out in the minutes made little attempt to disprove the respondent's case. He concluded that there was no intention to steal on the part of the respondent and that this aspect had not been canvassed on the scant facts set out in the minutes. The Labour Court then ordered the employer to reinstate the respondent without loss of salary and benefits. Aggrieved by this ruling the employer has appealed to this Court.

It is apparent from the record that the Disciplinary Hearing Committee did not keep a proper record of proceedings. The imprecise facts set out in the minutes of the Disciplinary Hearing Committee only indicate that the appellant was found guilty of all four charges and was consequently dismissed. No reasons were given for such verdict. The court *a quo,* too, fell into error in failing to determine which of the four charges of misconduct preferred against the respondent had been proved.

The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation. This position has been affirmed by this Court. In *Book v Davidson* 1988 (1) ZLR 365 (S) at 384 B-F,

DUMBUTSHENA CJ quoted with approval the words of Potgieter AJA in *Mobil Oil Southern Africa (Pvt) Ltd v Mechin* 1965 (2) SA 706 AD at 711 E-G:

> "The general principle governing the determination of the incidence of the onus is the one stated in the *Corpus luris simper necessitasprobandiincumbitilli qui agit*. In other words he who seeks a remedy must prove the grounds therefore."

The respondent was charged and convicted of theft among other offences. The essential elements of theft remain the same whether in a disciplinary hearing or in a criminal trial. The position now appears settled in this jurisdiction that where a person is charged in a disciplinary hearing with an offence of a criminal nature, such an allegation should be proved beyond a reasonable doubt and that it would be unfair to condemn a man and punish him for an offence of a criminal nature on a balance of probabilities rather than evidence which established the commission of the offence beyond a reasonable doubt. In this connection see *Mugabe & Anor v Law Society of Zimbabwe* 1994(2) ZLR 356(S) 364G – 365B. For the purposes of the present appeal, it is not necessary to determine whether or not this principle should apply to ordinary disciplinary proceedings in labour matters.

The respondent in this case violated a company rule that no product was supposed to be loaded into a delivery truck without necessary supporting documents. The rule that the respondent had violated was meant to prevent pilferage and protect the business interests of the appellant and was therefore a reasonable standard which had to be respected.

The court *a quo* held that the appellant failed to prove that the respondent intended to deprive the appellant of his paint. In its findings the President of the Labour court stated that:

> "The sketchy facts set out in the minutes made little attempt to disprove the appellant's case. He admitted that he negligently loaded consignments of paint which had no invoice. The charge of theft requires proof of a guilty mind. In other words the loading must have been deliberately done with intent to deprive the owner of his paint. This aspect was not canvassed on the facts set out on the minutes."

The evidence on record shows that the respondent used a 4x5 litres invoice to load 4x20 litres. When asked to explain his conduct he said it was a mistake on his part as he was holding two separate invoices at the time for the same commodity one for 4x5 litres and the other for 4x20 litres. No evidence was led as to how he procured the 4x20 litres of lacquer thinners from the stores, or who may have procured it.

It is this Court's view that the appellant company failed to discharge the onus upon it. The fact that the respondent admitted that he mistakenly loaded 4x20litres of paint and gave the security guard a wrong invoice does not mean that he intended to deprive the appellant of his paint. The appellant was required to prove that the respondent's intention was to permanently deprive the appellant of his paint. There is nothing to disprove the respondent's assertion that he made a mistake when he loaded 4x20 litres of lacquer thinners into the truck instead of 4x5 litres.

In our view, the conclusion of the court *a quo* that the intention to deprive the owner of his goods on the charge of theft had not been established, is a correct finding. There is therefore no basis upon which this Court can interfere with the above finding of the court *a quo* because there is no evidence on record that shows that the respondent intended to permanently deprive the appellant of his paint.

The papers filed of record reveal that the respondent was facing four counts of misconduct two of which were of negligence and he pleaded guilty to those counts. However, the court *a quo* in finding that the respondent was not guilty of theft or aiding theft did not make a finding as to whether or not he was guilty of negligence.

The respondent had admitted having been negligent. At the very least, the admitted facts proved that he was negligent in executing his duties. The court a quo should therefore have substituted a verdict of guilty of negligent performance of duty. As all the facts are before us, this Court can correct this anomaly without the need to remit the matter. Accordingly, the order of Labour Court must be set aside and substituted with one, finding the respondent guilty of negligence.

On the issue of the appropriate penalty, it is common cause that the prescribed penalty for negligent performance of duty in terms of the appellant's code of conduct is a final written warning. As there is no need to remit the matter, that is the penalty that should be substituted.

Accordingly it is ordered:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following substituted:

"i. The appellant's dismissal is set aside.
ii. The appellant is found guilty of negligent performance of duty.
iii. The appellant is given a final written warning."

ZIYAMBI JA: I agree

GARWE JA: I agree

Costa &Madzonga, appellant's legal practitioners