REPORTABLE (27)

Judgment No. S.C. 34/02
Civil Appeal No. 225/01

GEDDES LIMITED v MARK TAWONEZVI

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, SANDURA JA & MALABA JA
HARARE, JANUARY 10 & MAY 27, 2002

A G Matika, for the appellant

The respondent in person

MALABA JA: This is an appeal from a judgment of the High Court delivered on 24 July 2001 granting the respondent the following order:

> "1. THAT misconduct proceedings instituted against the applicant, together with his suspension, preferment of misconduct charges, determination of these charges and meting (out) of penalty be set aside as null and void.
>
> 2. THAT the respondent pay to the applicant the salary and other benefits due to him from the date of his suspension, being 10 August 1998, minus whatever sum he is proved to owe the respondent and any deductions required by law.
>
> 3. THAT the respondent shall pay the costs of this application."

The historical events forming the background to the case are these -

The respondent was employed by the appellant. Their relationship as employer and employee was governed in matters of discipline by a registered Code of Conduct for the Commercial Sector ("the Code"). The Code defined the acts of

misconduct and prescribed the disciplinary procedure to be followed should an employee be accused of committing misconduct. It also specified the person to investigate the allegations, prefer charges and conduct disciplinary hearings. The disciplinary action to be taken in the event of an employee being found guilty of misconduct was also specified.

In clause 3.3 of the Code it was provided that:

> "… the employer, after consultation with the Works Council, shall appoint in writing one or more persons in his employment to be the 'Designated Officer' for the purpose of administering this Code." (the underlining is for emphasis)

Clause 4 provided that where it appeared to a "designated officer" that an employee had committed an offence he had to investigate the circumstances of the alleged commission of the offence forthwith. He was obliged to:

> "4.1 Notify the employee, in writing, of the nature of the alleged offence and of the impending investigations;
>
> 4.2 In the event of an offence warranting dismissal in terms of Part IV, SUSPEND the employee with or without pay as the officer shall stipulate, pending his decision on the matter in terms of paragraph 5.2;
>
> 4.3 Gather and record all evidence to the alleged misconduct;
>
> 4.4 Afford the employee the chance of presenting his or her case either personally or by a chosen representative, and of calling witnesses in his defence, the employer shall release such witnesses to enable them to attend the hearing for the purpose of giving evidence;
>
> 4.5 Conduct his investigation in accordance with the principles of natural justice;
>
> 4.6 Prepare a comprehensive summary of his investigation, including such summary of any decision made and action taken in terms of paragraph 5; and
>
> 4.7 Give a decision within fourteen (14) days of receipt of such case."

Paragraph 5.2 provided that if, after having conducted the investigation, the designated officer was satisfied that the employee had committed an offence for which the appropriate penalty was dismissal, he had to submit all the evidence, in whatever form, assembled by him together with the summary referred to in para 4.6 to the employer for his decision.

On receipt of the evidence the employer was obliged under clause 6.1 to examine such evidence in detail. The employer had the discretion to take such further evidence in whatever form he considered appropriate. If he decided to call for further evidence the employer was obliged to afford the employee the opportunity of appearing before him. If the employer was satisfied that the employee was guilty of an offence he could impose the appropriate penalty in relation to that offence as set out in Part IV of the Code. If the penalty was dismissal, the employer was obliged to advise the employee in writing indicating the date of termination of employment and of the employee's right to appeal.

It so happened that on 10 June 1998 an order was purportedly made by Lesel Cosmetics to the appellant to supply goods valued at $16 427.43. An invoice, No. 221144, was raised in respect of the order and its details recorded in the computer. Although the goods were dispatched they were never delivered to Lesel Cosmetics. It was discovered, upon investigation, that there was no record of the order in the computer. The respondent's password had been used, the same day, to delete all information relating to the order. As a result of the fraud the appellant lost goods valued at $16 427.43.

On 19 August 1998 Mrs G K Madyara, who was the operations director, wrote the respondent a letter of suspension in these terms:

> "RE: BREACH OF EMPLOYMENT CONTRACT; DISHONESTY AND OTHER RELATED OFFENCES; EMPLOYMENT CODE OF CONDUCT AND GRIEVANCE PROCEDURE FOR THE COMMERCIAL SECTOR, GROUP IV OFFENCES
>
> On the 10/6/98 an order for Lesel Cosmetics was generated, shipped and dispatched. Later on the same day your password was used to delete all the quantities on invoice 221144 so that the computer record would show that nothing went out on that invoice. Unfortunately that order was not delivered to Lesel and the company lost goods worth $16 427.43.
>
> As a result you are hereby suspended without pay from the 10th August 1998."

The letter did not charge the respondent with any particular offence. It was not alleged in the letter that the respondent personally used his password to delete the information relating to the order from the computer or that he permitted another person to use his password to delete the information with the intention of causing prejudice to the appellant. Mrs Madyara signed off as a "Designated Officer".

On 19 August 1998 Mrs Madyara wrote to the respondent, requesting him to attend a disciplinary hearing on 25 August 1998. Present at the hearing was Mrs Madyara, Mr J Chifokoyo, the appellant's human resources manager, his assistant and the respondent. No record of the proceedings was produced.

The respondent disclosed in the founding affidavit that it was alleged at the hearing that he had deleted the information from the computer because his password was used. He said he vehemently denied the allegation. It was his uncontradicted averment that Mrs Madyara admitted at the hearing that she had at the

time authorised one H Mundwa to use his password. He said Mrs Madyara also admitted that H Mundwa had confessed to using his password on the day the information relating to the order purportedly made by Lesel Cosmetics was erased from the computer. The disciplinary hearing was adjourned, ostensibly to give management time to investigate the allegations by the respondent that someone else could have used his password unlawfully to delete the order from the computer.

When the hearing resumed, the respondent was told that management considered it a waste of time to investigate the truthfulness of his allegations. He was told that no further hearing would take place but that a determination would be sent to him.

In the meantime, Mrs Madyara forwarded all the evidence gathered at the hearing to the employer. On 25 September 1998 the employer found the respondent guilty of misconduct and dismissed him from employment. The letter notifying him of the termination of the contract of employment read:

> "We refer to hearings held on 25th August 1998 regarding allegations of misconduct levelled against yourself.
>
> You are advised of management's decision to terminate your employment contract with Geddes Limited with effect from 10th August 1998. This decision has been taken in accordance with the Code of Conduct for the Commercial Sector Part IV Offences paragraphs 5 and 8. Management believes that you were involved in the fraudulent activities that resulted in substantial prejudice to the company. Your computer password was used to delete computer records of invoices for orders, which later disappeared. Management has therefore acted accordingly."

The evidence on which the employer found that the respondent was guilty of misconduct has up to now remained a secret, known to management only.

On 27 October 1998 the respondent lodged an appeal with the Labour Relations Tribunal. Thirty-three months after he was notified of the termination of the contract of employment, he made an application to the High Court for an order setting aside his suspension, preferment of the charges, misconduct proceedings, determinations and dismissal as being null and void. The grounds for his application were stated in the founding affidavit as being:

> "- Absence of jurisdiction in that the proceedings were dealt with by an official who was not the designated officer and were continued after fourteen days from their commencement.
>
> - The charges were not properly framed in that the factual allegations did not disclose any misconduct. The suspension was not founded on allegations disclosing misconduct. The determination has no basis in evidence or factual allegations in the charge. The procedure of the Code was not followed."

In the opposing affidavit the appellant took as a point *in limine* that in making the application to the High Court thirty-three months after his dismissal, the respondent was in breach of Order 33 Rule 259 of the High Court Rules 1971, which requires that a decision should be brought on review within eight weeks of it having been made. It alleged that as there was no application for condonation of the late institution of the application for review, the application was not properly before the court. On the merits Mr Chifokoyo, who deposed to the opposing affidavit on behalf of the appellant, baldly stated that Mrs Madyara was a "designated officer". He did not produce a letter of her appointment as such, even at the eleventh hour. He averred that the letter of suspension sufficiently informed the respondent of the nature of the offence he was accused of having committed.

The respondent indicated in the answering affidavit that he was applying for a declaratory order. It was his contention that the time limit within which an application for review had to be brought to the High Court was not applicable to his application. He persisted in the allegation that the disciplinary proceedings which led to his dismissal were a nullity. He said if Mrs Madyara had been properly appointed a designated officer in terms of clause 3.3 of the Code, she would have been given her own letter of appointment. The employer and the Works Council would each have kept a copy of the letter of appointment. Up to the time the application was heard by the High Court, the appellant had failed to produce the letter appointing Mrs Madyara as a designated officer.

The learned judge correctly decided that the question whether or not the application was not properly before the court depended on the nature of the application. He held that the application was for a declaration of rights. It was not for a review of the decision of Mrs Madyara or that of the appellant finding him guilty of the alleged misconduct and terminating his contract of employment. I am unable to find fault with the learned judge's decision.

In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. In *City of Mutare v Mudzime & Ors* 1999 (2) ZLR 140 (S) MUCHECHETERE JA quoted with approval from *Kwete v Africa Publishing Trust & Ors* HH-216-98, where at p 3 of the cyclostyled judgment SMITH J said:

> "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of Rule 259 of the High Court Rules, 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought. … It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review."

In this case the respondent was not attacking Mrs Madyara's decision to suspend him from work, the disciplinary proceedings she presided over or the decision of the employer to dismiss him from employment. He was in fact treating these decisions and proceedings as a nullity. In other words, they were as good as not having happened and there was no route leading to them upon which they could be reviewed. The ground on which he was treating these decisions and proceedings as a nullity, was that Mrs Madyara had no legal authority or jurisdiction to make the decisions and institute disciplinary proceedings against him.

In highlighting the want of jurisdiction on the part of Mrs Madyara to do what she did, the respondent did not need to review her actions. The approach adopted by the respondent receives authority from the decision in *Bayat & Ors v Hansa & Ano* 1955 (3) SA 547 where at 552 C-D CANEY J said:

> "… the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them either to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or ignoring the second respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights …". (the underlining is for emphasis)

I accept that there are terms used by the respondent in the application which could suggest that the application was for review. The notice of the court application stated that it was a "review court application". In para 20 of the founding affidavit, he said he did not pursue the appeal before the Labour Relations Tribunal because he believed that it did "not have power to deal with irregularities of a reviewable nature". He went on to attack the failure by Mrs Madyara to properly frame the charge levelled against him. The draft order prayed for the setting aside of his suspension and the disciplinary proceedings.

Setting aside of a decision or proceeding is a relief normally sought in an application for review. When one looks at the grounds on which the application was based and the evidence produced in support of them, there is, however, just enough information to support the learned judge's decision that the application was for a declaration of rights. In *Musara v Zinatha* 1992 (1) ZLR 9 (H) ROBINSON J at 14 C-D said:

> "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension …".

The next question is whether the learned judge was correct in holding that this was a case in which a declaratory order ought to be granted. The learned judge was entitled on the evidence before him to exercise the broadest judicial discretion in deciding whether a declaratory order should be granted. It cannot be

said he did not exercise his discretion properly. The ground on which the application was based was that the appointment of Mrs Madyara by the appellant as a designated officer was null and void because the mandatory provisions of clause 3.3 of the Code had not been complied with.

It was made very clear to Mr Chifokoyo, who deposed to the opposing affidavit on behalf of the appellant, that the gravamen of the respondent's case was that only an appointment of Mrs Madyara as a designated officer in writing would have invested in her the jurisdiction to deal with the allegations of misconduct levelled against the respondent. The respondent filed an affidavit from Gibson Mutukwa, who was a member of the Works Council at the material time. He averred that the Works Council never sat to consider an application by the appellant to appoint Mrs Madyara as a designated officer.

Mr Chifokoyo did not deny that Mr Mutukwa was a member of the Works Council at the relevant time. Even at the eleventh hour the appellant failed to produce the letter in terms of which it appointed Mrs Madyara as a designated officer. It is clear from the provisions of the Code that only a person appointed a designated officer by the employer in writing could investigate allegations of misconduct against an employee, suspend him from work and institute disciplinary proceedings.

In *Mugwebe v Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) the company had the same Code of Conduct as *in casu*. The appellant in that case was suspended by the company's marketing manager, who was not the company's designated officer. SANDURA JA at 96H-97A had this to say about the appellant's suspension:

"The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect, I can do no better than quote what LORD DENNING said in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:

> 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'" (The emphasis is mine)

Having found that what Mrs Madyara did when she was not a designated officer was null and void, the learned judge properly exercised his discretion in favour of the respondent and granted the declaratory order.

The appeal is accordingly dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Hussein Ranchod & Co, appellant's legal practitioners