REPORTABLE ZLR (44)

Judgment No. SC 48/09
Civil Appeal No. 89/08

HALWICK INVESTMENTS t/a WHELSON TRANSPORT v GARAI STEPHEN NYAMWANZA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, OCTOBER 6, 2008 & NOVEMBER 19, 2009

A Mugandiwa, for the appellant

Respondent in person

GARWE JA: This is an appeal against the decision of the Labour Court setting aside the proceedings of a disciplinary committee constituted by the appellant and remitting the matter for a rehearing before a different panel.

The background leading to the institution of disciplinary proceedings against the respondent is common cause. The respondent was employed by the appellant as a driver. At the time the incident giving rise to the disciplinary proceedings took place, he was driving a truck belonging to the appellant carrying fertilizer destined for Zambia. There were also a number of other trucks belonging to the appellant carrying fertilizer to Zambia. At Chirundu Border post there was a delay in clearing the truck as one bill of entry was missing. The respondent then telephoned a Chief Superintendent Mandipaka of the Zimbabwe Republic Police and made a report to the effect that the appellant's clearing agents were smuggling fertilizer out of Zimbabwe. As a result of

that report some sixteen trucks, some belonging to the appellant, were delayed at the border post whilst the police investigated the report made by the respondent.

Upon full investigation, however, the missing bill of entry was found and it was established that there was no intention on the part of the respondent or its agent to smuggle the fertilizer out of the country. The appellant's clearing agent thereafter wrote a letter of protest to the appellant highlighting the inconvenience caused by the report and the expenses which the company had been forced to incur to have the matter resolved.

Against that background the appellant instituted disciplinary proceedings against the respondent on a number of allegations of misconduct. The disciplinary committee found the respondent guilty of misconduct and determined that his employment be terminated with effect from 14 December 2005. The respondent appealed to the appellant's Managing Director who by letter dated 23 December 2005 upheld the decision of the disciplinary committee. On 30 December 2005 the respondent filed a notice of appeal with the Labour Court, Harare, seeking a review of the proceedings. On 3 January 2006, however, the respondent and the appellant executed a document that read as follows:

> "I, NYAMWANZA G S, in my capacity as Driver being duly authorized hereto, hereby confirm that I have on this 03/01/06 day of Jan 2006 accepted from WHELSON TRANSPORT the sum of $15 168 014 179.00 in full and final settlement of my/our claim/entitlement arising out of Terminal Benefits and I confirm that my/our acceptance of the aforesaid amount determines finally my/our claim and that I/we have no future/retrospective claims against WHELSON TRANSPORT of any nature whatsoever, including interest costs, collection commission arising out of the subject matter aforesaid, or otherwise.

> I therefore do hereby sign as acknowledgement and in agreement with the above without alterations or cancellations."

The document was signed by the respondent.

Notwithstanding the above document, the respondent proceeded with his appeal before the Labour Court. He sought a review of the proceedings before the disciplinary committee on three grounds. These were firstly that his senior, a Mr Ndoro, played the dual role of chairperson of the disciplinary committee and witness during the disciplinary hearing, secondly that no hearing actually took place and thirdly that he was not given the opportunity to be heard.

In its submission before the Labour Court, the appellant raised two issues. These were firstly that having executed the document dated 3 January 2006, the respondent waived any rights he may have had to challenge the decision to dismiss him whether by way of appeal or review. Secondly, that the respondent had not established good legal ground for setting aside the dismissal.

The court *a quo* did not consider the issue of waiver raised. It only dealt with the question of procedural irregularity.

In determining that there had been a procedural irregularity and that the matter be remitted for a hearing, the Labour Court remarked:

"In this case there was a serious procedural irregularity in that the Chairman of the Committee was the witness. He led evidence from the bench. Obviously there was a real risk of bias in the findings by the Committee. However, from the facts of the matter which are follows: Appellant was employed as a driver with the respondent. On the day in question appellant was driving one of the respondent's trucks ferrying fertilizers to Zambia. When the appellant got to Chirundu Border Post and had found that one bill of entry form was missing he phoned the police and advised that respondent was smuggling fertilizers outside the country. As a result of the report 16 trucks belonging to respondent were delayed at the border whilst the police were carrying on investigations. Respondent lost time and money. The investigations revealed the report was false. The appellant was charged and dismissed from employment. Since the facts are common cause to some extent I will not order reinstatement of the appellant as he clearly has a case to answer."

The appellant attacks the decision of the Labour Court on four grounds. These are:-

1. That the Labour Court misdirected itself by not dealing with the defence of waiver raised by the appellant.

2. The Labour Court misdirected itself by coming to the conclusion that the rules of natural justice were violated in that the chairman of the disciplinary committee was both the chairman and the only witness.

3. The Labour Court misdirected itself by disposing of the matter on a technicality when it was possible for it to dispose of the same on the merits on the available evidence.

4. The Labour Court misdirected itself by finding that there was a real risk of bias in the findings of the disciplinary committee.

I proceed to deal with the issue of waiver which is the first ground of appeal raised by the appellant. Reference has already been made to the document signed by the respondent in which he accepted payment of a sum of money in full and final settlement of all his claims and in which he confirmed that his acceptance of the money finally determined any claim he may have had of any nature whatsoever.

In its heads of argument before the court *a quo*, the appellant specifically raised the issue of waiver. It was the appellant's contention that by entering into the above agreement the respondent had waived his right to appeal or to take on review the termination of his employment. The appellant had further contended that the ordinary grammatical meaning of the agreement was that the respondent had made an undertaking that the execution of the agreement determined finally any claims of any nature whatsoever.

Despite the fact that the issue had been raised, the court *a quo* did not consider it at all and made no reference to the submission in its judgment. This, in my view, was a misdirection. I would agree with the appellant that the failure to deal with a defence raised by one of the parties amounts to a failure to hear and determine the matter according to law.

The question that necessarily arises at this stage is how the misdirection should be corrected. The appellant has suggested that, since the facts are common cause and all that needs to be done is to determine whether on the facts waiver was established,

this Court should itself determine the matter since all that is involved is the construction of a contract. Unfortunately this branch of the law is not as clear as the appellant would seem to suggest.

The position is now settled that it is not permissible for an appellate Court to interfere with the discretionary power vested in a lower court unless it is shown that the lower court had committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision – the *Civil Practice of the Supreme Court of South Africa* by *Herbstein & Van Winsen* 4 ed at p 918. In the case of *Johnsen v AFC* 1995(1) ZLR 65(S), 73B-C. GUBBAY CJ, further clarified the position when he remarked as follows at p 78B-E:

> "… clearly a distinction was drawn between the position of an appellate court where, on the one hand, the court of first instance had not exercised a judicial discretion at all, and, on the other, where it had exercised the discretion, but wrongly. In the latter occurrence, the appellate court is not inhibited from setting aside the original discretion. It must examine anew the relevant facts and circumstances in order to exercise a discretion itself by way of review, which may uphold, reverse or vary, the order made by the court below. In re J (an infant) 1981(2) SA 330(Z) at 335D-E, I ventured to state the principle, as I understood it, thus:
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> > "If the (primary) court erred in the exercise of its discretion, and as all the facts relevant thereto are undisputed, this Court is now free to exercise its own discretion… If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it makes mistakes of fact, if it does not take into account some material consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for doing so."

In the *Johnsen v AFC case* (*supra*) the appellant had sought an order declaring *inter alia* that the AFC was not entitled to recover any amount claimed to be due in respect of an escalation of expense, however caused, of the equipment for the purchase of which the loans were granted. The learned Judge who heard the application was of the view that this was not a proper case for the grant of a declaratory order because firstly what was sought was a legal opinion from the Court, secondly that such relief if granted would not bring litigation between the parties to finality and thirdly that there was an alternative remedy by way of an interdict.

This Court rejected that finding and came to the conclusion that the omission of the court *a quo* to have regard to the terms of the agreement of loan as a factor to be weighed in the exercise of its judicial discretion constituted a misdirection. This Court remarked at p 76G-H:

> "In my view, the failure by the court *a quo* to construe the agreement of loan caused it to overlook that a *declarator*, though not necessarily ending all litigation over the issue of liability between these parties, nonetheless would have achieved finality on the applicability of the summary execution procedures. …"

This Court then decided to exercise its judicial discretion since the same materials that were before the court *a quo* were also before it.

The position was also aptly summarized by STEGMANN J in *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & Anor* 1989 (4) SA 31, at 40A-J when he stated:

"1. There is no rule of law to the effect that in every appeal against the exercise of any discretionary power vested in court of first instance the Court of appeal has no jurisdiction to interfere with the decision appealed against unless such decision is shown to have been unjudicial in one of the respects mentioned in *Ex parte Neethling and Others* 1951 (4) SA 331(A) at 335D-E.

2. In an appeal against the exercise of a discretionary power by a court of first instance, the first task of the Court of appeal is to examine the nature of the discretionary power, and to decide whether it belongs to the category of discretionary powers contemplated by the decision in *Ex parte Neethling and Others*.

3. If the power is found to belong to such category, the Court of appeal has no jurisdiction to interfere with the exercise of the power decided on by the court of first instance unless such decision is shown to have been unjudicial in one of the respects mentioned in *Ex parte Neethling and Others*, ie that such decision was capricious, that it was based on a wrong principle, that it was not reached by unbiased judgment, or that it was not based on substantial reasons.

4. If the discretionary power is not found to belong to such category, the Court of appeal must decide to what category it does belong. One possibility is that it may be found to belong to the same category as the discretionary power in *Mahomed v Kazi's Agencies (Pty) Ltd and Others* 1949 (1) SA 1162 (N).

5. If the power is found to belong to the last-mentioned category, the function of the Court of appeal is to hear all such arguments as may be addressed on the basis of the record before it, and to give due consideration to the decision of the court of first instance.

6. In some cases it may be possible to conclude that the exercise of the discretionary power by the court below was 'wrong' in some sense other than the sense of 'unjudicial' contemplated by *Ex parte Neethling and Others*. However, discretionary powers being what they are, there is usually no objective criterion according to which the exercise of such power can be judged to be 'right' or 'wrong'. The criteria according to which it may be judged to be 'judicial' or 'unjudicial' are dealt with in *Ex parte Neethling and Others*. However, there are always criteria according to which the exercise of a discretionary power may be judged to be 'appropriate' or 'inappropriate'. Such criteria depend upon the circumstances of the particular case. In the very nature of things, therefore, when the subject-matter of an appeal is the exercise of a discretionary power of the kind referred to in para 5 above, the Court of appeal is not bound to uphold the decision of the court below unless satisfied that such decision was 'wrong'.

7. In an appeal against the exercise of such a discretionary power, the function of the Court of appeal is to consider whether, in the light of all relevant factors, the exercise of the power by the court of first instance was appropriate to the circumstances of the particular case. If it was, the appeal must fail. If it was not, the court of appeal must exercise the discretion anew, and must substitute its own discretion for the discretion of the court below."

I am satisfied that the authorities referred to above correctly reflect the law on this aspect.

There was a failure by the court *a quo* to determine an issue that had been properly raised by the appellant. The Court completely ignored the issue of waiver raised and proceeded to determine the matter on the basis of procedural impropriety. There was a failure by the court *a quo* to appreciate that the question of waiver could finally determine the issues between the parties, depending on the interpretation that would be given to the agreement reached between the two sides. The contents of the agreement are not in dispute. In these circumstances, I am satisfied that no purpose would be served by remitting this matter to the court *a quo* for it to place an interpretation on the contents of the agreement entered into between the two parties. Since the contents of the agreement are common cause, the only issue that arises is whether the facts establish waiver. It has never been suggested that the document was the result of duress, mistake or undue influence. I hold the view therefore that this Court can properly determine the issue without the need to remit the matter to the court *a quo*.

The issue that arises as a result of the conclusion I have reached above is whether the respondent waived any rights he may have had to take this matter either on appeal or review. That question necessarily raises the question: What is waiver?

> "When one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights under the contract we select whichever word seems most appropriate from a list which includes abandonment, acquiescence, release, renunciation, surrender and waiver. Of these words by far the most commonly used is waiver, which is regarded in many of the cases as interchangeable with any of the other words…"

– See RH Christie, *The Law of contract in South Africa*, 3 ed at p 495-6. The law is also settled that there is a presumption against waiver and that it must be clearly proved that the person who is alleged to have waived his rights knew what those rights were.

The respondent in this case was fully aware of the dispute between him and the appellant. He had filed a notice of appeal with the Labour Court seeking the review of the disciplinary proceedings. About four days after doing so he then signed the document, part of the subject of this appeal. In that document he acknowledges receipt of a sum of money in full and final settlement of any claims he may have had against the appellant. In the document he further confirms that his acceptance of the amount determines finally his claim and that he has no future or retrospective claims against the appellant of any nature whatsoever.

Clearly the respondent accepted payment of a sum of money in full and final settlement of any claims he may have had against the appellant. That meant that as at that date he had waived any right of action he may have had to challenge his dismissal.

Having entered into this agreement he no longer had any rights to pursue. His decision to proceed with the appeal thereafter can only be described as dishonest.

I am satisfied in all the circumstances that the respondent waived any rights he may have had against the appellant who was his employer. The appellant's submission in this regard must therefore succeed.

In the light of the above conclusion, it becomes unnecessary to consider and determine the other grounds of appeal raised.

The appeal must therefore succeed.

It is accordingly ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the Labour Court is set aside and in its place the following is substituted:

"The appeal is dismissed with costs."

SANDURA JA: I agree

ZIYAMBI JA: I agree

Wintertons, appellant's legal practitioners