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ZIMBABWE PHOSPHATES INDUSTRIES (PRIVATE) LIMITED
v
FARAI DZIMIRI

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA AND UCHENA JA
HARARE, 27 March 2017

R. Magundani, for the Appellant

G. Pendei, for the Respondent

UCHENA JA: The appellant appealed to this court against the decision of the Labour Court.

The respondent was the appellant's locomotive driver. He was charged with misconduct in terms of schedule 4 of the Collective Bargaining Agreement: Chemical and Fertilizers Manufacturing Industry S.I. 131 of 2011. While carrying out his duties as a locomotive driver, he collided with and damaged a gate. A disciplinary committee constituted with unequal management and worker's representatives found him guilty and dismissed him from employment.

The appellant appealed to the General Manager who upheld the decision of the disciplinary committee. He unsuccessfully appealed to the National Employment Committee for the Chemicals and Fertilizers Industry. He finally appealed to the Labour Court which

upheld his appeal and set aside his conviction and remitted the matter to a properly convened disciplinary committee for a hearing *de novo*.

The appellant appealed to this court against the decision of the Labour Court. We heard and dismissed the appeal on 27 March 2017. We indicated that reasons for our decision would follow. These are they.

The appellant challenged the Labour Court's interpretation of clause 6(3) of S.I. 31/2011 and the effect of that interpretation. Clause 6(3) of S.I. 31 of 2011 reads as follows:

i. "There shall be established a disciplinary committee for each work place composed of equal number of worker representatives and management representatives of up to a maximum of four from either party. Unequal numbers mean there is no quorum hence the hearing shall not proceed.
ii. The disciplinary committee shall be chaired by a member from the management who in the event of equality of votes, the chairperson shall exercise a casting vote." (*sic*)

In upholding the respondent's appeal, the court, *a quo* at pages 3 to 4 of its cyclostyled judgment said:

> "A reading of sub clause 3(i) clearly shows that the members of the disciplinary committee must be equal in number. If there is to be 3 management representatives, then there must also be 3 worker representatives. The 6 will constitute the Disciplinary Committee.
> Sub clause 3(i) goes further to state that unequal numbers means there is no quorum and where there is no quorum the hearing shall not proceed.
> The provision is clear and unambiguous.
> Sub clause 3(ii) is to be read in conjunction with sub clause (i). The Chairperson shall therefore be one of the management representatives. To appoint a chair person from management outside those referred to in sub clause (i) will be going against the spirit and intention of the first part of sub clause (i). It means therefore, that there is no quorum, as the numbers will not be equal but odd due to the addition of the extra person who acts as chairperson".

Two questions arise for determination:

1. Did the court *a quo* correctly interpret clause 6(3); and
2. What effect does clause 6(3) have on the decision of an improperly constituted disciplinary committee?

Interpretation.

Miss *Magundani* for the appellant submitted that clause 6(3)(i) and (ii) provides for a disciplinary committee with equal numbers of workers and management representatives but is chaired by an additional management member. I do not agree.

Miss *Pendei* for the respondent submitted that clause 6(3)(i) and (ii) provides for a disciplinary committee with equal worker and management representatives and is chaired by one of the members from management. I agree.

The court *a quo's* interpretation is consistent with the cannons of interpretation. It takes into account the contextual meaning of clause 6(3). A provision of a statute should be given a meaning which is consistent with the context in which it is found. In the case of *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264 D-E McNALLY JA said:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

The provisions of s 6(3) must therefore be interpreted in harmony with each other. It is clear that it was intended to establish disciplinary committees with equal numbers of workers and management representatives. That is the central theme of the provisions. In s

6(3)(ii) provision is made for a chairman who is already a member of the committee to maintain the need for equal representation of worker and management representatives. Section 6(3)(ii) provides that the chairman shall be a member from management. That is why equality of votes is envisaged and the chairman's casting vote provided for.

Equality is made central by the provision that if there is no equality there is no quorum and disciplinary proceedings shall not proceed.

The argument that an additional member from management shall chair the disciplinary committee is not consistent with the scheme of s 6(3). I am satisfied that it was not the intention of the framers of the Statutory Instrument to provide for equal representation and then provide for inequality by providing for an additional representative from management who would chair it. It is trite that the Legislature cannot and should not provide for self-contradictory positions. Provisions of any legislation should be interpreted in harmony with each other.

I am therefore satisfied that the court *a quo* correctly interpreted s 6(3).

Effect of an unequally represented disciplinary committee.

Ms *Mugandani* for the appellant submitted that an allegation of a procedural irregularity ought to be accompanied by an allegation or finding of prejudice suffered before it can vitiate proceedings. She relied on the cases of *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 @ 359, *Rajah & Rajah (Pty) Ltd and Ors v Ventersdorp Municipality and Ors* 1961 (4) SA 402 (AD) at pages 407H to 408B. In the case of Rajah & Rajah (*supra*) at pp 407H- 408A Holmes JA said:

> "Now I think it is clear that the Court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice *Jockey Club of South Africa and Others v Feldman 1942 AD 340 @ 359 Larson and Others v Northern Zululand Rural Licensing BOARD, 1943 N.P.D 40.* In principle it seems to me that the Court should likewise not interfere in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations."

It must be noted that Holmes JA clearly said courts do not take interest in academic situations. In this case we are not dealing with an academic situation but the performance of a statutory function by a disciplinary committee which was not constituted according to the provisions of statute and which the statute prohibits from conducting proceedings. A party tried by an improperly constituted disciplinary committee cannot be said to have suffered no prejudice especially if such disciplinary committee is specifically prohibited from conducting any proceedings.

Ms *Pendei* for the respondent submitted that failure to comply with the mandatory provisions of s 6(3) renders the decision of the disciplinary committee of no legal effect. I agree.

It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to words like "may" is indicative of an intention to make the provision peremptory. In the case of *Daniel Shumba & Anor v The Zimbabwe Electoral Commission & Anor* SC 11/08 at pages 21 to 22 of the cyclostyled judgment Chidyausiku CJ said:

> "It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make the provision peremptory. The use of the word "may" as opposed to "shall" is construed as indicative of the legislature's intention to make a provision directory. In some instances,

the legislature explicitly provides that failure to comply with a statutory provision is fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.

In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the Courts to determine what the consequences of failure to comply should be.

The learned author Francis Bennion in his work Statutory Interpretation suggests that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

> "Where a duty arises under a statute, the court charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from breach of the duty.
>
> This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing "shall" be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.
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> It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of "mandatory" include "absolute", "obligatory", "imperative" and "strict". In place of "directory", the term "permissive" is sometimes used. Use of the term 'directory' in the sense of permissive has been justly criticised. (See Craises Statute Law (7th ed, 1971) p 61 n 74.) However, it is now firmly rooted.
>
> Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound)"" --.

In this case the provisions of s 6(3) (i) are mandatory. They state that the disciplinary committee "*shall*" have an equal number of representatives of workers and management. They further provide that if the committee has unequal representation it "*shall*" not form a quorum and no proceedings should take place before such a committee. This clearly means the disciplinary committee which convicted the respondent was improperly constituted

and could not make valid decisions. No valid proceedings could be conducted by a disciplinary committee which was prohibited from conducting proceedings.

The court *a quo* therefore correctly found that the proceedings were null and void. The appeal has no merit. It was for these reasons that we dismissed it with costs.

GWAUNZA JA I agree

HLATSHWAYO JA I agree

Messers Scanlen & Holderness, appellant's legal practitioners

Messers Manyangadze Law Practice, respondent's legal practitioners.