REPORTABLE: (62)

ZESA HOLDINGS (PRIVATE) LIMITED
V
OBSON MATUNJA

SUPREME COURT OF ZIMBABWE
MATHONSI JA, KUDYA JA & MWAYERA JA
HARARE: 12 MAY 2022 & 4 JULY 2022

M. M. Phiri with Ms *B. Mahuni*, for the appellant

D. Peneti, for the respondent

MATHONSI JA: Following the dismissal of two misconduct charges preferred against the respondent by an independent disciplinary authority, the appellant appealed to the Labour Court ("the court *a quo"*) which, by judgment delivered on 22 October 2021 struck the appeal off the roll. The basis for doing so was that an employer has no right of appeal against a decision of a disciplinary authority. This appeal is against that judgment of the court *a quo*.

This Court finds that s 92 D of the Labour Act [*Chapter 28:01*] ("the Act") as read with s 8 (6) of the Labour (National Employment Code of Conduct) Regulations S.I. 15/2006 ("the National Employment Code"), gives an employer the right of appeal to the Labour Court against a decision of the disciplinary authority. It is this Court's view that the right to appeal is given to a party or person who is aggrieved by such decision or determination in clear and unambiguous language as to admit no doubt whatsoever.

Indeed the procedure allowing access to the Labour Court by way of appeal provided for in the Act, cannot, by construction, be made available only to one party in a dispute and not the other. The reliance by the respondent on what turns out to be a fake judgment of this Court in *Pioneer Transport v Mafikeni* 2017 (2) ZLR 71 (S) does not take the respondent's case anywhere as shall be demonstrated later in this judgment.

FACTUAL BACKGROUND

The facts of this matter are generally common cause. The appellant employed the respondent as its Head of the Group Performance and Audit Division. The division's duties consisted mainly of field work which required the respondent and his team to itinerate by motor vehicles. As such, it was necessary for him to obtain copious amounts of fuel from the Management Services Division for his own division.

Allegations of gross misconduct were leveled against the respondent resulting in him being suspended from work on 1 July 2020 to facilitate investigations into the matter. By letter dated 16 July 2020, the respondent was charged with three counts of misconduct in terms of s 4 (a) and (d) of the National Employment Code as well as s 45 of the Public Finance Management Act [*Chapter 22:19*].

The allegations were that the respondent had committed various acts of conduct or omission inconsistent with the fulfillment of the express or implied conditions of his contract of employment. The misconduct in question was characterised as acts of theft or fraud. In the

alternative, the appellant accused the respondent of gross inefficiency in the performance of his work as Head of Group Internal Audit in terms of s 4 (f) of the National Employment Code.

Specifically, in count 1 it was alleged that he was liable for the offences of theft and fraud in that he converted 9 180 litres of fuel meant for the employer's operations to his personal use or other unauthorized usage. It was alleged that he committed those offences between January 2018 and December 2019.

In count 2 the allegations were that between September 2017 and February 2020, the respondent had continued to requisition fuel, which was issued in coupons, for the refueling of a Mazda B T 50 motor vehicle, registration number ABC 9160 allocated to one Lilly Mutandadzi, with the full knowledge that the said motor vehicle was off the road and under repairs.

In count 3, which was made in the alternative, as a result of the allegations contained in counts 1 and 2, the appellant alleged that the respondent had performed his work in a grossly inefficient manner which was far below the standards, principles and code of ethics set by the Institute of Internal Auditors in Zimbabwe in terms of s 50 (7) of the Public Finance Management (General) Regulations, S.I. 135 of 2019.

A senior legal practitioner, Chris Mhike, was appointed as the disciplinary authority to conduct a hearing of the case. A series of disciplinary hearings were held between 23 July 2020 and 6 August 2020. The disciplinary authority rendered a determination dated

7 September 2020 in which the charges in the first two counts were thrown out as baseless and unsubstantiated. The respondent was found not guilty in that regard.

On the alternative third charge of gross inefficiency in the performance of work by failing to set up loss control measures for the employer, the disciplinary authority issued "a caution and discharge" verdict.

PROCEEDINGS BEFORE THE COURT *A QUO*

Being aggrieved by the acquittal of the respondent, the appellant noted an appeal to the court *a quo* on 2 October 2020. The appeal was against the whole determination of the disciplinary authority. Seven grounds of appeal were relied upon by the appellant.

The respondent contested the appeal raising two preliminary objections to the appeal. The first preliminary objection was that the appellant, as the employer, had no right of appeal to the court *a quo* against the determination of the disciplinary authority or hearing officer. The second preliminary objection was that 4 of the 7 grounds of appeal were defective in one way or the other and ought to have been struck out.

In advancing the argument that an employer who has appointed a disciplinary tribunal has no right of appeal to the Labour Court in the event of an unfavourable outcome, the respondent's counsel relied on the authority of *Pioneer Transport v Mafikeni* 2017 (2) ZLR 71 (S). That judgment sought to interpret provisions of the Collective Bargaining Agreement,

Transport Operating Industry S.I. 67 of 2012 dealing with appeals against the decision of an internal Disciplinary Committee.

After making the observation, *obiter dictum*, at p 75 H, that on a common sense basis, the ridiculousness of an appeal by the employer to its own Chief Executive Officer against a decision of its own disciplinary machinery was self-evident, the judgment proceeds to conclude that the relevant provision of the Statutory Instrument did not give the employer a right to appeal.

In opposing that preliminary objection, counsel for the appellant drew the attention of the court *a quo* to a judgment of this Court in respect of the same matter which disposed of the dispute differently. That is the judgment in *Pioneer Transport v Mafikeni* SC 65/18. In that case this Court allowed the appeal by the employer and set aside the judgment of the Labour Court setting aside the dismissal of the employee from employment on appeal to the Managing Director. The Labour Court had confirmed the earlier decision of the Disciplinary Committee in favour of the employee.

The basis for allowing the appeal was that the Managing Director had determined the appeal from the Disciplinary Committee without affording the employee an opportunity to be heard in breach of the *audi alteram partem* rule. After setting aside the judgment of the Labour Court, this Court remitted the matter to the Labour Court for a rehearing of the appeal before a different judge. As shall become apparent later, that is the only valid and binding judgment of this Court.

The court *a quo* disposed of the appeal on the basis of the first preliminary objection. While acknowledging that s 92 D of the Act gives "a person" aggrieved by a determination made under an employment code a right to appeal to the Labour Court and that s 8 (6) of the National Employment Code also gives "a person or party" the right to appeal, the court *a quo* concluded that the employer has no right to appeal.

Although the court *a quo* acknowledged that the two *Pioneer Transport* judgments I have referred to are at cross-purposes, it elected to follow the 2017 judgment and ignored the 2018 one. The basis for opting for the 2017 judgment was that there is a certain degree of institutional bias in favour of the employer in disciplinary proceedings. The court *a quo* said:

> "The first judgment SC 45/17 observed the ridiculousness of an employer appealing its own judgment. This would be like the employer 'having their own cake and eat it', so to speak, clearly that is unfair."

By placing reliance on authorities exhorting an interpreter to avoid a construction of a statute that creates an anomaly or irrational result that the legislature could not have intended, the court *a quo* reasoned that interpreting the words "person or party" in the relevant sections to include an employer would create an anomaly. It found that the appellant did not have a right of appeal against the decision of the disciplinary authority appointed by it.

The court *a quo* struck the appellant's appeal off the roll.

PROCEEDINGS BEFORE THIS COURT

Still disgruntled, the appellant sought and was granted leave to appeal to this Court on the following grounds:

"1. The court *a quo* erred at law in finding that the appellant as an employer had no right of appeal against the decision of the disciplinary authority.
2. The court *a quo* erred at law in misconstruing the provisions of s 92 D of the Labour Act and Statutory Instrument 15 of 2006 in finding that "any party" as contained in those provisions does not include an employer."

Only one issue arises for determination from these grounds of appeal. It is whether the appellant has a right of appeal to the Labour Court against the decision of the disciplinary authority.

In their submissions before the court both counsel expressed concern at the existence of two judgments of this Court in respect of the same appeal in the *Pioneer Transport* case, *supra*. On the face of it, the same panel of this Court appears to have issued two conflicting judgments over the same appeal.

Mr *Phiri* for the appellant submitted that when the issue was raised before the court *a quo* the parties requested and were granted by the court *a quo* the opportunity to seek clarification from the registrar of this Court as to what the exact position of this Court was. Mr *Phiri* submitted that had clarification been made the matter would not have come this far as they have had to come on appeal in order to allow this Court an opportunity to resolve the conundrum arising from the two *Pioneer Transport* judgments after the Registrar was unable to articulate the exact status of the two judgments. Counsel requested the court to make a definitive determination of the issue of whether an employer has a right of appeal in view of the conflicting judgments.

On the merits, Mr *Phiri* submitted that the appeal turns on the issue of statutory interpretation. In counsel's view, the court *a quo* erred in construing the provisions of both the Act and the National Employment Code in a way that divested the appellant of its right of appeal. Had the court *a quo*, so the argument goes, properly applied the canons of statutory interpretation, it would have arrived at the conclusion that the appellant has a right to appeal against the determination of the disciplinary authority.

Regarding the effect of the two *Pioneer Transport* judgments, Mr *Phiri* took a two pronged approach in seeking to distinguish this case. Firstly, he submitted that the remarks made in the 2017 "judgment" on the employer's right of appeal were made *obiter dictum* in respect of an industry-specific Collective Bargaining Agreement not applicable to the present case which is regulated by the National Employment Code.

Secondly, Mr *Phiri* submitted that the 2017 "judgment" was distinguishable in the sense that the appeal lay to the Managing Director from a decision of the disciplinary committee, both of the employer. On the other hand, and quite distinct from the facts of that case, the disciplinary hearing was conducted by an independent authority and the appeal therefrom lies with the court *a quo* in terms s 92 D of the Act.

Per contra, Mr *Peneti* for the respondent submitted, relying heavily on the 2017 *Pioneer Transport* "judgment", that it was absurd for the employer to appoint an agent to handle the disciplinary hearing and still retain a right to appeal against the decision of its agent.

Although he urged the court to clarify its position and pronounce itself on the correct legal position, Mr *Peneti's* view was that the correct position is as set out in the 2017 judgment.

THE TWO CONFLICTING JUDGMENTS

Reacting to the invitation by both parties to set the record straight, this Court conducted an investigation on how there are two judgements, ostensibly disposing of one appeal in different ways. It has been verified that the 2017 "judgment" is certainly not the judgment of this Court. It is in fact a fake judgment which was never handed down by the court and never signed by the appeals panel that heard the appeal.

Indeed what is even more disturbing is that all this was drawn to the attention of the editorial committee of the Zimbabwe Law Reports when moves were made to report the 2017 "judgment". Regrettably, that notwithstanding, the irregular "judgment" was still included in the 2017 volume 2 of the Zimbabwe Law Reports.

Be that as it may, the fact remains that it is not a judgment of this Court. It has no binding effect. Administratively, there is need for intervention in the form of a corrigendum to fix the problem occasioned by that "judgment". The valid and binding judgment of this Court is *Pioneer Transport v Mafikeni* SC 65/18.

THE LAW

I have stated that this appeal calls upon this Court to determine whether the appellant enjoys a right to appeal against the acquittal of the respondent by the disciplinary authority. Section 92 D of the Act provides that;

> **"92 D Appeals to the Labour Court not provided for elsewhere in this Act.**
>
> **A person who is aggrieved by a determination made under an employment code, may within such time and in such manner as may be prescribed, appeal to the Labour Court**." (The underlining is for emphasis).

On the other hand, s 8 (6) of the National Employment Code, under which the respondent was disciplined, allows "a person or party who is aggrieved by a decision" to appeal.

In any interpretative endeavor, the basic principle of statutory interpretation which has been hallowed by repetition in this jurisdiction over many years, is that the words used in a statute must be accorded their primary and grammatical meaning. Only when doing so would lead to a glaring absurdity or inconsistency with the rest of the statute should it not be done.

The above canon, otherwise known as the literal rule of interpretation, is found in a long and consistent line of decisions of this Court. In *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd & Anor* 2015 (2) ZLR 186 (S) at 190 B it was referred to as "the time-honoured and golden rule of statutory interpretation."

It was stated in *Chegutu Municipality v Manyara* 1996 (1) ZLR 262 (S) at 264 D-E that:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey v Pearson* (1857)10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified as to avoid that absurdity and inconsistency, but no further?'"

See also *Car Rental Services (Pvt) Ltd v Director of Customs & Excise* 1988 (1) ZLR 402 (S) at 409; *Endeavour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 356 F-G; *Madoda v Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (S) at 377; *Zambezi Gas Zimbabwe (Pvt) v N.R. Barber & Anor* SC 3/20 at p 7 and *Tapedza & Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20 at p 4.

I mention in passing that s 3 of the Act makes it very clear that the Act applies to all employers and employees in Zimbabwe except those whose conditions of employment are otherwise provided for under the Constitution.

ANALYSIS

The disciplinary proceedings in this matter were conducted in terms of the National Employment Code. As already seen, s 92 D of the Act gives "a person" aggrieved by a determination made under an employment code a right to appeal to the court *a quo*. By the same token, s 8 (6) of the Code permits "a person or party" aggrieved by a decision to appeal.

According to *Black's Law Dictionary*, 8 ed (2004) at p 3619, in its ordinary meaning the word person includes:

> "artificial person (being) an entity such as a corporation, created by law and given certain legal rights and duties of a human being, a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being."

The words "aggrieved person" which clearly are a variant of the words "a person who is aggrieved" as used in s 92 D of the Act have been the subject of judicial pronouncements before. In *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood N.O.* 1975 (4) SA 231 (R) at 234; 1975 (2) RLR 4 at 8 G-H BEADLE ACJ observed:

> "The words 'aggrieved, person' have been defined by the Privy Council in *Attorney-General of the Gambia v N Jie* (1961) 2 A II ER 504 (P.C.) at p 511, thus:
>
> > 'The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.'"

See also *Van Niekerk v Van Niekerk* 1999 (1) ZLR 421 (S) at 426.

There is therefore no doubt whatsoever in light of the foregoing authorities, that on a proper interpretation of s 92 D of the Act, an employer is a person. An employer qualifies as a person who can be aggrieved by a determination made under an employment code. That is the only ordinary grammatical meaning of that section.

Indeed I find it extremely difficult to fathom why, and indeed how, the respondent would want this Court to import a meaning to a clear and unambiguous statutory provision, which is not there completely. As stated by the Constitutional Court in slightly different circumstances of the interpretation of s 93 (5a) and (5b) of the Act dealing with the rights of the

parties involved in conciliation proceedings to approach the Labour Court for registration of a labour officer's draft ruling in *Isoquant Investments (Pvt) Ltd t/a Zimoco v Darikwa* CCZ 6/20 at pp 25-26:

> "It is not clear why a procedure providing access to the Labour Court should, by construction, be made available to one party in a dispute of right which has not been resolved and, not the other party."

See also *Zangairai v Zimra & Anor* SC 113/21.

In my view, the law giver reposed upon any person or party to proceedings held under the National Employment Code, or any other Employment Code, the right to access the court *a quo* by way of appeal if aggrieved. That should be the end of the inquiry. Nowhere in s 92 D is it stated that the right to appeal is a preserve of an employee alone. The court *a quo* fell into grave error in holding otherwise.

DISPOSITION

The clear language employed in s 92 D is to the effect that both the employer and the employee involved in disciplinary proceedings before a disciplinary authority have a right to appeal to the Labour Court if aggrieved. The court *a quo* erred in upholding the preliminary objection. The appeal ought to be allowed.

On the question of costs, I agree with Mr *Peneti* for the respondent that the existence of seemingly conflicting judgments of this Court on the employer's right of appeal created the

need for an approach to this Court for clarification. Neither party should be mulcted with an order for costs for that reason.

In the result, it is ordered as follows:

1. The appeal is allowed with each party to bear its own costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The preliminary objection that the appellant has no right of appeal to the Labour Court is hereby dismissed."

3. The matter is remitted to the Labour Court for continuation.
4. The registrar of this Court is directed to issue a corrigendum removing the judgment *Pioneer Transport v Douglas Mafikeni* SC 45/17 (2017 (2) ZLR 71) from the list of Supreme Court judgments and asserting that the authentic judgment of this Court is *Pioneer Transport v Douglas Mafikeni* SC 65/18.

KUDYA JA: I agree

MWAYERA JA: I agree

Muvingi & Mugadza, appellant's legal practitioners

Maguchu & Muchada, respondent's legal practitioners