REPORTABLE (42)

Judgment No SC 47/05
Civil Appeal No 102/04

MARVO STATIONERY MANUFACTURING (PRIVATE) LIMITED
vs LOVEMORE JOKWANI AND 5 OTHERS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
BULAWAYO JULY 23 & OCTOBER 24, 2005

H. Moyo, for the appellant

A Muchadehama, for the respondent

CHIDYAUSIKU CJ: The respondents in this case are former employees of the appellant company. They were charged with misconduct. The allegation was that the respondents were amongst a group of employees that were found gambling at the appellant's company premises during working hours.

A hearing was held in terms of the Code of Conduct on 3 December 1996. The respondents denied the charge but were found guilty and dismissed. After a series of sittings, further hearings and applications the respondents' appeal was finally heard by the Labour Court on 11 November 2003. The Labour Court held that the respondents

had been unfairly dismissed and ordered that they be reinstated with an alternative for payment of damages. It is against this decision that the appellant company now appeals to this Court.

The learned President of the Labour Court allowed the appeal on the following basis:-

> "This act of misconduct is not specified in the Respondent's Code of Conduct namely the Collective Bargaining Agreement for the Printing Packaging and Newspaper Industry, Statutory Instrument 322 of 1993.
>
> According to the dismissal letters served on the Appellants dated 4th December 1996 the concession is made that neither the offence of gambling nor the penalty of dismissal is expressly provided for in the Code. Respondent however dismissed the appellants for conduct inconsistent with the fulfillment of the express conditions of their contract of employment.
>
> A perusal of the said Code of Conduct shows that the act of misconduct for which the Appellants were eventually dismissed is also not specified as an offence at all. This explains the difficulty encountered by Respondent in trying to impose a penalty right from the initial hearings. At first, the initial hearing Committee, came up with a penalty of deducting eight hours of Appellant's tickets. Later the penalty was changed to termination thereafter on appeal, the penalty was against changed to suspension for six weeks and then application for reemployment upon good behaviour by Appellants.
>
> A submission was made by Respondent's Legal Practitioner that Respondent was empowered in terms of Section 3:1:2 of the Code to impose a heavier penalty where in its opinion the offence is of such a serious nature.
>
> That may be so, but sight should not be lost of the fact that, that particular section relates to specified offences in the Code and not where the Code is silent about a particular offence. That Section therefore cannot assist Respondent."

The learned President of the Labour Court went on to conclude at p 3 of her judgment:-

"So there being no definition of the actions by Appellants in Respondent's Code of Conduct, it was not proper for Respondent to charge them as such. There was no contravention of the Code."

The appellant appeals to this Court on the following grounds:-

"1. It is respectfully submitted that the learned President erred in law in holding that since the act of gambling was not specified as an offence in the Code of Conduct, the respondents did not therefore commit an offence and could not be dismissed.

2. It is further respectfully submitted on behalf of the appellant that the learned President erred in law in holding that the list of dismissable (sic) offences provided for in the Code of Conduct was exhaustive.

3. The preamble of Section 3.8 of the Code of Conduct stated that discharge should be used when the offence committed is so serious a nature that it amounts to a breach of or repudiation of contractual obligations. Examples of such offences are therefore listed. This list of offences is only given as examples but does not exclude any other offence of a serious nature as described in Section 3.8

4. Gambling is a criminal offence according to the laws of Zimbabwe. The Respondents did not deny that they were engaged in such conduct at the work premises during working hours (letters of apology written by them were produced and are part of the record).

5. Such conduct is clearly inconsistent with the nature of their duties and is an offence of a serious nature warranting dismissal." (See the Notice of Appeal)

It would appear from the grounds of appeal that the issue that falls for determination by this Court is the correct interpretation of s 3.8.1 of the Collective Bargaining Agreement: Printing, Packaging and Newspaper Industry (Code of Conduct) Statutory Instrument 322 of 1993 (hereinafter referred to as the Code). The relevant section of the Code provides as follows:-

"3.8.1 Discharge is the final sanction and should be used –

(a) …

(b) …

(c) when the offence committed is of so serious a nature that it amounts to a breach of, or repudiation of, his contractual obligations such as –

(i) willful and unlawful breach of Company safety regulations or security regulations or any act of omission which intentionally endangers the health or safety of others;

(ii) absence from work for 5 or more consecutive working days without prior approval and an unacceptable reason for such absence;

(iii) willful and unlawful damage to plant or Company property through negligence or any act or omission which is likely to cause damage to Company property;"

Ms *Moyo*, for the appellant, submitted that notwithstanding the fact that the Code does not specifically provide for gambling as an act of misconduct it should be interpreted to include gambling. He argued that s 3.8.1(c) of the Code merely gives examples of possible misconduct and that the list is not exhaustive. The fact that gambling is not included in the list of examples given does not mean that it is specifically excluded.

I agree with Ms *Moyo's* submission that the examples set out in paragraphs (i) (ii) and (iii) of s 3.8.1(c) are not exhaustive examples. They are only examples and the fact that gambling is not specifically mentioned does not mean that gambling at work does not constitute an act of misconduct in terms of the Code, s 8.3.1(c) in particular.

I have no doubt in my mind that gambling at work during working hours is conduct which is in breach of the employee's contractual obligations. An employee is contracted to work and not to gamble during working hours. It is also clear from s 3.8.1(c) that it is not every breach of contractual obligation by an employee that constitutes a contravention of the section. The breach has to be of a serious nature in order to constitute a contravention of s 3.8.1(c) of the Code.

For instance, an employee who absents himself from work for one day or two days or three days or four days is clearly in breach of his contractual obligation to the employer. Yet absence from work for a period of less than five days does not constitute a contravention of s 3.8.1(c) of the Code. It is only absenteeism for a period of five days or more that constitutes a contravention of s 3.8.1(c) of the Code.

As I have already said gambling during working hours is conduct that is inconsistent with an employee's contractual obligation. An employee is contracted to work and not to gamble. However, for such gambling to be covered by s 3.8.1(c) of the Code it has to be of a serious nature. Gambling on the odd occasion, as seems to be the case here, is not of a serious nature and is not covered by s 3.8.1(c) of the Code. If it had been established that the gambling had been persistent in terms of frequency and for considerable periods of time during working hours I would have had no hesitation in concluding that it is of a serious nature and amounts to misconduct in terms of s 3.8.1(c) of the Code. Absenteeism from work for one day is not a contravention of s 3.8.1(c)(ii)

of the Code while absenteeism for five days is a contravention. By parity of reasoning gambling at work and during working hours on the odd occasion is not a contravention of s 3.8.1(c) while serious and persistent gambling during working hours would amount to a contravention of the section.

In the present case the respondents dispute that the gambling took place during working hours. Some of them suggest that the gambling took place during lunch hour. The evidence does not establish that the gambling was serious. If anything the evidence establishes that it was a one-off occurrence.

It may well be that the respondents, by gambling, committed a criminal offence.

The appellant argued that commission of a criminal offence on the employer's premises constitutes misconduct in terms of s 3.8.1 of the Code. I do not accept that there is substance in this submission. There is nothing in the language of s 3.8.1 of the Code to justify the conclusion that every conduct of an employee that is criminal constitutes misconduct in terms of s 3.8.1 of the Code as contended for by the appellant. It is only criminal conduct which is of such a serious nature as to amount to a breach of the employee's contractual obligation that constitutes a contravention of s 3.8.1 of the Code.

In the result I arrive at the same conclusion as the learned President of the Labour Court, that the allegations against the respondents do not constitute a contravention of s 3.8.1 of the Code, but for different reasons. I arrive at my conclusion on the basis that although gambling during working hours is, *prima facie*, conduct that is in breach of an employee's contractual obligation, such a breach has to be of a serious nature before it can amount to a contravention of s 3.8.1 of the Code. The gambling revealed on the papers is not of such a serious nature as would amount to a contravention of the Code.

For these reasons the appeal is dismissed with costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Joel Pincus Konson & Wolhuter, appellant's legal practitioners

Mbidzo Muchadehama & Makoni, respondent's legal practitioners