

REPORTABLE (61)

DHL INTERNATIONAL (PRIVATE) LIMITED
v
KEVIN TINOFIREYI

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, NOVEMBER 14, 2013 & OCTOBER 17, 2014

H Mutasa, for the appellant

Mr *Matsikidze*, for the respondent

GWAUNZA JA: This is an appeal against the whole judgment of the Labour Court, Harare, handed down on 28 January 2011. The brief facts of the matter are as follows:

The respondent was employed by the appellant in the capacity of Data Coordinator. On 7 May 2007 the respondent was served by the appellant with two separate charges of misconduct. The two charges were disobedience, provided for under s 19.3.5 and indiscipline, as provided for under s 19.2.10 of the appellant's Code of Conduct. The first hearing was held on the 10 of May 2007. The respondent was found guilty of disobedience and issued with a final written warning valid for 12 months. The second hearing was held on 22 May 2007 in respect of the indiscipline charge. The respondent was found guilty of indiscipline and punished with dismissal. He unsuccessfully appealed to the General Manager of the appellant. His appeal to the Managing Director met the same fate. The

respondent was, however, successful in his appeal to the Labour Court, which ordered that he be reinstated to his former employment, or be paid damages *in lieu* of re-instatement.

The appellant was disgruntled at this order, and filed the appeal now before the Court.

The appellant's grounds of appeal are as follows:

1. The court *a quo* erred in law in finding that the provisions of the applicable Code of Conduct precluded the imposition of the penalty of dismissal for the commission of the disciplinary offence of which the respondent had been found guilty;
2. The court *a quo*, having found that the respondent had committed a disciplinary offence striking to the root of the relationship between employer and employee, erred in law in nevertheless allowing the appeal;
3. Alternatively, the court *a quo* erred in law in upholding the appeal in its totality, without the imposition of any disciplinary penalty on the respondent.

The appellant prays that the appeal be allowed and that an order upholding the original determination of the hearing officer, to the effect that the respondent be dismissed from employment, be granted.

The conduct with which the respondent was charged and for which the penalty of dismissal was imposed is not in dispute. Nor is it disputed that for the conduct in question, i.e. indiscipline categorised as a very serious offence, the appellant's Code of Conduct provides the penalty of a severe written warning. It does not impose the penalty of dismissal. The appellant argued *a quo*, and in this Court, that the respondent's refusal to report for duty on 27 May 2007, after being asked to do so by the appellant, amounted to conduct that was incompatible with the fulfilment of the express terms and conditions of his employment. Such terms and conditions, it is further argued, required that he accepts changes in his hours

or pattern of work, and upon request, that he works overtime. For these arguments, the appellant relied on, among other authorities, the case of *Standard Chartered Bank Zimbabwe Limited vs Chapfuka* SC 125/04 where the court stated as follows:

“conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and employee giving the former a *prima facie* right to dismiss the latter.”

See also *Clouston & Co. Limited vs Corry* (1906) AC 122 at p 129, and *Tobacco Sales Floor Limited vs Chimwala* 1987 (2) ZLR 210 S.

The court *a quo* was not persuaded by the appellant’s submissions and stated as follows at p 16 of its judgment:

“Respondent’s reasoning is consistent with the common law position on the master and servant relationship. However our labour laws have evolved beyond that position. Our law has incorporated international labour standards including the concepts of social justice and democracy. Part and parcel of these concepts is collective bargaining involving employer and employee representatives in the setting of terms of employment. This has led to the introduction of employment codes. (See Section 101 of the Labour Act CAP 29:01). On such codes, GUBBAY C.J. as he then was, had this to say,

“The purpose of a Code of Conduct is to create certainty by spelling out what constitutes an offence in a given work place and, the penalty to be imposed for the commission of such offences.” **Delta Corp v Paul Gwashu SC 96/00**, (at p.3).

It follows, in my view, that any unwarranted departures from these codes only serves to undermine the labour standards agreed by employers and employees and risk reviving the old master and servant laws of the common law. As the common law was tilted in favour of the employer, continued reliance thereon in labour matters is, in my view, retrogressive.”

The crisp issue for determination is therefore whether the provisions of a Code of Conduct can override, and therefore alter, the common law principles governing an employer’s right to dismiss an employee for misconduct that goes to the root of the employment contract.

This Court, in the case of *Toyota Zimbabwe vs Posi* SC 55/07 had occasion to consider and determine the exact same issue. In that case MALABA JA (as he then was), stated as follows at p 8 of the cyclostyled judgment:

“The view of section 2 of the Code adopted by the learned President would drastically alter the common law. The position at common law is that a high degree of negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee: **Wallace v Rand Daily Mail Co 1917 AD 479 at 482**. It is a common law position that commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated. **Standard Chartered Bank Zimbabwe v Chapuka SC 125/04**. We are bound by the rule of construction to the effect that we must presume that there is no intention to alter the common law. As Mr Zhou put it, the Labour Act contains no provision which either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an agreement.” (my own emphasis)

In the earlier case of *United Bottlers v Kaduya* 2006 (2) ZLR150, a similar view was adopted by the Labour Court, *albeit* in relation to s 2 of the Labour Act (‘the Act’). In that case, CHIDYAUSIKU CJ considered the meaning and import of s 2A of the Act and stated as follows at page 155 B-C;

“Section 2A essentially sets out the objectives of the act and specifically provides that in the event of a conflict between the Labour Relations Act and any other enactment the Labour relations Act shall prevail. The section is not a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Labour Relations Act” (*my emphasis*)

It is pertinent to add that s 2A of the Act refers to conflict between the Labour Act and any enactment. ‘Enactment’ does not include common law. In any case, a proper reading of the authorities cited on this point clearly suggest that Codes of Conduct must be formulated in such a way that their provisions are not in conflict with common law, unless such a course is explicitly sanctioned by the enabling statute, that is the Labour Act. The

respondent did not point the court to any legal provision that either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee for misconduct that goes to the root of the employer and employee relationship. The view taken by the court *a quo* that a Code of Conduct overrides common law, is in the light of this, clearly erroneous. The court *a quo* therefore seriously misdirected itself in stating:

- i) that the dismissal of the respondent *in casu* was an ‘unwarranted’ departure from the appellant’s Code of Conduct;
- ii) that our labour laws have ‘evolved’ from the position where employers can dismiss an employee for conduct found to be inconsistent with the fulfilment of the conditions of his service; and
- iii) that it and any other court could not ‘re-write’ a company’s Code of Conduct in the absence of any ambiguity therein.

The fact hardly needs emphasising that a situation where an employee absents himself from work in defiance of an order to the contrary is untenable in any work situation. This is particularly so where the employer is in business and its success and viability hinge on, among other factors, the discipline of its workforce. Discipline in the work place fundamentally entails obedience to orders and respect for authority. It is therefore in the employer’s interest to do all in its power to nip in the bud any conduct that may lead to anarchy in the workplace. The respondent deliberately defied an order from his superiors not to leave work. His defiance had the effect of disrupting the appellant’s operations and causing inconvenience to its customers. Such conduct was clearly inconsistent with the fulfilment of the express or implied conditions of his employment. On the basis of common

law and numerous authorities in this jurisdiction and beyond, such misconduct justified dismissal. (See also *Clouston & Co. Ltd vs Corry* (1906) AC 122 at 129).

The point must however be made that not all acts of misconduct that are inconsistent with the express or implied conditions of one's employment warrant the penalty of dismissal. In this respect McNALLY JA, in the case of *Tobacco Sales Floors Ltd vs Chimwala* 1987 (2) ZLR 210 (S), cited with approval the following *dictum*:

“I consider that the seriousness of the misconduct is to be measured by whether it is ‘inconsistent with the fulfilment of the express or implied conditions of his contract’. If it is, then it is serious enough *prima facie* to warrant summary dismissal. Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.” (my emphasis)

The respondent *in casu* has not denied the seriousness of the misconduct for which he was dismissed. He did not and indeed could not show that the offence was “so trivial, so inadvertent or otherwise so excusable” as not to warrant the remedy of summary dismissal.

I find, in the result, that the appellant properly and in its discretion imposed the penalty of dismissal on the respondent, even though the conduct in question was not dismissible in terms of its Code of Conduct.

In all respects, therefore, the appeal has merit and must, accordingly, succeed.

In light of this finding, it is the view of this Court that it is not necessary to consider the appellant's other grounds of appeal.

It is in the result ordered as follows:

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

GOWORA JA: I agree

PATEL JA: I agree

Messrs Gill, Godlonton & Gerrans, appellant’s legal practitioners

Matsikidze & Mucheche, respondents’ legal practitioners