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Judgment No. SC 50/03
Civil Appeal No. 41/02

AGRIFOODS v J CHIRUKA AND FOUR OTHERS

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, SEPTEMBER 29, 2003 & JANUARY 20, 2004

T Biti, for the appellant

T Sakutukwa, for the respondents

GWAUNZA JA: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") in terms of which the appellant was ordered to reinstate the respondents to their previous employment without loss of salary or benefits. If reinstatement was no longer possible, the appellant was ordered to pay the respondents damages for loss of employment.

The facts of the matter are as follows. The respondents were employed by the appellant as shift workers. During the week in question they had worked the 10.00 pm to 6.00 am shift from Monday until Saturday, 8 November 1997. It is not in dispute that at the end of this shift they received orders to report for work the following day, which was a Sunday, and to work for five hours. The respondents regarded the order as unlawful, firstly, because they saw it is infringing on their statutory right to one day off per week and, secondly, because it went against previous practice where they were never required to make up for hours not worked in

a particular week. The respondents accordingly decided to disobey the order. As a result, and according to the appellant's Code of Conduct, the respondents were summarily dismissed from their employment. The charge was insubordination or failure to obey a lawful order.

In the court *a quo* all parties concerned were agreed that in terms of ss 5 and 6 of the Milling Industry Employment Regulations (SI 668/83), which applied to the appellant's employees, non-shift workers were required to work not more than forty-eight hours a week while shift workers were not to exceed forty-five hours per week. The position was also explained, and endorsed by the respondents' representative, that the respondents' eight hour shift translated to forty hours for five days, i.e. Monday to Friday. It was also explained on behalf of the appellant that it was in order for the respondents to complete their forty-five hours per week that the appellant ordered them to report for work for five hours the following day.

The details regarding the respondents' working hours per week are relevant to the determination of whether or not this appeal is properly before this Court.

Mr *Biti*, for the appellant, asserts that the learned member of the Tribunal who heard the matter seriously misdirected herself on findings of fact and that such misdirection amounted to a misdirection in law. (See *National Foods Ltd v Mupadza* SC 105/95). In particular, Mr *Biti* charged that the Tribunal made the following findings of fact –

(i) that the working week for the respondents was a forty-eight hour working week; and

(ii) that the particular order for the respondents to work on a Sunday was unlawful, in that it violated the six-day working week seeing that in any event it was not and could not have been an order to work overtime.

Mr *Biti's* assertions are well-founded. The record of the proceedings in the court *a quo* indicates there was a long explanation in that court concerning the respondents' regulated days and hours of work per week, and also that the respondents concurred with such explanation. Despite this explanation, the court *a quo* stated as follows in its judgment:

> "The reason for this instruction [to work on a Sunday] was to enable the particular shift to make up for the shortfall in hours. In the industry employees work a forty-eight hour week but due to the shift system one of the three shifts would only put in forty-five hours instead of forty-eight hours."

As already indicated, the evidence before the court *a quo* makes it clear that the court, in its judgment, misinterpreted the facts placed before it.

The respondents, in their heads of argument, also conceded that the court "did not grasp the hours of work for both shift and non-shift workers" since the former "were to work from one hour to forty-five hours but not exceed the forty-five hours in any one given working week".

Basing its determination on the erroneous assumption that the shift workers concerned had worked longer hours than they had actually done, the court

a quo concluded that the order for the respondents to report for work the following day "clearly" violated the six-day working week and was therefore unlawful. It was also the finding of the court that such order would have meant that the respondents worked seven days in a week, thereby forfeiting their entitlement to one day off in a week.

The legal position regarding misdirection based on facts is clearly articulated in the case of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 774 (S) where at p 670A the learned judge observed as follows:

> "For an appellant to avail himself of a misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been no misdirection; in other words, that the determination was irrational."

I am satisfied, on the strength of this *dictum*, which I find to be apposite *in casu*, that the court *a quo* did indeed misdirect itself as to the evidence before it. Had the court not so misdirected itself, I have no doubt in my mind that it might very well have reached a different conclusion. In particular, the court *a quo* may not have reached the conclusion that the order to report for work the following morning would have violated the respondents' right to one day off per week. The misdirection in question amounts to a misdirection in law. That being the case, the appeal, I find, is properly before this Court.

Coming to the merits of the appeal, it is contended for the appellant that the Collective Bargaining Agreement applicable to the parties, i.e. SI 668/83, provided for a forty-five hour working week for shift workers and not the six-day working week suggested by the court *a quo*. Further, that clause 5.6 of the same

Agreement provided that "every employee shall receive at least one day off duty in each week". It is argued for the appellant, correctly in my view, that these stipulations leave the employer "at large" to define the shift hours to be worked as well as the one day off that is to be taken in a week.

It is not in dispute that the respondents had that week worked the 10.00 pm to 6.00 am shift from Monday to Friday, with the Friday shift spilling into the early hours of Saturday. The order required the workers to report for work the following morning, which happened to fall on a Sunday. Having broken off work at 6 am on a Saturday, the workers would clearly have had a full day off by the time they would have started work on the Sunday as ordered. Working for five hours on the Sunday would have brought their working week to forty-five hours, a circumstance that, contrary to the finding of the court *a quo*, would not have violated clause 6.2 of Statutory Instrument 668/83.

Much is made in the respondents' heads of argument of the requirement that the respondents work on a Sunday. As already indicated, the Regulations governing the respondents' working hours do not specify which days the workers should or should not work. Therefore, to the extent that the employer could determine the hours and days of work, there was no violation of that particular provision.

It is also argued on behalf of the respondents that because for fifteen years the respondents had never been asked to work on a Sunday, the order to come to work on that day not only caused confusion among them but was perceived by them

to be unlawful. Because they perceived such order to be unlawful, it was further argued, it could not be said that they had wilfully disobeyed a lawful instruction.

I am not persuaded by this argument. Firstly, as the respondents themselves concede, the hours they had worked that week fell short of the maximum stipulated in the relevant Statutory Instrument, by five hours. Secondly, the order for them to report for work the following day was communicated both in writing and orally, so there should have been no confusion. Thirdly, and most importantly, since the order in question violated neither the forty-five hours per week rule nor the one day off per week rule, it could not have been unlawful. As long as the respondents concede, as they have done, that the working week for them amounted to a maximum of forty-five hours per week, it is, I find, contrary of them to then argue that the order for them to work an extra five hours was an attempt to introduce a new condition of work. Rather, the order merely sought to fulfil an existing regulated condition of work applicable to the respondents.

The court *a quo* in its judgment correctly stated that wilful disobedience constitutes a deliberate and wilful disobedience of an order that has been clearly communicated. I have already determined that the order in question was lawful. The evidence before me indicates that such order was clearly communicated to the respondents, not only in writing but also verbally. The respondents on their own determined – erroneously – that the order was unlawful. They then deliberately decided to disobey it. This, in my view, amounted to a wilful disobedience of a lawful order. Such conduct, according to the appellant's Code of Conduct, justified

summary dismissal. I am satisfied that the respondents were, accordingly, properly dismissed. The appeal must therefore succeed.

It is in the premises ordered as follows –

1. The appeal be and is allowed with costs.

2. The order of the Labour Relations Tribunal is set aside and is substituted with the following –

"The appeal is dismissed with costs".

SANDURA JA: I agree.

MALABA JA: I agree.

Honey & Blanckberg, appellant's legal practitioners

Mantsebo & Partners, respondents' legal practitioners