DISTRIBUTABLE (41)

ZB BANK
v
MARIA MASUNDA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & GUVAVA JA
HARARE, 23 MAY, 2014 & 1 NOVEMBER, 2016

T Mpofu, for the appellant

C Mucheche, for the respondent

GUVAVA JA: This is an appeal against a decision of the Labour Court dated 1 December 2011. The background to this matter may be summarized as follows:

The respondent was employed by the appellant as a Health Education Officer. In August 2007 the respondent approached her supervisor, a Mrs Chimhamhiwa, and advised her that they were overwhelmed at the clinic because of the growth of the group. During this period the respondent was granted permission to attend a training course in December 2007 until the end of the month at the Red Cross. In January 2008, on completion of the training respondent went on leave which was approved by the employer. Upon her return from leave the respondent wrote an email to Mrs Chimhamhiwa indicating that she required the assistance of a Clerk to clear, for reimbursement, all medical aid forms which had accumulated. In spite of the request no

additional personnel was appointed to the office of the respondent to assist with filing of the medical aid forms. The respondent did not indicate to her superior that the medical aid forms for reimbursement had not been filed as is required in terms of their laid down procedure. She merely indicated that there was pressure in her department and they were lagging behind.

A new manager was appointed in June 2008. She noticed that the medical aid forms had not been filed. She made a report and the respondent was charged with misconduct. She was charged with contravening s 10 (2) of the Code of Conduct for the Banking Undertaking Statutory Instrument 273 of 2000 for 'negligence causing substantial loss to the bank' and in the alternative, 'failure to comply with standing instructions or follow established procedure resulting in substantial loss to the Bank.' In terms of that code this offence was a category C offence which did not warrant a penalty of dismissal. At the end of the disciplinary hearing the respondent was found guilty of 'gross negligence' by not submitting CIMAS claims totaling ZW$623 trillion over the period December 2007 to May 2008. In terms of the Code of Conduct, this offence was a category D offence which warranted a penalty of dismissal.

The respondent noted an appeal against this decision to the National Employment Council Appeals Board. The Board found that she had been wrongfully dismissed and ordered her reinstatement without loss of salary and benefits from the date of wrongful dismissal. In making the award, the board noted that the bank had showed no evidence of having taken any disciplinary measures against the employee before taking the drastic measure to dismiss her. It also observed that the bank went on to employ two people to cover the employee's duties after dismissing her, which proved that the job was demanding as had been reported by the employee

and also that it 'doubted' the correctness of the charge of negligence on the grounds that the issue complained of was a one off incident.

The appellant noted an appeal against that decision to the Labour Court. That court dismissed the appeal. The appellant now appeals against that decision to this court on the following grounds:

> "1. The learned president fell into error when she grossly misdirected herself on a point of fact when she found that the respondent's failure to submit claims forms was in fact caused by the applicant who did not respond to the increased volumes of work.
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> 2. The learned president misdirected herself that negligence had not been proved when in fact the respondent did not deny that negligence had been proved. Further and in any event, in her capacity as a Health Education Officer, failure to submit claims forms to CIMAS weekly was total disregard of her duty.
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> 3. The learned president erred on a point of law by failing to pay due regard to the fact that the evidence presented proved the charge of gross negligence and accordingly the respondent was correctly found guilty of that charge.
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> 4. The learned president also fell into error by failing to order payment of damages as an alternative to reinstatement as she was legally bound to."

The relief sought by the appellant was that the respondent be dismissed from employment with effect from 13 July 2008 and that respondent pays the costs of the appeal.

The appellant indicated in its heads of argument and in submissions to this court that the main issues to be determined are whether the respondent was negligent and if she was negligent, whether the appellant properly took a serious view of her negligence.

As is apparent from the facts placed before this court the respondent was charged with 'negligence causing substantial loss to the bank' and in the alternative, 'failure to comply with standing instructions or follow established procedures resulting in substantial loss to the Bank' in terms of the Code of Conduct for the Banking Undertaking Statutory Instrument 273 of 2000. This offence is a category C offence which does not warrant a penalty of dismissal. However, the hearing officer found her guilty of 'gross negligence' which is a category D offence resulting in her dismissal. The National Employment Council Appeals Board ordered the reinstatement of the respondent but did not make a finding on this aspect regarding the decision that was being appealed against. The court *a quo* made mention of this in its judgment. On page 2 of the judgment of the court *a quo* noted that:

> "The charge that had been preferred against the respondent was a category C offence. In terms of the code of conduct category C offences attracted a warning if one was found guilty. The hearing officer however found her guilty of a Category D offence i.e. gross negligence when the allegations that had been preferred against her were lesser charges. In this regard the hearing officer misdirected himself."

The court *a quo* went on to consider other issues and made a finding that the respondent had continued to take the initiative to highlight and bring it to the employer's attention that her department was overwhelmed with increased volumes of work as a result the merger. The reasoning of the court *a quo* was that the disciplinary committee was bound to impose the penalty indicated for that breach regardless of the seriousness with which the employer viewed the offence.

The argument which was accepted by the court *a quo* was that the respondent ought to have been found guilty of the offence that she had been charged with, a lesser offence or

a competent offence flowing from the one charged. Instead, the hearing officer found her guilty of gross negligence which is a more serious offence than the one with which she had been charged.

Although the respondent was charged with 'mere negligence', it cannot be denied that what the respondent did was a serious act of misconduct when one has regard to all the factors in this case. In my view, the hearing officer cannot be impugned for having arrived at this conclusion after hearing all the evidence against the respondent. It should be noted that disciplinary proceedings , not being courts of law, are not bound by strict rules of procedure and it was quite proper for him to find her guilty of gross negligence where the evidence disclosed such an offence. In any event there is no doubt that the respondent was still found guilty of negligence though it was of a more serious nature.

At common law an employer has the power to dismiss an employee where the employee is found guilty of misconduct that goes to the root of the employment contract. See *Toyota Zimbabwe v Posi* SC-55-07. In essence, where the employer takes a serious view of the misconduct he can dismiss an employee even if in terms of the code of conduct the offence would have attracted a lesser penalty. This position was set out in *Zimplats (Pvt) Ltd v Godide* SC 2/16 where GOWORA JA noted that:

> "At common law an employer has the discretion on what penalty can be imposed upon an employee who has been found guilty of an act of misconduct which is inconsistent with the fulfillment of the expressed or implied terms of his or her contract of employment and where such misconduct goes to the root of his or her employment contract. [2] It is also settled that an appeal court cannot interfere with the exercise of this discretion by the employer unless there has been misdirection in the exercise of such discretion"

GOWORA JA further noted that:

> "The court ought to have asked itself whether the employer had properly taken a serious view of the matter and whether there was sufficient evidence to support the conviction on the preferred charges. Unfortunately the court *a quo* did not ask itself these pertinent questions and proceeded to determine the matter on an issue which was not even premised on the grounds of appeal before it. The law is clear that once an employer takes a serious view of the matter and the aggravated nature of the misconduct, it is irrelevant that the code does not provide for dismissal as a penalty. In *Circle Cement v Nyawasha* SC 60/03, this court held:
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> > "Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment the question of a penalty less severe being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee.""

I associate myself fully with the above remarks. The issue to be determined by this court is whether the employer took a serious view of the matter and made a finding that the misconduct was of an aggravated nature based on the evidence. It is also important to establish whether the respondent was guilty of an offence which went to the root of the employment contract. It is clear from the record that the disciplinary hearing was conducted in a fair manner and the respondent had the chance to advance evidence in the claim made against her. It is apparent from a reading of the record that the hearing officer, Mr I. Nyakonda, was cognizant of all the factors that were presented before him. In determining the penalty to be imposed he stated the following:

> "I have weighed the facts presented by both parties. I do understand that there was an increase in work because of the merger. However, Mrs Masunda did not understand the value attached to CIMAS claim forms, though she outlined that she was working under pressure. I saw an email here dated 25 April 2008 from Mrs Massunda to Mrs Chimhamhiwa advising her of the pressures that the clinic was facing. The challenge is the value of these claims, one, the face value and two, time value considering inflation. At the moment the bank had to fund the claims. The claims submitted so far amounted to +/- ZW$ 620 trillion. Mrs Massunda indicated that CIMAS might pay three quarters of

> the amount under normal circumstances. The focus is now on the monetary value of the offence at hand and the period that was taken by the respondent to take this issue seriously. According to the code of conduct I would refer this as gross negligence causing serious loss to the bank and this falls under category D and the penalty that goes with this is dismissal."

There is no doubt that the hearing officer took a serious view of the misconduct of the respondent in making a determination of the penalty. The fact that the respondent did not report that the medical aid forms were not being filed as is required shows that she did not really appreciate the gravity of the offence. The financial loss to the appellant, as a result of respondent's negligence, was extremely high. The respondent did not dispute this during the hearing. She also did not dispute the fact that she only made a report that there was a need to employ another person but did not explain that the work overload had resulted in the failure to file the medical aid claim forms for a long period. Had she reported this fact to her supervisor the employer might have ensured that another person was employed to assist in doing the outstanding filing work. Her negligence resulted in the company losing ZW$ 623 trillion.

It is clear that the filing of the medical aid claims was an integral part of the respondent's duties as an employee of the appellant. Where an employee fails to further the interests of the employer by omitting or refusing to do the work he is employed to do such failure amounts to a serious misconduct that goes to the root of the employment contract. There can be no doubt on the facts of this case that the respondent failed to execute her duties as was expected.

The Code of Conduct for the Banking Undertaking Statutory Instrument 273 of 2000 s 4(2) (f) provides that:

> "(f) Having examined all the facts, the hearing officer shall determine the disciplinary action to be taken, having taken note of comments by the workers'' representative."

The hearing officer, having considered all the circumstances, took a serious view of the matter and this resulted in the respondent being found guilty of gross misconduct and dismissed from employment.

That decision, in my view, was not unreasonable. The loss suffered by the appellant was high. That loss could have been avoided had the respondent made a complaint earlier. I find no impropriety in the manner in which the hearing officer exercised his discretion in this regard.

It is a trite principle of our law that an appellate court should not interfere with an exercise of discretion by a lower court or tribunal unless there has been a clear misdirection on the part of the lower court. In other words, the decision must have been irrational, in the sense of being so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664.

The only basis upon which the court *a quo* could have made a finding for the respondent is by investigating whether the decision of the hearing officer was irrational in the above sense and it is upon making such a finding that the court could have set aside the decision

of the disciplinary tribunal in the absence of a finding of a misdirection by that tribunal. The court *a quo* therefore misdirected itself by interfering with the finding of the lower tribunal.

In any event the order of the court *a quo* was incompetent as it sought to order the National Employment Council to reinstate the respondent without making a corresponding order for damages in the event that reinstatement was no longer possible. This order did not comply with the law. In terms of s 89 (2) (c) (iii) of the Labour Act [*Chapter 28:01*] an order for reinstatement must have a corresponding order for damages in the event that reinstatement is no longer possible. This position has been set out in a number of decisions. (See *Mandiringa & Ors v National Social Security Authority* 2005 (2) ZLR 329 (S).

In the circumstances, the court is satisfied that the appeal ought to succeed.

Accordingly, it is ordered as follows:

1. The appeal succeeds with costs.
2. The order of the Labour Court is set aside and substituted with the following:

"The appeal is allowed with costs".

ZIYAMBI JA: I Agree

GOWORA JA: I agree

Gill, Godlonton & Gerrans, appellant's Legal Practitioners

Matsikidze & Mucheche, respondent's Legal Practitioners