

**REPORTABLE** (42)

HURUNGWE RURAL DISTRICT COUNCIL  
v  
(1) JORAM MISHECK MOYO (2) KAROL MUTENGA  
(3) JACKSON MASHINGE

SUPREME COURT OF ZIMBABWE  
GUVAVA JA CHIWESHE JA & CHITAKUNYE JA  
HARARE: MAY 10, 2022

*B. Magogo*, for the appellant

*G. Madzoka*, for the respondents

**CHITAKUNYE JA:** This is an appeal against the whole judgment of the Labour Court (the court *a quo*) handed down on 28 February 2020 setting aside the appellant's decision to dismiss the respondents from its employment after a disciplinary hearing and ordering a fresh hearing. At the end of the hearing the court allowed the appeal and indicated that reasons will be provided in due course. These are they.

### **THE FACTS**

The respondents were employed by the appellant in various senior managerial capacities. The first respondent was the Chief Executive Officer (CEO) of the appellant, the second respondent was the Administration and Human Resources Manager and the third respondent was the Treasurer and Chairperson of the Procurement Committee.

Sometime in 2018, the respondents were arrested on allegations of abuse of office as defined in s 174 of the Criminal Law (Codification and Reform) Act, [*Chapter 23:09*].

The appellant duly placed them on suspension pending the finalisation of the criminal charges. The respondents were subsequently acquitted by the criminal court and the suspensions imposed as a consequence of the criminal charges were uplifted. Contemporaneously, the Ministry of Local Government, Public Works and National Housing investigated the allegations and produced a damning report validating the allegations against the respondents. The report recommended that disciplinary action be taken against the respondents.

The appellant found itself in a quandary as to the use of its internal code of conduct in disciplining the respondents. The three respondents, as senior managers, constituted the Disciplinary Authority in terms of the Hurungwe Rural District Council Code of Conduct (the internal code) and thus could not sit in their own disciplinary hearing. The National Employment Council for the Rural District Council's Code of Conduct, Statutory Instrument 87/17 (the NEC code) was operational but did not cover the respondents' grades.

In terms of s 101(1b) of the Labour Act [*Chapter 28:01*] (the Act), the appellant's internal code needed to be submitted to the National Employment Council (NEC) for approval for validity. This was not done and so, in terms of the aforesaid subsection, the internal code was superseded by the NEC code.

In the face of this dilemma, the appellant resorted to the use of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15/2006 (the Model Code)

to conduct disciplinary hearings against the respondents. The respondents were subsequently suspended on 24 July 2019, and charged with acts of misconduct. The charges emanated from breaches of procurement regulations in acquiring vehicles for the appellant in which all the respondents had been involved. A Disciplinary Authority was set up in terms of the model code. The Disciplinary Authority found each one of them guilty and recommended that they be dismissed from employment. They duly received their letters of dismissal in August 2019.

Aggrieved by the dismissal, the respondents approached the court *a quo* with an application for a review of the Disciplinary Authority's decision. The grounds of review included that the Disciplinary Authority had no jurisdiction to deal with the matter; that they were charged under the wrong code, the Model Code, as they ought to have been charged in terms of the internal code, notwithstanding the conundrum posed by the application of that code as stated above.

The appellant opposed the application contending that in the face of the quandary it found itself in, including that the respondents were the ones expected to sit in disciplinary proceedings representing the employer and thus could not preside over their case, and that lower-level employees could not preside over a matter involving their superiors, the use of the model code was justified in the circumstances.

The court *a quo* found in favour of the respondents. It held that the appellant should not have resorted to the model code but its internal code as the internal code had been used in previous disciplinary hearings. It found that their suspension was premised on criminal proceedings at Chinhoyi Magistrates Court of which they had been acquitted, that the charges did not come from the applicant's Code of Conduct and the Disciplinary Authority was not

appointed in terms of the internal Code of Conduct. As a result, it was not clothed with legality to try the respondents.

Aggrieved by the court *a quo*'s decision, the appellant appealed to this Court on the following grounds.

### **GROUND OF APPEAL**

1. The court *a quo* erred and misdirected itself on a point of law in finding that the appellant's Disciplinary Authority ought to have used the appellant's internal employment code of conduct as opposed to the model employment code of conduct in disciplining the respondents when it was clear that the internal employment code of conduct was inapplicable in the circumstances.
2. The court *a quo* further erred and misdirected itself in finding that the appellant's Disciplinary Authority lacked the requisite jurisdiction to preside over the disciplinary proceedings against the respondents.

### **BEFORE THIS COURT**

Counsel for the appellant, Mr *Magogo*, submitted that the circumstances obtaining were such that the use of the model code by the appellant was proper as both the internal code and the NEC code were inapplicable and thus unavailable in the case of misconduct by senior managers in the mould of the respondents. He further submitted that as the internal code had not been referred to the National Employment Council for approval, by virtue of s 101(1b) of the Act, it was superseded by the NEC Code.

He also argued that the NEC code did not apply to the respondents as it did not cover employees above grade 9. The respondents were in grades 10 and 11. He further

submitted that the respondent's contention that the internal code could still have been applied as the NEC code did not apply to the respondents' grades was in the same vein misplaced. He also submitted that the internal code would still be inapplicable as the respondents were supposed to sit in the Disciplinary Committee representing the appellant and they could not be expected to sit in their own disciplinary hearing. In any case, the first respondent as the CEO was the appellate disciplinary authority and he could not be expected to have his disciplinary hearing presided over by his juniors. Counsel further argued that the internal code did not make provisions for disciplinary hearings against the CEO. In the circumstances, he maintained that the internal code was inapplicable.

Mr *Madzoka*, for the respondents, on the other hand, submitted that the court *a quo* was correct in holding that the appellant erred in using the model code as it ought to have proceeded in terms of its internal code. He admitted that the NEC code was inapplicable as it only catered for grades lower than those of the respondents.

Whilst agreeing that the internal code was superseded by SI 87/17, Mr *Madzoka* contended that that should only be in relation to grades covered by the NEC code. For grades not covered by the NEC code but covered by the internal code, he submitted that the internal code should have been applied. As far as he was concerned the internal code remained available in respect of grades above grade 9. Counsel was, however, unable to explain how the internal code, whose application he was so passionate about, would apply to senior managers who in terms of that code were supposed to sit in the disciplinary hearings as representatives of the appellant. He was unable to state how the invidious position where junior employees would have to sit in disciplinary hearings against their seniors would be avoided if the internal code was used. Equally, he was unable to explain or point out any provision in the

internal code relating to disciplinary provisions against the first respondent in his capacity as the CEO of the appellant.

### **ISSUE FOR DETERMINATION**

I am of the view that only one issue commends itself for determination: Whether or not the court *a quo* erred and misdirected itself in finding that the appellant erred in proceeding in terms of the model code and that it should have proceeded in terms of the internal code.

### **APPLICATION OF THE LAW TO THE FACTS**

It is appropriate to start by considering the legal provisions on the application of codes of conduct.

Section 101(1) of the Act provides that:

“101 Employment codes of conduct

- (1) An employment council or, subject to subsections (1a), (1b) and (1c), a works council may apply in the manner prescribed to the Registrar to register an employment code of conduct that shall be binding in respect of the industry, undertaking or workplace to which it relates.
- (1a) Where an employment council has registered a code governing employers and employees represented by it, no works council may apply for the registration of a code in respect of any industry, undertaking, or workplace represented by the employment council unless it first refers the code to the employment council for its approval.
- (1b) Where a code is registered by a works council in respect of any industry, undertaking, or workplace represented by an employment council and the employment council subsequently registers its own code, **the code registered by the employment council shall supersede that of the works council unless the works council refers it to the employment council for approval.**”  
(My emphasis)

The clear import of the above provision is that a works council code of conduct only becomes binding upon approval of the same by the Employment Council where the employment council for the industry concerned has registered a code of conduct. On the basis

of this provision, it is apparent that where a works council does not refer its code of conduct to the employment council for approval, the code of conduct registered by the employment council supersedes the works council's code of conduct. The term supersede may be defined as 'to take the place of; to replace; to supplant' (Webster's Dictionary & Thesaurus)

*In casu*, though the internal code was registered with the relevant Ministry in 1998, upon the promulgation and coming into effect of the NEC code in 2017, by virtue of s 101(1)(1b) above, the internal code ought to have been referred to the NEC for approval. This was not done hence the contention that the internal code was supplanted by the NEC code.

It is trite that where a statute directs a certain action or step to be taken in order to give validity to certain procedures, failure by a party to follow those directions nullifies the respective procedures. Where, as *in casu*, a statute requires approval of the internal code, seeking that approval is not discretionary but mandatory. A failure to seek such approval nullifies such internal code despite the numerous times the unapproved code may have been erroneously used. It is axiomatic that the validity of an internal code is not conferred by the number of times it has been used but by its approval by the employment council (NEC) of the industry concerned. Thus, in circumstances where the internal code would not have been submitted for approval, it cannot be disputed that there is an absence of a duly registered and applicable internal code of conduct.

*In casu*, the appellant's internal code of conduct being unapproved, could not be validly relied upon. The fact that it may have been used in other disciplinary hearings would not validate it at all. The obvious and inescapable implication of the law is that, unless the

works council refers its internal code for approval, the internal code remains superseded by the NEC code.

Another hurdle to the use of the internal code was that the code was silent on provisions relating to how disciplinary hearings against the respondents, as senior managers, were to be conducted. The respondents were the ones supposed to sit in disciplinary committees representing the appellant. In terms of s 10(1) of the internal code, on the composition of the Disciplinary Committee, the second respondent as the Administrative and Human Resources Manager was designated as the permanent member of the Disciplinary Committee and was also the Chairperson of that committee. The first respondent, as the CEO, was the appellate authority and could not be expected to have his disciplinary hearing presided over by employees below his grade and even below that of the second and third respondents. Those below them could not be expected to replace them in those disciplinary hearings. This would certainly be an invidious position whereby a junior officer sits to discipline a senior officer. The scenario made the internal code further unavailable and justified the use of the model code and the setting up of a Disciplinary Authority in terms of the model code. See *Samuriwo v ZUPCO* 2000 (1) ZLR 647(S).

There was clearly an absence of a registered and applicable code to deal with the respondents' disciplinary hearings.

Where there is an absence of such a code, s 12B (2) of the Act provides that:

“12B Dismissal

- (1) Every employee has the right not to be unfairly dismissed.
- (2) An employee is unfairly dismissed—
  - (a) If, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or



**(b) In the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)."**

In terms of subs (2)(b) above, the employer is required to revert to the model code where there is the absence of a registered code applicable in the circumstances. The provisions of s 12B of the Act appositely apply because there was an absence of a registered code that could be applied to the respondents' case.

The contention by the respondents that the applicant had an internal code and ought to have used the same even though the code was inapplicable to the respondents does not only defy logic but also goes against the spirit of the Act which is to advance social justice in the workplace.

Section 12 B(2)(b) makes it mandatory to resort to the model code where there is absence of an applicable code of conduct. It is not enough that there is a code in existence when such a code does not cover the circumstances of a case. The mere existence of a code of conduct, even a registered code, is not sufficient to oust resort to the Model Code. There must be in existence a registered code of conduct applicable to the case in question and, where there is a registered code that is inapplicable to the circumstances of the case, there is an absence of an employment code for the purposes of s 12 B(2) of the Act.

In *City of Gweru v Masinire* 2018 (2) ZLR 461(S) at 464A-C BHUNU JA had this to say on the interpretation to be given to the term "in the absence of":

"C H Mucheche - *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe* 2<sup>nd</sup> ed (African Dominion Publications, Harare,) opines that resort to Model Code S.I 15 of 2006 is permissible if there is no applicable domestic code of conduct. Quoting Professor Madhuku the learned author states as follows:  
"According to Professor *Lovemore Madhuku* both section 12B (2) of the Labour Act and section 5 (b) of SI 15 of 2006 compel the use of SI 15 of 2006 in the absence of a

registered code of conduct. The expression, ‘in the absence of’ must be interpreted purposefully. The mere existence of a registered code of conduct is not sufficient to oust resort to SI 15 of 2006. There must be a registered code of conduct applicable to the case in question. Where there is a registered code of conduct which is inapplicable to the circumstances of the case, there is, ‘the absence of an employment code’ for purposes of section 12B of the Labour Act and section 5 (b) of SI 15 of 2006... One cannot apply a metal straight jacket and conclude that in every situation where an employment code of conduct exists, it automatically follows that such a code of conduct should solely be used to the exclusion of the National code of conduct”.

Further at p 465F-G the learned Judge aptly opined that:

“Considering that it is undesirable for parties to a dispute to be left without an appropriate mechanism of resolving their labour disputes, like Professor *Madhuku* and *CH Mucheche*, I consider that s 12B (2) (b) should be given a broad purposeful interpretation to include circumstances where an existing internal code of conduct or dispute resolution mechanism cannot for justifiable reasons apply to a particular case. It therefore appears to me that the legislator intended the model code of conduct to be a fall-back labour dispute resolution mechanism where it is impossible or inappropriate for good reason to apply any other dispute resolution mode. To that extent it is a universal disciplinary code of conduct fitting all circumstances according to the exigencies of each case within the confines of the Labour Act.”

*In casu*, it was established that not only was the internal code superseded by the NEC code, but also that there was no provision in it for disciplinary proceedings against senior managers who were instead supposed to sit in disciplinary hearings. The NEC code applied to grades lower than the respondents’ grades. Both the internal code and the NEC code being inapplicable, s 12B (2)(b) of the Act therefore appositely apply because there was an absence of a registered code that could be applied to the respondents’ case.

As noted above s 12 B (2)(b) makes it mandatory to resort to the model code where there is such an absence of an applicable code of conduct.

The appellant cannot therefore be faulted for resorting to the model code under the circumstances.

The court *a quo* also misdirected itself by placing precedential value on the fact that the appellant had used the internal code of conduct several times in previous disciplinary proceedings in holding it as available. The fact that the unapproved code had been used many times before does not clothe it with the requisite validity with which it ought to be clothed when approved in terms of s 101 (1) of the Act. Precedential use does not change the fact that the code is unapproved and, therefore, not binding on the employees whose conditions of service are contained therein. In any case, such use had been on lower-level employees and not on employees in the grades of the respondents.

The court *a quo* therefore erred and misdirected itself in concluding that the internal code ought to have been used.

### **DISPOSITION**

It was upon the above considerations that the court concluded that there was an absence of a registered and applicable code of conduct available under which the respondents could have been dealt with other than a resort to the model code. The appellant was clearly justified in resorting to the model code. Resultantly the court issued the following order:-

1. The appeal be and is hereby allowed with costs.
2. The decision of the court *a quo* in LC/H/56/20 be and is hereby set aside and substituted with the following:

“The application for review be and is hereby dismissed with costs.”

**GUVAVA JA** : I agree

**CHIWESHE JA** : I agree

*Mawire J.T. & Associates*, legal practitioners for the appellant

*J. Mambara & Partners*, legal practitioners for the respondents