REPORTABLE (47)

Judgment No. SC. 53/05
Civil Appeal No. 146/04

JERRY MUSARIRA vs ANGLO AMERICAN CORPORATION

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, MAY 30 & OCTOBER 24, 2005

T Biti, for the appellant

R M Fitches, for the respondent

CHEDA JA: The appellant was employed by the respondent as a departmental controller. In the course of his duties he handled foreign currency transactions for staff accounts.

Following reports made to his employer, investigations were carried out on the company's staff foreign currency accounts. The investigations led to the appellant's suspension. The appellant was later charged with misconduct and eventually dismissed from employment. He appealed, first to the respondent's appeals committee and then to the Labour Relations Tribunal ("the Tribunal"). The appeals were not successful.

The appellant has now appealed to this Court. In his notice of appeal he gave the following grounds for appealing:

"**GROUNDS OF APPEAL**

1. The court *a quo* grossly erred as a question of law in not finding that –

   a) There was bias in this matter sufficient to render the initial disciplinary hearings null and void. More importantly, the court ignored the fact that Mr A B Wishart, the hearing officer, had been involved in the investigations and in addition had actually wrote a letter containing the charges and was, therefore, disqualified from being the hearing officer (*sic*).

   b) *A fortiori*, the court *a quo* ignored the fact that the Disciplinary and Grievance Committee was also biased, in that certain members of the same had also participated in the investigation proceedings.

   c) The court *a quo* greatly erred as a question of law (by) not finding that there was a procedural irregularity, in that the investigations were not carried out by the Human Resources Department as stipulated in the Code of Conduct.

2. Further, the court *a quo* grossly erred in not considering the fourth ground of objection with regards to the competency of the charge. The court *a quo* ought to (have held) that, since the appellant had been acquitted of the first two charges, he could therefore not have been convicted on the third charge as it stood.

3. Further, whilst the court *a quo* was correct in holding that the denial of legal representation in this matter was fatal, the court erred in not setting aside the entire disciplinary proceedings including the disciplinary proceedings before the hearing officer. Even if the court could not set aside the findings of the hearing officer, to the extent that the appellant was not responsible for the sins of the Disciplinary and Grievance Committee, the court erred in not directing that the respondent pay the appellant his arrear salaries and benefit(s) up until such time as a newly constituted Disciplinary and Grievance Committee will rehear the matter."

Following the noting of this appeal, the respondent noted a cross-appeal on the following grounds:

"1. The court *a quo* erred in finding that the denial of legal representation in proceedings under a Code of Conduct violates s 18 of the Constitution of Zimbabwe and is a gross irregularity, vitiating the proceedings in question.

   The court (*a quo*) ignored the point that in proceedings under a Code of Conduct, there is no inherent right for an accused employee to be

> represented by a legal practitioner. The issue is governed by the provisions of the Code of Conduct and, *in casu*, the Code of Conduct specifically defines officials who may represent accused employees in such proceedings. Legal practitioners are excluded."

I will deal with the matter under the following heads, which I consider to be the main issues – (a) bias; (b) legal representation; and (c) the discharge on charges one to three.

BIAS

The appellant argued that the Tribunal ought to have found that there was bias on the part of Mr A B Wishart ("Wishart"), the hearing officer, as he was the one who laid the initial charges against the appellant. He referred to the letter written to him by Wishart, who invited the appellant to attend the disciplinary hearing on 1 February 2002. He says Wishart was the investigating officer, prosecutor and judge and that this was not in keeping with the terms of the Code of Conduct, which required that all the investigations have to be carried out by the Human Resources Department of the respondent.

A reading of the correspondence shows very clearly that Wishart requested Omega Research (Pvt) Ltd ("Omega") to investigate the matter. It is, therefore, incorrect to say that Wishart investigated the matter himself. The report from Omega confirms that they were asked to investigate and they submitted a report on their findings. On that basis alone, the complaint that Wishart was the investigating officer cannot stand.

It has not been shown that the investigations by Omega prejudiced the appellant in any way. The fact that it was not the Human Resources Department that investigated the matter does not make any difference at all. Omega submitted the report to the respondent, just as the report by the Human Resources Department would have been. In any case, Omega would have been more independent than the Human Resources Department of the respondent, as Omega is not part of the respondent company.

After receiving the report from Omega, Wishart wrote to the appellant, advising him of the allegations in detail and the date of the disciplinary hearing.

I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that the misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned – (a) must be given adequate notice; (b) must be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes. See *Dabner v S.A. Railways and Harbours* 1920 AD 588 at 598.

The appellant was given adequate notice in writing of the date of the disciplinary hearing and the nature of the charges against him; he was afforded an opportunity to respond in writing and to be present and be heard during the proceedings; and he was afforded an opportunity to call witnesses.

At the end of the proceedings, the appellant was actually found not guilty of misconduct on those charges where it was felt that there was no evidence to support the charges against him. In my view, this shows that the disciplinary and grievance committee ("the committee") was not biased against him in any way, as he was convicted only on those charges that the committee felt had been sufficiently proved. We have not been referred to any action on the part of Wishart or Mr Bruce, a director of the respondent, that indicates any bias or which would even cause any suspicion of bias on the part of any person.

Further to that, Wishart was the hearing officer only at the very initial stage. He only put the charges to the appellant and recorded his response. He did not make the final decision in the matter. His part was to make recommendation based on what he had gathered.

It is worth noting that when the matter went to the committee no allegation of bias was made.

The appellant referred to several authorities on the issue of bias. The case of *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 shows that there must be reasonable ground for the appellant believing that he could not receive justice and a fair hearing and decision. See also *Foya and Anor v R Jackson N.O* 1963 R & N 318 and *Leopard Rock Hotel Co (Pvt) Ltd and Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S).

The suggestion that there was a likelihood of Wishart being biased is based on the allegation that he was involved in the investigations. This allegation, being incorrect, does not therefore support or show any likelihood of bias on his part. I have already pointed out that the investigations were carried out by an independent organisation and not by either of the two officials of the respondent.

The appellant was free to state what he was admitting and what he was denying. He admitted that the foreign currency he took was not for his official use on business, but for his wife who was to travel with him. He admitted that he knew who was to authorise the foreign currency. He admitted using the names of person who had since left the respondent and said he was not prompted by anyone to act as he did. He disclosed that he owned up regarding the processing of the transactions, as the respondent would not have known that he was responsible.

In view of the above, there is no basis to say that any reasonable person could suspect that there was any bias.

LEGAL REPRESENTATION

The cross-appeal was against the Tribunal's conclusion that the refusal to allow the appellant to be legally represented was wrong.

The right of a person who is accused is firmly entrenched in s 13 of the Constitution of Zimbabwe Act [*Chapter: 1*] ("the Constitution"). Section 13(3) of the Constitution reads as follows:

> "(3) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention, and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him." (my emphasis)

The above right is not limited to arrests and detentions only, but extends to many other situations that the courts have had to deal with. However, authorities, both old and new, make the position clear as to what situations require legal representation.

The point was dealt with extensively in the case of *Dabner v South African Railways and Harbours supra*.

Dabner had been charged with a criminal offence, for which he faced imprisonment or a fine not exceeding fifty pounds or both such fine and such imprisonment. The charge was later withdrawn and he was then charged with misconduct of a serious nature in terms of the South African Railways and Harbours Regulations ("the Regulations"). The Regulations under which he was charged provided for appeal to the assistant general manager, then to the appeal board, and finally to the Railways and Harbours Board ("the Board"). Reports were to be made to the general manager, who would give his decision.

Section 155 of the Regulations provided that, and I quote from p 584 of the judgment:

> "… no servant charged in (the) manner provided by Regulations Nos. 150 and 151 may appear by a legal adviser, nor shall he be entitled to a copy of the record of the proceedings, but he shall be entitled to personal inspection of the record of proceedings at any reasonable time."

Dabner was served with a notice of an enquiry in terms of the Regulations. He applied for leave to be legally represented by his attorney, and suggested that the matter be held over pending a legal decision on the point of legal representation. The Board allowed Dabner to be legally represented and proceeded with the hearing before the issue of legal representation was determined. The charge was not sustained.

The Administration noted an appeal against legal representation to the Provincial Division. It was argued that the Regulation prohibiting legal representation by an attorney was invalid and violated a fundamental right to be legally represented at such proceedings. The Appellate Division held as follows at p 597 of the judgment:

> "Now, clearly the statutory Board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the Board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports its finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The Board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character."

Further down on p 598 INNES CJ stated in the same judgment:

> "The Act before us does not confer the right of legal representation; it leaves all matters of procedure to be governed by regulations, and, as already stated, I know of no authority in our law which would invalidate a rule compelling the right of appearance and audience to be personally exercised. Tribunals

> specially created to deal with disputes relating to administration or discipline are not bound to follow the procedure of a court of law."

Before the matter went on appeal to the Appeal Court GARDNER J had made the following observation at p 588 of the judgment delivered by the Provincial Division:

> "The Board of Inquiry is not a court of law, nor do I think it can properly be styled a judicial tribunal. There is no provision in the Act or Regulations for the officer, who has laid the charge, being present or represented at the inquiry; there is no prosecutor. The Board has no power of administering an oath to witnesses, and it does not even give a decision having a binding effect upon the person into whose conduct inquiry is made. According to Regulation 153, all that the Board has to do is to report to the convening officer its conclusion upon the evidence. It is then for him, under Regulation 154, after considering the report, to give his decision upon the case. He may acquit the employee, inflict a penalty, or, if the offence calls for more severe punishment than he is empowered to impose, refer the papers, with his recommendation, to a higher authority for decision. The Board is, therefore, merely an inquiring body, clothes with no power of returning a verdict as to the guilt of the employee, and the convening officer is not bound to accept its conclusions."

The above shows that there is no absolute right to legal representation at the preliminary hearing which is mainly a domestic enquiry.

Reference was made also to the exercise of discretion in allowing legal representation. According to *Dhadla and Ors v Administrator, Natal and Ors* 1995 (3) SA 769, the hearing officer should use his discretion where the procedural rules are silent as to whether legal representation should be allowed or not.

In the present case, representation is clearly limited to a Union official, or a member of the workers committee, or a colleague from his working section, as

prescribed in the Code of Conduct. I do not think that it was intended to provide for both representation by a legal practitioner and a Union official or fellow employee.

In *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175, it was held at p 180 that:

> "It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation; and where the relationship between the parties is governed by contract, the right of the person being subjected to an enquiry arising out of that contract to be legally represented at such enquiry must depend upon the terms of the contract itself."

The appellant's case is governed by the respondent's Code of Conduct, which excludes the right to be legally represented.

THE DISCHARGE ON CHARGES ONE TO THREE

The appellant argued that since he was discharged on the first two counts he should not have been convicted on the third charge. This charge concerned:

> "Concealment of or failure to report a business irregularity which an employee becomes aware of".

It is clear that the appellant became aware of irregularities carried out by his superior, Ms Ncube. He became aware of irregular entries, which he tried to cover up and even used the names of persons who had left the respondent's employ in order to cover up the irregularities. In his own explanation at the hearing he said he reversed certain entries and backdated them to January 2001. He used a silent journal

that resulted in the transactions passing through the system without any explanation, authorisation or detection. This was clear concealment of the irregularities that he had become aware of. The finding of guilt on that charge was, therefore, proper.

CONCLUSION

In conclusion, I cannot find any basis for the alleged bias on the part of Wishart and Mr Bruce. There was no absolute right for the appellant to be allowed legal representation at the initial hearing. In any case, when the matter eventually came before the Tribunal the appellant was legally represented. The finding that the appellant concealed business irregularities is confirmed, even by the appellant himself in his own admissions.

Accordingly, the appellant's appeal is dismissed with costs. The cross-appeal by the respondent is allowed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners