

DISTRIBUTABLE ZLR (7)

Judgment No. SC 4/07  
Civil Appeal No. 261/05

**CIRCLE TRACKING v MIKA MAHACHI**

SUPREME COURT OF ZIMBABWE  
MALABA JA, GWAUNZA JA & GARWE JA  
HARARE, FEBRUARY, 13 & MARCH 22, 2007

*S Machiridza*, for the appellant

No appearance for the respondent

GARWE JA: At the conclusion of the appeal from a decision of the grievance and disciplinary committee, the Labour Court upheld the appeal and ordered that the appellant re-instate the respondent with no loss of salary or benefits. It is against that decision that the appellant has appealed to this Court.

The facts of this case are these. At the relevant time the respondent was employed by the appellant as a driver. It appears to be common cause that there was a standing instruction that drivers were not allowed to carry unauthorised passengers. It further appears from the record that this instruction was not being complied with and for that reason a Mr Huni (the security officer) and Mr Taberekerwa (the transport controller) left Harare for the Eastern Highlands to check on company vehicles travelling to and from that area. This was on 7 October 1999. It is not in dispute that Mr Huni and Mr Taberekerwa met the respondent, as well as another driver by the name Mukorera. What happened thereafter was in dispute during the disciplinary proceedings that followed. Mr Huni and Mr Taberekerwa told the disciplinary

hearing that they had seen the respondent carrying unauthorised passengers and luggage. The respondent on the other hand denied this completely.

At the hearing the respondent was charged with:

“contravening s 5(l) Part V 2 and s 5(p) of the Circle Cement Code of Conduct (“the Code”): In that on 7 October you were caught carrying passengers and goods ...”.

The respondent was found guilty of “contravening s 5(1) Part VI of the Code i.e. corruption”. He was consequently dismissed from the employ of the appellant.

The respondent thereafter appealed to the Labour Court against his dismissal. The Labour Court upheld the appeal.

The judgment of the Labour Court is attacked by the appellant on three grounds. The first is that contrary to the finding of the court *a quo* the respondent was correctly charged in terms of the Code. The second is that the conduct of the respondent was corrupt and therefore the disciplinary board correctly found him to be guilty of corruption. The third is that the court *a quo* did not fully appreciate the question of *onus* and that such *onus* was on the appellant, dischargeable on a balance of probabilities.

The first and second issues raised are interlinked and will be dealt with together. The question is whether the respondent was correctly charged and therefore correctly found guilty of misconduct. The allegation in the charge that was preferred against the respondent was that he had carried unauthorised passengers and goods in contravention of s 5 Part V 2 and s 5(p) of the Code. He was eventually found guilty of contravening s 5(l) Part VI of the Code.

On a careful analysis of the record it is apparent that the respondent appeared before the disciplinary committee facing two alternative charges arising from the same set of facts. In this regard I would agree with the appellant's submission that the appellant was not facing two distinct offences.

The gravamen of the offence was carrying passengers and goods without authority. That is the offence that the respondent was facing before the disciplinary committee. Whether the carrying of passengers in these circumstances contravened s 5 (1) or 5(p) of the Code was the second rung of the inquiry. This is the issue the court *a quo* was obliged to determine. It was never suggested that carrying unauthorised passengers was in itself a specified offence. In the end the disciplinary committee found the respondent guilty of contravening s 5(l) i.e. corruption. The issue is whether the conviction on an allegation of corruption is proper.

The word corruption is defined in the Concise Oxford Dictionary as:

"decomposition; moral deterioration; use of corrupt practices (bribery, etc); perversion (of language, text, etc.) from its original state; deformation ... "

Corruption is not a common law offence. The Prevention of Corruption Act has, however, made provision for certain specific acts and made them criminal.

The term corruption in the context of the Code must be given its ordinary grammatical meaning and not be construed within the criminal context. Indeed some decisions of this Court have stressed that a Code of Conduct should be interpreted in such a way as to give effect to the intention and spirit of the

Code of Conduct. It is not the kind of document that should be construed strictly and each word given a legal meaning..

In all the circumstances I am satisfied that a driver who, without the authority of his employer, carries passengers and goods in return for a fee would not only be acting contrary to his employer's instructions but would also be corrupt. The act of carrying passengers without the knowledge of the employer and exacting a benefit out of such a transaction would amount to corruption for purposes of the Code of Conduct.

I would consequently agree with the appellant that the respondent was correctly charged. I would further agree with the submission made by the respondent that the ferrying of goods and passengers in these circumstances would also be a contravention of s 5(p) of the Code, i.e. disobedience to a lawful order or instruction given by the employer. Since the respondent could not be found guilty of contravening both sections, he was, in my view, correctly charged with contravening s 5(1) of the Code. It is not correct, as the court *a quo* found, that the appellant was charged with one offence but was dismissed for a different offence.

It appears that in framing the charge against the respondent reference was made initially to Part V2 and thereafter to Part V1. In my view, the respondent knew the particulars of the offence he was facing. The failure to correctly cite the relevant part of the Code applicable was never made an issue. In my view, nothing turns on this.

On the question of *onus* the Labour Court remarked that:

"What emerges from the minutes is that the appellant was proving his innocence instead of the respondent having to prove the appellant's guilt. It is settled that a person is innocent until proved guilty and that he who alleges must prove.

Evidence was led in court. There is evidence to show that something happened at Christmas Pass. However, it is not clear what charge the appellant ought to have been facing. The appellant was charged with offence (*sic*) but was dismissed for another offence. In *Standard Chartered Bank v Matsika* 1996(1) ZLR 123 it was held that it would be incompetent for an employee to be dismissed on the basis of a conviction on a charge which he/she was not originally charged with.

From the various portions of the record which the court has referred to, it would appear the respondent was not quite sure about whether or not the appellant had committed an offence. The charge was not clear ... ."

I have already commented on the propriety of the charge preferred against the appellant. That the respondent was correctly charged there can be no doubt. The apparent confusion on the part of the learned Labour Court President arose from her failure to appreciate that the particulars given, i.e. carrying unauthorised passengers, were intended to prove the two alternative offences leveled against the respondent. These were not distinct charges. The particulars were intended to complement the actual charge, i.e. of contravening s 5 of Part VI of the Code. It is also unclear how the learned President arrived at the conclusion that the respondent in this case had had to prove his innocence instead of the appellant proving his guilt. The record shows clearly that the appellant called witnesses before the respondent did so. It is not clear in what way the respondent was asked to prove his innocence. The *onus* of proving the guilt of the respondent lay on the appellant. That *onus* was discharged. It is clear that the learned President failed to come to a definite finding owing to the fact that she failed to appreciate that there was only one offence being preferred against the respondent i.e. carrying unauthorised passengers in contravention of either para (i) or para (p) of s 5 of Part VI of the Code. The learned President erroneously concluded that the respondent was charged with one offence but was convicted of another. She failed to make a definite conclusion on the facts owing

to what she perceived as impropriety in the charge preferred against the respondent.

It is not the position, as suggested by the respondent in his heads of argument, that the learned President did not find sufficient evidence to formulate a factual finding that the respondent did carry unauthorised passengers. It is clear the learned President accepted that "something had happened" but did not know what charge applied thereto.

In all the circumstances, I am satisfied that the decision of the Labour Court was wrong and that it should be set aside.

In the result, it is ordered as follows -

- "1. The appeal be and is hereby allowed with costs.
  
2. The decision of the Labour Court is set aside and in its place the following is substituted:

The appeal is dismissed with costs."

MALABA JA: I agree.

GWAUNZA JA: I agree.

*Simbarashe Machiridza*, appellant's legal practitioners

*Matimba & Muchengeti*, respondent's legal practitioners