REPORTABLE (87)

RAINBOW TOURISM GROUP LIMITED
v
NYASHA NYARUWATA

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 15 JANUARY 2024 & 19 SEPTEMBER 2024

Ms *R Mabwe,* for the appellant

Ms *R Munatsi*, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the Labour Court, Harare (the court *a quo*) handed down on 22 November 2019, wherein it upheld the respondent's appeal and consequently ordered his reinstatement without loss of salary and benefits and the payment of damages *in lieu* of reinstatement, if reinstatement was no longer tenable. The appellant seeks the setting aside of the judgment of the court *a quo* and its substitution with an order confirming the dismissal of the respondent from the appellant's employment.

FACTUAL BACKGROUND

The respondent was employed by the appellant for about 17 years and had risen to the position of General Manager at the appellant's Harare International Conference Centre (HICC). On 17 November 2014, he was seconded to Mozambique to hold fort for the incumbent General Manager, who had to attend to an emergency family matter in Zimbabwe, as Acting General Manager at the appellant's Rainbow Hotel Mozambique (Hotel

Mozambique). The respondent remained in Mozambique until December 2015 when he was recalled to Zimbabwe and resumed his position of General Manager at the HICC, with effect from 3 February 2016.

On 8 March 2016 the respondent was placed on suspension without pay on allegations of misconduct. On 15 March 2016, he was charged with misconduct in terms of s 1.2.28 of the appellant's code of conduct. In terms of the said s 1.2.28, an employee commits gross misconduct if he/she engages in an act, conduct or omission, which is inconsistent with the fulfilment of the express or implied conditions of his contract of employment.

The appellant alleged that in terms of the respondent's contract of secondment to Mozambique, contained in his letter of appointment (Annexure 'C') dated 17 November 2014, he was entitled to a basic salary of US$ 3813.00 from which a sum of US$1324.07 was to be deducted once he started receiving his Mozambique component of 42900 meticais in Mozambique. The contract obligated him to inform the Corporate Office at Head Office, Harare, once he activated the receipt of that component so that the Corporate Office would correspondingly activate the deduction of the equivalent sum from the salary payable into his account. The balance of US$ 2 488.93 would then be payable into the respondent's account in Zimbabwe. The respondent is alleged to have failed to inform the Corporate Office that he had activated the receipt of 42900 meticais per month in Mozambique beginning in January 2015 hence the equivalent of US$1324.07 was not deducted from his basic salary of US $3813.00. Resultantly, from January 2015 to December 2015, the respondent was overpaid in the sum of US$12 810.39, thus financially prejudicing the appellant in that sum.

It was also alleged that the respondent failed to execute his duties as general manager in running the payroll of the Hotel Mozambique in that he facilitated the payment of

yearly salary increments for expatriates without making arrangements for the deduction of such amounts from the salary in Zimbabwe. It was further averred that as a result of such conduct the appellant was financially prejudiced in the sum of US$90 211.56. Apparently, this latter part included the period 2011 to June 2014 when the respondent had earlier been posted to Hotel Mozambique.

The respondent's defence to the allegations was to the effect that the secondment contract referred to by the appellant was not the correct one. Instead, he contended that his secondment was in terms of a letter of appointment dated 1 November 2014 which he attached to his response as annexure 'G'. That contract was to be read together with annexure 'F'. He contended that in terms of annexure 'G', as read with annexure 'F,' the 42 900 meticais he was receiving in Mozambique was a Business transport allowance and such would not be deductible from his salary.

The respondent subsequently appeared before an appointed Designated Officer (D/O) for a disciplinary hearing. The D/O, upon considering the documentary evidence tendered and the *viva voce* evidence of the four witnesses who testified for the appellant and the respondent, found the respondent guilty of the charge preferred and imposed a penalty of dismissal with effect from 8 March 2016.

In arriving at the verdict, the D/O held, *inter alia*, that the correct contract upon which the respondent was seconded to Rainbow Hotel Mozambique is annexure 'C'. In terms of that contract the respondent was obligated to advise the Corporate Office, Head Office, in Harare when he would have started receiving the Mozambique portion of his salary of 42 900 meticais so that the Corporate Office would activate the deduction of the equivalent sum of US$1324.07 from his gross salary of US$3813.00 and the balance paid to him in Zimbabwe;

that the respondent failed to or omitted to advise Corporate Payroll Office when he started to receive the Mozambique portion of his salary; that his contention that the money he received in Mozambique was compensation for working in a foreign country was not backed by any documentary evidence, similar to annexure 'J' he had attached to his response to the allegations; and that his evidence on the contract he sought to rely on was improbable whilst on the other hand the evidence led by the appellant showed that the respondent was guilty of the charge; and finally, that as a consequence of his failure to advise the Corporate Office, the appellant was prejudiced of a total sum of US$12 610.39 for the period January 2015 to December 2015. The D/O did not specifically pronounce himself on the allegations relating to the US$90 211.56 allegedly prejudiced in the earlier period.

Upon such factual findings the D/O held that the respondent's conduct was grossly inconsistent with the fulfilment of the express or implied conditions of his employment contract.

Aggrieved by the decision, the respondent appealed to the appellant's Appeals Hearing Officer (AHO) who dismissed the appeal for lack of merit. In dismissing the appeal, the AHO upheld the D/O's finding that the applicable contract was annexure 'C' and not annexure 'G' as read with annexure 'F'.

PROCEEDINGS BEFORE THE LABOUR COURT

Irked by the dismissal of his appeal, the respondent appealed to the court *a quo* on the following grounds:

"1. The Appeals Hearing Officer generally and seriously misdirected himself on the facts in failing to find that appellant was not informed that the income paid to him

in Mozambique was supposed to be deducted from the income paid to him in Zimbabwe.

2. Alternatively, the Appeals Hearing Officer generally and seriously misdirected himself in upholding that appellant should be penalized for his employer's mistake in failing to deduct the income paid in Mozambique from the income paid in Zimbabwe."

At the hearing of the appeal *a quo*, the respondent sought the setting aside of the decision of the Appeals Hearing Officer and its substitution with an order for his reinstatement without loss of salary and benefits. He further submitted that if reinstatement was no longer tenable, he be paid damages *in lieu* thereof as determined by the court.

Per contra, the appellant contended that the AHO did not misdirect himself in failing to find that the respondent was not informed that he was required to advise the Corporate Office Head Office when he activated the receipt of income whilst working in Mozambique so that an equivalent sum is deducted from his income in Zimbabwe. The appellant submitted that the respondent was given a written contract that stipulated that he was to advise Corporate Office upon starting to receive the Mozambique portion of his salary so that an equivalent amount would be deducted from his salary in Zimbabwe. The appellant averred that, though the respondent had not signed the written contract alleging that there were some unresolved issues, he had nevertheless taken the two copies of the contract that had been prepared for his signature after which he had proceeded on the secondment on the next day. Further, the appellant contended that the contract that governed the respondent's employment relationship immediately before he went to Mozambique was not the one applicable once he took up the General Manager's position at the Hotel Mozambique. The appellant maintained that the

respondent was mandated to advise the Corporate Office in Zimbabwe that he had started receiving the Mozambique portion of his salary so that Corporate Office would deduct the equivalent of the amount he was earning in Mozambique from his basic salary in Zimbabwe. It was for this reason that the appellant maintained that the respondent's dismissal was not irrational such as to warrant interference by the court *a quo*.

In resolving the appeal before it, the court *a quo* identified issues for determination as:- (a) was there a contract of employment dictating the terms and conditions of the respondent's employment in Mozambique; and (b) should the appellant have been penalized for the non-deduction of the income paid in Mozambique from the income paid in Zimbabwe.

On the first issue the court *a quo* held, *inter alia*, that –

- the appellant bore the onus of proving that there was in existence an agreement speaking on the remuneration of the respondent for the time that he was working in Mozambique of which it found that the appellant had failed to do so;
- the authenticity of the contract which the appellant relied on had been successfully challenged by the respondent;
- on a balance of probabilities, the contract in question had been created in 2016 as the respondent was only given a copy on 24 March 2016;
- the letter dated 17 November 2014 that contained the contract in question (Annexure 'C') specified that it was valid for fourteen days;
- after the lapse of fourteen days the letter became invalid;
- there was no indication that the respondent accepted the conditions in the letter as his signature was not endorsed on the document; and resultantly,

- there was no contract for the secondment to Mozambique.

On the second issue the court *a quo* held, *inter alia*, that as the basis for the deductions had not been established, the respondent should not have been penalized for such non-deduction; that even if the deductions were supposed to be effected, the respondent was not to blame for the omission as the auditor's report of 1 March 2016 stated that the omission was an "administrative omission".

The appeal was allowed with costs and the court ordered that the respondent be reinstated with an alternative for payment of damages if reinstatement was untenable.

PROCEEDINGS BEFORE THIS COURT

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

1. The court *a quo* grossly misdirected itself and thus committed a fatal irregularity in that it failed to decide the issue before it being which contract prevailed between the parties.
2. The court *a quo* grossly misdirected itself on the facts and thus erred at law in that it determined that there was no contract between the parties which issue was not before the court as both parties accepted there was at all material times an employment contract between them.
3. The court *a quo* grossly misdirected itself on the facts in that it made a decision grossly defiant of logic which no other court confronted with the same set of facts would have arrived at the same decision in finding that respondent was not guilty of inconsistent conduct or omission arising from his failure to inform appellant's corporate office that he was receiving the sum of 42 900 meticais in Mozambique

so that the equivalent sum of $1 324.07 could be deducted from his monthly salary in Zimbabwe when the evidence before the court proved the contrary.

4. Further, the court *a quo* grossly misdirected itself and thus committed a fatal irregularity by deciding an issue that was not before it in that it decided that the respondent could not be penalized for an administrative error of not subtracting the US$1 324.07 from his salary of US$3 813.00 in Zimbabwe.

SUBMISSIONS BY COUNSEL

In motivating the appeal Ms *Mabwe*, for the appellant, submitted that the court *a quo* made a determination in respect of issues that were not before it. She submitted that there were only two issues before the court *a quo,* that is- whether the respondent was aware that he was required to advise Corporate Office, Head Office, that he had activated the receipt of the Mozambique component of his salary so that an equivalent amount thereof would be deducted in Zimbabwe and whether the respondent should have been penalized for the appellant's failure to deduct the money received in Mozambique. Counsel submitted that in resolving the matter placed before it, the court *a quo* set out its own issues which were not placed before it. She further submitted that the D/O made findings in relation to the payroll but the court *a quo* did not deal with the issue. On the charge, counsel submitted that the respondent was aware that he was supposed to advise Corporate Office, Head Office that he was now in receipt of the Mozambican component of his salary so that an equivalent amount could be deducted from the salary paid to him in Zimbabwe but he failed to do so resulting in him being overpaid in salaries.

Per contra, Ms *Munatsi*, for the respondent, submitted that the court *a quo* did not go on a frolic of its own as it dealt with the issue of the contract which had been raised in

the grounds of appeal. She argued that the court *a quo* properly found that there was no secondment contract regulating the respondent's secondment to Mozambique and that in the absence of a secondment contract the respondent could not be found guilty of misconduct.

Regarding the issue of the payroll, counsel submitted that the grounds of appeal placed before the court *a quo* did not raise the issue of the payroll as the D/O had not made any findings on it in his determination.

ISSUES FOR DETERMINATION

1. Whether or not the court *a quo* determined issues not placed before it?
2. Whether or not the court *a quo* erred and misdirected itself in finding that there was no contract between the parties regulating the respondent's secondment to Hotel Mozambique?
3. Whether or not the court *a quo* erred and misdirected itself in holding that the respondent was not guilty of inconsistent conduct or omission in terms of s 1.2.28 of the RTG Code of Conduct.

ANALYSIS

A careful perusal of the record of proceedings shows that the D/O made factual findings after a consideration of the evidence adduced by the parties. Those findings of fact were upheld by the AHO. It was against those factual findings that the respondent appealed to the court *a quo*. It is, however, apparent that the D/O did not make a specific finding on the Payroll prejudice of US$ 90 211.56 which related to a prior period. Equally the grounds of appeal in the court *a quo* did not relate to the D/O's failure to make a determination on that issue hence that issue was not before the court *a quo.*

It is trite that an appellate court should generally not interfere with factual findings of a trial tribunal, unless the findings are grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; that is, there must be some irrationality with the findings made.

This was encapsulated in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 in these words:

> "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

In *ZINWA* v *Mwoyounotsva* 2015 (1) ZLR 935 (5) at 940 E-F this Court reiterated this position as follows:

> "It is settled that the appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it; or that the decision was clearly wrong."

A gross misdirection was explained in *Reserve Bank of Zimbabwe* v *Granger & Anor* SC 34/01 as follows:

> "A gross misdirection of facts is either a failure to appreciate a fact at all or a finding that is contrary to the evidence actually presented, or a finding that is without factual basis or based on misrepresentation of facts"

The overarching issue in an appeal attacking factual findings, and before interfering with factual findings, would be to establish whether the trial court or tribunal arrived at a finding that is grossly unreasonable and which no reasonable tribunal could have arrived

at had it applied its mind to the same facts. Such a scenario would obtain for instance where the finding is not supported by the evidence adduced or is contrary to the evidence adduced. That is the task an appellate court should engage in before interfering with factual findings. The issue is not whether another court could have come to a different finding. The rationale for the appellate court's reluctance to interfere with factual findings arise from, *inter alia*, the fact that the trial court would have had the benefit of observing the demeanor of the witnesses and, exercising its discretion, determined the credibility or believability of the witnesses. Such observations would not be available to an appellate court and yet form an important basis in deciding the balance of probabilities.

1. Whether or not the court *a quo* determined issues not placed before it?

In order to ascertain whether the court determined issues not placed before it, it is pertinent to consider the issues identified for consideration and whether such issues derive from the grounds of appeal. The findings must be interrogated to ascertain if they meet the criteria set above for interference by an appellate court. In this regard it is also pertinent to consider the nature of the appeal that was before the court *a quo*.

An appeal may take different forms depending on the requirements of a particular statute. These comprise an appeal in the wider sense and an appeal in the ordinary sense. An appeal in the wider sense entails a complete rehearing and fresh determination of the merits of the matter, with or without additional evidence or information. An appeal in the ordinary sense is a rehearing on the merits but restricted to the evidence on which the decision appealed against was given, and in which the only determination is whether that decision was right or wrong. *See Tikly & Ors* v *Johannes N.O & Ors* 1963 (2) SA 588 (T).

In terms of s 89 (2)(a) of the Labour Act, [*Chapter 28:01*] the Labour Court, in the exercise of its functions in the case of an appeal, may conduct a re-hearing into the matter or decide it on the record.

In casu, the court *a quo,* in exercising its power did not conduct a fresh hearing but confined itself to the record and submissions that were before it. The submissions related to the grounds of appeal placed before it. Thus, the appeal before it was an appeal in the ordinary sense. In such circumstances the court *a quo* was required to ascertain whether the lower tribunal had grossly misdirected itself in its factual findings warranting its interference with the findings made by the D/O.

The bone of contention in the present appeal is mainly premised on the issue of whether or not the court *a quo* determined issues that were not placed before it. The appellant's main argument is based on the allegation that the court *a quo* went on a frolic of its own thereby creating its own issues which were not argued or presented before it.

Counsel for the appellant submitted that the court *a quo* was only faced with two issues for determination which related to the grounds of appeal before it. The issues, evident from the grounds of appeal, were: (a) whether the D/O and AHO erred in failing to find that the respondent was not informed that the income paid to him in Mozambique was supposed to be deducted from the income paid to him in Zimbabwe and (b) whether the AHO erred and misdirected himself in upholding that the respondent should be penalized for the appellant's mistake in failing to deduct the income paid in Mozambique from the income paid in Zimbabwe. It would also be necessary to ascertain if the D/O made such a finding. The

appellant also submitted that the court *a quo* did not deal with the findings by the D/O regarding the payroll.

As alluded to earlier the overarching consideration in an appeal seeking to challenge findings of fact is whether the findings by the lower tribunal were grossly unreasonable and/ or contrary to the evidence adduced such that no reasonable tribunal applying its mind could have arrived at such findings. The court *a quo* in its judgment did not address the irrationality or gross unreasonableness of the findings, if any. It instead proceeded to make its own findings of fact premised on issues it identified as- (a) was there a contract of employment dictating the terms and conditions of the respondent's employment in Mozambique; and (b) should the appellant have been penalized for the non-deduction of the income paid in Mozambique from the income paid in Zimbabwe.

In *Nzara & Ors* v *Kashumba N.O. & Ors* 2018 (1) ZLR 194 (S) at 201G-202B this Court aptly stated that: -

> "The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court…This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties." (emphasis added)

See also *CABS* v *Stone & Ors* SC 15/21.

The duty of the court is to determine all the issues that have been submitted and argued upon by the parties. A court does not formulate its own issues and turn a blind eye to the issues placed before it for determination by the parties.

It is pertinent to note that the two grounds of appeal that were before the court *a quo* raised two issues alluded to above which related to the respondent's awareness that he was obligated to advise Corporate Office, Head Office that he had activated the receipt of the Mozambique component of his salary and whether the D/O made a finding that the respondent had been penalised for the appellant's failure to deduct the income paid in Mozambique.

The issue of the existence of a secondment contract between the parties which the court *a quo* chose to grapple with did not arise from the grounds of appeal and submissions made before it. This had never been an issue even before the D/O. The issue raised before the D/O and the AHO related to the applicable secondment contract between the one relied upon by the appellant, annexure 'C' (also referred to as 'D'), and the one relied upon by the respondent, annexure 'G' as read with annexure 'F'. The D/O held that the applicable one is 'C'. It is that 'C' that contained the terms and conditions for his secondment in Mozambique. Clearly that is the finding the respondent sought to have overturned by the court *a quo* such that it would concomitantly be held that he had not been made aware of the need to advise the Corporate Office of the receipt of the Mozambique component of his salary as annexure 'G' did not contain such a requirement. Annexure 'G' only stated how much he was to receive in Mozambique, but this would only be as a business transport allowance of which he was not required to advise the Corporate Office, Head Office.

The court *a quo,* instead of engaging the issue of the applicable contract as between the contracts annexures 'C' and 'G', interrogated whether there was a secondment contract regulating the respondent's stay in Mozambique and made a finding that there was no such contract despite the parties' own acknowledgement that such a secondment contract existed. In this regard it is evident that the court *a quo* went on a frolic of its own regarding

the pertinent issue for determination. The argument by the appellant that the court *a quo* made a determination in respect of an issue that was not before it has merit.

The alternative ground of appeal before the court *a quo* adverted to the AHO having misdirected himself by upholding that the respondent should be penalised for his employer's mistake in failing to deduct the income paid in Mozambique from the income paid in Zimbabwe. Whilst there were submissions made on this issue, it is baffling that the court *a quo* went on to determine the issue as if there had been such a finding by the D/O. A mere recourse to the D/O's determination would have confirmed that he never made a finding that the appellant had made a mistake in failing to deduct the sums involved or that the respondent was being penalised for the appellant's failure to deduct the sums involved. Instead the D/O related to the failure by the respondent to advise the Corporate Office, Head Office as the basis for the conviction and penalty. Any submission that the respondent was being penalised for the employer's mistake would thus be meritless. The failure by the Corporate Office to deduct the sums involved was not found to have been a mistake but a consequence of the respondent's failure to advise the it. If for instance, the respondent had duly advised the Corporate Office as mandated by annexure 'C' and that office had not activated the deduction of the money, surely the respondent would not have been held liable. It is the act or omission of not advising that office as obligated by the secondment contract that led to the conviction and penalty.

2. Whether or not the court *a quo* erred and misdirected itself in finding that there was no contract between the parties regulating respondent's secondment to Rainbow Hotel Mozambique?

It may be noted from the above that, the court *a quo* made a finding that there was no contract of secondment regulating the respondent's employment in Mozambique. It reasoned that the appellant had failed to produce a signed contract that regulated the respondent's stay in Mozambique. This finding was clearly misplaced. The D/O had made a

factual finding that annexure 'C' was the applicable contract. Neither the grounds of appeal nor the reasoning by the court *a quo* stated that such a finding was grossly unreasonable or contrary to the evidence adduced. It was clear from the documents that were tendered, annexure 'C' by the appellant and annexure 'G' by the respondent, that both had signatures purporting to be by the appellant's human resources manager, C Mpofu. Annexure 'C' was dated 17 November 2014 whilst 'G' was dated 1 November 2014 as the dates when the appellant's representative signed the documents. Both were, however, not signed by the respondent, thus even the respondent's 'G' was not signed by him yet he sought to rely on it as the applicable contract governing his secondment to Mozambique. It was in this scenario that the D/O, with the benefit of *viva voce* evidence from both parties, found annexure 'C' to be the applicable contract and not 'G'. It was not disputed that on 1 November 2014 the said appellant's representative was not in Mozambique and so she could not have signed it. The absence of the respondent's signature was thus an aspect afflicting both documents 'C' and 'G' hence *viva voce* evidence came in handy.

The issue of the appellant's board members appointed in 2016 being on annexure 'C' was addressed by the witnesses. The evidence was to the effect that annexure 'C' was prepared and signed by the appellant's representative in 2014 as a soft copy. Two copies were printed for the respondent to sign. He was required to leave one signed copy behind. He did not sign the copies but, nevertheless, took both prepared documents on the pretext that he wanted certain issues addressed and never returned them. He, instead, proceeded on the secondment mission on the following day. Annexure 'C' was retained as a soft copy. In March 2016 when the auditor requested for a copy of annexure 'C' the soft copy was used to print a copy for the auditor. Thus, the presence of new board members on the printed copy came about. The evidence led convinced the D/O on a balance of probabilities that annexure 'C' was the

applicable contract. This finding was not challenged as being grossly unreasonable in the court *a quo*.

It may also be noted that the fact that a contractual document was not signed by a party does not necessarily imply that no contract was concluded. The validity of an unsigned contract was considered in *Afritrade International Limited* v *Zimbabwe Revenue Authority* SC 3/21 on p 11 and this Court aptly stated as follows:

> "In principle, an unsigned agreement cannot ordinarily be relied upon as creating a valid and binding contract. However, the surrounding circumstances, including prior dealings between the parties concerned, may give rise to the *prima facie* presumption that the terms and conditions embodied in an unsigned agreement represent the true intention of the parties. The burden then shifts to the party disputing the authenticity of the agreement to show that it was not intended to be binding." (emphasis added)

See also *Associated Printing & Packaging (Pvt) Ltd & Ors* v *Lavin & Anor* 1996(1) ZLR 82(S) at 87B-D.

In *casu*, evidence was led from witnesses on the circumstances of the contended contracts ('C' and 'G') after which the D/O accepted, on a balance of probabilities, the appellant's version on the applicable contract. If any appellate court was to interfere with such a finding, it ought to first be satisfied that such a finding was grossly unreasonable in the circumstances. The court *a quo* did not advert to this at all before rejecting annexure 'C' and holding that there was no contract on the respondent's secondment to Mozambique. Without interrogating the evidence given and the credibility of the witnesses as found by the D/O, the court *a quo* simply made its own factual finding that the appellant had failed to prove that 'C' was the applicable contract. This, in my view, was a grave misdirection warranting this court's interference.

3. Whether or not the court *a quo* erred and misdirected itself in holding that the respondent was not guilty of inconsistent conduct or omission in terms of s 1.2.28 of the RTG Code of Conduct

The D/O found the respondent guilty of misconduct as charged in that he had failed to advise the Corporate Office that he had activated the receipt of the Mozambique component of his salary. He held that such failure was inconsistent with the terms and conditions of his contract of employment. The findings made by the D/O in arriving at the verdict were not shown to have been grossly unreasonable or contrary to the evidence adduced such that no reasonable tribunal applying its mind to the facts could have arrived at such findings. As already alluded to elsewhere, the court *a quo* did not engage in such an inquiry. It instead proceeded to make its own fresh findings of fact and held that as the appellant had failed to prove, apparently before it, the existence of a contract, the respondent was not guilty of the charge of misconduct preferred against him. The court *a quo* clearly misdirected itself and failed to apply proper legal principles when sitting as an appellate court. The setting aside of the conviction and penalty was clearly not warranted. The appeal ought to succeed.

On the question of costs, the court finds that no justification was made for costs not to follow the cause as is the norm.

DISPOSITION

The appeal has merit as the court *a quo* clearly misdirected itself and failed to deal with the pertinent issues before it. It instead went off at a tangent to the task at hand and erroneously made factual findings contrary to findings by the D/O without engaging those findings. The court *a quo* did not even begin to consider the basic requirements to be established before an appellate court can interfere with findings of fact made by a lower tribunal. It simply side stepped the D/O's findings of fact and came up with its own findings without any legal justification. Premised on its own findings it allowed the appeal before it

and set aside the determination by the D/O. This was clearly wrong and cannot be allowed to stand.

It is accordingly ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following: -

   "1. The appeal be and is hereby dismissed with costs.

   2. The Designated Officer's decision of 12 December 2017 terminating the respondent's employment and the subsequent decision of the Appeals Hearing Officer of 15 February 2018 be and are hereby upheld."

MAKONI JA : I agree

MATHONSI JA : I agree

C. Kuhuni Attorneys, appellant's legal practitioners

Munatsi & Associates, respondent's legal practitioners