REPORTABLE (45)

Judgment No. SC 47/07
Civil Appeal No. 319/05

PASSMORE MALIMANJANI v

CENTRAL AFRICA BUILDING SOCIETY (CABS)

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, SEPTEMBER 3, 2007

L Mazonde, for the appellant

H Zhou, for the respondent

GWAUNZA JA: At the hearing of this appeal, counsel for the appellant conceded that he had no meaningful submissions to make on behalf of the appellant. Counsel for the respondent then moved for the dismissal of the appeal with costs. This Court thereupon dismissed the appeal with costs and indicated that the reasons would follow. These are they.

The facts of the matter are as follows. The appellant was employed as a bank teller by the respondent. On 31 March 2003 he recorded a shortfall of $50 000.00 and made a report to his superiors. A few days later, the appellant reimbursed the sum of $50 000.00. He, however, lied to his superiors that he had recovered the money from a client whom he had overpaid. In reality he had paid the money from his own resources.

The appellant was subsequently charged with the misconduct of "unsatisfactory work performance", was found guilty and dismissed from his employment. His successive appeals to the Local Joint Committee, the Negotiating Committee and the Labour Court were unsuccessful. He has now appealed to this Court.

The court *a quo* found that the appellant, having acted dishonestly, had performed his duties in an unsatisfactory manner and was therefore properly dismissed. The court *a quo* noted as follows at p 4 of its cyclostyled judgment (Judgment No. LC/H/104/2005):

> "He (the appellant) acted dishonestly. He performed his duties in an unsatisfactory manner in that he sought to mislead the employer as to how he had incurred the shortfall and further as to how he had recovered the shortfall. Performing your duties in a dishonest manner is clearly unsatisfactory work performance."

The appellant takes issue with the decision of the court *a quo* on a number of grounds.

Firstly, the appellant seeks to argue that the court *a quo* erred in holding that by lying about the source of the refund, he had committed an act of dishonesty as contemplated by s 5 to PART IV Offences of the respondent's Code of Conduct ("the Code"). He contends that under the Code dishonesty and unsatisfactory work performance are listed separately and, by definition, did not cover the type of conduct that led to misconduct charges being preferred against him.

I do not find any merit in these contentions. The appellant does not deny that he lied, firstly by saying that the shortfall was occasioned by an overpayment made to a client, and secondly by stating that the same client had provided the refund. These are by any definition serious offences. As correctly contended for the respondent, in a financial institution, such as the respondent, integrity and honesty are fundamental attributes forming an integral part of the employee's performance of his work.

The respondent's Code makes it clear that such conduct as unsatisfactory performance of work and dishonesty are dismissible offences. Details of conduct that would constitute such offences must be viewed in the light of being examples. They could not possibly have been meant to be exhaustive. Viewing them as exhaustive would result in the ridiculous situation where someone who commits an offence that in the ordinary sense would constitute the conduct in question, e.g. dishonesty, would walk free simply because the specific offence was not listed as an offence. That could not have been the intention of the drafters of the Code, who, in general, are not schooled in the law.

The conduct with which the appellant was charged constituted dishonesty and unsatisfactory performance of his work, if the ordinary meaning of those words is to be applied. The court *a quo* was alive to this interpretation and noted as follows at p 3 of its cyclostyled judgment:

> "The Labour Court is a court of equity concerned, not with the formalities and technicalities of the legal profession, but with achieving just and equitable resolution of disputes between the parties."

Earlier on, the learned President of the Labour Court had observed, again correctly, as follows at p 3 of its cyclostyled judgment:

> "The Supreme Court has stated in *Coh Coh Enterprises v Mativenga and Anor* SC 30/2001 that one cannot strictly interpret the provisions of the Code or restrict it to what the lay persons stated. It would not be in the interest of justice to find that an admitted act of dishonesty is not covered in the Code because the drafters shoddily drafted the offences."

These passages being apposite to the circumstances of this case, I am satisfied the appellant was properly charged, "convicted" and dismissed from his employment.

Secondly, the appellant takes issue with the court *a quo's* finding that the penalty of dismissal was properly imposed. He contends that the court *a quo* erred in not considering the imposition of other alternative forms of punishment besides dismissal.

The issue of what punishment to impose after an employee is found guilty of an act of misconduct is clearly one of discretion. The respondent's Code emphasises this in para 3.4 of its Part I, which reads as follows:

> "3.4 The penalties to be imposed for each offence are specified in Part IV and Part V. Part V applies to the Private Security Sector only. However, an employer may apply a lesser penalty <u>at his discretion</u>." (my emphasis)

It is trite that an appeal court does not interfere with the exercise of discretion by a lower tribunal unless it is shown that the discretion was improperly

exercised. As contended for the respondent, the penalty imposed must show a serious misdirection to justify interference by the appeal court. The misconduct with which the appellant was charged attracts the penalty of dismissal. There is nothing in the manner in which the proceedings were conducted, and the evidence against him considered, to suggest any misdirection on the part of the employer.

The court *a quo* was therefore correct in upholding the decision to dismiss the appellant from his employment.

In the light of the foregoing, we were satisfied the appeal had no merit, hence we dismissed it with costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners