REPORTABLE (46)

Judgment No. S.C. 135/01
Civil Appeal No. 224/01

AUSTIN MUROIWA v (1) DELTA OPERATIONS LIMITED t/a OK ZIMBABWE (2) EARNEST THOMPSON

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & MALABA JA
HARARE, OCTOBER 1, 2001 & JULY 8, 2002

The appellant in person

Ms E Mushore, for the respondents

CHIDYAUSIKU CJ: The appellant in this case was employed by the first respondent as a buyer. In February 1998 the appellant was charged with two counts of misconduct. In the first count, the appellant was charged with misuse or negligent use of company property. In the second count, the appellant was charged with disobeying company rules and regulations.

An enquiry into the allegations against the appellant was conducted by the first respondent's motor vehicle committee. It was established during this enquiry that the appellant was involved in no less than twelve accidents and/or incidents with his employer's motor vehicles from 1996 to 1998. The employer lost three vehicles completely through the appellant's accidents. In answer to the list of allegations against him the appellant admitted that he was wrong. The committee explained to the appellant the gravity of the allegations against him and invited him to reflect on the matter and submit a written response.

The appellant reflected on the matter and responded in writing. His response in part reads as follows:

> "I am deeply concerned and worried about the occurrence (*sic*) of the past six months, which involve company vehicles. As minutes will show, I agree that I was at fault and accept disciplinary action taken by the motor vehicle committee (to me, the Company)."

The motor vehicle committee thereafter dismissed the appellant from employment. The appellant appealed against the dismissal, as was his right in terms of the code of conduct ("the Code") to the divisional chief executive. The ground of appeal was that his transgression was minor and did not warrant dismissal.

On 25 February 1998 the managing director of the first respondent wrote to the chairman of the motor vehicle committee informing him that there had been a procedural error in the proceedings against the appellant, in that both the managing director and the motor vehicle committee chairman should not have participated in the proceedings and that in terms of the Code the industrial relations manager should have chaired the proceedings. Accordingly, and with the intention of adhering to the laid down procedure, the managing director recommended that the dismissal letter be revoked and a properly constituted disciplinary committee rehear the matter.

By letter dated 26 February 1998 to the appellant, the first respondent revoked the dismissal and advised the appellant that he was to be reheard. At the same time the first respondent advised the appellant that because the offences were

committed whilst the old Code of Conduct was in place, the old Code would be applied.

On 12 March 1998 a rehearing of the appellant's case was conducted by a properly constituted disciplinary committee. The appellant was charged with the same counts of misconduct, namely misuse and negligent use of company property and violation of company rules and regulations. During these proceedings the appellant admitted using various company vehicles on various occasions without authority; using a vehicle without the company knowing where he would use the vehicle as he never mentioned where he was taking the vehicle to; wanton destruction of company property; suspicious circumstances leading to the first respondent's vehicle under the appellant's control being damaged and requiring repairs totalling $10 000; failure to report accidents to the police; leaving another vehicle in an unsecured place, leading to it being stolen; being granted permission to use a vehicle to undertake a certain task and then abandoning that task in order to go joyriding; and visiting a girlfriend, during which visit a company vehicle was stolen. The last incident occurred on the first occasion a ban on the appellant to use company motor vehicles had been lifted. In his defence, all that the appellant could state was that those incidents had happened against his will and he did not consider them serious.

The disciplinary committee found the appellant guilty and terminated his contract of employment with the first respondent. In the letter of termination of employment, details of the appellant's transgressions and reasons for termination were set out.

The appellant appealed to the appeals committee on the grounds that the second disciplinary committee was biased and that the committee should not have looked at every offence but should only have looked at one offence. The appellant also contended that the punishment was severe and that the hearing by the committee was out of time. On 2 April 1998 the appeals committee dismissed the appeal and confirmed the appellant's dismissal from employment.

After a lapse of some eighteen months and on 19 September 2000, the appellant launched review proceedings in the High Court against the determination of the appeals committee of 2 April 1998. In the application for review the following two grounds for review were advanced:

(1) the appeals committee took a globular approach in coming to its decision without going to the merits of the matter; and

(2) that the new Code should have been used as opposed to the old Code which was used.

The court *a quo* dismissed the application for review on the basis that it was made out of time and that there was no basis for granting the application for condonation.

It is this decision that the appellant now appeals against. The grounds of appeal are set out in the notice of appeal, which read as follows:

> "1. It is submitted that the trial judge misdirected himself by considering the circumstances of the first dismissal of the appellant instead of relying on the proceedings of the appellant's appeal to the second respondent in the prosecution of the matter before him.

2. It is further submitted that the trial judge erred in concluding that the reasons for the delay in bringing the matter up for a review were unsatisfactory, especially when he could not proceed with the matter without the record of proceedings.

3. With regards to the proceedings, the trial judge overlooked fundamental facts on the merits of the matter. It is submitted that the decision of the second respondent, as set out by letter of 2nd April 1998, is totally different from the proceedings which clearly show at least two important areas of agreement with the appellant."

Rule 259 of the High Court Rules provides that review proceedings must be brought within eight weeks of the date of the determination being brought on review. The same Rules also confer on the High Court the discretion to condone a delay in the launching of review proceedings on good cause being shown.

In a case where the court *a quo* has refused to grant condonation to a party, that party to succeed on appeal against such a refusal has to establish either a misdirection or that such refusal was grossly unreasonable.

In dismissing the application for condonation, the learned judge in this case took into account:

(1) the duration of the delay;

(2) the explanation for the delay; and

(3) the appellant's prospects of success on the merits.

The above factors were relevant to the issue the learned judge had to determine. Accordingly there was no misdirection.

The learned judge concluded that the delay in this case was inordinate. It is common cause that the determination sought to be reviewed was made on 2 April 1998 and the review was launched in August 2000. There is no doubt that the learned judge was correct in concluding that this delay, in excess of two years, was inordinate.

The appellant's explanation for the delay is that he had to institute court action to obtain a record of proceedings of the appeals committee. The appellant does not explain how or on what basis he contends he could not commence review proceedings without the record. It would appear from the record that he was demanding the record in order to institute an appeal to the Labour Relations Tribunal and not to institute review proceedings. Indeed it would also appear that the record of the proceedings of the appeals committee only became available to the appellant after review proceedings had been launched. In my view, the learned judge in the court *a quo* was correct in concluding that the explanation for the delay was unsatisfactory.

Apart from the above, the learned judge considered the appellant's prospects of success on the merits and concluded that there were no possible grounds upon which the determination of the appeals committee could be set aside on review. Again I find myself in agreement with the learned judge in this regard.

The grounds for review set out in the application for review are, as Miss *Mushore* correctly submitted, grounds of appeal. The only ground that has a semblance of a ground for review is that the appellant was charged and tried under a wrong code of conduct. I do not think there is substance in this contention.

Accordingly, the court *a quo* was correct in concluding that the application for review had no prospects of success on the merits.

It also follows from the above that the court *a quo* exercised its discretion properly in refusing condonation. This court will not, therefore, interfere with the exercise of that discretion.

In the result, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MALABA JA: I agree.

Wintertons, respondents' legal practitioners