REPORTABLE (45)

JUDICIAL SERVICE COMMISSSION
v
(1) IGNATIO KUDAKWASHE MHENE (2) NDUMO MASUKU (3) ATTORNEY GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & MAKONI JA
HARARE, 12 JUNE 2020, & 13 MAY, 2021

T. Mpofu, for the appellant
M. Mbuyisa, for the first and second respondents
No appearance for the third respondent

GUVAVA JA:

INTRODUCTION

[1] This is an appeal against part of the judgment of the Labour Court sitting at Harare dated 8 February 2019. The court *a quo* upheld the first and second respondent's ('the respondents') appeal and dismissed allegations of misconduct made by the appellant against them. The court *a quo* further set aside the penalty of a reprimand and ordered that the respondents should be paid their full salary and benefits from the date when they were suspended from employment.

BACKGROUND

[2] The respondents were employed by the appellant as Magistrates stationed at Marondera and Lupane respectively. Both respondents were charged by the appellant with

misconduct in terms of s 47 (2) (b) of the Judicial Service Regulations, 2015 (hereinafter referred to as 'the Regulations') as read with paragraphs 4 and 7 of the Third Schedule to the Regulations.

It was alleged that the respondents contravened the following paragraphs in the Third Schedule:

" 4. Failure to obey lawful instructions, including circulars, instructions or standing orders issued by the Commission, the Treasury or the Secretary or delegated authority.

7. Unbecoming or indecorous behaviour at any time or place in any manner or circumstances likely to bring the Commission or any part thereof into disrespect or disrepute."

[3] The facts that gave rise to the above charges were that it was alleged that on 3rd of September 2017 the first respondent as the Chairperson of the Magistrates Association of Zimbabwe (hereinafter referred to as 'MAZ') and the second respondent as the Secretary General of MAZ caused the publication of a statement in the Sunday Mail Newspaper without the requisite authority to do so by the appellant's Secretary as dictated by the Judicial Service Commission policy for employees to refrain from talking to the press. The circulars barring communication with the press are contained in circular number 2 of 2012 and number 5 of 2013, both issued by the Chief Magistrate on the instructions of the Secretary of the appellant.

[4] Following the publication in the Sunday Mail, the Secretary of the appellant issued the respondents with letters containing the charge and suspension notices on 12 October 2017. A disciplinary hearing was held on 12 December, 2017. At the disciplinary hearing, the respondents made an application for the recusal of the disciplinary committee on the basis that the members of the committee had been privy to discussions concerning the matter in management meetings. The application was dismissed on the basis that the evidence placed before the committee did not establish that they were biased.

[5] Thereafter, the appellant led evidence from Mr Guvamombe (the Chief Magistrate) and Mr Mutendamambo (the Acting Deputy Human Resources Manager) in respect to the facts upon which the charges had arisen.

[6] The respondents led evidence on their own behalf to the effect that when they caused the publication of the press statement they were acting in their capacities as executive members of MAZ and that the publication had been made on the instructions of members of MAZ in response to the sentiments and views stated by Messrs Manase and Hogwe (in a newspaper article) which implied that Magistrates were corrupt.

[7] The disciplinary committee found that while it could be argued that MAZ was a legal persona, personnel within MAZ were still subject to the dictates of their profession from which the association was born. The committee further held that in terms of s 13 of the Judicial Service Act [*Chapter: 7.18*] ('the Act') the appellant allowed the establishment of recognized associations and organizations. The committee however held that the associations and organizations could not be allowed to publish articles as was done by MAZ as this would result in the appellant losing control over its staff. As such the committee found that regardless of the 'hat' the respondents were wearing when they published the press statement the act of publishing remained unlawful.

[8] The disciplinary committee found that the respondents could not have spoken about the appellant's policy on corruption without being mandated to do so. The committee further found that the appellant had a discretion to punish the respondents only and leave other MAZ members. The disciplinary committee took note of the fact that the respondents had been given an opportunity by the Disciplinary Authority being the appellant's

Secretary, to retract their statements and apologize but had refused to do so. In the result the committee found the respondents guilty of the charges against them.

[9] On 12 February 2018 the respondents were served with letters informing them that they had been found guilty of misconduct and in terms of s 53 (1) (L) of the Regulations the following was stated:

> "… you be REPRIMANDED and that if you are involved in similar acts of misconduct in the future sterner disciplinary measures will be instituted against you. Please also be advised that, the period you were on suspension that is from the 16th of February 2017 to the 15th of January 2018 will be treated as leave without pay."

[10] Aggrieved by the verdict of guilt, the respondents filed an appeal against the determination of the appellant and also filed an application for review of the disciplinary proceedings against them. An application for the matters to be heard at the same time was granted by consent. The court *a quo* dismissed the review application. With regards to the appeal, the court dismissed the respondents' first -fourth, eighth, ninth, eleventh and twelfth grounds of appeal.

[11] With regards to the fifth ground of appeal which questioned whether or not the Disciplinary Authority and Disciplinary Committee erred and misdirected themselves when they attributed the statement issued by MAZ to the respondents in their individual and personal capacities, the court found that from the evidence filed of record, the appellant tacitly recognized MAZ as there had been meetings between the appellant's representatives and members of MAZ in the past. As such the court found that the conduct of MAZ in publishing the press statement (and not the respondents personally) was the one in issue. The court upheld the ground of appeal.

[12] The court also upheld the sixth ground of appeal which was to the effect that the Disciplinary Authority and Disciplinary Committee erred in finding that MAZ required permission to issue the press statement. The court held that as MAZ was a legal persona which never received the circulars restricting communication with the press it could not be bound by the circulars. The court upheld the sixth ground of appeal.

[13] The court also found merit in the seventh ground of appeal which was closely related to the sixth ground of appeal. The court further found merit in ground of appeal 9 and 13. The court found that the appellant had a discretion to issue any penalty against the respondents. However as the respondents had been wrongly charged in their personal capacities that penalty could not stand.

[14] In the result the court made the following order:

"1. The application for review be and is hereby dismissed.
2. The appeal partially succeeds.
3. The allegations of misconduct against the appellants be and is hereby dismissed.
4. The Appellants are entitled to their full salary and benefits from the date of suspension.
5. Each party bears its own costs."

It is against the third to fifth paragraphs of the operative part of the judgment that the appellant appeals before this Court on the following grounds:

1. "The court *a quo* erred at law in making a finding that the Respondent could do acts that were contrary to their express and implied terms and conditions of employment provided that the acts were perpetrated through an artificial person.
2. Put differently the court *a quo* erred at law in making a finding that the Respondent could not be charged for acts perpetrated through a legal persona if the acts were contrary to the express and implied terms and conditions of employment.
3. The court *a quo* erred at law in making a finding that the Respondents could act through a legal persona violating their express terms and conditions of employment.
4. The court *a quo* erred at law in making a distinction on the case of **Chidembo v Bindura Nickel Corporation 2015 (2) ZLR 25 95**) (*sic*) with the current case,

when clearly the principle embodied in the Chidembo case is applicable in the current case."

SUBMISSIONS ON APPEAL

[15] Counsel for the appellant, Mr. *Mpofu* abandoned the first, second and third grounds of appeal and motivated the appeal on the basis of the fourth ground of appeal alone. It was counsel's submission that the respondents could not hide behind MAZ in publishing the article which had not been sanctioned by the appellant as the employer. Counsel further argued that the respondents were employees of the appellant first and had a duty to their employer before carrying any title on behalf of the association and as such could not do anything which had not been mandated by the appellant.

[16] It was also argued by counsel for the appellant that by circular number 2 of 2012 and number 5 of 2013 issued by the Chief Magistrate at the instruction of the Secretary of the appellant, the respondents were made aware of the position of the appellant on issues to do with communication with the press. As such, the respondents could not have issued the press statement as they had not sought authority from the appellant to do so. With that, counsel argued that the court *a quo* erred in finding that the respondents could issue the press statement under the cover of MAZ.

[17] *Per contra* counsel for the respondent, Mr *Mbuyisa*, argued that the court *a quo* did not misdirect itself when it found that the respondents were acting under the cover of MAZ when they issued the press statement. Counsel further argued that the notion that the respondents had to first seek clearance from the appellant before issuing the statement, could only be true if the association and the appellant had dealt in that manner before.

It was counsel's argument that there was a long standing relationship between the appellant and the association as the appellant recognized the objectives of the association.

[18] In my view only one issue arises for determination. This is whether or not the respondents could be found guilty of misconduct.

APPLICATION OF THE LAW TO THE FACTS

[19] The court *a quo* in partially upholding the respondents' appeal found that as the respondents were acting on behalf of MAZ, a legal persona, they could not be found guilty of misconduct perpetrated in the name of MAZ.

Section 13 of the Judicial Service Act provides the following:

"13 Recognised associations and organisations

(1) The Minister responsible for labour may, after consultation with the Commission, by written notice to the association or organisation concerned, *declare any association or organisation representing all or any members of the Judicial Service to be a recognised association or a recognised organisation, as the case may be, for the purposes of this Act.*

(2) The Minister responsible for labour may, after consultation with the Commission, at any time by written notice to the recognised association or organisation concerned, revoke any declaration made in terms of subsection (1).

(3) Any member of the Judicial Service who is eligible to do so may join a recognised association or organisation and, subject to this Act, participate in its lawful activities.

(4) A member of the Judicial Service who fails or refuses to join a recognised association or organisation shall not, on account of such failure, be debarred from or prejudiced in respect of any appointment, promotion or advancement within the Judicial Service."(my own emphasis)

In terms of the Judicial Service Act the appellant has authority to recognise any association or organisation formed on behalf of its employees.

[20] During the disciplinary hearing it was argued, for the appellant, that it did not recognise MAZ, had not issued MAZ with a recognition certificate and as such the respondents could not purport to act on behalf of an association which was not recognized. The court *a quo* found that there was tacit recognition of MAZ by the appellant as MAZ members had meetings and engagements with the appellant's representatives. It cannot be denied that the appellant had tacitly recognised the association. However, it seems to me that the inquiry goes beyond recognition of MAZ.

[21] The crisp issue to be resolved in my view is whether or not the respondents can be shielded under the hat of the association in doing acts which had not been authorised by the appellant.

[22] In the case of *Ex TRTC United Workers Front & others v Premier, Province of the Eastern Cape* [2009] JOL 23737 (ECB)[1] Van Zyl J made a distinction between corporate associations and unincorporated associations. The court held as follows:

> "A distinction must be drawn between on the one hand, corporate associations which are by virtue of legislation (statutory associations) or under the common law (universitas personarum) legal entities distinct from their members, and what are referred to as unincorporated associations, on the other. For present purposes it is only necessary to deal with a universitas and an unincorporated association. The distinction between these two entities has been explained as follows in Webb v Northern Rifles:
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> > 'An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. A universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.'
>
> A universitas is therefore a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members. …. Being a legal persona, a universitas may sue or be sued in its own name**.** It derives these

[1] See also Polokwane Taxi Association v Limpopo Permissions Board and others (490/2016) ZASCA 44

characteristics from the common law and it is not necessary for it to be created by or registered in terms of a statute. By contrast, … An unincorporated association is regarded as merely an aggregation or collection (a body) of natural persons. …. it refers to nothing more than a collection of individuals who… are bound to one another by contract and who act jointly in pursuit of a common purpose. It has no existence on its own. It consequently cannot own property and has no locus standi to sue or be sued in its own name. In legal proceedings by or against the association, every member must as a result be cited as a plaintiff or a defendant as the case may be."

[23] In *casu*, as the MAZ is registered and possesses a Constitution it can be defined as an incorporated association/*universitas*. As a general rule a *universitas* has legal capacity to sue and be sued in its name. In the present case, the appellant issued two circulars which distinctly informed all its employees that all communication with the press were not allowed without clearance of the Secretary of the appellant. The circulars thus served as part of all the appellant's staff (including the respondents) conditions of service. Adherence to these circulars formed part of the duty of service the respondents owed to the appellant.

[24] Despite the fact that the association had legal personality, the respondents could not do anything which was not part of their conditions of service under the cover of the association. The association can only operate through persons who are the respondents *in casu*. The circulars by the Chief Magistrate were binding upon the respondents and had to be followed by all of the appellant's staff members.

[25] The case of *Chidembo v Bindura Nickel Corporation* 2015 (2) ZLR 25 at 29D-G is instructive in this present case. In Chidembo (*supra*) it was held that:

"I find this reasoning to be flawed in two main respects. First and foremost, the appellant was an employee of the respondent, to whom at all times he bore the duty of trust and loyalty. His conduct in relation to the respondent was regulated and governed by the requisite Code of Conduct, in this case S.I. 379/1990. As correctly averred by the respondent, the appellant remained accountable to his employer

> irrespective of the position he assumed as the worker's committee chairman. Secondly, I am satisfied that an act of misconduct committed by a worker outside the workplace, and in his – also work related – capacity as a workers' committee member, is unlawful as long as it impacts directly on the employer's private interests and in addition, constitutes a violation of the employer's Code of Conduct. This Court has effectively ruled as much in cases where workers' committee members, purporting to advance or protect workers' rights, have engaged in unlawful job actions. … The workers found that their status as workers' committee members did not clothe them with a cloak of immunity against misconduct charges. The central issue being the fact that if the conduct in question is outlawed under the Code of Conduct, it remains unlawful irrespective of the "hat" that the offending worker may be wearing at the time the misconduct is committed."

[26] Although Counsel for the respondent argued that MAZ had been allowed to address the press prior to the incident by the appellant and as such the respondents could act on behalf of the association in issuing the press statement. We were not persuaded by this argument. The fact that prior conduct allowed the respondents to breach acts of misconduct does not excuse them. The address to the press without the requisite authority of the employer, remained an unlawful act in terms of the appellant's contract of employment with the respondents. The fact that the respondents committed the acts of misconduct while performing their role as MAZ representatives is of no moment. This is because their status did not turn what was unlawful, into a lawful act. It became unlawful the moment they addressed the press without the authority of the appellant. An employer is perfectly within its right to put in place measures that will protect any address to the press relating to its employees and operations.

[27] The words of CHIDYAUSIKU CJ in the case of *Zimbabwe Electricity Supply Authority v Moses Mare* SC 43/05, are apposite;

> "In my view, members of the Workers' Committee are not a law unto themselves …In defending the rights of the workers, a member of the workers' committee is enjoined to observe due process."

[28] It is accepted that the Magistrates Association of Zimbabwe is not an association made in terms of any code of conduct or Act of Parliament. It is thus distinguishable from a worker's committee in Chidembo (*supra*). However, the conduct of a member of a workers committee was under scrutiny and the principles emanating from the case aptly apply to the conduct of the respondents. The respondents were employees of the appellant first before they became members of the association. The circulars by the Chief Magistrate were binding unto the respondents. The respondents could not use the name of the association to go against the provisions of the circulars by issuing the press statement. The act of issuing the press statement by the respondents amounted to misconduct.

[29] Communication with the press was prohibited by the appellant as a policy to ensure its proper conduct of business. The unlawful conduct of the respondents in issuing a press statement without clearance cannot be made lawful by virtue of the fact that the statement was made in the name of the association. The respondents, as argued by Mr *Mpofu*, are employees of the appellant first and foremost before they form part of any association or organisation and are therefore bound by the dictates of their employer.

[30] The court *a quo* clearly fell into error when it failed to realise that the respondents owed a duty to the appellant to follow the circulars which barred them from communicating with the press. The issue for determination before the court *a quo* went beyond the fact that MAZ was a *universitas* with legal status to sue or be sued in its name. The issue for determination by the court *a quo* was the resolution of whether or not the respondents were entitled to hide behind the association. The respondents clearly defied a lawful order given by the appellant. They ought to have sought clearance from the

appellant's Secretary first before issuing the press statement. In any event no resolution was produced before the court authorizing the respondents to address the press from the members of the MAZ.

[31] An employment contract is one which is made on the basis of consent between the employer and the employee. It is a contract characterised by obligations and duties flowing from both parties. An employee cannot be allowed to hide behind an association or organisation in defying set rules by the employer. Such a setup would result in chaos between the employer and the employee in the work environment.

DISPOSITION

[32] The court *a quo* clearly erred in finding that acts of MAZ could not be attributed to the respondents in their individual capacities. The appeal thus succeeds on this point.

[33] With regards to costs, it was submitted that each party should bear their own costs.

[34] In the result, it is accordingly ordered as follows:

1. The appeal be and is hereby allowed with each party bearing its own costs.
2. The decision of the court *a quo* be and is hereby set aside in part and substituted with the following:

"(3) The allegations of misconduct against the appellants be and are hereby upheld.
(4) The decision of the Disciplinary Committee be and is hereby upheld.
(5) Each party shall pay its own costs."

MAVANGIRA JA I agree

MAKONI JA I agree

Matsikidze Attorneys-At-Law, appellant's legal practitioners

Mtetwa and Nyambirai, 1st and 2nd respondents' legal practitioners