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Judgment No. SC 17/07
Civil Appeal No. 168/05

DULY HOLDINGS v PETER CHANAIWA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, JANUARY 29, & JULY 9, 2007

H Zhou, for the appellant

S Maruza, for the respondent

GWAUNZA JA: This is an appeal against an order of the Labour Court requiring the appellant to reinstate the respondent to his employment with it, or *in lieu* thereof pay him damages.

The facts of the matter are not in dispute. The respondent was employed by the appellant as a Branch Manager. Due to what was referred to by his Managing Director, Mr Papalexis, ("Papalexis") as the respondent's failure to comply with instructions from his superiors, unauthorized absence from his office and work performance that left a lot to be desired, a letter to the following effect was written to the respondent by Papalexis:

- "1. You are no longer permitted to leave your Branch without my authority or that of (the) Financial Director, during working hours.**
- 2. You will cease to play golf during working hours without prior approval.**
- 3. 3 – 5 (not relevant to these proceedings).**

Should you have any queries regarding these instructions, please refer them to me. Failure to comply with these instructions will result in disciplinary action which may include dismissal."

On 14 March 2002 the respondent requested authority to play golf in the afternoon. Such authority was denied. He then asked for permission to go to the bank for about 20 minutes, which was granted. It is not in dispute that after the respondent left (ostensibly to go to the bank) he did not come back to work for the rest of that day. Nor did he come to work the following day, which was a Friday. No word was received from the respondent as to where he might have been during the period of his absence.

These developments prompted Papalexis to write, on 15 March 2001, to the respondent, commenting on his unauthorized absence from work and drawing attention to the earlier correspondence, in which he had been instructed not to absent himself from the office without authority. Papalexis, through the same letter, also suspended the respondent with immediate effect, pending a disciplinary hearing to answer charge number 12:10 of the Code of Conduct ("the Code"), that is "failure to obey or comply with lawful instructions given by a person in authority".

A disciplinary hearing was duly held on 25 March 2002, and was chaired by Papalexis. The respondent was found guilty of the charge preferred against him, a circumstance that led to the disciplinary committee unanimously agreeing that he should be dismissed from employment. The respondent thereafter noted an appeal with the Managing Director, who happened to be Papalexis, against the decision to dismiss him. In his appeal, he took issue with the fact that the disciplinary hearing had been chaired by the Managing Director, i.e Papalexis, contrary to the appellant's Code of Conduct ("the Code"), when in terms of the Code

he would be required to file his appeal to the same Managing Director. The respondent charged, therefore, that the disciplinary committee had not been properly constituted, as required by Part III S 14.14.4 of the Code, which reads as follows:

“No employee shall be discharged from the service of the company without the proper disciplinary procedure having been taken.”

The respondent's appeal was heard on Tuesday 9 April 2002 and, at Papalexis' instruction, was chaired by the Finance Director, Mr Mutyambizi, who also acted as the management representative. The respondent lost the appeal, and subsequently appealed to the Labour Court. The Labour Court upheld the respondent's argument that the disciplinary proceedings had not been conducted in compliance with the Code. In addition to this, it was the Labour Court's finding that the rules of natural justice had not been observed in the manner in which the disciplinary proceedings against the respondent were held. For this, the court *a quo* relied on *Chataira v Zesa* HCH 9/2000 where it was held that the rules of natural justice required no more than that the domestic tribunal acts according to the commonsense precepts of fairness.

Observing that failure to follow the provisions of the Code was fatal to the disciplinary proceedings, the court *a quo* held that the respondent's dismissal was, therefore, wrongful. It ordered that he be reinstated with no loss of salary or benefits, failing which the appellant was to pay him damages in lieu of reinstatement.

The appellant submits, (i) that the court *a quo* erred in determining that there was a violation of the rules of justice in relation to the respondent and (ii)

that contrary to the respondent's assertions, he had suffered no prejudice from the procedure adopted. The appellant also submits as an alternative ground of appeal, that if there were procedural irregularities involved, the court *a quo* should have remitted the matter for a re-hearing or dealt with the merits of the case itself, instead of ordering the respondent's reinstatement.

I will consider the argument pertaining to the rules of natural justice first.

The appellant's contention that the disciplinary proceedings against the respondent accorded with the principles of natural justice, is premised on four grounds.

These are –

- (a) that the appellant did the "best thing in the circumstances" in order to guarantee the respondent natural justice, in the absence of a provision in the Code providing for the equivalent of a "head of department" for the respondent who, himself, was the head of his branch;
- (b) that in the absence of a provision in the Code specifically covering the conduct of disciplinary proceedings against a branch manager, the appellant had ensured that the respondent's case was properly heard before the disciplinary committee constituted and chaired by Papalexis for that purpose;

- (c) that since the provision in the Code for an appeal to the branch manager and the Operations Director in the relevant section did not apply to the respondent, the appellant had done the best it could under the circumstances to ensure that the appeal was determined by a committee that excluded Papalexis, who had chaired the earlier disciplinary committee proceedings; and
- (d) that in any case, the respondent was given ample opportunity to be heard in accordance with the *audi alteram partem* rule.¹

The appellant submits in the light of this that there were no procedural irregularities in the proceedings against the respondent. Further that, in any event, this Court has emphasized the importance of flexibility of disciplinary tribunals, and the principle that they are there to conduct an enquiry (*ZFC v Eunice Geza SC 14/98*).

I find the appellant's contentions to be persuasive. It has not been disputed that the respondent was a branch manager and therefore the most senior official at his branch. The appellant's Code outlines a procedure for disciplining an employee who in his work is accountable to a departmental head who, in turn, reports to the branch manager. The role of these two in such disciplinary procedure is clearly laid out. The Code attempts, in its Part III, to address the situation involving the discipline of a senior employee, by stating as follows:

¹ See *Sefularo v President of Bophuthatswana & Anor* 1994 (3) SA 80 at 82E

"14. In the case of senior staff, the alleged offence will be reported to the relevant Operations Director/Manager at Head Office".

The Code, however, does not go on to set out the disciplinary procedure to be followed after the Operations Director/Manager at Head Office is seized with the matter. While one might attempt to seek guidance or draw parallels from the procedures laid out for less senior staff, there is no denying the fact that this gap in the Code leaves the field open for relevant senior staff to apply disciplinary procedures that, in their view, accord justice to the offending employee. The appellant argues this is what happened *in casu*. Papalexis, being the respondent's superior, set in motion a process that saw the respondent being charged with an offence provided for in the Code, being given an opportunity to answer to those charges, appearing before a disciplinary committee and thereafter filing an appeal against that committee's determination and subsequently appearing before an appeal committee. Having chaired the disciplinary committee, Papalexis constituted an appeal committee that excluded him but had the requisite representatives from management and workers.

The respondent avers that he was prejudiced by the procedure followed in these disciplinary proceedings. He submits it was unlikely that, at the appeal stage, any other employee would have risked his employment by going against the judgment of the Managing Director, that is Papalexis.

I am not persuaded by this argument. Apart from Papalexis not having solely determined the respondent's fate at the disciplinary committee stage, since he sat with others on the committee, the appeals committee, in its turn, comprised members who represented, in equal numbers, management and workers.

To suggest without substantiation that members of both these committees so stood in awe of Papelexis that they would not have dared to go against his (Papalexis's) judgment on the respondent's case, is, in my view, to unfairly put their personal integrity and professionalism into question.

The appellant's argument that it did the best thing under the circumstances to ensure that the respondent had a fair hearing cannot, in my view, be faulted. To the extent that the respondent was given an opportunity to answer to the charges and present his side of the story, he should not be heard to say that there was no observance of the *audi alteram partem* rule. The court *a quo* correctly noted in its judgment that the rules of justice required no more than that the domestic tribunal acts according to the commonsense precepts of fairness. Given the circumstances outlined above, I respectfully disagree with the court *a quo*'s conclusion that it could, *in casu*, not be said that the rules of natural justice were observed. I am satisfied that the respondent was, therefore, not prejudiced in any way by the disciplinary procedures followed.

The appellant argues, correctly, that the adoption of disciplinary procedures not specifically outlined in the Code finds support in *ZFC v Eunice Geza* SC 14/97, where this court emphasized the importance of flexibility in the conduct of disciplinary tribunals, and the principle that they were there to conduct an enquiry. It cannot, in my view, be said in this case that the disciplinary tribunal did not conduct an enquiry.

The appellant argues in the alternative that, even if there were procedural irregularities, the court *a quo* erred in ordering reinstatement. The appellant correctly cites *Dalny Mine v Banda* 1999 (1) ZLR 220 in which this Court emphasized the undesirability of deciding labour matters on the basis of procedural

irregularities, instead of putting right such irregularities. The latter would be achieved either by remitting the matter for a hearing *de novo*, and in a procedurally correct manner, or by the Tribunal hearing evidence². This Court has also stressed the point that once the tribunal decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.

In casu, there is no evidence that the court *a quo* addressed its mind to the option of remitting the matter to the appellant, in keeping with the decisions of this Court referred to. That clearly was a misdirection at law.

Although I have considered remitting the matter to the *court a quo* for the appropriate determination as indicated, I am also cognizant of the need to bring finality to the case. Accordingly, since all the evidence that would enable this court to determine the matter on the merits has been placed before us, I shall proceed to do so.

It is evident from the record that the respondent disregarded specific instructions given to him not to absent himself from work without authority. While his belated explanation that he fell sick on both the days he absented himself from work, sounds somewhat farfetched, he did not ensure that even this explanation was transmitted to his office. The respondent explained that on both occasions he had fallen violently sick while driving his car, had stopped the car and then fallen asleep, only waking up some 3 to 4 hours later. He suspected it was food poisoning. By his own admission, he not only did not inform his wife of the first bout of sickness, but also left home the following day with no indication that he would not be going

² See also *Air Zimbabwe Corp v Mlambo* 1997 (1) ZLR 220 (S)

straight to work as usual. He asserted that he had only informed his wife of the second bout of sickness when he got home at the end of the second day. That was after he found that the letter of dismissal had been left at his home.

Under these circumstances, the disciplinary committees that heard the matter initially and on appeal clearly were correct in their finding that the respondent had indeed disobeyed lawful and specific instructions given to him by his superior. Their finding that the respondent's explanation lacked credence cannot be faulted, neither can their determination to dismiss him. The appeal must therefore succeed.

It is in the result ordered as follows –

1. The appeal be and is hereby allowed with costs.
2. The judgment of the Labour Court is hereby set aside and substituted with the following -

“The appeal be and is hereby dismissed with costs.”

ZIYAMBI JA: I agree

GARWE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chingore & Garabga, respondent's legal practitioners