

REPORTABLE: (41)

WONDER SIMUKA
v
MONTANA CARSWELL MEATS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & KUDYA JA
HARARE: 24 SEPTEMBER 2021 & 23 MAY 2022

Mr. *K. G. Gama*, for the appellant

Mr. *T. Zhuwarara*, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the Labour Court sitting at Harare upholding the decision of the appeals officer confirming the dismissal of the appellant from the respondent's employ pursuant to a disciplinary hearing.

FACTUAL BACKGROUND

The appellant was employed by the respondent as an administrative clerk. During the period between 2 November 2015 and 20 November 2015 the appellant was tasked to stand in for a cash sales clerk who had proceeded on leave. It was alleged that, during that period the appellant failed to account for the sum of USD600.00 and ZAR 1730-00. He was arraigned before the disciplinary committee charged with theft. He was found guilty and dismissed from his employment with the respondent.

Aggrieved by that turn of events he appealed to the Appeals Officer who dismissed the appeal. The matter was thereafter referred to arbitration. The arbitrator ruled in favour of the appellant. The respondent then appealed to the court *a quo* which set aside the

arbitrator's ruling and upheld the decision of the disciplinary committee. The appellant noted an appeal with this Court challenging the decision of the court *a quo*. The matter was remitted to the court *a quo* for it to determine whether the appeals officer was correct, in finding the appellant guilty of theft or fraud. The court *a quo* found in favour of the respondent and upheld the decision of the appeals officer. The appellant has, in turn, appealed to this Court for relief.

GROUNDS OF APPEAL

The grounds of appeal read as follows:

- a The court *a quo* misdirected itself in upholding the decision of the appeals officer without establishing if the evidence before the disciplinary committee and the appeals officer proved the essential elements of theft and fraud on a balance of probabilities.
- b Further, the court *a quo* misdirected itself in finding appellant guilty of negligence and in upholding his dismissal on that basis.
- c The court *a quo* further misdirected itself in finding that:
 - (i) Appellant was solely responsible for the receipt and banking of cash.
 - (ii) Appellant had either stolen or negligently dealt with South African Rands,
 - (iii) Appellant had worked in the cash office before,
 - (iv) Appellant had to explain how the banked South African Rands were taken away from his custody, and
 - (v) Appellant used to correct his manager.
- d Furthermore, the court *a quo* erred in finding that appellant was responsible for the loss and, in any case, in upholding his dismissal on that basis.
- e The court *a quo* misdirected itself in not finding that as the respondent had neither presented a case nor led evidence before the disciplinary committee the respondent had not established a prima facie case against the appellant.
- f Additionally, the court *a quo* misdirected itself in failing to properly consider the grounds upon which appellant had appealed against the appeals officer's decision."

RELIEF SOUGHT

The appellant seeks the following relief:

- 1 That the appeal be allowed with costs.
- 2 That the judgment of the court *a quo* be set aside and in its place the following order be made:
 - “a The appeal against the appeals officer’s decision be and is hereby allowed with costs.
 - b The appeals officer’s decision be and is hereby set aside and the following order is made in its place:
 - (i) The appeal against the disciplinary committee’s decision is allowed and the disciplinary committee’s decision is set aside and replaced with the following:
 - A The employee be and is hereby found not guilty of theft or fraud.
 - B The employee be and is hereby reinstated without loss of salary and benefits with effect from the date of dismissal failing which the employer shall pay him damages in *lieu* of reinstatement.”

THE ISSUE

The sole issue that arises for determination is whether the appellant was properly convicted of theft and fraud and therefore properly dismissed from employment.

THE EVIDENCE

The appellant attacked the decision of the disciplinary committee on two fronts. Firstly he argued that the respondent did not establish a *prima facie* case against him. Secondly he submitted that the proceedings before the disciplinary committee were fraught with irregularities which denied the appellant his right to a fair hearing.

We agree that the respondent failed to prove its case against the appellant. The appellant denied the charges preferred against him. In his defence he stated as follows:

“During the period in question, Marvelous Kakave (the cashier) would bring cash together with a breakdown on a piece of paper for all customers and I would count the cash against the receipts. I would then take the cash, receipts schedule and a

breakdown of cash to the manager (Patch) who would approve (sign) and give it back to me and then to Marvellous Kakava, who would then send the cash to number 17 Lobengula Road Cash Office.”

It stands to reason that in order to prove its case against the appellant on a balance of probabilities the respondent had to adduce evidence from the cashier proving that the cashier had surrendered to the appellant certain amounts of cash for onward transmission to the manager. The absence of such evidence is fatal to the respondent’s case. One cannot attribute discrepancies to the appellant in the absence of proof of the amount actually received by him. Further the appellant says he would take the cash and the receipts to his manager who would confirm by his signature that the cash and the receipts submitted tallied. There is no evidence to contradict the appellant’s assertions in that regard. The manager was not called to corroborate or deny the appellant’s defence. It is trite that he who alleges must prove his allegations. The respondent failed to discharge that *onus*. In an effort to buttress its case against the appellant, the respondent sought to rely on an “acknowledgement of debt” in which the appellant allegedly admitted to the theft of the monies entrusted to him. The appellant vehemently denied authoring that document. He insisted that the signature appended thereto was not his. A decision was taken that the document be referred to a handwriting expert to determine the authenticity of the signature. In the end no such referral was made and no expert opinion was furnished to the disciplinary committee. Any purported reliance on that document was clearly misplaced.

On that basis we agree with the appellant that there was no evidence upon which a reasonable tribunal could have properly convicted the appellant. The court *a quo* misdirected itself in confirming the erroneous decision of the disciplinary committee. That being the case it is not necessary to consider the procedural defects alleged by the appellant.

Those procedural issues should have been dealt with by way of review before a court of competent jurisdiction.

Costs shall follow the cause.

DISPOSITION

It is ordered that:

1. The appeal be allowed with costs.
2. The order of the court *a quo* be set aside and in its place the following order be made.

“a) The appeal against the appeals officer’s decision be and is hereby allowed with costs.

b) The appeals officer’s decision be and is hereby set aside and the following order is made in its place:

i) The appeal against the disciplinary committee’s decision is allowed and the disciplinary committee’s decision is set aside and replaced with the following:

A. The employee be and is hereby found not guilty of theft or fraud.

B. The employee be and is hereby reinstated without loss of salary or benefits with effect from the date of dismissal failing which the employer shall pay him damages *in lieu* of reinstatement.”

UCHENA JA : I AGREE

KUDYA JA : I AGREE

Gama and Partners, appellant’s legal practitioners

Coghlan, Welsh & Guest, respondent’s legal practitioners