Z B FINANCIAL HOLDINGS v MAUREEN MANYARARA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GOWORA AJA
MONDAY, JANUARY 23, 2012

T Mpofu, for the appellant

F Nyakabawu, for the respondent

MALABA DCJ: This is an appeal against that part of the judgment of the Labour Court by which it set aside the decision of the initial hearing by the appellant to dismiss the respondent from employment following a finding of misconduct in that she participated in an unlawful collective job action on 4 May 2004. The court *a quo* substituted for a dismissal a penalty of a final written warning and ordered reinstatement alternatively payment of damages.

The Labour Court did so after consideration of three factors which it took to be mitigatory. These were that; the participation was for two hours, the duration of the collective job action was short; and there was no evidence of previous convictions. The contention by the appellant is that the court *a quo* misdirected itself in the exercise of its discretion. The court agrees that there was a serious misdirection on the part of the court *a quo*.

The fact of the respondent's participation for a period of two hours is not a mitigating factor because that was the duration of the unlawful collective job action. The offence she was charged with was of participating in an unlawful job action regardless of its duration. Even assuming that the respondent was a first offender the court *a quo* had to take

into account the fact that the employer considered the misconduct as one that was so serious as to go to the root of the contract of employment. The court clearly did not apply its mind to the fact that it was dealing with a case of an exercise of discretion by an employer and that it could not interfere with the decision to dismiss without a finding of misdirection on the party of the employer. The reliance on the fact of the respondent being a first offender to set aside the dismissal in the absence of a finding of misdirection on the part of the employer was improper.

The unanimous view of the court is that the appeal succeeds.

Accordingly it is ordered as follows:

1. The appeal is allowed with costs.

2. The judgment of the court *a quo* setting aside the dismissal of the respondent and ordering her reinstatement is hereby set aside and substituted with the following order:

   "That the dismissal of the respondent be and is hereby confirmed with costs".

ZIYAMBI JA: I agree

GOWORA AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners