REPORTABLE ZLR (33)

Judgment No. SC 24/06
Civil Appeal No. 336/04

N E I ZIMBABWE v LYNETTE MAKUZVA

SUPREME COURT OF ZIMBABWE
CHADYASUKIKU CJ, CHEDA JA & MALABA JA
HARARE MAY, 18 2006

T Biti, for the applicant

G Valla, for the respondent

CHDEA JA: The respondent in this matter was an employee of the applicant. The exact nature of her employment is not disclosed in the papers, save to say that she was appointed to represent the other employees when some negotiations were going on concerning the allocation of shares to employees when the appellant was taking over the company from Rolls Royce, the previous owners of the appellant company.

A confidential document was forwarded to the appellant's financial director by the operations director of the appellant.

The contents of the confidential document were relevant to the issue of shares but the envelope containing the documents was addressed to Doris Asher, the Secretary to the Finance Director, and clearly marked *"private and confidential"*.

Once it was discovered that these documents had gone missing from Doris Asher's Office the employees of the appellant were questioned and none admitted any knowledge of the whereabouts of the documents.

The respondent was also asked about the documents and denied any knowledge.

Some plain clothes investigators were called in and a massive search was conducted in offices and motor vehicles.

The documents were later found in the vehicle of the respondent, hidden under the carpet inside the boot. This background was not contested by the respondent. Such conduct was not taken lightly by the appellant. The fact that the documents concerned shares that the workers were entitled to did not justify what she did. Once she was aware of the information she could have dealt with the matter in some other way. The appellant then applied for authority from the Labour Relations Officer to dismiss the respondent from employment.

The Labour Relations Officer failed to adjudicate on the matter properly. Her findings clearly contradicted the factual situation revealed on the papers. She concluded as follows:

"**OFFICER'S FINDINGS**

1. That applicant failed completely to prove that respondent had unlawfully removed documents from Doris Asher's office. Doris Asher was not even called to give evidence to this effect.

2. That by first offering a severance package to respondent, applicant shared (sic) that he had also a case to answer, why would one offer a package to a thief? It is clear from the submissions that's the applicant who stole from all employees their right to shares.

3. That on the issue of extortion the applicant can refer the case to the police."

The above sounds like a finding against a charge of theft. It is again not clear on the papers if the charge against the respondent was that of theft which was referred to the police, or that of misconduct. The appellant had dismissed her for her conduct which was inconsistent with one's nature of employment.

The Labour Officer made no clear finding regarding misconduct.

It was then ordered that she be reinstated without loss of pay and benefits from the date of her suspension or be paid damages agreed between the parties.

The appellant appealed to the Labour Relations Tribunal ("the Tribunal") against that decision. The Tribunal concluded, and rightly so, that the letter to the Ministry dated 31 August 2000, that is the application for dismissal of the respondent, clearly explained the conduct for which she was dismissed, and that it was not theft.

It also found that the conduct complained of was not denied by the respondent.

The Tribunal found that the conduct of respondent, in hiding the documents in her car and failing to own up, was clearly dishonest conduct and was totally contrary to what could be expected from an honest employee, and if left unpunished, could lead to chaos in the work place. I find no fault with this conclusion.

On appeal to this Court, the above finding was not challenged by the respondent. What was challenged is the decision that the Tribunal made concerning the respondent's dismissal.

The Tribunal proceeded to state the following in conclusion:

> "Having found that the Respondent's conduct was punishable, one has to look at the punishment that was imposed. I am in agreement with Mr Hwacha's submissions that regard should have been had (had?) to s 12B(4) of the Act. The circumstances of this case required Management to closely examine the facts that led to the act of misconduct. The conduct of Management itself was not up to scratch. Given the need for good corporate governance, the conduct of Management, which conduct was not denied, was not commendable. Management did not act in good faith and that was a betrayal of the worker's interests. As stated elsewhere in this judgment the appellant's conduct promoted agitation in the workforce. That, however, is not to suggest that workers should have taken the law into their own hands.
>
> I am convinced that in providing for s 12B(4) in the Act, the Legislature meant to ensure that employers did not rush to dismissals merely because the acts of misconduct are dismissable."

After making observations about the copies of the same document(s) from the Reserve Bank, the President of the Tribunal went on to say:

> "The act of misconduct, although deserving punishment, does not in my view call for the dismissal of the respondent."

The Tribunal then went on to confirm the refusal of authority to dismiss the respondent and substituted its own penalty for he misconduct. This was after it had observed that the referral back to the senior labour officer to consider an appropriate punishment would delay the course of justice.

This is the conclusion of the matter which the appellant has now appealed against.

In short, the issue is whether the Tribunal had the discretion to set aside the decision of the disciplinary authority and substitute its own where an employee is clearly guilty of misconduct.

Section 12B(4) of the Act *[Cap 17 of 2002]* ("the Act") reads as follows:

> "(4) In any proceedings before a designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee."

Two questions immediately arise for consideration.

Firstly, was this law at the time this matter arose?

Secondly, if it was, were there any circumstances which it can be said the Tribunal took into consideration in the respondent's favour?

By then, the appellant had a vested right to have the respondent dismissed according to the law as it was then, after seeking authority. Such right accrued before Act 17 of 2002 came into operation.

It cannot be said that such right did not exist just because the labour officer made the wrong decision on the matter.

Section 12B(4) of Act 17/2002 cannot be applied to this matter retrospectively. See *Curtis v Johnnesburg Muncipality* – 1906 TS at 311; *Bell v Voorsitter Van Die Rasklassifikasieraad En Andere* 1968 (2) SA 678 (A); *Agere Nyambuya* 1985 (2) ZLR 336; *Nhamo and Anor v Attorney General and Ors* 1993 (2) ZLR 422 and more recently *Net-One Cellular (Pvt) Ltd v Net-One Employees and Anor* SC 40/05.

Even if the law had changed following the amendment by s 12B(4), were there any mitigatory factors or special circumstances that the Tribunal was asked to consider; No information regarding the respondent's nature of employment, record of employment or previous conduct was placed before the Tribunal at all for its consideration except the fact that she dishonestly concealed the documents in her car

and lied, firstly, that she had not seen them, and secondly, said she handed over the documents, yet they were found as a result of a search. The correct position is that the law at the time had no provision for the Tribunal to exercise any discretion in the form it did.

Accordingly, I find that the Tribunal misdirected itself in concluding that is could substitute its own penalty in terms of s 12B(4) of Act 17/2002.

In the result I order as follows:

1. The finding of guilty of conduct inconsistent with one's nature of employment is to stand.

2. The penalty imposed by the Tribunal is set aside.

3. The appellant is granted authority to dismiss the respondent in terms of the conditions on which she was suspended.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Honey & Blackenburg, appellant legal practitioners

Kantor & Immerman, respondent's legal practitioners