

SPECISS COLLEGE
vs
MAXWELL CHIRISERI (2) EMMANUEAL CHIDODO (3) ALLEN
MUSEVENZI

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, JUNE 12, 2012 & FEBRUARY 12, 2013

T Mpfu, for the appellant

P Mabundu, for the respondents

ZIYAMBI JA: This is an appeal against a judgment of the Labour Court setting aside the dismissal of the respondents and reinstating them to their former positions in the employ of the appellant.

The appellant, as its name suggests, is a college whose core business is delivering education and training to students of varying ages. The respondents were employed by the appellant as tutors. It is common cause that a withdrawal of labour was called for by the respondents' union as a means of forcing the employers to negotiate salaries. It is also common cause that the strike was called off but the respondents nevertheless withdrew their labour on 6 September 2006, which was the beginning of the new school term. As a result, new students wishing to register for classes were turned away, tuition fees were not collected and those who did attend classes received no tuition.

Misconduct proceedings were conducted in respect of most of the participants in the collective job action, the allegation being that the collective job action was unlawful. Thirteen of the participants were given final warnings while the respondents, who had played a leading role in inciting other employees to participate in the collective job action, as well as one employee who was already on a final written warning, were charged with *sabotage* and, having been found guilty, were dismissed from employment. The respondents successfully appealed to the Local Joint Committee which set aside their dismissals on the basis that *sabotage* was not proved. The appellant appealed without success to the National Employment Council and to the Labour Court. Before the latter court it was contended on behalf of the appellants that by unlawfully withdrawing their labour the respondents had interrupted services necessary to the operations of the employer's business.

The court *a quo* dismissed the appeal on the basis that although by the withdrawal of their labour the respondents had made it "difficult and perhaps impossible for the business of teaching to be conducted" their actions did not amount to *sabotage* within the meaning of the Code. It said:

"The employee has been given the right to strike. This right must be exercised in a given manner. When exercised it necessarily entails the withdrawal of one's labour. In a lot of cases this withdrawal results in the operations of a business being interrupted completely. In other words the employee would have interrupted his supply of services, so to speak. But is this the kind of interruption that was meant to be curbed? If it is then it would mean giving with the right hand and taking away with the left hand. It appears more appropriate that the interruption of services is of third parties and not services of the employee himself...."

The learned President then proceeded to give a treatise on the right to strike which was, bearing in mind that the strike was unlawful as I shall demonstrate later in this judgment totally uncalled for.

The appeal was premised on the following grounds, namely, that the court *a quo* erred:

- (i) In failing to find that the withdrawal of labour by the respondents amounted to an unlawful collective job action;
- (ii) In finding, given the circumstances, that the respondents had a right to withdraw their labour; and
- (iii) In finding that the respondents had not committed the disciplinary offence of sabotage as defined in the applicable code of conduct.

I will deal separately with each ground of appeal.

- (i) The failure to find that the withdrawal of labour by the respondents amounted to an unlawful collective job action.**

Allen Musevenzi, the third respondent, was the chairman of the Workers' Committee of the appellant. The letter notifying him of the intention to institute disciplinary proceedings against him stated as follows:

“It is alleged that you engaged in a collective job action by refusing to carry out your normal duties on Wednesday 6 September 2006 between approximately 0800 and 1000. You engaged in this collective job action:

1. Without submission of 14 days written notice to Speciss College of your intent to resort to such action (as it required by section 104 (2) of the Labour Act).

2. After having been informed verbally that such action was illegal.
3. After having been warned by the Managing Director's Notice following the previous such action by certain staff on 29 March 2004 that any future such action would result in Speciss imposing the most severe legal penalties against those involved.
4. Without having made any effort to establish whether the collective job action was still being called by your principals”

Your engagement in this illegal collective job action constitutes the offence of Sabotage (Item 9 of the Group IV schedule of offences in the NEC for the Commercial Sector Employment Code of Conduct) in that your actions interfered with and interrupted services necessary to the operations of the Campus. Your involvement in the illegal collective job action is aggravated by the fact that you were observed to be instigating and leading the action at the Campus. This offence can result in dismissal for a first offence.”

The same charges were preferred against Maxwell Chiriseri, the first respondent, and Emmanuel Chidodo, the second respondent (“Chidodo”). Chidodo was not a first offender having received a penalty of a final written warning the previous year for being absent from his workstation without authority.

Section 104 of the Labour Act [*Cap. 28:01*] (“the Act”) sets out in subs (1) and (2), the right to strike and the parameters for the lawful exercise of that right. It provides:

“104 Right to resort to collective job action

(1) Subject to this Act, all employees, Workers' Committees and Trade Unions shall have the right to resort to collective job action to resolve disputes of interest.

(2) Subject to subsection (4), no employees, workers' committee, trade union, employer, employers' organisation or federation shall resort to collective job action unless-

(a) fourteen days' written notice of intent to resort to such action, specifying the grounds for the intended action, has been given—

(i) to the party against whom the action is to be taken; and

(ii) to the appropriate employment council; and

(iii) to the appropriate trade union or employers' organisation or federation in the case of members of a trade union or employers' organisation or federation partaking in a

collective job action where the trade union or employers organisation or federation is not itself resorting to such action; and
(b) An attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section *ninety-three*.”

That the respondents had the right to withdraw their labour is, therefore, beyond question. That right must, however, be exercised within the parameters set out in the Act. It is not disputed that no notice was given to the appellant of the impending strike or that no attempt had been made to conciliate the dispute as required by subs 2(b) of s 104. In the circumstances the collective job action was unlawful by reason of its non-compliance with s104. The Labour Court made no finding on the lawfulness or otherwise of the collective job action in which the respondents had participated. It ought to have done so and the failure so to do was a misdirection on its part.

The consequences of a collective job action will depend on the lawfulness or otherwise of it. While there may be no repercussions consequent upon a lawful strike, the same cannot be said in respect of an unlawful strike. In terms of s 109 (6) of the Act, employees who participate in an unlawful collective job action “shall be jointly and severally liable, at the suit of any injured party, for any injury to or death of a person, loss of or damage to property or other economic loss, including the perishing of goods caused by employees’ absence from work, caused by or arising out of or occurring during such collective action”.

Further, an employee who participates in an unlawful collective job action risks dismissal from his employment and non-payment of wages or salary for the period of such unlawful collective job action. In this connection, it is to be noted that engaging in ‘*any unlawful collective job actions as defined by the Labour Relations Act as amended from time to time*’ is a dismissible offence in terms of the relevant code of conduct which is the

N.E.C.C.S. Employment Code of Conduct (hereinafter referred to as “the Code”) and that the conduct of the respondents in engaging in an unlawful collective job action warranted dismissal on that ground.

- (ii) **The finding, given the circumstances, that the respondents had a right to withdraw their labour.**

In view of the non-compliance with s 104 of the Act, it is clear that the respondents did not lawfully exercise their right to withdraw their labour. Put differently, in the purported exercise of their right to strike they defied the very law which gave them that right. No right can exist to act unlawfully. This ground is also decided in favour of the appellant.

- (iii) **The finding that the respondents had not committed the disciplinary offence of sabotage as defined in the applicable Code of Conduct.**

The offence of sabotage is defined in the Code as follows.

“SABOTAGE

Any wilful act by an employee to interfere with the normal operations of the employer’s business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations”.

Sabotage has been defined as:

“noun’ 1. The act of doing deliberate damage to equipment, transport, machines, etc to prevent an enemy from using them, or to protest about something...”

Verb 1: to damage or destroy something deliberately to prevent an enemy from using it or to protest about something...

Verb2: to prevent something from being successful or being achieved, especially deliberately'. See *Oxford Advanced Learner's Dictionary 8 Ed.*"

It is defined in *Wikipedia* as:

"a deliberate action aimed at weakening another entity through subversion, obstruction, disruption, or destruction. **In a workplacesetting**, sabotage is the conscious withdrawal of efficiency generally directed at causing some change in workplace conditions...".(My emphasis)

In *Black'sLaw Dictionary 8 Ed*, it is defined as:

"1. ... the destruction, damage, or knowingly defective production of materials, premises, or utilities used for national defense or for war...

2. The wilful and malicious destruction of an employer's property or **interference with an employer's normal operations especially during a labour dispute.**"(My emphasis)

In its ordinary meaning, therefore, sabotage can mean the withdrawal of labour with the intention of forcing the employer to comply with the employees' demands. While such withdrawal of labour when exercised in the context of a lawful strike is permitted by law, it is contended by the appellant that the unlawful withdrawal of services by the respondents in this matter constituted sabotage as defined in the Code.

The court *a quo* was of the view that while the actions of the respondents constituted an interruption of supply of services to the employer such interruption was not meant to be proscribed by the Code but rather it was the interruption of the services, not of the employee, but of third parties to the employer, which was intended to be proscribed.

I am unable to agree with this view. For to do so would mean that an employee who, during the course of an unlawful collective job action deliberately refrains from sending a signal of the arrival of a train to the next station knowing that his failure to send the signal might cause a derailment of the train and such a derailment does eventuate, could, in answer to a charge of sabotage, take refuge in the fact that the withdrawal of his labour does not constitute sabotage.

In my view, the unlawful withdrawal of their services by the respondents did constitute sabotage. They interfered with the normal operations of the appellant to the extent that those services were not available to the appellant, to its loss, during the period of the strike. Their conduct amounted to an interruption of services necessary to the operations of the appellant who was dependent on those services for its functioning. They were, therefore, properly found guilty of the misconduct of sabotage and dismissed by the appellant.

In the result, the appeal succeeds with costs.

The judgment of the court *a quo* is set aside and substituted with the following:

“The appeal is allowed.

The determination of the Disciplinary Committee to dismiss the respondents is hereby upheld.”

GARWE JA: I agree

OMERJEE AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Maganga & Company, respondents' legal practitioners