REPORTABLE (56)

PIONEER TRANSPORT
v
DOUGLAS MAFIKENI

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & BHUNU JA
HARARE, JANUARY 26, 2016 & OCTOBER 19, 2018

R. Matsikidze, for the appellant

The respondent in person

MAVANGIRA JA: This is an appeal against a judgment of the Labour Court wherein the decision to dismiss the appellant from employment that had been made by the appellant's Managing Director was set aside whilst an earlier decision by the disciplinary committee that the respondent be issued with a second written warning was confirmed.

The facts of the matter may be summarized as follows: The respondent was employed as a creditor's clerk by the appellant. He was charged with a number of acts of misconduct. He denied all the charges. A hearing was conducted by the disciplinary committee. On 30 January 2014, the Human Resources Manager communicated the disciplinary committee's decision to the respondent in the following terms:

"RE: DETERMINATION ON HEARING

Reference is hereby made to the internal disciplinary hearing finalized on the 29th of January, 2014 in respect (of) cases in terms of SI 67 of 2012 Annexure 2 Action Code:

1. Offence number 2; 2.2 – Gross incompetence or inefficiency in performance of work
2. Offence number 2; 2.3.1- Gross negligence
3. Offence number 3; 3.7 – Insubordination
4. Offence number 3; 3.14 wilful disobedience of a lawful order given by the employer

After deliberations the hearing committee passed the following verdict:

- Presentation of case was not properly done
- You need to change your attitude towards your job and to put more effort in your job.

You shall report for duty to your normal duties with effective (sic) 1st February, 2014
In light of the above the hearing committee then agreed that you be given a 2nd written warning which will last for the period of 3 months.
If you are aggrieved with this decision you have the right to appeal in terms of SI 67 of 2012 appeal procedure."

The complainant in the disciplinary hearing appealed to the Managing Director against the Disciplinary Committee's decision. There was no appeal by the respondent.

On 10 February 2014, the Managing Director wrote to the complainant in the following terms:

"**Attention: - COMPLAINANT**
PIONEER TRANSPORT
…….
Re: APPEAL AGAINST DECISION IN DOUGLAS MAFIKENI HEARING

I refer to your letter addressed to me dated the 3rd of February appealing against the decision of the Disciplinary committee in the Hearing of Douglas Mafikeni passed on the 29th of January 2014.

I have read through the minutes of the Hearing and looked at the deliberations made, and have come to the conclusion that the Disciplinary Committee made an error in coming up with the determination.

It is very clear that Douglas Mafikeni (sic) failed to meet set deadlines and submitted creditor's listing (sic) that was grossly incorrect showing a very high level of incompetence. Despite him having been given a written warning three months earlier he still failed to improve performance in executing his duties.

Matters of discipline are determined on a balance of probability and as such all these factors of failure to meet deadlines, production of incorrect creditor's listing even after having been given an extension. (sic)

THEREFORE, in light of the above I hereby overturn the determination by the Disciplinary Committee, and the respondent is found guilty of the charges and the penalty is dismissal. The respondent (sic) should be dismissed effective 12 February." (emphasis added)

On 12 February 2014, a letter was written by the Human Resources Manager to the respondent. It reads:

"This letter serves to inform you that following a disciplinary committee hearing that was concluded on 29 January 2014, where the disciplinary committee made a decision to give you a second warning an appeal was made by the complainant against that decision in terms of Part E section E1.1 of the S.I. 67 of 2012. (sic)
A decision was made by the office made from the office (sic) of the Managing Director as defined in Part A4 (definitions) of the Sixth Schedule overturning the decision of the disciplinary committee.

The decision to overturn the disciplinary committee ruling was based on the fact that you failed to meet set deadlines, you also presented a creditors listing that was grossly incorrect showing a very high level of incompetence. It is against this background that you were found guilty in terms of S.I. 67 of 2012 Annexure 2 sections 2.2, for gross incompetence, section 2.3.1, section 3.7 and section 3.14.

You are therefore being dismissed from Pioneer Transport with effect from 12 February 2014 and you are further advised that you have the right to appeal to the Labour Court against this decision in terms of Part E section E.3 of the Sixth Schedule within 21 working days."

Aggrieved by the decision to dismiss him, the respondent appealed to the court *a quo,* arguing, *inter alia,* that the Managing Director had erred in considering an earlier written warning which had, in any event, expired. The appellant's contention on the other hand, was that the earlier written warning was relevant and was therefore properly taken into consideration.

The court *a quo* approached the matter as one in which it needed to examine whether the appellant, as the employer, had exercised its discretion judiciously in light of s 12B (4) of the Labour Act, on the basis that it could only interfere with such discretion if it was not so exercised.

The court *a quo* found that the earlier written warning had expired and that therefore, the Managing Director had misdirected himself in giving any consideration to it. On that basis the court then interfered with the appellant's decision and set aside the dismissal imposed by the appellant's Managing Director but confirmed the disciplinary committee's decision that a written warning be issued.

It may be noted at this juncture that the respondent averred that the first written warning is non-existent as the appellant failed to produce a copy of it in the disciplinary hearing and to the court *a quo*. The appellant has not shed any light on this issue.

The appellant has now appealed to this Court against the court *a quo's* decision on the following grounds:

"1. The Court *a quo* grossly erred at law in interfering with the penalty of dismissal for a misconduct that goes to the root of the contract.

2. The Court *a quo* erred at law in making a finding that an expired warning cannot be treated as a record of employment service when imposing penalty contrary to the provisions of section 12B(4) of the Labour Act [28:01] which makes it mandatory to consider such.
3. The Court *a quo* misdirected itself factually, which misdirection amounts to a point of law, in that it made a finding that the decision of the Appeals Officer to impose a penalty of dismissal was solely hinged on the issue of a previous warning which was not the case as the Appeals Officer also considered other factors like the gravity of the offence, *inter alia*.

5. The Court *a quo* grossly misdirected itself on the facts, which misdirection amounts to a question of law, in failing to make a finding that at the time of the commencement of the disciplinary hearing, the first warning against the respondent was valid at law and it ought to have been considered in deciding a penalty."

The appellant's prayer (as amended) is for an order that the appeal is allowed and that the decision of the court *a quo* be set aside and substituted with the following:

"That the appeal be and is hereby dismissed with costs."

The last paragraph of the letter dated 30 January 2014 to the respondent informing him of the decision of the disciplinary committee pointed him to SI 67/12 with regard to his right to appeal should he be aggrieved. He did not appeal. As already pointed out earlier, an appeal was noted by the appellant's representative who was the complainant in the Disciplinary Committee hearing.

SI 67/12 is the "Collective Bargaining agreement: Transport Operating Industry." It incorporates in the Sixth Schedule thereof the Code of Conduct applicable to the entire transport operating industry. Part E in terms of which the complainant appealed to the Managing Director provides as follows:

"E. APPEALS AND REVIEW OF MATTERS
A party which may be aggrieved by the decision of the Disciplinary Committee as per D.1 above, may within 5 days-
E.1 Appeal to the Chief Executive.
E.1.1 Appeals to the Chief Executive where the issue involves dismissal or any form of termination of employment shall be in writing, and shall state the grounds of appeal."

By stating that "A party, which may be aggrieved … may appeal", the section gives the right to appeal against the decision of the Disciplinary Committee to any party, including an employer, who may be aggrieved by the Committee's decision. Thus, whilst it is generally undesirable for an employer to appeal against decisions that are usually viewed as decisions of its own internal disciplinary bodies, in *casu*, the applicable law, that is to say, the Statutory instrument, allow in clear terms, for an appeal against the decision of the Disciplinary Committee by a "party which may be aggrieved." Accordingly, the employer being an aggrieved party, acted within its statutory rights in appealing against the decision of the Disciplinary Committee.

The respondent's averments that he was not served with a copy of the said appeal and that he was not invited to make any submissions in relation thereto were not challenged. In addition, note is also taken that the letter that triggered the complainant's appeal to the Managing Director is not part of the record. The appellant's legal practitioner was unable to shed any light regarding the non-availability of the letter on the record.

A fundamental rule of natural justice was broken when the Managing Director made the decision that he did without hearing the respondent. As the respondent was not served with a copy of the appeal letter, only the appellant and its Managing Director are privy to the details of

the appeal. The proceedings before the Managing director fell afoul of the axiomatic requirement of the rules of fair play in the delivery of justice. A decision that affects the respondent was made without him being heard by the maker of the decision.

In *Jerry Musarira v Anglo American Corporation* SC 53/05 the following was said at p 4 of the cyclostyled judgment:

> "I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that the misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned – (a) must be given adequate notice; (b) must be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes. See *Dabner v SA Railways and Harbours* 1920 AD 588 at 598."

In *casu*, the respondent was not heard in the appeal before the Managing Director. By reason thereof, the said appeal proceedings must be set aside. So axiomatic is the *audi alteram partem* rule, that it would be unconscionable for this or any Court to uphold proceedings wherein the rule was not complied with. The proceedings before the Managing Director are a nullity. The Labour Court did set aside the Managing Director's decision but for different reasons. It decided the matter on the merits and in doing so it erred.

The proceedings before the Managing Director having been a nullity, the appropriate course would have been for the court *a quo* to remit the matter to the Managing Director for a hearing that accords with the rules of natural justice. In the circumstances, the decision of the Managing Director ought to be set aside. It would however, be undesirable to have the matter remitted to him for a rehearing. This is so because the fact that the Managing Director

was prepared to and did determine the matter without hearing the respondent might justifiably create an impression of partiality on his part. Justice must be seen to be done. For these reasons, in the interests of justice, instead of having the court *a quo* remitting the matter to the Managing Director, this Court will order that the Labour Court rehear the appeal instead and ensure that the rules of natural justice are complied with.

Section 89 (2) (i) of the Labour Act empowers and enables the Labour Court to conduct such a hearing. Labour matters ought not be dealt with and finalized on technicalities. The rehearing of the matter by the Labour Court will ensure that this does not happen. This is so because if such a rehearing is not ordered, especially after the nullification of the proceedings before the Managing Director, then the merits of the matter would remain eternally undetermined, to the prejudice of one party or the other.

Section 89 (2) reads:

"(2) In the exercise of its functions, the Labour Court may -

(a) In the case of an appeal –
  (i) Conduct a hearing into the matter or decide it on the record; or
  (ii) Confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order; or
  (iii) … (repealed) or
  (iv) … (repealed)."

In *Dalny Mine v Banda* 1999 (1) ZLR 220 **McNally JA** stated at 221B – C:

"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. This can be done in one of two ways:

(a) By remitting the matter for hearing *de novo* and in a procedurally correct manner;
(b) By the Tribunal hearing the evidence *de novo*.

He continued at 222B:

"The point I am making is that when the Tribunal decides, as it did in this case, to exercise its powers under s97 (4) (a) of the Act, and to "proceed with the appeal by way of a hearing", then it is starting afresh, as it were, on a clean page. The errors of the past are no longer relevant."

He continued further at 222D:

"It does not seem to me, with respect, to be a compliance with s 4(1)[1] if the Tribunal, for technical reasons, compels an employer to reinstate (or pay damages to) a person who has been clearly shown to have committed a dismissible offence."

The applicable statute in the *Dalny Mine* case (*supra*) was the Labour Relations Act. Section 97 (4) (a) of that Act is similar to s 89 (2) (a) of the Labour Act which is the applicable statute in *casu*. Section 97 (4) (a) of the Labour Relations Act [*Chapter 28:01*], Act No. 16 of 1985 as amended by Act No. 20 of 1994 reads:

"Upon receiving notice of an appeal, the Tribunal may –
(a) proceed with the appeal by way of a hearing; or
(b) decide the appeal on the record; or
(c) remit the matter to the senior labour relations officer concerned for further investigation, and, upon the conclusion of such investigation, proceed with the appeal by way of a hearing or decide the appeal on the record."

[1] The section 4(1) referred to provides: "Subject to these regulations, the Tribunal shall conduct any hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings."

The similarity in the wording of the relevant portions of the two ss (89(2) and 97(4)(a)) of the current and repealed statutes respectively, justifies the applicability of the reasoning as cited above from the *Dalny Mine* case to the instant case.

In the result, the appeal succeeds for reasons different to those raised in the grounds of appeal and consequently, with a result different to that in the appellant's prayer.

Accordingly, the following order is made:

"1. The appeal is allowed.
2. The judgment of the Labour Court be and is hereby set aside.
3. The matter is remitted to the Labour Court for a rehearing of the appeal before a different judge of that court.
4. Each party shall bear its own costs."

GARWE JA: I agree

BHUNU JA: I agree

Matsikidze & Mucheche, appellant's legal practitioner

Transport & General Workers Union, for the respondent