

JASSEL JASIRE NYEMBA
v
CMED PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & GUVAVA JA
HARARE, MARCH 23, 2015

T Mpfu for the appellant

Ms F Mukosi, for the respondent

GUVAVA JA: This is an appeal against the decision of the Labour Court. The appellant appealed to the Labour Court against the decision of the respondent's hearing committee dismissing him from its employ. Aggrieved by the Labour Courts decision he appealed to this court.

On the day of the hearing we dismissed the appeal with costs and indicated that reasons would be availed in due course. These are they.

The facts of the matter may be briefly summarised as follows.

The appellant was employed by the respondent as a Manager, manning respondent's Chinhoyi Depot. On 10 March 2010 the appellant was served with a suspension letter, which letter was subsequently followed up with another dated 23 March 2010 which outlined the misconduct charges that were being levelled against him. On 26 March 2010, the appellant wrote to the respondent seeking clarification on the charges he would be facing

on the day of the hearing in view of the fact that he had received two different letters dated 10 and 23 March 2010.

The respondent thereafter wrote to the appellant on 9 April 2010, nullifying the suspension letter of 10 March 2010 with effect from 9 April 2010. The letter further advised the appellant that he should report for duty. The appellant duly reported for duty. On the 13 April 2010, the respondent re – suspended the appellant. On 16 April, 2010 the appellant was notified that a disciplinary hearing was scheduled for 26 April 2010 at 0900hrs. Attached to this notification were the allegations outlined in the letter dated 13 April, 2010. The charges were as follows:

“1. During the month of January 2010 you withdrew fuel using a stolen coupon. Your fuel consumption was high in the range of + / - 1000 litres which suggests a misappropriation of company coupons and abuse of fuel. On this act of misconduct I therefore charge you in terms of the CMED (Private) Limited Code of Conduct section 18.3 Category 4 subsection 12 and 13 on:

- a) Theft / fraud including attempted fraud.
- b) Bribery, corruption and misappropriation.

2. During the month of January – February 2010 you disregarded the company policy on usage of condition of service vehicle LLD465. It was established by investigations that the vehicle was being used by your wife. LL6630 was meant to generate revenue, in so doing you financially prejudiced the company. You are therefore charged in terms of the CMED (PVT) Ltd, Code of Conduct Section 18.3 subsection 21 on;

- a) Gross disregard of standing procedures / rules including disregarding standing rules/procedures resulting in actual loss / prejudice to the company.

3. During the course of investigations you misled Senior Management about the name T.G purporting to be your fuel attendant and at the same time, you tried to defeat the course of justice by persuading the fuel attendant to resign so as to conceal the underhand dealings at Chinhoyi fuel station. You are therefore charged in terms of CMED Code Section 18.3 subsection 16 on:

- a) Falsification of records or any document(s) whether of a personal nature or otherwise.”

On the day of the hearing the appellant did not appear at the designated time. The respondent telephoned the appellant to enquire about his failure to attend the hearing. The appellant requested that the matter be stood down until 1700hrs of the same day. At 1700hrs the appellant arrived and the hearing commenced. It ended around 2400hrs after which the hearing committee found the appellant guilty of the charges levelled against him. The hearing committee recommended that the appropriate penalty was to dismiss the appellant. The respondent acted on the recommendation of the hearing committee and the appellant was subsequently dismissed from employment.

The appellant appealed to the court *a quo* seeking the setting aside of the findings of the hearing committee and reinstatement into respondent's employ.

The court *a quo* dismissed the appeal by the appellant on the basis that the appeal lacked merit. It is against this decision of the court *a quo* that the appellant approached this Court on the following amended grounds of appeal:

- “1. The court *a quo* erred in holding that the employer's determination was valid notwithstanding that it was not supported by any reasons at the time it was made,
2. The court *a quo* erred in not concluding that the determination made by respondent to the effect that appellant is guilty as charged, is without meaning and not valid at law,
3. The court *a quo* erred in not considering that the allegations made against appellant were not proven.
4. The court *a quo* erred in holding that the employer's determination was valid notwithstanding that appellant was not afforded the opportunity to mitigate before the employer imposed the penalty of dismissal.”

On the first ground of appeal, Mr *Mpofu* submitted that as the decision of the hearing committee was not supported by reasons the court *a quo* ought to have set it aside.

The basis of his argument was that a body which is vested with powers to try persons must give reasons for its findings. He submitted that a judgment or order of court which is not supported by reasons gives the impression that it is arbitrary and capricious and is subject to criticism on that basis. This is because litigants are not able to make a decision as to whether to appeal against a judgment or resign to the fact that there are no prospects of success in the event of an appeal. In *Kazingizi v Dzinoruma* HH - 106 -2006, MAKARAU J (as she then was) had the following to say at pp 1 and 2 of the cyclostyled judgment:

“The absence of reasons for the judgment gave us great cause for concern.

It is trite that every trier of fact has to give reasons for his or her decision. A judicial decision that is not explained easily lends itself to criticisms of being arbitrary and/or capricious. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and their argument have been received and if not, why. So fundamental is the legitimate expectation of the litigants in our law that the legislature saw it fit to make it one of the duties of administrative authorities to give reasons for their decisions. (See s 3 (1) (c) of the Administrative Justice Act [*Chapter 10:28*].”

See also *Fox & Carney P/L v Sibindi* 1989 (2) 173 at 179 G – H

There can be no doubt that the above is the correct enunciation of the law. The appellant was correct in stating that a judgment should be backed by reasons. In *casu*, it is apparent from an examination of the record that the hearing committee did give reasons for the decision it arrived at. In my view the appellant may have taken issue with the manner or format with which the reasons were set out or he simply did not agree with the finding of the hearing committee. An examination of the record shows that reasons for the decision of the hearing committee were set out on p 107 of the record. Perhaps it is necessary for a proper determination of this case, to set out in full, the reasons of the hearing committee. The excerpt from the record is set out below:

- “1. Mr Nyemba used stolen coupon 0043270 to fuel his condition of service vehicle.

2. Mr Nyemba failed to convince the Board regarding the service of the coupon (0043270).
3. Mr Nyemba used 400 litres of fuel in excess of his monthly allocation of 200 litres without authority from his superior.
4. Mr Nyemba allocated himself vehicle No.LL6630 a Mahindra vehicle from October 2009 to present over and above his conditions of service LLD465.
5. LL6630 did not generate revenue as expected as the vehicle ended up being used by the manager.
6. When the stolen coupon 0043270 surface, the Manager persuaded the fuel attendant, Mrs Mafura to resign.
7. The committee established that coupon No. 0043270, redeemed by Mr Nyemba was among the batch of stolen coupons with serial No. 0043251 to 0043288, part of which were withdrawn by coupons inscribed T.G

PENALTY

Mr Nyemba is found guilty as charged and dismissed with immediate effect.”

The fact that the hearing committee wrote their reasons on one page and in point form does not make them any the less reasons for their decision. It cannot be disputed that the decision of the hearing committee was in a different format from that associated with judicial officers. In our view this point on its own does not detract from the fact that reasons were given. One cannot expect an internal disciplinary body to handle hearings with the same degree of expertise as is expected of judicial officers conducting proceedings in a court of record. In any event it is trite that labour proceedings are conducted in an informal manner. What is important is that they relay in some form the basis of their decision.

It seems to me that the import of the requirement that any disciplinary body must give reasons, apart from those set out in the case referenced above, is also to demonstrate the factors that the body would have considered in arriving at the conclusion that the person whom they have tried was guilty of the offence(s) that he was charged.

The hearing committee's reasons were given after evidence had been led before it. When one has recourse to the evidence and the findings which were arrived at by the committee it is clear that they had considered the evidence that was placed before them. The committee's finding is *in tandem* with the evidence that had been adduced during the disciplinary hearing. The court *a quo* cannot be faulted for finding in its judgment that the committee had come to a correct decision. It should be noted that most of the evidence was not disputed by the appellant. He accepted that he had allocated the company vehicle to himself without authority from the head office. He also confirmed that the signature that was on the coupons alleged to have been stolen was his signature.

It was our considered view that there was overwhelming evidence against the appellant. Accordingly, the first ground of appeal lacks merit and the findings of the court in this respect cannot be faulted.

Turning to the second and third grounds of appeal, the appellant's contention was that there were three charges levelled against him, hence for the respondent to simply say he was guilty as charged made no sense and was not valid at law. In other words, the appellant seemed to suggest that he was unaware of which particular charge(s) had been proven against him. In response, Ms *Mukosi* for the respondent submitted that all the essential elements of the charges had been proved against the appellant. He further submitted that the verdict of the hearing committee was commensurate with the offences and valid at law. The respondent premised its submissions on the authority of *Lawsign Nyarumbu v Sandvik Mining & Construction Zimbabwe (Pvt) Ltd* SC – 31 – 13 at p 3 where it was stated;

“Nevertheless, there are certain basic principles that neither a court nor tribunal can depart from. One of those principles is that the offence that the accused is found guilty of must be commensurate with the offence that he has been charged with. In

other words, both offences must bear some legally cognisable affinity with one another.”

Applying the above legal principle to the facts in this matter, the following can be deduced. On the first charge of theft / fraud including attempted theft / fraud, the respondent managed to prove that the appellant was in possession of stolen coupons, which coupons had been used to refuel his vehicle and other containers. The fact that the appellant’s signature was on a coupon that had been used to refuel a motor vehicle twice, amounted to theft or fraud.

It was also not in dispute that witnesses had positively identified the appellant as the person who had been using *pseudo* names on various coupons to refuel the vehicles. The same coupons bore the signature of the appellant. We agreed with the respondent’s counsel that the only reasonable inference that could be drawn from the evidence adduced and the facts proven was that the appellant had committed theft or had defrauded the respondent.

It is therefore difficult to fathom how it can be argued that the verdict arrived at by the respondent was meaningless.

With regards to the charge of unauthorised use of the respondent’s motor vehicle, the appellant admitted that he had allocated to himself the use of the motor without the requisite authority. On this point alone we could not fault the court *a quo* when it found *that* the appellant never controverted this charge in any way because he admitted to having flouted company procedures which ought to have been followed when seeking allocation of company motor vehicles. The charge of gross disregard of standing procedures resulting in actual prejudice or potential financial prejudice was clearly proved from the above

admissions by the appellant. Thus, the verdict of guilty as charged was correct and neither this court nor the court *a quo* can fault the findings of hearing committee.

In the premises, we found that grounds two and three of the appeal also lacked merit.

It was also our view that the fourth ground of appeal lacked merit. The appellant sought to convince the court that the hearing committee never afforded him an opportunity to make submissions in mitigation before the penalty of dismissal was imposed. A mere reading of the record shows that this was patently false. The court *a quo* on p 6 of its judgment had this to say:

“After the hearing the Appellant was asked if he had submissions to make and he failed to state any mitigatory facts he may have wished to advance. It is not true therefore that he was not given an opportunity to mitigate.”

At the conclusion of the hearing the appellant was asked whether the board had given him a fair hearing or if he had anything further to say. He gave the following response:

“Yes. But I just want to register my displeasure with the presence of Mr Manjengwa with him being the custodian of the fuel. All managers were not willing to assist me”.

It is clear from the above response that the appellant chose not to state any mitigating factors; therefore, he cannot be heard to say that the respondent failed to afford him an opportunity to make submissions in mitigation.

It was for these reasons that we found that the appeal was devoid of merit and accordingly dismissed it with costs.

GWAUNZA JA: I agree

GOWORA JA: I agree

Nyikadzino, Simango & Associates, appellants' legal practitioners

Gula – Ndebele & Partners, respondent's legal practitioners