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Judgment No S.C. 60\2002
Civil Appeal No 209\2001

STANDARD CHARTERED BANK ZIMBABWE LIMITED v
KEDSON NKOMO

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA AJA
HARARE JULY 16 & AUGUST 8, 2002

E.K. Mushore, for the appellant

M.G. Ndiweni, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") which ordered the appellant ("the bank") to reinstate the respondent ("Nkomo") as a teller or, alternatively, pay him damages.

The dispute between the parties has a long history, and this is the second time that the bank has appealed to this Court against the Tribunal's order directing that Nkomo be reinstated or paid damages.

The background facts in the matter were accurately set out by McNALLY JA in *Standard Chartered Bank Zimbabwe v Kedson Nkomo*, S-7-98 (not reported), at pages 1-2 of the cyclostyled judgment, as follows:-

"Mr Nkomo was a teller working for the Bank. On 24 June 1996 a customer approached him. The customer had a Bank cheque made in favour of one Bright Taruvinga ("Taruvinga"). It was for $15 000. The crossing was cancelled. This meant that Nkomo was entitled to cash the cheque for the customer so long as he did two things -

1. He had to check with his superior before cashing any cheque over $10 000. He did so. His superior initialled the cheque.

2. He had to satisfy himself that the person before him was indeed the payee. This he says he did by asking for and receiving the metal Identity Card of Taruvinga, and checking it against the appearance of the person before him. He was (he said) satisfied, and paid out the money.

It transpired that two other employees (now serving prison sentences) had fraudulently made out the Bank cheque. They debited it to the account of some unfortunate customer. One of these two was subsequently found in possession of, not one, but two metal identity cards of Taruvinga.

Bright Taruvinga was traced, and said that at different times two of his identity cards had indeed been stolen or gone missing. The one was a replacement for the other. He works in Harare, but said he was at work at the alleged time the cheque was cashed, which, according to Nkomo, was about 3 pm."

The innocent customer from whose savings account the money was fraudulently withdrawn was a Mrs M.L. Crow ("Crow").

Subsequently, the bank had the withdrawal form, which had been used in withdrawing the money from Crow's account, and the cheque examined by Mr Blackmore, a Questioned Document Examiner. In his interim report, Blackmore expressed the opinion that Nkomo had written the details on the front and back of the withdrawal form.

Thereafter, Nkomo was charged with the following acts of misconduct:-

"1. A serious act, conduct and omission inconsistent with the fulfilment of the express or implied conditions of your contract.

2. Gross negligence causing serious loss of $15 000.00 to the Bank.

3. Failure to comply with Standing Instructions or follow established procedures resulting in the substantial loss of $15 000.00 to the Bank."

After the charges were preferred against him, Nkomo appeared before a disciplinary committee on 4 September 1996 and was found guilty as charged. As the offences were Category D offences, the penalty for which was dismissal, that penalty was imposed on the following day by the bank's Regional Manager.

Thereafter, Nkomo unsuccessfully appealed to the Grievance and Disciplinary Committee, and the Employment Council for the Banking Undertaking. He then appealed to the Tribunal and was successful. The Tribunal ordered that he be reinstated or paid damages.

The bank appealed to this Court and was successful in that the decision of the Tribunal was set aside and the matter was remitted to the Tribunal for the leading of further evidence. After further evidence was led, the Tribunal again ordered that Nkomo be reinstated or paid damages.

Aggrieved by that decision, the bank appealed to this Court for the second time. It alleged that the Tribunal's decision was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Before dealing with the merits of this appeal, I would like to indicate the further evidence which ought to have been led after the matter was remitted to the Tribunal. This Court directed that Taruvinga's metal Identity Card should be produced and that Blackmore, the Questioned Document Examiner, should be called as a witness.

The need for the production of Taruvinga's metal Identity Card was clearly set out by McNALLY JA in *Standard Chartered Bank Zimbabwe v Kedson Nkomo, supra,* at page 6 of the cyclostyled judgment, as follows:-

> "It seems to me that in approaching this question (whether there is a reasonable possibility that Nkomo's evidence might be true) too much emphasis has been placed on the fact that Taruvinga probably was not the man in the Bank with the cheque. It does not follow that Nkomo must be guilty. One must assume that the conspirators, having access to Taruvinga's Identity Card, would look for someone at least vaguely similar to Taruvinga, someone who could pass as the face on the metal Identity Card. No-one has looked at the metal Identity Card. It is not an exhibit. But one knows that the pictures on these Identity Cards are far from high quality, award-winning portraits. It must surely be a possibility that they found someone willing to assist, unknown to Nkomo, who could pose as Taruvinga and get away with it.
>
> I conclude therefore that the Identity Card should have been produced. If it is the usual dark picture of an ordinary looking black man of indeterminate age, it may be difficult to conclude that Nkomo was negligent. If it shows a man with some remarkably distinct feature, the opposite conclusion may be reached. The point is that if Nkomo reasonably thought it was a picture of the man in front of him, he was not negligent."

In my view, that accurately sets out the evidential value of Taruvinga's metal Identity Card. Its production at the resumed hearing before the Tribunal was, therefore, essential. Regrettably, it was not produced and no satisfactory explanation was given for the failure to produce it.

In the circumstances, it cannot be said that there is no reasonable possibility that Nkomo's evidence might be true. In the absence of Taruvinga's metal Identity Card, the bank failed to establish that when Nkomo cashed the cheque in question he acted negligently.

In addition, the allegation by the bank that when Nkomo cashed the cheque he did not follow the bank's instructions, and was therefore negligent, has no validity. I say so because it was based on the erroneous assumption that Nkomo cashed a crossed cheque. Nkomo's evidence was that when the cheque was presented to him for encashment the crossing had been cancelled, and the cancellation of the crossing had been authenticated by two senior officials of the bank. It was common cause that the two officials referred to had the authority to cancel the crossing, and that Nkomo was familiar with their signatures.

In the circumstances, the bank's instructions concerning the cashing of crossed cheques do not apply in this case.

I now proceed to consider Blackmore's evidence. He was called as a witness by the bank following this Court's order remitting the matter to the Tribunal for the leading of further evidence.

In the previous proceedings the Tribunal had concluded that as Nkomo had not been specifically charged with fraud, Blackmore's evidence was irrelevant, a conclusion with which this Court subsequently disagreed. Commenting on this, McNALLY JA said the following at page 5 of the cyclostyled judgment:-

> "But the Tribunal … erred in concluding that because there was no specific fraud charge the evidence of (Blackmore) was not relevant. If (Blackmore) had been allowed to give evidence, and if his evidence had convinced the Tribunal, he would have proved that Nkomo was party to the fraud. If he was party to the fraud, he would have known that the person seeking to cash the cheque was not Taruvinga …
>
> Nkomo would clearly have been guilty on the first charge. He would have committed 'a serious act, conduct and omission inconsistent with the fulfilment of the express or implied conditions of (his) contract.'
>
> If, on the other hand, the evidence of (Blackmore) was not regarded as sufficient to prove the guilt of Nkomo, I am inclined to agree with the Tribunal's conclusion (i.e. that the charges had not been proved)."

Subsequently, Blackmore testified before the Tribunal and was cross-examined. He confirmed what he had stated in his interim report in August 1996, that in his opinion it was Nkomo who had written the details on the front and back of the withdrawal form. He, however, conceded that his opinion required corroboration by other evidence.

After considering the evidence, the Tribunal concluded that in the absence of corroborative evidence Blackmore's evidence was unreliable and, therefore, did not establish that it was Nkomo who had written the details on the front and back of the withdrawal form.

The question which now arises is whether, as submitted by Ms *Mushore*, who appeared for the bank, that conclusion is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it. I do not think so, for the following reasons.

In the first place, Blackmore himself conceded that his opinion required corroboration by other evidence. It is significant that no corroborative evidence was led to confirm his opinion, and it is, therefore, reasonable to assume that no such evidence was available.

The concession by Blackmore was an acknowledgment of the fact that the opinion of an expert as to the identity of handwriting is not as highly regarded as the evidence on fingerprints. As *Hoffmann and Zeffertt* state in The South African Law of Evidence, 4 ed at page 103:-

> "It is generally recognised that the identity of fingerprints can be accurately established by expert inspection … But the opinion of experts as to the identity of handwriting is not so highly regarded …"

At page 105 the learned authors indicate the problems which arise when an attempt is made to identify a handwriting by comparing it with another specimen already proved to be genuine, as Blackmore did in this case, and state as follows:-

> "More difficult problems arise when attempts are made to identify a handwriting by comparison with another specimen which has been proved to be genuine. The courts have frequently emphasised that this method of identification must be used only with the greatest caution. A witness who is looking for similarities in two specimens of handwriting is unlikely not to find any, and this may involve him in an unconscious circuity of reasoning …"

In addition, Blackmore was clearly wrong when he said that the signature of Zungunde, the authorised signatory in respect of the cheque in question, was suspect. Zungunde gave evidence and stated that the signature on the cheque appearing above the words "Authorised Signatory" was his, and that he was

authorised to sign cheques on behalf of the bank. He added that when the fraud was discovered it was not suspected that he had participated in it.

Finally, I have myself examined the writing on the questioned document (i.e. the withdrawal form) and compared it with Nkomo's specimen handwriting. Apart from the similarities observed by Blackmore there are dissimilarities which cannot be overlooked. I do not think that it can be determined with any degree of certainty whether these dissimilarities are genuine or whether they are a result of a deliberate attempt by the writer of the questioned document to disguise his handwriting.

I am, therefore, satisfied that there is no logical basis for the allegation that the Tribunal's decision is irrational.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

ZIYAMBI JA: I agree

GWAUNZA AJA: I agree

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