Judgment No S.C. 83\2001
Civil Appeal No 30\2001

SMITH CHATAIRA v ZIMBABWE ELECTRICITY SUPPLY AUTHORITY

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & MALABA JA
HARARE OCTOBER 2 & NOVEMBER 22, 2001

T. Mahaso, for the appellant

No appearance for the respondent

EBRAHIM JA: The appellant (hereinafter referred to as "Chataira") was employed by the respondent (hereinafter referred to as "ZESA"). He was charged with misconduct, found guilty and discharged. He appealed to the Appeals Committee and his appeal was dismissed. He then brought the proceedings on review, claiming that there were errors of law on the part of the Appeals Committee. The alleged errors were that it accepted evidence from "flea market" vendors by way of affidavit, without calling them to give *viva voce* evidence, and that it accepted the uncorroborated evidence of the investigation officers well knowing that they would give evidence against him at all costs. He submitted that it was grossly irregular for the Appeals Committee to accept hearsay evidence.

ZESA opposed the application. It was its case that the Appeals Committee did not err in law by accepting written statements from the flea market vendors in evidence.

It was also ZESA's case that the application for review before the High Court failed to comply with the requirements of Order 33, rule 257 of the High Court Rules, in that it did not state, shortly and clearly, the grounds upon which the appellant seeks to have the proceedings set aside and this failure to comply with rule 257 is a fatal flaw - see *Minister of Labour, Manpower Planning and Social Welfare & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S), *Mashaishi v Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (HC) and *Chairman of the Public Service Commission & Anor v Marumahoko* 1992 (1) ZLR 304 (S). It was also submitted that none of the "complaints" relied on by Chataira constituted a ground for review and that domestic tribunals are entitled to follow their own procedures and are not bound by the ordinary rules of evidence, as long as their procedures did not conflict with the rules of natural justice. It was also submitted, as regards the *audi alteram partem* rule, that it does not include the right to cross-examine witnesses. Cases cited in support of this submission are *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 146 (SC); *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T); *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) and *Chairman of the Public Service Commission & Anor v Marumahoko* 1992 (1) ZLR 304 (S). The submission was that the *audi alteram partem* rules requires no more than an opportunity to make representations, to place one's own version before the tribunal concerned and to rebut evidence against oneself. See the *Metsola* case, *supra*, the *Heatherdale Farms* case, *supra*, and the

Makwavarara case, *supra.* Chataira was given all those opportunities. An opportunity to cross-examine is not a *sine qua non* of an opportunity to present one's case and rebut the other side's evidence.

The question which fell for determination was whether the hearing by the Disciplinary Committee was defective because the witnesses were not called to give *viva voce* evidence and therefore Chataira was unable to cross-examine them.

The learned judge *a quo* observed that "in *Riekert's Basic Employment Law* 2 ed at p 102 *et seq* the learned author, J Grogan, says that procedural fairness is the yardstick against which the employer's pre-dismissal actions are measured. The employer is required to act judicially before imposing a penalty on an employee. However, the requirement of a fair hearing does not mean that employers must handle disciplinary proceedings according to the rigorous standards of a court of law. The rules of natural justice require no more than that a domestic tribunal acts according to the common sense precepts of fairness. Save in exceptional cases, there must be a hearing before disciplinary action is taken to ensure that the employee has an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertion of his accusers before an adverse decision is taken against him. The employer should advise the employee of the precise charge or charges that he is required to answer in advance of the hearing so that he can adequately prepare for his defence. In *Selwyn's Law of Employment* 7 ed at para 7.14 the learned author says that an employee should always be given an opportunity to state his case. He is entitled to plead that he did not do the alleged act or that he did not intend the construction put on it or that

mitigating circumstances relating to his case should be taken into consideration. As long as the employee is given a fair hearing, there is no particular form of hearing that must be adopted. When an allegation of an employee's misconduct has been made by an informant, a balance must be maintained between the need to protect the informant and respect his anonymity, and providing a fair hearing to the accused employee. In *Bowers on Employment* at p 217 the learned author refers to the case of *Khanum v Mid-Glamorgen Area Health Authority* [1978] 1 RLR 215 wherein it was held that the lack of opportunity to cross-examine and to produce statements of witnesses to alleged misconduct did not render the hearing unfair. In that case the three guiding principles were summarised as follows:-

(a) that the employee should know of the accusations he has to meet;

(b) that he should be given an opportunity to state his case; and

(c) that the internal tribunal acts in good faith.

From the authorities referred to above it is clear that at a hearing into allegations of misconduct, it is not necessary that *viva voce* evidence be led. The employee concerned must obviously be shown any statements or documentary evidence that is being produced before the Disciplinary Committee but he cannot insist that the person who made the statement be called so that he can be cross-examined."

The approach of the learned judge *a quo* is unassailable.

The learned judge *a quo* also referred to the case of *Bentley Engineering Co Ltd v Mistry* which is referred to in *Anderman's The Law of Unfair Dismissal* 2 ed at pp 141-142 and observed:-

> "In that case the Employment Appeal Tribunal upheld the industrial tribunal's decision that the dismissal was unfair, partly because the dismissed employee was insufficiently informed of the nature and detail of the allegations to give him an opportunity to reply. At p 142, a portion of the judgment of the EAT is reported as follows –
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> > 'Natural justice, in a case such as the present one, requires not merely that a man shall have a chance to state his own case in detail; he must know sufficiently what is being said against him so that he can properly put forward his own case. In order to adequately satisfy the requirements of natural justice it may be, according to the facts, that what is said against the employee can be communicated to him in a written statement, or it may be sufficient if he hears what the other protagonist is saying, or it may be adequate in an appropriate case for matters which have been said by others to be put orally in sufficient detail. There is no particular form of procedure that has to be followed in any and every case. It is all a question of degree.'
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> In *Heatherdale Farms,* case, *supra*, at p 486 D COLEMAN J said:-
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> > 'It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral bearing; or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents.'
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> Similarly, in the *Metsola* case, *supra*, GUBBAY JA (as he then was) said at p 154E:-
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> > 'The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons underlying the impeding decision; to disclosure of material documents; to a public hearing and, at that hearing; to appear with legal representation and to examine and

> cross-examine witnesses. See, generally, *Baxter Administrative Law* at pp 545-547. The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the "right to be heard" in appropriate circumstances may be confined to the submission of written representations.'"

As regards the failure on the part of Chataira to comply with rule 257 of the High Court Rules, the learned judge said:-

> "It seems to me that such non-compliance would constitute good grounds for dismissing this application. Rule 257 requires that an application to bring proceedings under review shall state shortly and clearly the grounds upon which the appellant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In the *PEN Transport, Mushaishi and Marumahoko* cases referred to earlier, the courts clearly stated that failure to comply with rule 257 constituted a fatal flaw. Despite those warnings, legal practitioners still fail to comply with the rule. The time has surely come to say enough is enough and to dismiss the defective applications without considering the merits."

In my view these observations are beyond criticism.

It seems to me that even on the merits of this matter Chataira does not have a good case. In any event he had an adequate indication of the reasons of his proposed dismissal and was well aware, in specific detail, of the accusation he faced and had ample time and opportunity to state his case. There is, therefore, no merit in this appeal and accordingly the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree

MALABA JA: I agree

Mahaso & Partners, appellant's legal practitioners

Madanhi & Associates, respondent's legal practitioners