Judgment No. S.C. 101/99
Civil Appeal No. 29/98

ANELE DUBE AND ONE HUNDRED AND SIXTY-SEVEN OTHERS

v (1) UNIFREIGHT LIMITED

(2) THE MINISTER OF LABOUR AND SOCIAL WELFARE

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, SEPTEMBER 13 & DECEMBER 14, 1999

*B S Kaseke*, for the appellants

*H L Thompson*, for the first respondent

No appearance for the second respondent

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 21 January 1999 in which their applications for reinstatement were dismissed with costs.

The appellants were employed by the first respondent. On 28 May 1997 they, together with other employees of the first respondent, engaged in what they called a collective job action against their employer. They explained that this was because "we had a lot of grievances which the respondent's (the first respondent) management refused to address".

Anele Dube ("Dube"), who swore the founding affidavit on behalf of all the appellants, states the following in paras 4 to 8 of the affidavit:

"4. In the course of negotiations with the 1st respondent's management, the Ministry of Labour and Social Services and myself and other members of the workers' committee, a show cause order was issued by the 2nd respondent on June 3, 1997. I annex the order and mark it Annexure 'A'. In terms thereof I and my colleagues were directed to terminate the collective job action immediately.

5. My colleagues and I did not stop the collective job action subsequent to the issue of the show cause order. Management refused to guarantee that there would be no reprisals against us.

6. On 4 June 1997 the 2nd respondent issued a disposal order. I attach a copy of the same and mark it Annexure 'B'. The disposal order was read to the applicant (Dube) outside the 1st respondent's premises by a Mr Masuku ("Masuku"), the 1st respondent's Executive Director, Personnel and Training. It was read at about 3.00 pm. It was not possible to unconditionally return to work by 2.00 pm as per (the) disposal order.

7. Whilst the applicants (the appellants) were still considering what action to take and around 3.20 pm the 1st respondent threw several copies of a document which I annex hereto and mark Annexure 'C'. In the document, the 1st respondent had terminated the applicants' services unilaterally. It is clear that the disposal order did not authorise the 1st respondent to terminate the applicants' services and certainly it never referred to 9.00 am. Annexure 'C' took workers aback because we were prepared to resume work. The termination and more so the way it was unilaterally done did not go down well with the applicants. It was decided to seek legal representation and advice.

8. On 5 June 1997 the applicants sought legal advice and the applicants' legal practitioners wrote an urgent letter which I personally delivered to the 1st respondent. I attach it and mark it Annexure 'D'. In relation to Annexure 'D' I and my colleagues now accept that we cannot successfully challenge the issuing of the show cause and disposal orders. However, it is clear that the 2nd respondent's disposal order did not authorise a unilateral termination of the applicants' contracts of employment. Paragraph 3 of the order Annexure 'C' does not state that the applicants should be dismissed." (My emphasis).

The disposal order (Annexure 'B'), which was addressed to the National Chairman of the Workers' Committee (Dube) and the Vice-Chairman, reads:

"In view of the illegality of the collective job action it is directed that:

1. All workers unconditionally return to work not later than 2.00 pm 4 June 1997, with loss of pay for the period not worked.

2. No loss of pay for those employees who adhered to the agreement on 29 May 1997 to return to work on Friday 30 May 1997.

3. The employer may take any disciplinary action he deems fit on any workers who fail to comply with the disposal order." (My emphasis).

The document produced as Annexure 'C' reads as follows:

"**TO ALL STRIKING WORKERS - SWIFT ARDBENNIE**

The Company has been issued with a disposal order by the Ministry of Labour authorising it to terminate the services of those Swift (the first respondent) employees who are still engaged in an illegal strike action as at 0900 hours on Wednesday 4 June 1997.

This circular sets out that you as a recipient are no longer employed by this Company.

The Company is prepared to consider re-engaging you, but you need to reapply personally to the Depot Personnel Manager Ardbennie by no later than 1700 hours Thursday 5 June 1997.

You are also required to collect your letter of termination of services which is available through the office of the Depot Personnel Manager Ardbennie."

Mr Masuku swore the opposing affidavit on behalf of the first respondent. He states that after the issue of the show cause order the appellants' attitude, as indicated by Dube, was that either the first respondent agreed to an across the board wage increment or the strike was to continue. They then challenged officials of the second respondent to issue a disposal order. When it was eventually issued, an official of the second respondent attempted to serve it on the appellants through the workers' committee during the morning of 4 June 1997. The other members of the workers' committee refused to accept the document - Dube was not

present at the Ardbennie Depot that morning. Masuku went on to say in paras 25 and 26 of his affidavit:

> "25. … It was because the strikers repeatedly frustrated efforts to serve the document on them that I eventually read the disposal order out to them at approximately 3.00 pm, by which time, obviously, the 2.00 pm deadline to return to work had expired. All the same, I told the strikers that the first respondent would be prepared to consider the deadline to expire at 3.30 pm on 4 June and exhorted them to return to work by that time.
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> 26. By 3.30 pm there had been no response to my invitation and the strikers remained on strike. I left the Ardbennie Depot to return to the first respondent's head office. It was only following my departure, and at about 3.45 pm, that Annexure 'C' to the Chamber Application was distributed. I repeat that I had given the strikers until 3.30 pm to return to work and that they ignored my request. I do not accept that the strikers wanted to return to work. Indeed this allegation contradicts the first sentence of paragraph 7 which states that the strikers were still considering what action to take when they received Annexure 'C'". (My emphasis).

The first issue to deal with is whether the disposal order did authorise the dismissal of the appellants on failure to comply with the order to return to work. The submission for the appellants in this Court was that the order authorised disciplinary action and that disciplinary action is different to and distinguishable from dismissal. It was argued that if the order had intended to authorise dismissal it would have stated so explicitly. It instead authorised disciplinary action and not dismissal.

In my view, the appellants have not read the order properly. The order stated that the employer "may take any disciplinary action which he deems fit". I agree with the reasoning of the learned judge in the court *a quo* that whilst the concepts of disciplinary action and dismissal may be distinguishable and separate concepts they are not self-exclusive. The concept of dismissal may be and is

contained within the meaning of disciplinary action. Mr *Kaseke*, for the appellants, conceded this during the hearing.

I therefore agree that the use of the words "may take any disciplinary action", taken together with the fact that the appellants had refused to obey the terms of the show cause order, suggests that it was intended to authorise the first respondent to dismiss those employees who failed to return to work unconditionally if it so wished.

The next issue to resolve is whether in dismissing the employees the first respondent was bound to comply with the provisions of the Code of Conduct between it and its employees. Again I consider that the finding of the learned judge in the court *a quo* is unassailable. The Code of Conduct applies in the normal circumstances where an employee is charged with an offence and then steps outlined in the Code are undertaken. These are designed to establish whether or not the alleged offender is guilty of misconduct. The procedure under ss 106 and 107 of the Labour Relations Act [*Chapter 28:01*], that is where the labour relations officer issues a show cause order and disposal order, envisages that the labour relations officer has already made the enquiry through a show cause order issued by him before making the disposal order. That replaces the procedure in the Code of Conduct. Indeed the appellants' representatives in this case made their case before the labour relations officer during the show cause hearing before the disposal order was issued. Once the labour relations officer makes the disposal order, as in this case, all that remains is for his authorisation to be carried out.

The other issue raised by the appellants was that the disposal order was not served on them and that they therefore had no opportunity to comply. The accepted evidence in this case is that the appellants were throughout the proceedings represented by their workers' committee. Indeed the show cause order was addressed to and served on the workers' committee. The appellants do not deny that this was proper service. The workers' committee was aware that the disposal order would be issued and that, judging by the contents of the show cause order, the former would order the strikers to go back to work immediately. This time when the disposal order was issued in the same manner they refused to accept service of it. I consider that their refusal was simply meant to frustrate the proper course of the action which was being pursued. The workers' committee was not entitled to refuse service in the circumstances and its refusal cannot be allowed to frustrate the first respondent's legitimate actions. They are in the circumstances bound to have been served with the disposal order - they were indeed aware that its contents were to order the immediate return to work. And service to the workers' committee is service to all striking workers in the circumstances. See *Tsodzo & Ors v Saybrook (1978) (Pvt) Ltd and Ors* S-13-99 at p 3 of the cyclostyled judgment where in a similar case EBRAHIM JA said:

> "Mr *Nherere* conceded that the events leading to this case are the same as those in *Tsingano and Forty-five Others v Munchville Investments (Private) Limited t/a Bernstein Clothing* S-163-98. He accepts that the case arises following a strike in the Zimbabwe clothing industry that occurred from 7 to 11 July 1997. It was Mr *Nherere's* submission that the crucial decision to be determined was whether or not the Union was representing the appellants in the proceedings culminating in the disposal order issued on 11 July 1997. He accepts that if it was, then the appellants were party to the proceedings, culminating in the disposal order being made and as service was effected on the Union the appellants were properly served with both the show cause order and the disposal order." (My emphasis).

In the present case service of the disposal order was made certain by the reading of its contents by Masuku at about 3.00 pm to the assembled striking employees. There was therefore proper service of the order on the appellants.

The next issue raised by the appellants is that at the time the disposal order was read to the striking employees the deadline indicated in the order for returning to work - 2.00 pm - had expired and could not therefore be fulfilled. It was also submitted that it was improper in the circumstances for the first respondent to extend the deadline unilaterally to 3.30 pm. And that the first respondent should have gone back to the labour relations officer for authority to extend the deadline. I do not agree with these submissions.

In the first instance, I have already held that the disposal order must in the circumstances be deemed to have been served on the appellants during the morning of the 4th when their representatives, the workers' committee, wrongly refused to accept service. Secondly, even if service were to be held to have been effected at 3.00 pm I consider that the effect of the order as far as the appellants were concerned was ameliorated by the extension of the deadline to 3.30 pm. In this connection I agree with the reasoning and finding of the learned judge in the court *a quo*, which was to the effect that the first respondent had been authorised to dismiss striking employees who did not return to work by 2.00 pm. The extension of the time did not alter the import of the order and did not introduce a new term. It in fact altered the timing in favour of the appellants - to accommodate them in the face of the disservice meted out to them by the workers' committee. There was therefore in the circumstances no need to go to the labour relations officer who would in any event

have approved the extension. In my view, this should not be a cause of complaint by the appellants.

The last issue raised by the appellants was that the time limit set by the first respondent at 3.00 pm to return to work - thirty minutes - was too short for them to enable them to able to comply. Here again I agree with the finding of the learned judge in the court *a quo*. The appellants were assembled at their workplace when the order was read out to them. None of them indicated that they were not present when the order was being read. They all knew what was coming - the show cause order had been to the effect that they should return to work immediately. In these circumstances I consider that thirty minutes was time enough for them to walk from their assembly point to their places of work. Indeed, none of them indicated that it was physically impossible for them to comply or that they tried to comply but failed. The indication is, as stated in para 7 of Dube's affidavit, that instead of attempting to comply with the order the time expired "when they were still considering what action to take". I agree with what the learned judge in the court *a quo* said at p 6 of the cyclostyled judgment (HH-16-98):

> "What the applicants ignore is that the time for discussion was over. There was a lawful order served on them to return to work by a certain time. They were told of the consequences of failure to obey that order. They did not obey the order. The threatened consequence followed. The applicants have not shown that they could not comply with the order, nor have they shown that they had any lawful excuse not to comply with it."

From the above it is clear that I consider that the judgment of the learned judge in the court *a quo* is unassailable.

In the result the appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I have read the judgment prepared by my brother MUCHECHETERE but respectfully disagree with it for two reasons.

In the first place, I disagree with the conclusion that the disposal order must be deemed to have been served on the appellants during the morning of 4 June 1997. That conclusion was based solely on the averments made by Masuku, the executive director of the first respondent ("Swift"). He averred as follows:

> "An official of the Ministry, a Mupandiwana, attempted during the morning of 4th June to serve the Disposal Order on the strikers, through the Workers' Committee members. Mr Dube, the Workers' Committee Chairman, was not present at the Ardbennie Depot and other members of the Workers' Committee who were present refused to accept the document. It was because the strikers repeatedly frustrated efforts to serve the document on them that I eventually read the Disposal Order out to them at approximately 3.00 pm, by which time, obviously, the 2.00 pm deadline to return to work had expired."

Masuku's averments were disputed by Dube, the chairman of the workers' committee, who in his answering affidavit averred as follows:

> "I was in fact present and was not called upon by the official referred to and I did not see him. I do not know what Mr Masuku means by saying that service of the disposal order was frustrated by the workers. Inasmuch as he read the disposal order around 3.00 pm as he states, the same could have been read earlier.
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> I aver that by the time the disposal order was read, it was no longer possible to comply with it within the time which had been set by the appropriate authority …".

In the circumstances, there was a dispute of fact which could not be resolved on the papers without hearing oral evidence. Regrettably, no oral evidence was led and the dispute of fact was not resolved. In addition, no affidavit from the official who allegedly attempted to serve the disposal order on the members of the workers' committee, setting out what he did on the occasion in question, was filed. No explanation was given for the failure to file such an affidavit. In my view, there can be no basis whatsoever for the conclusion that the disposal order must be deemed to have been served on the appellants during the morning of 4 June 1997.

Secondly, I disagree with the conclusion that the deadline of 2 pm set out in the disposal order issued by the labour relations officer was properly extended to 3.30 pm by Masuku. Assuming that when Masuku read out the disposal order to the assembled workers at 3 pm that act constituted proper service of the order on the appellants, the order was served long after the deadline of 2 pm had passed and the appellants could not have complied with it. In the circumstances, when the order was served on the appellants it was unenforceable. Masuku could not make the order enforceable by substituting 3.30 pm for the deadline of 2 pm set by the labour relations officer. He had no powers to do so. He should have gone back to the labour relations officer and sought an extension of the deadline by which the appellants were to return to work.

The position would have been entirely different if, before the deadline of 2 pm, the disposal order had been served on the appellants and thereafter Masuku had extended the deadline to 3.30 pm, thereby giving the appellants more time within which to return to work. In that event, a valid and enforceable order would have been

served on the appellants, and Masuku, acting for Swift, would have been entitled to waive any rights which Swift had in terms of the order by, for example, not insisting on the 2 pm deadline.

In the circumstances, in my view, the appellants were unlawfully dismissed. I would, therefore, have allowed the appeal with costs and set aside the order of the court *a quo* and in its place substituted the following:

> "The application is granted in terms of paras 1, 2, 3, and 5 of the terms of the final order sought."

*Chinamasa, Mudimu & Chinogwenya*, appellants' legal practitioners

*Wintertons*, first respondent's legal practitioners