

REPORTABLE (43)

**KNOWLEDGE DANHA
v
HEALTH SERVICES BOARD**

**SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 7 OCTOBER 2024 & 23 MAY 2025**

B. Matanhire with A.T.T Mbotshwa, for the appellant

L.T Muradzikwa, for the respondent

BHUNU JA:

1. This is an appeal against the whole judgment of the Labour Court (the court *a quo*) which dismissed the appellant's appeal against his dismissal from employment. The judgment appealed against is dated 24 November 2013. That is to say more than 11 years ago. This Court however, granted the appellant leave to appeal on 26 June 2024.

FACTUAL BACKGROUND

2. The appellant was employed by the respondent, the Health Services Board as an assistant accountant. He was dismissed from employment on allegations of defrauding a patient of \$130.00 in the course of his employment.
3. The appellant was arrested and charged with fraud but was acquitted by the criminal courts. He was nevertheless subjected to disciplinary action by the disciplinary committee on allegations of defrauding the patient. The disciplinary committee found him guilty as charged and ordered his dismissal from employment. He appealed to the court *a quo* without success. The court *a quo* found that the appellant's acquittal in the criminal courts

was no bar to disciplinary proceedings. It further found that on the facts before it, the disciplinary committee was correct in finding him guilty as charged and in ordering his dismissal without salary and benefits.

4. The court *a quo* made a factual finding as did the disciplinary committee, that the appellant was part of a syndicate of the respondent's workers that was in the habit of defrauding patients of their money. The *modus operandi* was through generating fake receipts falsifying that a patient had paid for services rendered. In this case, the complainant paid US\$130.00 for services which were never provided. The appellant was implicated by his junior workmate one Wellington Mugabe who testified that the appellant requested for a blank receipt which was later found to have been used to defraud the complainant. The disciplinary committee believed Mugabe's evidence whereupon it found the appellant guilty as an accomplice and ordered his dismissal without salary and benefits. Upon a consideration of the facts and the law, the court *a quo* found no misdirection on the part of the disciplinary committee and consequently dismissed the appeal.
5. Discontented with the appeal outcome, the appellant turned to this Court for relief on appeal on the following grounds:

GROUND OF APPEAL

1. A point of law is raised for the first time, that the appellant's dismissal was unfair, unlawful and irregular in that he was wrongly, procedurally and unlawfully charged, convicted and dismissed on the basis of the Health Services Regulations SI 117/2006, which regulations were at the time of the charge, conviction and dismissal not an employment code applicable to employees in the Ministry of Health, as they were not registered as an employment code of conduct in accordance with s 101 of the Labour Act [*Chapter 28:01*].

2. The court *a quo* grossly misdirected itself in fact, which amounts to an error at law in confirming appellant's guilt on the basis of a finding that he had been given a blank receipt by Wellington Mugabe which receipt was used to defraud Biton Chigowi, regardless of the fact that the record of the disciplinary hearing before it, clearly shows that Wellington Mugabe exculpated the appellant and admitted that he had falsely and wrongly implicated him before the board of inquiry.
3. The court *a quo* grossly misdirected itself in fact which is an error at law in finding that the appellant had failed to refute Wellington Mugabe's assertions at an inquiry in circumstances where appellant had controverted the allegations and there was neither direct nor circumstantial evidence proving appellant's guilt, a fact which both the board of inquiry and board of hearing acknowledged.
4. The court *a quo* erred at law in disregarding and not giving any weight to the fact that a criminal court had found the appellant not guilty and acquitted on the same facts which were before it and exercised its discretion and found appellant guilty on the basis of no evidence but over stretched speculation."

THE RELIEF SOUGHT

6. On the basis of the above grounds of appeal, the appellant seeks the following relief:

- “1. The appeal be and is hereby upheld.
2. The appellant be and is hereby reinstated to his original position of Assistant Accountant at Mpilo Hospital without loss of salary and benefits from the date of his unlawful dismissal and if reinstatement is no longer an option respondent shall pay Appellant damages *in lieu* of reinstatement to be agreed to by the parties failing which each party may approach the Labour Court for quantification of damages”.

“There shall be no order as to costs.”

THE APPELLANT'S CASE

7. The appellant's complaint on the merits is basically that he was convicted without sufficient evidence establishing his guilt. His contention is that the respondent's star

witness, Wellington Mugabe gave evidence which exculpated him from any wrongdoing. He argues that the factual misdirection in this respect is so gross that no sensible person applying his/her mind properly could have come to such a decision. See *Mutsuta & Anor v Cagar (Pvt) Ltd* 2009 (2) ZLR 27 (S)

8. As an afterthought, about eleven years after conviction and sentence, he now complains for the first time that his conviction and sentence was unfair, unlawful and irregular in that he was dismissed under the Health Services Regulations Statutory Instrument 117 of 2006 which was an unregistered disciplinary code of conduct at the time.
9. In bringing the legal argument at this inordinate hour, the appellant relies on the *dictum* in *Muchakata v Netherburn Mine (Private) Limited* 1996 (1) ZLR 153(S) at p 157A where this Court observed that:

“Provided it is not one which is required by a definitive law to be specifically pleaded, a point of law which goes to the root of the matter, may be raised at any time, even for the first time on appeal, **if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman 1918 AD 460; Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at D – G*** (My emphasis)
10. On the basis of the above authorities, the appellant argues that the point of law raised goes to the root of the matter and is dispositive of the appeal in his favour. He submits that this is because he was dismissed in terms of a non-existent code of conduct which renders the dismissal a nullity.

THE RESPONDENT’S CASE

11. Right at the onset, the respondent objected to the appellant’s notice of appeal on the basis that it is fatally defective. His argument is that the appellant has incompetently substituted the grounds of appeal he proffered when applying for leave to appeal with a completely

new set of grounds of appeal. The relief sought is fatally defective in that it does not seek the setting aside of the judgment appealed against.

12. The respondent's case in opposing the appeal is that the judgment the appellant seeks to appeal against has since superannuated after 11 years of lying undisturbed.
13. The respondent further objects to the raising of the point of law at this late hour on the basis of fatal procedural irregularity. It contends that the raising of the point of law for the first time on appeal without notice violates r 51 of the Supreme Court Rules 2018 for want of notice in terms of the rule.
14. On the merits respondent submits that the appellant cannot challenge the factual findings of the court *a quo* on appeal. It further contends that the court *a quo* did not misdirect itself in holding that the disciplinary committee was correct in determining that the appellant was guilty as charged and then ordering his dismissal from employment without salary or benefits.
15. Regarding the criticism of Mugabe's evidence, the respondent conceded that his evidence was somewhat shifty but consistent and reliable on the crucial aspect of the charge that he gave the appellant a blank receipt which was later used to defraud the complainant. The court *a quo* attributed the inconsistency in Mugabe's evidence to fear of testifying against his superior at work. Despite the inadequacies in Mugabe's evidence the respondent was adamant that it had discharged the onus of proving on a balance of probabilities that the appellant was guilty as charged.

ISSUES FOR DETERMINATION

16. The contest between the parties in this case raise both preliminary and substantive issues.

These may be formulated as follows:

Preliminary issues

- (i) Whether the matter is properly before this court on appeal.
- (ii) Whether the judgment appealed against has superannuated.
- (iii) Whether the appellant has validly raised the point of law challenging the validity of the proceedings before the disciplinary committee.

Issues on the merits

- (i) Whether the court *a quo* was correct in upholding the decision of the disciplinary committee.

ANALYSIS AND DETERMINATION

Whether the matter is properly before this Court on appeal.

17. Whether or not this matter is properly before the court on appeal is a jurisdictional issue deserving to be dealt with first as it is dispositive of the matter should the court find in favour of the respondent on this issue. Without jurisdiction the court cannot move one inch forward to consider all the other issues pertaining to this case. In this regard the record speaks for itself.
18. The grounds of appeal which the appellant filed and relied upon when applying for leave to appeal appear at p 101 of the record of proceedings. They are couched as follows:

“**TAKE FURTHER NOTICE** that grounds of appeal as required by r 29 (1) (d) as read with r 32 of the Rules of the Supreme Court aforesaid are as follows:

GROUND OF APPEAL

1. The Honourable Court *a quo* grossly misdirected itself, that no reasonable court would have arrived at a conclusion that there was overwhelming evidence against appellant when in actual fact the respondent’s Board of enquiry found that the evidence of Wellington Mugabe was inadequate to discipline the appellant and further during the Disciplinary Hearing Committee, Wellington Mugabe completely exonerated the appellant.

2. The Honourable Court *a quo*, ought to have found that there was no evidence at all to link the appellant to the commission of the offence
3. The Honourable Court grossly misdirected itself in its finding that the appellant did not challenge Wellington Mugabe's testimony during investigations when in actual fact at all material times the appellant denied the allegations and the testimonies of Wellington Mugabe.

WHEREFORE appellant prays that the decision of the court *a quo* be set aside ...”

19. We have already quoted the current grounds of appeal before the court in full at para 5 of this judgment. If the two sets of grounds of appeal are juxtaposed, it will be seen that the two bear no resemblance to each other as they are totally different.
20. It is plain that the original grounds of appeal are solely based on attacking the factual findings of the court *a quo* whereas the current grounds of appeal constitute a mixed bag of points of facts and law.
21. The law on the incompetence of deviating on appeal from the grounds of appeal proffered when applying for leave to appeal was spelt out by GUVAVA JA in *Bonde v National Foods Limited* SC 11 /21 at p 7 where the learned judge said:

“It is trite that the draft notice of appeal placed before the court in an application of this nature becomes the notice of appeal which forms the basis of the appeal to be heard by the court. It is imperative that the draft notice of appeal must comply with the rules of the court. The appellant's notice of appeal is defective in this regard.” (The emphasis is mine)
22. The underlying rationale for holding an appellant to the grounds of appeal proffered when applying for leave to appeal is to avoid taking the other side by surprise by sneaking in foreign grounds of appeal not forming the basis upon which leave to appeal was granted. Judicial proceedings should not be reduced to a game of hide and seek where the respondent is left uncertain of the case they are to meet on appeal. It is therefore devious,

dishonorable and unacceptable for an appellant to shift from the grounds of appeal upon which leave to appeal was granted. The appellant must therefore, be held and firmly bound to the grounds of appeal upon which leave to appeal was granted. Doing otherwise would be prejudicial to the other party concerned.

23. The other reason is the fact that leave to appeal had been granted on the basis of the grounds of appeal before the judge, and on the consideration that such grounds of appeal enjoyed some prospects of success. This Court cannot therefore properly consider a completely new set of grounds of appeal in order to determine the matter.

DISPOSITION

24. In the final analysis, we hold that it was a fatal procedural irregularity for the appellant to substitute the grounds of appeal upon which leave to appeal was granted with a different set of grounds of appeal. The appeal is therefore a nullity and consequently improperly before the court. That conclusion of fact and law is dispositive of the matter and renders it unnecessary to consider and determine all the other remaining issues arising from this case.

COSTS

25. Upon consideration of the facts and the law, the Court takes the view that, costs follow the cause.
26. It is accordingly ordered that:
1. The matter be and is hereby struck off the roll.
 2. The appellant shall bear respondent's costs at the ordinary scale.

CHIWESHE JA:

I agree

CHATUKUTA JA

I agree

Civil Division of the Attorney General, the respondent's legal practitioners.

R Chibaya Law Chambers, the appellant's legal practitioners.