

REPORTABLE (32)

DUNMORE MUPANDASEKWA
v
GREEN MOTOR SERVICES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & GUVAVA JA
HARARE, JULY 8, 2014 & JUNE 25, 2015

Advocate T. Magwaliba, for the appellant

Advocate F. Mahere, for the Respondent

GWAUNZA JA: This is an appeal against the entire judgment of the Labour Court, handed down on 28 January 2011.

The facts of the matter are aptly summarised as follows in the respondent's heads of argument:

The appellant was employed as a Logistical Officer/Controller by the respondent. In December 2009, he was charged, found guilty and dismissed, on grounds of gross negligence and inefficiency that led to the respondent losing revenue. He lodged an internal appeal on 4 January 2010, but it was not heard. He then lodged a complaint with the Ministry of Labour, but the matter was not settled at conciliation, and it was referred to arbitration. The arbitrator found that there had been irregularities in the hearing. He ordered that the appellant be paid salary arrears and benefits to the date of

his award, then determined the matter on the merits and upheld the dismissal. The Appellant then appealed to the Labour Court, which dismissed his appeal.

The appellant has now appealed to this Court. However Mr *Magwaliba* for the appellant concedes the point made by Ms *Mahere* for the respondent and confirms that the appellant has abandoned all of his grounds of appeal except the one that reads as follows;

“The Labour Court erred by holding that appellant had to show more than a possibility of bias whereas he had shown actual bias”

The allegation of bias was directed at the chairperson of the disciplinary authority before which the appellant appeared. The specific charge in respect of which the appellant was found guilty and dismissed was given as follows:

“It is also alleged that with/or without Great Milan’s Knowledge you filled a Bill of Entry (ZIMRA Form 24) using a different name, Giband. This was against ZIMRA requirements, and is a case of fraud.”

The following facts are not in dispute. The Bill Of Entry issued by the appellant indicated that the consignee was “Giband Industrial Company” and quoted their BP number as “0200077700”. The goods involved belonged to a different customer called Great Milan, which was obliged to pay presumptive tax to ZIMRA upon the goods entering Zimbabwe. Giband, on the other hand, was only obliged to pay VAT and not presumptive tax. There was suspicion that the appellant was bribed by an official of Great Milan to facilitate its non-payment of presumptive tax through use of Giband’s name and BP number. There was also strong suspicion that this was just a tip of the iceberg.

As already indicated, the only issue raised in this appeal is whether the arbitrator - and the Labour Court by upholding his decision - erred in dismissing the appellant's allegations of bias and proceeded instead, to consider the merits of the dispute.

The appellant argues that the chairperson of the disciplinary hearing, one *Chioneso Muvandi* was part of the team that investigated the offences allegedly committed by him. As a result, she was not only "compromised" but clearly biased. Evidence of this bias is given as an advertisement that she caused to be published in a newspaper, before the hearing, to the effect that the appellant was no longer employed by the respondent. He argues that this was indicative of the chairperson having pre-judged the matter and that, as a consequence, there was no possibility of her being fair at all in the circumstances. The appellant further argues that the chairperson demonstrated actual bias by, among other things, denying him an opportunity to cross examine the respondent's witness who stood as the complainant.

The court was referred to the case of *Nyikadzino v Tsvangirai* 2012 (1) ZLR 405 (II) at 410 E-F, in which the appellant avers the rule in respect of bias, interest in the cause and fairness is set out.

The arbitrator found against the respondent in respect of his dismissal, even though he agreed that there were some irregularities in the proceedings. The arbitrator's remedy for the irregularities alleged by the appellant was an order for the respondent to pay the appellant back pay and salaries. The order reads as follows;

- “1. Due to the procedural irregularities in the hearing respondent is ordered to pay applicant his full salary and benefits up to the date of this award (17 March 2010).
2. The dismissal is allowed to stand, as applicant really did show some inefficiency and dishonesty.”

It is not denied by the respondent that the chairperson concerned was part of the team mandated to investigate the multiple charges levelled against the appellant. Nor is it disputed that she caused a notice to be published in a newspaper before the hearing, informing the public that the appellant was no longer employed by the respondent. The respondent however argues that, this notwithstanding, the appellant had failed to demonstrate actual bias on the part of the chairperson of the disciplinary hearing. In any case, the respondent further argues, any possible irregularity in this respect was cured by the arbitrator's award of payment of salary and benefits to the appellant.

The Labour Court, in dismissing the appellant's appeal, in effect upheld the arbitrator's decision on this point. The court addressed the question of whether or not, apart from the irregularity occasioned by the chairperson's role in chairing the proceedings, the appellant had demonstrated actual bias against him, on her part. The Judge expressed the view that the adjudicator is required to execute his duties impartially, and a 'showing' of bias is required to nullify proceedings already concluded. The court found that the appellant had failed to show any bias or prejudice. It held as follows in its judgment;

“Appellant queried why the arbitrator did not use that finding (of bias) to nullify the proceedings. In my view the question is considered differently before and after a hearing. The adverts complained of may be taken to show bias. Indeed I would, on that basis, have interdicted the official from hearing the matter. However, after a hearing has already been conducted the situation is different.... A showing of bias is required to nullify proceedings already concluded. It is not enough to show a possibility of bias as is the case prior to the hearing. *In casu* appellant failed to show bias or prejudice arising from such bias”

I find little to fault in the Judge's reasoning. The question of likelihood of bias can only, logically, be raised before or perhaps during the proceedings in question. In such cases an affected party would normally be expected to request that the person suspected of such

bias recuse him or herself from participation in the proceedings in question. There is no record that *in casu* such a request was made by the appellant in respect of the chairperson of the disciplinary proceedings. Consequently proceedings continued to finality. The appellant could only, after that, have relied on demonstrated bias to request that the proceedings be set aside. The court *a quo* found that he had failed to do so.

The appellant as indicated above referred the court to the comments made by the learned judge in the case of *Nyikadzino v Tsvangirai* 2012 (1) ZLR 405 (II) at 410 E-F to the following effect;

“Indeed it harkens back to feudal form of justice that has no place whatsoever in any modern legal system. It should be blindingly obvious to any judicial officer that he cannot institute a claim or complaint and also adjudicate it himself. It follows that the summons issued by *Chief Negomo* is fundamentally flawed. For this reason alone, the proceedings pursuant to that summons constitute a nullity and must be treated as being void *abinitio*.”

Before the learned Judge made the comments cited by the appellant, he noted as follows;

“The citation in the summons of the plaintiff and the presiding officer as being one and the same person was an affront to every acceptable notion of justice and procedural fairness....”

I am not persuaded that this authority is applicable, on the facts, to the circumstances of this matter. Firstly, the impugned proceedings in the *Nyikadzino* case were conducted by and in a court of law. Secondly, the judicial officer concerned, that is Chief *Negondo*, personally served summons on the defendant in Harare, requiring him to attend his court at a named business centre. He himself and another person were cited as the plaintiffs. He then proceeded to hear the matter. Thirdly, unlike *in casu*, the dispute in the *Nyikadzino* case was not premised on any allegation of bias. The bone of contention there was the violation

by Chief *Negonde* of procedures laid down by statute, relating to the issue and service of summons, that is where, how and by whom. It was because of this and other irregularities that the proceedings in that case were nullified.

By contrast, the disciplinary hearing *in casu* was not in the nature of court proceedings. The chairperson thereof was neither a judicial officer, nor did she institute the proceedings against the appellant. More significantly, she was not the complainant for purposes of the proceedings. Thus while the observations made in the *Nyikadzino* case, as cited were valid and relevant to the circumstances of that case, I do not find that one can draw appropriate parallels between that case and the current one.

In any case numerous authorities in this jurisdiction and beyond effectively caution against treating disciplinary proceedings at the work place, as if they were court proceedings. The authorities point to a number of important considerations that come into play in considering the question of whether or not to set aside proceedings of this nature on the basis of any alleged bias. The first general consideration is aptly expressed thus in *Geo Quinot's "Administrative law: Cases and Materials" Second Edition at page 539;*

“While it is true that the duty to act fairly and listen to both sides lies upon everyone who decides anything, one should be careful not to treat administrative tribunals as though they were courts of law..... The test in matters of this nature is whether the hearings were fair when proceedings are judged in their broad perspective.

We should not lose sight of the fact that one is here dealing with disciplinary hearings presided over by largely laymen. Therefore they cannot be expected to observe all the finer niceties that would have been observed by a court of law. It appears that every effort was made to give the first applicant a fair opportunity to be heard before an impartial tribunal...”¹

¹ Analysis of the judgment in the case of *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others 2000 (4) SA 621 (C)*

(See also *Anglo American Farms t/a Boschendal Restaurant vs Konjwayo* 1992
13 ILJ 573 at 587G)

My view is that these remarks apply with equal force to disciplinary proceedings conducted at the work place. They are therefore apposite *in casu*. They resonate with some remarks made by this Court, in particular the following comments made by the learned judge in the case of *Dalny Mine v Banda* 1999 (1) ZLR 220 SC @ 221

“As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right.”

Further to this, I find, on a proper consideration of the minutes of proceedings before the disciplinary authority, that every effort was made *in casu* to minimise if not eliminate altogether any perception of the appellant not having been accorded a fair trial. *Albeit* chaired by a person whose position had been “compromised”, to use the appellant’s terminology, it is evident from the record of proceedings that full proceedings were held. The appellant was asked to call his own witness but declined to do so. During the hearing, the appellant does not appear to have been in any way restrained in expressing himself on any issue he felt had to be addressed. The record shows that he interjected whenever he felt he had something to say to challenge the actions or non-action of the appellant’s witness, to explain why he had done what he was charged with and even to advance some argument in mitigation. He also argued his case through the answers that he gave to any questions asked, the questions that he himself put as well as uninvited comments that he made on the correctness or otherwise of the arbitrator’s determination of the merits of the case and the court *a quo*’s upholding of the same.

In relation to the alleged failure by the appellant to cross examine the respondents' witness who was officially the complainant, I find there is substance in the following submissions made on behalf of the respondent,

“The minutes of the hearing do not show that the appellant was denied the right to cross examine witnesses. They actually show he was belligerent and rude to the hearing authority as well as the Managing Director who was the complainant ...”

The minutes also show that the appellant did question the complainant, for example about why he had not acted sooner than he did, to take corrective action related to the charges he was facing. The respondent also contends correctly that the appellant never asked to cross examine the complainant beyond his “rude interjections”. He also did not indicate what other questions he may have wanted to put to the complainant nor how his failure to do so caused him to suffer any prejudice, if any.

I find that, in the spirit of the commonly accepted principle “substance matters more than form” that the totality of the disciplinary proceedings shows clearly that the applicant adequately argued his case.

In addition to having done so, the appellant did not deny committing the offence in question, nor did he challenge the finding of guilt made by the arbitrator, and confirmed by the court *a quo*. The ground of appeal that touched on the issue of guilt is one of those that he has abandoned. In light of this, I find there is merit in the following averments made on behalf of the respondent;

“Any procedural irregularities in the matter could not outweigh appellant’s guilt, and it would be a travesty of justice for appellant to be reinstated simply on the basis of procedural irregularity.”

This position finds support in the comments made by *Chidyausiku CJ in Air Zimbabwe (Pvt) Ltd v Chiku Munensa & Mavis Marweyi* SC 89\04,

“A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent”

It is also pertinent to note that while the appellant seems to insinuate in his grounds of appeal that the arbitrator’s compensatory award to him of arrear salaries and benefits was inadequate, he did not take this matter on appeal, nor did he give any indication that he had rejected the award.

As a result I find there is no basis for faulting the finding of the court *a quo* that the appellant failed to demonstrate any actual bias on the part of the chairperson of the disciplinary hearing, to the extent that warranted nullification of the proceedings in question. Equally, I find no fault with the judge’s finding that the appellant failed to prove that he suffered any prejudice as a result of the alleged bias.

In all respects therefore, I find that this appeal lacks merit and ought to be dismissed.

It is accordingly ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of suit.

GOWORA JA: I agree

GUVAVA JA: I agree

Bere Brothers, appellant's legal practitioners

Coghlán, Welsh & Guest, respondent's legal practitioners