REPORTABLE (51)

Judgment No. SC 60/03
Civil Appeal No. 10/03

CIRCLE CEMENT (PRIVATE) LIMITED v CHIPO NYAWASHA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, SEPTEMBER 29, 2003 & MARCH 2, 2004

G Mandizha, for the appellant

J Mambara, for the respondent

MALABA JA: This is an appeal from a judgment of the Labour Court dated 3 October 2002, in which a decision of the grievance and disciplinary committee constituted under the employment Code of Conduct operated by the appellant ("Circle Cement") finding the respondent ("Nyawasha") guilty of misconduct and having her dismissed from employment was on appeal set aside and an order substituted in its place to the effect that she be reinstated, without loss of salary and benefits, or damages be paid to her in lieu of reinstatement.

The facts of the case are these:

Nyawasha was employed by Circle Cement as a sister-in-charge of the occupational health, safety and environment department. In July 2001 she applied to the University of Zimbabwe ("the University") for a place to study for a diploma in community health. She was offered the place and, on 24 August 2001, obtained

authority from the Head of Department to attend at the University on that day for purposes of registration on the course. The course was to run for eighteen months from 10 September 2001.

Without having obtained leave of absence from her workplace, Nyawasha commenced attendance at the University from 10 September 2001 and continued attending lectures in the course thereafter until she was recalled to work on 4 October 2001, when it was discovered that she had not been granted leave of absence. She had been away from work without leave for nineteen days.

On 8 October 2001 Nyawasha was charged with the offence of absence from work for five or more working days without the employer's permission or without reasonable excuse in contravention of section 5(e) of Part VI of the registered employment Code of Conduct. She appeared before the grievance and disciplinary committee on 8 November 2001. In answer to the charge she admitted that she had not obtained leave of absence from her head of department. She alleged that she was confused as to the person from whom she had been expected to seek leave because when she sought authority to attend at the University for registration purposes she had been referred to Mr Mutasa, the industrial resources manager. It transpired at the hearing that although Mr Mutasa had told her to go and register for the course, the authority had been given by her head of department, the human resources manager.

It was established during the disciplinary hearing that Nyawasha knew before she attended the course that Circle Cement had no provision for study leave. She knew that no employee could be away from work for five days or more without

the employer's permission. She, as head of a section, had processed applications for leave submitted by junior employees. It was established that she had exhausted all her annual leave days. It was not her defence to the charge when she appeared before the disciplinary and grievance committee that she had a reasonable excuse for her absenteeism.

The disciplinary and grievance committee found that Nyawasha knew that she had to seek and obtain leave of absence from work before attending the lectures at the University. They adjudged her conduct of staying away from work for nineteen days as deliberate. The view of the committee was that such misconduct was of so serious a nature as to constitute a repudiation of her contractual obligations. Their recommendation to the managing director to the effect that Nyawasha be dismissed from employment was accepted. She was dismissed by letter dated 15 November 2001.

On 28 November 2001 Nyawasha lodged an appeal with the Labour Court, now contending that the course she had embarked on at the University would have benefited Circle Cement. She contended that, because of the benefit her employer would have derived from the knowledge she would have acquired after attending the course, she had a reasonable excuse for being absent from work for nineteen days.

The member of the Labour Court who heard the appeal said:

> "That there was need to apply for study leave cannot be disputed. An employee cannot just take off without securing official leave. The employer did not immediately question her absence from work until nineteen days later.

> When she was questioned she immediately dropped from the course and resumed her duties.
>
> Her conduct suggests that she was genuinely mistaken as to the need to formally apply for leave. She openly went about her activities in the honest belief that nothing was amiss. When confronted after nineteen days she quickly abandoned the course and resumed her duties.
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> That she had erred by going without leave cannot be disputed but I am of the view that under the circumstances the penalty meted out was unjustifiably harsh.
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> … The respondent ought to have opted for a less severe form of punishment. The circumstances of this case do not warrant a dismissal. The employer improperly exercised its discretion. In *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H) at 396A the court stated that where dismissal is the maximum permissible punishment, the employer has a discretion to impose a less harsh sentence."

The relief granted by the Labour Court was that:

> "The decision to terminate the contract of employment is set aside. The appellant is to be reinstated into her former position with effect from the date of dismissal. The employer is to consider a less harsh penalty. Alternatively, if reinstatement is no longer an option the appellant is to be paid damages for the premature loss of employment calculated from the date of dismissal."

The Labour Court accepted that the employer had established the essential elements of the offence charged against Nyawasha. It was not her defence before the disciplinary and grievance committee that she was genuinely mistaken as to her obligation to apply for and obtain the employer's permission before staying away from work for five days or more. Her defence was that she had been confused as to the person from whom to seek the requisite permission. The disciplinary and grievance committee found that her actions were deliberate. The suggestion by the Labour Court that Nyawasha conducted herself in the manner she did because she was genuinely mistaken as to her contractual obligation to seek and obtain leave from her employer before staying away from work for five days or more has no factual basis.

That was not part of her case before the disciplinary and grievance committee. She was a managerial employee who knew that leave had to be obtained from the employer before one went away from work for five days or more. Her contractual obligation was to be at work and provide the services that she had bound herself to provide to her employer at the time agreed upon by the parties.

The Labour Court did not apply its mind to the facts on which the disciplinary and grievance committee concluded that the respondent's conduct was of so serious a nature as to amount to a repudiation of the contract of employment between the parties. These facts were that she knew that there was no provision in the conditions of service for an employee to go on study leave and that she had exhausted all the annual leave days she would have taken for the purpose of attending the course at the University. In staying away from work for nineteen days without leave the employee was adjudged to have acted deliberately in breaching her contractual obligation to be at her workplace at the particular time.

Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment the question of a penalty less severe than dismissal being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee. The principle enunciated in *Zikiti*'s case *supra* was inapplicable to the decision of the disciplinary and grievance committee to dismiss Nyawasha because it was not shown to the Labour Court that its

finding that her act of misconduct was of so serious a nature as to constitute a repudiation of her contractual obligation entitling Circle Cement to dismiss her from employment was one a reasonable employer would not have made.

Not only did the Labour Court make a finding of fact which was not supported by the evidence, it also applied a wrong principle of law in setting aside the decision of the disciplinary and grievance committee to dismiss the respondent from employment.

Nothing was said by the Labour Court in its judgment about the contention (not advanced before the disciplinary and grievance committee) that the respondent had a reasonable cause for being away from work for nineteen days because she was doing a course from which she would have acquired knowledge, the use of which would have benefited her employer. The contention had no basis. A cause had to be a reasonable cause for the purpose of the defence to the offence with which the respondent was charged by having reference to herself. There had to be established facts which showed the existence in her mind a belief that she was doing the course to benefit her employer and that the belief caused her to stay away from work for the period in question. Once that cause was established as a fact, it would become a question of law whether the facts found were such as to constitute a reasonable cause for her conduct. *King v Port of London Authority* 1919 AC 3 at 20, 23 and 31.

In the absence of any proof of a belief in her mind that she was doing the course for the benefit of her employer, the contention that Nyawasha had a

reasonable cause for having been away from work for nineteen days was bound to fail. I am accordingly of the opinion that the decision of the Labour Court should be set aside.

The appeal succeeds with costs. It is ordered that the decision of the Labour Court be and is hereby set aside and in its place substituted the following:

> "The appeal against the decision of the disciplinary and grievance committee is dismissed with costs."

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Muzangaza, Mandaza & Tomana, appellant's legal practitioners

Musunga & Associates, respondent's legal practitioners