DISTRIBUTABLE (67)

BENHAM G. MOMBESHORA
v
INSTITUTE OF ADMINISTRATION AND COMMERCE (ZIMBABWE)

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
HARARE, OCTOBER 24, 2013

E. Moyo, for the Appellant

J. Mambara, for the Respondent

GUVAVA JA: This is an appeal against the whole judgment of the Labour Court, sitting at Harare dated 23 November 2009. After hearing argument from both counsel we dismissed the appeal with costs and indicated that the reasons for the decision would follow in due course. These are they:-

The appellant was employed as the managing director for the respondent. He signed a contract of employment on 5 February 2007. In July of the same year, he was suspended from employment without salary and benefits in terms of the Labour (National Employment Code of Conduct) Regulations 2006, published in SI 15 of 2006. He was charged with the following acts of misconduct under s 4 of the regulations:-

a. Wilful disobedience to a lawful order

b. Refusal to avail himself to answer queries relating to alleged irregular transactions

c. Flouting of RBZ rules and regulations

d. Insubordination

A disciplinary hearing was convened after due notice to the appellant. He did not appear at the hearing. The disciplinary authority proceeded to determine the matter in the absence of the appellant and he was found guilty of the alleged acts of misconduct. He was thereafter dismissed from employment.

He appealed unsuccessfully to the appellate authority of the respondent. The matter was subsequently referred to arbitration where he challenged his dismissal. The basis of challenging his dismissal were that:

(i) the disciplinary hearing was conducted outside the time limits prescribed by the regulations under which he was charged.

(ii) that the committee was not properly constituted and

(iii) that his dismissal was unlawful.

The arbitrator found that the disciplinary committee was properly constituted and that since the appellant did not attend at the disciplinary hearing, the allegations against him were unchallenged. He thus concluded that the dismissal was lawful and dismissed the appeal. The appellant was aggrieved by the arbitrator's determination and appealed to the court *a quo* which upheld the decision of the arbitrator.

The appellant was dissatisfied with the decision of the court *a quo,* and appealed to this Court, on the following grounds;

"1. The learned President erred and misdirected herself in law and in holding that appellant was precluded from challenging his dismissal because appellant had claimed that the provisions of the Companies Act ought to have been applied in any disciplinary proceedings brought against him.
2. The learned President erred in failing to consider whether the findings made by the Arbitrator with regard to the time limits and compliance issues were correct having regard to the evidence placed before her and the provisions of the applicable law and in so failing arrived at a decision so unreasonable as to constitute a misdirection in law.
3. The learned President erred and seriously misdirected herself on the facts in finding that the grounds of appeal raised by the Appellant were never raised before the Arbitrator when it is clear from the terms of reference referred to the Arbitrator that appellant challenged his dismissal before the Arbitrator on the basis that it was unfair and unlawful and in particular whether the time limit prescribed in SI 15 of 2006 had been complied with."

In my view it is apparent from the appellant's grounds of appeal that two issues arise for determination. These are the following:

1. Whether or not labour law or company law was the law applicable in this case.
2. Whether or not the time limits and compliance issues were properly dealt with by the Arbitrator.

I propose to deal with each of these issues.

1. Whether or not labour law or company law was the law applicable in this case.

It was the appellant's submission that he was unlawfully dismissed as he was dismissed in terms of the Labour Act [*Chapter 28:08*] (the Labour Act) when he should have been dealt with in terms of the Companies Act [*Chapter 24:03*].

The appellant argued that although he was respondent's employee, in terms of the contract of employment, he was also a director of the respondent, and as such his matter ought

to have been determined in terms of s 175 of the Companies Act. He relied on the relevant part of the provision which reads as follows;

"**175 Removal of directors**
(1) A company may, by resolution of which special notice has been given, remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him:
. . ."

Section 2 of the Labour Act defines an employee as any person who performs work or services for another on such terms and conditions as agreed upon by the parties or as provided for in this Act …. In terms of s 12B of the Labour Act every employee has a right not to be unfairly dismissed. The provision further provides that an employee is unfairly dismissed if he is not dismissed in terms of an employment code or in the absence of an employment code in terms of the model code. It seems to me that these provisions must be read together with s 2A (3) of the Labour Act.

Section 2A (3) of the Labour Act provides that;

"**2A Purpose of Act**
(1) ...
(2) ...
(3) This Act shall prevail over any other enactment inconsistent with it."

It cannot be argued that the appellant was not an employee of the respondent as he entered into a contract of employment on 7 February 2007. He had duties assigned to him and devoted his time to the company in terms of his contract of employment. In exchange for his work he was paid a salary for the work that he performed. It is accepted that he was also a director of the company. In normal business ethics the position of director would entail that he attends certain Board meetings. Although it is not stated in the papers one would assume that he would be paid a fee for his attendance which would be separate from his salary.

A reading of s 12B of the Labour Act and s 175 of the Companies Act shows that the provisions are inconsistent as they are mutually exclusive. Section 175 of the Companies Act seeks to limit the dismissal of a director in accordance with the procedure set out in that section i.e. by special resolution. On the other hand the Labour Act provides for the dismissal of employees in terms of a code of conduct.

It seems to me that s 2A (3) of the Labour Act was enacted in order to deal with such inconsistencies as would arise in cases such as these. It was specifically added to the Labour Act in 2005 to deal with the mischief which was anticipated because of such inconsistencies. This was well after the enactment of the Companies Act in April 1952.

There can be no doubt that s 2A (3) the Labour Act overrides all other Acts in the event that there is an inconsistency.

Clearly, on a proper reading of these provisions the issue of dismissal of an employee, whatever his post in the company, the Labour Act overrides the provisions of the Companies Act.

It should also be noted that the appellant had a contract of employment which contained the terms and conditions of his employment. The said contract contains the following clause;

> "The law applicable to this contract shall be the law of Zimbabwe and any dispute shall be subject to the jurisdiction of the Labour Court of Zimbabwe. Failure by the Institute to enforce the contract timeously or at all shall not be deemed to be a variation thereof or waiver of its rights hereunder, all of which shall remain vested in the Institute from the date of accrual of such rights."

This clause is clear and needs no interpretation. It specifically provides that the appellant agreed, through the contract of employment that should any employment disputes arise between the two, the law applicable to the disputes would be the Labour law of Zimbabwe.

A similar issue also arose in the case of *Gomwe & Anor v Associated Newspapers Association of Zimbabwe* 2001(2) ZLR 415(H). In that case the court held that termination of employment of a company director who is also an employee can be done under labour law and that it is not necessary to follow procedures under the Companies Act. It follows therefore that if the option to deal with a director under labour law is already available at law then where his contract expressly provides for the application of labour law, a tribunal cannot be faulted for applying labour law in such circumstances.

All the findings above lead to the inescapable conclusion that the law applicable in this matter was the labour law and not company law and thus the finding of the court *a quo* cannot be faulted.

2. Whether or not the time limits and compliance issues were properly dealt with by the arbitrator.

Despite having argued that company law ought to have been applied in this matter, the appellant also argued that the respondent conducted the hearing process after the expiry of the 14 day period provided for in the National Employment Code. In his findings the Arbitrator correctly conceded that indeed the disciplinary hearing was conducted outside the prescribed time limit but found that the delay was not fatal to the proceedings. This was an exercise of discretion by the Arbitrator to condone the delay.

In his submissions, the appellant argued that the court *a quo* erred in not interfering with the finding of the arbitrator on compliance with the time limits. He submitted that once an employer fails to act within a prescribed time limit, it loses the right to discipline its employees.

This contention is wrong at law. According to the case of *Nhari v Zimbabwe Allied Banking Group* SC-51-13, this court stated that the effect of an employer's failure to act within a prescribed time limit is to give the employee a right to demand a hearing in time thereafter and not to stop the proceedings from ever being held or nullifying the proceedings done outside the stipulated period. The position was succinctly explained by GARWE JA, as follows;

> "It is perhaps pertinent to note at this stage that the basis for the setting aside of the suspension appears to have been the failure on the part of the respondent bank to comply with the fourteen (14) day requirement provided for in s 6(2) of the Regulations. Whether the Labour Court was correct in making that order is not an issue before me. Attention should however be drawn to the decisions in *Nyoni v Secretary for Public Service Labour and Social Welfare & Anor* 1997(2) ZLR 516, 522G-523 A-B and *Posts and Telecommunications Corporation v Zvenyika Chizema* SC 108/04 which suggest that delay alone cannot justify reinstatement and that delay merely gives the aggrieved party the right to the remedy of a *mandamus* to enforce due compliance with any time limits." [My emphasis]

From this authority, it is clear that, where disciplinary proceedings are conducted out of time, the delay does not nullify such proceedings nor does it stop the proceedings from ever being held. In the case of *Air Zimbabwe v Mnesa & Anor* SC-89-04, CHIDYAUSIKU CJ explained the position as follows;

> "A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent."

A reading of the record revealed facts that showed that the appellant was guilty of the misconduct complained of. Even he did not challenge the substantive findings which were

made against him by the disciplinary committee and the arbitrator. Consequently I find no fault in the decision of the court *a quo* wherein it declined to interfere with the decision of the arbitrator. In my view, the technical issues were properly dealt with. The court *a quo* correctly found no reason to interfere with that exercise of discretion by the arbitrator.

I have no doubt in my mind, that, realising he had no case on the merits the appellant sought to have the substantive findings of his guilt nullified on the basis of technicalities.

It is for the above reasons that the appeal was unanimously dismissed with costs as it was totally devoid of merit.

MALABA DCJ: I agree

GOWORA JA: I agree

Mtetwa & Nyambirai, appellant's legal practitioners

J. Mambara & Partners, respondent's legal practitioners