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Judgment No. SC 85/06
Civil Appeal No. 66/06

ZIMBABWE REVENUE AUTHORITY v LINDIWE MPINDIWA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & GWAUNZA JA
HARARE, OCTOBER 30, 2006 & JULY 17, 2007

*P Machaya*, for the appellant

*J Ndlovu*, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Court in terms of which the appellant ("Zimra") was ordered to reinstate the respondent ("Lindiwe") as its librarian, or pay her damages in lieu of reinstatement.

The factual background is as follows. At the relevant time Lindiwe was employed by Zimra as a librarian. On 29 July 2005 she was charged with two acts of misconduct in terms of Zimra's Code of Conduct ("the Code"). The details of the alleged acts of misconduct are not necessary for the determination of this appeal.

Subsequently, on 2 August 2005 Lindiwe appeared before Zimra's disciplinary and grievance committee for a hearing on the misconduct charges. After the

hearing, she was found guilty of both charges, and her employment contract was terminated with effect from 4 August 2005.

Dissatisfied with that result, Lindiwe appealed to the appeals committee on 6 August 2005, challenging both convictions.

Thereafter, the appeal was set down for hearing on 18 August 2005. However, on that date it was postponed to 19 August 2005 because certain relevant documents had not been placed before the appeals committee.

On 19 August 2005 the hearing of the appeal was again postponed, because one of the members of the appeals committee was not present.

However, the appeal was finally heard on 26 and 29 August 2005. What happened at the end of the hearing conducted on 29 August 2005 is indicated by the record of the hearing as follows:

> "The committee adjourned at 19.30 hrs and agreed to have minutes of the proceedings typed and later come up with a final overall verdict."

After the appeal had been heard, the chairman of the appeals committee ("the chairman") wrote a letter to Zimra's human resources manager on 7 September 2005. The relevant part of the letter reads as follows:

> "The committee did not reach a consensus on the various issues under consideration in this case. …

> From the deliberations of the appeals committee, I recommend that the verdict passed by the disciplinary and grievance committee be upheld … .”

Six days later, on 13 September 2005, the chairman wrote another letter to Lindiwe. The letter, in relevant part, reads as follows:

> “I refer to the decision that is addressed to the human resources manager that was also sent to you dated 7 September 2005, informing you about the outcome of your appeal.
>
> For the avoidance of doubt, this is to advise that after the committee deliberated over the matter, I, as the chairman, have found no reason to interfere with the decision of the disciplinary and grievance committee.
>
> This means that you remain dismissed. In terms of the Code of Conduct you have a right to appeal against this decision to the Labour Court.”

Thereafter, Lindiwe appealed to the Labour Court. That court found that the appeals committee had not determined Lindiwe’s appeal. It then proceeded to determine the appeal which ought to have been determined by the appeals committee. It set aside the decision of the disciplinary and grievance committee, and ordered Zimra to reinstate Lindiwe as its librarian or pay her damages in lieu of reinstatement.

Aggrieved by that decision, Zimra appealed to this Court.

In my view, there are two issues for determination in this appeal. The first is whether the appeals committee determined Lindiwe’s appeal, and the second is whether it was proper for the Labour Court to determine Lindiwe’s appeal which ought to have been determined by the appeals committee.

With regard to the first issue, there is no doubt in my mind that the appeals committee did not determine Lindiwe's appeal. I say so for three reasons.

The first reason is that there is no evidence in the record before this Court that after the appeals committee adjourned on 29 August 2005 it ever reconvened and reached a verdict on Lindiwe's appeal.

The second reason is that in his letter to the human resources manager, dated 7 September 2005, the chairman stated that the appeals committee had not reached a consensus on the issues it had considered, and that he was, therefore, recommending that the verdict of the disciplinary and grievance committee be upheld.

And the third reason is that in his letter to Lindiwe, dated 13 September 2005, the chairman said the following, *inter alia*:

> "For the avoidance of doubt, this is to advise that after the committee deliberated over the matter, I, as the chairman, have found no reason to interfere with the decision of the disciplinary and grievance committee. …"

It is quite clear from this extract that the decision communicated to Lindiwe was that of the chairman, and not that of the appeals committee.

As the chairman had no authority to decide the appeal on behalf of the appeals committee, his decision was null and void, and of no force and effect. There

was, therefore, no decision or determination against which Lindiwe could have appealed to the Labour Court. That is significant because the existence of a decision, determination, judgment or order is a prerequisite to the noting of an appeal. Consequently, Lindiwe's appeal was premature and was not, therefore, properly before the Labour Court. On that basis alone it should have been struck off the roll.

Although the conclusion I have reached in respect of the first issue in this appeal effectively disposes of the appeal, I will consider the second issue, which is whether it was competent and proper for the Labour Court to determine Lindiwe's appeal which should have been determined by the appeals committee. There is no doubt in my mind that it was not.

In determining the appeal which should have been determined by the appeals committee, the learned Senior President of the Labour Court relied upon what McNALLY JA said in *Dalny Mine v Banda* 1999 (1) ZLR 220 (S). At 221 B-F the learned JUDGE OF APPEAL said:

> "As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:
>
> (a) by remitting the matter for hearing *de novo* and in a procedurally correct manner;
>
> (b) by the Tribunal hearing the evidence *de novo*.
>
> In regard to the first of these alternatives, this Court has previously said that:

> 'The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.'

See *Air Zimbabwe Corp v Mlambo* 1997 (1) ZLR 220 (S) at 223F, and s 101(8) of the Act.

In regard to the second alternative, I draw attention to the words in the above extract: 'and that it cannot come to a conclusion on the merits'. There used to be many cases in which the record of evidence was so scanty that it was virtually impossible to come to a conclusion on the record. I commented on this in *Sirdar's Manufacturers (Pvt) Ltd v Chinya* 1995 (1) ZLR 368 (S) at 370F *et seq*. I noted there that the Tribunal has the power to hear evidence in terms of s 106(6) of the Act as amended (now s 90(6) of *Chapter 28:01*). See also s 18(1) of SI 30 of 1993. It may also be pointed out that in terms of s 97(4) (a) and (b) of the Act, the Tribunal has a choice (to be exercised, of course, judicially) either to 'proceed with the appeal by way of a hearing' or to 'decide the appeal on the record'."

However, the facts of that case were very different from the facts of the present case. The facts were summarised by McNALLY JA at 220F-221B as follows:

> "The facts are, briefly, that Banda was suspended from his job as a cardex clerk at the mine on 16 December 1992. At a hearing the previous day he had been found guilty of 'failure to follow established procedures'. He appealed, in terms of the relevant Code of Conduct (SI 165 of 1992), to the Mine Manager. The Mine Manager dismissed him on 30 December 1992, having offered an alternative of demotion which was refused.
>
> Banda then appealed, in terms of Part D, s 3(e) of the Code, to the labour relations authorities, and his appeal was heard and dismissed by a senior labour relations officer on 1 February 1993. He then appealed to the Labour Relations Tribunal (the Tribunal). His hearing in that forum extended from 30 November 1995 to 5 November 1996, 20 February 1997 and 7 May 1997.
>
> The decision of the Tribunal was based on three procedural points taken by the Tribunal *mero motu* and *in limine*. Because it found fatal procedural defects in the procedure, the Tribunal 'considered it proper to uphold the appellant's (Banda's) appeal without going into the merits'. Accordingly, it ordered his reinstatement with an alternative of damages."

In my view, it is clear from the above facts that there is at least one fundamental difference between *Banda's* case *supra* and the present case. The difference is that whereas in *Banda's* case *supra* Banda's appeals to the Mine Manager and the senior labour relations officer were dismissed, and therefore determined, Lindiwe's appeal to the appeals committee was never determined by that committee. Banda's appeal to the Tribunal was, therefore, properly before the Tribunal, whereas Lindiwe's appeal to the Labour Court was not properly before that court, and should not have been heard. What McNALLY JA said in *Banda's* case *supra* does not, therefore, apply to the present case.

It seems to me that instead of appealing against a non-existent determination of the appeals committee Lindiwe should have sought a court order compelling the appeals committee to determine her appeal. This she can still do, because the appeals committee has not yet determined her appeal.

The appeal before this Court must, therefore, succeed. However, as far as the costs in the court *a quo* and in this Court are concerned, in view of the fact that Lindiwe was represented by the Legal Aid Directorate, there will be no order as to costs.

In the circumstances, the following order is made –

1. The appeal is allowed with no order as to costs.

2. The order of the court *a quo* is set aside, and the following is substituted –

"The matter is struck off the roll, with no order as to costs."

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Legal Aid Directorate*, respondent's legal practitioners