

REPORTABLE (130)
Judgment No SC 144/04
Civil Appeal No 48/04

STEPHEN MACKENZIE v RIO TINTO ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE NOVEMBER 1, 2004 & JUNE 30, 2005

A. Kara, for the appellant

N. Chauraya, for the respondent

CHIDYAUSIKU CJ: The appellant in this case was employed by the respondent. On 25 July 2002 the respondent suspended the appellant pending investigations into allegations of fraud and theft. On 8 August 2002 the respondent extended the suspension as the investigations were not complete.

On 19 August 2002 the respondent notified the appellant that there would be a disciplinary hearing on 23 August 2002. Before that date, on 21 August 2002, the appellant applied to the High Court for an order setting aside his suspension and a stay of disciplinary proceedings against him. Before the matter was set down for hearing in the High Court the respondent convened a disciplinary hearing and dismissed the appellant. The decision to dismiss the appellant was set aside by a High Court provisional order issued on 12 September 2002.

The provisional order was confirmed and set aside the dismissal of the appellant on a technicality, namely, that the person who had dismissed the appellant had no authority to do so.

The respondent complied with the High Court order and reinstated the appellant but later invited the appellant to a disciplinary hearing on 30 June 2003. The charges were the same as those that had led to the dismissal that was set aside by the High Court. The disciplinary hearing commenced on 30 June 2003 and was adjourned to 8 July 2003. The appellant attended the hearing on 30 June 2003 with his legal representative. He did not attend the hearing on 8 July 2003. The appellant was found guilty *in absentia* and was dismissed with effect from July 8, 2003.

The appellant appealed to the designated authority as is provided in the Code of Conduct. The designated authority, Mr Sachikonye, heard the appeal on 9 September 2003. The appellant's grounds of appeal to the designated authority as set out in the Notice of Appeal were:-

- "1. He was technically not given effective notice of the hearing.
2. The disciplinary committee was not properly constituted in that it lacked a quorum.
3. The reconvened meeting had no capacity to carry out the disciplinary hearing because of the judgment passed by Justice R. Makarau on the matter on the 13th May 2003."

The appellant was happy with the first part of Mr Sachikonye's determination which nullified his dismissal. He, however, was aggrieved with the second part of the determination which remitted the matter to the respondent for a

fresh hearing. He appealed against that part of the judgment to the Labour Court upon the grounds set out in his Notice of Appeal which provide as follows:-

- "1. The respondent has clearly issued a directive, which he cannot do in terms of the Code of Conduct.
2. The applicant reasonably apprehends that the purported remittal is merely intended to attempt to dismiss him.
3. In terms of the Code of Conduct, disciplinary proceedings cannot proceed unless proceedings are convened within 72 hours of the submission of the complaint form. The complaint form was originally submitted in May/August 2003.
4. Should the respondent proceed as threatened, the Applicant will be dismissed and have his salary and benefits withdrawn. This is obviously prejudicial to him and his family."

The main issue before the Labour Court was whether or not the designated authority had the power to remit the matter to the respondent for determination. The Labour Court concluded that the designated authority had the legal power to remit the matter for further hearing. In arriving at that conclusion the learned Senior President of the Labour Court reasoned as follows:-

"The appellant's grounds of appeal are based on the issue of remittal. I think in order to place the issue of remittal in proper perspective, we need to be guided by the grounds of appeal that were placed before Mr Sachikonye. I have indicated these on page 4 of this judgment. As argued by the respondent the grounds were on procedural irregularities. There was no appeal on the merits of the matter. To that end Mr Sachikonye correctly ruled in favour of the appellant and then directed that a fresh hearing be conducted in terms of the code. His finding was that no hearing had been held yet and the issue was still pending. He could not proceed and conclude on the merits when that issue was not before him. The message of his determination was clear i.e. Reinstate the appellant and rehear the matter against him in terms of the law. Mr Sachikonye could not have been expected to end up at reinstatement when he knew there was still a dispute."

The appellant, in this Court, has argued that the Labour Court was wrong in concluding that the designated authority has the jurisdiction to remit a

matter for a re-hearing *de novo*. The main thrust of the appellant's argument was that the Code, in s 3(d) of Part D, which states:-

“(d) The designated authority shall make a determination in respect of the appeal within a period of five working days and the form endorsed accordingly. The decision of the designated authority shall be final.”

does not authorise a designated authority to remit the matter for further consideration.

It was argued, for the appellant, that the words “shall be final” means that the decision should be one that concludes the matter one way or the other either by way of acquittal or a finding of guilt. It was argued that that is the meaning that should be ascribed to the words “the decision of the designated authority shall be final.”

I am not persuaded by this argument. I would agree with the conclusion of the learned Senior President of the Labour Court that the designated authority had the jurisdiction to remit the matter to the respondent. An appeal court or a body vested with authority to hear an appeal has, at least, the jurisdiction to allow an appeal, dismiss an appeal, or remit the matter for a re-hearing. The jurisdiction to do any of the above is inherent in the authority to hear an appeal. Where the lawmaker does not wish the appeal court or authority to have any of the three above options the language of the statute has to be explicit. Thus, in the absence of explicit language or implication from the language that an appeal authority cannot remit a matter for a hearing *de novo*, the appeal court or authority has such jurisdiction.

I do not accept that the words "shall be final" mean that the designated authority cannot remit a matter for a hearing *de novo*. In the present case the designated authority was satisfied that the decision of the respondent was a default judgment reached in the absence of the appellant and, therefore, not on the merits. He also was satisfied that the committee that adjudicated on the matter was not properly constituted. In those circumstances the proper course to follow was to remit the matter for a hearing *de novo*. The decision of the designated authority in this case cannot be faulted.

I also agree with the learned Senior President of the Labour Court that even if Sachikonye had not directed a re-hearing the respondent, as the employer, was not barred from proceeding with a fresh disciplinary hearing. Authority for this proposition, as was pointed out by the learned Senior President of the Labour Court, is to be found in the case of *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S) wherein GUBBAY J (as he then was) had this to say: -

"... if the suspension of an employee is nullified by the omission of the employer to apply forthwith to a labour relations officer for an order of termination, the employer is not precluded from re-suspending the employee and applying forthwith on the same ground as before or on a different ground or from simply applying to the labour relations officer without re-suspending the employee, on any of the grounds specified in Section 3(1) of the Regulations."

The facts of this case may be different from the *Standard Chartered Bank* case, *supra*, but the principle set out in that case applies to this case with equal force. This conclusion also disposes of the other argument raised by the appellant that the proceedings against him should have been concluded within 72 hours after the submission of the complaint.

The principle that disciplinary proceedings that are tainted with irregularities regarding procedure can be set aside and commenced afresh was restated by McNALLY JA in the case of *Dalny Mine v Musa Banda* SC-39-99 wherein the learned judge of appeal had this to say: -

"As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one or two ways:

- (a) by remitting the matter for hearing *de novo* and in a procedurally correct manner;
- (b) by the Tribunal hearing the evidence *de novo*".

For the foregoing reasons the appeal in this case cannot succeed and is, accordingly, dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Hussein Ranchod & Company, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners