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Judgment No S.C. 8\03
Civil Appeal No. 267\2000

ALMIN METAL INDUSTRIES LIMITED v HARDON CHINOWAITA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE JANUARY 16 & MARCH 28, 2003

N.B. Nagar, for the appellant

The respondent in person

ZIYAMBI JA: The issue in this matter is whether or not the National Employment Council Code of Conduct for the Engineering and Iron and Steel Industry applies to managerial employees. The facts giving rise to this appeal are as follows:

The respondent, who was employed as a manager by the appellant was, on the 11th March 1996, suspended by the appellant without pay pending dismissal. The letter of suspension read as follows:-

> "The disciplinary committee met in accordance with the company Code of Conduct on 8th and 11th March 1996 to consider allegations that you had failed to perform your duty to the required standard in so much as you failed to follow proper procedures with respect to technique sheets on the 23rd February.

> The disciplinary committee considered the allegations proven to their satisfaction. The penalty for this offence bearing in mind that there is an active last written warning on record for an offence in the same category, is dismissal.
>
> You are, therefore, advised that you are suspended without pay or benefits in accordance with the requirements of S.I. 371 of 1985 awaiting a determination from a Labour Relations Officer with respect to an application that the company will make forthwith for termination of your employment. This suspension is effective immediately."

An application for authority to dismiss the respondent was made and the matter was heard by the Labour Relations Officer who ordered the appellant to reinstate the respondent with immediate effect and "without loss of pay, benefits and status or alternatively to pay his wages and terminal benefits … within 14 days after receipt of this determination".

The Senior Labour Relations Officer before whom the matter went on appeal found the allegations against the respondent to have been proved and reversed the determination of the Labour Relations Officer and authorised the dismissal of the respondent with effect from the date of suspension.

Before the Labour Relations Tribunal, the respondent persisted in his stance that he should be dealt with in terms of the appellant's Code of Conduct and that the Labour Relations Officer and Senior Labour Relations Officer had had no jurisdiction to hear the matter. This contention was upheld by the Tribunal which found that the respondent, as a managerial employee, was covered by the Code of Conduct for the industry and ought to have been dealt with in terms thereof. The Tribunal directed the appellant to reinstate the respondent without loss of pay and

other benefits with effect from the date of his suspension without pay. Against this decision the appellant appeals on the grounds that the Tribunal erred in law in holding that the Code of Conduct for the industry concerned applied to the respondent notwithstanding that he was a managerial employee.

I turn now to examine whether the Tribunal was correct in its conclusion.

The Collective Bargaining Agreement: Engineering and Iron and Steel Industry S.I. 282 of 1990 ("the Agreement"), contains a Code of Conduct for that industry. In terms of section 1(1), the terms of the agreement are binding upon and shall be observed by:-

> "(a) the employers and employees in the industry who are members of the employers' organization and trade union respectively in the area of Zimbabwe;
>
> (b) all other employers and employees in the industry in the area of Zimbabwe."

It defines "employee" as follows:-

> "'employee'" means every person employed in the industry, other than a managerial employee as defined in the Act, the nature of whose employment is covered by the registered interests of the trade union and for whose grade or class of skill a salary or wage is prescribed in this agreement, and includes a learner as provided for in clause 21A and a self-employed person;". (My emphasis).

The Act referred to was the Labour Relations Act 1985, now the Labour Relations Act [Chapter 28:01].

Although the appellant sought in the hearing before us to argue to the contrary, the duties performed by him as apparent on the record place him within the definition of "a managerial employee as defined in the Act" and indeed his status was common cause at all the hearings below.

The Collective Bargaining Agreement: Engineering and Iron and Steel Industry, SI 57 of 1994 which amended SI 282 of 1990, provides in s(2) thereof that:-

> "This Code of Conduct applies to all employers and employees in the General Engineering Industry covered by the Collective Bargaining Agreement of the Engineering and Iron and Steel Industry (General Engineering Section)."

A further amendment to the Agreement was published in SI 301 of 1996. It provides in s 1(2) that:-

> "This Code of Conduct applies to all employers and employees in the General Engineering Industry covered by the Collective Bargaining Agreement of the Engineering and Iron and Steel Industry (General Engineering Section):
>
> Provided that a Works Council in an undertaking in the Industry may apply for the registration of a code governing employees represented on that works council, and, where such code is registered, it shall be binding in the undertaking."

The definition of employee as contained in the Agreement was not amended by the statutory instruments above-mentioned. The respondent, being a managerial employee, was not covered by the Agreement and the Code of Conduct was therefore not applicable to him.

The Tribunal based its judgment on a decision of this court in *Zimbabwe Tourist Investment Company v Gwinyai* S-150 of 1995 in which it was held that the Code of Conduct of the appellant in that case was applicable to all employees including managerial employees. At page 3 of the cyclostyled judgment McNALLY JA after quoting the definition of "managerial employee" as set out in s2 of the Labour Relations Act 16/85, said:-

> "I quote this definition to underline the perhaps obvious point that a managerial employee is an employee. Therefore, *prima facie* a code of conduct applicable to employees is applicable to all employees unless otherwise stated."

It will be seen, that unlike the position which pertained in *Gwinyai's* case *supra*, the Code of Conduct applicable in *casu* does state otherwise. It clearly states, by its definition of "employee", that it is not intended to apply to managerial employees.

I conclude, then, that the Tribunal was wrong in its conclusion that the Code of Conduct for the Engineering and Iron and Steel Industry as contained in the Agreement applies to managerial employees.

Before concluding this judgment I should comment on a point made by the respondent, *in limine*, that this appeal had been dismissed for want of filing heads of argument and that he was not aware that an application for reinstatement of the appeal had been made.

The record shows that an application for the reinstatement of the appeal was granted in chambers by a judge of this Court on 3 May 2002. This application, the respondent alleged, was not served on him and there is nothing in the record to gainsay his allegation.

Without determining the truth or otherwise of the respondent's assertion, suffice it to say that the respondent has not been prejudiced by the grant of the application. This is so because even if the application had been served on him and he had made submissions in opposition, it is highly improbable, having regard to the contents of the founding affidavit and the annexures, that the application would have been dismissed.

Accordingly, the appeal is upheld with costs. The matter is remitted to the Tribunal to hear and determine the appeal on the merits.

SANDURA JA: I agree.

CHEDA JA: I agree.

Atherstone & Cook, appellant's legal practitioners