REPORTABLE (88)

MISHECK MABEZA
v
(1) SANDVIK MINING (2) CONSTRUCTION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA & BHUNU JA
HARARE: OCTOBER 31, 2017 AND NOVEMBER 15, 2019

L. Mazonde, for the appellant

Z. T. Chadambuka, for the respondent

GOWORA JA: On 9 January 2008 the respondent engaged the appellant as an Operations Contract Manager in terms of a written agreement. The agreement provided that the appellant would be an area manager responsible for Ngezi North. The preamble to this agreement read as follows:

> Sandvik Mining and Construction Zimbabwe have entered into an agreement with various mines to provide maintenance service contracts. Under the terms of these contracts, Sandvik Mining and Construction Zimbabwe has agreed to make human resources available to these Mines, in order to maintain their equipment.

At the time of the occurrence of the events central to the dispute between the parties the appellant was based at Unki Mine. For reasons known only to the parties its exact location has never been revealed. It was probably assumed that the location plays very little part in the determination of the dispute. The parties may be correct.

Early in the morning of 8 October 2014, the appellant and a colleague, one Christopher Tias, left the mine proceeding to Harare. It is common cause that Tias was the appellant's subordinate. The appellant was driving. Sometime around 7 am the appellant received a telephone call from Sandi Zaranyika his immediate supervisor based in Harare. The connection was bad resulting in Zaranyika terminating the phone call. When the duo were near Featherstone, Zaranyika sent a message on Tias's mobile phone. Although addressed to Tias, it is common cause between the parties that the appellant was the intended recipient. He was told to go back to the mine and not to come to Harare until the situation at the mine had become stable.

It is common cause that the appellant was shown the message by Tias. They proceeded to Harare nevertheless. The appellant instead called a subordinate at the mine. He was given information on the situation. On arrival in Harare he was informed that the meeting had been cancelled. He was instructed to return to the mine.

On the same day, that is 8 October 2014, he was given notification to attend a disciplinary hearing on 22 October 2014. The charge against him was that he had willfully disobeyed a lawful order in contravention of s 4(b) of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15 of 2006, ("the National Code of Conduct"). The disciplinary hearing was held as scheduled and he was convicted of misconduct on the single charge and was dismissed from employment. He appealed internally but was not successful. In accordance with the code of conduct the matter was referred by the appellant to a labour officer. The labour officer was unable to resolve the matter and it was referred to compulsory arbitration for resolution.

The arbitrator found that the appellant had not willfully disobeyed a lawful order. It was his finding that the only thing that the appellant did not do was to return to the mine. It was also his conclusion that it was not necessary for the appellant to go to the mine to physically check the situation in view of the fact that "someone competent to do his duties was fully in charge of the mine and confirmed that the situation was under control."

As a result of the above findings the arbitrator found that the appellant had committed no wrong justifying his dismissal. He ordered that the appellant be reinstated without loss of salary and benefits or *in lieu* of reinstatement that he be paid damages if his employment was no longer tenable.

The respondent appealed to the Labour Court which appeal succeeded. The Labour Court found that the appellant had committed the misconduct that he had been charged with. The learned judge in the court *a quo* as a result found that there was willful disobedience of a lawful order. The court therefore allowed the appeal and set aside the arbitral award in its entirety. It is against that decision that the appellant approaches this Court. The grounds of appeal upon which the appellant seeks relief are the following:

(1) The court *a quo* grossly misdirected itself on the facts amounting to a misdirection at law in finding that appellant's conduct in ascertaining the situation at the mine through his subordinate Luis Matizha constituted a willful disobedience to a lawful order. Such a finding is grossly unreasonable so as to raise a sense of shock that no reasonable tribunal properly applying its mind to the question and the order given by the employer would come to that conclusion.

(2) The court *a quo* grossly misdirected itself on the facts amounting to a misdirection at law in failing to appreciate that the effect of the evidence of Luis Matizha showed that he had managed the situation at the mine to be stable. Thus the court's finding that the witness's evidence connoted that all was not well at the mine was so outrageous in its defiance of logic that no sensible person who has applied his mind to the question to be decided could arrive at it.

This matter proceeded to compulsory arbitration through a reference to the labour officer in terms of s 8 (6) of the National Code of Conduct. The documentation in terms of which the matter was referred to the labour officer is not on record. His deliberations are not on record. His own referral to compulsory arbitration is also not on record. What is on record is what the arbitrator recorded as the terms of reference by the labour officer to arbitration.

The terms of reference agreed by the parties were the following:

Whether or not the claimant was unlawfully dismissed;

If so, to determine the appropriate remedy.

It is obvious that *in casu*, the termination was effected in terms of the National Code of Conduct. The appellant in this dispute was charged with misconduct in terms of the National Employment Code of Conduct. He was subjected to a disciplinary hearing in terms of a code of conduct as required by the law after which he was dismissed from employment. Given that the appellant was subjected to a properly conducted disciplinary process which culminated in a verdict and a dismissal consequent thereto, a reference to the labour officer alleging unfair dismissal does

not accord with the law. The labour officer did not deal with the merits of the disciplinary process. On that premise it cannot be said that the dismissal was unfair as envisaged in terms of the Act.

It is therefore clear to the naked eye that he could not lodge a complaint with the labour officer alleging unfair dismissal. The labour officer would not have the jurisdiction to entertain any complaint from the appellant as what the appellant was seeking was the setting aside of the determination of the disciplinary process. This process could only be set aside through an appeal or a review. The process before the labour officer was none of the above.

In *casu*, the since the disciplinary proceedings against the appellant were conducted under the aegis of the National Employment Code of Conduct it stands to reason that the matter was referred to a labour officer in accordance with the provisions of the same. Sections 8(6) and (7) thereof provide as follows:

> (6) A person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or an Employment Council Agent, as the case may be, within seven working days or receipt of such decision.
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> (7) The Labour Officer or an Employment Council Agent to whom a case has been so referred shall process the case as provided for under s 93 of the Act.

In *casu*, a determination on the merits had been made by the disciplinary authority as provided for in the code of conduct. The reference to the labour officer in terms of s 8(6) of the code of conduct would as a consequence seem to be in direct contrast to the provisions of s 101(5)

and (6). When one has regard to s 8(6) of the National Employment Code one may be misled into assuming that even completed disciplinary hearing should be referred to a labour officer. It is not so. In sum this means that the proceedings before the labour officer are a nullity as are the proceedings before the arbitrator.

It is therefore disquieting to note what the arbitrator said:

> "Unless there are other hidden issues, there is absolutely nothing wrong with what the claimant did that warrants dismissal. More so when one considers the fact that the claimant had a clean record and also making decisions from a managerial realm, there was nothing weird done to warrant dismissal. The issue is simply trivial to say the least, for it seems the respondent simply wanted the claimant to go back to the mine even though the assignment could have been simply and easily done by just making a phone call and check on the stability of operations at the mine, like what the claimant did."

A perusal of the record will show that a claim for unfair dismissal was presented before the arbitrator. In his statement of claim, the appellant made reference to the disciplinary proceedings instituted against him and the fact that he was found guilty of the charge of misconduct preferred against him resulting in his dismissal from employment. He also made reference to the fact that he had appealed against the verdict and the penalty to the Appeals Authority which authority confirmed both the verdict and the penalty. The appellant ends his claim by stating that he was wrongly found guilty. As a consequence, he prays for reinstatement, back-pay from the date of dismissal and damages in lieu of reinstatement.

It is clear that the claim brought by the appellant, although disguised as an unfair dismissal was in actual fact an appeal against the dismissal of his appeal by the Appeals Authority. This much is obvious from his statement that he was wrongly found guilty. What he sought was a

reversal of the findings of the disciplinary authority. The question is did the arbitrator have the jurisdiction to act as an appeal tribunal and set aside the decision of the appeals authority.

This matter made its way to the arbitrator as a reference to compulsory arbitration from a labour officer acting in terms of s 93 of the Labour Act [*Chapter 28:01*]. His function under s 93 is to conciliate or settle the dispute failing which he issues a certificate of no settlement and refers it to an arbitrator under s 93 (5) where the dispute is a dispute of right. In *Watyoka v ZUPCO (Northern Division)* 2006 (2) ZLR 170, this court said:[1]

> "There are, therefore, three important conditions under which such matter can be referred to a labour relations officer:
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> (a) the matter must not be one that is liable to be the subject of proceedings under a code of conduct;
> (b) the matter has not been determined within thirty days of the date of notification; and
> (c) where the parties to the dispute request and are agreed on the issues in dispute (s 93(1)(ii)).
>
> …….
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> Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made."

And later at p 173H-174A, the court put the issue beyond any doubt and stated:

> "The section cannot be read as providing for a second determination over and above the one already made by a disciplinary committee. Once there was a determination, the correct procedure was to appeal to the company's management as provided in the code of conduct."

And later still at p 175B-C:

[1] At p 172

> "In this case, by the time the matter was entertained by the labour relations officer, two separate provisions had ousted his jurisdiction. They were, firstly, the fact that a determination had been made, and secondly, the dispute had prescribed in terms of s 94(1)(b), in that the allegations of unfair labour practice were raised at meetings held with the disciplinary committee in November 1997 but the labour relations officer only entertained the complaint on 6 August 1999, a period of about eighteen months, and well beyond the period of one hundred and eighty days provided in s 94(1)(b)."

These remarks were made in consideration of the powers that a labour officer is imbued with under s 93 of the Act prior to its amendment in 2015 by Act 5 of 2015. It is obvious therefore that completed proceedings under a code of conduct are not subject to scrutiny by a labour officer as that process is confined to initial complaints where a labour officer exercises his powers under s 93 of the Act in order to conciliate failing which he is empowered to refer the parties to arbitration. The view I take therefore is that a labour officer is empowered to determine complaints of unfair labour practice and unfair dismissal where there has not been procedural process that has been completed. His jurisdiction is limited to that of a tribunal of first instance.

In my view, the principle emerging from all the authorities referred to above can be summarized by the statement to the effect that a labour officer does not have any jurisdiction under s 93 to entertain a matter once a determination on the merits has been made through a disciplinary process under a registered code of conduct. It is clear that in this case the labour officer presided over a matter over which he did not have any jurisdiction. As stated in Watyoka's case (*supra*), once there is a determination on the merits of a dispute a labour officer has no jurisdiction under s 93 of the Act.

In this context the implications of what the arbitrator did are obvious. He was aware that the appellant had been dismissed as a result of a finding of guilt made by a disciplinary body set up under a code of conduct. He was equally aware that an appeals authority set up under the same code of conduct had confirmed not just the findings of guilt on the part of the appellant but had also confirmed the penalty of dismissal.

Notwithstanding this knowledge on his part, the arbitrator proceeded to entertain a claim the premise of which was to set aside proceedings of a disciplinary body. He obviously was not acting as an appeals tribunal. He however considered himself properly seized with the proceedings.

The latter proceedings were in fact a rehearing of the facts of the dispute. It is pertinent to note that the arbitrator did not have regard to the record of proceedings of the disciplinary hearing. The ruling by the arbitrator was couched in a manner which ignored the findings of the disciplinary tribunal. The arbitrator proceeded to substitute his own determination on the facts as if a disciplinary hearing had not been conducted and the appellant dismissed consequent to a finding of guilt. He exercised a power he clearly did not have.

And yet, by the stroke of a pen, without exercising any appeal jurisdiction over the disciplinary body, the arbitrator went on to set aside the findings of fact reached by the disciplinary authority which were confirmed by the appeal structures of the respondent. Such a result would in my view lead to an absurdity. To describe the process by which this decision was reached as being irregular is mild. It is not only irregular, it was unlawful and nothing can stand on that decision.

I conclude therefore that the labour officer did not have jurisdiction to hear a complaint from the appellant of whatever nature and that the referral to compulsory arbitration was unlawful and the proceedings before the arbitrator were as a result an irregularity.

In this case, the appeal is against the decision of the Labour Court which set aside the arbitral award. The court in determining the appeal before it had regard to the record of proceedings of the disciplinary hearing. In my view, very little purpose would be served in setting aside the proceedings before the arbitrator. I intend to consider the appeal in light of the findings by the Labour Court with regard to the disciplinary proceedings.

At issue before the court *a quo* and this Court is the statement forming the basis of the charge. The contention of the respondent is that the appellant failed to adhere to an instruction lawfully issued by his superior at the work place. On the other hand the contention of the appellant is that he did not deliberately defy an instruction, and that he lacked the requisite intention to disobey the instruction. The sole issue therefore is whether or not he willfully disobeyed a lawful instruction. What constitutes willful disobedience to a lawful instruction at the workplace was defined by GUBBAY JA (as he then was) in *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987(1) ZLR 206(S), at p 211 wherein the learned jurist said:

> "Willful disobedience or willful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial –not simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and the employee, going to the very root of the contract of employment."

The contention is made that the court *a quo* erred in finding the appellant guilty of the offence of willful disobedience to a lawful order when the facts and the circumstances of the matter and the nature of the instruction given does not support the finding made. The appellant further argues that there was no willful disobedience because the SMS which was sent by his immediate superior was conditional upon the stability of the situation at the mine. The SMS read:

> "Misheck LHD 24 is down at Unki Mine. Go back to the mine, do not come to Harare until the situation is stable."

The court *a quo* said the following:

> "The order needs no interpretation. The respondent was advised, LHD 24 was down, which was a fact. He was told to go back to Unki Mine, he did not. He was told not to proceed to Harare until the situation was stable, he did proceed when the situation was not yet stable.
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> I say this because Luis Matizha in his evidence said he told the respondent about the issue. The respondent was not a shop floor employee, he was a senior employee who is expected to know the exigencies of accountability especially in such a case where the appellant's role at Unki Mine was to maintain the machinery. The respondent being the person in charge it would be expected that some situations required his personal attendance. He failed to do so despite being given an order.
> The test for willfulness is an objective test. See Matereke case. A reasonable man in the respondent's shoes would have known that he was obliged to go back and attend to the situation."

The interpretation of the SMS by the court *a quo* was on point. The appellant was told to go back to the mine. He was not to come to Harare until the situation had stabilized. He was not told to ascertain the status through the telephone. He deliberately ignored the clear instruction to go back to the mine. His presence at the mine was imperative. The preamble to his contract of employment made it clear that he was assigned to the Ngezi Mine site to enable the respondent to perform its own contracts with various mines. The evidence adduced before the disciplinary authority supports the finding by the court *a quo* that the situation at the mine warranted the

presence of the appellant. The court *a quo* correctly found that by failing to attend to the mine as instructed the appellant willfully disobeyed a lawful instruction. The court *a quo* was correct in allowing the appeal and setting aside the arbitral award.

In the premises the appeal is devoid of merit and ought to be dismissed. It is accordingly dismissed with costs.

PATEL JA: I have read the judgment of GOWORA JA, with which judgment BHUNU JA concurs, and wish to add the following remarks.

While I agree that the appeal is devoid of merit and ought to be dismissed, I have certain reservations *apropos* the preliminary observations in the main judgment curtailing the jurisdictional role of labour officers and arbitrations under the governing statutory provisions. In particular, I am inclined to the view that s 8 of the National Code of Conduct, construed in a purposive manner, is reconcilable with ss 93 and 101 of the Labour Act in such manner as to accommodate the jurisdictional competence of labour officers and arbitrators over labour disputes emanating from internal disciplinary proceedings.

Nevertheless, given the view that I take of the merits of this matter, I do not think it necessary to elaborate the aforesaid reservations in the context of this particular case. I fully concur with the reasoning and findings of GOWORA JA to the effect that the arbitrator misdirected himself on the substantive merits by trivialising the degree of culpability attributable to the appellant's misconduct *in casu.* By the same token, I fully endorse her conclusion that the decision

of the court *a quo* on the merits is unassailable and that it quite correctly set aside the impugned arbitral award in its entirety. In short, there is no doubt that the appellant was guilty as charged of wilful disobedience of a lawful order and that, consequently, he was justifiably subjected to the ultimate penalty of dismissal. For these reasons, I agree that the appeal be dismissed with costs.

BHUNU JA: I have read the comments by my brother PATEL JA and wish to comment as follows:

I do not see how the 3 sections alluded to by PATEL JA can be reconciled to accord a Labour Officer jurisdiction that he does not have. It is inconceivable that a Labour Officer can assume jurisdiction over a completed matter by another tribunal without being clothed with appellate or review jurisdiction. In the absence of specific statutory provisions, it is only appellate or review jurisdiction that authorizes a higher court or tribunal to intervene in the conduct or verdict of a subordinate court or tribunal.

In the circumstances both the Labour Officer and the Arbitrator acted without power, jurisdiction or authority to intervene in a matter completed in terms of the National Code of Conduct. It is for the foregoing reasons that I agree with my sister GOWORA JA.

TH Chitapi & Associates, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners