REPORTABLE ZLR (50)

Judgment No. SC 45/05
Civil Appeal No. 205/03

ZIMBABWE FINANCIAL HOLDINGS vs KUDA MAFUNGA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, MAY 5 & NOVEMBER 1, 2005

A M Gijima, for the appellant

C Phiri, for the respondent

GWAUNZA JA: This is an appeal against the judgment of the Labour Court, in terms of which the appellant was ordered to reinstate the respondent to his former employment without any loss of salary or benefits. In the event that reinstatement was no longer possible, the appellant was ordered to pay the respondent damages in *lieu* thereof.

The facts of the matter are as follows:

The respondent, who was employed by the appellant as a cashier in one of its branches, cashed two savings account withdrawals amounting to $400 000. This was on 29 May and 1 June, 1999. It is common cause that fraudsters had used a fictitious name to open the account from which the withdrawals were made. The fraudsters again visited the appellant's premises on 21 June 1999, with the intention of withdrawing more money from the fraudulent account. A trap that the appellant had

set for them failed to 'net' the suspected fraudsters because, it was alleged, one of them was surreptitiously alerted to the trap by someone inside the bank, leading to their escape. The appellant alleged that the respondent was the one who had warned the suspected fraudsters off, a circumstance that the appellant believed pointed to the possibility of collusion between him (respondent) and the fraudsters.

Charges were subsequently brought against the respondent in terms of Category D of the appellant's Code of Conduct as follows:

> "1. You committed a serious act, conduct or omission which is inconsistent with the fulfillment of the express or implied conditions of your contract.
>
> 2. You were grossly incompetent and inefficient in the performance of your work.
>
> 3. You were grossly negligent and caused a very serious loss to the bank; and
>
> 4. You failed to comply with standing instructions or follow established procedures which resulted in a very substantial loss to the bank".

A disciplinary hearing conducted on the 3rd of August 1999 considered, among other evidence, sworn statements made by deponents who claimed to have played a role in the opening of the fraudulent account from which the withdrawals in question were later made. One of the deponents implicated the respondent in the scam. The statements were sworn at the police station following the arrest of two suspects, one being the suspected fraudster allegedly warned off by the respondent.

At the end of the disciplinary hearing the respondent was found guilty as charged and dismissed from his employment. He appealed to the Grievance and Disciplinary Committee, which dismissed his appeal. On 7 October 1999, the Appeals Board, to which the respondent had appealed following the decision of the Grievance and Disciplinary Committee, upheld the respondent's appeal and ordered the appellant to reinstate him. The appellant was aggrieved by this decision, and appealed to the Labour Court, which, in its turn, dismissed the appeal.

The appellant's grounds of appeal are as follows:

"**Grounds of appeal**

1. that the Labour Court erred on a point of law by holding that the appellant failed to justify its dismissal of the respondent on a balance of probabilities for lack of compliance with its beam procedures as articulated in Circular No. 16/3/99, whereas, the Labour Court's record of proceedings contained sufficient evidence which proved otherwise;

2. that the Labour Court further erred in law in failing to place reliance on affidavits deposed to by respondents' accomplices, confessing to the fraud, on the basis that the deponents had not given *viva voce* evidence in the Court; and

3. that consequently, the Labour Court erred in law in holding that respondent's dismissal by the appellant was unlawful".

I will consider these grounds separately.

First Ground of Appeal

The appellant contends that there was sufficient evidence before the Labour Court to prove that the respondent had not complied with the appellant's BEAM procedures as

articulated in Circular No. 16/3/99. In this connection, it is alleged that the respondent in contravention of these procedures, cashed cheques of over $20 000 without referring to the Manager or Accountant. The appellant charges that the Labour Court ignored the document on p 148 of the record, which was an extract from the BEAM procedures, and which increased the control limit of $5 000 on BEAM authorisation for teller withdrawals, to $20 000. Further, that the history of the account in question should have alerted the teller to the fact that all was not in order, and therefore, the need to refer the matter to the manager or accountant.

There is in my view merit in these submissions.

While it is true, as noted by the court *a quo*, that the teller's manual produced by the appellant in the court *a quo* made no reference to the need for tellers to refer cash withdrawals of over $20 000 for authorisation by management, there is indeed a document on p 148 of the record, which clearly increased the control limit for authorisation for teller withdrawals from $5 000 to $20 000. The document is an extract from the Beam procedures that the court *a quo* was persuaded the respondent had followed before cashing the two savings account withdrawals. The court *a quo* made no reference to this document, a circumstance that lends some weight to the appellant's assertion that the court had ignored this evidence. It has not been said by either party that this document did not form part of the record in the court *a quo*.

It is not in dispute that the respondent did not refer the withdrawals, which far exceeded the $20 000 threshold, to management for authorisation. The two withdrawals that the respondent cashed were for $200 000 each. In 1999, these

constituted very large amounts of money. If as a general rule, cheque and cash withdrawals of $20 000 needed authorisation, it is difficult to understand how the respondent could have believed he could cash withdrawals of amounts ten times more than the $20 000, without some kind of authorisation.

The respondent's actions become even more suspect when regard is had to what the appellant termed the "history" of the account in question. According to the evidence before the Court, the account in question had been fraudulently opened on 17 April 1999 with a cash deposit of $1 000. On 19 May 1999 a large deposit of $874 720,25 was made into the account. On 28 April, 1999 two small withdrawals were made. The following day, 29 April 1999 the respondent cashed a withdrawal of $200 000 from this account, and two days after that, another withdrawal of $200 000. Between these two withdrawals, a large amount of $450 000 was withdrawn from the same account but through the services of a different teller. The appellant contends, and I find myself in agreement with its contention, that any diligent teller would have viewed with suspicion the frequency of the withdrawals from this account. He or she would then have felt obliged to take the type of action envisaged in the teller's manual under "General Routines" which reads as follows:

> "Do – always refer to your accountant any transaction on which there is any uncertainty".

The account was new and, given the fact that a fictitious name was used to open it, the "client" was also new. Yet the respondent, allegedly, saw nothing unusual and felt no suspicion when, after making one large cheque deposit, the client then went on, with unusual frequency, to withdraw huge amounts of cash from the

account. Instead, the respondent facilitated the withdrawals in question, resulting in the appellant suffering serious financial loss.

In my view, the respondent was properly charged with gross negligence and causing a very serious loss to the bank.

The Labour Court found that the probabilities favoured the respondent's denial that he was required to refer withdrawals in excess of $20 000 to management and based its decision partly on that finding. This I find is where the court *a quo* fell into error. Even if the respondent was indeed not required to refer withdrawals in excess of $20 000, he was surely not exempted from the general rule that tellers were required to "always" refer to their accountant any transaction on which there was any uncertainty.

In my opinion there was "uncertainty" in the transactions in question, the respondent did not refer the transactions to his accountant. The Labour Court therefore clearly erred in disregarding, as it obviously did, this important provision.

On that ground alone the appeal should succeed.

Second Ground of Appeal

The appellant's second ground of appeal is concerned with the rejection by the court *a* quo, of statements made by witnesses who claimed to have

been the respondent's accomplices in the fraudulent opening of the account in question, and the subsequent withdrawals made from it.

It is not in dispute that one of the suspected fraudsters, Sebastian Muriritirwa, was arrested following a report made to the police by an administrative officer with the bank, Mr Mutanga ("Mutanga"). Mutanga had observed the respondent communicating with a suspected accomplice of Muriritirwa, who had come into the bank to make a further withdrawal from the account in question. The suspected accomplice was then seen walking quickly away from the bank, and, in the company of Muriritirwa who met him at the door, getting into the latter's motor vehicle and driving away quickly. Because the suspected accomplice walked away quickly from the bank after communicating with the respondent and without conducting the business he had come to the bank for, the appellant suspected him of having warned the accomplice off, thereby facilitating his escape. The appellant also suspected him of being an accomplice to the fraud. Following his arrest, Muriritirwa deposed to an affidavit in which he implicated the respondent as follows:

> "As I was (about) to get into the main entrance, I met Leonard at the main entrance coming out of the bank. He advised me that he had been told to get out of the bank by Kuda, a bank teller based at the bank".

In rejecting this evidence the learned President of the Labour Court said in his judgment:

> "The same applies for the appellant's reliance on affidavits made by self confessed accomplices. Men of dubious probity, whose evidence could not be tested by cross examination. I am satisfied that the accomplices being men of dubious characters had every reason, to colour and manufacture evidence in an attempt to wriggle out of trouble or to lessen the severity of punishment by shifting blame. That being the case no reliance can be placed on their

> affidavits unless they had given *viva voce* evidence and the veracity of their evidence subjected to scrutiny by cross examination and corroborated by some other evidence.
>
> One could not safely rely on their evidence without falling in danger of convicting an innocent man".

The court *a quo* makes reference to cross examination of the deponents to the affidavits – in effect one deponent since the other made no reference to the respondent by name – or corroboration of their statements by some other evidence.

I am satisfied there was adequate and credible corroboration of Muriritirwa's evidence. Such corroboration came from Mutanga, who described how he had seen Muriritirwa's suspected accomplice being "warned off" by the respondent, rushing out of the bank and together with Muriritirwa whom he met at the entrance, getting into the latter's car and driving away. This evidence dovetails neatly with that of Muriritirwa. There could not have been any collusion between the two, since they were on opposite sides of the dispute.

In what amounts, in my view, to a misdirection of facts so gross as to constitute a misdirection on a point of law, the learned President of the Labour Court rejected Mutanga's evidence, stating as follows on p 4 of the judgment:

> "Mr Mutanga's evidence has no ring of truth. His conduct was grossly unreasonable and illogical in the extreme. Surely, a bank accountant cannot pursue a fraudster on his own without raising any alarm or alerting colleagues and security…".

The evidence on record shows clearly that Mutanga, having observed the suspicious communication between the respondent and Leonard Chidharara, the suspected fraudster, rushed into the office of a bank official referred to as Renzie Vulalo and reported what he had observed. According to Vulalo's statement, the two then rushed after the suspect and saw him hurrying to a parked car together with Muriritirwa. They then drove away. Vulalo stated in his report that he knew Muriritirwa since he was a client at the bank. Thus contrary to the finding of the court *a quo*, Mutanga did not single handedly "pursue" the suspect without raising any alarm or alerting colleagues and security. He took the precaution, before rushing after the suspect, to alert a colleague and enlist his aid in following the movements of the suspect after he rushed out of the bank.

The evidence relating to the actions of Mutanga and Vulalo in my view clearly corroborates Muriritirwa's sworn evidence. Based on its own argument, therefore, the Labour Court should have accepted, and not rejected, Muriritirwa's sworn statement concerning the involvement of the respondent in the perpetration of the fraud in question. When this is taken together with the respondent's apparent disregard of the suspicious history of the fraudulent account in question, and his failure to refer the transaction to an accountant, the probabilities in my view favour a finding that the respondent was complicit in the fraud.

The Labour Court's reference to the "danger of convicting an innocent man" to my mind suggests the court was applying a higher test for proving a case against the respondent, than is required in a case of this kind. I am satisfied, on the

evidence before the Court, that the appellant proved, on a balance of probabilities, that the respondent had committed the acts of misconduct that he was charged with.

The appellant's third ground of appeal, that the Labour Court erred in law in holding that the respondent's dismissal was unlawful, is therefore well founded.

I find when all is told, that the respondent was properly charged and found guilty of the misconduct in question. In the result it is ordered as follows:

1. The appeal be and is allowed with costs;
2. The determination of the Labour Court is set aside and is substituted with the following:

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

SANDURA JA: I agree.

MALABA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners