REPORTABLE (30)

ZINWA
v
JOSEPH MWOYOUNOTSVA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & HLATSHWAYO JA
HARARE, JUNE 5, 2014 & JUNE 23, 2015

J Dondo, for the appellant

The respondent in person

ZIYAMBI JA

[1] This is an appeal from a judgment of the Labour Court (KACHAMBWA P) which upheld an arbitral ward against the appellant. It is the appellant's contention that the Arbitrator sitting as an appeal court erred in law when it interfered with findings of fact made by the Disciplinary Committee of the appellant and that the Labour Court similarly erred in upholding the award.

THE BACKGROUND TO THE APPEAL

[2] The respondent was employed by the appellant (alternatively referred to as "the Authority") as an accountant. On 5 January 2011 he appeared before a disciplinary hearing of the appellant on two charges of misconduct, the first being that he had committed an act or conduct inconsistent with the terms of his contract of employment as provided in s 4 (a) of

the Labour Employment Code of Conduct; and the second being a violation of s 4(d) of the Code: theft or fraud. The charges arose from the following events.

[3] On 29 May 2009, as part of his conditions of employment, the respondent signed a document entitled: ZIMBABWE NATIONAL WATER AUTHORITY: CONDITIONS OF USE OF AUTHORITY VEHICLES. Of relevance are the following clauses:

> Clause 3: The vehicle shall not be used after 19.00hours during weekdays, during weekends and holidays except while on official duty for which written approval will have been issued by my Head of Catchment Department.
>
> Clause 9.0: I will not tamper with or attempt to have the vehicle that has been involved in an accident repaired without the prior consent of management.
>
> Clause 10: Any breach of these Conditions of use of an authority vehicle will constitute a breach of my contract of employment which may lead to such disciplinary action as the offence warrants.

[4] It is common cause that the respondent went to his rural home on Saturday 13 November 2010, driving a vehicle (AAA 0773), owned by the appellant. The record does not indicate whether written approval was obtained but nothing was made of it in the disciplinary proceedings.

[5] The vehicle being driven by the respondent, broke down a few kilometers from his destination, upon which he called for assistance from two of the Authority employees who proceeded to tow the vehicle. During the towing process, the rope broke causing the two vehicles to ram into each other. On his return on Sunday 14 November 2010, he gave instructions to the employees assisting him, that the vehicle be taken to Surprise Panel Beaters, for repairs.

[6] It was alleged that the respondent did so in the full knowledge that only the hearing committee or management could take a decision to send for repairs an Authority vehicle involved in an accident. Even then, the requirement was that there must be three quotations from the prospective panel beaters before such a decision could be taken. Further, his abuse of authority as an accountant caused the drivers of the two vehicles to disobey clause 9.0 of the Conditions of use of Authority vehicles as set out above.

[7] In addition, in his accident report to the Catchment Manager, he gave a false report, namely, that one of the vehicles ABA 7366 had incurred minor damage yet internal investigations revealed that the two doors of this vehicle were interchanged with those from vehicle AAA 0773 (the vehicle driven by the respondent) and that vehicle number ABA 7366 was spray painted to match the colours of the foreign doors with the vehicle body.

[8] Regarding the second charge, it was alleged that he deliberately sent an Authority vehicle, registration number AAM 8967, to Surprise Panel Beaters for bodywork and re-spray without proper authorization 'as evidenced by the following papers on record', namely:-

"

- Internal purchase requisition number 10 090 dated 10/11/10 sought quotations for the "bodywork and re-spray" to vehicle AAM 8967 which resulted in the responses from the three companies below:
- Quotation number 0000462 from Surprise Panel Beaters for US$350 was dated 9/11/10.
- Quotation number 00423 from Cagon Engineering for US$650 dated 09/11/10.
- Quotation number 001228 from Perfect Panel Beaters & Spray Painters for US$1 138.50 with a dated 9/11/10.

The dates on the three quotations were all altered to read 10/11/10 to synchronize with the date on the internal purchase requisition purchase number 10 090.

- Comparative Schedule numbered 07702 was regularized by the Acting Catchment Manager on the 15/11/10 to facilitate payment of US$350 only to Surprise Panel Beaters.
- You passed for payment Invoice number 0000483 from Surprise Panel dated 18/11/10 with an amount of US$650 contrary to the figure on the comparative schedule 07702. The Authority could have (been) prejudiced with an amount of US$300 for a service that was not rendered.
- As the Catchment Accountant, you seriously breached the trust bestowed on you by Management when you altered the schedule. Such action now makes it difficult for Management to trust you to handle Catchment financial matters."

[9] The respondent was represented by a legal practitioner at the hearing. He denied both charges but was found guilty as charged and dismissed. Thereafter, internal appeals having failed to exonerate him, the matter ended before an Arbitrator who stated his terms of reference to be:

> "To look into the substantive fairness of the dismissal" of the respondent from the appellant's employ.

[10] The record contains no information as to how the matter ended up before the arbitrator. Part of the award reads:

> "Appellant was dismissed and a penalty of dismissal meted out. Dissatisfied he appealed to the respondent's Appeals Officer. His appeal was dismissed on 1 February 2011. The appellant then appealed to the Labour Court in error but only had to be referred to this Tribunal by the Registrar of the Labour Court… His grounds of appeal before me are as follows …"

In terms of the Labour Act[1] [*Chapter 28:*01] the matter could have come to the Arbitrator as a dispute referred either by a Labour Officer for compulsory arbitration in terms of s 93; or by the Labour Court in terms of s 89. Neither of the two sections refers to appeals to an Arbitrator.

[1] [Chapter 28:01]

[11] The Arbitrator proceeded to determine the matter as an appeal. Before him, the respondent's 'grounds of appeal' were, as to the first charge,:

a) That he had authority as part of management to direct the vehicles to be sent to Supreme Panel Beaters and have them repaired:

b) That item no. 9.0 of the conditions of use of Authority vehicle did not apply to him in this case since he was not driving the vehicles. It only applied to the mechanics who were driving the vehicles that got involved in an accident.

c) Regarding the tender procedure he is alleged to have flouted, there are exceptional situations in which discretions (sic) were used to procure services for the Authority. He submitted that a situation such as this one has been treated in the same way for countless times with no adverse consequences.

Regarding the second charge,:

d) That all the appropriate documentation supporting the transactions were available;

e) That the alleged offence was discovered only through documents that had been sent to the Catchment manager for seeking approval and authorization. Therefore it was improper to charge him with an offence which had not materialized.

f) That the alteration of dates on the quotations was done at the instance of the catchment manager who had insisted on it (being) done to enable him to process the transaction. He approved it thereafter".

These 'grounds of appeal' formed the basis of his submissions. They found favour with the Arbitrator.

[12] The Arbitrator heard no evidence but relied on that contained in the record of disciplinary proceedings before the appellant. In respect of the first charge, he concluded, that the respondent, being an accountant, was a part of management and as such had a discretion

to make decisions that help the authority; that the respondent's action was reasonable in that he had to use his discretion to make decisions that help the Authority; and that the vehicle which had been sent for repairs was a utility vehicle which needed immediate attention.

With regard to clause 9.0 of the Authority's Conditions of Use of Authority vehicles, since the respondent was not the driver of any of the vehicles, he had the authority as part of management to send the vehicles for repairs. He was "of the informed view" that there was no exclusive way of securing services to the appellant and the respondent had used his discretion 'to elect from the many ways accepted in the organization to secure service for the vehicles in this matter…'

[13] Regarding the second charge, he found no evidence to support a charge of theft or fraud. He upheld the appeal, set aside the findings made by the domestic tribunals and ordered the reinstatement of the respondent.

[14] Aggrieved by the Arbitrator's award, the appellant appealed, unsuccessfully, to the Labour Court contending, in the main, that the Arbitrator had no jurisdiction to set aside the factual findings of the lower tribunals.

THE APPEAL

[15] The main issue to be decided in this appeal is whether the

Labour Court was wrong in law to uphold the award of the Arbitrator in quashing the findings of the disciplinary committee as confirmed by the Appeals officer. A resolution of this issue depends on a determination as to the whether or not the Arbitrator, sitting as an appeal Court, could set aside findings of fact made by the lower tribunal.

[16] It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it[2]: or that the decision was clearly wrong.

[17] Although the background of the matter is unclear, I proceed from the premise that the Arbitrator sat as an appellate tribunal. In that capacity he could not set aside findings of fact made by the disciplinary tribunal unless such findings were so irrational that no reasonable tribunal applying its mind to the same facts would arrive at the conclusion that it did. There was no such finding by the Arbitrator or the Labour Court. The Arbitrator's action in this regard constitutes an error of law and the Labour Court fell into the same error. In upholding the award it said:

> "Even the Arbitrator sitting as an appeal tribunal, it cannot be said that the award was misplaced. It is accepted that an appellate tribunal/court does not lightly interfere with the decision of a lower court but it appears that this is a proper case for interfering."

It gave no explanation as to the reason for the interference. In the absence of a finding by the Arbitrator of irrationality on the part of the Disciplinary Committee, the Labour Court erred in law in upholding the award.

[18] The Disciplinary Committee made the following factual findings:

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[2] Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670; METALLON GOLD ZIMBABWE v GOLDEN MILLION (PRIVATE) LIMITED SC 12/2015.

> "The vehicles were towed past the Zinwa premises to the panel beaters on the respondent's instructions.
> The respondent gave verbal instructions to the panel beaters to commence work on the Authority vehicles without following up with immediate documentation.
>
> No requisitions were raised for urgent repairs in respect of the vehicles nor were quotations sought from Surprise Panel Beaters or any other service provider in that connection.
>
> The respondent agreed that he was aware of the appellant's tender procedures but chose to ignore them.
>
> The respondent showed no signs of remorse and indicated that he would do the same thing again if he found himself in the same circumstances."

These findings by the committee are supported by the evidence on record. In addition, the respondent admitted that he deliberately chose to flout the Authority's service procurement procedures on the grounds that he, as part of management, could use his discretion to act in the Authority's interests. On these facts the committee's conclusion that the respondent committed an act inconsistent with the express or implied conditions of his employment was, in my view, unavoidable.

[19] The respondent was the accountant of the Authority, employed to safeguard its finances. A high degree of integrity was expected of him. The evidence showed that he ignored all procedures put in place by the appellant for the very purpose of safeguarding its finances and brazenly told the committee that he would repeat that performance if he was retained in that position as an accountant. The evidence also revealed that the respondent did not obtain the approval of the leader of the management team, one Juma, although he spoke to him after the accident. His actions are those of someone who had something to conceal.

[20] The finding by the Arbitrator that there was no exclusive way of ordering services went contrary to the evidence. It was repeatedly put to the respondent at the hearing before the disciplinary committee that his actions ran contrary to established procedures in the company.

[21] There is no reason apparent on the record as to why the respondent did not obtain verbal approval from Juma. If, as he repeatedly said, he was also part of management, since this was a matter concerning an accident in which he was involved, the prudent course would have been to wait for the following day to obtain the proper approval. If the matter was so urgent that action had to be taken on a Sunday he ought to have obtained verbal approval from Juma when he had an opportunity to do so and before ordering the vehicle to be repaired in apparent violation of the Authority's rules. The evidence revealed that he saw Juma shortly after his return and advised him of the accident. He was asked at the hearing why he felt constrained to send the vehicle for repairs on a Sunday to which he replied that the company was short of vehicles. In my view, this presented all the more reason for urgent consultation with Juma on the matter.

[22] Surprise Panel Beaters is apparently located beyond the appellant's premises. The respondent caused the vehicles to be towed past the appellant's premises on the way to Surprise Panel Beaters. When asked why he did not have the vehicles moved onto the appellant's premises, he gave the reply that he was considering the company's need for vehicles. Since there was no indication that the vehicles were going to be repaired that night, it was not established how his unholy haste in towing the vehicles to Surprise Panel Beaters on a Sunday would benefit the appellant. In any event, going by the

Authority's procedures, the vehicles would have had to await a go-ahead from the Management of the appellant after quotations had been obtained in accordance with the Authority's accounting procedures.

[23] When the facts are examined, it becomes evident that the respondent, by sending the vehicles for repairs, was himself in breach of clause 9.0 of the Conditions of use of the Authority's vehicles. There is no provision, in the document which he signed, that this clause would only apply if he was the driver of the vehicle. He caused the vehicles to be driven to Surprise Panel Beaters and gave instructions for their repair without following laid down procedures and without seeking approval. Surprise Panel Beaters were the very ones whom he attempted to pay an extra $300.00 without supporting invoices and for no work done. (This is the subject of the second charge). I find no irrationality in the factual findings made by the Committee or in its approach.

[24] Regarding the second charge, the factual findings by the

Committee were that:

> "The respondent authorized an increase in a service value without supporting documentation, namely, a requisition, comparative schedule and order.
>
> There was no evidence on the invoice to show that an additional service was requested; and there was no proper documentation to support an extra payment even if that were genuine.
>
> The respondent had admitted to instructing his subordinates to process payment of an extra charge without the Catchment Manager's authority.
>
> There was no indication on the invoice that it was an advance payment.
>
> The respondent agreed that he was aware of the tender procedures but he chose to ignore them.
>
> By so doing the respondent showed utter contempt for Authority procedures.

> The respondent authorized payment for a service that was neither requested nor provided.
>
> That the respondent was grossly incompetent, in that he processed a 'lot of papers' without documentation."

And in passing verdict the Committee said:

> "After a thorough scrutiny of the circumstances surrounding all the documentary evidence the committee regretfully noted that Mr Mwoyounotsva has no respect for the organization's policies and that he has utter contempt of the Authority. Furthermore, the panel sadly noted that because of his I know-everything attitude, it is difficult to make him follow authority policies and procedures. Despite him acknowledging that he was well aware of the appropriate procedures, Mr Mwoyounotsva deliberately chose to ignore them. The panel was convinced beyond reasonable doubt that Mr Mwoyounotsva was not trustworthy and unashamedly betrayed the trust bestowed upon him by the Authority. The last thing an Accountant would do, would be to deliberately authorize payment of anything without proper documentation, not to mention an attempt to temper(sic) with dates and figures. Mr Mwoyounotsva is therefore found guilty as charged."

In my view there was nothing irrational about this reasoning. If anything, it was sound and did not warrant interference by the Arbitrator. The Labour Court therefore erred in law in failing to find that the Arbitrator had acted improperly in interfering with the findings of the Committee which findings are supported by the evidence on record.

[25] I would observe, though, that while the Committee chairman explained the charge to be 'intention to defraud' the evidence would appear to support a charge of attempted theft or fraud. To obtain approval for payment of $350.00 and then to pass payment for $650.00 without an invoice or supporting document suggests dishonest behavior. This is more so because the respondent's duties as accountant for the Authority would necessarily involve strict accounting and payment procedures. In the absence of any allegation whatever by the respondent that he passed the payment in error, the Committee's

assessment of the evidence against him and their consequent verdict cannot be said to be irrational.

[26] If there was any irrationality displayed in this matter it was in the Arbitrator's acceptance of the respondent's claim that it was up to his Catchment Manager to detect the fact that the respondent had passed an overpayment to Surprise Panel Beaters.

[27] In any event, the conviction on the first charge carried with it the penalty of dismissal.

[28] For the above reasons, I conclude that the Labour Court erred in law when it upheld the award of the Arbitrator.

[29] Accordingly, the appeal is upheld with costs.

The judgment of the Labour Court is set aside and substituted with the following:

"1. The appeal is allowed with costs

2. The award of the Arbitrator is set aside

3. The dismissal of the respondent is hereby confirmed."

GWAUNZA JA: I agree

HLATSHWAYO JA: I agree

Dondo & Partners, appellant's legal practitioners