REPORTABLE (8)

Judgment No. SC 27/09
Civil Appeal No. 60/07

CLAUDIUS MURAWO v GRAIN MARKETING BOARD

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, JANUARY 22, 2008 & MAY 11, 2009

C Kwaramba, for the appellant

A Moyo, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Court which dismissed an appeal by the appellant ("Murawo") against the termination of his contract of employment by the respondent ("the G.M.B.").

The background facts are as follows. Murawo was employed by the G.M.B. as a safety, health and environment officer. Between 4 March and 7 March 2004 the G.M.B. held a strategic planning workshop ("the workshop") at Troutbeck Inn, Nyanga. Those eligible to attend the workshop were divisional heads and departmental heads. Officers below departmental heads could also attend the workshop if invited. Murawo was neither a divisional head nor a departmental head.

On 5 March 2004 Murawo attended the workshop and presented his paper. However, it later turned out that Murawo's attendance at the workshop had not been authorised by the G.M.B. directorate. He was, therefore, asked to leave the workshop.

On 6 March 2004 Murawo left the workshop and checked out of the hotel, but remained within the hotel premises because he had a cheque to give to Mrs Zemura ("Zemura"), the G.M.B.'s public relations manager, who was participating in the workshop.

However, Murawo's continued presence at the hotel offended the G.M.B. directorate. Consequently, the directorate called upon Mhonde, Murawo's head of department, to ensure that Murawo left the hotel premises. Subsequently, Murawo left Troutbeck Inn after giving Zemura the cheque that he was supposed to give her.

Thereafter, on 8 March 2004 Murawo was suspended without pay and benefits on the ground that he had committed two acts of misconduct in terms of the G.M.B. Code of Conduct ("the Code"). In relevant part, the letter of suspension written by Mhonde reads as follows:

> "On Wednesday the 3rd of March 2004 you communicated to me that the Marketing Director had invited you to the Strategic Planning Workshop. This, however, turned out to be untrue.
>
> On Saturday morning at about 08.30 am on the 6th March 2004, I told you to leave the Troutbeck Inn immediately as you were not invited to the meeting. However, up to lunchtime you were still at the premises and now purporting to have been tasked by the A/CEO to discuss issues related to workers with the Union representatives, Mr Munodawafa and Mr Mhunza, and present them in the Seminar. This also turned out to be untrue.
>
> Given the scenario explained above, Management has decided that you be suspended without pay and benefits with immediate effect, and you are being charged in line with the G.M.B. Code of Conduct as follows:

1. Category I section 1:

   'Insubordination – wilful and unreasonable disobedience of a lawful order from a superior'.

2. Category I section 5:

   '… activities inconsistent with the express or implied condition of his contract of employment.' …

In keeping with the provisions of our Code of Conduct you are required to reply in writing answering to the above charges …

Your reply must of necessity cover the following aspects:

a) Admit or deny the charges.

b) Facts to be taken into account if you admit the charges.

c) If you deny the charges, offer an explanation of the basis of your defence …".

On 9 March 2004 Murawo replied to the letter of suspension. His letter, in relevant part, reads as follows:

"I confirm that I did not receive a written invitation to present a paper at the Troutbeck Retreat. I, however, thought in good faith that since this was an important strategic planning session of the organisation our department could take advantage of the gathering of eminent people in the organisation to market the Health and Safety portfolio, which was launched some eight months ago. I prepared a document for presentation. Initially, the presentation was short and just a small section of the presentation of the Engineering Department. I, however, developed a longer presentation which I thought could be incorporated in the Engineering Report.

I thought I was contributing to the organisation's cause. I did not know that in doing so I was contravening any section of the G.M.B. Code of Conduct. Therefore if at all I contravened category I section 1 and 5 of the Code, the contravention was not wilful.

When I was excused from the activities of the 6th of March 2004, I checked out of the hotel. I, however, realised that I had forgotten to give a cheque I had been asked to bring to Mrs Zemura. As the morning session had already started, I

> thought it was not wise to disturb the session. I waited for an opportune moment to give the cheque to Mrs Zemura. That moment presented itself at lunchtime and I duly handed over the cheque to Mrs Zemura. At the same time some apples and potatoes I had ordered away from the hotel after checking out were only delivered to me around the same time. I then left for Harare …".

On 18 March 2004 Murawo appeared before a disciplinary hearing committee which found him guilty on both counts, and recommended his dismissal. He was subsequently dismissed with effect from the date of his suspension, i.e. 8 March 2004.

Thereafter, on 3 May 2004 Murawo appealed to the acting chief executive officer ("Muvuti") against the dismissal. In that appeal he alleged that he had attended the workshop because Mhonde had indicated to him that he (Mhonde) would be comfortable if he (i.e. Murawo) attended the workshop and presented his own paper as an addendum to his (i.e. Mhonde's) report. He also denied being ordered by Mhonde to leave Troutbeck Inn. Nevertheless, on 30 May 2004 Muvuti dismissed the appeal. Aggrieved by that decision, Murawo appealed to the Labour Court.

After hearing evidence and considering written submissions filed on behalf of the parties, the Labour Court allowed the appeal in respect of the first count, i.e. the count alleging "wilful and unreasonable disobedience of a lawful order from a superior", but dismissed the appeal in respect of the second count, i.e. the count alleging that Murawo committed "activities inconsistent with the express or implied condition of his contract of employment". Dissatisfied with that result, Murawo appealed to this Court.

The first issue for consideration is whether this appeal raises any question of law. The issue is important because in terms of s 92F(1) of the Labour Act [*Cap 28:01*] ("the Act") the only appeal against a decision of the Labour Court which lies to the Supreme Court is an appeal on a question of law.

What is a question of law was considered by this Court in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S). At 220 D-F GUBBAY CJ said the following:

> "The twin concepts, questions of law and questions of fact, were considered in depth by E.M. GROSSKOPF JA in *Media Workers' Association of South Africa and Ors v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A). Approving the discussion of the topic in *Salmond on Jurisprudence* 12 ed at 65-75, the learned JUDGE OF APPEAL pointed out at 795 D-G that the term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what it considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors."

Applying those principles to the facts of the present case, I have no doubt that the appeal raises a question of law. I say so because one of the issues for determination in this appeal is whether the *eiusdem generis* rule of statutory interpretation applies to the interpretation of the act of misconduct specified in s 5 of category I

offences, the act of misconduct which Murawo was found guilty of. That, in my view, is a question of law within the second sense of the term "question of law" set out above.

As the appeal raises a question of law, the matter is properly before this Court.

The main issue in this appeal is whether Murawo was properly found guilty of "activities inconsistent with the express or implied condition of his contract of employment".

However, before dealing with that issue, I would like to consider a submission by Murawo's counsel in his heads of argument. The submission was that the Labour Court erred in its interpretation of the act of misconduct specified in s 5 of category I offences, and that in terms of the *eiusdem generis* rule of statutory interpretation the conduct complained of by the G.M.B. does not constitute the act of misconduct specified in s 5.

The act of misconduct specified in s 5 reads as follows:

> "Incitement, intimidation, indulging in disorderly behaviour or activities inconsistent with the express or implied condition of his contract of employment."

As already indicated, Murawo was charged with "activities inconsistent with the express or implied condition of his contract of employment".

The submission by Murawo's counsel was that the activities inconsistent with the express or implied condition of an employee's contract of employment envisaged in s 5 must be activities in the same *genus* or class as incitement, intimidation and indulging in disorderly behaviour.

The learned author, Gail-Maryse Cockram, states the *eiusdem generis* rule as follows at p 153 of her work, *The Interpretation of Statutes* 3 ed:

> "Where a list of items which form a *genus* or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words."

I should now determine whether the *eiusdem generis* rule applies to the interpretation of Employment Codes of Conduct. I do not think it does. I say so because, in general, Employment Codes of Conduct are not drafted with the same expertise and precision required for the drafting of statutes. Almost invariably Employment Codes of Conduct are drafted by laymen with little or no knowledge of law.

However, even if the *eiusdem generis* rule applied to Employment Codes of Conduct, I am of the view that the rule should have no application in the present case because it would lead to an absurdity. It would mean that "activities inconsistent with the express or implied condition of his contract of employment" which are in the same *genus* or class as "incitement, intimidation (and) indulging in disorderly behaviour" would constitute acts of misconduct, whilst other "activities inconsistent with the express or implied condition of his contract of employment", which are not in the same *genus* or

class as "incitement, intimidation (and) indulging in disorderly behaviour", which could be more serious activities, would not constitute acts of misconduct.

In any event, the *eiusdem generis* rule is not a rule of general application, and has to be applied with caution. This point was made by SOLOMON CJ in *Rex v Nolte* 1928 AD 377 at 382, where the learned CHIEF JUSTICE said:

> "Moreover, the rule itself is one that has to be applied with caution, and is not of general application. Thus LORD ESHER, in *Anderson v Anderson* (1895, 1 QB 752) in commenting upon the rule, said: 'I am not surprised to find that the modern tendency of the Courts has been to construe general words in their ordinary sense' …".

Similar views were expressed by BARON JA in *S v Makandigona* 1981 (4) SA 439 (Z AD) at 443H-444A as follows:

> "It must be remembered that the *eiusdem generis* rule is only one of many rules of construction; it is not to be invoked automatically whenever general words follow particular words. Thus *Craies on Statute Law* 7 ed says at 181:
>
> > 'The *eiusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being what it is, a mere presumption, in the absence of other indications of the intention of the legislature.'"

In the circumstances, I am satisfied that the Labour Court did not err in its interpretation of the act of misconduct specified in s 5 of category I offences. I am also satisfied that the conduct complained of by the G.M.B. constitutes the act of misconduct specified in s 5.

I now wish to determine whether Murawo was properly found guilty of the act of misconduct specified in s 5. I have no doubt in my mind that he was.

In the Labour Court four people gave evidence and were cross-examined. These were Murawo, the G.M.B. marketing director ("Makwenda"), Mhonde and Zemura.

Murawo alleged that he attended the workshop at Troutbeck Inn because he had been invited to do so by Mhonde. That allegation was denied by Mhonde, who said that Murawo had told him that he had been invited to the workshop to present his report by Makwenda. On the understanding that Makwenda had invited Murawo to attend the workshop, Mhonde authorised Murawo's travel arrangements. Makwenda denied that he had invited Murawo to the workshop.

Zemura said that although initially Murawo was not part of the group of people going to attend the workshop he subsequently told her that he had been asked to attend the workshop by Mhonde, and present his report. Acting on that information, she booked him into the hotel.

In his judgment the Senior President of the Labour Court said the following at pp 24-25 of the cyclostyled judgment (judgment no. LC/H/51/2006):

> "On the issue of inconsistent conduct, I am persuaded to agree with the respondent's submissions that the appellant lied and conducted himself in a manner not befitting an officer of his status. The first lie relates to the issue of

> who actually invited the appellant to the workshop. I do not believe that Mr Mhonde ever invited the appellant. The appellant would have said so in his response to the allegations contained in the letter of suspension. Instead the appellant told the truth by stating the following:
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> > 'I confirm that I did not receive a written invitation to present a paper at the Troutbeck Retreat. I, however, thought in good faith that since this was an important strategic planning session of the organisation our department could take advantage of the gathering of eminent people in the organisation to market the Health and Safety portfolio, which was launched some eight months ago. I prepared a document for presentation. …'
>
> The above constitutes the truth on the issue of invitation. Any departure from the above cannot be true. If that were not the case I would have expected the appellant to go further and say 'You verbally invited me to present my ten page report as an addendum to yours'. The appellant does not say so because he knows that he had told his boss that Mr Makwenda had invited him. That was a lie."

And at p 26 the Senior President continued as follows:

> "All arrangements for the appellant's attendance at the workshop were based on lies from himself. The lie to Mrs Zemura was that the technical manager (Mhonde) had authorised him to attend, and the lie to Mr Mhonde was that Mr Makwenda had invited him to present a detailed paper on the Safety, Health and Environment Programme. Both officers had then in good faith proceeded to facilitate the appellant's attendance at the workshop. …
>
> My finding therefore is that the appellant attended the workshop without authority and that he lied about his invitation. Such conduct was therefore inconsistent with the express and implied conditions of his contract of employment i.e. a violation of the expected degree of honesty and integrity."

It is clear, therefore, that the learned Senior President made specific findings of fact on the credibility of the four people who testified before him. He found that Murawo had lied, and that the witnesses who testified on behalf of the G.M.B. had told the truth.

As stated by Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 916:

> "It has repeatedly been laid down that in view of the advantages enjoyed by the trial court in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial, an appeal court is in general reluctant to disturb the findings of a trial court on questions of fact."

In the present case, I can find no reason for disturbing the findings of fact made by the Labour Court. In my view, the conclusions reached by the Senior President cannot be described as being so outrageous in their defiance of logic that no sensible person applying his mind to the questions to be decided could have arrived at such conclusions.

Finally, I wish to deal with the submission made by Murawo's counsel that a penalty less than dismissal ought to have been imposed. The issue of the appropriate penalty for misconduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment was considered by this Court in *Tobacco Sales Floors Ltd v Chimwala* 1987 (2) ZLR 210 (SC). At 218D-219A McNALLY JA said:

> "In *Halsbury's Laws of England* 4 ed vol 16 para 642 it is said:
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> > 'Misconduct inconsistent with an employee's proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal.'
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> That passage is based on a *dictum* by LORD JAMES OF HEREFORD in *Clouston & Co Ltd v Corry* [1906] AC 122 at 129 (PC), cited with approval in

Laws v London Chronicle (Indicator Newspapers Ltd) Ltd [1959] 2 All ER 285 (CA) at 287H as follows:

> 'Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be conduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.'

I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough *prima facie* to warrant summary dismissal. … Then it is up to the employee to show that his misconduct though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted."

In the present case, Murawo's misconduct can hardly be described as "so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted". On the contrary, the misconduct was serious and premeditated, and called for the penalty of dismissal.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

CHEDA JA: I agree

GWAUNZA JA: I agree

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners