

Judgement No. SC 42/06
Civil Appeal No. 113/02

TAPIWA FRANK ZHOU v ZVIMBA RURAL COUNCIL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 22 & OCTOBER 16, 2006

S Moyo, for the appellant

W.T. Pasipanodya, for the respondent

ZIYAMBI JA: On 24 June 1996, the respondent ("the Council") suspended the appellant from employment and four days later sought authority from the labour relations officer in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 S.I. 371 of 1985 (now repealed) ("the Regulations") to dismiss him.

The labour relations officer heard the matter on 2 August 1996 and, on 7 February 1997, gave authority to the Council to dismiss the appellant in terms of s 3(1) (a),(g) and (h) of the Regulations.

Section 3 (1) provided as follows:

"3. (1) Where an employer has good cause to believe that an employee is guilty of -

(a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract;

- (b) – (f) ...
- (g) habitual and substantial neglect of his duties;
- (h) gross incompetence or inefficiency in the performance of his work;
- (i) ...

the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment. ...”

It was alleged, citing s 3(1)(a), that the appellant had failed to disclose his interest to the Council in the allocation of stands, namely stands 16 and 17 to his wife “Ratisai” and stands 67 and 69 to Sapient Business Leaders, a company, of which Ratisai was a director and he the company secretary, and that he had allocated himself a loan of \$25 000 which was not authorized by the Council or the Council regulations.

It was further alleged, citing s 3(1)(g), that the appellant displayed gross negligence in the performance of his duties in that, among other things, he allowed Council to incur an unauthorized overdraft of \$540 000 and allowed beer funds to be used for unauthorized purposes.

The decision of the labour relations officer was upheld on appeals to the senior labour relations officer and the Labour Relations Tribunal (“the Tribunal”)(now the Labour Court).

At the hearing of this appeal Mr *Moyo* relied on two points of law, which he stated as follows, namely, whether the appellant was obliged to disclose his interest (which he alleged was a known fact) to the Council and whether the

appellant as Chief Executive Officer could be held accountable for the malperformance of the treasurer.

The duty to disclose

It was Mr *Moyo's* submission that the appellant had no duty to disclose a fact which was known. The finding of the Tribunal, however, was that his interest was not known to the Council. The letter which he produced in proof of his submission that the fact of his interest was known was found by the Tribunal to be of doubtful origin. It was written two years after the allocation of the stands took place. The Tribunal and the courts below made findings of fact concerning the reliability of the letter, which findings this Court cannot reverse, this being an appeal on a point of law only. One factor of relevance, however, is that there is no indication in the letter that the Council was aware, at the time of allocation of the stands in question, that the applicants for the stands were the appellant's wife and a company in which his wife is a director and he the company secretary.

In any event, it was for the appellant to make a disclosure of his interest in the stands in question and he did not do so. Even as late as 8 February 1996, at an executive committee meeting of the Council, the appellant was requested to put in writing his "outside interests". He failed to do so and, he being the one who recorded the minutes of the meeting, provided no minutes of that meeting.

The minutes of the meeting of the Council, held on 16 July 1991, show that the appellant was present in his then capacity as secretary of the Council when the applications for stands 16 and 17 by Ratisai and 67 - 69 by Sapient Business

Leaders were approved. There is nothing in those minutes to show that the appellant declared his interest on the said stands.

Again on 17 September 1991, the Council held a meeting at which the appellant attended in his capacity as secretary. During that meeting the application for Stand 170 to Sapient Business Leaders was approved. No declaration was made by the appellant of his interest in the outcome of the application by virtue of his association with that company.

On the contrary, the appellant sought to conceal his interest in the said stands, by omitting to place certain motions on the agenda for discussion by the Council, for example, a motion querying the allocation of the above-mentioned stands to Sapient Business Leaders and to Ratisai.

Accordingly, the conclusion of the Tribunal, that the appellant failed to disclose his interest in the acquisition of the stands, cannot be faulted.

The malperformance of the treasurer

The appellant next took issue with the finding by the Tribunal that, as Chief Executive Officer, he was negligent in allowing the treasurer to incur an unacceptably high overdraft contrary to the Council's regulations. In this regard, it was submitted by Mr *Moyo* that the appellant had no authority to dismiss the treasurer and the Tribunal therefore erred in law when it attributed responsibility for the mismanagement of the Council funds to the appellant.

As Chief Executive Officer of the Council, the duties of the appellant were stated to be, to ensure:

- a) that the council operates efficiently;
- b) that proper books of accounts were held and financial procedures followed;
- c) that resolutions of Council and its committees are effected;
- d) that officers and employees of the new council get timeous instructions, directions and guidance in the performance of their duties.

The appellant, therefore, being the overall head of operations at the Council, occupied a position of great responsibility. He was the person responsible, and accountable to the Council, for the efficient management of the Council. It was not for the appellant to say, "people have been employed to do the job so I shall let them get on with it however they choose". His was a management and supervisory role and he was answerable to the Council for the proper running of its affairs. It was therefore his duty to ensure that the Council's regulations were fully complied with by the treasurer.

On 26 February 1996, the treasurer wrote to the appellant forwarding a projected cash flow for the period ending 30 June 1996. It was highlighted therein that the Council would be experiencing cash flow problems and it was estimated that an overdraft of \$171 624, starting in March 1996 and rising to \$745 656 in June 1996, would be necessary. The treasurer advised that he had spoken with the bank

manager who was agreeable to affording an overdraft facility if it was "formalized with a Council resolution".

It seems it is the practice of the Council to hold its meetings at the end of each month. Be that as it may, no mention was made of the overdraft to the Council by the appellant, in any of the minutes of the meetings attached to the record, namely, those of the 29 March, 16 April, 23 April (finance committee), 24 April (special meeting) and 28 May 1996 (finance committee). The overdraft was not authorized by resolution of the Council but was somehow obtained with the result that the Council was overdrawn by some \$540 000,00.

It is evident to me that the appellant breached his duty to ensure that proper financial procedures were followed in compliance with the Council's regulations. I find no merit, therefore, in the submission that the appellant was not to be held responsible for the acts of the treasurer in incurring the overdraft.

It is clear from the above that I hold the view that there is no merit in the appeal and it is accordingly dismissed with costs.

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners