

REPORTABLE (47)

Judgment No. SC 57/03  
Civil Appeal No. 304/01

TM SUPERMARKET v ELISHA MANGWIRO

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA JA  
HARARE, NOVEMBER 3, 2003 & FEBRUARY 23, 2004

*T Biti*, for the appellant

*S Mushonga*, for the respondent

GWAUNZA JA: The appellant appeals against an order of the Labour Court, which gave it the option to either reinstate the respondent without any loss of benefits, or pay him damages in lieu of reinstatement.

The facts of the matter are as follows: The respondent was employed as a branch manager by the appellant, which operates a chain of supermarkets throughout the country. In December 1998, the appellant was charged with and found guilty of conduct, act or omission inconsistent with the fulfillment of the expressed or implied terms of his contract. He was subsequently dismissed from his employment.

The details of the conduct of which he was found guilty are contained in his letter of dismissal and are cited as follows in the judgment of the court *a quo*:

- “1. He failed to discover and investigate three missing reset numbers. (one that occurred between 20 and 31 October 1998 and two on consecutive weeks between 10 and 25 November 1998). The total cash lost by the company from one till operator was \$24 896,67.
2. He did not timeously take disciplinary action against eight till operators with huge cash shortages in one week totalling \$6 721,14 (see the attached auditor’s report for the breakdown).
3. He failed to adhere to basic administrative systems and procedures stipulated for controlling and managing cash generated at the branch. His failure to adhere to stipulated systems resulted in the loss to the company of a total of \$69 975,11.
4. He failed to ensure proper filing and storage of till audit rolls and DBS printouts. Some audit rolls and DBS printouts were missing on 15 December 1998 when I was carrying out investigations and are still missing to date.”

The letter from the appellant, in which these charges were laid out, had the following conclusion:

“Cash management is critical to the success of our business. Mr Mangwiro had abdicated critical controls notwithstanding the fact that he was instructed to handle such very important aspects of control himself. The degree and extent of his ineptitude coupled with the consequential loss suffered by the company were found to be acts, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment. Therefore his blatant abdication and negligence of critical controls of our business could not be condoned.”

*Mr Biti* for the appellant contends the decision of the court *a quo* on the various counts with which the respondent was charged were wholly questions of law and that therefore the appeal is properly before this Court.

*Mr Mushonga*, for the respondent, argues on the other hand that there were no issues of law arising in the grounds of appeal cited by the appellant. Further, that even were this court to arrive at a different conclusion on the facts placed before the court *a quo*, it would still have to determine whether the decision of the court *a quo* was so

outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided, would have arrived at it.

This Court must therefore first determine whether the appeal is properly before it.

It is trite that an appeal from the labour court to this Court can only be on a point of law. (See the numerous authorities on the determination of what constitutes a point of law, that include *Muzuwa v United Brothers (Private) Limited* 1994 (1) ZLR 217 (S), *National Foods Limited v Mugadza* SC 105/95 and *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/2001).

Mr *Biti* submits, in relation to the first charge brought against the respondent, that the court *a quo* misdirected itself on a question of law in two ways;

- (i) by determining that the task in question was one that could be delegated; and
- (ii) by making a finding of fact to the effect that the respondent's role was restricted to "spot checks" when his job description specifically provided that the responsibility to record the till resets was his (ie branch manager's) personally.

As far as the issue of delegation of the responsibility in question is concerned, I am persuaded by the appellant's contention that the determination of whether or not the function in question was one that the respondent could delegate was a question of law. In *Media Workers' Association of South Africa and Ors v*

*Press Corp of South Africa Limited* 1992 (4) SA 791 (A) the learned judge pointed out that the term “question of law” is used in three distinct though related senses. In relation to the third sense, he stated:

“... and third, any question which is within the province of a judge instead of the jury is called a question of law.”

I am satisfied the determination, based on an interpretation of the provision in question, of whether or not the respondent could delegate the task in point, properly falls “within the province of a judge.”

The evidence before the Court shows that the respondent’s responsibilities in respect of re-set numbers mentioned in the first charge brought against him were explained during the proceedings in the court *a quo*. The relevant paragraph of the TM Management Controls Manual was read to the court *a quo*, as follows:

“Reset numbers are recorded separately in a book by the Branch Manager and cross-checked with the weekly Balance Summary”.

By his own admission, the respondent did not personally record the till reset numbers in a Tills Reset Control Book, as required, but delegated the function to one of his subordinates. He thereafter failed to follow the matter up to ensure that the task had been properly carried out. One result of this delegation of responsibilities was that the appellant was defrauded of the amount referred to.

Given the facts placed before the court on that charge it is evident that the court *a quo* did not give due weight to the clause in the appellant’s manual that set out the function that the respondent was to personally carry out. This is evident from the court’s assessment of this charge, where it is noted as follows in the judgment:

“I find it incredible and highly improbable that the Branch Manager could have been required to scrutinize the work of till operators when there were supervisors and section managers to do the job. It sounds more probable and reasonable to this Tribunal that it was the responsibility of supervisors and section managers to scrutinize the work of till operators and draw any irregularities to the appellant’s attention. In the circumstances I believe the appellant when he says his roll (*sic*) was restricted to carrying out spot checks which were not meant to unearth all anomalies and irregularities.”

Mr *Biti* contends, correctly, in my view, that contrary to this assessment, the responsibility in question was not about scrutiny or spot checks, but about who recorded the till resets. The manual was very specific as to who was to shoulder this responsibility. It was the manager. Therefore, the question of it being “probable” that supervisors were to do it, did not arise.

I am also persuaded by the contention that the court *a quo* in this particular respect misinterpreted the evidence placed before it. This Court has held, in *Reserve Bank of Zimbabwe v Corrine Granger supra* that such a circumstance amounts to a misdirection in law. At p 6 of that judgment, MUCHECHETERE JA stated as follows:

“And a misdirection of fact is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.”

This authority, I find, is apposite *in casu*. The court *a quo* took the view that the responsibility in question entailed simply checking the resets and not recording the reset numbers. The evidence makes it clear this was not so. The misdirection of the court is thus evident.

The other charges brought against the respondent put in question his style of management in relation to:

- (i) the extent to which he supervised the work of various levels of subordinates working under him.
- (ii) the determination of what responsibilities to delegate, and to whom and
- (iii) the actions he was expected to take to ensure that those subordinates who stole from the supermarket or otherwise failed to perform to expectation, were disciplined.

I find merit in the appellant's submission that the decision of the court *a quo* on these issues was on points of law.

Lastly the appellant takes issue with the decision of the court *a quo* that even if there was admitted negligence on the part of the respondent, that alone was not enough to justify his dismissal. The contention is made for the appellant that the respondent was not charged with negligence, but with conduct inconsistent with the implied or express terms of his employment contract. As a result, the appellant contends, the determination by the court *a quo* that negligence was not a basis for the respondent's dismissal was a 'serious misdirection.'

I have no doubt that the basing of a conclusion on non-existent facts, in the case, the absence of a charge of negligence, does amount to a misdirection at law.

I am satisfied, in the result, that the sum effect of the appellant's appeal is to raise points of law. Such appeal therefore, is properly before this Court.

Before I deal with the merits of the appeal, it is pertinent to note that the respondent, while admitting that the appellant did suffer the financial loss referred to, denied any fault on his part. It is noted in the judgment of the labour court that his defence was simply that as branch manager, he was not expected to attend to the minute details pertaining to the running of the supermarket.

With regard to the first charge brought against the respondent, and on the merits, it is contended for the appellant that while in terms of its Management Controls Manual, various functions were assigned to different officers (e.g. section managers and till operators), the function of recording reset numbers separately in a book and cross checking with the weekly balance summary, was assigned specifically to the Branch Manager, who in this case was the respondent. It is further contended that therefore, this was not a function that he could delegate. Even assuming he could delegate, it is also contended, the onus lay on him to carefully supervise the subordinate he had delegated the function to, to satisfy himself the work had been done properly. The appellant avers the respondent had not discharged this burden.

I am persuaded there is merit in these submissions. Had the intention of the appellant been for any other official to record the reset numbers separately in a book, it is not unreasonable to assume that the relevant provision in the management manual would have been so worded as to convey that intention. That this is not so in this case suggests an intention to have the particular function personally carried out by the branch manager. According to the evidence, the task in question was directly linked to cash management, said to be critical to the success of the appellant's business. It is stressed that for any supermarket, it is the cash generated on a daily

basis that has to be “protected most.” The evidence of Mr Mashingaidze (“Mashingaidze”), representing the appellant in the count below, was to the effect that a missing reset number represented a loss to the supermarket since the cash paid for the purchase of goods through the till in question would not be recorded. According to Mashingaidze this meant nobody knew:

“... that the till has been operated and the only check for the manager on a weekly basis is to check those reset numbers.”

It was also Mashingaidze’s evidence that this was the reason the reset control book had to be kept personally by the branch manager. In the face of the respondent’s “abdication” of this responsibility, it is contended for the appellant that the respondent’s actions amounted to gross dereliction of duty since he not only delegated where he should not have done so, he then failed to check that the task he had delegated had been carried out properly. Because of that conduct, the appellant suffered financial loss.

I am satisfied the respondent delegated to a subordinate a function that, given its sensitive nature, he should have carried out himself. He compounded the error by not checking to see that the work had been done properly. This, in my view, suggests an inability to appreciate the seriousness of one’s responsibilities. This is particularly so given the fact according to Mashingaidze, that the appellant had taken the trouble to stress to each and everyone of its managers, the importance of personally keeping the reset control book. The respondent thus defied both the appellant’s Management Control Manual, and the appellant’s explicit instructions. His conduct resulted in substantial financial loss to the appellant.

I am satisfied such conduct was inconsistent with the fulfillment of the implied and express conditions of his contract.

The respondent was also charged with failing to timeously take disciplinary action against eight till operators responsible for shortages in one operational. He did not deny that the loss suffered by the appellant was due to the conduct of the errant till operators. His defence was that it was not his responsibility to initiate disciplinary proceedings, since such responsibility lay with one of his subordinates, referred to as a designated officer. He believed that he would have been accused of interfering with the investigations of the designated officer if he had pressed the latter on his handling of the task.

I do not find merit in these averments. The respondent occupied a senior position within the appellant. As branch manager, he had overall responsibility to ensure that the business of the appellant was conducted properly and efficiently. He was ultimately accountable for all that happened at and within his branch. Because of that overall responsibility and accountability the respondent would have been acting within his mandate had he instructed the relevant subordinates to investigate the shortages that had been drawn to his attention.

That this is what the appellant expected the respondent to do was made clear by Mashingaidze, who said there could not have been any question of the respondent “interfering” if what he had done was to properly and timeously instigate investigations into the suspected cases of fraud. Mashingaidze made it clear that the appellant expected its branch managers to maintain total control over all that

happened within the supermarket, and not to entertain high expectations of subordinates being able to efficiently and honestly discharge their respective duties.

I find, again, that the respondent's conduct is suggestive of an inability to appreciate the importance of his responsibilities. It also indicates a readiness to delegate, which was not matched with an appropriate degree of supervision. That such conduct clearly fell short of what is expected of a manager was underlined by the resultant financial loss to the appellant.

The respondent was also charged with failure to ensure proper filing and storage of audit rolls and DBS printouts. The audit rolls were supposed to be collected and filed daily by the section manager. That officer did not assiduously carry out this task, and the respondent's "spot checks", it would appear, failed to identify this laxity. The appellant asserted it was the role of the branch manager to ensure the audit rolls were collected, accounted for and securely stored not only through checking this was done, but requiring the relevant section manager to do so where he/she had not. Mashingaidze for the appellant asserted in relation to this responsibility that it was specifically listed in the Management Controls Manual as one of the branch manager's responsibilities.

The respondent's defence to this charge was that he could not be expected to do a thorough checking of all the audit rolls filed and in any case, only one audit roll out of many that were stored in about fifteen to twenty bags went missing. It was missing not because it had been mis-filed but because it had been

deliberately removed and destroyed by the employees who had perpetrated the fraud. So no blame, according to the respondent, should be placed on him.

The labour court was persuaded by this argument and determined that the respondent could not be blamed for the loss of one out of fifteen to twenty bags of audit rolls, in circumstances where the roll had been “deliberately removed and destroyed” by the employees who had perpetrated the fraud. The court rejected the appellant’s contention that if the respondent had been vigilant, he would have discovered the loss of the audit roll, since he was responsible for everything that went on at his branch.

It would appear the court *a quo* missed the point, which was that the respondent had not checked properly to see that all audit rolls had been collected, accounted for and stored securely, not that the missing audit rolls had been mis-filed or destroyed. In particular, the respondent had failed to perform a function specifically assigned to him, resulting in loss to the appellant. As Mashingaidze put it:

“Mr Mangwiro seems to think that it is not his role to look after the safe custody of all records, in our view the branch manager as the head of that particular branch is responsible for everything that goes on at his branch; everybody else does it for him, in other words, he is in charge ...”.

There were functions that were to be personally carried out by the respondent, and others that were to be performed by other people, who, albeit at different levels of operation, were all ultimately accountable to the respondent. While he could not thoroughly check the work of each and every employee at the branch, the respondent could nevertheless have ensured that the “spot checks” that he carried out were effective both as a deterrent to errant employees and as a means to

monitor the various operations of the supermarket. The evidence before the Court shows that the “spot checks” that he carried out failed to detect any sign of the fraud that was being perpetrated at his branch.

The appellant’s attitude in light of all this, was that the respondent’s conduct evinced an inability to fully appreciate his responsibilities as a manager, to adequately supervise subordinates or to establish the controls necessary to minimise the loss of cash to it. In other words the appellant was saying, (and I am persuaded to the same view), that the respondent was not possessed of the managerial, administrative and leadership skills requisite for the discharge of a branch manager’s responsibilities.

The respondent conceded in relation to all the charges that he faced, that his conduct amounted to negligence but denied such negligence warranted his dismissal. The appellant, on the other hand, submitted that while the conduct in question did amount to negligence, that specific charge had not been brought against the respondent.

There is substance in this submission. The appellant alleged against the respondent, conduct inconsistent with the terms of his employment contract. It placed before the court evidence to prove the charges in question. The respondent denied the charges but admitted his conduct amounted to another act with which he had not been charged. The court *a quo* then decided that the latter conduct did not warrant the respondent’s dismissal. It is my opinion that such a determination was not justified on the evidence before the Court, and is therefore unsustainable.

I have no doubt that the respondent's conduct as analysed above was inconsistent with the implied and express conditions of his contract of employment. It follows that the decision to dismiss him was properly taken.

The appeal must, accordingly, succeed.

It is in the result ordered as follows:

1. The appeal is allowed with costs.
2. The decision of the Labour Tribunal is set aside and substituted with the following:

“The appeal is dismissed with costs.”

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

*Honey & Blankenberg*, appellant's legal practitioners

*Mushonga & Associates*, respondent's legal practitioners