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Judgment No. SC 19/05
Civil Appeal No. 407/02

NOREST TARUVINGA v CIMAS MEDICAL LABORATORIES

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA
HARARE, FEBRUARY 28 & JUNE 27, 2005

A Muchadehama, for the appellant

D S Mehta, for the respondent

GWAUNZA JA: The appellant worked for the respondent as a laboratory technician. On the night of 10 December 2000, he was on night duty at the respondent's Harare laboratory. He does not deny that around 1.30 a.m. he, in the company of a colleague, drove one of the respondent's vehicles into the city centre. He returned to his station more than four hours later, around 6 a.m. It is also not disputed that during the appellant's absence certain urgent work needing his attention was brought in from the Avenues Clinic.

After efforts to locate the appellant failed, another laboratory technician had to be called in from home around 5.00 am, to carry out the relevant tests.

It is the respondent's assertion that the delay in the carrying out of the tests in question inconvenienced and upset not just the parents of the child whose blood samples had to be tested, but authorities at Avenues Clinic as well. The latter, a major client of the appellant, had filed a complaint and threatened to report the matter to the Health Professions Council. Such a report could have resulted in the cancellation of the respondent's practising licence.

The respondent preferred four charges against the appellant, in terms of its Code of Conduct, under Group IV offences. These were Misuse of the Employer's Property; Dishonesty and Other Related Offences, Breach of Employment Contract and Sabotage. In terms of the respondent's Code of Conduct, the penalty for such offences is dismissal.

In the subsequent disciplinary proceedings, the appellant was found guilty as charged, and dismissed from his employment. He appealed unsuccessfully to the Local Joint Committee, the Negotiating Committee of the NECC and the Labour Court. The Labour Court limited itself to the charge relating to misuse of the employer's property and, on the basis of the appellant's admission that he had driven the vehicle in question to Chicken Inn Restaurant without authority, dismissed his appeal. The learned President of the Labour Court found that as a result of the misuse of the respondent's property, the latter had suffered loss to the extent of the fuel consumed and wear and tear

of the vehicle during the unauthorised journey of 72 km. In adopting this stance, the Labour Court erred, as will be indicated below.

In his grounds of appeal, the appellant avers that the Labour Tribunal erred "in law" in concluding that the charge that was preferred against him was correct and that he was properly dismissed. Expanding on this ground of appeal, the appellant contends in his heads of argument, that the respondent had picked on charges that it knew merited dismissal, when it could have preferred charges attracting a lesser penalty. The appellant charges, in addition, that the Labour Tribunal failed to take cognisance of the fact that the actual offence and the circumstances surrounding the occurrence did not warrant dismissal.

I am persuaded there is some merit in these submissions.

A perusal of the respondent's code of conduct shows that some offences are cited in general but identical terms, under different "groups" of offences. There is, for instance, the general offence entitled "Misuse of Employer's Property" being cited under Group II, III and IV offences. The Code then lists the specific conduct that would constitute the general offence as it appears under each particular "group". Evidently it is this conduct, rather than the general offence, that determines the penalty to be imposed on the offender. Under Group II offences the offence attracts in the first instance, the penalty of a written warning, followed by final written warning and finally dismissal. The specific misconduct is described as:

> "The unauthorised use of the employer's property or other facilities for a purpose other that for which it was intended."

Conduct constituting misuse of the employer's property under Group III offences is cited as:

> "negligent loss or damage to any property of the employer or any other employee or customer's property."

The penalty is firstly final written warning and then dismissal.

Under Group IV offences, misuse of the employer's property is described as:

> "Wilful or intentional loss/damage of employer's/customer's property, regardless of the values of such property."

The penalty is dismissal.

One of the charges brought against the appellant was misuse of employer's property as defined under Group IV offences.

My view is that the conduct of which the appellant was accused, that is, taking and driving the respondent's vehicle for 72 km without authority, does not

constitute "wilful or intentional loss of the employer's property" as envisaged in s 2 of the Group IV Offences. The use of the vehicle might have resulted in loss to the employer in the form of the fuel consumed and the wear and tear to the vehicle, but I am not persuaded that is the type of loss envisaged under that provision. One does not "lose" the fuel of another person by driving that person's vehicle without his authority. Nor can "wear and tear" be defined as "damage" to the vehicle in question. The court *a quo* in my view misinterpreted this provision of the Code and accordingly erred in law.

I find therefore, that the appellant was wrongly charged with this offence as described under Group IV offences. Much though the respondent may have wished to impose a very harsh punishment on the appellant, it is clear that in terms of the Code the offence is not considered to be as serious as the respondent viewed it.

The appellant was charged with three other offences, also arising from the same conduct. Although the Labour Court did not deem it necessary to consider these other offences, it is the interests of justice, and finality in litigation, that they be considered by this Court on the basis of the evidence before it.

The second offence with which the appellant was charged, that of "dishonesty and other related offences" is cited under both Group III and Group IV offences. The respondent charged the appellant under Group IV offences where the conduct constituting this offence is explained as:-

> "Falsifying or changing any document with fraudulent intent or attempting to do so including clocking of another employee's card.
>
> Unlawful taking of property with the intention of permanently depriving the company of the use of such property.
>
> Knowingly aiding or assisting the unlawful taking of property stated above.
>
> Giving or receiving or attempting to give or receive any bribe or inducing or attempting to induce any person to perform any corrupt act."

It is again, evident that the conduct of the appellant did not constitute this offence. He did not falsify any document, take the vehicle in question with the intention of permanently depriving the owner of the use thereof, nor did he do any of the other things listed. There is, however, evidence that the respondent was concerned more about what it perceived as dishonest conduct on the part of the appellant than the specific conduct listed under that offence. That this was the case is made clear from a reading of part of a letter written by P Jambo, the respondent's Head of Department (Human Resources) to the respondent's Senior Designated Agent. It reads as follows:

> "The element of dishonesty comes in, in that during the period he deserted the laboratory, he was being paid for working overtime. This to us is dishonest conduct because we believe in paying 'a fair day's wage for a fair day's work'."

Clearly the attitude implicit in these words derives from a misreading of the Code of Conduct. As already stressed, it is the specific, rather than the general offence, which is the correct point of emphasis.

The appellant was therefore wrongly charged with the offence of dishonesty as described under Group IV offences of the Code.

The other charge levelled against the appellant was "Breach of Employment Contract". This general offence appears under Group II, Group III and Group IV offences of the respondent's Code of Conduct. The conduct constituting this offence under Group II offences is –

"Non compliance with established procedures or standing instructions."

The appellant was not charged under this category of offences, despite the respondent's reference to him having breached standing instructions by not completing the log book on his return from the city.

The Group III offences category lists conduct that is clearly not applicable in *casu*.

Under Group IV offences, the conduct is defined as –

"Violating safety rules or measures with serious consequences."

The respondent did not explain what specific safety rules or measures the appellant, through his conduct, violated nor did it indicate what serious consequences resulted from such conduct.

I am therefore satisfied the appellant was wrongly charged with this offence as it appears under the Group IV offences.

The last offence the appellant was charged with was sabotage. This offence is listed under the Group IV offences only and is described as follows:

> "Any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations."

The respondent's understanding of this charge is explained in the written determination of the respondent's Senior Designated Officer, P Ngando, as follows:

> "The element of 'Sabotage' comes into play in that by deserting the laboratory for approximately four hours when he was being paid double the pay rate, he willfully disrupted the normal operations of the employer's business by failing to provide services necessary to the operations. The consequences for (*sic*) his act of misconduct are too ghastly to contemplate.
>
> His conduct was totally unprofessional and impossible as it showed no regard to the patient who was highly stressed, no regard to referring doctor who had to wait for endless hours to get the test results and no regard for the Laboratory which has a reputation to protect and is currently being subjected to still competition from other Laboratories."

It is argued for the appellant that the charges of dishonesty and sabotage were untenable and unsubstantiated on the facts. It is argued further that the "ordinary interpretation of the definition of 'sabotage' excludes acts or omissions ascribed to the appellant."

While I am persuaded, as already shown, by the argument relating to the charge of dishonesty, I am not so persuaded on that concerning sabotage.

A reading of the various charges as formulated in the respondent's Code of Conduct shows that the Code does not pay homage to dictionary or ordinary meanings of certain words and phrases. This is demonstrated by the fact, already alluded to, that different offences are listed under common headings that appear in the various categories of the offences section of the Code. The conduct that is specified under these headings suggests more than any other circumstance, that the common headings are used for convenience only and are not to be given ordinary or dictionary meanings.

It is in this light that the heading "sabotage" in the Code of Conduct is to be viewed. The offence for purposes of the Code of Conduct is not committed when the dictionary meaning of "sabotage" is satisfied. Rather, it is committed when the conduct complained of constitutes the specific offence defined under that heading. That being the case, the argument that the conduct must meet the dictionary or ordinary meaning of "sabotage" for it to constitute an offence under s 8 of the Group IV offences, is without merit. All that the respondent had to do was prove that by his conduct, the appellant breached s 8 of the Group IV offences. I am satisfied, when regard is had to the respondent's explanation of the offence, referred to above, that the applicant did breach s 8 of the Group IV offences. By absenting himself from his workplace during the hours in question, he withheld a service necessary to the smooth operation of the laboratory. Much time was devoted to establishing his whereabouts, while work that had been brought in for his attention could not be performed with the urgency that it required. As a result another person had to be recalled from home in the early hours of the morning to do the work which should have been done several hours earlier.

I have no doubt this interruption to the operations of the respondent's laboratory, is the type of conduct that, among others, is envisaged under s 8. He was therefore properly charged and penalised.

The appellant makes reference to an unfair splitting of charges. I am not satisfied there is merit in this submission. There were facets to the appellant's conduct that constituted different offences. His unauthorised use of the employer's vehicle for a purpose other than that for which it was intended, constituted an offence under s 2 of Group II offences of the Code of Conduct. By committing this offence, the appellant simply provided himself with the means to commit the other offence referred to as sabotage. However, the two offences are separate and distinct and could have been committed independently of each other. While this Court might have upheld his appeal on the offence of "misuse of the employer's property", and that of dishonesty and other related offences, for the reasons given, it cannot do the same with the offence of sabotage.

On that ground, the appeal must fail.

It is in the result ordered as follows:-

"The appeal be and is hereby dismissed with costs."

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Muzenda & Maganga, respondent's legal practitioners