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TONGOGARA RURAL DISTRICT COUNCIL
v
SITHEMBISO NDIRIPO

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHITAKUNYE JA & MUSAKWA JA
HARARE, 23 May, 2022 & 17 MARCH, 2023

N. Mashizha, for the appellant

P. D. Sibanda, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the Labour Court ("the court *a quo*), sitting at Gweru, wherein the court *a quo* upheld an appeal by the respondent on the basis that she had been improperly charged and convicted by the appellant's disciplinary authority.

FACTUAL BACKGROUND

The respondent was employed by the appellant as a treasurer in June 2015 and worked in that capacity until 20 January 2021 when she was suspended from employment on four allegations of misconduct. On 23 February 2021, she was dismissed from employment upon being convicted of three counts of contravening s 4(f) of Statutory Instrument 15 of 2006 (the National Code) that is, for gross incompetence or inefficiency in the performance of her work.

The respondent was initially charged with four counts of misconduct in contravention of s 4 of the National Code. She was, however, acquitted of the first count which related to her relationship with a former chief executive officer (CEO) of the appellant in contravention of s 4(a) of the National Code but was convicted of the three counts which related to c/s 4(f) of the National Code.

The allegations upon which she was convicted of gross incompetency or inefficiency in the performance of her work in contravention of s 4(f) of the National Code were: -

(a) Firstly, that she had failed to implement and advise the appellant on issues relating to a Pastel Accounting System which had been installed and this led to financial loss.

(b) Secondly, that the respondent had unilaterally and irrationally allocated an extra 60 litres of diesel fuel to one of the appellant's drivers; and

(c) Thirdly, that she failed to execute her duties by failing to check whether the then CEO had approved a salary advance for a Mr. Nyebera.

On 19 February 2021, a disciplinary hearing was conducted. The appellant submitted that the respondent had failed to execute her duties by failing to advise Council on the Pastel Accounting System, which had been introduced resulting in the appellant incurring financial loss due to some problem with the system. On the allegation of giving extra 60 litres of fuel to one of the drivers, the appellant alleged that the respondent was guilty of not following

the appellant's procedures as she had used no formula to calculate the fuel to be allocated. In that regard the respondent had given an extra 60 litres to the driver for a Shurugwi to Harare return trip instead of the regulated 80 litres for the trip without any justification. On the other count the appellant's position was that the respondent as the council Treasurer had failed to check whether the application for a salary advance by Mr W Nyebera had been approved by the Chief Executive Officer (CEO), B Rufasha, before sending the documents to the bank for payment to be effected. The Appellant's contention was that in failing to check that the documents had been signed and approved by the CEO, the respondent was grossly incompetent and inefficient in her duties as appellant's financial gate keeper (Treasurer).

The respondent denied the charges and pleaded not guilty. Regarding the count of failing to advise the appellant on the Pastel Accounting System, the respondent's defence was that the responsible person, who was supposed to be held accountable for failing to advise the Council on the Pastel Accounting System, was the CEO.

On the count of allocating an extra 60 litres of fuel to one of the drivers, the respondent's defence was that the matter had been dealt with by the former CEO on 29 September 2020, hence the matter was *res judicata*. On the count of unauthorised salary advancement, the respondent also pleaded *res judicata* on the basis that the issue had been dealt with by the former CEO on 29 January 2020.

The disciplinary authority dismissed the respondent's defences to the above three counts and held that the respondent was guilty of gross incompetency or inefficiency in the

performance of her duties. The disciplinary authority ruled that the plea of *res judicata* advanced by the respondent did not apply since no proper hearing was conducted. The respondent was therefore dismissed from employment.

Aggrieved by the decision of the disciplinary authority, the respondent appealed to the court *a quo*.

IN THE COURT *A QUO*

At the hearing of the appeal, counsel for the appellant raised a preliminary point objecting to the inclusion by the respondent of an audit report and an email trail. Counsel argued that it was improper for the respondent to attach these documents to her appeal as they had been disregarded by the disciplinary authority because the audit report was unsigned. It was thus prayed that the documents be expunged from the record.

In contrast, counsel for the respondent contended that the disciplinary authority erred at law in giving insufficient weight to the evidence led on behalf of the respondent, such as the audit report, which exonerated her of two charges that she was facing. He contended that the email trail established that the audit report had originated from the appellant and had circulated between the parties' respective legal practitioners and the erstwhile CEO. He further submitted that the failure by the disciplinary authority to consider such evidence despite the paper trail showing that such evidence originated from the appellant was one of the grounds of appeal before the court *a quo*.

On the merits, counsel for the respondent submitted that the rationale behind the plea of *res judicata* is to protect those alleged to have committed an infraction from being punished more than once. Counsel submitted that the erstwhile CEO had taken conclusive action by requesting the respondent to write a report after which he cautioned her regarding her conduct. An affidavit by the erstwhile CEO was produced wherein the then CEO confirmed having cautioned the respondent for erroneously tendering an unapproved advance salary and allocating extra fuel to one of the drivers. The respondent's counsel thus submitted that the matters had been fully resolved. Further, on the allegations that the respondent had failed to advise council on the challenges with the Pastel Accounting System, counsel for the respondent submitted that the appellant had merely made bald allegations without giving any evidence that the Pastel Accounting System was not performing efficiently. Evidence of the implementation and performance of the Pastel Accounting System was exhibited by the respondent through two trial balances which showed that the Pastel Accounting System was working. The respondent had, in fact, averred that she had kept the then CEO informed about the operations of the Pastel Accounting System and it was for the CEO to in turn advise the appellant.

Per contra, counsel for the appellant submitted that the plea of *res judicata* was inapplicable in the circumstances as the matters were merely browsed through; there was no final and definitive judgment on the matters and that the issues had not been decided by a tribunal or court. Counsel urged the court *a quo* not to interfere with the disciplinary authority's findings on the plea of *res judicata*. Regarding the issue of Pastel Accounting System, the appellant's counsel submitted that the respondent was guilty of failure to advise the appellant that the Pastel Accounting System be terminated because it was inefficient.

FINDINGS OF THE COURT *A QUO*

The court *a quo* held that the evidence that the disciplinary authority failed to consider was in support of the respondent's case. The court held that as the documents (audit report and email trail) originated from the appellant and were exchanged between the parties' legal practitioners, it was an error on the part of the disciplinary authority not to consider such evidence. The appellant's objection to the inclusion of those documents was thus dismissed.

The court *a quo* further found that the respondent's acts of misconduct relating to the unauthorised advance salary payment and the allocation of extra fuel could not be said to have been merely browsed through since the CEO had firstly advised the internal auditor to investigate the matter leading to the internal auditor issuing reports in which he concluded that the matters be put to rest. The CEO in cautioning the respondent was in effect acting in tandem with the recommendation by the internal auditor. It was clearly not a case of mere browsing as suggested by the appellant. The court *a quo* ruled that disciplinary action was not limited to conducting a disciplinary hearing, hence the CEO's cautionary letters to the respondent were held to be sufficient disciplinary action which decisively concluded the issues. The court further held that the respondent, having been cautioned by the then CEO, could not be disciplined twice for the same offences. It therefore ruled that the respondent had been wrongly convicted on the third and fourth counts.

On the issue of the Pastel Accounting System, the court *a quo* ruled that the trial balances and payments to the service provider produced by the respondent proved that the system had been implemented and was working. It further found that the allegation that the

respondent failed to advise the appellant on the progress and challenges of the pastel accounting system was unsupported. Therefore, the court *a quo* held that the respondent had been improperly convicted of the charges against her and allowed the appeal.

Irked by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred grossly on the facts and at law in finding that the unsigned audit report originated from the appellant and was exchanged between Counsel when there was no sufficient evidence to support such a finding.
2. The court *a quo* erred at law in interfering with the Tribunal's factual finding to the effect that the matters were browsed at without finding that such factual finding was grossly unreasonable.
3. The court *a quo* erred at law in upholding the plea of *res judicata* in circumstances where the said plea did not apply.
4. The court *a quo* erred grossly on the facts and at law in finding that the respondent was not grossly inefficient in relation to Pastel Accounting when sufficient evidence had been led to prove the said allegation.

The appellant seeks that the appeal be allowed with costs and that the judgment of the court *a quo* be set aside and substituted with an order dismissing the respondent's appeal.

SUBMISSIONS BEFORE THIS COURT

At the commencement of the hearing *Mr Mashizha,* for the appellant, indicated that he was abandoning the fourth ground of appeal. This ground related to the court *a quo's* finding that the allegation that the respondent had failed to advise the appellant on the Pastel

Accounting System was unsupported and thus found her not guilty on this count. The grounds that remained for consideration pertained to the counts for which the court *a quo* found the plea of *res judicata* to be applicable.

Mr *Mashizha,* for the appellant, submitted that the court *a quo* erred in finding that the unsigned audit report, which was said to have exonerated the respondent from the charges of misconduct, was generated by it. Mr *Mashizha* further submitted that as the authenticity of the audit report and the email trail had been disputed, the onus of proving their origin lay with the respondent. He also submitted that because the disciplinary authority had not admitted such evidence, it was incumbent upon the respondent to make an application to introduce the documents as fresh evidence. Without this application having been made, he opined that the court *a quo* had no power to consider the documents on appeal.

Counsel for the appellant also submitted that the court *a quo* erred in interfering with a factual finding made by the disciplinary authority that the matters were browsed through, without demonstrating any unreasonableness on the disciplinary authority's part.

Counsel further submitted that it was improper for the court *a quo* to uphold a special plea of *res judicata* when it did not apply. He argued that it had not been shown that any proceedings had been instituted against the respondent in terms of which a final and definitive decision was made on the substantive issues. Counsel concluded his submissions by stating that the respondent had not been properly charged as required by s 4 of the National Code, thus, the plea of *res judicata* could not be upheld.

On the contrary, Mr *Sibanda*, for the respondent, submitted that the appellant had only objected to the production of the audit report and the email trails without providing any evidence to challenge the authenticity of those documents. Counsel contended that the court *a quo* had rightly found that the disciplinary authority's rejection of the evidence provided by the respondent was an error at law.

Further, counsel submitted that the court *a quo* had powers to inquire afresh on the issue of *res judicata* on the basis that it was a finding of law and not fact. Counsel also submitted that the appellant did not challenge the CEO's authority to discipline the respondent and merely argued that the respondent should have been brought before a tribunal for the plea of *res judicata* to succeed. He further submitted that the charges against the respondent were not merely browsed through since the former CEO wrote cautionary letters to her. Counsel averred that the respondent was cautioned for the charges of misconduct levelled against her in 2020 and was, in 2021, called for a disciplinary hearing on the same charges. He argued that this amounted to double prejudice against the respondent which was unwarranted.

We are of the view that only two issues arise for consideration. These are: -

1. Whether or not the court *a quo* erred in accepting the audit report and the email trail as evidence.

2. Whether or not the court *a quo* erred in holding that the plea of *res judicata* applied to the respondent's case.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred in accepting the audit report and the email trail as evidence.

The appellant's bone of contention in relation to the audit report, as submitted by its counsel, was that it was not signed and that there was no conclusive proof that the document in question had been generated by it. The appellant disputes the email trail as evidence that the audit report had originated from it.

Nevertheless, in our view, despite not being signed, the circumstances surrounding the origin of the audit report *prima facie* point to it being generated by the appellant. The email trail provided by the respondent is most telling. Part of the email trail reads as follows:

> "Regards, find attached the auditor's report on Mr. Nyebera's salary advance forwarded to me by Mr. Rufasha who long received it from council lawyer Mr. Mashizha when he was also preparing for his case."

The email trail undoubtedly shows that the appellant sent the audit report on 13 November 2020 at 4:01 pm to its legal practitioner, Mr *Mashizha*, who in turn forwarded it to the erstwhile CEO in the prosecution of disciplinary action against him on the same date at 4:11pm. It is the former CEO who forwarded the very same audit report to the respondent on 18 February 2021. The respondent thereafter forwarded it to her legal practitioner, Mr *Sibanda*, accompanied by the above quoted caption. That sequence is not denied by the originator and the addressees or recipients of the email as forwarded. The appellant did not deny sending the email to its legal practitioner and that legal practitioner did not deny receiving such email or deny that he subsequently forwarded it to the former CEO. All that the appellant seemed to rely on was its

own failure to sign the audit report that it sent to its legal practitioner. The disciplinary authority considered such failure as fatal to the respondent's efforts for it to be considered. It is in these circumstances that the court *a quo* held that: -

> "To have rejected such evidence on the basis that it was not signed yet it was clearly shown that the evidence originated from the respondent (appellant now) and was exchanged between counsel appearing before the tribunal *a quo* and me is an error at law. Such evidence should have been considered."

It is difficult to appreciate why the appellant would question the authenticity of the audit report when it had shared the same with its legal practitioner, thus, clearly showing that the report was generated by it. In any case the disciplinary authority did not hold that the audit report and the email trail were not authentic but did not accept it because it was not signed. In that regard the reason for not considering it was captured as: -

> "The chairperson highlighted that the document could have circulated but the intention to that was still not clear and had the document been signed it was going to be accepted." (my emphasis)

In the case of *Delta Beverages (Pvt) Ltd* v *Pyrate Investments (Pvt) Ltd* HH-135-18, wherein the court was faced with a claim based on an unsigned contract, the court stated that:

> "Documentary evidence such as emails, faxes, showing the intention of the parties and dealings between the parties after the alleged contract was entered into serve to confirm the existence of the contract."

By parity of reasoning with the above authority, the email trail attached by the respondent serves to confirm that the disputed audit report was generated by the appellant.

Mr *Mashizha*, for the appellant, submitted that once the authenticity of the audit report had been challenged *a quo*, the respondent ought to have proved that its origin lay with the appellant. It is trite law that labour issues are determined on a balance of probabilities and that proof beyond a reasonable doubt is not needed. See *Ngwaru* v *First Mutual Health Company (Pvt) Ltd* S–38–19. In the English case of *In re H (Minors)* [1996] AC 563 at 586, LORD NICHOLLS explained that proof on a balance of probabilities is a flexible test as follows:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not." (my emphasis)

Also, in the case of *Thulisani Dube Nyamambi* v *Bongani Ncube* HB-82-15, the court aptly held that;

> "In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities", but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to another. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed." (my emphasis)

See also *British American Tobacco Zimbabwe* v *Chibaya* S30-19.

It is our view that on a balance of probabilities, the email trail provided by the respondent establishes that the audit report was generated by the appellant. In *Mukozho* v *Standard Bank of Zimbabwe Ltd* S73-20 MAKONI JA aptly held that:

> "In a civil case where the court seeks to draw inferences from the facts, it may by balancing probability, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones though that conclusion is not the only reasonable one."

In light of this, we find that the appellant's contention that the audit report and the email trail should not have been accepted as evidence by the court *a quo* is devoid of merit. The court *a quo* cannot be said to have erred in accepting that the audit report originated from the appellant.

Whether or not the court *a quo* erred in holding that the plea of *res judicata* was applicable in this case.

In respect of the second and third grounds of appeal, the appellant's counsel submitted that the plea of *res judicata* should not have been upheld by the court *a quo*. This was in relation to the charges of unauthorised salary advance payment and the issuance of an extra 60 litres of fuel to one of the drivers by the respondent. The appellant's position was that the respondent was not arraigned before a disciplinary tribunal and so the plea of *res judicata* did not apply to the charges against her. It contended that cautionary letters by the erstwhile CEO were not issued by a disciplinary tribunal and so would not suffice.

The concept of *res judicata* basically means that "the matter has already been decided" and cannot be redecided. In the case of *Sibanda* v *Sheriff of the High Court* HB22-22 at p 6, the concept was lucidly defined as follows:

> "The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in the proceedings between the parties and that it therefore cannot be raised again."

In *Wolfenden v Jackson* 1985(2) ZLR 313 at 313B-C GUBBAY JA (as he then was) articulated the special plea of *rei judicata* as follows: -

> "the exception *rei judicatae* is based principally upon the public interest that there must be an end to litigation and that authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en' Ander v Roux* 1967(1) SA 446(a) at 461H. It is a form of estoppel and means that where a final and definitive judgement is delivered by a competent court the parties to that judgment or their privies (or in the case of a judgment in rem, any other person) are not permitted to dispute its correctness."
> See *Munemo v Muswera* 1987(1) ZLR 20(SC)

The effect of successfully raising a plea of *res judicata* was enunciated in *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & Ors* CCZ-6-18 to be that it precludes the court from re-opening a case that has been litigated to finality. Nonetheless, there are certain requirements which must be met in order for a plea of *res judicata* to prevail. These are essentially that:

(1) the two actions must be between the same parties;

(2) the two actions must concern the same subject-matter;

(3) the two actions must be founded upon the same cause of action; and,

(4) there must be a final judgment or determination of the matter in the first action.

See *Flowerdale Investments (Pvt) Ltd & Anor* v *Bernard Construction (Pvt) Ltd & Ors* 2009 (1) ZLR 110 (S).

The necessity of satisfying the requirement that there must be a final resolution of the matter during the prior proceedings when pleading *res judicata* was discussed by MAKARAU JP (as she then was) in the case of *Chimpondah & Anor* v *Muvami* 2007 (2) ZLR 326 (H) in the following manner:

> "For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having

> determined the matter must have put to rest the dispute between the parties by making a finding in law and/or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment."

The cardinal question that arises is whether the court *a quo* correctly held that the facts of this case satisfy the requirements of *res judicata*.

It is not disputed that when the issues in question arose the erstwhile CEO, assigned an internal auditor to investigate the allegations. The internal auditor produced reports which were submitted to the former CEO. The former CEO issued letters to the respondent. These are the letters the court *a quo* referred to as 'cautionary letters' constituting the final and definitive resolution of the matters. It is apposite to consider the process undertaken by the former CEO. Were these disciplinary hearings or simply supervisory processes undertaken over an immediate subordinate with no final and definitive effect?

In an employment environment, disciplinary action is a method of dealing with employees who are alleged to have breached any of the institution's rules, policies, expected ethos or code of conduct. It is thus a process of dealing with employees alleged to have deviated from conduct expected in the performance of their duties. In order that fairness and justice prevail in such process, procedures for conduct of disciplinary process are set out in advance. These are generally set out in a code of conduct that the employer and employees subscribe to at the work place or, as in this case, in a National Code of conduct. The code of conduct will

invariably set out the disciplinary authority that is responsible for dealing with breach of conduct at various levels and the procedure to be followed.

In many instances where a breach of a code of conduct arises a preliminary investigation is conducted in order to ascertain the appropriate charge to be laid against the employee. The findings would inform the employer on the nature and extent of the breach and the appropriate charge to prefer against the employee. The employer is then expected to formulate the charge and inform the employee of the specific charge against him or her with an invitation for a response thereto. In *Chairman, Public Service Commission and Another v Marumahoko* 1992(1) ZLR 304(S), this court alluded to the need for the employer to carefully formulate the charge so that the employee is properly informed as to the nature and extent of the misconduct being alleged against him or her. The charge must be sufficiently clear for the employee to know what conduct, by omission or commission, he/she is required to respond to.

Once the employee has responded or declined within a given timeline, the employer can proceed with further investigations or the holding of a full inquiry through the relevant Disciplinary Authority in terms of the Code. It is that disciplinary authority that will, at the conclusion of its hearing, make its findings. Generally, the determination by such disciplinary authority will be subject to challenge before a higher authority or forum.

In *casu*, when cases of the respondent's conduct arose the erstwhile CEO, asked the internal Auditor to investigate each of the two matters. Upon receipt of the auditor's report in respect of each case and receipt of the respondent's responses thereto, the then CEO wrote letters

to the respondent. These are the letters referred to in the court *a quo* as cautionary letters. It is apparent that in instructing the internal auditor and in requesting for the respondent's response, the former CEO did not prefer any particular charges. Even in writing the two letters he did not state or specify any charges of misconduct against the respondent. A careful scrutiny of the letters gives the impression that these were reminders to the respondent of what the employer expected of her in her duties as Treasurer. For instance, in the letter of 29 January 2020 on the issue of the advance payment to Mr Nyabera, the former CEO, after acknowledging receipt of her response and confirming that the procedure was not followed, wrote, *inter alia*, that: -

> "As such I would like to remind you that it is the duty of the treasurer to supervise the expenditure clerk and ensure that this cadre's work is in line with the set procedure. In your report you are shifting blame to the clerk. Let me point out that you are merely playing a blame game because of the following. In the first place you were not supposed to allow the clerk to process payment without approval of the advance payment. The advance form was not recommended by administration neither was it approved by the CEO….
>
> You disregarded the role of administration and the CEO hence not following the procedure……
>
> Given the above I would like to remind you that failure to follow set procedure is a serious offence and as a senior member of staff your responsibility is to ensure that work procedures are followed always. The procedure was put in place to prevent possible loss of council money through unorthodox means. So, for senior members of staff of the organisation to disregard the procedure amounts to a conduct inconsistent with the fulfilment of the express or implied conditions of your contract of employment….
>
> I expect you to follow procedures always and improve your reaction to simple matters like being asked to account for an anomaly in your department."

The above letter makes no reference to any charge of misconduct or to any determination on any charge. The letter was essentially reminding the respondent of what was expected of her and for her to always follow laid down procedures.

The letter of 29 September 2020 on the issue of 60litres of diesel was also couched in similar fashion as a reminder to the respondent of what was expected of her. As with the first letter, no charge was preferred against the respondent. The letter reads in the pertinent part: -

> "In management meeting of 8 September 2020, I raised the concern that the driver in question had requested an additional 60L of fuel and you never bothered to say it is you who had decided the amount. It is clear you are trying to cover up for an unorthodox act. Let me remind you that this is a serious issue had it not been that I was alert, council would have been prejudiced of its resource. Your duty as a senior member of staff is to protect council resources and not to aide(*sic)* unjustifiable plundering of council resources."

As with the previous letter, there is no reference to any charge having been preferred against the respondent. The letter is essentially a reminder to the respondent of what was expected of her.

From the foregoing it is clear that the former CEO did not undertake any disciplinary process against the respondent from which a final and definitive decision would have arisen. In fact, the former CEO besides reminding the respondent of her duties did not arrive at any determination that would by any stretch of imagination be deemed final and definitive as no charges were preferred against the respondent. He was simply exercising his supervisory role over his immediate subordinate. Such a process by one's immediate supervisor or head cannot be turned into a disciplinary hearing. Any contemplated disciplinary action or process has its own procedural requirements in terms of the applicable code of conduct some of which cannot be avoided such as the preferring of a charge against an employee. Though the former CEO deposed to an affidavit on 17 February 2021 in which he stated that he had dealt

with the two matters involving the extra 60ltres of fuel and the unsigned and unapproved salary advance application by Mr Nyebera, in terms of the law. He, however, did not disclose the process he undertook. As the CEO he had supervisory role to play which is what he seems to have exercised as espoused above.

The court *a quo* thus erred and misdirected itself when it held that what the CEO engaged in was a disciplinary process with the letters of 29 January 2020 and 29 September 2020 as the final and definitive decisions on the alleged acts of misconduct alleged against the respondent. As already alluded to above, there were no charges in terms of any code of conduct preferred against the respondent and the letters in question also make no reference to any such charges or to any verdict.

We thus hold that the issue of misconduct charges against the respondent had not been decided by the former CEO. The respondent's defence of *res judicata* can therefore not hold water as its requirements were not met. The court *a quo* erred in this regard and its decision cannot stand. It ought to be vacated.

COSTS

Costs will follow the cause as no case was made justifying a departure from the norm.

DISPOSITION

In the light of the foregoing analysis, we find that the appeal has merit and ought to succeed. The judgment of the court *a quo* cannot stand.

Accordingly, it is hereby ordered as follows: -

1. The appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following: -

"The Labour Court Appeal in LC/MD/03/21 be and is hereby dismissed with costs."

MAVANGIRA JA **:** I agree

MUSAKWA JA **:** I agree

Mashizha & Associates, appellant's legal practitioners

Ncube & Partners, respondent's legal practitioners