

REPORTABLE ZLR (37)

Judgment No. SC 45/06
Civil Application No. 166/06

**Export Leaf Tobacco Company Of Africa (Private) Limited
V
Albertina Gwavava**

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 13 & OCTOBER 6, 2006

H Zhou, for the applicant

E W Morris, for the respondent

Before: GWAUNZA JA, in Chambers in terms of r 5 of the Supreme Court Rules.

This application is made in terms of s 92F(3) of the Labour Relations Act, [*Cap 28:01*]. It follows the refusal by the Labour Court to grant leave to the applicant to appeal to this Court against the lower court's judgment of 20 January 2006. The applicant therefore seeks the leave of this Court to file the appeal in question.

In dismissing the application for leave to appeal against its judgment, the Labour Court was satisfied that the intended appeal was not on a point of law, as required by s 92F(2) of the Labour Act [*Cap 28:01*]. The applicant being of the opposite view, it now falls to this Court to determine the matter.

The case against the respondent in the court *a quo* was that she had failed to disclose, in the manner prescribed by the applicant, her interest in enterprises which dealt with the employer and was therefore guilty of dishonesty

or deliberate misrepresentation and corruption as defined in the applicant's Code of Conduct.

At the time this dispute arose, the respondent was employed by the applicant as its financial director. It is common cause that the respondent was also the corporate secretary and co-director of a company called Pickhill Enterprises. This company provided accounting services to Kwik Courier, a company that was engaged in business with the applicant. The court *a quo* accepted the respondent's evidence that upon Kwik Courier's request, the managing director of the applicant authorised her, as a signatory to the applicant's cheques, to henceforth uncross or open all cheques issued in favour of Kwik Courier in payment for its services to the applicant. The court also accepted the evidence of the respondent that she, the applicant's managing director and Kwik Courier later agreed that these cheques would be deposited into the bank account of Pickhill Enterprises.

It is not in dispute that the applicant in early February 1998 required its senior employees to complete a form indicating, *inter alia*, whether or not they had "conflicts of interest" in relation to enterprises which dealt with the employer, i.e. the applicant. The form was to be completed by February 16, 1998. Nor is it disputed that the respondent filled in such a form on 13 February 1998 and indicated she had no conflicts of interest.

The applicant's case against the respondent was, therefore, that, by completing the form in the manner she did, the respondent had deliberately failed to disclose certain interests that she had in an enterprise that dealt with her employer. The enterprise in question was Kwik Courier, whose cheques were deposited into Pickhill Enterprise's account.

There seems to be no dispute that the relationship between the respondent, Kwik Courier and Pickhill Enterprises constituted a conflict of interest *vis-à-vis* the respondent's relationship with her employer. What was in dispute was whether or not the respondent had disclosed this interest to the employer. The finding of the court *a quo*, which undoubtedly was a factual finding, was that she had done so. This was because the court *a quo* found that the respondent's dealings with Kwik Courier had been at the request of the applicant's senior management. It becomes evident from this that the respondent, as did the court *a quo*, interpreted "disclosure" in its wider, general sense. The applicant, on the other hand, relied on a narrower definition of the word, that is, disclosure in the specific manner prescribed by the applicant.

As already indicated, the court *a quo* dismissed the application for leave to appeal, on the basis that the intended appeal was on points of facts, not law.

The applicant argues that its grounds of appeal raised issues of law, in particular, whether, in the face of the express conditions of employment which required disclosure of interests in a particular form, the conduct of the respondent in stating that she had no interest, constituted the misconduct charged. The applicant argues further that even the additional issue of whether such a conflict could be excluded by imputing knowledge of the respondent's interests upon some managers, was a question of law, not fact.

I am persuaded by these contentions. The respondent cannot have failed to appreciate that a conflict of interest arose from her dealings with the applicant on one hand, and Kwik Courier on the other. It may be accepted as a matter of fact, as found by the court *a quo*, that the applicant's senior management not only knew, but had actually instigated, these dealings. What,

however, is in my view relevant is that at a later date, the applicant required of its employees that they recorded any interests they had, in writing. It is not in dispute that the respondent did not so disclose her interests.

Her evidence was that her superiors had advised her not to disclose the interest in the form, since such interest was known to management. In other words, she did not disclose the interest, not because she did not have it, but because she was advised not to.

The issue to be determined in the circumstances of this case as outlined, is whether disclosure of an interest made in any other manner than that prescribed by the applicant, i.e. in writing, absolved the respondent from effecting the disclosure in the prescribed manner.

Put differently, the issue is whether the respondent's failure to disclose her interest in the manner prescribed by her employer, constituted the misconduct charged. This is clearly a question of law. I am persuaded by the applicant's submission that questions of law do not cease to be such merely because they are underpinned by factual findings.

I am satisfied the applicant's main ground of appeal raises a point of law and not fact. The applicant is therefore entitled to the relief sought. Since the applicant has indicated it will not seek costs against the respondent, no such order shall be made.

It is in the premises ordered as follows:

1. The applicant be and is hereby granted leave to appeal to this Court against the judgment of the Labour Court in Case No. LC/11/198/2005.

2. There shall be no order as to costs.

Gill Godlonton & Gerrans, applicant's legal practitioners

T H Chitapi & Associates, respondent's legal practitioners